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# The detention of migrant children: The risks of the new European Pact on Migration and Asylum

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## About this paper

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This article seeks to examine the implications of the recently adopted European Pact on Migration and Asylum in light of the existing prohibition on the detention of children, as enshrined in European and international law.

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# The detention of migrant children: The risks of the new European Pact on Migration and Asylum

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**Abstract:** This article seeks to examine the implications of the recently adopted European Pact on Migration and Asylum in light of the existing prohibition on the detention of children, as enshrined in European and international law. It will focus on the new screening and border procedures, with a particular emphasis on immigration detention and the deprivation of liberty of children. To this end, an analysis of the legal framework before and after this new reform has been carried out in order to identify the changes introduced, in accordance with the legislative texts and the lines of reasoning developed by the European Court of Human Rights in its decisions on the detention of children in the context of migration. Thus, it is observed that the new EU Pact, through the screening and border procedures, could increase the cases of detention of migrant children and, consequently, pose a risk to the rights of the child. Assumir-se-á uma aceção de jurisprudência multicultural no seu sentido meramente descritivo, já que se procura retratar “a prática dos tribunais tal como ela é, em situações pluriculturais”<sup>3</sup>. Trata-se de um foco institucional que muito bem se justifica: se o propósito assenta na melhor concretização da justiça administrativa e fiscal, haverá então que melhor compreender as *instituições* que a prosseguem e os processos de decisão que são empregues<sup>4</sup>.

As referências, no presente escrito, à *cultura*, serão reconduzidas à *identidade cultural*, ou seja, aos modos de vida, aos sistemas de valores e às tradições<sup>5</sup>.

**Keywords:** Rights of the child; European Pact on Migration and Asylum; Immigration detention; Measure of protection; Jurisprudence.

**Summary:** Introduction. 1. Protection measures and the situation of children in the context of migration. 2. The detention of children in the jurisprudence of the ECtHR. 3. Migrant children’s detention within the existing legal framework: the lack of a clear conclusion. 4. Detention of children: screening and border procedures. Final remarks.

## Introduction

The growing interest in the protection of migrant children is part of a broader effort to safeguard children’s rights, which is a fundamental human right<sup>6</sup>. This issue is particularly relevant because migrant children, whether

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<sup>3</sup> Sobre os vários sentidos da expressão *jurisprudência multicultural*, vide PATRÍCIA JERÓNIMO e MANUELA IVONE CUNHA, “A jurisprudência multicultural dos tribunais portugueses”, in *Multiculturalidade e Direito*, Centro de Estudos Judiciários, Coleção Formação Contínua, janeiro de 2022, p. 42 (disponível em <https://repositorium.sdum.uminho.pt/handle/1822/75415>).

<sup>4</sup> Assim, NEIL KOMESAR, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, Chicago & London, The University of Chicago Press, 1994.

<sup>5</sup> Como conceito operativo de *cultura*, aponta-se aquele que resulta da Declaração Universal sobre Diversidade Cultural, de 2001, da UNESCO: *cultura* corresponde ao conjunto de características espirituais e materiais, intelectuais e emocionais diferenciadoras de uma sociedade ou de um grupo social, e que compreende, para além da arte e da literatura, os estilos de vida, as formas de viver em conjunto, os sistemas de valores, as tradições e as convicções. A Declaração, na versão em português, encontra-se disponível em <https://gdde.ministeriopublico.pt/sites/default/files/decl-diversidadecultural.pdf>.

<sup>6</sup> See Convention on the Right of Child, adopted on the 20 November 1989 by United Nations General Assembly. Retrieved November 10, 2024, from <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

accompanied by their families or unaccompanied, are more vulnerable than adults. It thus follows that they require special protection.

Recent data from UNICEF indicates that the number of migrant children is increasing, representing a novel demographic phenomenon<sup>7</sup>. In 2020, around 13% of migrants were children, i.e. human beings under the age of 18<sup>8</sup>. This figure is notable in that it underscores the need to consider the issue of migration in the context of the growing number of children involved. In this regard, it is noteworthy that nearly ten years have elapsed since the 2015 European migrant crisis, during which almost one million individuals arrived in Europe. Despite this considerable time span, concerns about the protection of migrant children have not diminished. These issues continue to be a significant point of contention in European public discourse. In this context, the new EU Pact on Migration and Asylum is a relevant document when it comes to assess the protection of migrant children. It is therefore essential to address this issue with due consideration of the vulnerable situation of children.

