European Master's Degree
In Human Rights and Democratisation

Awarded Theses
of the Academic Year
2013/2014

"The prominence of the body as an instrument of border control. Assessing the age of unaccompanied migrant children in the European Union"

Thesis *by* Venturi Denise

E.MA European Master's Degree in Human Rights and Democratisation

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FOREWORD

The *European Master's Programme in Human Rights and Democratisation* (E.MA) is the first Master's course in human rights and democratisation launched and financed by the European Commission that later served as model for establishing other Regional Master's around the world. Since January 2013 these are all connected and managed by the E*uropean Inter-University Centre for Human Rights and Democratisation* (EIUC) under the *Global Campus of Regional Master's Programmes* (GC).

E.MA is a one-year master's course aimed at preparing professionals to respond to the requirements of daily work in international organisations, field operations, governmental and non-governmental bodies, and academia. The programme offers an action and policy-oriented approach to learning about human rights, democratisation and international relations from legal, political, historical, anthropological, and philosophical perspectives. This interdisciplinary nature and wide-ranging scope of E.MA reflect the benefits of true European inter-university cooperation in human rights education. It is an interdisciplinary programme that reflects the indivisible links between human rights, democracy, peace and development.

During the first semester in Venice, students have the opportunity to meet in a multi-cultural environment and be taught by leading academics, experts and representatives of international and non-governmental organisations. During the second semester students relocate to one of the *participating universities* in the various EU Member States to follow additional courses in an area of specialisation of their own choice and to write their thesis under the supervision of the E.MA Director or other academic staff. After successfully passing exams and completing a Master's thesis, students are awarded the European Master's Degree

in Human Rights and Democratisation jointly conferred by a group of EIUC/E.MA universities.

Each year the E.MA Council of Directors selects five theses which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, and potential usefulness in raising awareness about neglected situations or issues and capacity for contributing to the promotion of the values underlying human rights and democracy.

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- Schrempf, Tessa Antonia, *The Satanic Mill. Human Rights and the Responsibility to Counteract*, Supervisor: Prof. Jan Klabbers, University of Helsinki.
- Storaas, Guri, *Surviving Independence. South Sudan's Contested Constitution-making Process*, Supervisor: Prof. Véronique Dudouet, University of Hamburg.
- Venturi, Denise, *The Prominence of the Body as an Instrument of Border Control. Assessing the Age of Unaccompanied Migrant Children in the European Union*, Supervisor: Prof. Marie-Claire Foblets, Catholic University of Leuven.

This volume includes the thesis *The Prominence of the Body as an Instrument of Border Control. Assessing the Age of Unaccompanied Migrant Children in the European Union* by Venturi, Denise, and supervised by Prof. Marie-Claire Foblets, Catholic University of Leuven.

BIOGRAPHY

Denise Venturi holds a Magister Degree in Law, a Postgraduate Degree in Asylum and Immigration Law from the University of Florence and a E.MA Degree in Human Rights and Democratisation (EIUC Venice, KU Leuven). Previously she has worked as a criminal defence

and immigration lawyer. She is currently PhD student at the Sant'Anna School of Advanced Studies (Pisa, Italy). Her research interests focus on human rights and securitisation of borders, in particular the case of LGBTI asylum seekers.

ABSTRACT

The premises of the research are rooted in the debate about human rights of migrants and securitisation of borders in the European Union. In this context the body is in the spotlight, since a key component in the reinforcement of external borders has been represented by the growing use of biometric data that is derived from the human body. The paper aims at investigating how and to what extent the human body is considered as an instrument of border control in the European Union.

After providing an overview on the relevant EU legislation, the paper explains which human rights implications are entailed by the use of biometrics in the management of migration and asylum. It then introduces the case study of age assessment for unaccompanied migrant children, illustrating in particular the human rights that can be at stake with regard to medical age examinations. Through the analysis of the selected case study it makes clear the crucial role that the human body plays in the strategies of border control. Eventually the paper argues that, through the deployment of such techniques, states are expressing their power on the body of migrants in order to exclude and not to include them.

Like past editions, the selected theses amply demonstrate the richness and diversity of the E.MA programme and the outstanding quality of the work performed by its students.

On behalf of the Governing Bodies of EIUC and E.MA and of all participating universities, we congratulate the author.

PROF. FLORENCE BENOÎT-ROHMER
EIUC Secretary General

PROF. RIA WOLLESWINKEL
E.MA Chairperson

DENISE VENTURI

THE PROMINENCE OF THE BODY AS AN INSTRUMENT OF BORDER CONTROL ASSESSING THE AGE OF UNACCOMPANIED MIGRANT CHILDREN IN THE EUROPEAN UNION

Two roads diverged in a wood, and I –
I took the one less traveled by,
And that has made all the difference.
(Robert Frost, *The Road Not Taken*)

Che cosa stiamo aspettando?
Altri diritti dell'uomo?
(Ministri, *Il bel canto*)

This work is dedicated to my parents, Gabbriella and Sergio. Mum, your complete dedication always amazes me. Dad, your unconditional support is my greatest resource.

A special thought goes also to my grandmothers Pia and Ilda, for being always there.

It is absolutely true that it is not the destination that matters, but the journey that makes the difference. And the difference has been made by the people that have crossed my path in so many different ways.

It has been an honour to be surrounded by people who share the same commitment and who are ready to stand for human rights. In particular, I thank you Marta, for giving me the chance to be part of your world. I do not know where you were before, but I know where you will be from now on: by my side, because "non c'è alternativa al futuro."

I want to thank the Belgium-based Masterini, in particular Alberto. I am also grateful to the Migrants Matter team, for the enthusiasm and passion for our project.

Thanks to the people who made my stay in Leuven greater than I expected: Mihir, for making me believe that "there is more to the picture than meets the eye," the Leuven Writing Club and my lovely Italians Camilla, Marianna, Serena and Silvia.

I would like to express my gratitude to the E.MA staff in Venice, in particular to Piero Sullo and Alan Desmond. I also would like to warmly thank the KU Leuven – E.MA academic staff, Professor Koen Lemmens and Michael Mërrigan, for the opportunities they gave us. I am particularly grateful to my supervisor Professor Marie-Claire Foblets, for having encouraged my research by offering me new perspectives and for having helped me to further develop my ideas. This thesis would have not been the same without your contribution. I am profoundly grateful to Professors Maria Helena Smet, Guy Willems and Patrick Thevissen because they have kindly shared with me their professional knowledge, enriching my work with a scientific perspective based not only on academic research, but also on their experience working in the field. Many special thanks to Sarah Ganty, whose work was inspirational for me. I wish there were more lawyers with the same commitment and passion as you have.

Finally, thanks to the ones who are always with me: Alessia, Alice, Anna Chiara, Elena, Elisa B., Elisa P., Laura, Lucia, Marella, Paola, Sandra P., Sandra S. and Romina.

CCNE	Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé
CEAS	Common European Asylum System
CRC	Convention on the Rights of the Child
DTMD	Degree of third molars development
EASO	European Asylum Support Office
ECHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EDPS	European Data Protection Supervisor
EMN	European Migration Network
EPIA	European Pact on Immigration and Asylum
EU	European Union
EURODAC	European Dactyloscopy Database
EUROPOL	European Police Office
FRA	European Union Agency for Fundamental Rights
GAMM	Global Approach to Migration and Mobility
IOM	International Organisation for Migration
KU Leuven	Katholieke Universiteit Leuven
NGOs	Non-Governmental Organisations
ORAM	Organisation for Refugee, Asylum & Migration
PICUM	Platform for International Cooperation on Undocumented Migrants
SCEP	Separate Children in Europe Programme
SIS	Schengen Information System
SOLID	Solidarity and Management of Migration Flaws Programme
TFUE	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UZ Leuven	Universitair Ziekenhuis Leuven
VIS	Visa Information System

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[...] Robot guards patrolling the border
Cybernetic dogs are getting closer and closer
Armored cars and immigration officers

Burnin' up, can we survive re-entry
Past the mines and the cybernetic sentries [...]
You don't like the effect, don't produce the cause

The chip is in your head, not on my shoulder
Total control just around the corner
Open up the floodgates, time's nearly up
Keep banging on the wall of Fortress Europe

We got a right, know the situation
We're the children of globalization
No borders, only true connection
[...] We're sitting tight
'Cause asylum is a right [...]
Who doesn't run when they're feel the hunger [...]

(Asian Dub Foundation, *Fortress Europe*)

INTRODUCTION

Migration is an emotionally-charged[1] topic and represents a challenge for states and society. However, this issue cannot be addressed on the wave of emotion, but it requires a pondered approach. Too often the discourse seems to be stuck in between polarised opinions, without any chance to reach a constructive and fruitful debate. Especially in a moment of tough economic crisis, states are being more and more reluctant to move toward the improvement of migrants' rights. The fear lies in the belief that granting rights to migrants, especially social rights, is expensive and thus not viable in a moment when the resources of the states are scarce for their own citizens.

The premises of the present research are rooted in the current debate[2] about human rights of migrants and securitisation of borders in the European Union (hereafter EU). The struggle between these two elements has increasingly marked the migration policy of EU and member states. The need to secure external borders seems to be far more important than any human rights concern. It has become clear how migrants have been, and currently are, experiencing difficulties in obtaining asylum or residence in EU member states[3] and this can be considered as a consequence of states' fear to "open the gates" to immigrants.

While freedom of movement is being granted to European citizens, at the same time the EU is increasingly securing its external borders[4]. To this extent, EU and its member states are frequently recurring to the

[1] Van Krieken, 2001, p. V.
[2] Berglund, McCarthy & Patyna, 2012, p. 4.
[3] Van Krieken, 2001, p. V.
[4] Berglund, McCarthy & Patyna, 2012, p. 4.

use of technology in order to better check the identity of third-country citizens seeking to cross their borders. This process can be traced back to recent historical events, that strongly affected "the manner in which governments approach border security and international migration management[5]," such as the terrorist attacks of 11 September 2001. These episodes corroborated the idea that a weak migration management system can endanger the security of countries and, more generally in the long run, their welfare. The request for a higher level of security has led to the empowerment of controls on travel documents, as well as to the development of new techniques aiming at providing more accurate identification of people. In such a context, a *key component*[6] has been represented by the growing use of biometrics as means to manage international migration.

In the process of securitisation of borders, the human body acquires an increasing prominence. Biometric technology is based on bodily features that are uniquely linked to a specific individual and can, therefore, improve the identification of (unwanted) migrants. However, the deployment of biometric data is not free from criticism, and it shows how the human rights of migrants are often neglected and put at risk.

The aim of the research is to assess how and to what extent the human body is functioning as an instrument of border control in the EU. It will be argued that the current policies and legislations adopted by the EU and its member states rely more and more on the deployment of technologies that are centred on the analysis of the physical body, instead of on the account and the specific story of individuals. To this extent, the case of age assessment for unaccompanied migrant children will be taken into consideration as a case study. Eventually, it will be discussed that, through the deployment of such techniques, states are expressing their power on the body of the individuals in order to exclude and not to include migrants.

STRUCTURE

The first chapter introduces the issue of the body as a source of

[5] International Organisation for Migration (IOM), 2005, p. 5.
[6] Ibidem.

evidence in migration proceedings. It then offers an overview on EU policy on migration and asylum, with the aim to set the legal background of the research topic.

The second chapter deals specifically with what biometrics is and how it is used in the field of migration. It then explores which are the human rights implications of this technology.

The third chapter is focused on the selected case study. It firstly explains why this topic is relevant in the framework of the research, and then it indicates the sources for age assessment at international and European level. Finally, it illustrates the state of the play in the EU, with specific reference to Belgium.

The last chapter provides a critical analysis of age assessment methods, with particular focus on Belgium's system. It highlights the human rights concerns and promotes an approach that can be in compliance with the principle of the best interest of the child. Then, it discusses the findings of the selected case study in the broader discourse about the body as an instrument of border control.

METHODOLOGY

The paper is mainly based on desk research. The legal analysis has been carried out both through the study of legal documents and academic papers. Official websites of EU and other institutions, such as the United Nations (hereafter UN) agencies have been consulted. Literature about biometrics and age assessment has been reviewed in light of the research aim.

Regarding specifically the topic of age assessment, the main problem experienced at the beginning was that the majority of the sources available were from Non-Governmental Organisations (hereafter NGOs). On one hand, this gives a clear idea of the several human rights implications that this issue entails. However, in order to ensure the objectivity of the present research, other types of source have been investigated. First, academic literature has been taken into consideration. Second, interviews with experts have been conducted. The latter stage was necessary in order to have a clearer picture of the different issues, in particular due to the highly technical content that characterises inevitably the medical age assessment. The decision was to interview both medical practitioners and lawyers. The underlying

idea was to collect information and practical experiences from different points of view of the ones who are performing medical age assessment according to scientific knowledge and experience and the ones who can actually challenge, before a court, the result of the examinations without that specific knowledge, but with legal instruments and arguments.

The first interview took place mainly with Professor Dr. Patrick Thevissen, DDs, MSc, PhD, Forensic Odontology, Forensic Dentistry, Department of Oral Health Science, Faculty of Medicine, Katholieke Universeteit Leuven (hereafter KU Leuven) and Professor Dr. Guy Willems, DDs, PhD, Head of Orthodontics, Head of Forensic Dentistry, Department of Oral Health Science, Faculty of Medicine, KU Leuven. The second was carried out with Professor Dr. Maria Helena Smet, Md. PhD, Department of Radiology, Clinical Head Pediatric Radiology, Universitair Ziekenhuis Leuven (hereafter UZ Leuven). The information from both interviews was used in Chapters III and IV. The third interview involved Ms. Sarah Ganty, Researcher at the Institute for European Studies and at the Perelman Centre, Université Libre de Bruxelles, and former lawyer at the Bar of Brussels. She is currently researching and working on the topic of age assessment. The findings have been used mainly in Chapters III and IV.

The persons indicated above agreed on being mentioned in the present paper[7].

[7] The references from the interviews have been respectively quoted in the text as: "Interview with Prof. Thevissen," "Interview with Prof. Smet," "Interview with Sarah Ganty."

I.

SEEKING EVIDENCES IN MIGRATION PROCEEDINGS IN THE EU

1. THE HUMAN BODY AS A SOURCE OF EVIDENCE IN MIGRATION PROCEEDINGS

When it comes to migration flows the human body is in the spotlight. It is indeed a powerful picture: hundreds of migrants crammed in small boats, or corps floating in the Mediterranean Sea after a shipwreck. It echoes in the words of some politicians who declare that Europe is facing an invasion, having so many people literally pushing at its external borders, hence fences are built in order to deter people from crossing the frontiers. Fences are emblematic: they constitute a concrete barrier, because they are made out of barbed wire, which can harm and cause wounds.

The relationship between human body and power dates back to the history of society. The body has always been the place, *par excellence*[8], where the power shows its supremacy over the individuals. This concept is made clear by Fassin and D'Halluin, who stated how the body "[...] is an instrument both to display and to demonstrate power. [...] [t]he body seems to be political insofar as it always demonstrate, as a last resort, the evidence of power[9]." This is what seems to be happening in the governance of migrations as well. States exercise their right to territorial sovereignty defining conditions of entry, while migrants have to give evidence of being able to meet those requirements if they want to be admitted. Whereas, traditionally, the body has represented the site where the power manifested its sign (i.e. the application of death penalty), with regard to migration there is a sort of shift: the human body

[8] Fassin & D'Halluin, 2005, p. 597.
[9] Ibidem.

becomes a source of evidence that can actually "tell the truth[10]" about the individual. The manifestation of power on the physique is somehow indirect; the body is used as a *medium* between the migrant or asylum seeker and the authority that has to decide upon their application.

Generally speaking, the body plays a crucial role in migration proceedings in two cases: to ascertain one's identity and to establish the status of protection that a person is entitled to receive.

The first case occurs when information about the identity of a person is lacking or unreliable. In this situation, personal data is drawn from the body[11] and then processed, collected, elaborated and stored. Once arrived at the EU's external borders, migrants undergo a first identification interview[12] and then are demanded to give their fingerprints and photographs for European Dactyloscopy (hereafter EURODAC), the European database of asylum seekers' fingerprints[13], so to create a file for each person. Especially in case of massive arrivals, it can happen that very few personal details are asked to migrants[14], while priority is given to fingerprints taking. This shows how "the human body lies at the heart of all strategies for identity management[15]." Undocumented migrants have nothing to prove who they are except their bodily data; therefore, states deal with them resorting to technologies that are able to generate a "digital body." The identity obtained from such procedures is based on the individual's body – or better, on a part of the body (i.e. fingerprints)[16].

The second case refers to all situations where a particular condition can grant the person with a certain degree of protection. This is mainly the realm of asylum procedures, when the accounts and the personal histories of asylum seekers require to be matched with the story that their bodies tell. If, during the asylum interview, the applicant claims that he has been tortured, the marks on his[17] body will constitute "the

[10] Ibidem.
[11] Bygrave, 2010, p. 2.
[12] About first identification interview: European Union Agency for Fundamental Rights (hereafter FRA), 2013a, p. 88.
[13] See Chapter II, 2.2.1.
[14] According to FRA's report, for instance, migrants are only asked their name and nationality before taking fingerprints. Identification interviews carried out by the police are usually very brief and migrants are provided with very little or no information (FRA, 2013a, pp. 87-91).
[15] Mordini, 2008, p. 249.
[16] Guild & Carrera, 2013, p. 8.
[17] In the present paper the term "he" shall be intended as referring also to "she." The same is for "himself" – "herself" and "his" – "her."

best of all the proofs[18]" insofar they will give high credibility to his report. Eventually, the signs appearing on the body will lead the person to obtain the refugee status.

In both cases, as anticipated, proofs lie in the body and states are well aware of that, so their migration policies are conceived in order to take into account this aspect.

The core of the present research is therefore to investigate how the body is gaining increasing attention in the context of migration and asylum policies. Through the selected case study of age assessment for unaccompanied migrant children, the paper will assess to what extent the human body is functioning as an instrument of border control and it will discuss what human rights implications are triggered by such case.

2. AN OVERVIEW ON EU POLICY ON MIGRATION AND ASYLUM

This section will present a succinct analysis of the topic, to the extent that it is necessary to set and define the area of investigation[19]. Hence, the next sections will present the current legislative basis upon which the EU has competence in migration and asylum, respectively. The main sources will be outlined, in the light of recent developments and in order to highlight the increasing use of biometrics as a means of border control.

