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Combating interests

- Can migrant children challenge State sovereignty?

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Abstract

One of the main principles in international law is State sovereignty. Traditionally, States have almost complete freedom to regulate the admission, residence and expulsion of non-citizen's, but this freedom is slowly being limited. The adoption of the Convention on the Rights of the Child (CRC) 25 years ago lead to extensive development in law in favour of migrant children. The CRC has taken an important role in healing the Refugee Convention's total absence of a child-specific approach. The European framework has followed the lead of the CRC and implemented its guidelines into the Lisbon Treaty and the EU Charter of Fundamental Rights. However, some European countries have still not incorporated the principles of the CRC into their national law and several States still tend to override the full application of the CRC for migrant children in practice.

The CRC armours children with an important weapon - but are they powerful enough to challenge the States?

Against this background, this thesis will examine whether the principle of the best interest of the child (Art. 3.1 CRC) has the possibility to limit or restrict State sovereignty in their field of migration policies.

I encounter migrant children daily at my work at the Swedish Migration Board. In my view, the implementation of the principle of the best interest of the child is merely a standard phrase used in our decisions, rather than an act of assessment. My intention behind this research was to highlight the conduct of the principle in regard to migrant children.

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List of abbreviations

CAFCASS: Children and Family Court Advisory and Support Service

CJEU: Court of Justice of the European Union

CRC: Convention on the Rights of the Child

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EU: European Union

GC: General Comment

Prop: Proposition of the Swedish Government

UKBA: United Kingdom Border Agency

UNHCR: United Nations High Commissioner of Refugees

TEU: Treaty of the European Union

UNICEF: The United Nations Children's Fund

UK: United Kingdom

UKVI: United Kingdom Visas and Immigration

UNHRC: The United Nations Human Rights Council

UtlL: Swedish Aliens Act

Chapter 1: Introducing the issue

1.1 Starting Point: Problem Diagnosis

The traditional view of State sovereignty is that States have the full capacity to control the flow of migrants. The right of a state to control immigration specifies a range within which a State is entitled to a free choice regarding which immigration policy to adopt. Traditionally, States have almost complete freedom to regulate the admission, residence and expulsion of non-citizens (migrants). Hence, this area of free choice is not unlimited as States are being restricted by duties of mutual aid owed to certain potential immigrants.

Migration in Europe is a recurrent topic in today's news. Newspapers report regularly on illegal migrants crossing the borders in to Europe. In addition, European Union countries, of which many still suffer from economic crisis, display a fear for migrants.¹ The election to the European Parliament (May 2014) resulted in far-reaching gains for far-right parties that promote anti-immigrant and, often, anti-Semitic policies.²

The 1951 Convention relating to the Status of Refugees and its amending protocol 1967 (Refugee Convention) does not contain any specific child-provisions. Instead the Convention on the Rights of the Child (CRC) covers as a tool for a child-specific-approach in the determination of migrant children's cases. Article 3.1 CRC stresses that the best interest of the child shall be a primary consideration in all policies concerning children.³ Important to note is the wording of the article, stating that the best interest of the child shall be 'a' primary interest rather than 'the' primary interest. The wording in the article diminishes complete protection for children and acknowledges that there might be other actors that also need to be taken into account, such as the State. Does this imply that States still can regulate the decision-making and procedural assessments of migrant children with the use of their own sovereign powers, or can Article 3.1 restrict

¹ Authors own words

² Al Jazeera, 2014 <http://america.aljazeera.com/articles/2014/5/25/far-right-gains-in-european-parliament-voting.html>. Last accessed on 2014-06-12

³ UN General Assembly, Human Rights Council: resolution on its 9th session, 24 September 2008 A/HRC/9/28 p. 20

States in their national migration policies concerning migrant children and how wide is the margin of appreciation that has been given to Member States in their application of the principle?

Indeed, Article 3.1 has been recognised as an influential actor and the principle is widely accepted in the international field.⁴ Member States of the European Union (EU) have decided to follow a similar approach for the rights of children and incorporated the principle into the Treaty of the European Union (TEU) as well as the EU Charter of Fundamental Rights ('the Charter').⁵ During 2014 the Convention on the Rights of the Child will commemorate its 25th anniversary, the Treaty has since its adoption accomplished a great deal, it is ratified by all European Union countries and as an international treaty in vigour it's a binding obligation under international law. Yet, not all European Union countries have incorporated, according to their national system of incorporation of International Law to National Law, the principle of the best interest of the child and some European Union Member States still tend to override the full application of the CRC for migrant children.⁶ Considering this, Courts such as the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) have been given a major role to interpret the CRC, especially since their jurisprudence hopefully will lead the way in influencing national courts.

1.2 Legal and Scholarly Relevance

In the academic sphere there is a protracted debate on how State sovereignty is being challenged by the flow of migration. This has created a prolonged discussion and led to an extensive body of literature focusing on 'migration as the last bastion of State sovereignty'.⁷

⁴ Van Bueren, G, *The International Law on the Rights of the Child*, 1995 p. 53

⁵ EU, Treaty on European Union, C 325/5; 24 December 2002. Art. 3. The Charter of Fundamental Rights of the European Union, 7 December 2000, OJ L C 346/01 Art. 24.

⁶ Macdonald, A, *Protection Responses to Unaccompanied and Separated Refugee children in Mixed Migration Situations*, *Refugee Survey Quarterly*, vol. 27, no. 4, 20 09 p. 50

⁷ Dauverne, C "Sovereignty, Migrations and the Rule of Law in Global Times, *The Modern Law Review* 67.4 (2004) p.588-615. See also Guiraudon, V, Lahav, G. (2000). *A Reappraisal of the State Sovereignty Debate The Case of Migration Control*. *Comparative political studies*, 33(2),163-195.

Literature and academic research on migrant children also exists on a large variety of topics. Since the adoption of the CRC the principle of the best interest of the child has constantly increased in importance in times of children's cases.⁹ This thesis will however address a whole new spectrum; the specific relevance of the application of Article 3.1 CRC for migrant children and if the boosted position of the principle has limited the sovereignty of Member States in the European Union. As yet, there are no sustained academic analyses on this specific question considering the child-specific approach within this area. The approach of this thesis aims to provide an overview of the legal framework for migrant children and how much legislative power has been left for States to govern their own decisions and policy assessments concerning migrant children. The thesis will also look into the interpretation and implementation of the principle in European Union States, where two European Union countries will be highlighted as examples. Such analysis will provide information on how the principle is being implemented in practice and with this information, it is able to examine if States are being constrained in their sovereign powers regarding migrant children.

1.3 Objective

The central objective of this thesis is to commit research on whether State sovereignty has been challenged by the implementation or application of the best interest of migrant children expressed in Article 3.1 CRC.

This approach aims to provide an overview of the legal framework of Article 3.1 and how the principle has influenced regional and national law. Focus will be on the implementation of the principle in a migrant context. The research in this thesis will provide information on the scope of Article 3, its influence regionally and nationally and to what degree States can use their sovereign powers to control decisions and the procedural steps of migrant children. The thesis will also provide two examples on the implementation of the principle of the best interest of the child in practice in States as

⁹ Hammarberg, T Commissioner for Human Rights, *The Principle of the Best Interest of the Child – What it Means and Demands from Adults*, Council of Europe. May, 2008 Warsaw (CommDH/Speech(2008)10)

Sweden and the United Kingdom. Such analysis will inform the debate on prospective events of eradication of the State sovereignty in this specific matter.

The thesis will be divided into four parts. The first part (Ch. II) will provide information on legislation relevant for migrant children. The Second part (Ch. III) presents an analysis of Article 3 and the interpretation of the principle in Article 3.1. The third part (Ch. IV) will investigate the principle's influence in the European Union (EU). Case law from CJEU and ECtHR will illustrate if countries in Europe are overriding or applying the principle. Part four, (Ch. V) will illustrate the implementation in national States. This will be conducted by the presentation of England's and Sweden's national legislation, practice and jurisprudence, because both States are examples of incorporation of treaties obligations through national legislations. The last part 4 (Ch. VI) will consist of a discussion dealing with the interplay between State sovereignty and the principle of the best interest of the child. The conclusion will disclose the tension between the two areas investigated.

1.4 Research question and sub-questions

This thesis address the following research question:

“Has the increased influence of Article 3.1 CRC concerning migrant children challenged or limited the sovereignty of the State?”

The thesis will further answer the following sub-questions:

- (a) How does Article 3.1 function in regard to migrant children and how has the principle influenced the regional framework in the European Union?
- (b) To what extent does article 3.1 and its existence in international and European legal instruments constrain the actions of national policy makers?

1.5 Method and Materials

This research is primarily done from a traditional legal dogmatic method where primary sources have been interpreted and systemised. The main sources consist of international, regional, national laws and jurisprudence along with general and fundamental principles of law. The collected legal material will be used in order to understand Article 3, its implementation from a migrant context and the influence of the Article in regional as well as national law. A comparative approach will be used to analyse cases from the CJEU, ECtHR and decisions in cases concerning migrant children from national courts. This will be done in order to examine in what way the national courts have implemented the principle in practice, and to what extent international and regional legislation and jurisprudence are being followed. It is also of interest in this research to investigate whether the regional courts limited the States margin of appreciation in their decisions. The Convention on the Rights of the Child has relatively low legal capacity in both Sweden and the United Kingdom. Due to this, the traditional legal dogmatic method is too limiting for the purpose of this research. Legal norms and standards in the field of both migrants and children consist of a pluralistic network of various treaties, documents and guidelines of different legal status. Considering this, I have also included 'soft law' that is normally issued by intergovernmental organisations (United Nations (UN), Council of Europe for e.g.) and more supranational organisations, such as the EU. Alongside with above-mentioned material, additional secondary sources will be used such as, academic literature, articles and project studies. The collected material will be used to provide an analysis of implications illustrating in what way State sovereignty has been affected by the expansion and application of the best interest of the child.

Sweden and United Kingdom both apply the dualist approach in their adoption of legislation. Meaning that there is a need for the States to translate international law into its national legislation before it can be applicable as national law, since national and international law are considered to be independent on each other.¹⁰ There is an

¹⁰ Malanczuk, P, & Akehurst, M 2002, Akehurst's Modern Introduction To International Law, London: Routledge, eBook Collection (EBSCOhost), EBSCOhost, viewed 12 May 2014 p.63

advantage by examining two States with a dualistic approach. An examination of the national legislation will provide information on whether States have made a full and correct implementation of the provisions in the CRC. While for States with the monist approach, there is no need for transformation of the international law since the mere act of ratification on an international treaty will constitute the incorporation of the law into the national legislation.¹¹ Some monist States also consider customary international law or *jus cogens* as directly applicable in their legislation.¹²

The principle of the best interest of the child shall be considered throughout the whole process of applying for asylum, from handing in an application and receiving a guardian to final decision and possible residence permit or return to the country of origin.¹³ Due to the limited scope of this thesis, three areas have been chosen to investigate the implementation of the principle in practice. The three areas chosen provide information on the different stages in the process of the assessment of a child's claim for residence permit. These are detention, age assessment and lastly, the thesis will cover the implementation in the final decision-making of residence permits, such as decisions on family reunification, refugee status or other protection under the national law, the implementation of the best interests of the child in times of return will also be highlighted in regards to a negative final decision. The selected areas are normally recurring subjects in debates concerning the implementation of the best interest principle for migrant children and may shed light on whether the policies that are taken out by States, either to control immigration or in the best interest of the child. The areas will be examined by investigating whether States, in the specific areas, considered the best interest of the child in accordance to the guidelines of assessment, in the same areas, to international and regional framework.

¹¹ Ibidem p.63

¹² Ibidem

¹³ UNCRC, General Comment No 6. CRC/GC/2005/6, Para 19-22, UNHCR Guidelines on Determining the Best Interests of the Child, 2008 p.31

1.6 Delimitation

I have chosen to limit my research to the territorial area within the European Union. The articles of the CRC and legal material presented in the thesis have been limited to provisions that are specifically aimed at dealing with issue of migrant children. Case law from different States of the European Union will be presented but when it comes to a closer investigation of national legal implementation of practice and jurisprudence, Sweden and United Kingdom will exclusively be presented. The selection of the countries is as simple as the author manages the languages in these countries, which simplifies the review of case law decisions, legislation and other legal material. This thesis aim at investigating if State sovereignty is being challenged or limited by ‘migrant children’ which in this research aim to address third-country-national children applying for asylum, both as a part of a family unit or unaccompanied. The term also includes children with cases applying to, or being applied to, in means of family reunification. Children in migration as a subject of family members to students, tourists or migrant workers will not be subjects of this research.

1.7 Criticism of method

Legislation and regulations are constantly developing. It is therefore difficult to claim to provide an exhaustive account of legislation of current presented area. The risk might also be that the interpretation of jurisprudence will be obsolete or replaced by newer regulations. The Dublin (III) regulation is one example of legislation in change. The regulation was adopted in June 2013¹⁴ and became applicable in Sweden and United Kingdom on 1 January 2014. Since the regulation is still relatively new, the Dublin III regulation will be dealt with in parallel to the earlier Dublin II regulation.

I have chosen to include migrant children in times of family reunification and children applying as a part of a family unit. Hence, as you will notice, the main focus will fall on unaccompanied migrant children, especially when it comes to the three areas of best-interest-assessment in times of detention, age assessment, final decision (including possible return). The research might have been more consistent to only include

¹⁴ Official Journal of the European Union, Regulation (E) No 604/2013, 26 June 2013

unaccompanied children or children applying for asylum. In my opinion, cases of family reunification children are often left out from the academic sphere. It was therefore my wish to include and shed a light on whether these children also may have challenged States sovereign powers.

This research aims to examine if States have limited their sovereign powers in advantage over the principle of the best interest of the child. Yet, the thesis will only provide case law from ECtHR and CJEU and merely Sweden and United Kingdom will be examined in terms of their national legislation and practice. Legal traditions differ among the European Union Countries in the integration of international law and so does the application of international law. Since this thesis only represents two countries with a dualist approach, not the whole spectra of the European Union Community will be reflected. However, this thesis does not have the ambition to provide information on a country-by-country basis. In order to draw such conclusions, a much more extensive research will be required. Instead Sweden and UK will be highlighted as two examples providing information on how the principle is implemented and followed.

1.8 Sources

In order to provide information on States obligations towards migrant children the Refugee Convention and the UN Convention on the Rights of the Child and it's provisions have been analysed. The regional legal sources will mainly consist of the Charter of Fundamental Rights, which copied the best interests principle from the CRC. Case law from the European Court on Human Rights and Court of Justice of the European Union will be examined to provide further clarification on interpretation of the Convention on the Rights of the Child and the application of article 3.1 in a migrant context. National legislation and case law have been used to research to what extent member States have implemented and incorporated the principle into national policies and how the principle is used in practice. Soft-law instruments, such as the General Comment (GC) No. 6 on the treatment of unaccompanied and separated children outside their country of origin, No. 12 on the right of the child to be heard and ultimately General Comment No 14 on the right of the child to have his/hers interests

taken as a primary consideration have been used in order to understand the application of Article 3.

The EU regulation is manifested in different types of acts. These acts are placed in the EU hierarchy, where primary laws are consisting of the Treaties and the EU Charter of Fundamental Rights. Second in the hierarchy come EU law of general principles and secondary law, as expressed in Article 289 TEU (such as, regulations, directives and decisions).¹⁵ At the bottom of the hierarchy acts of delegation and implementation exist, which are not legislative,¹⁶ nor will they be presented in this thesis. This thesis will address the EU Charter of Fundamental Rights and again, the Lisbon Treaty, both instruments have been presented in the thesis to provide information on how the Convention on the Rights of the Child has influenced the European Union framework. In addition the Dublin Regulation will be presented in this thesis. Indeed, the European Community exists of a large array of regulations and directives aiming at the treatment of migrants and asylum seekers. However, the Dublin Regulation is relevant due to the received criticism in not taking the best interests of the child into account. The Dublin regulation was recently revised and this research may therefore be considered as up-to-date. In addition, linked to the Dublin system is also the Returns Directive, Asylum Procedures Directive, Family Reunification Directive and Directive on the Reception of asylum seekers. Academic literature and relevant secondary sources have been consulted to clarify the concept and interpretation of the principle in article 3 CRC.

