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# Mind the gap: transitioning into undocumented adulthood in the European Union

Durable solutions in the best interests of unaccompanied migrant children

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## Abstract

Unaccompanied children whose asylum claim is denied in the European Union risk being returned to a country where their protection needs are not safeguarded. The international human rights framework requires host countries to identify durable solutions in the best interests of unaccompanied children. This conflicts with the interests of the European Union to combat irregular migration and deter individuals who do not qualify for asylum. States provide unaccompanied children whose claim for asylum was rejected and who cannot be returned a temporary right to stay, until these children turn eighteen and obligations of the State to protect their rights as children no longer exist. They remain or become undocumented upon ageing out and are then restricted from accessing rights and services which allow them to participate in society. For unaccompanied children who do not qualify for asylum, no durable solution in the best interests of the child is identified. This thesis aims to seek common ground between the best interests of the child with interests of the State to control migration flows, to identify a framework through which EU member states can find durable solutions for unaccompanied children, which provide more certainty about their legal status.

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## List of abbreviations

<b>ABRvS</b>	Afdeling Bestuursrechtspraak van de Raad van State
<b>AMIF</b>	Asiel, Migratie en Integratiefonds
<b>BIC-Model</b>	Best Interests of the Child-Model
<b>CEAS</b>	Common European Asylum System
<b>CRC</b>	Convention on the Rights of the Child
<b>CRC Committee</b>	Committee on the Rights of the Child
<b>CJEU</b>	Court of Justice of the European Union
<b>DT&amp;V</b>	Dients Terugkeer & Vertrek
<b>ERPUM</b>	European Return Platform for Unaccompanied Minors
<b>EU</b>	European Union
<b>EURODAC</b>	European Dactyloscopy
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations Children's Fund

## 1. Introduction

### 1.1 Unaccompanied migrant children who remain or become undocumented upon ageing out: who are they?

One out of every four first-time asylum applicants in the European Union (EU) in 2022 were children and 19% of these children were unaccompanied.<sup>1</sup> Every human being below the age of eighteen is a child, according to the definition of article 1 Convention on the Rights of the Child (CRC).<sup>2</sup>

Unaccompanied children are separated from the adults who are, legally and by custom, responsible for their care, such as (foster) parents or other relatives.<sup>3</sup> When children turn 18, and thus age out, they are no longer protected by the CRC. This is especially problematic for unaccompanied children who remain or become undocumented upon ageing out. Without a legal status, they are limited in exercising their fundamental human rights and they risk being returned to their country of origin.<sup>4</sup> This thesis aims to identify durable solutions for unaccompanied children who remain or become undocumented upon ageing out to provide them more certainty about their legal status.

Undocumented, for the purposes of this thesis, refers to people without a legal status. In the EU, thousands of children remain or become undocumented upon turning eighteen. To qualify as a refugee, an individual must inter alia have a well-founded fear persecution.<sup>5</sup> However, this may not always be the driving factor to leave a country. Outside the frameworks of international refugee law, and labour migration, there is a group of people who migrate because of other reasons, varying from economic and social distress caused environmental or natural disasters or by the political situation in their home country, to personal and family considerations, and beyond. If their asylum request fails, or if they did not lodge one in the first place, they are left without a legal status and expected to return to their

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<sup>1</sup> 'Children in Migration - Asylum Applicants' (*Eurostat*, 29 April 2022) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children\\_in\\_migration\\_-\\_asylum\\_applicants](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants)> accessed 29 April 2023.

<sup>2</sup> International Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 157 UNTS 3 (CRC), article 1; This provision does state that majority can be attained earlier under States' law applicable to the child.

<sup>3</sup> GC 6, 'CRC "General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin"' (1 September 2005) UN DOC CRC/GC/2005/6.' para. 7.

<sup>4</sup> 'Guidance to Respect Children's Rights in Return Policies and Practices Focus on the EU Legal Framework' 27 <[https://picum.org/wp-content/uploads/2019/09/2019\\_Guidance\\_childrens\\_rights\\_in\\_return\\_policies.pdf](https://picum.org/wp-content/uploads/2019/09/2019_Guidance_childrens_rights_in_return_policies.pdf)>.