At the moment, the EU has adopted relevant pieces of legislation on the matter and it is moving toward the implementation of this system, broadening the area of its intervention. EU has taken steps toward a more concerted and co-ordinated manner[20] to regulate migration and this process has led to the progressive creation of an EU's acquis on migration and asylum. The acquis serves as the basis for further regulations and decisions taken by the EU[21]. Thus it can be seen as a "living document[22]," prone to be continuously amended and adjusted as the EU is enlarging and abandoning its former three-pillars structure.

[18] Fassin & D'Halluin, 2005, p. 599.

[19] For a comprehensive and complete analysis on European migration and asylum policies, see: Gortàzar et al., 2012; Goudappel & Raulus, 2011; Hailbronner, 2010; Hatton, 2005; Higgins, 2004; Peers, 2003; Peers, 2008; Schuster, 2011; Van Krieken, 2000;Van Krieken, 2001.

[20] Van Krieken, 2001, p. V.

[21] Ibidem, pp. 131-133.

[22] Ibidem, p. 1.

However, the debate is still ongoing whether the EU is really adopting a common policy on migration and asylum. Voices among scholars and NGOs actually doubt it, pointing out how EU policy lacks balance when it comes to human rights. As Peers argued, the level of protection of fundamental rights agreed in the legislation and programmes adopted by the EU "[...] is so low in many respects as to raise doubts about the legitimacy of the EU's policy[23]." According to De Jong, when the European Community undertook the path toward coordination in this area, the inspiring idea was that the governance of migration at the European level could be "less restrictive and more humanitarian[24]" than the one of member states. However, the current situation seems to indicate that the defence of external borders has so far been prioritised to the detriment of a coherent right-based approach to asylum and legal migration.

Nevertheless, fundamental rights should be incorporated not only in asylum legislation, but also in other legislative instruments, especially those dealing with the creation of regular ways to enter Europe. In fact, "mixed flows" (groups of people composed both by economic migrants in irregular position and potential asylum applicants) are indeed a reality for Europe[25], which has to be tackled respecting humanitarian obligations towards refugees as well as other human rights obligations under international law.

2.1. EU's Approach to Migration

The idea that migration issues can be better addressed through partnerships and burden sharing is the basis of the 2005 Global Approach to Migration and Mobility (GAMM, renewed in 2011). This document is the overarching framework for EU external migration policy and it recalls the importance of adopting a migrants-centred perspective, as to strengthen the respect for fundamental rights. Within this context, the European Council adopted, in 2008, the European Pact on Immigration and Asylum (EPIA), which sets the objectives and priorities of EU migration and asylum policy. In particular, this pact deals with the return of irregular migrants and

[23] Peers, 2003, p. 387.
[24] De Jong, 2000, p. 33.
[25] Gortàzar et al., 2012, p. 2.

the establishment of partnerships between countries of origin and transit[26].

However, it has been noticed how its application could raise doubts regarding the coherence between the interest in the control of external borders and EU's obligations regarding human rights[27]. As the paper will explain further, this point seems to be the *leitmotiv* of European policy.

Later, the European Council issued the Stockholm Programme to build "an open and secure Europe serving and protecting citizens." This multi-annual plan has covered the period from 2010 until 2014 and has defined EU's priorities in the area of home affairs, including migration and asylum. In particular, it is stated that "the Union must continue to facilitate legal access to the territory of its Member States while in parallel taking measures to counteract illegal immigration. [...] The strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them [...][28]." Now, the post-Stockholm scenario will require the EU to be able to achieve the ambitious targets set during this timeframe.

The peril is that – despite the rhetoric[29] that suggests a very proactive role by the EU in respecting human rights in its policy – the reality shows a different, more cautious approach, revealing that the primary concern of EU and member states is irregular migration. A clear tendency to favour a security-oriented policy can be tracked down in the European legislation of the past decade, such as the creation on Frontex in 2004 and, recently, of Eurosur in 2013.

2.2. The Legislative Framework

The legislative competences of the EU regarding immigration and asylum law have been broadened since the entry into force of the Lisbon Treaty. This Treaty abolishes the third pillar and conveys visas, asylum and immigration issues into the area of freedom, justice and home affairs. Moreover, it grants jurisdiction to the European Court of

[26] See, for further details, Raffaelli, 2013, and http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0038_en.htm (consulted on 12 March 2014).

[27] Gortàzar et al., 2012, p. 2.

[28] European Union, 2010, Chapter 5.

[29] Eisele & Reslow, 2012, p. 167.

Justice in this area, removing the restrictions formerly provided by the Amsterdam Treaty[30].

Article 79 of the Treaty on the Functioning of the European Union (hereafter TFUE) obliges the Union to establish a "common immigration policy aimed at ensuring [...] the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings[31]." This commitment is something new[32] and it is the result of the amendment made by the Lisbon Treaty: there is no similar obligation in the previous version of the text (former Article 63).

According to Article 80 TFEU[33], solidarity and fair sharing of responsibility are the principles that should inform immigration policies. The criterion of fairness is recalled also by Article 79, regarding the treatment of third-country nationals.

The latter provision allows EU to take measures to incentivise and support states' actions towards the integration of third-country

[30] Fitchew, 2011.

[31] Article 79 TFEU: "1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children. 3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States. 4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States. 5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."

[32] Hailbronner, 2010, p. 2.

[33] Article 80 TFEU: "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

nationals; however, no harmonisation of member states' laws is foreseen. Rather, this article drafts the legislative competence of the Union in three different fields (Article 79, para. 2)[34].

The first one concerns regular migration. EU has the competence to lay down the conditions of entry and stay for third-country citizens with long-term visas and residence permits (included those for family reunification). The right to regulate admission for people seeking job is still retained by the states. The second field of competence refers to integration; the EU can support initiatives taken by the states to promote the integration of regularly resident immigrants. The third field regards the fight against irregular immigration[35]. EU can adopt measures to contrast irregular entry and residence, including "removal and repatriation" (letter *c*). This area is particularly delicate, because it demands the EU to prevent and control irregular migration, with due respect for fundamental rights. Therefore, return policies and readmission agreements shall be concluded taking primarily into account the respect for human dignity. Eventually, the contrast to irregular migration also requires the EU to take adequate measures to eradicate trafficking of human beings (letter *d*).

Besides the relevant treaty provisions, in the last years several important directives have been adopted at the European level, concerning regular and irregular migration. Regarding the latter, it is worth mentioning Directive 2008/115/EC (hereafter "*Return Directive*"), which establishes procedures for returning irregular migrants to their country of origin. One of the key features is the obligation for EU states to grant the person a "period for voluntary departure[36]." Regarding the implementation of the directive, the European Commission promoted a human rights based approach[37], together with the development of dialogue with non-EU countries,

[34] See Raffelli, 2013.

[35] When referring to migrants without a valid residence permit it is more accurate and correct to use the term "irregular" instead of "illegal." In fact, the latter has an innate connotation with criminality and being in a country without the required papers is, most of the times, only an administrative infringement. Labelling undocumented migrants as "illegal" can jeopardise the full enjoyment of their rights. (Platform for International Cooperation on Undocumented Migrants, PICUM, http://picum.org/en/our-work/undocumented-migrants/terminology/ (consulted on 14 March 2014). The author endorses this view; therefore in this paper the term "irregular" migrants will be used.

[36] For a comprehensive analysis about EU directives on migration, see Raffaelli, 2013.

[37] European Commission, 2014.

in order to ensure cooperation regarding return, readmission and re-integration.

2.3. The Common European Asylum System (CEAS)

The protection of people fleeing persecution or serious threats in their home countries requires effective and fair procedures, in order to grant asylum to people who are in need of it. Asylum is a fundamental right[38], as it recognised firstly by Article 14[39] of the Universal Declaration of Human Rights (UDHR), then by the 1951 Convention and by the 1967 Protocol relating to the Status of Refugees. Within the European area of freedom of movement, the procedures to grant asylum need to be based on the same shared values and should be inspired by a joint approach, in order to guarantee a high standard of protection in every EU country, in compliance with international obligations[40].

EU countries have a shared responsibility to welcome asylum seekers and to ensure them a fair treatment, in the framework of the system conceived by the EU. The purpose of the CEAS is thus to avoid differences among EU member states and to harmonise domestic legislations.

The legislative foundation of EU competence in asylum matters is Article 78 TFEU as modified by the Lisbon Treaty: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection[41]." For this purpose, the European Parliament

[38] See Goodwin-Gill, 2012, pp. 35-37.

[39] UDHR, Article 14, para. 1: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

[40] Goodwin-Gill, 2012, p. 37.

[41] TFEU, Article 78, para. 1: "1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum

and the Council shall adopt measures to set up common procedures for granting uniform asylum and subsidiary protection status, as well as for defining common standards regarding the reception of applicants (TFEU, Article 78, para. 2)[42].

As for now, the current EU asylum regime is based upon five "blocks," whose purpose is to determine as quickly as possible the country responsible and to deter multiple asylum claims:

1) Directive 2011/95/E (hereafter "Qualification Directive"): this act (a recast of Directive 2004/83/EC) clarifies legal concepts such as "actors of protections" (Article 7) and "acts of persecutions" (Article 9), enabling states to identify people in need of protection quicker. Moreover, it highlights the importance of taking into consideration the "best interest of the child" during the procedure.

2) Directive 2013/33/E (hereafter "Reception Directive"): this document (that replaces Directive 2003/9/EC and will enter into force from July 2015) lays down standards for the reception of applications for international protection and aims at strengthening the respect for fundamental rights. The personal scope is now widened, because it comprises asylum seekers and also people who applied for international protection, included subsidiary protection (Article 3). Moreover, it states that detention is possible only as a last resort measure and on the basis of an individual assessment (Article 8), enforcing guarantees such as access to free legal assistance (Article 5).

3) Directive 2013/32/EU (hereafter "Procedure Directive"): also this new text (replacing Directive 2003/9/EC and entering into force from July 2015) applies to all people seeking for international protection (Article 2). Moreover, it requires highly trained personnel to conduct interviews

or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. 3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

[42] Kaunert & Léonard, 2012, p. 15. Previously, Article 63 of the Treaty of the European Community did not give Europe a general competence on asylum, but only one limited to the fields specified in the text. Instead, the Treaty of Lisbon changed considerably this scenario, enabling EU to go beyond a "minimum standard" legislation.

and provides reinforced safeguards for unaccompanied minors (Article 25), such as the appointment of a guardian. The document aspires to the creation of a coherent and harmonised procedure, where asylum decisions are made more efficiently and fairly.

4) Regulation 603/2013/EU (hereafter EURODAC Regulation): the practical problems and human rights implications posed by the European Dactyloscopy Database (hereafter EURODAC) will be analysed further on[43]. For the purpose of the present section, it is important to mention that this system was first created by Regulation 2725/2000/EC with the aim to have a fingerprints database to which states could refer during asylum procedure. Thus, EURODAC is strongly linked to the Dublin mechanism and – according to the intention of EU legislator – it should help its smooth functioning. Recast EURODAC Regulation (that will enter into force in July 2015) envisages a controversial possibility, which already caused a lot of disputes among NGOs and human rights practitioners. In fact, under specific circumstances, national authorities and the European Police Office (EUROPOL) can access the database and compare fingerprints for the prevention and investigation of terrorist offences and other serious crimes. It becomes clear how this new provision may clash with the respect of fundamental rights[44].

5) Regulation 604/2013/EU (hereafter "Dublin III"): considered as the milestone of this new system, the legislation entered into force at the beginning of 2014, replacing Regulation 343/2003/EC ("Dublin II")[45]. The purpose of the whole Dublin system is to fix a hierarchy of criteria in order to identify the member state that is responsible for the examination of the asylum application, as stated in Chapter III of Dublin II. Firstly, the competence lies with the state where a family member of the applicant is residing and secondly, with the state that issued a visa or a permit. It might be interesting to note that, if the document was issued on the basis of a false identity, this does not prevent the state to

[43] See Chapter II, 2.2.1.
[44] Jones, 2014.
[45] For a comprehensive and detailed analysis on CEAS, from the origin to present, see http://www.ecre.org/topics/areas-of-work/introduction/194.html (consulted on 16 April 2014); Kaunert & Léonard, 2012; Peers, 2012.

be held responsible for the application (Article 9, para. 5). Furthermore, if those are not the cases, the Regulation considers as competent the state whose borders the claimant had irregularly crossed (Article 10) and, eventually, the state where the application was lodged. However, this legislation raised several human rights concerns, especially after the intervention of the European Court of Human Rights[46] that highlighted the flaws of the Dublin mechanism, both for protection matters and inadequate reception conditions. Therefore, new Article 3 expressly prohibits the transfer of claimants towards the state primarily designated as responsible if there are "substantial grounds" for fearing violation of their human rights[47]. The underlying principle of Dublin III is the same of Dublin II: every asylum claim should be examined only by one member state. Competence criteria leave very limited room for individuals to choose where to apply.

The impact of CEAS' new tools will be assessed only in the next couple of years. Anyway, the outcome will rely heavily upon EU countries' implementation. Notably, the purpose of Dublin III is not to modify *in toto* the system established by Dublin II, rather to try to improve it in order to guarantee a higher level of protection.

However, it does not seem that the recast legislation has the potential to solve Dublin system's innate problems, whose architecture is grounded on the assumption that all member states are able to ensure the same level of protection[48].

Hence, EU's asylum policy needs to be profoundly reviewed, because at the moment the risk is that Dublin III will only maintain the *status quo ante*. Indeed, the challenge for a more human rights oriented asylum governance will be played also at the national level: "[i]f Europe is to

[46] European Court of Human Rights, *M.S.S. vs Belgium and Greece*, application no. 30696/09, 21 January 2011. The Strasbourg Court found that Belgium had violated Article 3 of the European Convention of Human Rights by sending asylum seekers back to Greece, where they would have faced detention and precarious living condition, due to the deficiencies of Greek asylum procedure.

[47] Dublin III, Article 3, para. 2: "[...] Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible [...]."

[48] European Council on Refugees and Exiles (hereafter ECRE), 2013.

have a common asylum system that is truly based on common standard with a high level of protection [...], then governments will need to interpret and apply the Dublin III Regulation correctly[49]."

3. WHERE IS THE TRUTH? THE USE OF DATA IN MIGRATION MANAGEMENT

As argued in the previous sections, the management of external borders has been one of the greatest concerns for the EU. Nevertheless, the system of controls can work only if it is accompanied by effective means able to identify who the people approaching European shores are.

The problem of identification goes hand in hand with the deployment of border control technologies which are firstly put in place at the EU external borders. Fair and reliable identification procedures are essential to provide a prompt response to migration flows, so to steer migrants towards appropriate channels[50], depending on their need and status. The EU and member states make use of a variety of instrument of border control, starting from the traditional manual check of passports. However, very often migrants are *sans-papier*, undocumented, since they come without any document able to prove their identity. In many cases this is because in the countries of origin there are not efficient or reliable civil registries or they have been destroyed during conflicts.

This uncertainty about the identity of the person[51] brings along several questions and challenges for the political power. The state's necessity of knowing who is residing in the national territory is somehow self-evident, because it helps managing migration flows by establishing who is entitled to stay and who, instead, has to go back and under which conditions. When it comes to asylum seekers, then, it becomes absolutely relevant to correctly assess their identity and to retrace their story, because this investigation will deeply affect their claim for international protection.

However, this problem is not only related to irregular migration, but it entails the whole discourse on migration. Even regular migrants are required, at several stages of their stay, to give evidence of what

[49] Ibidem.
[50] FRA, 2013a, p. 87.
[51] Mordini & Rebera, 2012, p. 5.

they are doing in the country, where and who are they staying with. Depending on the different type of permit of stay, regular migrants have to go through this process once in a while (i.e. every year), providing the authorities with the necessary information.

Several scholars[52] argued on the fact that the terrorist attacks of 11 September 2001 marked the moment when national security strategy and immigration policy merged: the strengthening of entering criteria has been elected as the most practical tool to reinforce national borders and to prevent attacks.

For this purpose, states need to collect as much data as possible so to have reliable and updated facts upon which to make their own evaluations. Together with the flow of migrants, countries deal with another flow, directly connected to the previous one, which is a flow of data. It is an administrative burden[53] that authorities have to handle and that requires them to use more and more sophisticated technologies to collect, store and use data belonging to migrants.

Whereas the term "data" is a broad one and can include different meanings, for the purpose of the present paper it has not to be intended as indicating the statistics regarding the numbers of migrants. Instead, it refers to the details, information, facts and materials that are used in migration proceedings (such as asylum applications) in order to ascertain the identity of a person, determine his status, verify his story through the examination of his physical features and the evaluation of his declarations. In this context, biometric data plays a crucial role.

The aim of using data in this field is to "seek the truth," finding out who that person is, i.e. if he is a real asylum seeker or someone willing to enter the country for other (dangerous) purposes. Thus, the identification of migrants reaching EU borders represents a fundamental step in the overall EU migration system and raises several questions with regards to the techniques that are used to serve this purpose.

Most of all, the growing use of data triggers a series of considerations regarding the treatment of the human body in the management of EU borders, as the next chapters will debate.

[52] McCabe, 2011. See also Edwards & Ferstman, 2010, p. XXI.
[53] Koslowsky, 2011, p. 5.

II.

THE BODY AS AN INSTRUMENT OF BORDER CONTROL

1. FOREWORD

Regarding the question of determining someone's identity, biometric data deserves a special mention. It is considered as the most reliable way to tackle the phenomenon of irregular migration, because such technique ties the person to the identity that is re-created through its use. Thus it is possible to assess who is entitled to cross the borders and who is not, relying on a set of information immutable and fixed that is to enable to ban and exclude people considered as dangerous.

The deployment of biometrics in migration procedures seems to tell that no matter how far a person can travel, he will always be traceable and identifiable through his physical features. Biometrics follows the human body from which they are taken: technology makes possible to "derive myriad types of personal information from human biological material[54]."

2. BIOMETRIC DATA AND THEIR USE IN THE FIGHT AGAINST IRREGULAR MIGRATION

Especially after the attacks of September 2001, but also Madrid 2004 and London 2005, the fact that the EU has moved towards an increasing use of biometrics data in the field of migration should not be surprising, considering the strong connection between immigration policies and

[54] Bygrave, 2010, p. 2.

national security[55]. As a fact, the first response put in place by states to national threats has been very often the attempt to not let (potential dangerous) aliens entering their territories. To this extent, biometrics couples[56] with traditional means of securitisation; it has been regarded as the missing tile in border control.