¹⁵ Craig, P, De Burca, G. EU law, text cases and materials, Oxford University Press, 2011 p. 112

¹⁶ Ibidem

Chapter 2: Legal framework from a child migrant context

2.1 The Refugee Convention

The 1951 Convention Relating the Status of Refugees (Refugee Convention) has been described as the “cornerstone of the international refugee protection”.¹⁷ The Convention is the most ratified treaty that addresses people fleeing from acts of persecution.¹⁸ However, it is important to emphasise that merely fleeing from persecution is not seen as a valid claim to receive refugee status. The Conventions criteria’s to receive refugee status consist of an extensive article that requires a location, well-founded fear and the fulfilment of one of the five forms of persecution. The Article providing refugee status is stated under Article 1. A (2) and follows:

”As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹⁹

The Convention also contain some excluding articles that regulate cases where your protection under Article 1 A (2) ceases. You may for instance not have the right to the recognition as a refugee if you acquired a new nationality or voluntarily re-availed yourself the protection of your nationality.²⁰ The Convention also set out some rulings for people whom committed such serious acts that they don’t deserve to receive the protection under Article 1. A (2) This is for example the occasion when there are

¹⁷ UNHCR, Conclusion on the provision of International Protection including trough Complementary Forms of Protection, No 103 (LVI), October 2005. Para 1.

¹⁸ 144 States of United Nations 192 Member States have ratified either one or both instruments of the 1951 Convention relating to the Status of Refugees or the amended protocol adopted in 1967. See <http://www.unhcr.org/3b73b0d63.html>, last accessed on 2014-06-19

¹⁹ Refugee Convention, Art. 1, A (2)

²⁰ Ibidem Art. 1. C (1) and (3). See Art 1(C) for exhaustive list.

serious doubts that a person committed the most severe crimes, such as crimes against humanity, war crimes and genocide.²¹

The articles in the Refugee Convention is age-neutral, the convention does not distinguish between children and adults, neither does the Convention contain any specific articles or references to children. Indeed, some articles do provide information that children actually exist as a subject of migration but these articles mainly address to parents instead of children.²² The drafters did have an opportunity to aim Article 22 of the Convention, 'the right to public education', specifically towards children but instead the article demonstrates the Conventions lack of interrelation to both children and age. The absence of references to children in the Refugee Convention does although not necessarily need to imply that there were no refugee children at the time of the adoption of the Convention. As war often tend to do, the Second World War separated a large number of families and many children lost their family members. This was a consequence of vicissitudes of the war, kidnapping or execution of families. Many children also became victims of being forcibly removed to spend their youth in institutions, these children originated from homes considered as non-Germanic and the children became an object for the 'Germanization'-agenda of the war.²⁴

However, migrant children have been recognised in several international instruments before the adoption of the Refugee Convention, the International Refugee Organisation²⁵ explicitly recognised the special needs for children in times of war.²⁶ Furthermore, in the Final Act of the Conference of Plenipotentiaries unaccompanied children and girls were mentioned with recommendations for governments to adopt

²¹ Ibidem Art 1.F

²² Ibidem. Freedom as parent to religious education of their children (Art 4), and the right to employment of having one or more children possessing the nationality of the country of residence (Art 17(2)(C))

²⁴ Pobjoy, Jason. M. A child's rights framework for assessing the status of refugee children Paper No. 27/2013, University of Cambridge august 2013 p. 8

²⁵ The IRO was created in 1946 in order to organise the mass displacement of people following the Second World War, IRO Constitution, UNGA Res 77, 15 December 1946, Preamble.

²⁶ Bhabha, J. Minors or Aliens? -Inconsistent state intervention and separated child-asylum seekers, European Journal of Migration and Law 3, 3/4 (2001), p.283-284

necessary measures for their protection.²⁷ The document is merely a recommendation and not legally binding but can still be seen as a moral document that requires acts of responsibility from States.

2.2 Convention on the Rights of the Child

Children's rights were for the first time mentioned in the 1924 Geneva Declaration of the Rights of the Child adopted by the League of Nations. According to the declaration "mankind owes to the child the best that it has to give"²⁸. The declaration was followed by other international instruments that put out a special protection aimed at children, in 1959 the United Nations adopted the Declaration of the Rights of the Child that offered a more comprehensive declaration than the one from 1924.³⁰ In addition, the special protection for children has also been mentioned in the 1949 Geneva Conventions as well as the Universal Declaration of Human Rights.³¹

Hence, the adoption of the Convention on the Right of the Child was a breakthrough in many areas of children's rights. Except for the fact that the CRC does not permit derogation from any of its provisions at any time, this was the first time that an international legal instrument articulated a full set of rights applicable to only children.³² Secondly, the CRC was also the first instrument to identify children as right-bearers acknowledging them as active holders of their own rights.³³ Additionally, the CRC has accomplished the astonishing achievement of near-universal acceptance and the CRC and its Optional Protocols are legally binding to all its ratifying nations. Worth mentioning also is that the CRC provides a monitoring body that requires regular

²⁷ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Person, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, A/CONF.2/Rev.1, 25 July 1951

²⁸ Geneva Declaration of the Rights of the Child of 1924 adopted Sept 26, 1924, League of Nations O.J. Spec. Supp. 21 at 43 (1924)

³⁰ Declaration of the Rights of the Child, UNGA Res. 1386 (XIV) 20 November 1959 is providing 10 principles for the protection of Children.

³¹ Declaration on the Protection of Women and Children in Emergencies and Armed Conflict, UNGA Res. 3318. 14 December 1974 and the Universal Declaration on Human Rights, UNGA Res. 217 (III) 10 December 1948. Article 25(2) stress that childhood is entitled to special care and assistance.

³² Juss, S. S., & Harvey, C. (Eds.). Contemporary Issues in Refugee Law. Edward Elgar Publishing. 2013 p.106 and Contra. ICCPR Art. 4.

³³ UNICEF, The State of the World's Children: Celebrating 20 years of the Convention on the Rights of the Child (2009) p. 2

reports from the Member States and provides State parties with guidance on application and interpretation of the treaty.³⁴ The CRC gives space for the States themselves to interpret and implement the treaty as long as the four core principles³⁵ are being respected. States also have guidance of implementation from the General Comments as well as the general measures of implementation established by the Committee on the Rights of the Child.³⁶

2.3 The interplay between the Refugee Convention and the CRC

The Refugee Convention has been described as inadequate in meeting the protective needs of children in a migrant context. A reason for this may be the definition in the Refugee Convention which is written in such way as it aims to reflect an adult male norm and excludes norms that differ too much from the drafters intended refugee, as for example children.³⁷ Surprisingly though, is that the articles of the CRC neither address explicitly to migrant children, nor does it provide with a satisfactory direct legal protection for migrant children. The only article that is addressed directly to refugee children is article 22 CRC that endorses the right to appropriate protection and humanitarian assistance. Instead, child migrants receive their protection by cross-referencing the body of the CRC and the Refugee Convention.³⁸

The Refugee Convention does not provide any legislation in the procedures around the refugee status determination, instead this has been left for the Member States to decide.³⁹ Yet, the CRC contains a number of articles that could be interpreted as guidance on the determination of refugee status. The interlinked relationship between the Refugee Convention and the CRC has been expressively stated in the General

³⁴ Ibidem. p. 6

³⁵ Non-discrimination (Art. 2), the Best Interest of the Child (Art. 3), the Right to be Heard (Art. 12) and the Right to Life and Development (Art. 6).

³⁶ UNICEF The State of the World's Children: Celebrating 20 years of the Convention on the Rights of the Child, (2009) p. 6

³⁷ Nykänen, E "Protecting children? The European Convention on Human Rights and child asylum seekers" European Journal of Migration and Law 3.3 (2001) p.318

³⁸ Goodwin-Gill, G. S and McAdam, J. The Refugee in International Law. Oxford University press, New York, 2007. p. 475

³⁹ The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating the Status of Refugees (UNHCR, Geneva, 1992) was written in order to guide governments in the creation of their own asylum policies,

Comment No. 6 dealing with the treatment of unaccompanied and separated children outside their country of origin. The same paragraph stresses the importance of interpreting the definition of the Refugee Convention in an age and gender sensitive manner and taking into account ‘the child-specific forms and manifestations of persecution’⁴⁰. The important relationship between the Conventions has also been recognized both by the CRC and the UNHCR.⁴²

The four core principles of the CRC are; the principle of non discrimination (Art. 2), the best interest of the child (Art. 3.1) and the right of the child to express views on all matters affecting him or her and to have these opinions taken into consideration (Art. 12). These are the most important articles of the Convention that needs to be taken into account in the procedural treatment and final assessment of migrant children. The three mentioned rights reinforce each other to reach the objective of the last fundamental principle, the right to life, survival and development (Art. 6).⁴³

Despite all the material providing assistance in both treatment and assessment of migrant children, the domestic approach to this work still tends to consider the children as applicants as migrants first and children second.⁴⁴ This is one of the arguments aiming at the wide latitude of interpretation that the states have been given within the Child Convention.⁴⁵ Except for the abstract formulation in the CRC many of the parties to the Convention have made wide reservations that exclude their responsibility to non-citizens and there has also proven to be a large difference in implementing the CRC and actually enforcing it in practice.⁴⁶

⁴⁰ CRC, General Comment No. 6. Para 74

⁴² UNHCR, Guidelines on International Protection No.8: Child Asylum Claims under Articles 1(A) and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 22 December 2009 para.13

⁴³ UNICEF The State of the World’s Children: Celebrating 20 years of the Convention on the Rights of the Child. (2009) p. 6-7

⁴⁴ Bhabha, J. Minors or aliens? Inconsistent state intervention and separated child asylum-seekers, 2001 p. 293-294

⁴⁵ Detrick, S, A Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers, 1999 p.7

⁴⁶ Reservations are mainly targeted to art 10 and 7, see Bhabha, J. Arendt’s Children: Do Today’s Migrant children have a right to have rights? Human Rights Quarterly 31.2. 2009, p. 422

The Committee on the Rights of the Child has in its General Comment No. 14 commented on the wide flexibility of the concept on the best interest of the child and expressed that it leaves some room for manipulation by Governments and other State authorities. Both when it comes to justifying its own interests but also by professionals who could not be bothered and dismisses the assessment of the child's best interest as irrelevant or unimportant.⁴⁷

Chapter 3: The complex character of Article 3 CRC

3.1 The development of the best interest of the child

The idea of the principle of the best interest of the child is not a new concept in international law, the fact is, that the principle has existed far longer than the CRC itself. The birth of the principle can be traced back to the 1959 Declaration of the Rights of the Child. However, the wording differed somewhat from the one being used today, the 1959 Declaration outlined that the best interest of the child shall be the 'paramount consideration' in the 'enhancement of laws' concerning children.⁴⁸ The concept of the best interest of the child has since developed and is highlighted in several other international human rights instruments.⁴⁹ The most recognised principle of the best interest of the child today is the one stated in Article 3.1 in the Convention on the Rights of the Child, and follows:

“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”.⁵⁰

Article 3 of the CRC is divided into three sections all dealing with improving the application of the best interest of the child. Article 3.2, in difference from 3.1, aims at

⁴⁷ CRC General Comment No. 14, CRC/C/GC/14 2013, Para 34

⁴⁸ Collins, T & Senator Pearson, L, Personal Representative of the Prime Minister to the UN Special Session on Children. What does the 'best interests of the child' mean? Discussion paper April 2002 p.2

⁴⁹ Alston, P ” The best interest principle towards a reconciliation of culture and human rights”, International Journal of Law and the Family 8, (1994) p.3-4

⁵⁰ Art.3.1 CRC

one single group of actors, States. The State is according to the article obliged to ensure necessary protection and care for children in all circumstances without interfering with the rights and duties of parents. The third section, Article 3.3 requires that ‘competent bodies’ establish standards for all institutions, services and facilities dealing with children and additionally, obligates states to ensure the compliance with the outset standards.⁵¹ The principle has not only been recognised as a part of several international and national legislations, it has also gained general acceptance in the legal analyses in the international field. An example of this is the increased references from the European Convention on Human Rights and the individual communications under the Optional Protocol.⁵²

Despite this it is often argued that Article 3 of the CRC often is misunderstood or overruled by Member States. Philip Alston, an academic in the field, believes that one reason might be that the Convention is widely accepted as an uni-dimensional document and ratifying States expect the Convention to bring a unified viewpoint on children’s rights and provide a comprehensible solution that can be applicable in all kinds of violations against children.⁵³ Alston argues that it is of high importance to develop a better understanding for the complex nature of the CRC in order to address the entire range of major issues affecting children globally as well as nationally and locally.⁵⁴

3.2 Scope and complexity of Article 3 CRC

In order to understand the complex character and the full application of the article, this chapter will provide a review of the language used in article 3.1. The article will be broken into four sections and will thereafter be scrutinised after its wording.

‘All actions concerning children’

Examining the section of the first phrase of the article, it is clear that it is children that are the right-bearers of the provision. The definition of a child is stated in the first

⁵¹ Collins, T, Senator Pearson, L What does the ‘best interests of the child’ mean?, April 2002 p.3

⁵² Alston, P. The best interest principle towards a reconciliation of culture and human rights, International Journal of Law and the Family 8, 1994, p.4

⁵³ Ibidem p. 2-4

⁵⁴ Ibidem

Article of the CRC.⁵⁵ During the preparatory work of the Convention, the Working Group discussed other ages, differing between 14 to 16 to be the ages of adulthood.⁵⁶ In the end, a compromise allowing States themselves a certain amount of sovereignty was reached, stating: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.⁵⁷ ‘Actions’ in the phrase is meant to include decisions but also acts, conduct, proposals, services, procedures and other measures.⁵⁸ Inaction or failure to take action is also considered to fall under ‘actions’ under this provision. This is for example applicable when social welfare authorities fail to take action when children are victims of neglect or abuse.⁵⁹ Notable also is that the principle refers to ‘all actions concerning *children*’, while, in the end the principle aims at ‘the best interest of the *child*’. This plural approach may imply a broader coverage for the principle of the best interest of the child.⁶⁰

‘By public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’

The first phrase in Article 3.1 also provides information of both right-bearers and duty holders. The suggestion on extending the duties to parents and guardians were proposed in the initial process of the creation of the Convention.⁶¹ Some argued that the inclusion of additional duty holders would provide a greater protection for the child, while others questioned if an international Convention as the CRC really could impose such obligations on parents and guardians.⁶² The final result of the article excludes parents and guardians but includes both the public and private sector. Nevertheless, the idea

⁵⁵ Art. 1 CRC

⁵⁶ Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1989/48, 1989. Para 82

⁵⁷ Art. 1 CRC

⁵⁸ CRC General Comment No. 14, CRC/C/GC/14 2013. Para 17

⁵⁹ Ibidem. Para 18.

⁶⁰ Alston, P. The best interest principle towards a reconciliation of culture and human rights, *International Journal of Law and the Family* 8, (1994), p. 14

⁶¹ UNHCR, *Legislative History of the Convention on the Rights of the Child*, Vol. 1 2007, p. 337

⁶² Ibidem p. 339

with Article 3.1 is to function as a general principle that could impose obligations even without amounting to a regulation per se.⁶³

'The best interests of the child'

Moving on to observe the language used in the principle with 'the *best* interests of the child'. The choice of word in the phrase 'best' may also function as an eliminative actor since children have all kinds of interests, which does not necessarily need to be included in the child's *best* interest.⁶⁴ Though, the importance still rests with the determination of those interests, which also is the main challenge in the application of the principle.⁶⁵ The same argument was raised during the drafting of the Convention where criticism against the concept of the 'best interest of the child' was brought up. The raised issue of criticism was that the concept would bring the interpretation of States apart rather than bring the legislation of the various States closer together, risking the Convention to fail as a reference document among its member States.⁶⁶ The term 'best interests' refers to the well-being of the child. The assessment of well-being is based on a variety of circumstances differing among each singular child. Age, level of maturity, presence or absence of parent/s along with the child's surrounding environment and personal experiences are indicators that need to be scrutinised while determining the best interests of the child.⁶⁷

The fact is that the CRC does not contribute with any interpretation on a determination on the best interest of the child and the main responsibility of implementation of the principle is first and foremost the State's responsibility.⁶⁸ The principle is indeterminate and we can never know for sure what the best interest of the child is, neither can the actors agree on what values are important in the determination.⁶⁹ It is however stated

⁶³ Parents are not explicitly mentioned in the final provision but their obligations can be found in Art 18.1, stressing that the best interest of the child 'will be their basic concern'

⁶⁴ Alston, P "The best interest principle towards a reconciliation of culture and human rights", International Journal of Law and the Family 8, (1994) p. 12

⁶⁵ Ibidem.

