

Veljko Turanjanin*

UNACCOMPANIED MIGRANT MINORS DETENTION BEFORE THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The author deals with the one of the most problematic issues of the migrant crisis, namely the deprivation of liberty of a unaccompanied migrant minor in his or her migrant journey. The situation of migrants in the crisis that has hit Europe is not easy in itself, but it is made even more difficult by the fact that children often travel with adult migrants, and the most difficult aspect of this phenomenon is certainly unaccompanied migrant children. The countries most affected by the influx of unaccompanied children are Greece and Malta. Article 5 of the European Convention on Human Rights and Fundamental Freedoms lays down the grounds on which a person may be deprived of his liberty, and in recent years the European Court of Human Rights has elaborated in detail the basis for ordering detention of migrants. The author has paid the greatest attention to the views of this Court when it comes to unaccompanied migrant children analyzing all the judgments rendered by July 2019, and the difficulty of their position is sufficiently illustrated by the fact that the Court found violations of convention rights in all judgments in their deprivation of liberty.

Keywords: *unaccompanied minor, detention, migrant crisis, European Court of Human Rights, European Convention on Human Rights and Fundamental Freedoms.*

* Assistant professor, Faculty of Law, University of Kragujevac

1. Introduction

The Mediterranean migrant crisis is not calming down. Between 1950 and 2010 however, the nature and character of these migrations changed (Haas, 2011: 60). The Italy has, for many years, faced an influx of illegal migrants by sea, often organized by criminal groups (Pascale, 2010: 283). However, according to the proceedings pending and/or ended before the European Court of Human Rights (“the Court”), Greece and Malta do not lag behind Italy. With less success, migrants file complaints against other countries, such as countries in the region. Such voyages are fraught with life-threatening hazards, ships often carry far more migrants than a ship can dock, do not have standard equipment, and captains often are not professional sailors (Klug, 2014: 49).

Migrants are in a difficult position in both developed and developing countries (Ogg, 2016: 385). It is a mixed migration, while this concept still evolving, encompassing migrants of different nationalities, motives, etc. (Sharpe, 2018). However, the pressure of migration cannot relieve states of their human rights obligations (Moreno-Lax, 2012: 598). The focus of this paper will be at the Mediterranean crisis and the situation of juvenile migrants, accompanied and unaccompanied, primarily from the perspective of the Court, with other countries, such as Australia, facing similar problems (Schloenhardt and Craig, 2015; Marmo and Giannacopoulos 2017: 5; Henderson, 2014).

It should be noted at the outset, as stated in numerous judgments, that the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) is a living instrument, which may result in its provisions being interpreted over time in a different way (Mekbrajd, 2009: 17; Bjorge, 2013: 120). The most famous judgment in this area dates back to 2012, welcomed as historic by human rights defenders (Mann, 2018: 357), which drew attention to key international instruments in force in this area (*Hirsi Jamaa and Others v. Italy*, 2012), in which the Court found a violation of Articles 3, 13 and 13 of the Convention and Article 4 of Protocol 4 to the Convention, while not forgetting the Commission's decision on the inadmissibility of the application in *JHA v. Spain* (for lack of *locus standi* (*J.H.A. v. Spain*, 2008)). This is the first judgment where the Court unanimously found a state responsible for violating the human rights of migrants and refugees intercepted on the high seas and repatriated to a third country (Giuffre, 2012: 729) and represents an improvement of the Court's case-law in several fields, such as the extraterritorial application of human rights and the treatment to be provided to migrants and asylum seekers (Papanicolopulu, 2013: 420). As the judge *Pinto de Albuquerque* points out in this judgment, the ultimate question is how Europe

should recognize that migrants are entitled to have rights (about it Hirsch and Bell, 2017: 418).

A key element of the EU's evolution is the abolition of internal borders and the establishment of freedom of movement, which, however, is not accompanied by a single legal system (Mitsilegas, 2014: 182). The foundations of the modern system of migrant protection were laid after the Second World War (Betts, 2013: 10). The last decade, however, has been marked by two different approaches to the migrant issue, and on the one hand we have increased militarization and border control, while raising fences, and on the other, strengthening human rights and freedoms of migrants (Aas and Gundhus, 2015: 1). Economic crisis and political change in certain regions of Africa and Asia inevitably cause challenges for Europe (Černič, 2016: 237), that are in this context primarily emigrational. In line with developments, politicians, lawyers, lay people are advertised through social networks, announcements and papers. International organizations around the world look at how human rights can protect migrants' rights (Cantor, 2014: 79), and the debate on the link between human rights and migrant rights is deeply relevant (Harvey, 2014: 44; McConnachie, 2017: 191). It is a really big problem and political discourse (Meçe, 2018: 45), and thereby, the biggest discussion on migrant control is kept regarding the legality of the activities of repression (*push-backs*) (Markard, 2016: 591-592). Immigration control systems are today characterized by “extraterritoriality” strategies (Ryan, 2010: 3), which primarily include interception measures on ships at sea or in territorial waters of third countries and the appointment of immigration officers to prevent migrants from embarking on flights to a third country (Klug and Howe, 2010: 69-70). EU Member States use a range of means to control their borders, extending beyond their territories (Costello, 2012: 290). While, on the one hand, we have states' activities to address migrant issues, the problem has arisen to what extent the Convention is a means of extraterritorial immigration control, especially after the judgment of *Banković and Others v. Belgium and Others* further stirred the sea (Brouwer, 2010: 213). Both figuratively and in nature.