This section will look at the concept of biometrics and will then take into consideration EURODAC as an emblematic case where the use of biometrics is serving both immigration and crime prevention purposes. It will analyse the relationship between biometrics and fundamental rights, discussing how the physical body is gaining increasing prominence in the discourse of border securitisation.

2.1. What Biometrics?

The word "biometrics" indicates all that set of data – such as fingerprints, DNA, iris and facial recognition, hand geometry, bone measurements – that is used in order to recognise or identify a person. More precisely, biometrics is defined in academic literature as "[...] methods of measuring, analyzing and processing the digital representation of unique biological data and behavioural traits [...][57]." Hence, it can be based both on physiological and behavioural patterns[58]. The former include the information obtained through techniques involving *prima facie* the physical body and that are performed directly on it: i.e. fingerprints are collected straight from the impression of the finger on a support able to capture, process and store them in a database. The latter, instead, refer to all those characteristics that are related to a specific person, but that are not extrapolated immediately from the physical body, i.e. gait and hand-written signature analysis[59].

There are two ways in which biometrics can be used. The first way is to identify a person and aims at answering the question "who is this person?," through the determination of the person's identity. The

[55] See *amplius* Moeckli, 2010, pp. 459-494.
[56] Lodge, 2006, p. 258.
[57] Ajana, 2012, p. 852.
[58] Thomas, 2005a, p. 377.
[59] Ibidem. See also Ajana, 2012, p. 852; Redpath, 2007, p. 28; and Mordini, 2008, p. 250. The academic literature about biometrics is vast and multidisciplinary, since this technology is deployed in diverse sectors of life, such as criminal investigation, medical industry and commercial sector. The references to biometrics contained in this paper are limited to the problems arising from its use in migration proceedings.

second way is verification (or authentication), the purpose of which, instead, is to answer the question "is this person who he/she claims to be?[60]." In both cases, the goal is to differentiate individuals among themselves and to acquire a specific level of certitude when it comes to assess who is who, especially when there are no reliable documents or no documents at all.

This is done by means of a multi-step process that begins with the collection of information. Data is then processed and stored in a database that will be later accessible. This procedure brings to the creation of a source of "unique, permanent and universal imprint of a person's identity[61]."

2.2. Biometrics and Migration in the EU

Traditionally, biometrics has been employed mainly in the realm of criminal proceedings, when its use has increased during the recent years due to the growth of transnational crime and terrorism. Nevertheless, this technology has recently grabbed the attention of governments because of its potential in the area of border control[62].

As Rebeka Thomas stated, biometrics is a way of "filling the gaps[63]" in the managements of frontiers. As a matter of fact, the possibility to include biometric identifiers in visas, residence permits and other types of documents can reduce the area of uncertainty when it comes to assess someone's identity. States have paid more and more attention to the potential of biometric systems as tools for the enforcement of security at the borders[64] and therefore able to contrast irregular migration[65].

In this context, the EU has indeed showed interest in the possibilities offered by this technology for the development of its migration and asylum policy.

Biometrics is used to different extents in migration proceedings, not only with regard to undocumented migrants, but also to asylum seekers

[60] Mordini, 2008, p. 250. As the author points out, the distinction is however "partly theoretical [...]. [A]ll biometrics can be used for verification, but different kinds of biometric vary in the extent to which they can be used for identification. Identification mode is also more challenging, time-consuming and costly than the verification mode" (ibidem).
[61] Thomas, 2005a, p. 377.
[62] Maguire, 2009, p. 9.
[63] Thomas, 2005a, p. 378.
[64] Redpath, 2007, p. 28.
[65] Ibidem.

and to regular migrants. One of the main sectors where biometrics is currently utilised is the one of travel documents[66], in order to improve their security and avoid them to be counterfeited. Notably, the EU has established a uniform format for non-EU nationals' residence permits, which includes fingerprints and facial image. According to the Directorate Generale (DG) Home Affairs, during the recent years the EU has adopted and improved large-scale information technology systems in order to collect, process and share information "relevant to external border management[67]."

The presence of such systems must be considered in relation to the principle of freedom of movement in Europe. As mentioned before, following the recent development of the EU's policy, the idea is that the more the freedom of movement is granted within the EU, the more it becomes difficult, for non-EU citizens, to cross its borders. The increasing usage of biometrics in different sectors of migration management corroborates this assumption. Migrants from third countries are more likely to be requested for biometric data, since they need to go through a more complex procedure if they wish to enter in Europe.

At the present time, there are several mechanisms put in place by the EU involving biometric information that are linked directly or indirectly to the governance of migration. The reference is to the Schengen Information System (hereafter SIS and SIS II), to the Visa Information System (hereafter VIS) and to EURODAC; each one of these systems resorts to biometrics for different purposes. The growing development of such databases demonstrates how migrants become the "primary targets[68]" of biometrics technology and they experience, *in primis*, its shortcomings and inherent risks, as this section will try to demonstrate.

The SIS[69] can be considered as the largest database of information for public security in Europe, which aims at ensuring the safe freedom of movement. It contains very diverse informations that range from

[66] Also EU citizens' passports are now equipped with biometrics (holder's facial image and fingerprints). See European Commission Directorate Generale Home Affairs at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/document-security/index_en.htm (consulted on 20 March 2014).

[67] Ibidem. See *amplius* Brouwer, 2006, pp. 148-149.

[68] Thomas, 2005a, p. 388.

[69] See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm. See also Brouwer, 2006, pp. 139-145.

details about people involved in serious crimes, to missing children and to third-country nationals who have been refused entry in the EU[70]. In April 2013 SIS II entered into force, providing new features such as the use of biometrics.

The Visa Information System[71], instead, consists of a central infrastructure that allows the exchange, among Schengen states, of data related to visa applications from non-EU citizens. VIS is a tool to implement EU's policy on visa. Ten fingerprints and a digital photograph are collected from the person applying for a EU visa and are stored in the VIS database, that will be later accessible to competent authorities to decide whether to grant the permission. VIS performs biometric matching (mainly fingerprints) for identification and verification of visa applicants/owners[72].

2.2.1. When Fundamental Rights Collide with Security Needs: The EURODAC System

Among the different ways in which the EU resorts to biometrics in the realm of migration proceedings, EURODAC is one of the most criticised. This database is a clear example of how the prevention of crime and the governance of migration are more and more often placed at the same level by the political power. The recent development of EURODAC is emblematic as to show how security needs can potentially collide with the safeguard of migrants' rights.

The legislative framework regarding EURODAC has been analysed before[73]. For the purpose of the present section, it is important to underline the practical problems posed by this system. EURODAC comprises a vast range of information[74]: together with the ones regarding country of origin, sex, date and place of lodgement of the asylum application, it encompasses fingerprints of asylum applicants and irregular migrants over 14 years old[75]. More precisely, participating states are required to transmit fingerprints of asylum applicants[76] and of

[70] Article 96 Schengen Border Code.
[71] Brouwer, 2006, pp. 147-149.
[72] Several researches investigated the characteristics of SIS and VIS. The core of the present dissertation is not to go deep into this analysis, but to provide an overview on the increasing employment of biometrics in migration management. See Kabera Karanja, 2008.
[73] See Chapter I, 2.3.
[74] Jones, 2014, p. 2.
[75] Xynou, 2012, p. 1.
[76] Council Regulation 2725/2000/EC, Article 4: "Each Member State shall promptly

third-country aliens apprehended in connection with irregular crossing of an external border[77] to the Central Unit database[78]. Data of asylum seekers is stored for ten years, while irregular migrants' ones are retained for two years (as soon as the recast EURODAC Regulation will enter into force, the period will be reduced to eighteen months).

Originally, EURODAC was created to facilitate the implementation of the Dublin system[79], by comparing the fingerprints of an asylum applicant with those already present in the database, in order to determine the responsible state for the application. The original purpose was therefore to discourage "orbiting refugees[80]" and to prevent the "asylum shopping" phenomenon. Despite the strong opposition[81] by civil society and migration experts to the proposal of reform in 2013, now EURODAC can be accessed also by EUROPOL and national agencies. From June 2015, EUROPOL and "Member States' designated authorities" (Article 1, para. 2 recast EURODAC Regulation) can request the comparison of fingerprints with the ones stored in EURODAC for "law enforcement purpose," that has to be intended as the purpose of "preventing, detecting or investigating terrorist offences or other serious criminal offences" (Preamble, no. 13).

take the fingerprints of all fingers of every applicant for asylum of at least 14 years of age and shall promptly transmit the data referred to [...] the Central Unit." Recast EURODAC Regulation, Article 9: "Each Member State shall promptly take the fingerprints of all fingers of every applicant for international protection of at least 14 years of age and shall, as soon as possible and no later than 72 hours after the lodging of his or her application for international protection, [...] transmit them together [...] to the Central System."

[77] Council Regulation 2725/2000/EC, Article 8: "Each Member State shall, in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child, promptly take the fingerprints of all fingers of every alien of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back." EURODAC Regulation, Article 14: "Each Member State shall promptly take the fingerprints of all fingers of every third-country national or stateless person of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back or who remains physically on the territory of the Member States and who is not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn him or her back."

[78] Kabera Karanja, 2008, pp. 269-270.

[79] Brouwer, 2006, pp. 145-146.

[80] Kabera Karanja, 2008, p. 266.

[81] The proposal has been found against the principle of data protection by the European Data Protection Supervisor (EDPA), for "singling out a particular social group for treatment not applied to others" (Jones, 2014, p. 4). The reform of EURODAC has been opposed also by the UNHCR (2012b).

According to the legislative document, such interference must comply with the proportionality test: it must be in accordance with the law, necessary in a democratic society and proportionate to the objective to achieve (Preamble, no. 13)[82].

It goes without saying how this new provision can clash with the respect of fundamental rights[83]. The potential risk for privacy is of all evidence: data belonging to asylum seekers (and irregular migrants caught at the borders) is used for purposes that go far beyond the original reason why they had been collected. Moreover, the formulation of the new recast regulation about the identification of national law enforcement agencies seems to be quite vague[84] and unclear, leaving a considerable margin of discretion to member states. On the contrary, supporters of new EURODAC features claim that the access will be extremely limited, since the consultation will be authorised only as a measure of last resort, where no matches can be found in national databases[85].

In any case, the concrete impact of this controversial change could be assessed only in the future, when the recast regulation will enter into force and EU states will have identified the competent agencies.

2.3. Biometrics and Human Rights Implications

As explained, the use of biometrics for the management of borders is indeed a reality in Europe. Since biometrics is difficult to falsify or steal, its use will increase as security needs will grow, because it allows to "[...] identify humans both locally and remotely on a routine basis[86]." However, as the EURODAC case demonstrates, this use is not free from criticism from a human rights point of view.

Biometrics raises several issues with regard to the right to private life enshrined in Article 8[87] of the European Convention for the Protection

[82] See further 2.3.
[83] Jones, 2014, p. 2.
[84] Xynou, 2012, p. 2.
[85] Deutsche Well, "EU Fingerprint Plan Alarms Human Rights Groups", available at http://www.dw.de/eu-fingerprint-plan-alarms-human-rights-groups/a-16465294 (consulted on 22 April 2014).
[86] Kabera Karanja, 2008, p. 328.
[87] Article 8 ECHR: "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a

of Human Rights and Fundamental Freedoms (hereafter ECHR) and, more generally, with regard to the protection of personal data. Since biometrics carries information about unique features of the person, there can be "a certain degree of friction between the security interests of policymakers and the right to privacy of those subject to any of these measures[88]." It is thus necessary to find a balance between these two competing interests.

The right to private life can be restricted only in accordance with the conditions established in the second paragraph of Article 8: the interference must be provided by law, must be necessary in a democratic society and there must be a legitimate aim[89]. Moreover, the interference must also pass the "proportionality test[90]": there must be proportionality between the legitimate aim and the means used to achieve it[91]. The proportionality criterion is the one that raises more issues, especially with regard to the recast EURODAC Regulation. The legality requirement[92] is satisfied given that the collection and the storage of biometrics are regulated by the legislation[93]. The condition of "legitimate aim" can be justified by the need of "national security": states have the power to regulate the conditions of entry and residence of third-country nationals in their territories and biometrics is one of the instruments to pursue such aim.

However, problems may arise regarding both the "necessary in a democratic society" condition and the issue of proportionality. The former has been discussed several times by the European Court of Human Rights, especially in order to assess whether the restriction to the right protected by the first part of Article 8 was "necessary[94]" for the life of a democratic society. The need to identify people and, in particular, third-country nationals can be justified in this sense. However, what raises doubts is how this need is concretely satisfied in

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[88] Thomas, 2005b.

[89] Lambert, 2006, p. 38.

[90] Kabera Karanja, 2008, p. 350.

[91] Ibidem, p. 322.

[92] Although some techniques (such as DNA exam for family reunification) "may fall in the grey area where legislation is not clear" (ibidem, p. 349).

[93] See Chapter I, 2.2.

[94] Kabera Karanja, 2008, p. 322.

practice. Migrants' biometrics serve different purposes; as explained, once they are collected and stored they can be accessible not only for immigration purposes but also for other broader aims, such as counter-terrorism measures and prevention of crimes[95]. Therefore, in the context of biometrics used for multiple aims[96], it can be difficult to clearly establish which is the "pressing social need pursued by the measure[97]."

Regarding, instead, the problem of proportionality[98], the question is whether the use of personal data through biometric technology can be judged as a proportionate measure to achieve the aim of border security[99]. A measure can be considered "proportionate" in case there are not other less restrictive alternatives[100] that could have been adopted. In this context, a distinction must be made between biometrics that is used only for the purpose of immigration control and the one that is collected initially to this extent, but then used also for other reasons (as in the case of EURODAC). In the first case, biometrics allows more incisive control than what it is possible only with the use of traditional means. Since the latter cannot provide the same standards of security, the use of biometrics may be justified[101]. This technology reduces the area of risk that is entailed in identity control, because it produces "as much information of population as possible[102]." However, the main problem here is the current large scale use[103] of biometrics for identification purposes, since the trend is to associate this technology with traditional instruments[104] (i.e. the incorporation of biometric features in identity documents). Therefore, its deployment shall be assisted by adequate safeguards; in particular, transparency[105] should be ensured. This means that the individual shall be granted with the right to access[106] his personal data, in order to know if it is correct, complete and used for the purposes for which it was collected[107].

[95] Thomas, 2005b, p. 5.
[96] Kabera Karanja, 2008, p. 350.
[97] Ibidem. The 1990 UN General Assembly Guidelines for the Regulation of Computerised Personal Data Files establishes the principles of lawfulness, fairness, and of "purpose-specification" in the protection of personal data (Jones, 2014, p. 4).
[98] Van Der Ploeg, 1999.
[99] Thomas, 2005b, p. 6.
[100] Kabera Karanja, 2008, p. 350.
[101] Thomas, 2005b, p. 6.
[102] Kabera Karanja, 2008, p. 319.
[103] Ibidem, p. 350.
[104] Ibidem, p. 316.
[105] Ibidem, pp. 169 ff.
[106] Ibidem, pp. 354 ff.
[107] Ibidem, p. 355.

The matter of proportionality is particularly striking in the case of EURODAC. The fact that, as explained above, this database can now be accessed also for crime prevention purposes gives a clear picture of how immigration control and security needs are intertwined. It is true that EURODAC can be accessed only when information cannot be retrieved from other databases[108] and only in case of overriding security issues[109]; however law enforcement aims are indeed prevailing on any other human rights concern, in particular, data protection. Moreover, the recast EURODAC Regulation contains provisions which are surely going beyond the original and peculiar function of the system. The fact that asylum seekers' fingerprints are accessible up to three years after they have been granted with the refugee status[110] appears like an assumption that people recognised as in need of international protection are potential criminals[111]. Here the controversial aspect is the retention of personal data once it served its original function[112]: it is difficult to justify such circumstance in light of proportionality.

Furthermore, biometrics can have a discriminatory effect[113] towards migrants and asylum seekers. If someone has been granted with international protection it means that he has given enough proof regarding his condition and the fact that he travelled to Europe precisely to seek protection[114]. If, after this, he commits a crime, it would be merely rhetoric to explain this referring to his status of refugee. Instead, the new EURODAC provision perpetrates once again the stereotype of asylum seekers as people willing to "cheat" the system: there are always perceivable feelings of mistrust and disbelief towards the entire category. Nowadays biometric technology interests the vast majority of population, but migrants are its specific target[115] and this trend does not seem to decrease. This is due to the fact that the same tool – biometrics – is used to approach two different issues, crime prevention

[108] Such as national databases and VIS. See Jones, 2014, p. 4.
[109] Ibidem.
[110] Recast EURODAC Regulation, Article 18, para. 2: "The data of beneficiaries of international protection stored in the Central System and marked pursuant to paragraph 1 of this Article shall be made available for comparison for the purposes laid down in Article 1(2) for a period of three years after the date on which the data subject was granted international protection."
[111] Ibidem.
[112] Thomas, 2005a, p. 385.
[113] Ibidem, p. 388.
[114] Ibidem.
[115] Thomas, 2005b.

and immigration control. The result is very often the criminalisation[116] of migrants, that is their implicit association with illegality. Hence, there would be the necessity to approach security needs and migration/asylum issues as two separate problems[117], even if the same instruments to deal with them are used. The prioritisation of security is leading to the detriment of human rights of a particular group of people; therefore, the proportionality scrutiny must be strict and must be the result of an adequate balance between relevant colliding interests. It is true that EURODAC is a precious source of information, but it is not enough to resort to it for any other purpose: the fact that personal data is there does not allow any automatism regarding its use[118].

It becomes a problem of establishing limits: can we justify more and more intrusion in people's private life in the name of security? Are we sure that giving up on "their" privacy will enhance "our" feeling of security? As Rebekah Thomas rightly pointed out, "there is little evidence [...] that biometric technology has contributed to reducing either terrorism or irregular migration[119]."

3. BORDER CONTROL AND HUMAN BODY: A CONTROVERSIAL RELATIONSHIP

Scholars have written about the "informatization of the body[120]," emphasising the close link between personal data and physical body. The body of migrants and asylum seekers is scanned through *ad hoc* devices in order to get the needed information. Of course, the act of taking fingerprints does not seem to constitute an attempt to bodily integrity *per se*[121] and the same can be said for other types of biometrics. Besides the one related to its use (as already explained), biometrics entails, first of all, a problem of "image[122]," because they are commonly linked to criminality and crime prevention activity[123].