<sup>5</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), article 1.

country of origin. There is no specific framework to protect these people who are often referred to as irregular or undocumented migrants.<sup>6</sup>

Children can become undocumented in this same way, but they are protected by the CRC.<sup>7</sup>

Article 3 CRC demands that in every action concerning children, the best interest of the child is of primary consideration. According to the Committee on the Rights of the Child (CRC Committee) “The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution.”<sup>8</sup> Regardless of the child’s legal status, the best interests of the child must be a primary consideration in identifying a durable solution.<sup>9</sup>

For unaccompanied children who did not apply for asylum, or whose application was rejected, the durable solution preferred by the EU is return.<sup>10</sup> International human rights law standards set various preconditions for the return of unaccompanied children. For example, care in the country of origin must be ensured.<sup>11</sup> Therefore, a family member or nominated guardian must be present. If this cannot be arranged, at least concrete care arrangements and custodial care must be ensured. EU law requires “adequate reception facilities” to be present in the country of return, in addition to the prerequisite that “due consideration” was given to the best interests of the child.<sup>12</sup> Consequently, more than half of the EU Member States do not return unaccompanied children.<sup>13</sup> According to the general comment on the rights of the child in the context of international migration, durable solutions are, to the greatest extent possible, meant to cater to the child’s long-term interests and guarantee that the child is able to grow up beyond the age of eighteen in a setting where their needs are addressed.<sup>14</sup> If return is not in the best interests of the child, “local integration based on a secure legal status” is the best durable solution.<sup>15</sup>

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<sup>6</sup> Alexander Betts, ‘Towards a “Soft Law” Framework for the Protection of Vulnerable Irregular Migrants’ (2010) 22 *International Journal of Refugee Law* 209, 211–212; ‘Scaling Fences | United Nations Development Programme’ (*UNDP*) <<https://www.undp.org/publications/scaling-fences>> accessed 11 June 2023.

<sup>7</sup> ‘FAQs Undocumented Children’ (*PICUM*) <<https://picum.org/faqs-undocumented-children/>> accessed 29 April 2023.

<sup>8</sup> (n 3) para. 79.

<sup>9</sup> Article 2 and 3 CRC; *ibid* para. 84; ‘CMW and CRC “Joint General Comment No. 3 (2017) and No. 22 (2017) on the General Principles Regarding the Human Rights of Children in the Context of International Migration” (16 November 2017) UN DOC CMW/C/GC/3-CRC/C/GC/22.’ para. 32.

<sup>10</sup> Jennifer Allsopp and Elaine Chase, ‘Best Interests, Durable Solutions and Belonging: Policy Discourses Shaping the Futures of Unaccompanied Migrant and Refugee Minors Coming of Age in Europe’ (2019) 45 *Journal of Ethnic and Migration Studies* 293, 9.

<sup>11</sup> GC 6 (n 3) para. 84.

<sup>12</sup> Directive (EU) 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ 348/98 (Return Directive), article 10.

<sup>13</sup> Laetitia Van der Vennet, ‘Turning 18 and Undocumented: Supporting Children in Their Transition into Adulthood’ (Platform for International Cooperation on Undocumented Migrants (PICUM) 2022) 12 <[https://picum.org/wp-content/uploads/2022/04/Turning-18-and-undocumented\\_EN.pdf](https://picum.org/wp-content/uploads/2022/04/Turning-18-and-undocumented_EN.pdf)>.

<sup>14</sup> (n 9), para. 32 (j).

<sup>15</sup> GC 6 (n 3) para. 88.