After repeated warnings from non-governmental organisations (NGOs) such as Save the Children<sup>9</sup>, Eurochild<sup>10</sup>, and the French organisation La Cimade<sup>11</sup> regarding the urgency of the situation and the need for Member States to implement measures to significantly improve the protection of migrant children, on 10 April 2024 the European Parliament finally approved the new EU Pact on Migration and Asylum, formally adopted by the Council on 14 May 2024<sup>12</sup>. This document introduces several new rules and modifications to existing ones, thereby enabling a comprehensive reform. Indeed, many argue that this text marks a pivotal moment in the evolution of the Common European Asylum System (CEAS). For some, such as NGOs and other human rights defenders, this reform signals a shift towards a securitised and repressive approach to migration within the European Union. Nevertheless, despite fierce opposition, a majority of the European Parliament has voted in favour of it.

The new EU Pact is a wide-ranging agreement that encompasses a multitude of subjects, including provisions relating to solidarity for the expedited administration of border controls. The document comprises eleven regulations and directives, which collectively represent a comprehensive and far-reaching overhaul. Although the new rules do not explicitly address the issue of the protection of migrant children, such as the Screening Regulation<sup>13</sup> and the Eurodac Regulation<sup>14</sup>, they do contain provisions that are significant for the protection of children's rights. In this regard, an area that requires closer examination within this corpus of novel legislation is the issue of the detention of migrant children. Even if this is not the principal objective of the new EU Pact, it constitutes a considerable challenge in the endeavour to protect the rights of migrant children.

The aim of this research paper is to illustrate the extent to which the new EU Pact can be considered a risk to the protection of children's rights, particularly in the context of the detention of migrant children. For this purpose, it is first necessary to contextualise the importance of special protection measures for children's rights, with particular emphasis on the detention of minors in the context of migration. Furthermore, we examine a sample of judgements

<sup>7</sup> United Nations Children's Fund – UNICEF, *supra* n 1.

<sup>8</sup> United Nations Children's Fund – UNICEF (2021, April), *Migration - In 2020, the number of international migrants reached 281 million; 36 million of them were children*. Retrieved November 10, 2024, from <https://data.unicef.org/topic/child-migration-and-displacement/migration/>.

<sup>9</sup> Save The Children (2024, April 10). *Statement: New Migration & Asylum Pact will drastically undermine children's rights in Europe* [Press release]. Retrieved November 10, 2024, from <https://www.savethechildren.net/news/statement-new-migration-asylum-pact-will-drastically-undermine-children-s-rights-europe-save>.

<sup>10</sup> Eurochild (2024, April 11), *The EU Migration and Asylum Pact will put children in danger* [Press release]. Retrieved November 10, 2024, from <https://eurochild.org/news/the-eu-migration-and-asylum-pact-will-put-children-in-danger/>

<sup>11</sup> La Cimade (2024, June 27). *Decoding the EU Pact on Migration and Asylum* [Press release]. Retrieved November 10, 2024, from <https://www.lacimade.org/wp-content/uploads/2024/06/Decoding-the-pact-UE.pdf>.

<sup>12</sup> Official Journal L series daily view (2024, May 22), *Pact on Migration and Asylum*. Retrieved November 10, 2024, from <https://eur-lex.europa.eu/oj/daily-view/L-series/default.html?&ojDate=22052024>.

<sup>13</sup> Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. Retrieved November 10, 2024, from [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L\\_202401356](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401356).

<sup>14</sup> Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC. Retrieved November 10, 2024, from [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L\\_202401358](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401358).

of the European Court of Human Rights (ECtHR) to identify and characterise some cases pertaining to the detention of migrant children and the argumentative agreements established by this Court. Subsequently, an analysis is conducted of the legislation that preceded the new EU Pact regarding the detention of migrant children, with the objective of identifying the changes derived from this new legislation. To achieve this, several legal instruments that protect the rights of children are analysed, including the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the United Nations Convention on the Rights of the Child. Finally, we describe and analyse the control and border procedures in the new EU Pact regulations and their impact on the protection of children's rights.