[116] Thomas, 2005a, p. 388.
[117] Thomas, 2005b, p. 6.
[118] Jones, 2014, p. 4.
[119] Thomas, 2005b. In the United States, among 2.5 million visitors "no terrorist suspects have been caught to date, and these statistics do nothing to change the number of migrants who enter legitimately, but who become irregular once inside the country" (ibidem).
[120] Bygrave, 2010, p. 6.
[121] Mordini & Tzovaras, 2012, p. 9.
[122] Ibidem, p. 8.
[123] Thomas, 2005b and Separated Children in Europe Programme (hereafter SCEP), 2006, p. 8.

Therefore, the consequence of such aspect on people's perception must not be underestimated[124], especially when it comes to children[125]. Migrants and asylum seekers can be stigmatised[126] by the deployment of biometrics and therefore associated with criminals: in this sense, it is significant that the EURODAC Regulation uses the term "illegal[127]" to indicate people who are staying in EU member states in violation of administrative rules regarding immigration. However, this is the other side of the coin that comes out when immigration and crime prevention issues are regulated through the same instruments, namely biometrics and the use of detention[128]. In both fields, the body represents the instrument to ascertain the identity, to control and to exclude the individual.

3.1. The Body as a "Medium" between Competing Interests

Although biometrics is an important area where bodily features are taken into consideration for migration and asylum purposes, there are other situations in which the relationship between human body and border control acquires relevance. The case of asylum seekers represents, once again, an interesting field of investigation. In order to prove their claims, applicants are requested to give clear evidence of the persecution that endangers their lives. However, as anti-fraud controls increase, asylum seekers' accounts are often not sufficient to support their applications. Especially in the case of torture, claimants are requested to provide proofs of the physical suffering they have gone through[129]. The story told by the applicant may sometimes be contradictory, full of gaps and imprecise[130]: hence, the marks displayed on the body can be decisive for the application's outcome[131]. As Fassin

[124] "The stigma of criminal activity attached to fingerprints [...] or even the hygiene-related issue of touching a finger scan – might be felt more acutely within different cultural groups" (Thomas, 2005b).

[125] SCEP, 2006, p. 8.

[126] Thomas, 2005b. See also UNHCR, 2012a, p. 11.

[127] "Third-country nationals or stateless persons found illegally staying in a Member State", EURODAC Regulation. See footnote 35 of this thesis for the distinction between irregular and illegal migrants.

[128] Specifically on the connection between migration and detention, see Santoro, 2008.

[129] Fassin & D'Halluin, 2005, p. 597.

[130] Survivors of torture may experience problem in remembering and also in telling a coherent story, due to the trauma (Pettitt, 2011, p. 5).

[131] Fassin & D'Halluin, 2005, p. 598.

and D'Halluin observed, "[S]cars, both physical and psychological, are the tangible sign that torture did take place and that violent acts were perpetrated[132]." Therefore, medical documentation becomes of first relevance, since it can either corroborate or discredit the person's story[133]. However, asylum seekers may be reluctant, ashamed or scared to show the signs of violence on their body, but eventually they have to do it if they want to be believed, since their personal story will be disqualified in case of contradictions[134]. Another problem regarding the proof of torture is that perpetrators have interest[135] not to leave visible marks on the victims so to deny that torture occurred. To this extent, practices of torture have become more and more hidden and hence difficult to demonstrate visibly. It is of all evidence how such case entails problems with regard to the assessment of asylum seekers' credibility. In absence of visible marks on the body, relevance should be given to the account of the person. However, this clashes with the growing trend of suspicion towards migrants and refugee claimants. In this respect, Fassin and D'Halluin noted the paradox related to the "increasing expectations of physical evidence simultaneous to the state's decreasing confidence in the victim's demonstration of it[136]."

The issue of credibility lies at the core of all asylum claims and states have strong interest in finding better ways to assess it: therefore, if inspecting the body can be useful to this extent, then it will be done. This is what has happened in the case of the so-called "phallometric test[137]" which has been used in order to establish if the applicant was "gay enough" in sexual orientation-based asylum claims.

All those cases reveal the tension between the evidence that the state requires in order to entry in its territory and what individuals can actually do to meet those conditions. The body functions as a "medium" between the two competing interests, because it can give the information that is needed regarding identity, age, health conditions and further on. States

[132] Ibidem.
[133] Pettitt, 2011.
[134] Fassin & D'Halluin, 2005, p. 606.
[135] Ibidem, p. 598.
[136] Ibidem.
[137] Phallometry is "an attempt to scientifically quantify male sexual arousal by measuring physiological responses to visual stimuli through attachment of electrodes to the penis" (Organisation for Refugee, Asylum & Migration [hereafter ORAM], 2010, p. 5). The test has been strongly opposed for being contrary to basic principles of human dignity (UNHCR, 2012b, paras. 64 and 65).

are well aware of the immense potential that lies within the body of migrants: the growing importance of biometrics proves this assumption. Nevertheless, this process entails many criticisms with regard to the respect of migrants' human rights. Notably, this debate is intimately linked to the one about human rights and securitisation of borders. If the latter is prioritised, than the massive use of body for this purpose will not be opposed.

Having said so, one should not claim too easily that considering the body as a source of proofs in migration proceedings is necessarily negative. Experience demonstrates that, in some cases and in presence of adequate safeguards, this process can bring solutions that are positive also for the migrant. In the case of torture, for instance, the clinical examination can support and demonstrate the truth behind a personal story that has been told with many flaws due to memory gaps. As for biometrics, they can be a potential aid when there is the necessity to identify people in need of urgent assistance[138], or in case of family reunification for unaccompanied migrant children[139]. Thus, it would probably be unrealistic to advocate the end of biometrics in the management of migration flows, also because states' concern for security – to be intended also as social security, as the access to the welfare system – cannot be completely left aside.

Hence, the problem does not seem to be in the use of the body as instrument of border control *per se*, but rather in how this process is conducted and carried out. Once again the question is: where is the limit? It is a matter of values, which inspire and guide the system and, consequently, a problem of proportionality of measures. The information must be gathered from the body respecting human dignity and bodily integrity. Adequate safeguards must be provided, so that the person does not find himself in unbearable disadvantage against the state.

The next section will analyse this question in light of the case of age assessment procedures for unaccompanied migrant children. The aim

[138] For instance, UNHCR resorted to biometric systems to improve the management of their refugee camps. Recently, this has been the case of Malawi: "[T]he UN refugee agency has completed initial testing of a new biometrics system that should help to better register and protect people, verify their identity and target assistance for the forcibly displaced in operations around the world," available at http://www.unhcr.org/52dfa8f79.html (consulted on 5 July 2014).

[139] SCEP, 2006, p. 12.

is to try to draw a line between security of borders and human security in cases where the human body is used as a tool to solve uncertain cases where the person is not believed or there are no other reliable information available.

III.

HUMAN BODY AND BORDER CONTROL: THE CASE OF AGE ASSESSMENT OF UNACCOMPANIED MIGRANT CHILDREN IN THE EU

1. THE AGE ASSESSMENT OF UNACCOMPANIED MIGRANT CHILDREN AS A CASE STUDY

The present section takes into consideration the topic of age assessment of unaccompanied migrant children as the selected case study. Generally speaking, age assessment is the procedure that aims at establishing the age of an individual in all those cases when doubts may arise[140]. As it will be further outlined, age assessment is very often carried out through the deployment of biometric data[141]. Namely, through the selected case study it is possible to evaluate to what extent the use of biometrics may clash with the human rights of children who undergo these specific procedures. Therefore, the chosen case appears to be particularly emblematic, since it highlights many of the human rights concerns that are involved in the main research question about the role played by the human body in the securitisation of borders.

One could say that here the already referred human rights concerns are coupled with the considerations about the peculiar needs of minors, who should be entitled to a greater standard of protection. That is due to the fact that young migrants are more vulnerable than adults, especially when they come to Europe on their own, without a network of kin to rely on. Their specific status as minors carries along questions whether and to what extent migration and asylum policies should take into account their condition of particular vulnerability[142] in order to create exceptions to the general rules provided for adult migrants. The

[140] See further 1.1.
[141] SCEP, 2006, p. 8.
[142] Levinson, 2011, p. 2.

acknowledgement that migrant children (especially if unaccompanied) require *ad hoc* protection brings the adoption of child-friendly policies and legislations, which should be conceived with the view to provide higher degree of protection to migrant minors[143].

Through the study of the proposed case, this section aims at analysing how the use of biometrics and the resort to classical medical examinations to determine the age of young migrants can endanger fundamental rights if those tests are not performed taking into account the best interest of the child. Rather, they show once again the primary concern for the control of states' borders. In this respect, the research on age assessment procedures serves to demonstrate how the human body is increasingly considered as a tool of border control.

1.1. Why Is Age Assessment Relevant?

The relevance of the assessment of the age in the field of migration and asylum is connected to the enforced protection that is provided to individuals under the age of 18 years[144] at the international, European and domestic level. Looking at the broader picture, the importance of age assessment is crucial to avoid the risks that unaccompanied migrant children may face when they are placed in an adult environment, or when they are treated without proper consideration of the needs related to their age[145]. On the other hand, a correct age assessment also helps to avoid adults claiming to be children so to benefit from provisions they are not entitled to receive[146].

The fact that a migrant is a child is a "pivotal factor[147]" in the reception and care system and it affects his status during the whole

[143] For instance, the return of migrant children to home countries is envisaged only as a measure of last resort (ibidem, p. 16).

[144] FRA, 2011, p. 53.

[145] The case of migrant children restricted in adult detention centres in the United Kingdom generated a big echo in the media, putting the issue of correct age assessment back in the public debate. It was found that young migrants, whose age was wrongly assessed, were held in adult detention estates, compelled to share rooms and facilities with adults, facing risks of abuses and traumas (source: *The Independent*, 9 January 2014, available at http://www.independent.co.uk/news/uk/politics/exclusive-children-are-still-held-in-adult-detention-centres-despite-coalition-pledges-to-end-the-practice-9050170.html; consulted on 25 April 2014).

[146] European Asylum Support Office (hereafter EASO), 2013, p. 12; Mougne & Gray, 2010, p. 1.

[147] SCEP, 2011, p. 18.

migration or asylum procedure[148]. Namely, it allows the application of all those provisions dedicated to children, in order to give them particular attention and safeguards.

First of all, if a migrant is recognised as being under the age of 18, then the Convention on the Rights of the Child (hereafter CRC) will be applicable[149]. This means that international protection applications lodged in by minors may be subject to different standards than those done by adults. That is the spirit of 2009 UNCHR *Guidelines on International Protection for Child Asylum Claims*, which calls upon a "child-sensitive approach[150]" to the 1951 Convention relating to the Status of Refugees. Migrants under 18 years are entitled with "child-specific rights[151]" during asylum procedures and they should receive appropriate protection (such as the right to family reunion) in accordance with Article 22 CRC[152].

Turning to EU asylum system, the fact that the applicant is an unaccompanied minor determines which state is competent to deal with his claim. Recast *Dublin Regulation* provides that, in such case, the competence lies first of all within the member state where the child has a family member *legally* present, even if it is not the same state from where the minor entered in Europe[153].

[148] EASO, 2013, p. 8.
[149] All EU member states have ratified the CRC.
[150] HRC/GIP/09/08, p. 4.
[151] Ibidem, p. 8.
[152] Article 22 Convention on the Rights of the Child: "1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention." A similar provision can be found in Article 31 of EU Qualification Directive.
[153] Dublin III, Article 8: "1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. [...] 2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative

Child-oriented policies are also foreseen in other EU legislations. For instance, Article 24[154] of the *Reception Directive* lists a set of safeguards for unaccompanied minors, such as the appointment of a representative (para. 1).

The *Return Directive* establishes dedicated measures to be respected by states when dealing with the return and removal of unaccompanied minors[155]; namely, they can be returned only to their families or whether adequate facilities are in place[156]. Anyway, one of the most important consequences of qualifying a person as a child or as an adult concerns the scope of application of this directive. According to Article 11[157], migrant minors can be detained only as a last resort measure and for the shortest period of time. The directive states also that detention should be regarded as an exception for unaccompanied migrant children. However, in the case that detention occurs, it can never be in prison,

can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor [...]." See Ferri, 2013.

[154] *Reception Directive*, Article 24 "Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child [...]."

[155] Directive 2008/115/EC, Article 10: "Return and removal of unaccompanied minors. 1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child. 2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return." See Baldaccini, 2010, pp. 121-122.

[156] Baldaccini, 2010, p. 129 and Baldaccini, 2009, p. 9. For a comparative analysis of EU member states practices on return and removal of unaccompanied migrant children, refer to European Migration Network (hereafter EMN), 2010.

[157] *Return Directive*, Article 11: "[...] Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. 3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults [...]."

rather in *ad hoc* institutions, separated from adults. Therefore, a wrong age assessment may lead to the detention of the minor and this event can have dramatic consequences on the child's mental and physical welfare.

Moreover, age matters also when it comes to the application of the EURODAC Regulation. According to Article 9, fingerprints can be collected only if the person is above 14 years old[158]. In this case it is noticeable how the perspective changes: it is not a matter of distinction between adult and child anymore, but the focus is now moved to a distinction between two elements of the same group, so between child and child. For the scope of this regulation it is not enough to define people as minors or adults, but it is important to define exactly the age of the person.

Children can also be entitled to specific safeguards in member states' domestic legislations, in line with EU standards[159]. The presence of such provisions contributes to the establishment of a coherent system of safeguards for this particularly vulnerable group of people, in accordance with EU member states' international human rights obligations. However, the effectiveness of such measures is subject to two main conditions. The first one is that those provisions are effectively implemented by states when dealing with minors. The second one is that age assessment should be conceived as a reliable, effective and rights-oriented procedure. As listed above, age is the distinctive criterion to identify the scope of application of a series of provisions regarding migration and asylum. Therefore, "[a]ge assessment is [...] required to help children realise their right to this aspect of identity. In practice, children acquire rights, have concessions withdrawn, and obligations placed upon them at various ages, even before attaining 18 years[160]."

2. CONCEPTUAL CLARIFICATIONS

The following sections will define the scope of the investigation and will provide a review of the current practices of age assessment taking

[158] EURODAC, Article 9: "Collection, transmission and comparison of fingerprints. Each Member State shall promptly take the fingerprints of all fingers of every applicant for international protection of at least 14 years of age [...]."

[159] For instance, Italian Law Decree 286/1998 foresees specific cares for unaccompanied migrant children, such as the grant of a permit of stay (Article 32, 1 *bis*).

[160] EASO, 2013, p. 12.

place in EU member states. Then, the procedures will be commented from a human rights perspective.

Before proceeding further, it is necessary to give some clarifications[161] of two main concepts: 1. who should be comprised in the definition of "unaccompanied migrant children"? 2. what age assessment is and why it is relevant in the field of migration and asylum policies?

2.1. Unaccompanied Migrant Children

According to Article 1 of the CRC, a child is "[...] every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Commonly, unaccompanied migrant children are to be intended as people below 18 years, travelling without their parents or an adult guardian[162].

A definition of unaccompanied migrant children is provided by the EU Council Resolution 97/C 221/03 of 26 June 1997 "on unaccompanied minors who are nationals of third countries." According to Article 1, para. 1, unaccompanied migrant children are third-country nationals under the age of 18, who arrive in one of the member states without being accompanied by an adult responsible for them or are left unaccompanied after their arrival. This status lasts until they are not fostered in the care of such a person[163].

The same definition can be found in Article 2, letter e) of the *Reception*

[161] The current research adopts the perspective of the EU and member states. Therefore, the considerations shall be intended as limited to this area.

[162] Levinson, 2011, p. 2.

[163] Article 1: "1. This Resolution concerns third-country nationals below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively in the care of such a person. This Resolution can also be applied to minors who are nationals of third countries and who are left unaccompanied after they have entered the territory of the Member States. The persons covered by the previous two sentences shall be referred to herein as 'unaccompanied minors.' 2. This Resolution shall not apply to third-country nationals who are members of the family of nationals of a Member State of the European Union, nor to nationals of a Member State of the European Free Trade Association party to the Agreement on the European Economic Area and the members of their family, whatever the latter's nationality may be, where, pursuant to the Treaty establishing the European Community or the Agreement on the European Economic Area respectively, rights to freedom of movement are being exercised [...]." Its scope is clearly limited to children who are not EU citizens or who are stateless (Levinson, 2011, p. 2).

Directive[164] and in the *Dublin Regulation*[165]. Instead, a definition of this peculiar category of migrants is not provided by the *Return Directive*, which just includes them among the "vulnerable persons[166]."

A distinction can be drawn between unaccompanied and separated children. According to the Committee on the Rights of the Child, the difference between the two categories lies in the fact that the latter are not necessarily separated from relatives other than parents[167]. Sometimes, instead, the difference is more focused on the practical situation that the child is going through. According to the definition provided by the Separated Children in Europe Programme (hereafter SCEP), for instance, separated children are those who "may appear 'accompanied' when they arrive in Europe, but in practice the accompanying adult may be unable or unsuitable to assume responsibility for their care[168]." This description is also recalled by the Office of the UN High Commissioner for Refugees (hereafter UNHCR) that encourages the use of this terminology[169], although it is acknowledged that only few states mention this definition together with the one of unaccompanied migrant children.

However, for the purpose of the present analysis it has been chosen to make use of the term "unaccompanied migrant children." Such terminology, as highlighted, is the one used at EU level and can also be

[164] *Reception Directive*, Article 2, letter e): "'unaccompanied minor': means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States."

[165] Dublin III, Article 2, letter j). See also Article 2, letter e), Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[166] Return Directive, Article 3, para. 9: "'vulnerable persons' means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence."

[167] UN Committee on the Rights of the Child, 2005, p. 6: "'Unaccompanied children' (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. 'Separated children' are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members."

[168] SCEP, 2006, p. 1.

[169] "[...] UNHCR encourages the usage of the term 'separated children' to draw attention to the potential protection needs of this group. [...] In practice, however, few states have adopted the expanded international definition of 'separated children' and continue to refer to 'unaccompanied minors' in their asylum legislation and statistics. [...]" (UNHCR, 2004, p. 2).

found in member states' legislations. Therefore, it seems to be the most appropriate, since the area of investigation is limited to the EU.