⁶⁶ UNHCR, Legislative History of the Convention on the Rights of the Child, Vol. 1 2007, p. 341-342

⁶⁷ UNHCR, Guiding principles on Determining the best interests of the child, 2008 p.14

⁶⁸ Ibidem p. 26

⁶⁹ Thomas, N. O'kane, C. When children's wishes and feelings clash with their 'best interests'. The International Journal of Children s Rights, 6.2 1998 p.138

that it is necessary to adopt the concept of the child's best interests on a case-by-case basis and its up to the duty holders of the provision to clarify the concept and make concrete use thereof.⁷⁰ It should always be adjusted and defined on an individual basis, taking into consideration the child's personal context, situation and needs.⁷¹

'Shall be a primary consideration'

The formulation used in the principle, 'a primary consideration', is of paramount importance in this thesis. The adoption of the wording 'a' instead of 'the' primary consideration eliminates the situation that the child's best interest always will be the superior. Instead it allows children's interests to be weighed against other competing actors, such as the interests of parents, the State or immigration control.⁷² The wide space of interpretation in Article 3.1 may also address the fact that children might not always be the primary actor in certain proceedings. Situations where this might occur are, for example, during divorce proceedings where children might be involved but where the outcomes are mainly based upon the wishes of the involved adults.⁷³ Medical emergency during childbirth is another situation, which has been mentioned where additional parties might have the superior legal interests.⁷⁴ Additionally, the consideration may also differ, depending on the special situation of the child, such as dependency, maturity, legal status and voicelessness of the child.⁷⁵

During the drafting of the article it was actually proposed that the State's interests should be prior to the interests of the child.⁷⁶ Although, the final choice of the use of 'a' primary interest has been claimed to instead impose a burden of proof on actors whom are about to make a non-child-centred approach.⁷⁷ The Committee has also stated that it is important to have in mind that, the provision recognise the best interests of the child

⁷⁰ CRC General Comment No. 14, CRC/C/GC/14 2013. Para 32

⁷¹ Ibidem

⁷² Collins, T, Senator Pearson, L. What does the 'best interests of the child' mean? April 2002 p.2

⁷³ Van Bueren, G. The International Law on the Rights of the Child, 1995 p. 62

⁷⁴ Alston, P. The best interest principle towards a reconciliation of culture and human rights, International Journal of Law and the Family 8, 1994, p. 12

⁷⁵ CRC General Comment No. 14, CRC/C/GC/14 2013. Para 37

⁷⁶ Alston, P. The best interest principle towards a reconciliation of culture and human rights, International Journal of Law and the Family 8, 1994, p. 12

⁷⁷ Ibidem

with high priority and shall not just be measured as one of several considerations. A larger weight needs to be given to what assists to the child's best.⁷⁸ When a child's best interests are in conflict with other rights in the Convention or even other actors rights, it is important to weigh all the various elements into the assessment ensuring that the child's interest is 'a primary consideration'.⁷⁹

Noteworthy also is the use of '*shall* be a primary consideration', where *shall* be, puts out a strong legal obligation, ordering States to assess and ascribe children's best interests as a primary consideration in any actions undertaken.⁸⁰ 'Consideration' in the article promotes that the child best interests are actually considered. The conduction of the consideration must be genuine rather than formal and must ensure that all aspects of the child's best interests are being addressed to.⁸¹

3. 3 Interrelation between Article 3 and other articles of the CRC

The Child Convention is indivisible and Article 3 is interdependent to other provisions in the Convention in times of child migrants. The significance of the Conventions three other core articles, Article 2, Article 6 and Article 12, have already been mentioned as essential to understand the nature of the CRC. Interpreting the principle of the best interest of the child in the light of the CRC by taking Article 3 in conjunction with other rights enshrined in the Convention, the principle appears in a more determinate way and are able provide more guidance on the interpretation on the best interest of the child.⁸² The rights expressed in the Convention are all dependent on the assessment of the principle of the best interest of a child, the assessment can either allow the exercise of a right or protect the child, in situations where the best interests of the child might be hampered. A situation on the prospect might occur in regard to the child's right to family reunification (Art.9), the right is not absolute and can only be applicable

⁷⁸ CRC General Comment No. 14, CRC/C/GC/14 2013. Para 39

⁷⁹ Ibidem, Para 80-84

⁸⁰ Ibidem Para 36

⁸¹ Alston, P. The best interest principle towards a reconciliation of culture and human rights, International Journal of Law and the Family 8, 1994, p. 2

⁸² Alston, P, Gilmour-Walsh, B. The best interests of the child: towards a synthesis of children's rights and cultural values, 1996. p. 2

depending on a concrete assessment on the child's best interest. By taking Article 9 in conjunction with Article 3 the child's right to family reunification can be restricted in cases when the child might be a subject of abuse or neglect.⁸³ Article 3 is also able to provide guidance or resolve possible conflicts among the other rights in the Convention or in other Human Rights instruments.⁸⁴ Nevertheless, even though the principle of the best interest of the child have been given one of the major roles in the CRC, it can still not be used with the purpose to override any of the other provisions in the Convention.⁸⁵ For children in a migrant context several articles of the CRC may play an interdependent role with Article 3 and are important to have in mind when dealing with cases concerning migrant children.⁸⁶ A selection of these, and its interrelation to Article 3 in regards to children in a migrant context will be presented in this chapter.

Non-discrimination

The principle of non-discrimination enshrines that all children within a State's jurisdiction are entitled to protection under the CRC. In this sense, children that are refugees, asylum seekers, other migrants and rejected asylum seekers should be enabled the same protection under the CRC as children holding citizenship within the State.⁸⁷

The right to be listened to

The child's right to be heard and to have ones views listened to and taken seriously (Art. 6) has been given a major role in the treatment of children in a migrant context and is also one of the major objectives that needs to be taken into account to make a decision in accordance with the best interest of the child.⁸⁸ The right of the child to be heard is applicable both during the original administrative decision-making process as well as possible subsequent judicial review.⁸⁹ The General Comment on Article 12 highlights

⁸³ UNICEF, *Judicial Implementation of Article 3 of the Convention On the Rights of the Child in Europe*, June 2012 p.12

⁸⁴ CRC General Comment No. 14, CRC/C/GC/14 201333

⁸⁵ Alston, P, Gilmour-Walsh, B. *The best interests of the child: towards a synthesis of children's rights and cultural values*, 1996. p. 2

⁸⁶ Art 7, art 8, art 9, art 10, art 16, art 20, art 21, art 30, art 37, art 38, art 39 and additional articles in the Optional Protocol to the Rights of the Child on the involvement of children in armed conflict. Selection of Articles is gathered from CRC General Comment 6, CRC/GC/2005/6, September 2005

⁸⁷ Juss, S, Harvey, C. (Eds.) *Contemporary Issues in Refugee Law*, 2013 p.105

⁸⁸ CRC General Comment 6, CRC/GC/2005/6, 2005 Para 23-24

⁸⁹ CRC, General Comment No. 12, CRC/C/GC/12, 2012, Para. 32

the importance to hear children of all ages, since children even at a young age might still be bearers of their own claims for refugee status or grounds for residence permit.⁹⁰ General Comment 6 stresses that the perspective of the child shall be vital in all decisions concerning themselves.⁹¹ However, likewise the interpretation of the wording in Article 3.1, this does not imply that children will have the final say in decisions. Instead, the child's views will be weighted against other considerations that in the end may be deemed to be more significant than the child's view.⁹² Aspects as information, experience, environment, social and cultural expectations, and different levels of support may all be taken into account in order to shape an understanding of the capacity of the child and to what extent the child's view shall be taken into account. This shall always be determined on a case-to-case basis where age should never be the sole determinative indicator.⁹³

The Right to Life and Development

Article 6 obliges states to ensure that children survive and develop healthily. Governments are also responsible to protect the child's right to life. This is a wide article that is dependent on the fulfilment of several other articles of the Convention. For children in a migrant context for example, the right to education, family reunification, adequate standard of living and information about ones rights are necessary for the children's development.⁹⁴ In addition, it has been generally accepted that the CRC provides a complementary basis for protection of the principle of non-refoulement as the one stated in article 3 of the Refugee Convention.⁹⁵ The assessment

⁹⁰ Ibidem Para 20-21

⁹¹ CRC, General Comment No. 6, CRC/GC/2005/6 2005, Para 25

⁹² Thomas, N. O'kane, C. When children's wishes and feelings clash with their 'best interests'. The International Journal of Children's Rights, 6.2 1998, p. 137

⁹³ CRC, General Comment No. 12, CRC/C/GC/12, 2012, Para 28-29

⁹⁴ UNICEF, www.unicef.org/crc/index_30177.html and www.unicef.org/crc/file7Survival_development.pdf Last accessed on 2014-05-03

⁹⁵ Can be interpreted from Art. 6 and Art. 37 of the CRC. The UNCRC have stated that children shall not be returned to his or hers country of origin where there are a 'substantial grounds for believing that there is a real risk of irreparable harm to the child' GC No.6, CRC/GC/2005/6 2005 Para. 27. Similar to the ICCPR this derives from the States obligation to respect and ensure the obligations set out in the CRC.

should be taken out in regards to age, gender and the serious consequences for children when they are at risk of insufficient provision of food or health services.⁹⁶

Appropriate measures for refugee children

Article 22 is the sole article in the CRC that expressly address refugee children, unaccompanied or accompanied. The article requires States to ‘take appropriate measures’ to ensure protection for any child applying for asylum. The Article viewed in the light of the principle in Article 3.1 constrains States to ensure continuity and care considering the best interests of the child.⁹⁷ When assessing an asylum claim, States must take into consideration the child-specific-persecution, such as under age recruitment, trafficking and sexual exploitation, female genital mutilation or other age and gender violations that constitutes well-founded fear among children.⁹⁸

The best interest of the child

This concept has been presented already with some guiding material on how to interpret the principle with regard to migrant children do exist.⁹⁹ The UNHCR has developed their own guidelines on how to determine the best interest for children, the guidelines are adopted as a tool for UNHCR and its partners in the field but may still contribute to States in their guidance of a best interest determination.¹⁰⁰ Several issues are important to take into account when implementing the principle in practice. First, a rights based framework and the need to apply the concept of evolving capacity is essential for the implementation of the principle. The best interest of the child is individual and needs to be decided in regard to each specific case.¹⁰¹ Secondly, the best interest of the child must be a primary consideration in all actions concerning migrant children. The principle shall be considered throughout the whole procedure during all stages of the

⁹⁶ CRC, General Comment No. 6, CRC/GC/2005/6 2005, Para 27

⁹⁷ Art 22 CRC, Art 3 CRC

⁹⁸ CRC, General Comment No. 6, CRC/GC/2005/6 2005 Para 59 and 74.

⁹⁹ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, General Comment 6 on unaccompanied and separated Children, CRC, General Comment No. 6, CRC/GC/2005/6 2005, and UNHCR, Executive Committee (ExCom) Conclusion No.107 on Children at Risk, 2007, are all valuable interpretative sources.

¹⁰⁰ UNHCR, Guidelines on Determining the Best Interests of the Child, May 2008 p. 10

¹⁰¹ CRC General Comment No. 14, CRC/C/GC/14 2013, Para 11

displacement of the child until a durable solution has been implemented.¹⁰² Additionally, traditional and cultural views of the State may contribute in the assessment of the best interest of the child. In highly industrialised countries the best interest of the child may be executed by policies of individuality while more traditional societies link the best interest of the child to the family or the community. It is therefore important to apply the principle from the individual preferences of the child.¹⁰³

Additional articles in interrelation to article 3 and applicable during the procedural steps of the migrant child

During the process of dealing with a child's asylum claim, there are other areas where the child's best interest will play an interdependent role together with other articles of the CRC. Each situation for migrant children is unique and their conditions are effected by a number of factors, which all should be considered in order to make a 'best interest determination' for the individual child. The principle is normally weighed several times when dealing with the cases of migrant children, the steps of the assessment may for example include whether family reunification in the home country is in the best interest of the child.¹⁰⁴ In this regard Article 3 is not to be considered as a freestanding article but as an article in reference to all other articles in the Convention, or even all other human rights beyond those expressed in the CRC.¹⁰⁵

Age Assessment

Additional steps where an assessment of the best interest of the child is necessary are for example in occasions where the child may be a subject of age assessment. This step is in many States a criterion in order to identify the applicant as a child and is also interlinked with the prioritized identification in Article 8 CRC. An age assessment cannot only be assessed on the basis of the physical appearance of the individual but also the psychological maturity. The assessment can't endanger the safety of the child

¹⁰² CRC, General Comment No. 6, CRC/GC/2005/6 2005 Para 19-22

¹⁰³ Alston, P. The best interest principle towards a reconciliation of culture and human rights, *International Journal of Law and the Family* 8, 1994, p. 3

¹⁰⁴ UNICEF, *Judicial Implementation of Article 3 of the Convention On the Rights of the Child in Europe*, June 2012 p 12

¹⁰⁵ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. *Working with refugee children: Current issues in best practice*, Immigration Law Practitioners Association, May 2011 p. 15

nor consist any violation of the physical integrity of the child. The individual shall always be given the benefit of the doubt when uncertainty remains.¹⁰⁶ States need to have in mind that children might have a hard time providing documents proving their age, particularly since a child's birth might never have been registered or identity documents might never have been issued in the child's country of origin.¹⁰⁷ Age assessment can be seen as a double-edged-sword since it may appear in the shape of a key to the protection specifically given to children, but it may also consist of inappropriate age determination techniques and the existing medical assessment methods often includes a margin of error with at least two years.¹⁰⁸

Detention

Migrant children may also be subjected to detention. Article 37 CRC applied with the best interest of the child expresses that children should not, as a general rule be subjects of detention and is only exceptionally justified as a measure of last resort and for the shortest appropriate period of time.¹⁰⁹ Detention can never be justified with the mere element that the child is a migrant.¹¹⁰ The Special Rapporteur on the human rights of migrants stated that it should never be considered to be in the best interests of the child to be detained.¹¹¹

Durable solutions and return

The different steps of assessment on the best interest of the child is also necessary even in those circumstances when the child has received its final decision of residence permit. It is applicable both in times of offering the child a residence permit or negative decisions when the child receives a decision about expulsion. In times of expulsion children can only be returned to their country of origin if it is in 'the best interest of the child' and may only be implemented after careful balance between the child's best

¹⁰⁶ CRC, General Comment No. 6, CRC/GC/2005/6 2005, Para 31 (A)

¹⁰⁷ UNHCR, Refugee Children: Guidelines on Protection and Care, 1994. See Part I

¹⁰⁸ UN Human Rights Council, A/HRC/15/29, 2010 Para 42,

¹⁰⁹ CRC, General Comment No. 6 CRC/GC/2005/6, 2005 Para 61 and Art. 37 (A) – 37 (B).