## **1. Protection measures and the situation of children in the context of migration**

Special protection measures are commonly considered a response to the problem of justice in the field of children's rights. However, the content and scope of these measures are determined by analysing the different types of problems for their application in each specific situation or context to ensure their effective implementation to protect children's rights.

Therefore, it is possible to distinguish a wide range of protection measures, because these are analysed and applied in relation to the problem raised in each specific case. In this sense, although it is possible to draw up an extensive list of measures to be considered by States, this list may become incomplete in a short period of time, considering the variety of situations that may arise in such dynamic social contexts, as well as the specific conditions of each child or adolescent.

However, it is possible to distinguish between protection measures aimed at guaranteeing the right to live in dignity and, on the other hand, measures aimed at ensuring the judicial protection of minors. The first refers to measures to prevent situations of risk or danger, as well as to guarantee access to economic, social, and cultural rights (ESCR). The second refers to the broad protection of minors in conflict with the law, whether during judicial or administrative proceedings, and even to guaranteeing the full enjoyment of rights during deprivation of liberty.

In relation to risk or danger situations, these include those related to institutional violence and access to ESCR. The first refers to violence perpetrated by the State against minors, which mainly occurs in cases involving forced displacement, enforced disappearance, torture, threats, slavery, forced recruitment (violence in State institutions), gender-based violence, among others. This subset of problems is characterised by some specific contexts in which children and adolescents find themselves, such as internal armed conflicts and migration, which aggravate the problem scenario. The second subset includes problems related to restrictions or inaction by the State regarding access to ESCR, such as health, education, cultural identity, and an adequate standard of living. This may also include the sale of children and child labour, which are specific situations of risk or danger that affect the rights of the child. Therefore, the measures to be adopted in each situation, context, and particular case must be aimed at providing broad protection to the rights of the child.

Nowadays, the number of migrant children has increased considerably, and is consequently a cause of growing concern for States, due to various reasons, such as violence, armed conflicts, persecution, discrimination, economic factors (e.g., unemployment, poverty), etc.<sup>15</sup>. Therefore, the correct interpretation and application of these protection measures by States becomes an important activity to adequately address the problems of children in the context of migration, especially in cases of detention.

According to the UNHCR Guidelines, "the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities"<sup>16</sup>. On the other hand, the Human Rights Committee states that: "Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions

<sup>15</sup> See United Nations Children's Fund - UNICEF, *Uprooted: The Growing Crisis for Refugee and Migrant Children* (UNICEF, 2016) 7; and United Nations High Commissioner for Refugees - UNHCR, *Global Trends: Forced Displacement in 2017* (UNHCR, 2018) 2–3.

<sup>16</sup> United Nations High Commissioner for Refugees - UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (UNHCR, 2012) 9.

of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors<sup>17</sup>. Hence, each case requires an individual assessment of “reasonableness, necessity and proportionality”<sup>18</sup> to determine the detention of children based on the *ultima ratio principle*.

It should be noted that these protection measures arise from the immaturity, weakness, and inexperience of the child. Consequently, the application of measures and the interpretation of the migration regulations must be carried out in accordance with the best interests of the child. In relation to this concept, the Committee on the Rights of the Child points out that the best interests of the child are a right, a principle, and a rule of procedure<sup>19</sup>. Therefore, its content must be determined in each case, that is, it acquires meaning in relation to the problem that is raised. It is an ambiguous concept that stands out for its complex, flexible, adaptable, and dynamic content, due to the approach to different issues regarding children’s rights, and based on the specific circumstances of each child, group of children, or children in general.

Likewise, although detention constitutes a last resort protection measure, it should also be noted that the State has the obligation to implement positive protection measures; thus, immigration detention is never in the best interest of the child<sup>20</sup>. Despite existing legislation not explicitly prohibiting detention in all cases, case law can provide further clarification on this matter.

## 2. The detention of children in the jurisprudence of the ECtHR

The argumentative activity of the ECtHR has made it possible to understand the scope of the protection norms and expand their content, as well as to identify the characteristics of problems in different situations. In the case law of the ECtHR, understood as a place of permanent discussion and argumentative development based on problems, the justification of protection measures is established due to children being extremely vulnerable<sup>21</sup>. Therefore, it is possible to identify a series of measures aimed at the protection of children’s rights, because these are analysed and applied in relation to the issue raised in each specific case. In this sense, although it is possible to draw up an extensive list of protection measures that must be observed by States, this list may become incomplete in a short period of time, due to the variety of situations that arise in such dynamic social contexts and the special conditions in which children find themselves.