The 1951 Geneva Convention Relating to the Status of Refugees sets out situations in which a State must grant refugee status to persons seeking that status. Article 1 of the Geneva Convention defines the concept of a refugee, as a person who, due to a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion, finds himself outside the country of his nationality and is unable or, because of such fear, does not want to use the protection of that country; or persons who, because they do not have a nationality but reside, because of such events, outside the country in which they were previously settled, and cannot or,

because of such fear, do not wish to return to it. Thereafter, under Article 33, paragraph 1, no Contracting State shall in any way expel or return (*refouler*)¹ a refugee to the border of a territory where his life or freedom would be threatened on the basis of race, religion, nationality, affiliation with a particular social group or political opinions. Of course, international law allows states to take reasonable measures in their territorial waters to prevent the entry of ships carrying illegal migrants (Guilfoyle, 2009: 222). Simply, the link between migrants and migration control has always been a point of conflict between state sovereignty and international law (Gammeltoft-Hansen, 2011: 11), but also between law and politics. However, the existence of international treaties and national legislation guaranteeing rights does not mean that their violation will not occur at the same time (further on this topic: Storey, 2016: 20).

As we can see, one of the basic principles in this area is precisely the principle of non-refoulement, as pointed out by the UNHCR in its Note on International Protection of 13 September 2001, emphasizing that it is a key principle of protection embodied in the Convention, which is not allowed (see about the legal nature of this principle Greenman, 2015). In a significant sense, this principle is a logical continuation of the right to seek asylum, recognized in the Universal Declaration of Human Rights, which has come to be regarded as a rule of customary international law binding on all states. In addition, international humanitarian law establishes non-refoulement as a fundamental component of an absolute ban on torture and cruel, inhuman or degrading treatment or punishment. The duty not to return (*refouler*) has also been recognized as applicable to refugees regardless of the formal recognition of their status, so it obviously involves asylum seekers whose status has not yet been decided. It implies all measures attributable to the State that could have the effect of returning an asylum seeker or refugee to the borders of a territory where their life or liberty would be threatened, or where they would be at risk of persecution. These include border refusal, interception and indirect *refoulement*, either by an individual seeking asylum or in situations of mass influx. Although at first glance it may seem that returning a ship to the high seas does not have to lead to refoulement, because the ship can theoretically sail to any country in the world that has the sea, the matter is far more complicated (Guilfoyle, 2009: 222). Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe on the interception and rescue at sea of asylum seekers, refugees and irregular migrants is also very significant.² Although

¹ This principle dates back to 1933 (Bhuiyon, 2013: 101).

²1. The surveillance of Europe's southern borders has become a regional priority. The European continent is having to cope with the relatively large-scale arrival of migratory flows by sea from Africa, reaching Europe mainly through Italy, Malta, Spain, Greece and Cyprus.

YEARBOOK
HUMAN RIGHTS PROTECTION
PROTECTION OF THE RIGHTS OF THE CHILD
“30 YEARS AFTER THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD”