¹¹⁰ UN Human Rights Council, A/HRC/15/29, 2010 Para 52

¹¹¹ Ibidem Para 62.

interest and other considerations.¹¹² The General Comment No 6 stipulates that ‘non-based rights, such as those relating to general migration control, can not be used to override the principle of the best interest of the child’.¹¹³ The CRC provides guidelines stating that the determination on what is the best interest for the child in these circumstances needs to be assessed by investigation of the child’s views (Art. 12), safety and security, socio-economic conditions in the receiving country, possible care arrangements, the child’s level of integration, the child’s right to preserve his or her identity, including nationality, name and family relations (Art. 8) and the ”desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background” (Art 20).¹¹⁴

Chapter 4: The influence of children right’s at regional level

4.1 The Charter of Fundamental Rights

The European Union has clearly proven its standing on its work to enshrine and develop Children Rights, both by realising the provisions of the Convention on the Rights of the Child and by expressly stating its support in the Lisbon Treaty, where the Union stress its will to ‘contribute to the protection of human rights and in particular, the rights of the child’.¹¹⁵ The Lisbon Treaty has been recognised as an important milestone in children’s rights. This is the first time children are introduced as a legal objective in the European Union and the Lisbon Treaty contains all the juridical potential to develop a legislative strategy for the protection of the rights of the child.¹¹⁶ Additionally, the European Union has taken further actions, by implementing the rights of Children into its regional system. The principle of the best interests of the child is expressed in Article 24.2 in the Charter of Fundamental Rights of the European Union and has been given a comparable status to that in the CRC, stating that ‘the child’s best interests must be a

¹¹² CRC, General Comment No. 6 CRC/GC/2005/6, 2005, Para. 84

¹¹³ Ibidem Para 84-85

¹¹⁴ Ibidem

¹¹⁵ EU, The Lisbon Treaty Art. 3.5

¹¹⁶ E, Perillo, The Lisbon treaty and the Rights of the Child, in European Council for Steiner Waldorf Education (ECSWE), Improving the Quality for Childhood in Europe 2012, 2012 p.196

primary consideration.¹¹⁷ The same article also contains additional provisions copied from the CRC which collaborates to ensure the best interest of the child, Article 3, 9, 12 and 13 have been directly adopted from the Convention on the Rights of the Child.¹¹⁸

1. “Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.”¹¹⁹

2. “In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.”¹²⁰

3. “Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”¹²¹

The Charter is legally binding among its member States since 2009 when the Lisbon Treaty entered into force. From the time of the adoption of the treaty the Charter is considered to be primary EU law.¹²² According to the Charter, all Member States are responsible to interpret European Union obligations such as, asylum policies, in a way that protects and promotes fundamental rights.¹²³

The Treaty of the European Union stipulates that the provisions of the Charter may not in any way extend the competences of the Union.¹²⁴ This implies that the provisions of

¹¹⁷ EU, Explanations relating to the Charter of Fundamental Rights, C 303/17 14 December 2007, OJ (2007/C 303/02) Art 24.

¹¹⁸ Ibidem

¹¹⁹ Art 24.1 TEU

¹²⁰ Art24.2 TEU

¹²¹ Art 24.3 TEU

¹²² European Parliament, The Charter of Fundamental Rights, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_1.1.6.html Last accessed on 2014-05-13.

¹²³ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p.18

¹²⁴ E, Perillo, The Lisbon treaty and the Rights of the Child, in European Council for Steiner Waldorf Education (ECSWE), Improving the Quality for Childhood in Europe 2012, 2012 p.198-199

the Charter cannot form a legal ground to adopt EU legally binding acts. However, looking back to the provision of Article 24.2, this has already been foreseen by the drafters. The article obligates States to respect the mentioned rights in *all* legal or administrative acts of EU, including all European policies. This includes quite an extensive array of policies since ‘European policies’ refers to all policies in the European Union, including, foreign policies, humanitarian and development policies. This allows the European Parliament to work in a horizontal approach, enabling the complementation of essential provisions or clauses in order to strengthen legal rights and protection for children. And as an outcome, all EU policies must be designed in line with the child’s best interests.¹²⁵

The scope of application of the Charter includes providing general principles of EU law and aid to interpretation. Both EU law and national law must be interpreted in light of the Charter. In addition, any national law found to be in breach of the Charter must be set aside.¹²⁶ During the drafting of the Charter, some Member States feared that the Charter would overrule their sovereign powers in policies and decision-making. However, during the initial work of the Charter it was reassured that the Charter would not become the main character in times of European integration.¹²⁷ The division of competences between the European Union and Member States hampers European Institutions in their actions and their legal competence are limited due to subsidiary, proportionality and the principle of conferral in their potential to act for children’s rights.¹²⁸

4.2 Council Directives with reference to the best interests of the child

The TEU declares that competence in the areas of asylum and immigration in the EU must be achieved by a coordinated effort among Member States and institutions.¹²⁹ In regards to migrants, a comprehensive range of directives, policies and guidelines exists within the European Community. The motivating reason behind the adoption of

¹²⁵ Ibidem

¹²⁶ Lenaerts, K. Exploring the limits of the EU Charter of Fundamental Rights. *European Constitutional Law Review*, 8.3, 2012 p.376-377

¹²⁷ Ibidem

¹²⁸ Art. 4 and Art.5 TEU

¹²⁹ The principle of subsidiarity Art. 5 TEU

common standards was to reduce secondary movements of asylum seekers within Member States in the European Union, in this way the burden of receiving asylum seekers may be shared.¹³⁰ The outmost of the legislation for immigrants and asylum seekers are created in the form of directives that requires a transposition into national law by member State legislative bodies. This allows the national authorities to free choice of form and methods.¹³¹ The following chapters will present selected regional legislations that have been adopted in order to bring a common standard that has an impact on migrant children in the European Union countries.

The Dublin Regulation

The Dublin regulation, Dublin II was adopted in 2003 and replaced the former Dublin Convention. The Dublin regulation determines the responsible State of asylum applications. The regulation is a system based on the idea of common protection for asylum seekers in the European Community¹³².¹³³ The regulation is binding among the European Community countries and recognises asylum seekers first country of entrance as the country responsible for his or hers asylum claim. If the applicant seeks asylum in another EU-country, he or she will be transferred back to the first receiving country.¹³⁴ According to the regulation all individuals above 14 years old are required to leave their fingerprints, in order to facilitate the implementation of the Dublin system.¹³⁵ The Dublin system was evaluated in 2008 and the evaluation revealed that both legislation and practice seemed to differ among the European Countries that implemented the Dublin regulation.¹³⁶ The evaluation described the determination of Member States responsibilities, for asylum claims as a ‘lottery’. Care and procedure for unaccompanied minors seemed to vary to a large extent amongst the Member States, specifically in regard to assignment of guardian, family tracing, assessment of the best interests, age

¹³⁰ Drywood, E. Challenging concepts of the ‘child’ in asylum and immigration law: the example of the EU, *Journal of Social Welfare & Family Law*, 32.3, 2010. p. 311

¹³¹ Art. 288 TEU

¹³² All European Union Members but also Switzerland, Lichtenstein, Island and Norway have implemented the Dublin regulation.

¹³³ European Commission, *A Common European Asylum System*, Home affairs, December 2013, p.7.

¹³⁴ Dublin Regulation Art 3.1-2

¹³⁵ Eurodac Regulation, EU regulation No 604/2013 Art 9.1

¹³⁶ Eurochild, *The European Commission’s 2013 Report on the Application of the EU Charter on Fundamental Rights and its contribution to protecting children’s rights in the EU*, 2012, p.11

assessment and the interpretation of the Article 6 criterion.¹³⁷ The criterion of Article 6 of the Dublin II regulation stated that in a case where an unaccompanied child applies for asylum the responsible State should be the same State where a member of his or her family is legally present, if this is in the best interest of the child. If no family members are present in Europe, the responsible State is the one where the child lodged the application.¹³⁸ The revised Dublin regulation has incorporated other relatives to fall under ‘family members’ as stated in the previous Article 6.¹³⁹ The revised system also states that in absence of family, the last Member State where the child’s application was lodged will be responsible, provided that this is in the best interest of the child.¹⁴⁰ The evaluation of Dublin II also affirmed that the return of unaccompanied children from one country to another involved a negative impact on the child’s wellbeing and a large number of children that were transferred seemed to disappear before the transfer was executed.¹⁴¹ It was also stated that unaccompanied minors should never be detained for transfer to another Member State, unless in times of family reunification. In Dublin regulation III it was added that, all children should be handled in the country that they are being held, no matter if earlier application (without final decision) has taken place. It’s also stated in Article 6.1 that the Dublin regulation shall be interpreted in the light of the best interest of the child.¹⁴²

The European Court of Justice received a request from the United Kingdom on the position of unaccompanied children in reference to Article 6 of the Dublin regulation. Later, this became a crucial case, addressing the absence of a child-sensitive approach in the Dublin II regulation. The Court was asked to identify the responsible State for the children’s asylum claims, in situations when an unaccompanied child, without any family members that lawfully reside within a EU State and the child has lodged claims in more than one Member State. The case concerned three unaccompanied children that

¹³⁷ France terre d’asile. The reception and care of unaccompanied minors in eight countries in the European Union, 2011 p.6

¹³⁸ Council Regulation (EC) No 343/2003, Art. 6

¹³⁹ Council Regulation (EC) No 604/2013 Art 8.1-2

¹⁴⁰ Ibidem Art. 8.4

¹⁴¹ UNHCR, The Dublin Regulation <http://www.unhcr-centraleurope.org/pdf/what-we-do/ensuring-legal-protection/european-union-asylum-policy/the-dublin-regulation.html> last accessed on 2014-05-08

¹⁴² Eurochild, The European Commission’s 2013 Report on the Application of the EU Charter on Fundamental Rights and its contribution to protecting children’s rights in the EU, 2012, p.11

applied for asylum in the UK after previously lodged their applications in the Netherlands and Italy. The children did not have any family members, residing legally in any of the Member States.¹⁴³ The Court stressed that the ‘child’s best interest’ must be a primary consideration in all decisions under the Dublin II regulation in accordance to Article 24.2 of the Charter of Fundamental Rights and Freedoms and found that unnecessary delays by the Dublin regulation do not comply with the ‘best interests of the child’¹⁴⁴ and concluded that:

“Where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the ‘Member State responsible’.”¹⁴⁵

The earlier Dublin II regulation did not regulate family tracing, neither the assignment of a guardian nor regulation concerning age assessment.¹⁴⁶ The revised Dublin regulation has not fully covered this but addresses State’s to ‘*take appropriate action*’ to identify family members or relatives of unaccompanied children and ensure that a representative represents the unaccompanied child in any regards to the Dublin Regulation.¹⁴⁷ No regulation concerning the assessment of age has been dealt with in the new Dublin regulation, however, Article 31 stresses the transferring Member State’s duty to transmit any essential information concerning an assessment of the age of the applicant. The assessment of age may have a large impact on the applicability of the Dublin system since children and adults differ in support, reception conditions and other procedural matters throughout the asylum procedure.¹⁴⁸ It has occurred that asylum seekers are transferred as adults and thereafter are considered to be children in the receiving country, and vice versa. Member States also seem to differ in the recognition

¹⁴³ MA & Others v UK, C-648/11, 6 June 2013

¹⁴⁴ Ibidem Para 59-61

¹⁴⁵ Ibidem Para 66

¹⁴⁶ European Council on Refugees and Exiles, Dublin II Regulation: Lives on hold - European Comparative Report, February 2013 p. 29 -31

¹⁴⁷ Council Regulation (EC) No 604/2013 Art. 6.2 and Art. 6.4

¹⁴⁸ European Council on Refugees and Exiles, "Dublin II Regulation: Lives on hold" - European Comparative Report, February 2013, p. 31

of age assessment conducted by other Member States. It is not uncommon that an applicant deemed to be an adult in a prior asylum procedure, still will be considered to be an adult irrespective of the transferring Member States statement.¹⁴⁹

Returns Directive

The Returns Directive sets out common standards in Europe in times of removal and repatriation for third country citizens residing illegally within Europe.¹⁵⁰ The directive has specific provisions in regards to children. Member States are responsible to implement the directive, recognising that the best interest of the child should be a primary consideration, in line with the CRC.¹⁵¹ Additionally, in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life shall be a primary consideration.¹⁵² The Directive also emphasises the importance of taking the best interests of the child into consideration in matters such as detention.¹⁵³ Article 10 of the Directive addresses the issue of return and removal of unaccompanied minors and sets out requirements, which regulate the procedure of return for unaccompanied minors and the required standards of reception in the receiving country. Additionally, Article 10.1 stresses that decision-making bodies shall ask for assistance by appropriate organisations or agencies before making a decision on return, and the decision needs to take into account the best interest of the child.¹⁵⁴ Three options are available for States upon return of unaccompanied children. The child can be returned to a family member, to a nominated guardian or to adequate reception facilities. It needs to be certain that one of the options is possible before a return can proceed.¹⁵⁵

¹⁴⁹ This has proven to be the situation in Italy and Hungary. See European Council on Refugees and Exiles, Dublin II Regulation: Lives on hold - European Comparative Report, February 2013 p.31

¹⁵⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008

¹⁵¹ Directive 2008/115/EC, Preamble (22)

¹⁵² Ibidem Art. 5

¹⁵³ Ibidem Art 17.5

¹⁵⁴ Ibidem Art.10.1

¹⁵⁵ Ibidem Art.10. 2

The provision providing the three opportunities in times of return comes with several question marks. First, the provision in itself does not make it clear whether an assessment of the best interests of the child should be conducted. However, when reading Article 10.2 and Article 10.1 in conjunction with Article 5, it is more obvious to predict the interpretation of the provisions.¹⁵⁶ Secondly, the provision in Article 10.2 does not provide any information on the definition of ‘family’, or ‘guardians’ or ‘adequate reception facilities’.¹⁵⁷ Instead, it has been left for the Member States themselves to define the meaning of the wording in the article. The United Nations Human Rights Committee addressed the issue on return in the X.H.L against the Netherlands case, concerning a separated child from China where the child faced an expulsion.¹⁵⁸ The Committee stated that the Netherlands failed to interpret the best interest of the child in their decision on expulsion and declared that the State party had failed to identify any family members or friends with whom the child could have been reunited with in China.¹⁵⁹ Giving the margin of appreciation to Member States concerning the definition of ‘adequate housing facilities’ could imply that States set out standards that they are satisfied with even though the established standards may be incompatible with the minimum standards and obligations set out by the CRC.¹⁶⁰ The European Commission also stated that the act of handing over a child to parents or guardians must include an individual assessment on the situation.¹⁶¹

The best interests of the child have proven to have a minor role and are subordinate to the States desire to regulate migratory flows. Some States have prohibited forced removal of unaccompanied minors, although the distinction between forced removals and voluntarily return has proven to be narrow.¹⁶² European countries have all taken a different approach in the treatment of unaccompanied children. Sweden and Italy base

¹⁵⁶ Save the Children, Implementation of Article 10(2): Points for Reflection, February 2010 p. 1-2

¹⁵⁷ Ibidem

¹⁵⁸ Human Rights Committee, View on Communication No. 1564/2007 submitted by X.H.L against the Netherlands, 15 September 2011

¹⁵⁹ Ibidem Para. 10

¹⁶⁰ Save the Children, Implementation of Article 10(2): Points for Reflection, February 2010 p. 1-2

¹⁶¹ European Commission, Contact Committee ‘Return Directive’ 2008/115/EC, MIGRAPOL CC Return Dir. 30 p.37

¹⁶² France terre d’asile. The reception and care of unaccompanied minors in eight countries in the European Union, 2011 p.35

their removals upon the conditions in the country of origin, Spain and France investigates the minors desire, while Greece return children in the same way as adults are being removed.¹⁶³