The reason why the case study is centred on unaccompanied migrant children is their particular vulnerability, especially when it comes to ascertain their identity. Minors come very often from countries where no reliable birth registration systems are established[170]; indeed, being without an adult responsible for them complicates the process of identification, including the proof of their age. Regarding this last point, unaccompanied migrant children require extra care also because they are basically alone[171] when they undergo the process of age assessment. Hence, particular safeguards shall be provided to ensure the protection of this peculiar group of migrants.

2.2. Age Assessment

As briefly mentioned above, in the framework of the present dissertation, age assessment refers to the procedures through which authorities aim at establishing the chronological age of an individual, in order to ascertain whether that person is an adult or a child[172] in all cases where there are doubts about the declared age[173].

The assessment of the age can be performed through a vast range of methods, which may involve the body of the children to varying degrees. Traditionally, one can distinguish between medical/non-medical methods[174]. However, given the topic of the present research, it seems preferable to differentiate between physically invasive/non-invasive methods[175]. The former are the ones that are carried out directly on the child's body and require a certain degree of "contact" with the body.

[170] "Only half of the children under five years old in the developing world have their births registered" (Smith & Brownless, 2011, p. 1).

[171] It is true that several domestic legislations foresee the appointment of a guardian to the child. However, as it will be explained further on, it is not always the case that the guardian is appointed at the very beginning of the age assessment procedure.

[172] As referred before, Article 1 CRC.

[173] EASO, 2013, p. 12; SCEP, 2011, p. 4; FRA, 2011, p. 53.

[174] For instance, EASO, 2013, pp. 25 ff.

[175] The report prepared by EASO refers to "physically invasive or not" when assessing pros and cons of the different kind of examinations. However, it does not explicitly classify them according to this dichotomy.

a) Physically invasive methods

– *radiology tests*: X-rays are carried out on parts of the body that are subject to "skeletal change near the chronological ages of 15/16 or 18[176]." The most common one[177] is the examination of the carpal bone (wrist bone), but also the collarbone[178] is used[179];

– *dental examination*: also teeth can be observed through X-rays[180]. In particular, scientific literature identifies the presence of the third molars as a possible indicator of adulthood[181]. Dental variables that are related to the age are based on changes in the morphology, in the development and in the biochemistry (mineralisation[182]) of teeth[183];

– *sexual maturity assessment*: it involves the measurement and the evaluation of visible signs of sexual maturity[184].

b) Non-physically invasive methods

They comprise all those methods that do not require to be carried out by a medical practitioner. The range[185] is indeed a broad one and includes:

– *documents checking*: analysis of documents produced by the applicant or collected from other sources (such as embassies, schools, EURODAC)[186];

– *interviews*: the account given by the individual is collected by a range of different professionals and it is evaluated, often in the light of other findings[187];

– *visual estimation*: generally speaking, officials make an estimation of age based upon the individual's appearance in front of them. It includes

[176] SCEP, 2011, p. 4.
[177] Ibidem.
[178] SCEP, 2006, p. 9.
[179] "An X-Ray is taken normally of the hand, collarbone (clavicle) and/or wrist and methods such as the Greulich-Pyle (GP), Tanner and Whitehouse (TW-2) and Radius, Ulman, Short bones (RUS) are used to determine bone or skeletal age" (EMN, 2010, p. 50).
[180] SCEP, 2006, p. 9.
[181] See Thevissen, 2013, pp. 41 ff.
[182] SCEP, 2011, p. 4.
[183] Thevissen, 2013, p. 19.
[184] "[...] In boys, examination is based on penile and testicular development, pubic hair, axillary hair, beard growth and laryngeal prominence. In girls, the examination is focused on breast development, pubic hair, axillary hair and shape of the hip [...]" (EASO, 2013, p. 33 and SCEP, 2011, p. 4).
[185] SCEP, 2006, p. 4.
[186] EASO, 2013, p. 27.
[187] Ibidem, p. 25.

the estimation of the physical appearance (how the person looks like, whether or not he has the aspect of an individual below 18 years), but also of the behaviour of the person[188];

– *psychological tests*: all those techniques that explore the person's story and assess his maturation[189].

The above techniques can be used alone or in conjunction, in order to have a cross-check[190] of the obtained results.

However it is necessary to clarify what follows: it seems preferable to use the expression "age estimation" instead of "age determination" when referring to the outcome of such procedures. As it will be further explained[191], age assessment is not an exact science and therefore it is not possible to establish indisputably the chronological age[192]. The results that can be gathered from the methods just mentioned constitute only an estimate. However, it is here that the initial problem with age assessment comes from. For its scope of application[193] law requires the age to be something definite, certain and certified[194]. On the other hand, when other reliable information is lacking, the certification issued at the end of the procedure of age assessment indicates a numeric value that is the result of an approximation, of a "compromise" based on experts' knowledge. Nevertheless, law has to consider this figure as the chronological age in order to define the legal status of the individual. Therefore, there is an underlying gap between what age assessment procedures can actually provide and what the law would need. The point is to understand to what extent this discrepancy can hinder the rights of the individual.

3. SOURCES FOR AGE ASSESSMENT AT INTERNATIONAL AND EUROPEAN LEVEL

It must be made clear that the issue of age assessment is not envisaged in any *ad hoc* document or legislative text. Instead, there is a variety of

[188] Ibidem, p. 28.
[189] Ibidem, p. 32.
[190] SCEP, 2011, p. 4.
[191] See further on section 4.
[192] Crawley, 2011, pp. 28-29.
[193] This is particularly relevant when it comes to differentiate between people under or above 18 years (Chapter III, 1.1).
[194] This is the essential function of a birth certificate. See Crawley, 2011, p. 21.

sources about the topic that ranges from guidelines, statement of good practices, recommendations, to provisions included in legislative acts regulating other (and broader) areas[195]. Precisely, most of the listed sources contain, at the same time, principles and recommendations on how age assessment should be carried out. For this reason, the aim of this section is to offer a succinct overall review of the sources regarding this topic, while a proper analysis of recommendations and guiding principles will be provided further on.

With regard to international sources, while the CRC[196] does not contain any specific reference to the issue[197], the Committee on the Rights of the Child has touched upon the problem, although not providing any specific guidance on how age assessment should be effectively performed[198]. The European Parliament recently expressed its view on the matter of age assessment with Resolution 2012/2263 of 12 September 2013 on the situation of unaccompanied minors in the EU. Despite the non legally binding nature of the document, the resolution uses a quite strong language, stating that the Parliament "[d]eplores the unsuitable and intrusive nature of the medical techniques used for age assessment in some Member States, which may cause trauma, and the controversial nature and large margins of error of some of the methods based on bone maturity or dental mineralisation[199]."

Moving specifically to EU legislative framework, the Procedure Directive allows member states to resort to medical examinations as means to assess unaccompanied migrant children's age. Apart from stating that the methodology for the examination should be "the least invasive[200]" possible, few other indications are provided by Article 25.

[195] Refer to EASO, 2013, pp. 64-70, for an analytical examination of international, European and national sources concerning age assessment. EASO's report is particularly relevant because it compiles all the references on the topic (including also reports and statements of good practices) and, at the moment, it is the most up-to-date source of information regarding age assessment procedures in Europe.

[196] Generally speaking, the CRC puts at its core the concept of the best interest of the child, deriving rights and responsibilities from this concept. See Smith & Brownless, 2011, p. 10.

[197] Ibidem. The CRC states that every child should be registered immediately after birth (Article 7), calling upon states for the implementation of this provision. However, as indicated previously, this is not always the case.

[198] Smith & Brownless, 2011, p. 11.

[199] European Parliament, Resolution on the Situation of Unaccompanied Minors in the EU, no. 2012/2263, 12 September 2013, para. 15.

[200] Procedure Directive, Article 25, para. 5: "Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant

Among those, the right to be informed is recalled, as well as the need to obtain the child's consent prior to proceed with the medical test; the refusal to undergo medical examination can never be used as an argument to reject international protection claims. However, the article does not give any instructions as to which medical examinations are to be considered adequate and preferable. The result is that, as it will be explained later, member states resort to very diverse techniques[201]. This may be also due to the nature of Article 25, which is a norm contained in a directive. As known, a directive obliges states only to achieve certain results, but it leaves them free to choose the instruments for how to do so.

4. STATE OF THE PLAY IN THE FIELD OF AGE ASSESSMENT IN THE EU

Several comparative studies[202] have been carried out so far among EU countries, in order to investigate the different methods that are currently used to estimate young migrants' age. In the context of such researches, the report published by the European Asylum Support Office (hereafter EASO) in December 2013 represents the most recent and comprehensive compilation specifically dealing with age assessment practices in EU member states[203]. The European Commission, acknowledging that age assessment is a critical issue that involves "[...] a

indications, Member States have doubts concerning the applicant's age. [...] Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result. Where medical examinations are used, Member States shall ensure that: (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination; (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal. The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection."

[201] FRA, 2013b, p. 210.

[202] Such studies have been done by NGOs and EU agencies.

[203] Besides EU countries, EASO analyses also Norway, Switzerland, Australia, Canada, New Zealand and the United States of America (for a total of 34 countries). EASO, 2013, p. 23.

number of procedural and legal guarantees in relevant EU legislation, as well as the obligation to respect data protection requirements when recording information on unaccompanied minors in databases such as EURODAC[204]," invites EASO to provide training and to identify best practices.

Hence, the EASO's report gives a clear picture of the ongoing situation in Europe, because it takes into account information from member states, NGOs, Inter Governmental Organisations and experts[205]. Moreover, it considers also the findings of the 2011 comparative study prepared by SCEP.

For this reasons, the mentioned report will constitute the principal reference in the present paper regarding the different procedures currently deployed in EU countries[206].

4.1. Current Practices in EU Member States

The lack of a homogenous legislative framework produces, as a consequence, the co-existence of a variety of age assessment practices in EU member states[207]. This circumstance couples with the fact that, at the moment, there is still no single solution[208] which "can tell with certainty the exact age of an individual[209]." It is a vicious cycle that has brought to the present situation, where the absence of specific and clear regulations if, on one hand, can stimulate the circulation of good practices among EU countries[210], on the other hand it can create practical problems in the field. For instance, in Italy there is no organic regulation regarding age assessment[211]. The consequence has been that X-rays estimation has been used almost routinely (principally in the context of massive

[204] European Commission's Action Plan 2010-2014.
[205] EASO, 2013, pp. 10-11.
[206] Other sources may be also taken into consideration with regards to specific countries.
[207] "All Member States attempt to determine the age of an unaccompanied minors using a variety of techniques" (EMN, 2010, p. 49). See also SCEP, 2011, p. 4 and, in general, EASO, 2013.
[208] As it has been observed regarding medical age estimation, "[N]o consensus on a common practice for age-estimation examination has been reached internationally and often not even on the national level" (Thevissen, 2013, p. 32).
[209] EASO, 2013, p. 4.
[210] As it is the purpose of EASO's report.
[211] SCEP, 2011, p. 16. Article 19 of the legislative decree 25/2008 states that unaccompanied minors can be subjected to "non-invasive" medical checks when there are doubts about their age. However, neither this law, nor other legislations indicated clearly which were the medical examinations to be considered as "non invasive."

arrivals of migrants[212]), without granting the migrant the possibility to produce adequate documentation and without contacting embassies or authorities of the country of origin[213]. It is of all evidence how such situation constitutes a threat to migrants' human rights[214].

In this inhomogeneous context there is a permanent feature: the majority of EU countries resorts to medical examinations to determine the age of young migrants[215]. As it will be explained, these tests have been criticised from the point of view of accuracy[216] and for the possible risk for children's health[217]. In light of the present research, however, it is necessary to point out what follows: medical science is constantly improving and seeking solutions in order to achieve results that can be considered as accurate as possible, according to the best scientific knowledge available at the time. Claiming generically that the margin of error is "high" is, first of all, scientifically and academically vague and imprecise. Secondly, it does not take into proper account all the medical researches that have been, and currently are, undertaken in order to minimise and to reduce the margin of variation around the age that results from the examination[218].

The point is to understand whether such practices can endanger the child's rights and to find out which solutions can be in compliance with the best interest of the child, while being also sustainable for the state's resources. To this extent, the next section will look at the examples of Belgium, which appears to be particularly relevant due to the type of age estimation that is carried out.

[212] Save the Children Italy, 2013a, p. 5.

[213] Ibidem.

[214] Several NGOs have addressed concerns to Italy. Namely, Save the Children denounced situations that happened in certain cities in the South of the country where X-rays assessment was used in a systematic way, that is independently from the existence of a well-grounded doubt about the migrants' age (ibidem). A similar case involved the small island of Lampedusa. Save the Children expressed its concern about the fact that the wrist bone radiography was performed directly on the island, where there is not an equipped structure to do so (*amplius* on age assessment procedures in Lampedusa, Save the Children Italy, 2009, pp. 10-12). Proposals have been made to overcome this normative deficit. In particular, a Protocol was signed by the Ministers of Labour, Welfare and Health in 2009, committing the parties to adopt a multidisciplinary approach to age assessment. Regrettably, this project has not been implemented so far, mainly due to the shortage of adequate financial means. See further Save the Children Italy, 2009 and Save the Children Italy, 2013a, p. 5.

[215] EASO, 2013, p. 89 and EMN, 2009, p. 89.

[216] See, among all the relevant sources, EASO, 2013, p. 8.

[217] See, for example, The Royal College of Paediatrics and Child Health of the United Kingdom, 2007.

[218] Such as Thevissen, 2013.

4.1.1. Belgium

Belgium's legislation contains legal provisions regarding age assessment. Specifically, they are a part of the "Guardianship Act" of 24 December 2002[219]. The particularity of Belgium in this field is that the determination of the age is the result of a triple medical test[220]: collarbone, hand-wrist bone and dental X-rays[221]. Three different medical examinations[222] are carried out on the individual[223]; the chronological age is therefore estimated through the combination of the three different results obtained from each single technique.

Furthermore, the estimated age resulting from this triple examination comes with the indication of a margin of error. In practice, this means that the estimated age is reported with a "standard deviation" or a prediction interval with a set of probability[224]. The mention of the standard deviation is absolutely important, because it allows the competent authorities to grant the individual the benefit of the doubt[225]. As a consequence, "[i]n case of any doubt the lowest attested age will be taken into consideration[226]" so that, for contentious situations, the person will always be guarded and treated as a minor[227].

Nevertheless, prior to resorting to such tests, the age of the unaccompanied minor is possibly traced through the documents and the declarations given by the person[228]. Medical checks are carried out under the control of the Guardianship Service, when there are doubts about

[219] Guardianship Act, Title XIII, Chapter VI, *Tutelle des mineurs étrangers non accompagnés*, of the Programme Law of 24 December 2002, in *Belgian Official Gazette*, 31 December 2002, as modified by the Programme Law of 22 December 2003 and the Programme Law of 27 December 2004. See also Fournier, 2010-2011.

[220] SCEP, 2011, p. 9.

[221] La Plat-Forme Mineurs en Exile, 2012, pp. 2 ff.

[222] Precisely, "*at least*" three medical tests are combined (Thevissen, 2013, p. 32): in fact, before proceeding to dental X-rays, an examination is conducted by a specialist in order to have a "clinical impression" of the dental age of the applicant: this "provides a reasonably good estimation of whether the applicant is younger or older than 18 years old" (ibidem, p. 33). Opportunely, the examiner who registers the clinical examination is different from the one who performs the other steps of the "Triple Test," so to avoid biases (ibidem).

[223] EMN, 2009, p. 25.

[224] Interview with Professor Dr. Patrick Thevissen, DDs, MSc, PhD, Forensic Odontology, Forensic Dentistry, Department of Oral Health Science, Faculty of Medicine, Katholieke Universeteit Leuven, Leuven, 6 June 2014.

[225] As it is established by Article 7, Programme Law (*Loi Programme*) of 24 December 2002.

[226] EMN, 2009, p. 26.

[227] For instance, if the estimated age ranges from 17.5 years to 18.5 years, the person will be considered as a minor (ibidem).

[228] Ibidem, p. 25.

the authenticity of the papers or where documents are not available at all[229]. The so called "Triple Test" is performed by a specialist from each of the involved disciplines and the informed consent of the minor shall be asked and obtained prior to proceed[230].

4.1.1.1. "Triple Test"

Belgium's protocol for age examination has been developed in KU Leuven[231] and integrates three different medical tests that this part will briefly illustrate[232].

First, the dental age examination envisages different age assessment methods that are classified according to three groups: children, sub-adults (juveniles, from 16 to 22/23 years) and adults (from 23 years). The error rate increases with the age, so that it is easier to give a more accurate estimation for children instead of juveniles[233].

The development of permanent teeth except the third molars is used[234] to estimate the age in children, because on average they develop until the age of 16 years[235]. Since the simple observation of tooth eruption entails a high degree of variability and therefore should not be used[236], the dental age examination is carried out through radiography, to see the specific stage of development of seven[237] permanent teeth[238]. Every tooth is evaluated in its stage of growth[239]: the age estimation is therefore the

[229] Ibidem.

[230] Ibidem, p. 26.

[231] Thevissen, 2013, p. 32.

[232] Section 2.2 of Chapter III has illustrated the different medical age examinations. This part, instead, will focus specifically on the methods that are used in the context of the "Triple Test" as developed by KU Leuven. The information contained in this section is mainly the result of the interviews with Professor Thevissen and Professor Smet.

[233] The error rate is about 6 months for the first group (children), 1.5 years for the second group (sub-adults) and 5 or more years for the third group (adults). Source: Interview with Professor Dr. Patrick Thevissen, cit.

[234] See also Thevissen, 2013, pp. 23-25.

[235] Ibidem, p. 23.

[236] Interview with Professor Dr. Patrick Thevissen, cit. Teeth develop layer by layer, from the bone to the gum (Thevissen, 2013, p. 23).

[237] Usually those from the lower-left quadrant (Interview with Professor Dr. Patrick Thevissen, cit.).

[238] "It is indeed commonly accepted that tooth eruption as an evaluation method for dental age estimation has some limitations, since tooth eruption is heavily influenced by environmental factors such as available space in the dental arch, extraction of deciduous predecessors, tipping, or impaction of teeth. Oppositely, the method for dental age estimation using developmental stages of teeth is more useful since tooth development is less influenced by environmental factors" (Willems et al., 2011, p. 893).