2. Migrants, refugees, asylum-seekers and others risk their lives to reach Europe’s southern borders, mostly in unseaworthy vessels. These journeys, always undertaken illicitly, mostly on board flagless vessels, putting them at risk of falling into the hands of migrant smuggling and trafficking rings, reflect the desperation of the passengers, who have no legal means and, above all, no safer means of reaching Europe.
3. Although the number of arrivals by sea has fallen drastically in recent years, resulting in a shift of migratory routes (particularly towards the land border between Turkey and Greece), the Parliamentary Assembly, recalling, *inter alia*, its Resolution 1637 (2008) on Europe’s boat people: mixed migration flows by sea into southern Europe, once again expresses its deep concern over the measures taken to deal with the arrival by sea of these mixed migratory flows. Many people in distress at sea have been rescued and many attempting to reach Europe have been pushed back, but the list of fatal incidents – as predictable as they are tragic – is a long one and it is currently getting longer on an almost daily basis.
4. Furthermore, recent arrivals in Italy and Malta following the turmoil in North Africa confirm that Europe must always be ready to face the possible large-scale arrival of irregular migrants, asylum-seekers and refugees on its southern shores.
5. The Assembly notes that measures to manage these maritime arrivals raise numerous problems, of which five are particularly worrying:
 - 5.1. despite several relevant international instruments which are applicable in this area and which satisfactorily set out the rights and obligations of States and individuals applicable in this area, interpretations of their content appear to differ. Some States do not agree on the nature and extent of their responsibilities in specific situations and some States also call into question the application of the principle of non-refoulement on the high seas;
 - 5.2. while the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a ‘place of safety’, the notion of ‘place of safety’ does not appear to be interpreted in the same way by all member States. Yet it is clear that the notion of ‘place of safety’ should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights;
 - 5.3. divergences of this kind directly endanger the lives of the people to be rescued, in particular by delaying or preventing rescue measures, and they are likely to dissuade seafarers from rescuing people in distress at sea. Furthermore, they could result in a violation of the principle of non-refoulement in respect of a number of persons, including some in need of international protection;
 - 5.4. although the European Agency for the Management of Operational Cooperation at the External Borders of the member States of the European Union (Frontex) plays an ever increasing role in interception at sea, there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations it coordinates (Aas and Gundhus, 2015));
 - 5.5. finally, these sea arrivals place a disproportionate burden on the States located on the southern borders of the European Union. The goal of responsibilities being shared more fairly and greater solidarity in the migration sphere between European States is far from being attained.
6. The situation is rendered more complex by the fact that these migratory flows are of a mixed nature and therefore call for specialised and tailored protection-sensitive responses in keeping with the status of those rescued. To respond to sea arrivals adequately and in line with the relevant international standards, the States must take account of this aspect in their migration management policies and activities.
7. The Assembly reminds member States of their obligations under international law, including the European Convention on Human Rights (ETS No. 5), the United Nations Convention on the Law of the Sea of 1982 and the 1951 Geneva Convention relating to the Status of Refugees, and particularly reminds them of the principle of non-refoulement and the right to seek asylum. The Assembly also reiterates the obligations of the States Parties to the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue.
8. Finally and above all, the Assembly reminds member States that they have both a moral and legal obligation to save persons in distress at sea without the slightest delay, and unequivocally reiterates the interpretation given by the Office of the United Nations High Commissioner for Refugees (UNHCR), which states that the principle of non-refoulement is equally applicable on the high seas. The high seas are not an area where States are exempt

from their legal obligations, including those emerging from international human rights law and international refugee law.

9. Accordingly, the Assembly calls on member States, when conducting maritime border surveillance operations, whether in the context of preventing smuggling and trafficking in human beings or in connection with border management, be it in the exercise of *de jure* or *de facto* jurisdiction, to:

- 9.1. fulfil without exception and without delay their obligation to save people in distress at sea;
- 9.2. ensure that their border management policies and activities, including interception measures, recognise the mixed make-up of flows of individuals attempting to cross maritime borders;
- 9.3. guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of non-refoulement, regardless of whether interception measures are implemented within their own territorial waters, those of another State on the basis of an *ad hoc* bilateral agreement, or on the high seas;
- 9.4. refrain from any practices that might be tantamount to direct or indirect refoulement, including on the high seas, in keeping with the UNHCR’s interpretation of the extraterritorial application of that principle and with the relevant judgments of the European Court of Human Rights;
- 9.5. carry out as a priority action the swift disembarkation of rescued persons to a ‘place of safety’ and interpret a ‘place of safety’ as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardises their fundamental rights, since the notion of ‘safety’ extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation;
- 9.6. guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection;
- 9.7. guarantee access to protection and assistance, including to asylum procedures, for those intercepted who are victims of human trafficking or at risk of being trafficked;
- 9.8. ensure that the placement in a detention facility of those intercepted – always excluding minors and vulnerable categories – regardless of their status, is authorised by the judicial authorities and occurs only where necessary and on grounds prescribed by law, that there is no other suitable alternative and that such placement conforms to the minimum standards and principles set forth in Assembly Resolution 1707 (2010) on the detention of asylum-seekers and irregular migrants in Europe;
- 9.9. suspend any bilateral agreements they may have concluded with third States if the human rights of those intercepted are not appropriately guaranteed therein, particularly the right of access to an asylum procedure, and wherever these might be tantamount to a violation of the principle of non-refoulement, and conclude new bilateral agreements specifically containing such human rights guarantees and measures for their regular and effective monitoring;
- 9.10. sign and ratify, if they have not already done so, the aforementioned relevant international instruments and take account of the International Maritime Organization (IMO) Guidelines on the Treatment of Persons Rescued at Sea;
- 9.11. sign and ratify, if they have not already done so, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and the so-called ‘Palermo Protocols’ to the United Nations Convention against Transnational Organised Crime (2000);
- 9.12. ensure that maritime border surveillance operations and border control measures do not affect the specific protection afforded under international law to vulnerable categories such as refugees, stateless persons, women and unaccompanied children, migrants, victims of trafficking or at risk of being trafficked, or victims of torture and trauma.