As previously stated, European law authorises the detention of children in an immigration context only as a measure of last resort and for the shortest possible period of time. Likewise, in the case of *Popov v. France*, the ECtHR has noted that “[T]he protection of the child’s best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort”<sup>22</sup>. Thus, the justification of protection measures is an activity that transcends legal interpretation and requires the judge to engage in an argumentative activity aimed at explaining its content in each case analysed.

The following table provides a list of cases by the ECtHR that concern the detention of children. These were classified according to the situation of the child — accompanied or unaccompanied —, the specific issue — conditions of detention or deprivation of liberty —, and the article of the European Convention on Human Rights (ECHR) that was applied in the case.

<sup>17</sup> Human Rights Committee, *General Comment No 35: Article 9 - Liberty and security of person*, (16 December 2014, CCPR/C/GC/35) para. 18.

<sup>18</sup> C M Smyth, “Towards a complete prohibition on the immigration detention of children” (2019), *1 Human Rights Law Review* 19, 10.

<sup>19</sup> See Committee on the Rights of the Children, *General Comment No. 14: Article 3, para. 1 - On the right of the child to have his or her best interests taken as a primary consideration*, (29 May 2013, CRC/C/GC/14) para. 6.

<sup>20</sup> See United Nations Task Force on Children Deprived of Liberty, *Advocacy Brief: End Immigration Detention of Children* (UN Task Force, 2024). Inter-American Court of Human Rights, *Advisory Opinion OC-21/14 - Rights and guarantees of children in the context of migration and/or in need of international protection*, (19 August 2014) para. 154; and United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment - Juan Mendez*, (5 March 2015, A/HRC/28/68) para. 80.

<sup>21</sup> See E Garzón Valdés, “Desde la modesta propuesta de J. Swift hasta las casas de engorde: algunas consideraciones respecto de los derechos del niño” (1994), *2 DOXA: Cuadernos de Filosofía del Derecho* 15-16, 737-738.

<sup>22</sup> *Judgment Case of Popov v. France*, 19 January 2012, Application no. 39472/07 and 39474/07, para. 140-141, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-108710%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-108710%22]}).

**Table 1.** Migrant minors in detention

|      | Case-law                                                | Situation     | Issue                   | ECHR                                                                                                                                                                 |
|------|---------------------------------------------------------|---------------|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2006 | <i>Mubilanzila Mayeka and Kaniki Mitunga v. Belgium</i> | Unaccompanied | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)<br><br>Violation of Article 8 (right to respect for private and family life)                  |
|      |                                                         |               | Deprivation of liberty  | Violation of Article 5 § 1 (right to liberty and security)<br><br>Violation of Article 5 § 4 (right to have the lawfulness of detention decided speedily by a court) |
| 2010 | <i>Muskhadzhiyeva and Others v. Belgium</i>             | Accompanied   | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)                                                                                               |
|      |                                                         |               | Deprivation of liberty  | Violation of Article 5 § 1 (right to liberty and security)                                                                                                           |
| 2010 | <i>Bubullima v. Greece</i>                              | Unaccompanied | Deprivation of liberty  | Violation of Article 5 § 4 (right to have the lawfulness of detention decided speedily by a court)                                                                   |
| 2011 | <i>Rahimi v. Greece</i>                                 | Unaccompanied | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)                                                                                               |
|      |                                                         |               | Deprivation of liberty  | Violation of Article 5 § 1 (right to liberty and security)<br><br>Violation of Article 5 § 4 (right to have the lawfulness of detention decided speedily by a court) |
| 2011 | <i>Kanagaratnam v. Belgium</i>                          | Accompanied   | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)                                                                                               |
|      |                                                         |               | Deprivation of liberty  | Violation of Article 5 § 1 (right to liberty and security)                                                                                                           |