But the CRC protects children under eighteen, and there is no international framework to protect adolescents who remain or become undocumented upon ageing out. Consequently, EU Member States provide children a legal right to stay which expires upon their eighteenth birthday.<sup>16</sup> Without a legal status, they cannot work, study, and their access to social services is often restricted. They are effectively restricted from participating in society.<sup>17</sup> Ageing out into this legal limbo affects the adolescents' transition into adulthood. The insecurity affects their wellbeing and holistic development.<sup>18</sup> Moreover, the fear to be detained or deported constitutes a reason for many children to leave reception facilities with an unknown destination before they reach the age of majority.<sup>19</sup> States balance the best interests of the child against their own interest to control migration flows.<sup>20</sup> In this balancing exercise, the status of unaccompanied children as migrants risk taking the overhand over their status as a child. Overlooking the rights of the child and their long-term interests affects their development as children, and their transition into adulthood.<sup>21</sup> One could question whether durable solutions are durable and identified in the best interests of the child, if they result in children ageing out into a legal limbo.

## 1.2 Problem statement, objectives and research questions

The best interests of unaccompanied children transitioning into adulthood often conflict with the interests States to control migration flows and reduce the number of irregular migrants. This thesis addresses the problems unaccompanied children face when they transition into undocumented adulthood, because of the way in which States identify durable solutions for them. These durable solutions, which only take their best interest into account until their eighteenth birthday restrict unaccompanied children in building a viable future for themselves. The main objective of this thesis is to identify a framework through which EU member states can find durable solutions for unaccompanied children, which provide more certainty about their legal status. The thesis aims to do so

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<sup>16</sup> Joint GC 3 and 22 (n 9) para. 32 (j); GC 6 (n 3) para. 88; Van der Vennet (n 13) 12.

<sup>17</sup> Van der Vennet (n 13) 4–9.

<sup>18</sup> Ravi KS Kohli, 'Working to Ensure Safety, Belonging and Success for Unaccompanied Asylum-Seeking Children' (2011) 20 Child Abuse Review 311, 315.

<sup>19</sup> Maria-Margarita Mentzelopoulou, 'Disappearance of Migrant Children in the EU' <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733670/EPRS\\_ATA\(2022\)733670\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733670/EPRS_ATA(2022)733670_EN.pdf)> accessed 12 June 2023.

<sup>20</sup> Allsopp and Chase (n 10) 9.

<sup>21</sup> Margrite Kalverboer and others, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 The International Journal of Children's Rights 114, 128.

through a human rights-based approach and more specifically through the framework of the best interests of the child.

This leads to the following research question:

In the context of unaccompanied children's 'transition to adulthood in EU member states, what national measures can be taken to harmonise the 'the best interests of the child 'with the interests of the state to control migration and reduce the number of irregular immigrants in their territories, in order to find 'durable solutions 'for unaccompanied children to provide them more certainty about their legal status?

In order to formulate an answer to this research question, the following sub questions will be answered:

- What does 'the best interests of the child 'mean and why is it relevant for unaccompanied migrant children?
- What are durable solutions and how can they be identified?
- Why and in what way are 'the best interests of the child' in conflict with the European migration policy and the interests of states to control migration and reduce the number of irregular immigrants in their territories?
- How and to what extent can EU Member States harmonise the best interests of the child with their interest to control migration flows, in order to find durable solutions for unaccompanied children, while safeguarding their holistic development and providing more certainty on their legal status?

### **1.3 Structure of the thesis**

This first chapter serves as an introduction to the thesis. The chapter started with an explanation of what is meant by unaccompanied children who remain or become undocumented upon ageing out, because that is the main focus of the thesis. Then, the problems this thesis addresses, as well as the general purpose and the specified objectives of the thesis were addressed. The research question and the sub-questions were presented, and this section now presents the order in which these problems, purposes and objectives will be addressed. The last section of this chapter clarifies the scope and methodology of the thesis, and addresses the limitations. Chapter two explores the concept of the best interests of the child. The best interests of the child as enshrined in article 3 of the CRC is analysed and the way in which this provision relates to the other CRC provisions is explored.