Additional directives from the European Union

An additional regional framework worth mentioning is the Directive laying down minimum standards on the reception of asylum seekers.¹⁶⁴ There are several provisions in the Directive that are directly applicable to children. First, the directive includes a general duty to consider the specific situation for vulnerable persons, such as minors and unaccompanied minors.¹⁶⁵ Secondly, similar to other directives concerning asylum seekers, the best interests of the child shall be taken as a primary consideration when implementing the article.¹⁶⁶ The directive stresses States obligations in times of guardian¹⁶⁷, education¹⁶⁸, healthcare¹⁶⁹, housing¹⁷⁰ and tracing family members to unaccompanied children¹⁷¹. A Directive on minimum standards in relation to the asylum assessment process¹⁷² regulates that an unaccompanied child shall receive a representative at the interview.¹⁷³ However this obligation is limited for children who are soon to be 18 years of age or married and above the age of 16.¹⁷⁴ This is also the specific directive that allows Member States to perform a medical examination to determine the age of the applicant.¹⁷⁵ The Family Reunification Directive permits third country nationals to reunite with close family members residing in the European Union for at least one year.¹⁷⁶ Some limitations exist here as well; children above age of 12 may have to meet some conditions for integration, which are decided upon by the

¹⁶³ Ibidem p.35

¹⁶⁴ Council Directive 2003/9/EC

¹⁶⁵ Ibidem. Art. 17.1

¹⁶⁶ Ibidem. Art.18.1

¹⁶⁷ Ibidem Art. 19.1

¹⁶⁸ Ibidem Art. 10

¹⁶⁹ Ibidem Art.18.2

¹⁷⁰ Ibidem Art.19.2

¹⁷¹ Ibidem Art.19.3

¹⁷² Council Directive 2005/85/EC

¹⁷³ Ibidem. Art. 17.1

¹⁷⁴ Ibidem Art. 17.2

¹⁷⁵ Ibidem 17.5

¹⁷⁶ Council Directive 2003/86/EC, Art. 3.1

State.¹⁷⁷ In addition, Member States may require that the child residing in one of the Member States did not yet reach the age of 15.¹⁷⁸ The two latter examples of derogations together with the possibility for States to impose a waiting period, of up to three years between submission of the application and the issue of a residence permit to the family members¹⁷⁹, was the major theme in the judgement of Case C-540/03 *European Parliament v. Council*. The Parliament claimed that the derogations set out in the Directive were contradictory to fundamental rights, in particular the right to family life and the right to non-discrimination. The Court did not agree and ruled that the derogations of the Directive did not breach fundamental rights. The argument of the Court was to keep the margin of appreciation for States and that any interference with the right to respect for family life is justified on the basis that it minimizes the impact of immigration for the host Member State.¹⁸⁰

Berisha v. Switzerland, the case concerned the Swiss authorities' refusal to issue residence permits for three children. The parents of the children whom both had legal permits to stay in Switzerland brought their children, illegally to Switzerland where they lived illegally for 9 months before the parents notified the Cantonal Migration Office and wanted to apply for residence permits for the children. The court confirmed that the children were integrated in Switzerland but also argued that the children still had ties with Kosovo where they grew up and were educated for many years. The two older children, 17 and 19 at the time were considered to be of an age that they could be supported at a distance. In addition, the court states that there was nothing to prevent the applicants traveling to, or staying with the youngest child, 10 years old, in Kosovo in order to support the provision of the best interest of the child. The court deliberated on the untruthful conduct of the applicants in the domestic proceedings and stated that the Swiss authorities did not overstep their margin of appreciation under Article 8 of the

¹⁷⁷ Ibidem. Art. 4.1

¹⁷⁸ Ibidem. Art 4.6

¹⁷⁹ Ibidem Art. 8

¹⁸⁰ CJEU *Parliament v. Council* (Case C- 540/03, [2006] ECR I-5769, see <http://eur-lex.europa.eu/legal-content/en/TXT/HTML/?isOldUri=true&uri=CELEX:62003CJ0540> Last accessed on 2014-05-04

Convention in refusing to grant residence permits to the children.¹⁸¹

4.3 Jurisprudence

The legal traditions differ among the European Union Countries. Regional courts such as the ECtHR and CJEU recognise that the CRC is a binding obligation in international law. Their role is to lead the way through interpretation of cases concerning migrant children in jurisprudence. The jurisprudence of the regional courts is an important source for influencing good practice of implementation of the best interest of the child in individual cases, among Member States.¹⁸² Case law of the ECtHR has significant importance and has been recognised as the most direct and binding source, providing legally binding interpretations in the area of Human Rights Law. National States are required to follow the jurisprudence in their domestic policies, practice and case law. So far, regional and domestic courts have mainly considered the rights of children in regard to Article 3 and Article 8, in the area of immigration control.¹⁸³

The case ‘Nsona’, involved the return of a child from the Netherlands back to her country of origin. The return of the child was conducted under poor conditions and the actions of the government were found to be in the wrong by handing over all responsibility for the child’s welfare as soon as she had left the territory of the Netherlands. The child, who at the time was 9 years old, was removed from the Netherlands to Switzerland in the company of a total stranger. She was then sent from the airport in Zurich to Zaire on her own. In Kinshasa, the government of the Netherlands failed to provide a responsible person to pick her up at the airport, putting her in a vulnerable situation. The Court gave the Netherlands the margin of appreciation and argued that the return was poorly conducted but the act could not be considered to

¹⁸¹ ECtHR, *Berisha v. Switzerland*, Application No.949/12, January 2014

¹⁸² UNICEF, *Judicial Implementation of Article 3 of the Convention On the Rights of the Child in Europe*, June 2012 p.14

¹⁸³ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. *Working with refugee children: Current issues in best practice*, Immigration Law Practitioners Association, May 2011 p. 4

fall under the State's obligations under stated provisions in Article 8 ECHR or Article 3 ECHR.¹⁸⁴

It's not unusual that the ECtHR does not address to the implementation of Article 3 CRC. Children's rights are still mainly considered in relation to Article 3 and 8 ECHR in the area of immigration control.¹⁸⁵ More recent judgements from the ECtHR have proven to deliberate their ruling around Article 8 case law but still consider the best interests of the child as a factor.¹⁸⁶ In *Neulinger v Switzerland* the court observed that 'there is a broad consensus in support of the idea that in all decisions concerning children and their best interests must be paramount.'¹⁸⁷ In these cases the Court has persisted with a higher standard of interpretation of Article 3.1. The case of *Neulinger v Switzerland* may easily be connected to the similar case of *ZH Tanzania*.

ZH Tanzania concerned a mother that faced an expulsion from the UK to her country of origin, Tanzania. The mother claimed that her removal would constitute a disproportionate interference with her right in regard to Article 8 ECHR. The Supreme Court did however put the weight on the remaining children in UK and the courts crucial issue was to determine the best interests of the child and the affects of a decision to remove or deport one or both parents. In the specific case the mother made several applications to the UKBA, including two applications using a false identity. She later met a UK citizen with whom she got two children, also acknowledged as UK citizens. The parents split up and since the father had health issue, the mother was considered to be the sole custodian of the children. If she were returned, the children would also have to leave the UK, where they had spent all their lives.

In the decision the Court declared that the best interests of the child is closely related to the wellbeing of the child and that the child's interests may not always be the same

¹⁸⁴ ECtHR, *Nsona v. The Netherlands*, 63/1995/569/655, 26 October 1996

¹⁸⁵ See for example cases of *Uner*, *Boultif*, *Mubwwilanzila Maveke*, *Neulinger* etc.

¹⁸⁶ For further reading: *Uner v Netherlands*, *Boultif v Switzerland*, *Maslov v Austria*, *Rodrigues da Silva, Hoogkamer v Netherlands*

¹⁸⁷ ECtHR, *Neulinger v Switzerland*, *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07, 6 July 2010 Para 135

interests as their parents.¹⁸⁸ The court stressed that it is therefore always of high importance to listen to the child's views, an approach that all representatives should take into consideration in all acts concerning children.¹⁸⁹ The Court emphasised that it is obvious that the best interest of the child must be a primary consideration, however the child shall not be seen as the sole actor in the case. The court further stressed that:

“There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration.”¹⁹⁰

The Court also made the assessment that an illegal stay in the UK should never lead to the granting of a residence permit, although the children shall not be blamed for the acts of their parents. The court explains that in an assessment of proportionality, considering Article 8, the best interest of the child must be a primary consideration. In this case, the countervailing considerations were the States interest to maintain firm and fair immigration control, the mother's appalling immigration history and the fact that she created a family life without precaution, considering her position at the time. The Court continues to stress that the principle of the best interest of the child shall not function as a triumph card and provided that the tribunal did not treat any other consideration as inherently more significant than best interests, it could conclude that the strength of the other considerations outweighed them. But, as the Tribunal rightly pointed out, the children should not to be blamed for a parent's possible illegal actions. By removing the children's primary carer the unavoidable outcome would be that they would have to leave with her. The outcome of the case declared that a removal of the mother would constitute to a disproportionate interference with Article 8.¹⁹²

¹⁸⁸ Supreme Court, ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent), [2011] UKSC 4, 1 February 201, Para 29 and 34-37

¹⁸⁹ Ibidem Para 34-37

¹⁹⁰ Ibidem Para 44

¹⁹² Ibidem

When it comes to the European Court of Justice, asylum and immigration legislation are binding among Member States and the principle of supremacy indicates that EU laws are superior over national law.¹⁹³ In addition, since the adoption of the Lisbon Treaty and the following incorporation of the Charter, the Court of Justice of the European Union have increased in significance its applications of all EU directives, including asylum directives.¹⁹⁴

The case of Gerard Ruiz Zambrano v Office National de L'emploi (ONEm)¹⁹⁵ does not expressly target best interests of the child but expresses that declining to recognise the right to reside in the EU for a non-EU national parents with a EU-national child, would be a breach of the European Treaty as well as Article 24 of Charter of Fundamental Rights (which references to the best interest of the child). The case consents to parents to remain with their children in an EU country even though they are being upheld in the Member State without legal status. This is acceptable when reading the case of ZH (Tanzania) in the light of a child's right to citizenship (Art. 20 CRC). The decision is leading in jurisprudence for children's rights in the European Union and should be considered in all judgements concerning children.¹⁹⁶ In addition, the CJEU have mentioned the CRC as an instrument, which needs to be taken in to account while applying the general principles of European Law.¹⁹⁷

Chapter 5: Implementation of article 3 at the national level

5.1 Sweden

Sweden has a dualistic approach to public international law and the international and national law are considered as two separate legal systems. The CRC as an international treaty is being implemented by transformation into national law or directly incorporated

¹⁹³ CJEU, Van Gend en Loos (1963), Case 26-62, and Costa v. ENEL ECR Case 6-64, 1964

¹⁹⁴ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p.5-19

¹⁹⁵ CJEU Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), C-34/09, 8 March 2011

¹⁹⁶ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p.5-6

¹⁹⁷ CJEU, Case C-5540/03 Parliament v Council (2006) Ecr I-1569 Para 37

into Swedish law.¹⁹⁸ The principle of the best interest of the child was already a part of the domestic legislation even prior to the adoption of the Convention on the rights of the Child and no changes were made at the time of ratification. This has been questioned by several bodies, criticising whether the existing legislation really could meet the requirements set out by the Convention.¹⁹⁹ The criticism have been dismissed with the explanation that the Convention allows room for interpretation, which could make the national law compatible with the Child Convention, and the Swedish proposition affirmed that the national law would, in the future, be amended in accordance to the Convention.²⁰⁰ Subsequently, the CRC has not been incorporated, nor is it directly applicable in Swedish law and therefore the implementation of the CRC must be based on the Swedish law, preparatory work of the law and the Swedish jurisprudence.²⁰¹

The best principle of the migrant child can be found in the Swedish Aliens Act and expresses that development and best interest of the child shall be taken into particular account when it comes to cases concerning children.²⁰² The preparatory work behind the principle further explains that the best interests of the child are not an obvious conclusion. Hence, the best interest of the child needs to be balanced against consequence's that might be both in favour and of disadvantage for the child.²⁰³ Sweden has taken the position that it is not in itself negative against the migrant child, accompanied with his or her parents, to return to the country of origin. And it might not necessarily be in the best interest of the child to reside in Sweden. Contrary, the safety net and opportunities offered in the home country might be considered to have advantage over the situation of a possible integration in Sweden.²⁰⁴ The presence of, at least one of the parents has been given major importance in the Swedish legislation.²⁰⁵ However, the assessment of the best interest of the child shall always include possible

¹⁹⁸ DS 2014:5, Ministry of Justice, January 2014

¹⁹⁹ Prop. 1989/90:107, p. 28

²⁰⁰ Ibidem

²⁰¹ Nilsson E, Barn i rättens gränsland.. Om barnperspektiv vid prövning om uppehållstillstånd. [Children in the Borderland of Law. On Child Perspectives in the Determination on granting Residence Permits] Doctoral dissertation. Iustus Förlag AB. Uppsala 2007. p. 69-71

²⁰² SFS 2005:716 /UtlL 1 kap § 10

²⁰³ Prop 1996/97:25:249

²⁰⁴ Ibidem

²⁰⁵ SOU 1996:115:14f

interest of the State.²⁰⁶ Children shall in all cases be listened to, unless it is considered to be inappropriate due to the specific situation of the child.²⁰⁷

The Committee on the Rights of the Child criticised Sweden in 2009 for the lack of implementation of the principle in practice concerning migrant children and argued that the principle is not sufficiently taken into consideration during the process of asylum.²⁰⁸ When an asylum seeker enters the Swedish territory, the first mission for the Swedish authorities is to identify the identity of the person. This applies to both minors and adults. Although, for minors it is of even greater importance to determine the identity since this may lead to a whole different, more beneficial, proceeding throughout the application. The initial stages of the evaluation of identity and age are conducted in the same way as the claim for asylum, meaning that the applicants are expected to provide the authorities with documentation in order to prove their identity. If documentation is missing, the testimony of the applicant is of special importance and is only accepted when the applicant, to his or her greatest extent, tried to provide document and has given a reason on why documentation cannot be presented.²⁰⁹ The applicant should in these cases be given the ‘benefit of doubt’.²¹⁰ The Migration Board will also conduct an oral investigation with the applicant, with questions that will help to establish the age of the applicant.²¹¹ In cases where the age is in doubt after the investigation, a medical age assessment will take place.²¹² This is normally guided by the standards issued by The National Board of Health and Welfare and consist of a physical examination with additional x-rays on hand bones and teeth. Guidelines from the National Board of Health and Welfare also state that the medical assessment consists of a margin of error between 2 and 4 years.²¹³ Reports have proven that the attitude of giving the applicant the benefit of doubt is not always taken and several

²⁰⁶ Ibidem

²⁰⁷ SFS 2005:716 and UtIL 1 kap 11§

²⁰⁸ Committee on the rights of the Child, Concluding Observations: Sweden, CRC/C/SWE/CO/4, 12 June 2009 Para 27

²⁰⁹ RCI 13/2014

²¹⁰ Ibidem

²¹¹ GDA 6/2011

²¹² RCI 19/2012

²¹³ The National Board of Health and Welfare, http://www.socialstyrelsen.se/publikationer2012/2012-6-54/Documents/New_recommendations_on_Medical_Age_Assessment.pdf Last accessed on 2014-04-02

reports are made on the fact that the age of unaccompanied minors are constantly being changed to be above 18 and the Migration Board are criticised for putting too much importance on the medical age assessment.²¹⁴ In addition, the National Board on Health and Welfare came out with a report questioning the Migration Board for putting too much confidence in the results considering the lack of credibility of the tests. The Board on Health and Welfare also highlights their concern for the consequences of the tests where housing, legal position and the right to a legal guardian for the applicant may be affected.²¹⁵ In addition, Save the Children has questioned the medical intervention in the case of the age assessment, which could be in breach of children's right to health in accordance to Article 24 CRC.²¹⁶

According to the Swedish Aliens act, children may be detained with their custodian. Unaccompanied children that lack a custodian may only be detained under 'exceptional grounds'. Neither can parents be detained if it implies that the child will be separated from both parents.²¹⁷ Detention may not last for more than 72 hours, with one exceptional renewal. Minors may not, under any circumstances, be placed in prisons or police facilities.²¹⁹ Detention of migrant children is an uncommon practice in Sweden.²²⁰ The more common approach is the required appearance where the child can be required to report his or hers presence to the Police or Migration Board.²²¹

The Swedish Migration Court has stated that the Dublin regulation is directly applicable in Sweden and has precedence over national law.²²² As a result of the courts ruling in the case of *MA & Others v UK* the Swedish Migration Board issued a legal statement

²¹⁴ <http://www.svt.se/nyheter/regionalt/ostnytt/socialtjansten-i-soderkoping-joansmaler-migrationsverket>, <http://sverigesradio.se/sida/artikel.aspx?programid=78&artikel=5652714> . Last accessed on 2014-04-03 and Juhlén. K "Ensamkommande barn i Sverige – en kartläggning. Save the Children, 2003 p. 16

²¹⁵ The National Board of Health and Welfare, http://www.socialstyrelsen.se/publikationer2012/2012-6-54/Documents/New_recommendations_on_Medical_Age_assessment.pdf Last accessed on 2014-04-02

²¹⁶ Juhlén. K "Ensamkommande barn i Sverige – En kartläggning. [Unaccompanied children in Sweden – A mapping]. Save the Children, p. 15-17

²¹⁷ SFS 2005:716 and UtIL 1.3.