[239] The Demirijan's staging technique is applied; this system takes into consideration eight different stages of tooth's development (Interview with Professor Dr. Patrick Thevissen, cit.).

result of the combination of seven different teeth observed in their specific stage of development[240]. Regarding, instead, the category of sub-adults, the development of third molars is considered[241]. In fact, if all permanent teeth are mature[242], the age estimation is based on the observation of the so called "wisdom teeth." Despite the fact that the third molars are the most variable ones with regard to development, they are the only teeth still changing "in late adolescence and early adulthood[243]"; therefore, they are the only ones useful as "forensic estimators of chronological age[244]" when it comes to individuals between 16 and 22/23 years. This age range is crucial, because it includes the age of legal majority[245]. The system created in KU Leuven combines all the four third-molars information and integrates the development influence of missing third-molars[246], differently from the classical approach[247]. Moreover, it provides a probability of the applicant being older than 18 years. Given the assumption that there are differences in wisdom-teeth development between countries[248], the progressive collection of "country-specific third molar data sets[249]" will enable to refuse this hypothesis.

Second, the hand-wrist bone examination is performed in the pediatric radiology department. The non-dominant hand is imaged with X-rays in order to estimate the delay of bone ossification[250]: when all the bones are closed, it means that the biological maturity process is completed. The method in use is the Tanner et al.[251]: each bone of the hand and wrist is classified separately into stages, to which scores are assigned[252]. The scores are then combined to give the skeletal maturity. This system is quite complex and requires medical staff to be specifically trained to do it[253].

See Demirijan, Goldstein & Tanner, 1973.

[240] Ibidem. See also Thevissen, 2013, pp. 23-25.

[241] Thevissen, 2013, p. 25.

[242] Ibidem, pp. 33-34.

[243] Lewis & Senn, 2010, p. 79.

[244] Ibidem. See also Thevissen, 2013, p. 25.

[245] Thevissen, 2013, p. 137.

[246] Interview with Professor Dr. Patrick Thevissen, cit.

[247] Thevissen, 2013, p. 138.

[248] Ibidem, pp. 25 and 139.

[249] Ibidem, p. 141.

[250] Interview with Professor Dr. Maria Helena Smet, Md. PhD, Department of Radiology, Clinical Head Pediatric Radiology, Universitair Ziekenhuis Leuven, Leuven, 12 June 2014.

[251] Ibidem.

[252] Tanner et al., 1975, p. V.

[253] In case of emergency, instead, the classic method based on the Greulich & Pyle's *Atlas*

Third, the collarbone examination is carried out through the radiography of the clavicle. The radiological assessment aims at evaluating the degree of ossification and fusion of the medial clavicular epiphysis cartilage[254]: depending on its stage of fusion[255] it is possible to estimate the age of the person[256]. This part is the last bone to be completely developed, so this examination is relevant when all the third-molars are mature[257].

This protocol is currently subject to future research, especially with regard to the third-molars exam. The purpose of such study is to obtain uniform and undisputable forensic age estimation[258].

4.2. The Need for a Common EU Policy on Age Assessments

The conclusions that can be drawn from the considerations and the cases illustrated above is that, as anticipated, EU member states adopt different approaches and techniques for age assessment. Moreover there is not always a clear regulation and definition of which methodologies can be used to conduct age estimation[259]. It remains to investigate whether the lack of a standardised approach[260] among EU countries can constitute a threat to unaccompanied migrant children's rights. This question arises from the consideration that, whereas the EU is moving towards a common system regarding asylum, age assessment is instead performed by different means and procedures in each EU state.

In the context of the Dublin system[261] it can happen that the applicant is transferred from one member state to another (because, for instance, a family member resides there)[262]. Article 31 of the *Dublin Regulation* reads that the transferring member state shall transmit to

is used. The radiography of the hand of the person is compared to a series of "typical" (Tanner et al., 1975, p. 2) radiographies contained in the compilation. The user has to match the given radiography to the most similar one: "[t]he maturity recorded is then given by the age that characterizes this closest match" (ibidem).

[254] Interview with Professor Dr. Maria Helena Smet, cit.

[255] The total fusion can be estimated between the age of 20 (female) and 21 (male) and 27 years. Ibidem; refer to Annex.

[256] According to Schmeling et al., 2004.

[257] Thevissen, 2013, p. 34.

[258] Ibidem, pp. 138-139. This sentence has been reviewed by Professor Patrick Thevissen.

[259] As mentioned regarding Italy.

[260] SCEP, 2012, p. 7.

[261] See Chapter I, 2.3.

[262] See Ngalikpima & Hennessy, 2013.

the state responsible the information regarding "an assessment of the age of the applicant[263]." Nothing else is said regarding how different age estimations shall be considered, evaluated or challenged by EU countries. It would be important to ensure the mutual recognition of the age estimation carried out by one state; this measure will avoid distress to the child, who will undergo age assessment, when and if necessary, only once[264]. However such system would work correctly and smoothly only when a primary condition is in place: all EU countries should respect and adhere to the same principles, standards, criteria and guidelines when performing age assessment. Only this situation would allow the proper recognition of the age as determined by another state's authority. Otherwise, the receiving country could question the procedure carried out by the transferring country, with severe consequences for the rights of the person involved[265].

At the moment, however, common standards on age assessment are not foreseen and envisaged homogenously in EU countries. It is true that there are recommendations and good practices on the topic[266], but a proper coordinated framework is still missing. As long as this is the state of the play, it is premature to advocate for mutual recognition of age determination *per se*[267]. In this sense, SCEP's opinion can indeed be shared, since "[m]utual recognition within and between States should be practiced only after harmonization of methods, standards and safeguards concerning age assessment[268]."

[263] Dublin III, Article 31, para. 2: "The transferring Member State shall, in so far as such information is available to the competent authority in accordance with national law, transmit to the Member State responsible any information that is essential in order to safeguard the rights and immediate special needs of the person to be transferred, and in particular: (a) any immediate measures which the Member State responsible is required to take in order to ensure that the special needs of the person to be transferred are adequately addressed, including any immediate health care that may be required; (b) contact details of family members, relatives or any other family relations in the receiving Member State, where applicable; (c) in the case of minors, information on their education; (d) an assessment of the age of an applicant."

[264] SCEP, 2012, p. 11.

[265] There have been cases in which "individuals seeking international protection who have been fingerprinted in the first country of arrival and considered by the authorities as adults, are treated as children in other countries. When transferred back to the first country, they are treated as adults again. In other cases, the age of an individual assessed by a Member State and recorded into the European databases such as Eurodac and the Visa Information System (VIS) is taken for granted by another Member State without questioning the reliability of the assessment carried out" (ibidem).

[266] EASO, 2013.

[267] SCEP, 2012, p. 11.

[268] Ibidem.

5. THE BODY OF UNACCOMPANIED MIGRANT CHILDREN IN THE SPOTLIGHT

It has been explained how the system used by Belgium relies heavily on the medical examination of the body to give an estimation about the age of the person. However, this seems to be something widespread in the EU[269]. The most used technique happens to be carpal X-rays, followed by dental age estimation (through X-rays) and collarbone X-rays[270]. At least one type of medical estimation is present even when diverse methods (classified by EASO as "medical" and "non medical") are combined[271].

Moreover, based on EASO records, the majority of EU member states does not attempt to other approaches before undertaking medical examinations[272]. In particular, the publication[273] indicates how documents presented by the person are taken into account in 23 EU countries out of 28[274] and they serve mostly as a complement to medical assessment.

Reading this data, what catches the attention is the central position that the body of young migrants acquires in migration proceedings due to age assessment procedures. The circumstance that medical examination is largely utilised by EU countries may be explained by the fact that the chronological age measured through such way is linked to features that belong to that specific individual as such. In other words, similarly to what has been observed before regarding biometrics[275], the human body reveals a truth that, otherwise, could remain hidden or unknown. While identity documents can be counterfeited or destroyed, X-rays technology takes a picture of a part of the body as it is in that moment, without possibility to alter it. In the same way, while the child may lie when declaring his real age, radiography lays the body bare and the condition of the bones may tell another reality, which may clash or confirm the child's account.

Hence, medical age assessment is the way through which authorities

[269] EASO, 2013, p. 89 and EMN, 2009, p. 89.
[270] EMN, 2009, pp. 23 and 89.
[271] Ibidem, p. 23.
[272] Ibidem, pp. 87-88.
[273] EASO's findings confirm the outcome of other reports (such as SCEP, 2011 and EMN, 2010).
[274] EASO, 2013, p. 88.
[275] See Chapter II, 2.

assess the "truth from the body[276]" of young migrants. Namely, the aim of X-rays and similar techniques is to draw data from the body that will be later evaluated according to scientific rules and practices. The aim is to translate information taken from the physic into measurable parameters that can be associated and referred to a certain chronological age, with the final objective to categorise the migrant as an adult or a child. The biometric data retrieved from the child's body can be measured, compared, evaluated and eventually stored. This is the same process that takes place regarding other types of biometrics. However, the following important distinction must be made, which highlights the peculiarity and the specificity of age assessment procedures. The use of biometrics in the field of age assessment does not fall into the dichotomy "identification/verification[277]" that characterises the deployment of such data in other migration proceedings. In the case of identification, there is a "one-to-many comparison[278]," because one's identity is searched by confronting biometrics against a database. The second case, instead, involves a "one-to-one comparison[279]," since measured biometrics are checked against the ones coming from a particular person[280]. In both cases, however, a "matching process" is taking place, for the reason that data are coupled to someone's identity. Eventually, biometric values such as fingerprints, iris scan or DNA can reveal who a person is and what is his status as migrant. The discourse is, to certain extents, different with regards to age assessment. Biometrics retrieved from the youngsters' body, instead, provides a set of data that must be firstly interpreted and then, only in a second moment, compared against a database.

In this context, biometrics gathered through medical examinations is not used to identify or verify who that child is; rather, it aims at giving an estimation on a parameter – the chronological age – that is subject to change constantly. It is for this reason that the parts of the body that are taken into consideration for age evaluation are the ones subject to changes and modifications during the life of the individual[281]. Therefore,

[276] Fassin & D'Halluin, 2005, p. 597.
[277] See Chapter II, 2.
[278] Mordini, 2008, p. 250.
[279] Ibidem.
[280] Ibidem.
[281] "Human biological age-related variables are defined as human body parts that change in function of age. [...] In a human body, the optimal age-related variables have been detected in the skeleton and classified in a bone and a dental group" (Thevissen, 2013, p. 19).

the "pitfall" of age assessment procedures lies in the fact that they try to estimate a variable feature (age) relying on physical conditions that are naturally subject to transformation during the time. On the other hand, it becomes clear how it is necessary to rely on such parts of the body in order to get an indication about the stage of the life that person is in, since they develop and modify according to the growth[282] of the individual.

Given these premises, and although it must be acknowledged the progress made by medical science to achieve a higher level of accuracy and reliability, it cannot be denied that age assessment cannot bring to uncontested results. Eventually, the outcome of this process will give an estimation upon which authorities will decide if that person should be considered and treated as adult or child.

Hence, the case of age assessment show adequately how the human body is absolutely central in the governance of migration and asylum. As outlined above, being an adult or a child matters in the EU space, since unaccompanied migrant children are considered as vulnerable persons and therefore entitled to certain benefits[283]. It is (mainly) through the screening of the body that EU member states decide which status the person has the right to receive, whether more or less favourable.

[282] Generally speaking, growth can be affected by disease and malnutrition. Those factors can have an incidence on how certain parts of the human body develop. That is the case, for example, of the clavicle bone (Interview with Professor Dr. Maria Helena Smet, cit.).

[283] See Chapter III, 2.1.

IV.

ASSESSING THE TRUTH FROM THE BODY: CONCLUSIONS FROM THE SELECTED CASE STUDY

1. A DISPUTED ASSESSMENT

In the previous section it has been explained that the body plays a central role in the context of age determination procedures. As referred above, the use of medical examinations is often criticised, not only by human rights advocators, but also by medical practitioners[284]. Nevertheless, as illustrated, EU countries are still resorting to such techniques.

On one hand, one could wonder why states are continuing to invest resources in this direction, even if it is not possible to obtain any exact result, but only an estimation of the age of the individual. On the other hand, in the logic of states' control on migration flows, it is understandable how, at the moment, medical tests seem to be the most effective way to perform age assessment. First, they are rather quick: it is possible to have the results of the examinations in a short period of time[285]. Second, the involvement of other specialists, such

[284] The Royal College of Paediatrics and Child Health of the United Kingdom issued a statement in 2007, openly criticising the routinely use of bone X-rays for age assessment of young asylum seekers: "[T]here is no good research evidence for the use of X-rays for age-assessment, and we urge that the Home Office reviews its position. We accept the need for some form of age assessment in some circumstances, but there is no single reliable method for making precise estimates. The most appropriate approach is to use a holistic evaluation, incorporating narrative accounts, physical assessment of puberty and growth, and cognitive, behavioural and emotional assessments" (The Royal College of Paediatrics and Child Health of the United Kingdom, 2007). However, see further 2.3 and also Thevissen et al., 2012.

[285] As for Belgium, usually the individual receives the results from the Guardianship Service within one or two weeks after the examination (Interview with Ms. Sarah Ganty, Researcher at the Institute for European Studies and at the Perelman Centre, Université Libre de Bruxelles and former lawyer at the Bar of Brussels, Brussels, 27 June 2014). Moreover, regarding the dental age examination, it is possible to obtain the age estimation within 15 minutes after the X-rays results (Interviews with Professor Dr. Patrick Thevissen and Professor Dr. Maria Helena Ŝmet, cit.).

as psychologists, would present another cost for the state. Third, the objection can be that, although medical examinations come with a certain degree of variability, at the same time it is true that they can provide an estimation of the age, based on measurable body variables changing as the age increases.

Therefore, two questions arise from this reasoning. The first regards that human rights can be endangered by such procedures. The second, instead, concerns the way in which age assessment should be carried so to ensure adequate safeguards for the individual.

In order to respond to these questions, the next section will start from a critical analysis of the "Triple Test" as carried out in Belgium, highlighting advantages and flaws of the system. The purpose is to evaluate which are the conditions to be satisfied in order to perform age assessment in a child-friendly and rights-oriented manner. In particular, the research will investigate to what extent the use of medical examinations in this field can comply with the concept of the "best interest of the child." The overall objective is to underline how the body is absolutely central in the management of EU borders, even when it comes to children, who are usually entitled to higher guarantees and standards of protection.

2. BELGIUM'S "TRIPLE TEST": A CRITICAL ANALYSIS

As explained above[286], the "Triple Test" combines three different medical examinations. This procedure is emblematic in the present discourse about the role of the body in the management of borders. In fact, three different parts of the body are taken into consideration, on the basis that they can give information about the age of the person, because they vary as the age changes[287]. The reason why the "Triple Test" is used is because there is criticism regarding the reliability of each examination[288]:

[286] In the previous part it has already been described which are the three medical exams included in the "Triple Test" (see Chapter III, 4.1.1.1). The following sections will focus on the procedural aspects and on the human rights at stake.

[287] In other words, the human body presents variables that change in relation to the age. Such values can be referred to three factors which are related to age: the development of some parts of the body, morphological changes and biochemical changes. There are values that only apply to children (Interview with Professor Dr. Patrick Thevissen, cit.).

[288] EMN, 2009, p. 23.

therefore Belgium's system requires the individual to go through all the three different exams in order to get a more precise estimation about the age. In fact, the result of every single test is cross-checked with the others in order to obtain a final value that is the outcome of such a combination. At first sight, this can seem contradictory for the following reason. As underlined before, the use of medical examinations to perform age assessment (especially the use of hand-bone X-rays) is highly contested from the point of view of accuracy[289] since, at the moment, "[...] there is no scientific or medical assessment process which can solve this problem accurately [...][290]." For this reason, combining three medical tests would seem to multiply the margin of error that is already inherent in each one of the exams. However, the counter argument is that the combination of the three different results can be a way to prove and to counter prove the singular outcomes obtained from each one of the tests in light of the others[291]. This sentence by Professor Patrick Thevissen seems to provide a good synthesis of what has been just observed: "[B]ecause each test considers other biological variables, different age estimates with their associated level of uncertainty are obtained. Multiple test results increase the accuracy of the estimated age, expand the age range possible, and can confirm the test results[292]."

It remains to assess if this system, as foreseen by the legislation and applied in practice, provides enough guarantees to the migrant. Specifically, the question addressed is whether requiring the (presumed) minor to undergo three medical tests, with the aim to reach an assessment of the age as much accurate as possible, can be respectful of human rights and can be in compliance with the "best interest of the child" as stated, first of all, by Article 3 of the CRC. In order to do so, firstly it will be explained the procedure in place in Belgium when the age of unaccompanied migrant children is in doubt. Secondly, it will be analysed the human rights that are at stake.

[289] See, among others: Crawley, 2007, pp. 28-33; Save the Children Italy, 2011a, p. 17; SCEP, 2006, p. 11; The Royal College of Paediatrics and Child Health of the United Kingdom, 2007.

[290] Crawley, 2007, pp. 28-29. "Any parameter variation from a growth source varies as children get older and this variation reduces the degree of accuracy. To this extent, age assessment is not a determination of chronological age but rather an educated guess" (ibidem, p. 33).

[291] EMN, 2009, p. 23.

[292] Thevissen, 2013, p. 32.

2.1. Procedure[293]

When an unaccompanied migrant minor[294] arrives in the territory of Belgium, competent authorities[295] question him about his identity and age. It is surely important to ascertain whether the person is above or under 18 years, since, as explained in the precedent section[296], there are some benefits that come with the minor age[297]. In particular, unaccompanied migrant children are entitled to be assisted by a guardian ("tuteur") from the Guardianship Service[298].

Belgian legislation states that medical tests are immediately undertaken when the age is unknown or the competent authorities have doubts about the alleged age of the individual[299]. In such cases, the unaccompanied migrant is informed that he will need to undergo medical examinations in order to assess his age. In this case, the migrant will be hosted in a facility centre designed for minors, while waiting for the tests to be carried out, which will happen within two weeks after the interview with the Belgian autorithies[300]. It is important to note that not all the hospitals in Belgium can perform the "Triple Test"; there are agreements concluded by the public administration and the hospitals[301].

At this stage the system presents two main weaknesses. The first is that, if the person refuses to undergo the examinations, he will likely

[293] The information contained in the section has been collected through: 1) the interview with Sarah Ganty; 2) the website of the Belgium's Federal Justice System; 3) EMN's report (2009) and SCEP's report (2011).

[294] Regardless if he is an asylum seeker or someone who is willing to travel to Belgium looking for better condition to work and to live.

[295] It can be the case of the Aliens' Office, or of the Police.