10. The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union States and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations coordinated by that agency. While the Assembly welcomes the proposals presented by the European Commission to amend the rules governing that agency, with a view to strengthening guarantees of full respect for fundamental rights, it considers them inadequate and would

individual states enter into treaties that somehow attempt to circumvent the rules of international law, they cannot be rendered invalid in this way. For example, Italy and Libya concluded several secret agreements in the period 2000-2012, some of which concerned the control of smuggling of migrants to Italy and their sending back to Libya (Gallaghe and David, 2014: 7; Hessbruegge, 2012: 423; on smuggling and routes extensively in Tinti and Reitano, 2017), and Italy has concluded similar contracts with Tunisia. The treaties were repealed (Pera, 2017: 358) to conclude a new one two months after the verdict, which obliges Libya to strengthen its land and sea borders and Italy to provide technical assistance, equipment and training to Libyan officials (Gammeltoft-Hansen, 2014: 586). However, between May 6 and November 6, 2009, 834 persons were returned to Libya, 23 to Algeria (Giuffré, 2013: 697), and generally speaking, thousands of migrants were returned from European borders in recent years (Bevilacqua, 2017: 168). In the case of minors, however, Directive 2005/85, which provides that public authorities must avoid the detention of minors, is of great importance for these considerations.

2. Detention for migrants

Article 5 of the Convention guarantees that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty except in cases enumerated in such cases and in accordance with the procedure prescribed by law. This Article concerns the protection of each person, as confirmed by the Court in *Nada v. Switzerland* (*Nada v. Switzerland*, 2012: §224). Most EU countries allow migrants to be deprived of their

like the European Parliament to be entrusted with the democratic supervision of the agency's activities, particularly where respect for fundamental rights is concerned.

11. The Assembly also considers it essential that efforts be made to remedy the prime causes prompting desperate individuals to risk their lives by boarding boats bound for Europe. The Assembly calls on all member States to step up their efforts to promote peace, the rule of law and prosperity in the countries of origin of potential immigrants and asylum-seekers.

12. Finally, in view of the serious challenges posed to coastal States by the irregular arrival by sea of mixed flows of individuals, the Assembly calls on the international community, particularly the IMO, the UNHCR, the International Organization for Migration (IOM), the Council of Europe and the European Union (including Frontex and the European Asylum Support Office) to:

12.1. provide any assistance required to those States in a spirit of solidarity and sharing of responsibilities;

12.2. under the auspices of the IMO, make concerted efforts to ensure a consistent and harmonised approach to international maritime law through, inter alia, agreement on the definition and content of the key terms and norms;

12.3. establish an inter-agency group with the aim of studying and resolving the main problems in the area of maritime interception, including the five problems identified in the present resolution, setting clear policy priorities, providing guidance to States and other relevant actors, and monitoring and evaluating the use of maritime interception measures. The group should be made up of members of the IMO, the UNHCR, the IOM, the Council of Europe, Frontex and the European Asylum Support Office.

liberty upon entering the country, most often by border police (Cornelisse, 2010: 8). Establishing a global image of imprisonment for migrants is considered extremely difficult (Fiske, 2016: 191). The grounds for deprivation of liberty are exhaustively stated in the Convention and a person cannot be deprived of his liberty beyond the enumerated grounds (see *Saadi v. the United Kingdom*, 2008: §43). For these considerations it is important Article 5 § 1 (f) of the Convention, which prescribes the lawful arrest or deprivation of liberty of a person in order to prevent his unauthorized entry into the country or persons against whom expulsion or extradition measures are being taken, is significant. In other words, the deprivation of liberty of aliens in the context of immigration control is allowed. In *Saadi v. the United Kingdom* The Court for the first time explained the meaning of this point, holding that until the State authorizes the entry into the country of any foreigner, this procedure is considered unlawful and the detention of a person who wants to enter the country and who needs it and for which he does not have a permit may be lawful in terms of unauthorized entry. However, detention must be compatible with the overall purpose of Article 5, which ensures that no one is arbitrarily deprived of his liberty (*Saadi v. the United Kingdom*, 2008: §66). In keeping with this view, the Court held in *Suso Musa v. Malta* that the question of when the first part of Article 5 of the Convention ceases to apply because the individual has been granted a formal entry or stay permit depends largely on national law (*Suso Musa v. Malta*, 2013: §97).

Deprivation of liberty must be lawful, and when it comes to the lawfulness of detention, including the issue of the procedure prescribed by law, the Convention essentially refers to national law and provides for an obligation to respect the substantive and procedural rules of specific legislation. However, compliance with domestic law is not enough, and any deprivation of liberty must protect the individual from arbitrariness. Further, no arbitrary detention may be compatible with Article 5 of the Convention, whereby the notion of arbitrariness extends beyond incompatibility with domestic law, so that deprivation of liberty may be in conformity with domestic law, but still be contrary to the Convention (*Saadi v. the United Kingdom*, 2008: §67; *Mahamed Jama v. Malta*, 2015: §139). Also important for these considerations are the views taken by the Court in the judgments *A. and Others v. the United Kingdom* and *Louled Massoud v. Malta*. Namely, in order to avoid any detention being regarded as arbitrary, it must be determined in good faith. Then, it must be closely linked to the grounds for detention, the place and conditions in which the person is detained must be appropriate given the fact that this measure applies not to persons who have committed the crime but to aliens who are often in fear for their own lives, have fled their country, the length of detention not exceeding the time

reasonably necessary for the purpose for which it was determined (A. and Others v. the United Kingdom, 2009: §164; Louled Massoud v. Malta, 2010: §62).