²¹⁹ UtIL 10.2

²²⁰ France terre d'asile, European Union's Fundamental Rights and Citizenship program. The reception and care of unaccompanied minors in eight countries in the European Union, 2011 p. 39

²²¹ SFS 2005:716/UtIL 10.7-8

²²² MIG 2008:42

acknowledging that unaccompanied children have the right to have their cases tried by the State where the latest application of asylum was handed in.

Four different types of residence permit can be granted for children applying for asylum, with the highest level of protection being refugee status. The Swedish provision for refugee status includes two additional indicators (sex and gender) from the original declaration in the Refugee Convention.²²³ However, the most common standard for children is the granting of refugee status as a part of a family unit, where a parent has been recognised to have substantial grounds for refugee status.²²⁴ A Swedish academic, Lundberg, has examined the implementation of the principle in practice at the Migration Board. Her study (2009) proves that civil servants do not investigate accompanied children's claims properly. Their cases are instead considered as a part of a collective decision of the family unit.²²⁵ Even in cases where the child has clearly stated acts of persecution, this has not been mentioned or assessed throughout the decision making process and as an outcome, the children received refugee status or residence permit on the grounds of the parents claim.²²⁷ The child can also receive subsidiary protection when the child is at risk of being subjected to torture or inhuman degrading treatment, which also covers children at serious risk of injury due to armed conflict.²²⁸ Sweden has also included 'other protection' into their legislation. This category only exists in Swedish legislation and it does not have any equivalent in international law nor EU legislation. The permit is issued on grounds of environmental disasters, war or if the child feels a well-founded fear of being subjected to a serious violation.²²⁹

The most common residence permit given in regards to unaccompanied children is

²²³ SFS 2005:716/UtL 4.1

²²⁴ Nilsson, E, Barn i rättens gränsland, Om barnperspektiv vid prövning om uppehållstillstånd. [Children in the Borderland of Law. On Child Perspectives in the Determination on granting Residence Permits] Doctoral dissertation. Iustus Förlag AB. Uppsala 2007. p. 155-163

²²⁵ Lundberg, A Barnets bästa i asylprocessen [The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights] (English translation), Published by Malmö Institute for Studies of Migration, Diversity and Welfare (MIM) 2009 p.76-79

²²⁷ Ibidem p.76-79

²²⁸ Migration Board, <http://www.migrationsverket.se/Privatpersoner/Skydd-och-asyl-i-Sverige/Asylregler.html> Last accessed on 2014-06-07

²²⁹ Ibidem

based on ‘particularly distressing circumstances’.²³⁰ The residence permits are exceptional and the provisions are applied in a restrictive way. The assessment of the permit applies in the same way for children as for adults and the assessment is based on the child’s development, quality of life, assessed situation in the country of origin. The assessment also includes the financial commitments incurred by Sweden if a residence permit is to be granted.²³¹ Although, it is been proven that the provision demands less from children than adults.²³² The government of Sweden has taken the stand that the principle of the best interest of the child often implies a residence permit for children that are originating from countries of war or suffer from medical issues that cannot be treated in their home country.²³³ However, the government is also of the opinion that children might not necessarily be better off with a residence permit in Sweden, contrariwise, it is normally considered to be in the best interest of the child to return and live in their home environment. Upon a return, the possible damage of the child’s psychosocial development must be assessed.²³⁴

Migrant children in foster care in Sweden are included in the same return process as those of their parents, even though the parents are deemed unable or even unwilling to care for their children upon return to the home country. The children have normally made ties with the foster family, school and friends in Sweden. In the situation where parents are deemed incapable to care for their children, the second option is expulsion to a nursery/care home in the country of origin. Many children have already created a Swedish identity and their possibilities to reintegrate in their home country are considered low. In addition to this, the relationship between the parent and child is often problematic, or even non-existent.²³⁵

In July 2014, Sweden will extend the right to residence for unaccompanied children by

²³⁰ SFS 2005:716 and UtIL Art.1.10

²³¹ Sandesjö H and Wikrén G, Utlänningslagen med kommentarer, [Aliens Act with Commentaries] 2010, Comment to 5:6 UtIL

²³² See example; case MIG 2009:9 where the court stated that the lack of relatives in the country of origin risked the child’s psychosocial development upon a possible return.

²³³ Prop. 1996/97:25

²³⁴ Ibidem.

²³⁵ Motion 2013/14:Sf242

changing the provision of particularly distressing circumstances to ‘special distressing circumstances’. The new provision will create a possibility for unaccompanied minors to receive residence permit in cases where they do not fulfil the criteria for refugee protection or subsidiary protection.²³⁶

The returns directive demands that the child is being returned to his or hers family or other receiving unit. Sweden has interpreted this broadly; the receiving unit may consist of a social department, an orphanage or other institution that may care for the child.²³⁷ If an institution or family member can’t be found, the child will receive a residence permit in Sweden.²³⁸ At the same year of the inclusion of the returns directive the Swedish government increased the budget for cases of return and expulsion in their ‘appropriation directives’²³⁹ stating that more cases needs to be executed in times of return. It also stated that the execution of return must include specific account to the Child Convention.²⁴⁰

5.2 United Kingdom

In order for an international treaty to have legal effect in the UK it is necessary for the Parliament to first issue an act of incorporation of the treaty into national law.²⁴¹ The CRC has not yet been acknowledged and the provisions of the Conventions on the Rights of the Child are not explicitly incorporated into the domestic law in the UK.²⁴² Although, in accordance to the Human Rights Act 1998 the UK is obligated to respect the rulings by the ECtHR and the legislation of the European Convention on Human

²³⁶ Prop. 2013/14:216

²³⁷ Prop. 2011/12:60

²³⁸ European Commission http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/illegal-immigration/390_emn_ad-hoc_query_children_who_have_been_living_irregularly_for_a_long_period_15mar2012_wider_di_en.pdf, 2012 Last accessed on 2014-06-17 p.9

²³⁹ Appropriation directives are a government decision that contain the government’s objectives and requirements of performance from the different departments in Sweden, such as, the Police or the Migration Board.

²⁴⁰ National Police of Sweden <http://www.esv.se/Verktyg--stod/Statsliggaren/Regleringsbrev/?RBID=15006>, 2012 [Accessed 7 May 2014].

²⁴¹ United Kingdom Constitutional Reform and Governance Act 2010 Ratification of Treaties, Ch. 25, Part 2

²⁴² Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p. 4

Rights.²⁴³ The UK has also incorporated the Lisbon Treaty and is obligated to respect the provisions therein but also the European Charter and jurisprudence from the CJEU.²⁴⁴ Even though the CRC has not been incorporated into domestic law it is important for practitioners to include external sources and materials to understand the meaning and implementation of the CRC. Nevertheless, the provisions of the CRC will remain indirectly applicable via other treaty obligations and jurisprudence.²⁴⁵

In the UK legislation, the best interest principle is referred to as the ‘welfare of the child’ and stress that the child’s welfare shall be the court’s paramount consideration.²⁴⁶ The same provision is followed by several of indicators that need to be taken into consideration for the full application of the welfare of the child. Except from Article 3 CRC the UK provision also reflects, inter alia, two additional core principles deriving from the CRC (Art. 6 and 12).²⁴⁷ Upon ratification of the CRC, UK made several reservations concerning overseas territories, child detention and all possible matters of immigration control.²⁴⁸ The reservations were argued to be unlawful in accordance to the Vienna Convention²⁴⁹ and were criticised by both international and domestic actors in the field. The reservations were withdrawn in November 2008 and since then all actions and decisions concerning migrant children must be executed in accordance to the CRC.²⁵⁰

The UK has received similar criticism as Sweden regarding the incorporation of the CRC and the Committee on the Rights of the Child has stressed that there is a need for the UK to adopt the CRC into its national legislation. In addition the Committee

²⁴³ Ibidem

²⁴⁴ Ibidem

²⁴⁵ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p. 5

²⁴⁶ UK Children Act 1989 1.1

²⁴⁷ Ibidem 1.3

²⁴⁸ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011p. 21

²⁴⁹ Joint committee on Human Rights, 17th Report, Opinion of Nicholas Blake QC and Sandhya Drew, 2001, In the Matter of the United Kingdom Reservation to the UN Convention on the Rights of the Child <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/132/13217.htm> [Accessed 11 April 2014].

²⁵⁰ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p.21

expressed concern over the lack of a predominant policy in line with the provisions in the CRC and the fact that the CRC is not regularly used as a framework in the national legislation. The UK has also been recommended to implement Article 3 since the principle of the best interests of the child is not reflected as a primary consideration in all legislative and policy matters affecting migrant children.²⁵¹ Indeed, there have been some changes to strengthen the principle of the best interest of the child. In November 2009, the UK integrated the Section 55 Borders, Citizenship and Immigration Act (hereafter ‘the section 55 duty’) into its legislation. The section 55 duty regulates, the United Kingdom Border Agency (UKBA) to safeguard and promote the welfare of the child in all decisions. This duty is also applicable for third parties acting on behalf of the Secretary of State.²⁵² The earlier mentioned case of *ZH (Tanzania) v Secretary of the State* is the leading example among cases dealing with the best interest of the child.

Another example of a case giving certain focus to the migrant child’s best interests is *R (Tinizaray) v. SSHD*. The case concerned an Ecuadorian woman, residing in the UK illegally when she became pregnant. She applied for residence permits for herself, her mother and the child. Their applications were denied by the UKBA and an appeal was lodged on the grounds that the Secretary of State had failed to comply with her statutory obligations under Section 55 BCIA to consider the welfare of the child. HH Judge Anthony Sultan QC expressed his concern to the lack of evidence regarding the child specific circumstances in the case.²⁵³ He stated:

”It is not sufficient for the decision-maker to rely solely on information volunteered by a child’s parent, particularly if it is clear that that information is either incomplete or potentially slanted. In such cases, further information must be sought by the decision-maker including, in appropriate cases, interviews of the applicant and separate interviews of the child, questionnaires and seeking or soliciting the views, assessments

²⁵¹ Committee on the Rights of the Child, Concluding Observations United Kingdom of Great Britain and Northern Ireland, October 2008 CRC/C/GBR/CO/4, Para 10, 14, and 26

²⁵² UK Government, Policy Bulletin 75, Section 55 guidance, October 2011. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257491/pb75.pdf [Accessed 5 June 2014]. p.2-8

²⁵³ *Tinizaray, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 1850 (Admin) (25 October 2011)

and reports of other agencies such as local authority social services, CAFCASS or local children's welfare groups."²⁵⁴

The case set out guidelines for the assessment of the principle of the best interests of the child and further scrutinised the Secretary of State's duties under the Section 55 in cases of migration.²⁵⁵

The UK lacks formalised central government guidance for the local authorities assessment of disputable age regarding migrants. In the case of *R (FZ) v LB of Croydon* the Court stressed that age assessment was the government's responsibility to consider.²⁵⁶ In cases where UKBA question the age of a child, the applicant's case is forwarded to the local authorities that undertake an age assessment. The assessment is conducted by social workers that receive training to complete the assessment.²⁵⁷ The assessment of age in the UK is based on the 'Merton criteria' based on the case of *Mr Justice Stanley Burnton v The Mayor and Burgesses of the London Borough of Merton*. Specific requirements of a legal age assessment rise from the case and included an assessment on the applicants general background, assessment of family circumstances, education, ethnic and cultural information and collected information from the local authority proving that the child is not to be considered as a child.²⁵⁸ The determination is made by the local authorities that need to provide a basis for their conclusion and in return the applicant shall be given the opportunity to respond.²⁵⁹ The case of Merton resulted in a protocol 'Practice guidelines for age assessment of young unaccompanied asylum seekers'. The protocol recommends an age assessment in line with the criteria's listed by the Supreme Court.²⁶⁰ In UK, X-ray examination is not considered to be a

²⁵⁴ Ibidem Para 24

²⁵⁵ Ibidem

²⁵⁶ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p.69

²⁵⁷ UK Visas and Immigration (UKVI) Assessing Age an introduction, 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257462/assessing-age.pdf [Accessed 10 May 2014]. p.8-9

²⁵⁸ *B, R (on the application of) v London Borough of Merton* [2003] EWHC 1689 (Admin) (14 July 2003)

²⁵⁹ Ibidem

²⁶⁰ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 England p. 69

suitable tool for age assessment and the Children's Commissioner for England has highlighted that, in accordance with the Europe Council Directive on health protection of individual against the dangers of ionizing radiation in relation to medical exposure²⁶¹, a medical practitioner should justify X-rays that are considered to be for non-medical purposes.²⁶² The practice of age assessment in UK conveys that most young people will be subjected to an age assessment, either by UKBA or by the local authorities that often demand an age assessment even in cases where UKBA have acknowledged the applicant as a child.²⁶³ As a result, the UK has received criticism for the lack of recognition of the benefit of doubt in age-disputed cases. The UKBA have also issued instructions to consider applicants as adults in times where the physical appearance indicates that they are over 18 years of age. This indicates that the practices of age assessment in these cases committed by the UKBA are solely based on a subjective criterion.²⁶⁴

The Immigration Act 1971 and the Nationality, Immigration and Asylum Act 2002 cover detention for migrants, including migrant children. Detention for unaccompanied children are rare but exceptionally undertaken as overnight stay whilst alternative accommodation is being arranged for the child, on the day of a planned removal, to facilitate safe escort between the residence and port of removal and in criminal cases where the child poses a serious risk to the public and a decision to remove the individual has been taken.²⁶⁵ In 1994, the UK adopted a special advisory system, Refugee Council Panel of Advisers for Unaccompanied Refugee Children, highlighting the special needs of separated child asylum-seekers. The advisers help the children by assisting and counselling in times of immigration, education, health and other obstacles in their procedural steps of applying for asylum. The Government also adopted a policy

²⁶¹ Council Directive 97/43, of 30 June 1997, on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure, and repealing Directive 84/466 /Euratom.