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|      |                                                   |               |                         |                                                                                                                                                                                            |
|------|---------------------------------------------------|---------------|-------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2012 | <i>Popov v. France</i>                            | Accompanied   | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)                                                                                                                     |
|      |                                                   |               | Deprivation of liberty  | Violation of Article 5 § 1 (right to liberty and security)<br><br>Violation of Article 5 § 4 (right to have the lawfulness of detention decided speedily by a court)                       |
| 2012 | <i>Mahmundi and Others v. Greece</i>              | Accompanied   | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)<br><br>Violation of Article 13 (right to an effective remedy)                                                       |
| 2014 | <i>Mohamad v. Greece</i>                          | Unaccompanied | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)<br><br>Violation of Article 13 (right to an effective remedy) of the Convention taken in conjunction with Article 3 |
|      |                                                   |               | Deprivation of liberty  | Violation of Article 5 § 1 (right to liberty and security)                                                                                                                                 |
| 2016 | <i>Abdullahi Elmi and Aweys Abubakar v. Malta</i> | Unaccompanied | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)                                                                                                                     |
|      |                                                   |               | Deprivation of liberty  | Violation of Article 5 § 1 (right to liberty and security)<br><br>Violation of Article 5 § 4 (right to have the lawfulness of detention decided speedily by a court)                       |

|      |                           |               |                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|------|---------------------------|---------------|-------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2020 | <i>Moustahi v. France</i> | Unaccompanied | Conditions of detention | Violation of Article 3 (prohibition of inhuman or degrading treatment)<br><br>Violation of Article 5 § 1 (right to liberty and security)<br><br>Violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention)<br><br>Violation of Article 8 (right to respect for private and family life)<br><br>Violation of Article 13 (right to an effective remedy) in conjunction with Article 8,<br><br>Violation of Article 13 in conjunction with Article 4 of Protocol No. 4 |
|------|---------------------------|---------------|-------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

According to the cases that were mentioned, the detention of migrant children has been addressed in the context of Articles 3, 5, 8, and 13 of the ECHR. In cases concerning the conditions of detention, the Court has mainly focused on the facilities of the detention centres and the health status of the children. On the other hand, regarding the deprivation of liberty, the ECtHR has analysed the legality of the detention. Although the Court's case law distinguishes between accompanied and unaccompanied minors, the problems identified are common to both situations. However, its importance lies in the need to adopt the most appropriate protection measures for each type of situation, due to the extreme vulnerability of children. In this sense, the ECtHR held that "children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status". The Court has also observed that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents"<sup>23</sup>.

The ECtHR also noted that the fact that migrant children are accompanied is not sufficient to exempt the authorities from their obligation to protect the children. For example, in the case *Muskhadzhiyeva and Others v. Belgium*, the Court examined the situation of four children who had not been separated from their mothers and who had been held for over a month in a closed centre that was not designed to house children, causing serious harm to their health<sup>24</sup>. Likewise, in the case *Kanagaratnam v. Belgium*, the Court concluded that the detention of children for almost four months in a closed transit centre "exposed the children to feelings of anxiety and inferiority and, in full knowledge of the facts, had risked compromising their development" and therefore "the situation experienced by the children had amounted to inhuman and degrading treatment"<sup>25</sup>. Thus, the conditions of detention of children, even when accompanied by their parents, impose a situation of extreme vulnerability because it can cause them "distress and have serious psychological repercussions"<sup>26</sup>.

<sup>23</sup> Judgment *Abdullahi Elmi and Aweys Abubakar v. Malta*, 22 November 2016, Application no. 25794/13 and 28151/13, para. 103, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-168780%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-168780%22]}).

<sup>24</sup> Judgment *Muskhadzhiyeva and Others v. Belgium*, 19 January 2010, Application no. 41442/07, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-2998214-3304657%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-2998214-3304657%22]}).

<sup>25</sup> Judgment *Kanagaratnam v. Belgium*, 13 December 2011, Application no. 15297/09, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22002-250%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-250%22]}).

<sup>26</sup> Judgment *Case of Popov v. France*, 19 January 2012, Application no. 39472/07 and 39474/07, para. 140-141, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-108710%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-108710%22]}).