3. Detention of the unaccompanied migrants minors in the ECtHR's jurisprudence

The Court has so far pursued numerous proceedings to protect the rights of migrants, but particular emphasis is placed on the protection of the rights of juvenile migrants, accompanied and unaccompanied. The issue of imprisonment is particularly sensitive in this regard. Due to the scope of the work, only the issue of deprivation of liberty under Article 5 of the Convention will be explained here, while the issue of conditions of detention falls under Article 3 of the Convention, which will not be addressed, although it is known that migrants suffer various forms of violence when trying to cross the state border (Jeandesboz, 2015: 87). According to the *Popov protiv Francuske*, a measure of confinement must therefore be proportionate to the aim pursued by the authorities, namely the enforcement of a removal decision in the present case. It can be seen from the Court's case-law that, where families are concerned, the authorities must, in assessing proportionality, take account of the child's best interests. In this connection the Court would point out that there is currently a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount. 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 (Popov protiv Francuske, 2012: §§140-141).

One of the best observations of a child's position is given by the Court in the judgment *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, emphasizing that it must be borne in mind that the extreme vulnerability of the child is a determining factor and takes precedence over the status of illegal migrants (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006: §55). In this case, there was a nearly two-month imprisonment at the Centre for Adult Persons, a five-year-old migrant Congo national who travelled to meet her mother, who obtained refugee status in Canada and her subsequent repatriation. Although the application was filed by two applicants, there was only one person deprived of liberty in the present case, and the Court had already noted at the outset that only a person deprived of liberty could be considered a victim within the meaning of Article 5 of the Convention (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006: §96). In the present case, it was not disputed that the applicant was lawfully deprived of her liberty, whereby the particular situation was brought under Article 5 § 1f of the Convention, which prescribed the lawful arrest or detention of a person in order to prevent his

unauthorized entry into the country or persons against whom action is being taken to expel or extradite. However, the mere fact that a person's deprivation of liberty was brought under this article does not mean at the same time that the deprivation of liberty was lawful. In a series of judgments, the Court made clear that there must be a link between the grounds for deprivation of liberty and the place and conditions of detention (for example, *Ashingdane v. the United Kingdom*, 1985: §44; *Aerts v. Belgium*, 1998: §46). In this case, the Court drew attention to the fact that the child was imprisoned in a detention centre for illegal migrants on the same conditions as adults. These conditions were certainly not adapted to the situation of extreme vulnerability in which the child was unaccompanied (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006: §103). Therefore, Belgium violated Article 5 § 1f of the Convention, since its legal system did not sufficiently protect the applicant's right to liberty. At the same time, the applicant was not even allowed in this case to file a remedy against the decision on deportation, within the meaning of Article 5 § 4 of the Convention, which provided that everyone deprived of his liberty was entitled to bring proceedings in which the court would urgently examine the lawfulness of deprivation of liberty and to order release if imprisonment is unlawful. Since it is *lex specialis* in relation to Article 13 of the Convention, which provides for the right to an effective remedy, the Belgian authorities have failed to fulfil their obligations under this paragraph as well, since the deportation is not equated with the urgent release, one way violated convention rights.

Thereafter, Article 5 § 4 of the Convention was not respected in the case *Bubullima v. Greece*. The case involved a minor Albanian citizen who lived in Greece with an uncle who exercised his parental right. However, he was arrested by the immigration police who initiated the deportation proceedings against him for not having a valid residence permit. He was taken into custody, and after the deportation order was made, he was detained because of the risk of escape. The court ruled on the applicant's benefit, holding that the remedies available to the applicant did not meet the urgency criterion (*Bubullima v. Greece*, 2010: §31). The 14-day time-limit for deciding to terminate custody did not meet the above request, and the Court found stand in *Kadem v. Malta*, in which the period of 17 days did not meet the criterion of urgency *Kadem v. Malta* (*Kadem v. Malta*, 2003).

Viewed chronologically, the next item in this sequence is *Rahimi v. Greece*, in which the Court also found a violation of Article 5. In this case, an unaccompanied minor migrant was detained in the adult centre. Although detained at the centre for only two days, the Court took the view that the Greek authorities did not consider the best interests of the child or his situation as an unaccompanied migrant. Also, no alternative to custody was considered, which would be sufficient to secure deportation. These factors, therefore, cast

doubt on good faith in ordering custody (*Rahimi v. Greece*, 2011: §109). What is more problematic in this case is the violation of paragraph 4 of this article, due to a number of irregularities of the Greek authorities, beginning with the fact that it was practically impossible for the minor to reach a lawyer, then a brochure containing information on available remedies was written in the language which the minor did not understand, although his hearing was conducted in his native language, to the point that the minor was registered with an escort. Essentially, even if the applicant had remedies available, the Court in the present case did not conclude that it could have used them (*Rahimi v. Greece*, 2011: §120). The Court reached a similar conclusion in *Housein v. Greece*. Namely, in this case also the unaccompanied minor was placed in an adult centre from 2 June 2011 until 28 July of the same year. In this case, too, the Greek authorities did not take into account the fact that he was an unaccompanied minor, nor did they examine whether the purpose could be mitigated, although a proposal was made to move the juvenile to a centre tailored to his needs during the on-going proceedings (*Housein v. Greece*, 2013: §§75-77, 83).