Various frameworks to assess and determine the best interests of the child have been established by human rights bodies and in academic literature. These frameworks are explored to identify which elements comprise a holistic assessment and determination of the best interests of an unaccompanied child. Chapter three analyses how durable solutions in the best interests of the child can be identified. Identifying durable solutions is the ultimate aim in addressing the fate of unaccompanied children.<sup>22</sup> The concept as it emerged in international refugee law and was applied to unaccompanied and separated children will be critically analysed and the protection gaps in the existing framework will be identified. In response to these gaps, elements to identify durable solutions which are in the best interests of unaccompanied migrant children who remain or become undocumented upon ageing out are proposed. Chapter four aims to understand how the principle of the best interests of the child and durable solutions fit into the European asylum framework. The best interests of the child and the responsibility of Member States to find durable solutions for unaccompanied migrant children frequently conflict with the interests of the EU and Member States to restrict migration. Chapter four discusses this tension and seeks for common ground between these often-conflicting interests. Finally, chapter five will assess how the international and European framework are implemented on the national level through a case study of the Netherlands. The Netherlands is a State Party to the CRC and an EU Member State. The best interests of the child as implemented in Dutch migration law will be discussed as well as a case which was presented to the European Court of Justice (CJEU) for a preliminary ruling. The effect of this case on the identification of durable solutions in the best interests of unaccompanied migrant children will be discussed and the end of the chapter will discuss the situation of unaccompanied migrant children who aged out and who remained or became undocumented prior to this ruling. This will show how the interest of the State to control migration flows are balanced against the best interests of the child on the national level. Chapter six will present the conclusion of the thesis.

#### **1.4 Scope, methodology, and limitations**

This thesis is based on desk research conducted through legal analysis and by consulting academic literature. The CRC and its General Comments are the most relevant documents discussed in the first two chapters of this thesis. Chapter four and chapter five of the thesis focus on European legal documents and policies, and the case study is based on Dutch legislation. The target group of the thesis is unaccompanied children transitioning into undocumented adulthood in the EU. Children who become or remain undocumented upon turning 18 are not a homogeneous group. Moreover, limited

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<sup>22</sup> GC 6 (n 3) para 79.

data is available on these children. Therefore, it was difficult to define this group. Unaccompanied migrant children who remain or become undocumented upon ageing out, or who aged out into a legal limbo in the past, were not interviewed for this thesis. Their experiences would have provided valuable input, but I did not think it ethically appropriate to conduct such interviews. Especially since these interviews were not absolutely necessary to formulate an answer to the research question of this thesis. Rather, I spoke to professionals who have worked and spoken with these children for their work. These conversations were solely used as background information. Therefore, transcripts are not included. By referring to unaccompanied migrant children, the differentiation is made between children who qualified for asylum and those children who received a negative decision on their asylum application or who did not lodge such an asylum application. The thesis focuses on unaccompanied migrant children who have not been granted a legal status or right to stay in the host country and those children who have been granted a legal status which expires when they turn eighteen and age out. Sometimes, issues or documents are discussed which similarly affect unaccompanied migrant children, unaccompanied asylum-seeking children, and unaccompanied refugee children. In such cases, the term unaccompanied child will be used. Furthermore, the thesis refers to unaccompanied children and unaccompanied adolescents. Whereas a child is defined in international human rights law as a human being below the age of eighteen, this does not necessarily align with the period of adolescence. Adolescence is the period in which children transition into adulthood. It starts when the child is approximately eleven years old and it usually lasts until the person is between seventeen and twenty-one years old.<sup>23</sup> Therefore, when this thesis refers to unaccompanied adolescents it is referring to individuals between the ages of eleven and twenty-one years old.

Unaccompanied migrant children face many challenges before, during and after their journey to Europe. This thesis is focused specifically on durable solutions and the legal status of unaccompanied migrant children. Other common issues which arise upon arrival in Europe, or during the asylum procedure are only addressed insofar as they are relevant for the formulation of an answer to the research question. Issues which are shortly mentioned, but not discussed in detail are the reception of children and age assessment procedures. This thesis does not cover issues regarding appointment of guardians or legal representatives or facilities for further integration into the host State, such as healthcare, labour opportunities and educational opportunities.

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<sup>23</sup> Dap Louw and Anet Louw, *Child and Adolescent Development* (UJ Press 2014) 304.