In relation to the deprivation of liberty, the ECtHR has referred to the detention of children in closed centres designed for adults in conditions that were ill-suited to the extreme vulnerability of minors, as well as to the lawfulness of the detention. For example, in the case of *Popov v. France*, which concerned the administrative detention of a family for two weeks until their deportation to Kazakhstan, the Court held that there had been a violation of Article 3 of the ECHR in respect of two children, finding that the French authorities had failed to calculate the detrimental effects on the children of being held in a detention centre in conditions “ill-adapted to the presence of children”<sup>27</sup>. The Court also held that there had been a violation of Articles 5 and 8 in relation to the entire family group and referred to Article 37 of the Convention on the Rights of the Child, which provides that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age”<sup>28</sup>.

According to the ECtHR, the detention of minors, whether accompanied or unaccompanied, should therefore be considered as a measure of last resort and for the shortest appropriate period of time. It also notes that States have a positive obligation to ensure that children receive adequate treatment and are provided with adequate detention conditions.

### **3. Migrant children’s detention within the existing legal framework: the lack of a clear conclusion**

The topic of migration has been extensively addressed in the corpus of texts produced by the European Union. This set of rules encompasses a wide range of issues, including the detention of minors. However, the new EU Pact on Migration and Asylum introduces significant alterations to this subject matter, seemingly marking a paradigm shift. In the context of children’s rights, this transition gives rise to some inquiries. In order to gain a more comprehensive understanding, it is essential to examine the regulations that preceded the agreement. These regulations are more expansive, encompassing children in general, not only within Europe but also beyond.

At the international level, several rules are associated with the issue of children’s detention. The Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, Article 37, Paragraph b, states that: “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”<sup>29</sup>. In this framework, it can be argued that detention can only be lawful if it is used as a measure of last resort, in order to respect “the right of all persons under 18 years of age to be recognised as children in migration procedures, as well as allowing them to enjoy this status”<sup>30</sup>.

Another provision related to the detention of children is Article 3, Paragraph 1, which states 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”. Despite its somewhat ambiguous nature, the use of this concept is of the utmost importance, because it provides guidance on the application of the most appropriate measure to protect children’s rights. In the context of migration, this means that “policies on detention, deportation of migrants (children and/or their parents), decisions aimed at addressing parents’ irregular status, practices on access to health care and education in host country, social, intercultural integrations policies, and family reunification programmes, among other issues, should be guided by the best interest principle”<sup>31</sup>.

<sup>27</sup> Judgment *Case of Popov v. France*, 19 January 2012, Application no. 39472/07 and 39474/07, para. 95, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-108710%22%5D%7D>.

<sup>28</sup> Judgment *Case of Popov v. France*, 19 January 2012, Application no. 39472/07 and 39474/07, para. 90, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-108710%22%5D%7D>.

<sup>29</sup> See G Van Bueren, *The International Law on The Rights of the Child*, (Martinus Nijhoff Publishers, 1998) 206–215.

<sup>30</sup> J Markiewicz-Stanny, “The Rights of the Child and a Problem of Immigration Detention” (2020), 9 *Polish Review of International and European Law* 2, 88.

<sup>31</sup> P Ceriani Cernadas, “The human rights of children in the context of international migration”, in W Vandenhoe, E Desmet, D Reynaert, S Lembrechts (ed.) *Routledge International Handbook of Children’s Rights Studies* (Routledge, 2015) 339.

The relative prohibition of detention has been clarified by European law, as set forth by the Council of Europe and the European Union. In Article 5(d) of the ECHR, entitled “Right to Liberty and Security”, states that: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law [...] : d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority”<sup>32</sup>. This means that the deprivation of liberty of a minor is lawful if it is carried out in accordance with the strict procedures.

Likewise, several legislative instruments at the level of the European Union address this issue and the protection of children’s rights. For instance, the Charter of Fundamental Rights of the European Union, in Article 24, concerning the rights of the child, sets out a rule that may be relevant in the context of children’s detention. Indeed, Paragraph 2 of the same article stipulates that: “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”<sup>33</sup>.

A closer examination of the concept of the best interests of the child reveals its pervasive influence across the spectrum of European Union legislation, as well as in international children’s human rights law. This is because the best interests of the child, as set forth in Article 3 of the Convention on the Rights of the Child, have a “multi-faceted manifestation”<sup>34</sup>. As emphasised by the European Union Agency for Asylum, “the principle of the best interests of the child also cuts across all legal instruments of the Common European Asylum System”<sup>35</sup>.