²⁶² UNICEF, Judicial Implementation of Article 3 of the Convention On the Rights of the Child in Europe, June 2012 p. 36

²⁶³ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p. 67

²⁶⁴ GA, Report of the Special Rapporteur on the Human Rights of Migrants, March 2010, A/HRC/14/30/Add.3 Para 56

²⁶⁵ France terre d'asile. The reception and care of unaccompanied minors in eight countries in the European Union, 2011 p.71

to prevent unaccompanied children to end up in detention. However, in contrast to the policy it was found by the Panel for Unaccompanied Refugee Children that unaccompanied or separated children were five times more likely to be detained than adults.²⁶⁶ Ten years have passed since the adoption of the advisory system and the UK made a big step towards addressing the situation of detained children by removing the reservation in 2009. However, has the removal of the reservation concerning the detention of migrant children given full result of the implementation in practice? It was reported in 2009 that 30 children were detained with the sole reason of being migrants, 20 of those had been in detention for less than 29 days, 5 for a period of 29-62 days and 5 minors had been in detention between 2-3 months.²⁶⁷ Other reports from 2009 also present numbers indicating that nearly 1000 children in families, each year are being detained in removal centres and stakeholders have estimated the real figure to be double.²⁶⁸ Indeed, the UK Government has taken further steps since then and declared to end immigration detention for children and have developed alternative processes since then. Unaccompanied children are not detained in practice although the UK Government lacks legislation stating that unaccompanied children should not be detained in general. Neither does the UK express any requirements to conduct a best interest assessment for children being detained with their families.²⁶⁹

The UK has taken the same criteria for refugee status as the ones set out in the Refugee Convention.²⁷⁰ The immigration rules of the UK state that a child may qualify as a refugee, although the child's maturity needs to be taken in account and more weight should be given to objective indicators of risk rather than the child's view of the situation throughout the assessment of refugee status.²⁷¹ In addition, the child-specific

²⁶⁶ Bhabha, J. Minors or Aliens? Inconsistent state intervention and separated child asylum-seekers, 2001 p. 299-300

²⁶⁷ The report considers the total amount of children detained in March 2009, Report of the Special Rapporteur on the Human Rights of Migrants (A/HRC/14/30/Add.3) Para 47

²⁶⁸ Report conducted by House of Commons in 2009, see Report of the Special Rapporteur on the Human Rights of Migrants Para 55

²⁶⁹ European Council on Refugees and Exiles, Comparative Study on Practices in the Field of Return of Minors: a Checklist to Achieve Good Practices When Considering the Return of Children to Third Countries: A Tool for Quality Planning for Member States, December 2011 p.318

²⁷⁰ UK Visas and Immigration, Immigration Rules (updated April 2014) Para 334

²⁷¹ Ibidem Para 531

considerations, such as fear wellfoundedness, persecution and other factors that may impact the interpretation of these concepts needs to be taken in account in a determination of refugee status for children.²⁷² All children above the age of 12 shall have the opportunity to be interviewed unless it is considered to be inappropriate.²⁷³

Children that don't fulfil the criteria's under the Refugee Convention but are still considered to need international protection will be granted residence permit of humanitarian protection.²⁷⁴ In addition, if the child doesn't fall under the criteria as a refugee nor humanitarian protection, the child might still be granted a discretionary leave. This is the case in situations where Article 8 ECHR is applicable and the child has established a family or private life in the UK. Case officers are obliged to balance the interests of the child in accordance to Article 8.2 of the Convention. Discretionary leave can also be applicable for unaccompanied children in the UK. UKBA has a policy stating that no unaccompanied child will be removed from the territory of the UK unless the Secretary of State is satisfied with that safe and adequate reception arrangements are in place in the country to which the child is to be removed.²⁷⁵ Family reunification is normally considered to be in the best interest of the child.²⁷⁶ In cases where family or extended family cannot be found the child may be returned to other safe and adequate reception arrangements. Reports for each country provide information on arrangements that are considered to fulfil the criteria's of 'safe and adequate'.²⁷⁷ Family home or home of relative where the child has previously lived and was cared for or family or

²⁷² UK Visas and Immigration, Processing an asylum application for a child' April 2013, Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf p.39

²⁷³ UK Visas and Immigration, Immigration Rules (updated April 2014) Para 352

²⁷⁴ Ibidem Para 339 c

²⁷⁵ UK Visas and Immigration, Processing an asylum application for a child' April 2013, Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf p. 40-50

²⁷⁶ UK Visas and Immigration, Processing an asylum application for a child, April 2013 Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf . Section 17.7

²⁷⁷ Ibidem

relative in a third country whom the child wishes to be reunited be are considered to pass the criteria's for adequate and safe.²⁷⁸

The Section 55 duty consists of a positive duty to safeguard and promote the welfare of children.²⁷⁹ However, in some cases the child's best interest will be challenged, and while considering whether a child should be granted leave to remain or return to the country of origin other factors need to be taken in account such as, the need to control immigration.²⁸⁰ Here a balance between the best interests of the child and the wider public interest of controlling immigration will be considered. Indicators for the assessment are compassionate factors, level of integration, the availability of care arrangements and socio-economic conditions.²⁸¹ If best interests of the child are outweighed by the need to uphold immigration control, the child must be refused outright. For unaccompanied children the removal is deferred until their eighteenth birthday.²⁸² The UK did not opt for the Returns Directive and are therefor not subject to the Directive.²⁸³ However, in line with the best interest provision in the Returns Directive the UK has regulated that an assessment on the best interests of the child needs to be executed in cases when the child is at risk of persecution, the assessment must prove that the child's best interests are not served by returning to the home country.²⁸⁴ Negative decisions in asylum claims where the best interest of the child have not been considered are not in accordance with the law and constitute an automatic ground for appeal.²⁸⁵ UKBA has also adopted a statutory guidance on making arrangements to safeguard and promote the welfare of children.²⁸⁶ There is no system in the UK that assesses the reception of conditions for unaccompanied children who have

²⁷⁸ Ibidem

²⁷⁹ The Borders, Citizenship and Immigration Act 2009, Section 55

²⁸⁰ UK Visas and Immigration, Processing and Asylum application for a Child, April 2013 Section 17.8

²⁸¹ List is not exhaustive but made upon an individual assessment. See UK Visas and Immigration, 'Processing an asylum application for a child' April 2013 section17.8

²⁸² UK Visas and Immigration, 'Processing an asylum application for a child' April 2013, 17.9

²⁸³ European Council on Refugees and Exiles, Comparative Study on Practices in the Field of Return of Minors: a Checklist to Achieve Good Practices When Considering the Return of Children to Third Countries: A Tool for Quality Planning for Member States, December 2011 p.48

²⁸⁴ Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, May 2011 p. 21

²⁸⁵ Ibidem

²⁸⁶ The Borders, Citizenship and Immigration Act 2009, Section 55

been returned to their country of origin.²⁸⁷ The UK has taken the approach of implementing a child-specific refugee status determination process where officials are being trained in child protection and the procedural assessment is estimated to take a maximum time span of six months, including any appeal.²⁸⁸

Chapter 6: Discussion and Conclusion

The Refugee Convention was created following the aftermath of the II World War and reflected the typical refugee back then, who was expected to be a white man, fleeing for reasons of political persecution. Today, children have their own claims for refugee status and might enter State territories unaccompanied. The Convention on the Rights of the Child has brought an important perspective on the procedural and final assessment for migrant children. However, a ratification of the CRC does not necessarily need to result in the full application of the purpose and objects of the treaty. Instead, it has been conveyed that several Member States have the possibility to exploit several measurements in order to limit the rights of migrant children such as, reservations of CRC's provisions, the adoption of legal and political decisions that hampers children's rights in times of migration and the establishment of other limitations or obstructions in the processes for migrant children or their families. By doing so, States can use their sovereign powers to regulate the flow of migrants. The indeterminacy of the CRC can be interpreted in such a way that allows a degree of flexibility, which is a way for States to maintain a certain amount of power in order to control immigration. This makes the CRC adaptable to various States and limits the difficulties for the legal integration of the Convention. Below, several policy actions or restrictions that States can issue in order to limit migrant children will be presented.

6.1 Limiting child migrants by age restrictions

Age is the basis for children to claim their rights, it is a double-edged sword that can

²⁸⁷ Committee on the Rights of the Child, Concluding Observations United Kingdom of Great Britain and Northern Ireland, October 2008 CRC/C/GBR/CO/4 Para 70.C

²⁸⁸ GA, Report of the Special Rapporteur on the Human Rights of Migrants, March 2010, A/HRC/14/30/Add.3 Para 47

bring further protection or totally disclose migrants from additional rights or safeguards. In this regard, regulations concerning age are an important area of autonomy for States.

The preparatory work from the drafting process of the CRC reveals that the age for a child was highly debated and in the end a compromise allowing a certain amount of sovereignty was reached. The final wording of the provision states that “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier” (Art. 1 CRC). Controlling migration by limiting rights by age has proven to be a common practice among the member States in the European Union. First, the concept of age assessment needs to be mentioned. The Council Resolution on the Reception of Unaccompanied Minors regulates that States can demand a procedure of age assessment for migrant children. Age assessment is a common standard among all EU Countries, the method of assessment differs but common for all methods is the physical examination involving a minimum margin of error with plus/minus two years. The mere concept of age assessment as a form of physical examination creates a range of ethical issues. To determine whether the assessment is made for the best interest of the child or for States to control immigration it is important to scrutinise if the physical intervention of an age assessment is made on reasonable grounds. It is vital to draw a balance to clarify ‘in whose interests is the testing done?’ Is the testing committed in the best interest of the child, or the interest of the State of which the child is currently being upheld in? Indeed, the concept of age assessment can be beneficial for children, strengthening their access to rights and contributing to the right to identity (Art 8.2 CRC). Moreover, children will acquire rights and have obligations placed upon them at various ages outside the asylum procedure and in their new society if they gain a residence permit. This could for example involve such things as, marriage, sexual relationships, participation in elections, criminal responsibility etc. Nevertheless, it is of main significance that the assessment is conducted in a proper way. Both Sweden and UK have received criticism for not giving the applicant the full benefit of doubt. In addition, most applicants entering the UK territory are having their ages disputed and an age assessment is almost always conducted. Although, it must also be mentioned that

States have and are being challenged to introduce a more child specific approach in the particular field. The Merton case in the UK has led to a more structured conduct of the age assessment, producing guidelines for the work of UKBA and in Sweden the Board of Health have issued recommendations empowering the rule of law for migrant children exposed to the examination.

Other areas where children's rights come in second place due to the States' interests are the directives regulating migration within the European Community Countries where children might actually be denied their rights due to age, even in times when they are under the age of 18. A number of provisions of EU legislation that limit rights of those that are recognised as children can be enumerated. First, the Eurodac Regulation declares that all asylum seekers above the age of 14 shall leave their fingerprints for identification in the European Union Member States. Secondly, Member States may derogate about access to legal guardians and complicate opportunities for family reunification for children older than 16. The case C-540/03 European Parliament v. Council dealing with the legitimacy of the output restrictions of age is therefore a case that was hardly surprising. The Court mentions the Convention on the Rights of the Child but in my view they omit to consider the directives' inconsistency with Article 1 CRC. Quite remarkable, when it could be perceived as contradictory to accept provisions that separate between children and children. It could also be argued that the concept of mainstreaming children's rights in all European policies might be seen as a failure when such a large number of migrant children are being excluded from the child specific provisions.

Certainly, an area for discussion is that the directives may not entirely be a result of Member States' sovereignty to limit immigration. The Member States are merely following the regulations set out by the European Union and the formulated argument for measurements of immigrants is often referred to the security of States and their citizens.

In addition, the above-mentioned situations that exclude or minimise access to rights for migrant children may be dismissed by the explanation of a wide interpretation of the

CRC which is not directly inconsistent with the guidelines when interpreting the CRC. The situations that address problematic issues for migrant children are clear examples on how States still use their sovereign powers to override the CRC and control migration flow or limit chances for older children to reunite with their families in the European Union.

6.2 States hindering children's rights

States may not only use age to protect their borders from migrant children, several examples exist of States making use of the indeterminate character of the CRC. All mentioned directives regulating migrant children offer a best-interest approach in all cases concerning children within the European Union Countries. Member States have often followed the principle and incorporated it or a close definition into their national legislation. Guidelines on the CRC stress that the full application of Art 3.1 is best undertaken by the input of the child's views and feelings (Art. 12 CRC). This has been implemented in the Asylum Procedure Directive that guarantees the unaccompanied child to be represented by a legal guardian, while children applying as a part of a family unit are expected to be represented by their parents, a practice that may impede the possibility of determining the best interests of the child. In Sweden, final decisions of asylum are often designed for the whole family unit and in times of return for both accompanied and unaccompanied children the practice of Article 12 is absent.

Additional examples on practices where migrant children are not seen as individual right-bearers are present in judgements from the European Court on Human Rights. The fact is that there are very little jurisprudence where the final legal deliberation is based on Art 3.1 CRC. Instead the final decisions are normally centred upon Article 8 ECHR. In the case of *Berisha v. Switzerland* the courts argumentation concerns Article 8 ECHR and the right to family life. Similarly, in the case of *Nsona*, a consideration of Article 3 CRC is left out even though the children in these particular cases were the ones directly affected by the Courts ruling. Also worth highlighting is the case of *Berisha* where the Court gives Switzerland the margin of appreciation due to the untruthful conduct of the applicants in the domestic proceedings. An action that is contrary to the Courts decision

in ZH Tanzania where the Court state that children shall not affected by the wrongful conductions of their parents.

The wording in Article 3.1 CRC eliminates the possibility that the best interest of the child has the superior role. In a decision like Berisha, it could be argued that the States interest to control and prevent illegal actions in times of migration is superior to the best interests of the children, an action that according to the General Comments of the CRC is deemed to be unlawful.

6.3 Can children challenge States?

This research has proven that the legal development of the principle of the best interest of the child provides with a more beneficial approach for migrant children. The UK lifted their decade old reservation bringing further rights for migrant children. In addition, more recent judgements such as Uner, Boutif and Maslov have given Article 3.1 a more prominent role and in accordance to the GC No 14 the ECtHR stressed that the best interest of the child shall be primary, choosing the stand for a higher significance in the wording of primary. The Court ruling in the Neulinger case also stressed that there is a need to respect and follow the CRC and its guidelines on determining the best interests of the child. The rights of children have also started to affect family members around them since they normally are seen as indicators ensuring the well-being of the child. This has been highlighted in the case Zambrano, where the CJEU ruled that the right of a EU national child also include the right for a third-state-national parent to stay in the European Union. These judgements follows the GC No. 6 which emphasise that the best interest of the child shall still be a primary interest and the burden of proof is upon the actor who takes action without a child's best interest perspective. The CRC Committee also stresses that the best interests of the child shall not be one of several considerations but a larger weight shall be given to the child's best interest. As an example on the national level, the Swedish Policy preventing parents from being detained if it results in a child's separation from both its custodians may be presented.

The almost universal ratification of the CRC could itself impose as customary international law. Nevertheless, not all provisions of the CRC have the potential to receive status as customary law, since not all States agree on all provisions in the Treaty. Considering the recognition of Article 3 and the principle of the best interests of the child, the particular provision can be perceived as customary law. There is also a change in the empowerment of the CRC from a regional and national level. The importance of implementing a more child specific approach is apparent in the treatment of migrant children. Both Sweden and UK do not use detention on a regularly basis and practice of detention for unaccompanied children are rare. In addition, the Dublin Regulation has been revised and demands a more child specific approach to children from the contracting States treatment of migrant children.

6.4 Two combating interests

As a result we have the right of sovereign States to control their borders competing with the wide ratification of the CRC, but which one will prevail when the two interests clash? And how do we then ensure full recognition of the best interest principle for children when States, so highly, treasure their sovereignty in times of migration? This is the multifaceted issue of this research and in my view it must be solved through a balance between the substance criteria (the rights of the child) and the procedural criteria that allows the State to decide over their borders or limit migration flow. It could be argued that international human right treaties have little influence due to their wide interpretation and that the CRC needs to be strengthen in order to give more weight to the best interests of the child, this would concretise the obligations that are followed by a possible ratification. In addition, more specific guidelines would also limit States in their discretionary power to interpret the CRC and provide guidance in the light of the interests of children. Although, is the wide discrepancy not the triumph card of all human rights? Wouldn't the consequence of more influential human rights treaties constrain States to ratify and accede human rights and would the CRC still receive almost universal ratification if the Convention would impose more clear restrictions on States rights to control migration? Additionally, the wide area of interpretation of Article 3.1 needs to cover cultural and local customs and account for a

wide range of issues relating to the best interest of the child. A narrower approach on the interpretation on the subject would probably be more excluding than inclusive for children in migration.

Yet, it must be acknowledged that States themselves commit to international treaties such as, the Refugee Convention and the CRC and have therefore used their sovereign powers to accept their obligations towards children, an action made by sovereign powers. However, the CRC have received universal recognition and gained general acceptance in the legal analyses in the international field. The Charter of Fundamental Rights has copied the CRC and the principle of the best interest of the child and the Lisbon Treaty introduced children as a legal objective in the European Union for the first time. The principle of the best interest of the child is reflected in all directives dealing with migration among the European Union countries.