Mohamad v. Greece is characterized by the fact that at the time of his arrest, the applicant, an Iraqi national, was an unaccompanied minor who had reached the age of majority in custody. The Court found a violation of Article 5 § 1 on the ground that the Greek authorities had detained the minor in detention without regard to his unaccompanied minor status, and after reaching the age of majority they continued his detention without taking any steps towards his abolition (*Mohamad v. Greece*, 2014: §85).

In the case of *Abdullahi Elmi and Aweys Abubakar v. Malta* the Court, building on the understanding expressed in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* very nicely draws attention to the fact that children have specific needs that are particularly linked to their age and lack of independence and asylum seeker status, with the Convention on the Rights of the Child encouraging States to take appropriate measures to provide protection for a child seeking refugee status. and humanitarian aid, whether the child is alone or accompanied by a parent (*Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016: §103).³ In this case, the first applicant illegally arrived in Malta by boat, after which he was registered by the immigration policy. He informed the authorities that he was 16 years old. No interpreter was present during the interrogation and was assisted in the conversation by other illegal migrants who spoke English. He was taken into

³ The court also in *Tarakhel v. Switzerland* noted that reception conditions for asylum-seeking children must be adjusted to their age in order to avoid situations of stress and anxiety, with particularly traumatic consequences (*Tarakhel v. Switzerland*, 2014: §99).

custody and was given a brochure on Arabic-language rules and obligations in custody, which the applicant did not understand. The second applicant arrived the same way in Malta fifteen days later. When questioned, he stated that he was 17 years old and had been handed the same brochure in Arabic, which was not spoken by this applicant. He was subsequently detained. In the present case the Court also found violations of Article 5 §§ 1 and 4 of the Convention. Essentially, the applicants remained in detention for several months after being found to be minors. Although it is not disputed in this case that the detention order was closely linked to the grounds for detention in this case based on the prevention of unauthorized entry, delays after determining the applicants' age raised serious doubts about the good faith of the authorities, especially given the fact that at no stage did the authorities identify alternatives to detention (*Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016: §146). The extent to which certain legislations have poor solutions is demonstrated by the Court from time to time when it does not refer to individual cases, but finds a violation only by referring to older cases on the same issue. In the instant case, the Court considered that the remedies available to the applicants were ineffective and insufficient for the purposes of Article 5 § 4 of the Convention, with reference to the positions taken in the cases *Mahamed Jama v. Malta* and *Mohamed Ismaaciil and Abdirahman Warsame v. Malta* (*Mahamed Jama v. Malta*, 2015; *Mohamed Ismaaciil and Abdirahman Warsame v. Malta*, 2016).

The last two judgments regarding custody are dated 2019. However, despite the intense case law of the Court in this area, it turns out that as time goes on, so do the states, with increasing number of violations of convention rights, as evidenced by these two judgments. In the first place, in *H.A. i and Others v. Greece*, the authorities of the latter state imprisoned nine unaccompanied migrant minors, keeping them in police stations for periods of between twenty-one and thirty-three days. They were then transferred to a reception centre and then to special juvenile facilities. The court concluded that the placement of minors in police stations could be considered deprivation of liberty which was not lawful, and the public prosecutor, who by law was their guardian, did not contact the lawyer or file a complaint to terminate custody in order to expedite their transfer to the appropriate facilities (*H.A. and Others v. Greece*, 2019: §§207, 212).

In the second place, in *Sh. D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, five unaccompanied migrants between the ages of 14 and 17 entered Greece in 2016. Juvenile migrants were placed in police stations in custody. The court had initially dismissed the petition against Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia as manifestly ill-founded. The Court again found that the Greek authorities had violated Article 5 of the Convention, since the detention

was illegal, as the Greek authorities did not explain why the applicants were first housed in police stations instead of in alternative temporary accommodation (Sh. D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia, 2019: §69).

4. Conclusion

The second half of the XX and the beginning of the XXI century was marked by waves of migration, which move from east to west, from poorer to richer states. Migration flows are different and routes vary depending on the attitude of individual countries towards migrants. As is well known, Serbia is not spared from migration, although they certainly do not belong to countries that represent the final destination for migrants but only a transition country. There are exceptions, of course. On the one hand, Italy is the most exposed wave of migration coming from the sea, most often from Libya and Tunisia. An attempt by the Italian authorities to stop the migration by contracting with the countries concerned has failed. The applications submitted to the Court against Italy were successful, viewed by migrants points of view, whom the Court acknowledged violations of the Convention's rights. Greece and Malta, on the other hand, are also countries that are also affected by migration, and judging by the Court's judgments, these countries have hitherto suffered the most serious violations of Convention rights for unaccompanied migrant children. Although there are many international and national documents, which emphasize that in all actions where children appear their best interests must be the basic idea of the guideline, practice has shown that this is not always the case. Respect for human rights to this category of applicants was far from the required level, as demonstrated by the judgments we analyzed in the paper. While it could be concluded that over the years the migrant crisis will take place, and that Council of Europe countries will take the Court's views more seriously on these issues, practice has shown that this is not the case. Even in the most recent 2019 judgments, the Court takes the view that the imprisonment of unaccompanied children is still incompatible with the law. Which really raises the question of the reasons for, so to speak, so much disinterest in respecting basic human rights and freedoms. However, regardless of all the problems that the migrant crisis carries and the countries facing, it is necessary to take maximum care of this unique and universal part of the population - children.