## 2. The best interests of the child

In modern society, children are limited in their capacity to claim their rights. They are banned from directly influencing decision making because they cannot vote, and social and legal constructs have made them dependent on adults to fully exercise their rights.<sup>24</sup> The CRC acknowledges children do not have the autonomy adults have but at the same time recognises children as subjects of rights and their evolving capacities. Children have the right to participate in decisions affecting them.<sup>25</sup> As such, State Parties have the obligation to take the child's views in consideration and to take the best interests of the child into account as a primary consideration in all actions concerning children.<sup>26</sup> This chapter discusses the best interests of the child as a right, as well as the indeterminacy of the provision in the CRC. Furthermore, it analyses other provisions relevant to safeguard the best interests of unaccompanied migrant children who remain or become undocumented upon ageing out. These provisions are then combined with the rest of the CRC framework and academic literature to comprise a framework for the assessment and determination of the best interests of unaccompanied migrant children who remain or become undocumented upon ageing out, with the aim of overcoming some of the indeterminacy of the CRC provision.

### 2.1 What does it mean?

#### 2.1.1 Evolution and definition

The legal tradition of the rights of the child can be derived back to domestic legal systems of countries like France and the United Kingdom (UK), where these rights originally served to protect the interests of society and only later evolved into rights to protect children.<sup>27</sup> The rights of the child were first recognised in international law in the 1924 Declaration on the Rights of the Child, which was adopted by the League of Nations.<sup>28</sup> The 1959 Declaration on the Rights of the Child, which was adopted by the UN General Assembly explicitly included the right of the child to have their best interests taken into account 'as a paramount consideration.'<sup>29</sup> Both instruments present principles which are not

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<sup>24</sup> Mhairi Cowden, 'Capacity, Claims and Children's Rights' (2012) 11 Contemporary Political Theory 362, 362.

<sup>25</sup> Article 12 CRC.

<sup>26</sup> Article 3 CRC.

<sup>27</sup> Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child, Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF 1996) 4 <[https://www.unicef-irc.org/publications/pdf/is\\_best\\_interest\\_low\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/is_best_interest_low_eng.pdf)> accessed 1 May 2023.

<sup>28</sup> *ibid.*

<sup>29</sup> Declaration on the Rights of the Child (adopted 20 November 1959) UNGA Res 1386 (XIV) principle 2 (1959 Declaration on the Rights of the Child)

binding upon States. The drafting history of the 1959 Declaration reads that children were regarded as ‘immature beings,’ who are ‘incapable to protect [themselves].’<sup>30</sup> The CRC steps away from the perception of children as objects with entitlements, and who may enjoy benefits.<sup>31</sup> Rather, it recognises children as holders of rights. Furthermore, the CRC imposes binding obligation upon State Parties, and it is more extensive than its predecessors.

Enshrined in it, inter alia, are the right of the child to express themselves (article 13 CRC), the right to be heard and participate (article 12 CRC) and the best interests of the child (article 3 CRC). Regarding the latter, the CRC takes on a wide scope of applicability.

Article 3 (1) CRC reads as 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.*

The concept of the best interests of the child is threefold.<sup>32</sup> Firstly, it is a substantive right. It imposes the obligation upon States to implement the right and to respect it in all actions affecting children. As a substantive right, it is also directly applicable and can be invoked before a court. Secondly, it is a fundamental, interpretative legal principle. The CRC Committee explains this as follows: “if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen.” Thirdly, it is a rule of procedure. This imposes upon decision makers the duty to show that the best interests of the child were explicitly considered in a decision concerning children.<sup>33</sup>

Whereas the 1959 Declaration of the Rights of the Child speaks of the best interests of the child as being the paramount consideration, implying that the best interests of the child should take prevalence over any other consideration in acts concerning children, according to the CRC the best interests of the child must be taken into account as *a primary consideration*. This formulation leaves State Parties the

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<sup>30</sup> Anne F Bayefsky, ‘Office of the United Nations High Commissioner for Human Rights’ in Anne Bayefsky (ed), *The UN Human Rights Treaty System in the 21 Century* (Brill | Nijhoff 2000) 21–22  
<[https://brill.com/view/book/edcoll/9789004502758/B9789004502758\\_s044.xml](https://brill.com/view/book/edcoll/9789004502758/B9789004502758_s044.xml)> accessed 12 July 2023.