In regards to the above, this research has proven that the legal security of the best interest of the child already exists. The meaning of the principle can not only be found in international and regional legislation but also among European Union countries national legislations, as indicated in the examples Sweden and UK that are presented in this research. The remaining issue to solve is rather the *will* to promote the best interests of the child when States are holding on to their last sovereign powers in a constantly developing globalised world.

6.5 Conclusion

The concept of the best interest of the child is connected with many risks. Ideally, the concept will be used to protect and respect children's rights. On the other hand, such a wide concept may also be used counteractively to overrule the provisions in the CRC for the best interests of the State. To combat such exploitation it is important to constantly question implementation and practice of the concept. Is the specific procedural action taken out for the best interest of the State or for the child? The recent jurisprudence in the field demonstrates a common opinion, children's rights shall be paramount and even if the best interest of the child is competing among others and the

States interest to control immigration shall never be the superior.

Bibliography

Alston, P. The best interest principle towards a reconciliation of culture and human rights, *International Journal of Law and the Family* 8 p.1-25, 1994

Alston, P. Gilmour-Walsh, B. The best interests of the child: towards a synthesis of children's rights and cultural values (No. innstu96/9). UNICEF Innocenti Research Centre, 1996

Al Jazeera, 2014: Far right gains in European Parliament vote, available at: <http://america.aljazeera.com/articles/2014/5/25/far-right-gains-ineuropeanparliamentvoting.html> [Accessed 12 June 2014].

Bhabha, J. Arendt's Children: Do Today's Migrant children have a right to have rights? *Human Rights Quarterly* 31.2. 2009.

Bhabha, J. Minors or Aliens? -Inconsistent state intervention and separated child-asylum seekers, *European Journal of Migration and Law* 3, 3/4, 2001

Bolton, S, Kaur, K, Shin Luh, S, Peirce, J and Yeo, C. Working with refugee children: Current issues in best practice, Immigration Law Practitioners Association, London, May 2011

Collins, T & Senator Pearson, L, Personal Representative of the Prime Minister to the UN Special Session on Children. What does the 'best interests of the child' mean? Discussion paper April 2002

Council of Europe, European Court of Human Rights, *Nsona v. The Netherlands* , 63/1995/569/655 , Council of Europe:, Strasbourg, 26 October 1996,

Council of Europe, European Court of Human Rights (ECtHR), Case of Berisha v. Switzerland, Application no.949/12, Strasbourg 20 January 2014

Council of Europe, European Court of Human Rights Neulinger and Shuruk v. Switzerland, Application no. 41615/07, Strasbourg, 6 July 2010

Craig, P, De Búrca, G. EU law: text, cases, and materials. Oxford University Press, 2011

Dauverne, C, Sovereignty, Migrations and the Rule of Law in Global Times, The Modern Law Review 67.4, 2004

Declaration of the Rights of the Child, UNGA Res. 1386 (XIV) 20 November 1959

Declaration on the Protection of Women and Children in Emergencies and Armed Conflict, UNGA Res. 3318. 14 December 1974 and the Universal Declaration on Human Rights, UNGA Res. 217 (III) 10 December 1948

Detrick, S A Commentary on the United Nations Convention on the Rights of the Child. Martinus Nijhoff Publishers, 1999

Drywood, E Challenging concepts of the 'child' in asylum and immigration law: the example of the EU. Journal of Social Welfare & Family Law, 32.3, 2010.

DS 2014:5 Particularly distressing circumstances, Ministry of Justice, January 2014 Available at <http://www.government.se/sb/d/18311/a/232343> [Accessed 8 June 2014].

England and Wales High Court (Administrative Court) Tinizaray, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 1850 (Admin) (25 October 2011)

England and Wales High Court (Administrative Court) B, R (on the application of) v London Borough of Merton [2003] EWHC 1689 (Admin) (14 July 2003)

Eurochild, The European Commission's 2013 Report on the Application of the EU Charter on Fundamental Rights and its contribution to protecting children's rights in the EU, Brussels, December 2012

European Commission, A Common European Asylum System, Home affairs, December 2013.

European Commission, Contact Committee 'Return Directive' 2008/115/EC, MIGRAPOL, CC Return Dir. 30, Directorate C. Migration and Borders.

European Commission and European Migration Network. Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/illegal-immigration/390_emn_adhoc_query_children_who_have_been_living_irregularly_for_a_long_period_15mar2012_wider_di_en.pdf, 2012 [Accessed 17 June 2014]

European Council for Steiner Waldorf Education (ECSWE), Improving the Quality of Childhood in Europe 2012, Vol. 3, Brighton, January 2012.

European Parliament, The Charter of Fundamental Rights, Available at: http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_1.1.6.html [Accessed 13 May 2014].

European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

European Union: Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003, OJ L. 50, 25/02/2003

European Union: Council Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31

European Union: Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC

European Union: Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34

European Union: Council Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013, 29 June 2013, OJ L. 180/1-180/30; 29.6.2013, (EU) 2003/86

European Union: Council of the European Union, Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC

European Union: Council of the European Union, Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC

European Union, Explanations relating to the Charter of Fundamental Rights, C 303/17 14 December 2007, OJ (2007/C 303/02)

European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01

European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01

European Union, Council Directive 97/43, of 30 June 1997, on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure, and repealing Directive 84/466 /Euratom.

European Union, The Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 27 June 2006. European Parliament v Council of the European Union, Case C-540/03. Available at: <http://eur-lex.europa.eu/legal-content/en/TXT/HTML/?isOldUri=true&uri=CELEX:62003CJ0540> [Accessed 4 May 2014].

European Union, The Court of Justice of the European Union, Judgement of the Court of 5 February 1963. N. V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos and Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration), Case 26-62.

European Union, The Court of Justice of the European Union, Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E.L. Case 6-64.

European Union, The Court of Justice of the European Union, Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), C-34/09, 8 March 2011

France terre d'asile, European Union's Fundamental Rights and Citizenship program. The reception and care of unaccompanied minors in eight countries in the European Union, 2011

Geneva Declaration of the Rights of the Child of 1924 adopted Sept 26, 1924, League of Nations O.J: Spec. Supp. 21 at 43 (1924)

Geraldine Van Bueren, The International Law on the Rights of the Child. The Hague: Kluwer Law International/Martinus Nijhoff Publisher 1998.

Goodwin-Gill, G. S and McAdam, J. The Refugee in International Law. Oxford University press, New York, 2007.

Guiraudon, V, Lahav, G. A Reappraisal of the State Sovereignty Debate The Case of Migration Control. Comparative political studies, 33(2), 163-195, 2000

Hammarberg, T Commissioner for Human Rights, The Principle of the Best Interest of the Child – What it Means and Demands from Adults”, Council of Europe. May, 2008 Warsaw (CommDH/Speech(2008)10)

Human Rights Committee, View on Communication No. 1564/2007 submitted by X.H.L against the Netherlands, 15 September 2011

International Refugee Organisation Constitution, UNGA Res 77, 15 December 1946 Available at <http://www.unhcr.org/3ae69ef14.html> [Accessed 12 April 2014].

Joint committee on Human Rights, 17th Report, Opinion of Nicholas Blake QC and Sandhya Drew, 2001, In the Matter of the United Kingdom Reservation to the UN Convention on the Rights of the Child. Available at:

<http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/132/13217.htm>
[Accessed 11 April 2014].

Juhlén, K. "Ensamkommande barn i Sverige – En kartläggning. [Unaccompanied children in Sweden – A mapping]. Save the Children 2003.

Juss, S. S., & Harvey, C. (Eds.), *Contemporary Issues in Refugee Law*, Edward Elgar Publishing. 2013

Lenaerts, K, Exploring the limits of the EU Charter of fundamental rights. *European Constitutional Law Review*, 8.3, 375-403. 2012

Lundberg, A. Barnets bästa i asylprocessen [The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights] (English translation), Published by Malmö Institute for Studies of Migration, Diversity and Welfare (MIM)

Macdonald, A, Protection Responses to Unaccompanied and Separated Refugee children in Mixed Migration Situations, *Refugee Survey Quarterly*, vol. 27, no. 4, 2009

Malanczuk, P, & Akehurst, M 2002, *Akehurst's Modern Introduction To International Law*, Ed. 7, Routledge, eBook Collection (EBSCOhost), EBSCOhost, Taylor & Francis [Accessed 12 May 2014].

Motion 2013/14 Sf242 Utvisning av barn som står under LVU-beslut html [Expulsion of children in care by the State]. February 2013

National Police of Sweden, Policy documents, Available at: <http://www.esv.se/Verktyg-stod/Statsliggaren/Regleringsbrev/?RBID=15006>, 2012 [Accessed 7 May 2014].

Nilsson, E, Barn i rättens gränsland, Om barnperspektiv vid prövning om uppehållstillstånd. [Children in the Borderland of Law. On Child Perspectives in the

Determination on granting Residence Permits] Doctoral dissertation. Iustus Förlag AB. Uppsala 2007.

Nykänen, E, Protecting children? The European Convention on Human Rights and child asylum seekers, *European Journal of Migration and Law* 3.3 (2001)

Official Journal of the European Union, Regulation (EU) No. 604/2013 of the European Parliament and the Council of 26 June 2013. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF> [Accessed 8 May 2014].

Pobjoy, Jason. M. A child's rights framework for assessing the status of refugee children Paper No. 27/2013, University of Cambridge, August 2013

Proposition 1989/90:107, Om godkännande av FN-Konventionen om barns rättigheter [Approval of the UN Convention in the Rights of the Child]. Stockholm, Sweden. Ministry of Justice. March 1990

Proposition 1996/97:24, Svensk migrationspolitik i globalt perspektiv [Swedish politics of migration from a global perspective]. Stockholm, Sweden. State Department, September 1996

Proposition 2013/14:216 Särskilt ömmande omständigheter [Particularly distressing circumstances]. Stockholm, Sweden. Ministry of Justice. April 2014.

Proposition 2011/12:60, Genomförandet av återvändandedirektivet [Implementation of the returns directive]. Stockholm, Sweden. Ministry of Justice. January 2012

Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1989/48, March 1989

Sandesjö H and Wikrén G, Utlänningslagen med kommentarer [Aliens Act and Commentaries], Nordstedts Juridik, Stockholm 2010

Save the Children, EU Returns Directive Contact Committee. Implementation of Article 10 (2): Points for Reflection. February 2010

SFS 2005:716 Utlänningslag, [Aliens Act]. Stockholm, Sweden. Ministry of Justice

SOU 1996:115:14, Barnkonventionen och utlänningslagen [Convention on the Rights of the Child and the Swedish Aliens Act]. Stockholm, Sweden. Board of Health and Social Affairs

Swedish Migration Board, GDA 6/2011, Migrationsverkets Barnpolicy, [Swedish Migrations Board, Policy for Children]. June 2011.

Swedish Migration Board, Protection in Sweden, Available at:
<http://www.migrationsverket.se/Privatpersoner/Skydd-och-asyl-i-Sverige/Asylregler.html> [Accessed 7 June 2014].

Swedish Migration Board, Rättsligt ställningstagande angående åldersbedömning. [Legal opinion about age assessment] RCI 13/2014, June 2014

Swedish Migration Board, Rättsligt ställningstagande angående åldersbedömning, [Legal opinion about age assessment] RCI 19/2012. July 2012

Swedish Migration Court of Appeal, MIG 2008:42, UM2397-08, 24 September 2008.

Swedish Migration Court of Appeal, MIG 2009:9, UM5163-08, 21 April 2009

Thomas, N. O'kane, C. When children's wishes and feelings clash with their 'best interests'. *The International Journal of Children's Rights*, 6.2 137-154, 1998

The National Board of Health and Welfare, (Sweden) Document on age assessment. Available at: http://www.socialstyrelsen.se/publikationer2012/2012-6-54/Documents/New_recommendations_on_Medical_Age_Assessment.pdf [Accessed 2 April 2014].

UN Children's Fund (UNICEF), Judicial Implementation of Article 3 of the Convention On the Rights of the Child in Europe: The case of migrant children including unaccompanied children, June 2012.

UN Children's Fund (UNICEF), The State of the World's Children: Celebrating 20 years of the Convention on the Rights of the Child (2009)

UN Children's Fund (UNICEF) Implementation Handbook for the Convention on the Rights of the Child, Fully revised third edition, Geneva, September 2007

UN Children's Fund (UNICEF) Rights under the Convention in the Rights of the Child, Available at http://www.unicef.org/crc/index_30177.html [Accessed 3 May 2014]

UN Children's Fund (UNICEF) The Convention on the Rights of the Child. Survival and development rights: the basic right to life, survival and development of one's full potential http://www.unicef.org/crc/files/Survival_Development.pdf [Accessed 3 May 2014]

UN Committee on the Rights of the Child (CRC), CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 2005, CRC/GC/2005/6

UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, Para. 1), 29 May 2013, CRC /C/GC/14

UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Person,
Final Act of the United Nations Conference of Plenipotentiaries on the Status of
Refugees and Stateless Persons, A/CONF.2/Rev.1, 25 July 1951

UN General Assembly, Convention on the Rights of the Child, 20 November
1989, United Nations, Treaty Series, vol. 1577, p. 3,

UN High Commissioner for Refugees (UNHCR), Conclusion on Children at Risk, 5
October 2007, No. 107 (LVIII), 2007

UN High Commissioner for Refugees (UNHCR), Conclusion on the Provision of
International Protection Including Through Complementary Forms of Protection, 7
October 2005, No. 103 (LVI), 2005

UNHCR, the Dublin Regulation <http://www.unhcr-centraleurope.org/pdf/what-we-do/ensuring-legal-protection/european-union-asylum-policy/the-dublin-regulation.html>
[Accessed 8 May 2014]

UN High Commissioner for Refugees (UNHCR), The Handbook on Procedures and
Criteria for Determining Refugee Status under the 1951 Convention and the 1967
Protocol relating the Status of Refugees, Geneva, 1992

UN High Commissioner for Refugees (UNHCR), The Dublin Regulation. Available at:
<http://www.unhcr-centraleurope.org/pdf/what-we-do/ensuring-legal-protection/european-union-asylum-policy/the-dublin-regulation.html> [Accessed 8 May
2014]

UN High Commissioner for Refugees (UNHCR), UNHCR Guidelines on
Determining the Best Interests of the Child, May 2008,

UN High Commissioner for Refugees (UNHCR) Guidelines on International Protection No.8: Child Asylum Claims under Articles 1(A) and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 22 December 2009

UN High Commissioner for Refugees (UNHCR) Legislative History of the Convention on the Rights of the Child, Vol. 1, Geneva and New York 2007

UN High Commissioner for Refugees (UNHCR), State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. Available at <http://www.unhcr.org/3b73b0d63.html>, [Accessed 19 June 2014].

UN Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, A/HRC/11/7, May 2009

UN Human Rights Council (UNHRC), Report of the Office of the United Nations High Commissioner for Human Rights on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration, A/HRC/15/295, July 2010

United Kingdom Constitutional Reform and Governance Act 2010 Ratification of Treaties, Available at: <http://www.legislation.gov.uk/ukpga/2010/25/part/2> [Accessed 19 June 2014].

United Kingdom, Children Act 1989 Available at <http://www.legislation.gov.uk/ukpga/1989/41/contents> [Accessed 5 June 2014].

United Kingdom, Supreme Court, ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent), [2011] UKSC 4, 1 February 2011

United Kingdom Legislation, The Borders, Citizenship and Immigration Act, July 2009

United Kingdom, Government, Policy Bulletin 75, Section 55 guidance, October 2011.

Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257491/pb75.pdf [Accessed 5 June 2014].

United Kingdom Visas and Immigration (UKVI) Assessing Age an introduction, 2011, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257462/assessing-age.pdf [Accessed 10 May 2014].

United Kingdom Visas and Immigration (UKVI), 'Processing an asylum application for a child' April 2013, Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf

United Kingdom, UK Visas and Immigration (UKVI), Immigration Rules, Updated version from 8 April 2014

Van Bueren, G. The International Law on the Rights of the Child: Geraldine Van Bueren. Nijhoff, 1995