But even previously, the texts regulating asylum in the European Union contained articles dealing with detention and the best interests of the child. Directive 2013/33/EU<sup>36</sup>, which sets out standards for the reception of applicants for international protection, and its Article 23 are particularly relevant in this context. Paragraph 1 recalls the best interests of the child, while Paragraph 3 sets out the conditions for housing. It states that: “Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centres referred to in Article 18(1)(a) and (b) and to open-air activities”.

In a nutshell, while EU law doesn’t address the detention of migrant children to any great extent, it appears that such detention is never intended to be automatic, but is considered solely as a measure of last resort under strict conditions. Therefore, before the new EU Pact on Migration and Asylum, it seems that no rules were directly concerning the detention of child migrants. Moreover, there was no provision for the automatic detention of children. However, in 2024, a significant violation of children’s rights took place. This concerns the automatic detention of children linked to their migrant status. In this regard, Regulation (EU) 2024/1356, which introduced the screening of third-country nationals at external borders<sup>37</sup>, brought about the most substantial changes. Indeed, the Regulation foresees the implementation of border filtering and automatic detention.

#### 4. Detention of children: screening and border procedures

The new EU Pact on Migration and Asylum establishes screening procedures and border procedures with the objective of carrying out a series of security checks and assessments on all individuals entering Europe irregularly, including those seeking asylum. These procedures are designed to ensure the security of Europe’s external borders and to identify potential risks associated with irregular migration.

<sup>32</sup> European Convention on Human Rights, entry into force on the 3 September 1953. Retrieved November 10, 2024, from [https://www.echr.coe.int/documents/d/echr/convention\\_ENG](https://www.echr.coe.int/documents/d/echr/convention_ENG).

<sup>33</sup> Charter of fundamental Rights of the European Union, adopted on the 7 December 2000. Retrieved November 10, 2024, from [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>34</sup> J Markiewicz-Stanny, *supra* n 19, 89.

<sup>35</sup> European Union Agency for Asylum, *The principle of the best interests of the child*. Retrieved November 11, 2024, from <https://euaa.europa.eu/guidance-reception-unaccompanied-children/principle-best-interests-child>.

<sup>36</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Retrieved November 10, 2024, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033>.

<sup>37</sup> Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. Retrieved November 10, 2024, from [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L\\_202401356](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401356).

In accordance with Article 1 of this EU Pact, the screening process is applicable to “third-country nationals who, without fulfilling the entry conditions set out in Article 6 of Regulation (EU) 2016/399, have crossed the external border in an unauthorised manner, have applied for international protection during border checks, or have been disembarked after a search and rescue operation, before they are referred to the appropriate procedure” as well as to “third-country nationals illegally staying within the territory of the Member States where there is no indication that those third-country nationals have been subject to controls at external borders, before they are referred to the appropriate procedure”. The objective of this procedure is “to strengthen the control of third-country nationals crossing the external borders, to identify all third-country nationals subject to the screening, and to check against the relevant databases whether the persons subject to the screening might pose a threat to internal security”. The detention may last for a maximum of seven days, in accordance with Article 2, and it will consist of “a confinement of a person by a Member State within a particular place, where such person is deprived of freedom of movement”.

In relation to children, a specific provision has been established in Article 13, whose initial paragraph outlines the principle of the best interests of the child. This article stipulates that minors must be accompanied by an adult family member. In the case of unaccompanied minors, the Member State is obliged to appoint a representative with the aim of ensuring the best interests of the child throughout the process. Article 8 states that the “screening shall be conducted at any adequate and appropriate location designated by each Member State, generally situated at or in proximity to the external borders or, alternatively, in other locations within its territory”.

In this context, Directive (EU) 2024/1346<sup>38</sup> provides a more detailed account of the conditions of detention. It should be noted, however, that this is a directive and not a regulation. Consequently, Member States are at liberty to determine how the objectives set out in the text are to be achieved, and they enjoy a certain degree of flexibility in transposing it. Articles 10, 11, 12, and 13 address the issue of detention in general, which applies to the screening process. Hence, the most pertinent article in this context is Article 13, Paragraph 2: “Minors shall, as a rule, not be detained. They shall be placed in suitable accommodation in accordance with Articles 26 and 27.”