[296] See Chapter II, 1.1.

[297] Such as the access to school, the prohibition to be sent back, the access to facilities separated from those of adults and the appointment of a guardian. Moreover, personnel with a particular specialisation in children's issues will deal with the minor (Interview with Ms. Sarah Ganty, cit.).

[298] The appointment of a guardian for unaccompanied migrant children is foreseen by Article 8 of the Programme Law 24 December 2002: "Lorsque le service des Tutelles estime établi que la personne dont elle assume la prise en charge se trouve dans les conditions prévues à l'article 5, il procède immédiatement à la désignation d'un tuteur."

[299] Programme Law, Article 7, para. 1: "Lorsque le service des Tutelles ou les autorités compétentes en matière d'asile, d'accès au territoire, de séjour et d'éloignement ont des doutes concernant l'âge de l'intéressé, il est procédé immédiatement à un test médical par un médecin à la diligence dudit service afin de vérifier si cette personne est âgée ou non de moins de 18 ans."

[300] Interview with Ms. Sarah Ganty, cit.

[301] The EMN's report states that the Guardianship Service has an agreement with three hospitals: KU Leuven, UZ Leuven, Gent, Vrije Brussel (VUB) and Jett (information as of 2009).

be considered as an adult[302]. This does not seem fully respectful of the rights of the person involved. The refusal cannot be considered as a presumption of adulthood. There can be many reasons why the person refuses to take medical test, such as the information is not given in a clear way and in a language that the migrant can understand. Moreover, especially asylum seekers can have hard times in understanding what is going on and what will happen to them, since they carry a burden of tough experiences and they may be scared or suspicious. All these factors should be taken into account by the officials. The fact that the person is actually lying about his real age can be only one of the reasons why he does not give the consent to the medical examinations and therefore should not be evaluated as an implicit admission of adulthood.

The second weakness regards the fact that, between the time of the interview and the assessment of the age, the migrant is not assisted by a guardian[303]. The legislation states that the procedure of age determination shall be carried out under the supervision of the Guardianship Service[304]. In practice, this means that the Service will inform the hospital about the need to perform the "Triple Test" on that person. However, the appointment of the guardian will be made only once the medical test will state that the person has to be considered as a minor[305] and hence will qualify him as "unaccompanied migrant child[306]." Therefore, there is a "gap" between the decision to perform age assessment and the moment

[302] Interview with Ms. Sarah Ganty, cit. The Guardianship Act does not say explicitly anything about what to do in case of refusal: everything depends on the practice of the administration (ibidem).

[303] Ibidem.

[304] Programme, Law Article 7: "[...] Le test médical est réalisé sous le contrôle du service des Tutelles [...]." See also Article 3, para. 2: "Le service des Tutelles coordonne et surveille l'organisation matérielle du travail des tuteurs. Il a pour mission: 1° de désigner un tuteur aux mineurs non accompagnés en vue d'assurer leur représentation; 2° de procéder à l'identification des mineurs non accompagnés et, en cas de contestations quant à leur âge, de faire vérifier cet âge au moyen d'un test médical, dans les conditions prévues à l'article 7 [...]."

[305] Programme Law, Article 8, para. 2: "Si le test médical établit que l'intéressé est âgé de moins de 18 ans, il est procédé conformément à l'article 8. Si le test médical établit que l'intéressé est âgé de plus de 18 ans, la prise en charge par le service des Tutelles prend fin de plein droit."

[306] Article 5 of the above mentioned Law defines who unaccompanied migrant children are. This definition applies only to non-EU citizens: "La tutelle prévue à l'article 3, § 1er, alinéa 1er, s'applique à toute personne: – de moins de dix-huit ans, – non accompagnée par une personne exerçant l'autorité parentale ou la tutelle [...] – ressortissante d'un pays non membre de l'Espace économique européen, – et étant dans une des situations suivantes; soit, avoir demandé la reconnaissance de la qualité de réfugié; soit, ne pas satisfaire aux conditions d'accès au territoire et de séjour déterminées par les lois sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers."

in which the person will be declared minor and will be taken under the guardian's care. The practical consequence is that, during the medical examination, no assistance is provided to the individual. Furthermore, in most of the cases the migrant does not know, and neither he is informed, about the possibility to be assisted by a lawyer[307].

Once at the hospital, the doctor who is performing the test asks basic information to the (challenged) minor, such as the name, the country of origin and the age. The intervention of an interpreter is not envisaged.

The medical report is signed only by one of the doctors who took part in the "Triple Test": precisely, even if examinations are performed by different doctors according to their specialisation, the final results are coordinated only by one who then signs the decision[308]. After about one/two weeks the individual receives the result from the Guardianship Service, which will qualify the migrant as minor or adult on the basis of the advice given by the doctor involved in the test[309].

The decision on the age that is communicated to the person shows only the conclusion of the examinations; it does not include other documents or the calculations that have been made to determine the final result[310]. This succinct decision shows the "average" age of the result of the three tests[311]. Since the outcome is only an estimation of the age, it is also mentioned the range in which the age stands and the standard deviation[312]. In case of doubt, the lowest age is taken into consideration, as provided by the law[313].

2.2. Accuracy of Age Assessment

The issue of accuracy is probably the most problematic and difficult one, because it involves specific scientific knowledge. Each of the three examinations envisaged by the "Triple Test" presents problems of accuracy[314].

[307] Interview with Ms. Sarah Ganty, cit.
[308] Ibidem.
[309] Ibidem.
[310] Ibidem. However, it is possible to request the documentation.
[311] EMN, 2009, p. 23.
[312] Interviews with Ms. Sarah Ganty and with Professor Dr. Patrick Thevissen, cit. See also SCEP, 2011, p. 11 and EMN, 2009, p. 23.
[313] Programme Law, Article 7, para. 3: "En cas de doute quant au résultat du test médical, l'âge le plus bas est pris en considération."
[314] The "Triple Test" is "mainly based on dental-age estimation" (Thevissen, 2013, p. 32):

Each one of the five stages of ossification taken into consideration in the collarbone test refers to a quite wide array of ages: for example, the partial fusion is estimated to happen between the age of 16 and 26 years[315]. Moreover, the results are often difficult to read, because of the two-dimensional type of X-rays technique that is used[316]. As it has been noticed, at the moment "there is an evident lack of reliability in assessing the medial epiphyseal ossification of the clavicle by X-rays for the purposes of estimating chronological age[317]." Turning to the hand-wrist bone X-rays, the main problem is that this exam is based on information that is particularly out of date. The Tanner et al.'s method[318] is dated 1975 and refers to samples of British population[319]. The standards contained in the Greulich and Pyle's *Atlas* (1959 edition)[320] are derived from American population's samples dated 1930-1942[321]. Although the bone-score system foreseen by the first method is a technique that can be applied to all populations, "the means of the maturity scores at given ages vary from one group to another[322]." Therefore, the risk of error and inaccuracy can be major[323] when the age estimation concerns non-Caucasian individuals[324]. In fact, ethnic differences, diseases and other environmental factors (such as nutrition)[325] can influence bone development. Moreover the hand bone X-rays can tell if the fusion of the bones is completed, but it cannot tell since when it has finished[326]. For what concerns, instead, dental X-rays, it must be said that, among

hand-wrist and clavicle examinations are mainly used in order to have a confirmation of the dental results.

[315] See the Annex in this thesis.

[316] Interview with Professor Dr. Maria Helena Smet, cit. The radiography shows only a "flat" view of the interested part, hence anatomic overlaps could hinder the correct vision of the image (Cameriere et al., 2012, p. 923).

[317] Cameriere et al., 2012, p. 930.

[318] See Chapter III, 4.1.1.1.

[319] Tanner et al., 1975, p. V.

[320] This method is used at UZ Leuven in case of emergency, because it is easier to read and faster to elaborate (Interview with Professor Dr. Maria Helena Smet, cit.).

[321] "The standards in the Greulich and Pyle Atlas are derived from a study of healthy white middle-class children in the Cleveland area in the United States in the years 1931 to 1942" (Pederson, 2004, p. 2).

[322] Ibidem.

[323] Mora et al., 2001.

[324] Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé, 2005, p. 2.

[325] Pederson, 2004, pp. 3-4.

[326] Interviews with Professor Dr. Patrick Thevissen and Professor Dr. Maria Helena Smet, cit. See also Chariot, 2010.

the three methods, it is the one less affected by environmental factors[327]. Many studies have reported that the third-molar development is a reliable way for majority age estimation[328]: however, wisdom teeth develop in a variable and non-linear fashion[329] and sometimes they may be missing due to genetic factors or to extraction[330]. Furthermore, studies[331] demonstrated that third-molars development occurs at different times in different populations[332]: for this reason, it is important to use "population specific studies when estimating age from [...] third molars[333]." At the present time, a Belgium database is utilised for this examination[334], because the Belgium database is classifying more juveniles correctly compared to the own country reference data base. As such, an advantage of the doubt for the applicant is implemented[335]. Different aspects of this study are subject to further research: in particular, "an ongoing collection of country-specific third molar data-sets enables a continuous validation of the obtained age predictions and juvenile-adult discriminations between countries[336]."

The highlighted problems with accuracy go hand in hand with the necessity to clearly indicate the margin of error in the age assessment's outcome. The indication of the margin of error can be considered as a consequence of the acknowledgement of the impossibility of having an exact estimation of age[337]. Therefore, it is essential to mention it in the decision, so that the individual can be granted with the benefit of

[327] Interview with Professor Dr. Patrick Thevissen, cit.
[328] Cameriere et al., 2012, p. 923.
[329] Lewis & Senn, 2010, p. 83.
[330] Cameriere et al., 2012, p. 923.
[331] Such as Lewis & Senn, 2010.
[332] Thevissen, 2013, p. 139. "The differences in third molar development between countries were heterogenic, without clear patterns." The magnitude of the differences turns out to be small. As such, there is no evidence for important differences in degree of third molars development (DTMD) between the countries (ibidem). However, the study carried out at KU Leuven about differences in third molar development between countries and their influence on age predictions showed that, in absence of country-specific reference model, the Belgian one was the "most suitable" for dental age estimation (ibidem, pp. 139-141). This study is the only one performed on different countries in a standardised way. This part was reviewed by Professor Patrick Thevissen.
[333] Lewis & Senn, 2010, p. 83.
[334] Interview with Professor Dr. Patrick Thevissen, cit.
[335] Ibidem.
[336] Thevissen, 2013, p. 141. As specified: "[I]n the time frame of the current research it was impossible to collect a country-specific sample from a (black) colored population. Its integration in the already collected data would create a reference covering the major ethnic groups" (ibidem).
[337] SCEP, 2012, p. 10.

the doubt. However, margin of error shall not be confused with the "standard deviation[338]." The latter takes into consideration the average number of individuals that fall within a given range of values[339].

Another critical issue that is common to all three types of examinations is that, at the moment, there is no database that contains the results of the combination of the three tests. The combination is based on experts' scientific knowledge and experience[340] and this presents two main risks. The first is that the result can suffer from subjectivity, because it will depend upon that expert's judgment and experience. The second, instead, is the possibility that the outcome is biased due to the fact that the practitioner who combines the results had conducted one of the three exams[341]. The system could be therefore improved by building up a data set combining information related to the hand wrist, collarbone and dental development[342].

2.3. Human Rights Implications

The concerns expressed above regarding the accuracy of medical tests lead to investigate whether this system offers enough guarantees to the person whose age is challenged. There are three aspects that are particularly worthy to be taken into consideration. The first refers to the assistance that is provided to the person during the procedure. The second concerns the right to an effective remedy to challenge the decision on the age. The third, instead, regards the matter of proportionality and explores to what extent the rights of the individual can be restricted in order to achieve certain aims such as, *in primis*, the securitisation of borders.

[338] Interview with Ms. Sarah Ganty, cit.

[339] "The standard deviation of bone age at a given age is approx 1 year, which implies that in a random group of 7 boys of the same age, there is on average 3 years difference between the most and the least mature boy, i.e. the most advance boy has puberty 3 years before the least advanced" (*What Is Bone Age?*, available at http://www.bonexpert.com/what-is-bone-age, consulted on 16 June 2014).

[340] Interview with Professor Dr. Patrick Thevissen, cit.

[341] Before performing the "Triple Test" a clinical dental examination is performed, in order "to provide a clinical impression of the dental age of the applicant" (Thevissen, 2013, p. 33). Since this examiner may be "biased by seeing and clinically examining the applicant" (ibidem), the other parts of the triple test are performed by "another, independent examiner. If the results of the two experts disagree, the tests are reconsidered until a consensus is reached" (ibidem).

[342] Interview with Professor Dr. Patrick Thevissen, cit.

2.3.1. Assistance and Representation

One of the main reasons of concern is represented by the lack of proper assistance at the time that the "Triple Test" is carried out. As specified, the guardian is appointed only once the person is declared to be under the age of 18; indeed, the system reveals some contradictions. On one hand, before the result of age assessment is communicated, the person is hosted in *ad hoc* facilities, but the guardian is appointed only at a later stage, if that is the case. Thus, the migrant is considered a child only to certain extent. However, it is absolutely relevant to ensure the assistance to the minor even during the phase of age determination. This would be in line with Articles 18, para. 2, and 20, para. 1 of the CRC[343], as specified by the Committee on the Rights of the Child in its General Comment no. 6: "[...] States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified [...]. The guardian should be consulted and informed regarding all actions taken in relation to the child [...]. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings [...][344]." The necessity to provide the minor with assistance during this process is also underlined by the *Core Standards for Guardians of Separated Children in Europe*[345]: "guardians should be appointed before an age assessment is carried out [...][346]." Since Belgium's system grants the benefit of the doubt after the decision about the age has been made, it would be coherent to apply the same principle while that decision is pending. Moreover, the person should be informed about the possibility to be assisted by a lawyer or by a "personne de confiance[347]." Again, this is in line with the opinion of the Committee on the Rights of the Child, which recommends that children

[343] CRC, Article 18, para. 2: "For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children." Article 20, para. 1: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

[344] UN Committee on the Rights of Child, 2005, para. 33.

[345] Goeman, Van Os & Bellander, 2011. The *Core Standards* are a set of recommendations and good practices that have been developed "to inform, guide and influence parties involved in guardianship for separated children, including guardians, social workers and guardianship organizations and State authorities" (ibidem, p. 10).

[346] Ibidem, p. 16.

[347] That is a person who the minor can trust in, who can assist him during the procedure and in keeping the contact with authorities.

should be provided with legal representations when they are involved in "[...] asylum procedures or administrative or judicial proceedings [...][348]."

Providing the migrant with adequate assistance in this moment is particularly relevant also with regard to the matter of informed consent, which has to be obtained from the person before proceeding to medical examinations. The person must be adequately informed on which kind of examinations he will go through and the medical personnel shall mention the patient's consent in the report[349]. Actually, according to the Patient's Rights Law[350], in case of a minor it is upon his legal representatives to give the consent, unless the person seems able to decide reasonably upon his interests. However, such provision raises doubts in two senses. First, if during the age assessment the guardian is not yet appointed, there is no legal representative who can give the consent on behalf of the unaccompanied minor. Second, it is not clear who should assess if the individual is able to take such decision autonomously. Moreover, in case it should be evaluated that the person is "mature enough" to refuse the medical examinations, one could basically question the opportunity to perform the medical age assessment[351]. However, as anticipated above[352], the refusal to give the consent could also be motivated by fear and lack of information.

In conclusion, adequate assistance and representation should be provided also in the context of age determination: "[G]uardians should act as a watchdog[353]" in order to take into consideration the child's voice and to ensure the full respect of migrant's rights.

2.3.2. Right to an Effective Remedy

Another issue that can arise is the lack of effective remedy against

[348] UN Committee on the Rights of Child, 2005, para. 36.

[349] *Circulaire relative à la prise en charge par le service des Tutelles et à l'identification des mineurs étrangers non accompagnés*, 19 April 2004, Article M2. However, this is not always the case (Interview with Msd. Sarah Ganty, cit).

[350] Patient's Rights Law (*Loi relative aux droits du patient*), 22 August 2002, Article 12: "Si le patient est mineur, les droits fixés par la présente loi sont exercés par les parents exerçant l'autorité sur le mineur ou par son tuteur. § 2. Suivant son âge et sa maturité, le patient est associé à l'exercice de ses droits. Les droits énumérés dans cette loi peuvent être exercés de manière autonome par le patient mineur qui peut être estimé apte à apprécier raisonnablement ses intérêts."

[351] Interview with Ms. Sarah Ganty, cit.

[352] See section 2.1.

[353] Goeman, Van Os & Bellander, 2011, p. 19.

the decision on age assessment that the person considers to be wrong. The right to an effective remedy is functional to the protection of basic human rights. Its legal bases[354] can be found in Article 47[355] of the Charter of Fundamental Rights of the European Union and in Article 13[356] of the ECHR.

As said, the communication by the Guardianship Service reports only the estimated age and the margin of error. All the rest of the documents that constituted the ground of the decision have to be requested and, of course, this takes time. Being an administrative proceeding, the final decision by the Guardianship Service can be appealed before the Council of State (*Conseil d'État*). However – and this is the main issue – the judicial procedure can last too long[357]. Consequently, the applicant may not be interested any more in the decision because, in the meanwhile, he would have turned 18 years. In this sense, the real effectiveness of this remedy may be questionable, because it does not allow the person to challenge the decision efficiently. Furthermore, the breach of the right to an effective remedy can also be linked to what is stated above regarding the lack of adequate assistance. Indeed, the fact that the minor is not assisted during the whole age assessment procedure can hinder the possibility to have his rights properly guaranteed, because the "[A]ccessibility of legal procedures requires that individuals are informed about their rights[358]."

2.3.3. Proportionality

The principle of proportionality requires reasonableness between

[354] It is outside the scope of the present dissertation to provide a comprehensive analysis on the right to an effective remedy. See in details Lambert, 2006, p. 36 and Brouwer, 2005, in particular pp. 221 ff.

[355] Charter of Fundamental Rights of the European Union, Article 47: "Right to an effective remedy and to a fair trial. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

[356] Article 13 ECHR: "Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." See Mole, 2008, p. 67.

[357] Interview with Ms. Sarah Ganty,.

[358] Brouwer, 2005, p. 234.

the aim and the means to achieve it. In this respect, it remains to explore whether the restrictions to minors' rights that come with medical examinations can be considered proportionate to the objective of ascertaining their age in case of doubt. Specifically, the question is whether medical tests can be regarded as adequate tools to assess the age even if no undisputable and exact results can be obtained.