Bibliography

- A. and Others v. the United Kingdom, Application no. 3455/05 (ECtHR februar 19, 2009).
- Aas, K. F., & Gundhus, H. O. (2015). Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life. *Brit. J. Criminol.* vol. 55 , 1-18.
- Abdullahi Elmi i Aweys Abubakar v. Malta, Applications nos. 25794/13 and 28151/13 (ECtHR November 22, 2016).
- Aerts v. Belgium, Application no. 61/1997/845/1051 (ECtHR July 30, 1998).
- Ashingdane v. the United Kingdom, Application no. 8225/78 (ECtHR May 28, 1985).
- Betts, A. (2013). *Survival Migration: Failed Governance and the Crisis of Displacement*. Ithaca-London: Cornell University Press.
- Bevilacqua, G. (2017). Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities. In G. Andreone, *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests* (pp. 165-190). Rome: Springer Open.
- Bhuiun, J. H. (2013). Protection of Refugees through the Principle of Non-Refoulement. In R. Islam, & J. H. Bhuiyan, *An Introduction to International Refugee Law* (pp. 99-132). Leiden-Boston: Martinus Nijhoff Publishers.
- Bjorge, E. (2013). Right for the Wrong Reasons: Silih v Slovenia and Jurisdiction Ratione Temporis in the European Court of Human Rights. *The British Yearbook of International Law, Vol. 83, No. 1* , 115–136.
- Brouwer, E. (2010). Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States. In B. Ryan, & V. Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (pp. 199-228). Leiden-Boston: Martinus Nijhoff Publishers.
- Bubullima v. Greece, Application no. 41533/08 (ECtHR October 28, 2010).
- Cantor, D. J. (2014). Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence. *Refugee Survey Quarterly, vol 34* , 79-106.
- Černič, J. L. (2016). The European Court of Human Rights, Rule of Law and Socio-Economic Rights in Times of Crises. *Hague J Rule Law, vol. 8* , 227–247.
- Cornelisse, G. (2010). *Immigration Detention and Human Rights Rethinking Territorial Sovereignty*. Leiden-Boston: Martinus Nijhoff Publishers.
- Costello, C. (2012). Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored. *Human Rights Law Review, vol. 12, no. 2*, 287-339.
- Fiske, L. (2016). *Human Rights, Refugee Protest and Immigration Detention*. London: Palgrave Macmillan.
- Gallaghe, A. T., & David, F. (2014). *The international law of migrant smuggling*. Cambridge: Cambridge University Press.
- Gammeltoft-Hansen, T. (2011). *Access to Asylum: International Refugee Law and the Globalization of Migration Control*. Cambridge: Cambridge University Press.

- Gammeltoft-Hansen, T. (2014). International Refugee Law and Refugee Policy: The Case of Deterrence Policies. *Journal of Refugee Studies*, Vol. 27, No. 4, 574-595.
- Giuffré, M. (2013). State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya? *International Journal of Refugee Law*, Vol. 24, No. 4, 692–734.
- Giuffre, M. (2012). Watered-down Rights on the High Seas: Hirsi Jamaa and Others V Italy (2012). *The International and Comparative Law Quarterly*, Vol. 61, No. 3, 728-750.
- Greenman, K. (2015). A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law. *International Journal of Refugee Law*, Vol. 27, No. 2, 264–296.
- Guilfoyle, D. (2009). *Shipping Interdiction and the Law of the Sea*. Cambridge: Cambridge University Press.
- H.A. and Others v. Greece, Application no. 19951/16 (ECtHR February 28, 2019).
- Haas, H. (2011). Mediterranean migration futures: Patterns, drivers and scenarios. *Global Environmental Change*, 59-69.
- Harvey, C. (2014). Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law. *Refugee Survey Quarterly*, vol 34, 43–60.
- Henderson, C. (2014). Australia’s Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity. *Journal of International Criminal Justice*, vol. 12, 1161-1181.
- Hessbruegge, J. (2012). Introductory note to the European Court of Human Rights: Hirsi Jamaa et al. v. Italy. *International Legal Materials*, vol. 51, 423-476.
- Hirsch, A. L., & Bell, N. (2017). The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime. *Hum Rights Rev*, vol. 18, 417–437.
- Hirsi Jamaa and Others v. Italy, Application no. 27765/09 (ECtHR February 23, 2012).
- Housein v. Greece, Application no. 71825/11 (ECtHR October 24, 2013).
- J.H.A. v. Spain, Application no. 323/2007 (Commission against Torture, November 21, 2008).
- Jeandesboz, J. (2015). EU Border Control: Violence, Capture and Apparatus. In Y. Jansen, R. Celikates, & J. d. Bllouis, *The Irregularization of Migration in Contemporarz Europe: Detention, Deportation, Drowning* (pp. 87-102). London - New York: Rowman & Littlefield International.
- Kadem v. Malta, Application no. 55263/00 (ECtHR January 09, 2003).
- Klug, A. (2014). Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing. *International Journal of Refugee Law*, 2014, Vol. 26, No. 1, 48–64.
- Klug, A., & Howe, T. (2010). The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures. In B. Ryan, & V. Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (pp. 69-102). Leiden-Boston: Martinus Nijhoff Publishers.
- Louled Massoud protiv Malte, Application no. 24340/08 (ECtHR jul 27, 2010).
- Mahamed Jama v. Malta, Application no. 10290/13 (ESLJP November 26, 2015).
- Mann, I. (2018). Maritime Legal Black Holes: Migration and Rightlessness in International Law, *The European Journal of International Law* Vol. 29. No. 2, 347–372.