As in the Screening Regulation, Article 26 refers to the conditions of detention: “Member states shall ensure a standard of living adequate for the minor’s physical, mental, spiritual, moral and social development” as well as that “Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age, and to open-air activities within the premises and accommodation centres”. The Directive is somewhat vague in this regard, as it does not provide precise guidelines for the detention of children. Consequently, the States are afforded a certain degree of autonomy in determining the conditions of detention.

In consideration of the provisions described, it is questionable whether automatic detention is in the best interest of the child. Detention, when authorised and necessary, must be subject to strict conditions. Nevertheless, it is evident that the provisions are extensive, yet devoid of any discernible regulations.

This new rule appears to significantly undermine children’s rights. The automatic detention during the screening process, without specific exceptions for children, clearly increases the vulnerability of child migrants who are already in a precarious situation. The current text shows a lack of provisions specifically addressing children during the screening process. Furthermore, rather than strengthening protection, this measure ultimately diminishes the importance of the principle of the best interests of the child. This principle is fundamentally distorted, since detention, historically rejected, is now calmly considered as a managed exception.

A few non-governmental organisations have issued statements denouncing the recently introduced procedure, citing concerns that it may pose a risk to the well-being of children. Some international organisations also voiced their concern. For instance, even before the adoption of the Pact, the Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on States’ obligations regarding the human rights of children in

<sup>38</sup> Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast). Retrieved November 10, 2024, from [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L\\_202401346](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401346).

the context of international migration in countries of origin, transit, destination and return<sup>39</sup> stated that “Every child has, at all times, a fundamental right to liberty and the right not to be placed in detention on immigration grounds”. The Committee on the Rights of the Child has affirmed that “detention of migrant and asylum-seeking children because of their or their parents’ migration status is never in the best interest of a child and always a violation of children’s rights”<sup>40</sup>. A note from the Secretary-General of the United Nations, dated 20 July 2020, had already opposed the detention of migrant children. In this text, he reminds us that “Several special procedures mandate holders have also stressed that the detention of migrant children should be prohibited”<sup>41</sup>.

## Final remarks

The recently adopted EU Pact on Migration and Asylum gives rise to a number of complex issues concerning the rights of the child, particularly in relation to deprivation of liberty. In this context, it is important to draw attention to the recently introduced screening procedure as set out in Regulation (EU) 2024/1356 and Directive (EU) 2024/1346, as these texts permit the automatic detention of migrant children when they cross the border illegally. The deprivation of liberty may last for a maximum period of seven days and must occur in an “adequate and appropriate location” with due consideration for the best interests of the child.

This situation, which is addressed in the new EU Pact, would be a step backwards compared to previous legislation, as such detention was never allowed. However, the lack of clarity on minimum standards and the automatic nature of the filtering measures have attracted criticism, as these aspects may conflict with the core principle of children’s rights: the best interests of the child. In accordance with international standards on children’s rights, it is not possible to be certain that this type of filtering is illegal. However, a closer look at the jurisprudence of the ECtHR allows us to question its legality. Indeed, such detention would only be legal under certain precise conditions. In fact, the Court remains extremely strict when it comes to the detention of children, as shown by its numerous condemnations of EU Member States.

In this context, UN experts have also stated that EU members must prohibit the detention of children in immigration facilities as they prepare for the implementation of the new EU Pact. This entails a revision of all provisions of the Pact that may lead to the detention of children, with the objective of ensuring that no child is detained for immigration control purposes, whether based on their or their parents’ immigration status.

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<sup>39</sup> United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families - CMW, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (16 November 2017, CMW/C/GC/4-CRC/C/GC/23). Retrieved November 10, 2024, from <https://www.refworld.org/reference/research/cmw/2017/en/119190>.

<sup>40</sup> Committee on the Rights of the Children (2024, May 2). *Child immigration detention must be prohibited following adoption of EU migration and asylum pact, UN experts say* [Press release]. Retrieved November 10, 2024, from <https://www.ohchr.org/en/press-releases/2024/05/child-immigration-detention-must-be-prohibited-following-adoption-eu>.

<sup>41</sup> United Nations General Secretary, *Ending immigration detention of children and providing adequate care and reception for them* (20 July 2020, A/75/183) para. 17. Retrieved November 10, 2024, from <https://documents.un.org/doc/undoc/gen/n20/188/27/pdf/n2018827.pdf>.

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