Four main points can be raised in order to address the problem of proportionality. The first is the leitmotiv of the debate around age assessment: medical examinations can never give a precise indication of the chronological age, but only an estimate[359]. Thus, the underlying question is whether the system should continue to rely so heavily on medical tests, given that no exact answers can be provided. "Doit-on pratiquer [...] des examens dont les resultats sont si peu fiables?[360]": the answer seems to be negative. As it will be later explained, a different, multidisciplinary and integrated approach is needed. The second point refers to the fact that the techniques "were not designed to assess disputed chronological age[361]," but to monitor growth problems. They were not developed for merely administrative purposes – as it is the case here – but in light of medical intervention[362]. The transformation of their use from medical to juridical[363] can also explain the accuracy deficit. Of course techniques can always be improved, but it has to be considered that they have been created for different purposes. The third point regards the individual's bodily integrity and psychological harm[364]. Those methods require a certain degree of body contact, or have to be performed on the naked body. This is controversial, especially with regard to the culture of the individual and his perception of fear and discretion: for example, problems may arise between a male doctor and a female minor. Moreover, migrants could have suffered torture or other ill-treatments and therefore they may be reluctant and ashamed to unveil their body and reveal scars and other marks[365]. Medical examinations

[359] Aynsley-Green et al., 2012, p. 8.
[360] Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé, 2005, p. 4.
[361] Aynsley-Green et al., 2012, p. 8.
[362] Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé, 2005, p. 4.
[363] Ibidem.
[364] Thevissen et al., 2012, p. 93.
[365] Interview with Ms. Sarah Ganty, cit.

can be a traumatic experience and cause mental distress[366] to individuals that are already in a vulnerable position. The fourth and last point is related to the ethical dilemmas that have been raised regarding the use of ionising radiations without any medical purpose and without any therapeutic benefit for the person[367], but only for administrative reasons[368]. From a medical point of view, it must be said that the amount of radiations is minimal[369] and alternative approaches can be developed[370], such as the use of Magnetic Resonance Imaging[371]. The latter would give more accurate images[372] and, therefore, more accurate results: however, its applicability to age assessment (in particular to dental examination) has yet to be investigated[373]. Moreover, this procedure is time consuming[374] and it has also an important cost that cannot be ignored[375]. From a rights-perspective, instead, even if the use of X-rays does not cause a significant harm to the child's wellbeing, the main argument still recurs: it is ethically questionable to use ionising radiations on children only for administrative reasons. However, since at the moment there are no other valid alternatives and since it does not seem possible to abandon medical tests, the use of X-rays should be assisted by particular safeguards, in order to fully respect and guarantee the rights of the child.

According to what stated above, the idea is that the condition of proportionality is not fully met. The problems with accuracy, bodily integrity and psychological harm seem to be obstacles in the deployment of medical examinations. Notably, the means in place, with the human

[366] Smith & Brownless, 2011, p. 35.

[367] Article 3 of the Directive 97/43/EC states that, when exposing an individual to ionising radiations, "the net benefit to the individual must outweigh the risks" (Cameriere et al., 2012, p. 929). See also The Royal College of Paediatrics and Child Health of the United Kingdom, 2007, p. 1.

[368] Aynsley-Green et al., 2012, p. 8.

[369] Interviews with Professor Dr. Patrick Thevissen and Professor Dr. Maria Helena Smet, cit. "Nowadays, more recent data are also available that compare radiation exposure from medical X-rays with the hazards of everyday living. Based on these studies, the resulting risks from using X-rays in age estimation procedures is very low in comparison to other life risks" (Cameriere et al., 2012, p. 929). See also Thevissen et al., 2012, p. 9.

[370] Cameriere et al., 2012, p. 929.

[371] Thevissen, 2013, p. 141.

[372] It would allow to have a three-dimensional image (ibidem). This can be particularly useful with regard to collarbone examination (Interview with Professor Dr. Maria Helena Smet, cit.).

[373] Thevissen et al., 2012, p. 9.

[374] Ibidem.

[375] Ibidem.

rights issues they raise, do not seem adequate to fully reach the aim, because accuracy cannot be, at the moment, fully guaranteed. The condition of proportionality is met when no less restrictive measures could have been adopted: therefore, it is necessary to investigate whether other alternatives and viable solutions could be considered. However, at the moment there are no other techniques that can predict the age with greater accuracy[376]. Psychological tests are indeed useful and their use should be encouraged[377], but they cannot guarantee (better) accuracy.

3. TOWARDS A HUMAN RIGHTS BASED APPROACH TO AGE ASSESSMENT

In order to overcome the referred concerns, it is necessary to promote a human rights based approach to age assessment. Since, at the moment, it seems that medical age assessment will continue to be used, it is essential to establish adequate safeguards. In other words, medical tests are not wrong *tout-court*, but they need to be performed in a professional way and pursuing the best interest of the child[378].

The principle of the "best interest of the child," as enshrined in Article 3 CRC, has to be taken into "primary consideration[379]" in all actions regarding children. Applying this principle to age assessment procedures[380] means that all measures must not result in any harm for the minor and decisions have to be taken in his favour. This is the position expressed by the Committee on the Rights on the Child in the *General Comment no. 6 of 2005 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*. Age assessment

[376] The Royal College of Paediatrics and Child Health of the United Kingdom, 2007, p. 1.

[377] Those tests are foreseen in Belgium (in the *Circulaire* of 19 April 2004) but not applied in practice (Interview with Ms. Sarah Ganty, cit.).

[378] Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé, 2005, p. 5.

[379] Article 3 CRC: "1. 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. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

[380] Aynsley-Green et al., 2012, p. 3.

should involve not only the physical appearance of individuals, but also their maturity. Moreover, such examination shall be conducted in a child-sensitive manner, "avoiding any risk of violation of the physical integrity of the child[381]" and according the benefit of the doubt to the person. The same principles are enshrined in 1997 UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*. Particularly, it is recommended that medical assessment should be carried out safely and acknowledging its margin of error[382]. In 2009, UNHCR enhanced these safeguards[383], stating that age assessment should not be used in a restricted way to prevent individuals benefitting from their rights. Children must be treated as such and the margin of appreciation shall be considered in a child-favourable manner[384].

In order to ensure the compliance with Article 3 CRC, age determination should be carried out in a professional way: to this extent, there are five main conditions that need to be taken into consideration. First, the minor should be properly assisted[385] during the whole procedure and his informed consent must be obtained prior to any medical test. Second, age assessment must be performed by specifically trained and qualified personnel[386]. Third, the benefit of the doubt must always be applied, as a tool to counterbalance the lack of exact age determination[387]. Fourth, adequate remedies should be available if the person wants to challenge the decision about his age. Fifth, age assessment should be performed in a holistic fashion[388], meaning that it should envisage different approaches, not only the medical one. Priority should be given to the documentation presented by the person or to the one available through the embassy[389]. Medical examinations should be used also in case of "serious doubt [...] and never as a matter of routine[390]," for instance only when documents are lacking or blatantly unreliable. Then,

[381] UN Committee on the Rights of Child, 2005, para. 31.
[382] "When scientific procedures are used in order to determine the age of the child, margins of error should be allowed [...]" (UNHCR, 1997, p. 8).
[383] Smith & Brownless, 2011, p. 11.
[384] UNHCR, 2009, paras. 7 and 75.
[385] Crawley, 2007, p. 193.
[386] Cameriere et al., 2012, p. 932.
[387] EASO, 2013, p. 16. However, this is not always the case in EU member states (ibidem, pp. 86-87) .
[388] Ibidem, p. 25.
[389] When it is not dangerous for the individual himself, as in the case of asylum seekers fleeing state's persecution.
[390] Smith & Brownless, 2011, p. 23.

the holistic approach allows investigating the "maturity" of the person, rather than his mere chronological age. A variety of factors can be taken into account[391], namely the psychological, environmental and cultural ones; the person should be evaluated in his complexity, not only for his physical appearance.

3.1. Re-thinking the Concept of Age

The final consequence of this position is that the approach to age assessment should be, so to say, reversed. Since chronological age cannot be determined with certainty, one could ask if it is necessary to keep on categorising people according to a concept of age that is legal and artificial. The necessity of establishing the numerical age of the person lies on the fact that, as illustrated, law is constructed as a binary system: below 18 and above 18 years. The individual must fit in one of the two groups, otherwise there is no clear definition about the rights he is entitled to have[392]: and the most intuitive way to do so is to assign him a chronological age. However, childhood and adulthood have not the same meaning in every part of the world and in every culture. Crawley wrote about the "(in)significance of age[393]" to indicate how chronological age is important for some legal processes, such as the asylum one, but it can be less relevant for people themselves: for instance, in some culture birth records are not that significant and they are not considered as a recurrence to celebrate[394].

Of course it is important to distinguish between minors and adults, in order to grant a higher protection to the most vulnerable, but perhaps chronological age and its rigid paradigm is not the most suitable way to do it. As an example, one can think of a boy who used to work and to take care of his family in his country of origin. In such case, it is doubtful whether the appointment of a guardian and the consequent limitation of the person's autonomy can be considered as in his interest. The legal age is not always synonym of maturity, autonomy and responsibility[395].

In conclusion, on one hand re-thinking the concept of age by adopting

[391] Ibidem, p. 16.
[392] Bhabha, 2009, p. 427.
[393] Crawley, 2007, p. 17.
[394] Ibidem, pp. 17-19.
[395] Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé (CCNE), 2005, p. 4.

a more flexible and case-by-case approach would allow to provide a fairer balance between the person's needs and expectations. On the other hand, however, this system may be difficult to accommodate with the state's need of reducing costs, ensuring security and controlling immigration.

4. THE BODY AS AN INSTRUMENT OF BORDER CONTROL: DRAWING SOME CONCLUSIONS FROM THE SELECTED CASE STUDY

The aim of the present research is to demonstrate how the body is gaining increasing prominence in the EU policy on migration and asylum. The case of age assessment for unaccompanied migrant children has proved this assumption. In fact, even if there is strong criticism and opposition around medical examinations, EU states continue nevertheless to use them. In this sense, Belgium is indeed peculiar, because it seeks for greater accuracy by multiplying the number of medical tests.

The case of age assessments demonstrates clearly the suspicious approach that states have towards migrant and asylum seekers[396]. This "culture of disbelief[397]" leads states to dispute the age of young migrants more and more often[398]. From a human rights perspective, the primary interest is to have a minor treated as minor and to avoid that possible minors are treated as adults. Instead, states' logic is the opposite: since resources are scarce, it must be avoided to have people cheating on the system and benefiting from rights they are not entitled to.

The increasing use of the body as an instrument of border control arises from this mistrust against migrants[399]. It brings about being diffident towards their stories and therefore to enhance technologies of control[400] that are based on something different and apparently more reliable than documents and personal accounts. In this sense, the human body is "supposed to deliver the 'ultimate truth[401],'" a truth that cannot be counterfeited (like a document) or hidden (like the real age).

[396] Fassin & D'Halluin, 2005, p. 606.
[397] Crawley, 2007, p. 26.
[398] Ibidem.
[399] Ajana, 2012, p. 860.
[400] Zembylas, 2010, p. 32.
[401] Fassin & D'Halluin, 2005, p. 606.

Again, what happens during age assessment procedures is emblematic. In case of doubt, the age is estimated through medical tests. The same will happen if there is a feeling that the child is lying about his real age, or when the child declares his age and he is not believed. The body will be tested and the result will acquire legal value[402]. Paradoxically, if medical examinations find out that the person has to be considered as minor, but in reality he is above 18, he will be granted with child-related rights. The same happens with regards to biometrics: as explained previously[403], this technology creates a permanent link to the body that enables the state to control and to monitor the data's owner.

Through the deployment of such techniques, state exercises its power on the people by means of their body. Through the governance of migration policies, the state considers itself the holder of power on people's body. On the other hand, individuals have the feeling that the state has the supremacy on their body and they are subordinate to the power's will. In migration and asylum policies, then, the body is the tool through which the state shows its power in deciding who is admitted and who is not to enter the society. Therefore, an old pattern is still ongoing and it is the one of the body as an "object of political control[404]." During the years, governments have used the body to express their ultimate power and the monopolistic use of (legitimate) violence[405] on individuals through death penalty, torture and detention. Instead, now, when it comes to migrants, the state uses the body to express its power to include or exclude individuals. Artificial categories are constructed on the basis of the analysis of the physical body: child, adult, refugee, irregular/regular migrant. Through the exposure of their body[406], migrants receive a status, which defines the set of rights they can benefit of. Through the control on their body, political power subjugated migrant population.

In broad terms, the power of the state over the body recalls the concept of biopower elaborated by Michel Foucault[407]. However, while Foucault considers biopolitics as the government on the life of

[402] Ibidem.
[403] Chapter II.
[404] Mordini, 2008, p. 255.
[405] Fassin & D'Halluin, 2005, p. 597.
[406] Ajana, 2012, p. 860.
[407] Foucault, 2008.

the population in order to make it productive and disciplined[408], thus pursuing an "inclusive strategy[409]," here biopower acts on the physical body in order to decide who has to be excluded[410]. Mainstreaming the body in border management brings to de-subjectify[411] the person as a whole and to consider only his external and physical features. Once the political power has taken such control over the human body[412], the individual is reduced to "bare life[413]" and can enter political life only with an act of inclusion by the government[414].

It is in this ultimate sense that the human body functions as an instrument of border control. Individuals have to surrender their body, to unveil[415] it in order to have the chance to be admitted within the state's borders. However, handing over their physical features is not enough: the admission will depend upon the state's final act of inclusion. To this extent, the original concept of biopolitics can be declined as the "biopolitics of otherness[416]": the political power is used on the human body for the purpose of securitisation of the borders and, therefore, to exclude "the other."

[408] Maguire, 2009, p. 9.
[409] Santoro, 2008, p. 274.
[410] Ibidem.
[411] Fassin & D'Halluin, 2005, p. 598.
[412] See Ajana, 2013, p. 579.
[413] Agamben, 1998. See also Ellermann, 2009, p. 2; Zembylas, 2010, p. 35; and Myhrvold, 2011, p. 76.
[414] Zembylas, 2010, p. 35.
[415] Fassin & D'Halluin, 2005, p. 606.
[416] Fassin, 2011, p. 4.

CONCLUSION

The central research question about the role of the body in the management of border control is rooted in the broader debate about the human rights of migrants and securitisation of borders in the EU. The underlying idea is that giving concessions in the name of human rights will go to the detriment of state's security. The discussion is particularly acute in Europe[417], where the expression "fortress Europe[418]" has been used. It is also showed by the amount of resources that the EU is currently investing in the activities of external border control, which is superior to the money allocated to the Refugee Fund and Integration Fund[419]. The use of biometric technology is functional to guarantee security of borders and the human body plays a fundamental role in the development of such policy[420].

As the EU is increasing the use of biometrics, it enhances also the focus on the human body as a source of evidence in migration proceedings. This is what happens in the context of age assessment for unaccompanied migrant children, where medical examinations are used notwithstanding the problems with accuracy and compliance with children's rights. The perception is that unaccompanied migrant

[417] See http://www.whenyoudontexist.eu/amnesty-international-to-create-sandy-beach-on-the-shores-of-the-european-union-summit-in-support-of-news/ (consulted on 24 June 2014).

[418] See http://fortresseurope.blogspot.com/ (consulted on 24 June 2014).

[419] Among the resources allocated to the Solidarity and Management of Migration Flows Programme (SOLID) for the period 2007-2013, 46% was allocated to the activities of external border control, 16% to the Return Fund, 21% to the Integration Fund and 17% to the Asylum Fund (Amnesty International, 2014, p. 9). See also: http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/index_en.htm and http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/table_n1_v_200611_en.pdf (consulted on 10 July 2014).

[420] Mordini, 2008, p. 260.

children are considered *in primis* foreigners and hence a threat to state's security and only in second place they are regarded and treated as minors[421]. It is true that EU legislation dedicates several provisions to the protection of children, especially if unaccompanied[422]; but at the same time, no specific regulation is provided regarding age assessment.

The prioritisation of the fight against fake asylum claimers and irregular migrants[423] has led to the creation of a concept of identity that it is mainly based on the human body. It has very few similarities with the concept of "who that person is": rather, the identity established through border control techniques[424] responds to the question "who that person has to be" in order to be entitled to enter the country. If the person is denied access, his body will carry the "mark of illegality[425]."

Some aspects of the preset topic could be subject for future research. Specifically on the issue of age assessment, a future research could take into consideration different countries in Europe, in order to prepare a comparative study and to identify best practices[426]. Such findings could then be used in order to promote a comprehensive legislation at the EU level. For what concerns, instead, the broader discourse on the human body and the securitisation of borders, it would be interesting to take into account, for instance, the problems raised by the question of how to prove torture. Moreover, also a gender perspective could be included in the research.

In conclusion, it seems important to bear in mind that the challenge is to consider human rights and border control not necessarily as a mutually exclusive relationship. As already argued, the problem is to establish which the limit to the use of the body in border control strategies is. It is not possible to justify every sort of measure in the name of crime prevention and security of the state. It is necessary to take position and to refuse further restrictions to migrants' rights. It seems that for EU member states that moment has come.

[421] Drywood, 2010, p. 316.
[422] As seen in Chapter III, 1.1.
[423] Drywood, 2010, p. 316.
[424] Van Der Ploeg, 1999, p. 300.
[425] Ibidem, p. 299. EURODAC's fingerprints are stored for ten years (EURODAC Regulation, Article 12, para. 1).
[426] As far as the author is concerned, such study is not in place at the moment from an academic perspective.

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Interview with Professor Dr. Patrick Thevissen, DDs, MSc, PhD, Forensic Odontology, Forensic Dentistry, Department of Oral Health Science, Faculty of Medicine, Katholieke Universeteit Leuven, Leuven, 6 June 2014.
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ANNEX

Radiological assessment of the degree of ossification of the medial clavicular epiphyseal cartilage.

FORENSIC AGE DIAGNOSIS

Radiological assessment of the degree of ossification of the medial clavicular epiphyseal cartilage.

1. non-ossified epiphysis: until age 11 years.
2. discernible ossification centre: between age 11 and 22 years.
3. partial fusion: between age 16 and 26 years.
4. total fusion: between age 20(female)/21(male) and 27 years.
5. disappearance of the epiphyseal scar following total fusion: from age 26 years.

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(courtesy of Professor Maria Helena Smet, UZ Leuven)

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