- Markard, N. (2016). The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries. *The European Journal of International Law Vol. 27 no. 3*, 591–616.
- Marmo, M., & Giannacopoulos, M. (2017). Cycles of judicial and executive power in irregular migration. *Comparative Migration Studies, vol. 5*, 1-18.
- McConnachie, K. (2017). Refugee Protection and the Art of the Deal. *Journal of Human Rights Practice, vol. 9*, 190–196.
- Meçe, M. H. (2018). Risk Factors of the Irregular Migratory Waves on the Western Balkan Route: Implications in the European Union Countries. In E. Balica, & V. Marinescu, *Migration and Crime: Realities and Media Representations* (pp. 45-68). Bucharest: Palgrave Macmillan.
- McBride, D. (2009). *Human Rights in Criminal Proceedings: The case law of the European Court of Human Rights*. Belgrade: Council of Europe.
- Mitsilegas, V. (2014). Solidarity and Trust in the Common European Asylum System. *Comparative Migration Studies, vol. 2, no. 2*, 181-202.
- Mohamad v. Greece, Application no. 70586/11 (ECtHR December 11, 2014).
- Mohamed Ismaaciil and Abdirahman Warsame v. Malta, Applications nos. 52160/13 and 52165/13 (ECtHR January 12, 2016).
- Moreno-Lax, V. (2012). HirsiJamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control? *Human Rights Law Review, vol. 12, no. 3*, 574-598.
- Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, Application no. 13178/03 (ECtHR October 12, 2006).
- Nada v. Switzerland, Application no. 10593/08 (ECtHR September 12, 2012).
- Ogg, K. (2016). Protection from ‘Refuge’: On What Legal Grounds Will a Refugee Be Saved from Camp Life? *International Journal of Refugee Law, Vol. 28, No. 3*, 384–415.
- Papanicolopulu, I. (2013). Hirsi Jamaa v. Italy. *The American Journal of International Law, Vol. 107, No. 2*, 417-423.
- Pascale, A. (2010). Migration Control at Sea: The Italian Case. In & V. B. Ryan, *Extraterritorial Immigration Control: Legal Challenges* (pp. 281-310). Leiden-Boston: Martinus Nijhoff Publishers.
- Pera, A. (2017). The residence permit for third-country nationals who are victims of human trafficking: A double-face instrument between compliance strategy and protection of human rights. *Journal of Financial Crime, Vol. 24 No. 2*, 347-361.
- Popov v. France, Application no. 39472/07 i 39474/07 (ECtHR January 19, 2012).
- Rahimi v. Greece, Application no. 8687/08 (ECtHR April 05, 2011).
- Ryan, B. (2010). Extraterritorial Immigration Control: What Role for Legal Guarantees? In B. Ryan, & V. Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (pp. 3-38). Leiden-Boston: Martinus Nijhoff Publishers.
- Saadi v. the United Kingdom, Application no. 13229/03 (ECtHR January 29, 2008).
- Schloenhardt, A., & Craig, C. (2015). ‘Turning Back the Boats’: Australia’s Interdiction of Irregular Migrants at Sea. *International Journal of Refugee Law, Vol. 27, No. 4*, 536–572.

- Sh. D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia, Application no. 14165/16 (ECtHR Jun 13, 2019).
- Sharpe, M. (2018). Mixed Up: International Law and the Meaning(s) of “Mixed Migration”. *Refugee Survey Quarterly*, vol. 37, 116–138.
- Storey, H. (2016). The Meaning of “Protection” within the Refugee Definition. *Refugee Survey Quarterly*, vol 35, 1–34.
- Suso Musa v. Malta, Application no. 42337/12 (ECtHR July 23, 2013).
- Tarakhel v. Switzerland, Application no. 29217/12 (ECtHR November 04, 2014).
- Tinti, P., & Reitano, T. (2017). *Migrant, Refugee, Smuggler, Savior*. Oxford: Oxford University Press.