<sup>31</sup> See e.g. principle 4 and 7 1959 Declaration on the Rights of the Child.

<sup>32</sup> GC 14, ‘CRC “General Comment 14 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) UN DOC CRC/C/GC/14.’ para. 6.

<sup>33</sup> *ibid* para. 6.

discretion to give due weight to other interests as well, such as the interests of a democratic society or justice and security.<sup>34</sup> It still classifies the best interests of the child as the most important consideration, but the best interests of the child do not override all other interests. The best interests of the child covers a wide range of situations and is relevant to many different contexts.<sup>35</sup> The provision purposely has a wide scope, to allow for application under many different circumstances. Some of the characteristics of article 3 CRC are that the provision is applicable to individual as well as to groups of children and that the best interests of the child must be considered in all actions concerning children directly or indirectly.<sup>36</sup> Moreover, there is not one way to serve the best interest of the child. The way in which the best interests of the child should be taken into account differs from child to child and depends on the context in which the principle is applied. In preserving all these different characteristics, the formulation of article 3 CRC has become open-ended and somewhat vague. The Committee on the Rights of the Child (CRC Committee) has aimed to alleviate some of the indeterminacy surrounding article 3 (1) CRC in General Comment 14 (2013), inter alia by clarifying the scope of the provision, and by providing guidance on its implementation. Throughout this general comment the CRC Committee has tried to find a balance between clarifying the right of the child to have their best interests considered on the one hand and retaining its wide scope of applicability on the other hand. The condition that the best interests of the child must be considered in all decisions directly and indirectly affecting children implies that States must take the best interests of the child into account in all decisions. After all, all actions taken by States affect children one way or the other. General Comment 14 nuances this by explaining that decisions with a major impact on a child require a greater level of protection and detailed procedures, while decisions with a lesser impact require less protection. All actions which indirectly affect children require clarification of the word ‘concerning’ in light of the circumstances of each case.<sup>37</sup> To take the best interests of the child into account as a primary consideration, these interests must be assessed and determined. Assessment and determination are different components of the same process. The aim of this process is to ensure the effective enjoyment of CRC rights and the holistic development of the child.<sup>38</sup> An assessment evaluates and balances the

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<sup>34</sup> Alston and Gilmour-Walsh (n 27) 11.

<sup>35</sup> GC 14 (n 32) para. 39.

<sup>36</sup> Alston and Gilmour-Walsh (n 27) 9; Stephen Parker, ‘The Best Interests of the Child - Principles and Problems Special Issue: Part One: The Best Interests of the Child: Conceptual Issues’ (1994) 8 *International Journal of Law and the Family* 26, 28.; GC 14 (n 25) para. 19 and 23.

<sup>37</sup> GC 14 (n 32) para. 20. GC 14 (n 25) para. 20.

<sup>38</sup> Christina Jespersen, ‘Safe & Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe’ 31 <<https://www.refworld.org/pdfid/5423da264.pdf>> accessed 8 June 2023.

elements necessary to make a decision in a specific situation and should be made in light of the individual circumstances of the child and it requires their participation.<sup>39</sup> A determination of the best interests of the child is based on this assessment. The CRC Committee describes a best interests determination as a “formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment.”<sup>40</sup> It is left to State Parties to decide what decisions need a best interests assessment determination based on strict safeguards and how strict these procedural safeguards should be. The broad scope of application is retained, but at the same time this leaves the principal open ended.

### **2.1.2 Indeterminacy of the concept**

The open-endedness of the best interests of the child principle has evolved into the indeterminacy argument in academic literature. This criticism concerns the determination of the best interests of the child. Stephen Parker (1994) explains the indeterminacy argument using two theories: the rational choice theory and the theory of rule scepticism. According to the rational choice theory, to acquire a determinate answer to a decision problem, the following knowledge conditions must be met:

1. All the options must be known;
2. All the possible outcomes of each option must be known;
3. The probabilities of each possible outcome occurring must be known; and
4. The value to be attached to each outcome must be known.

If decision makers have different knowledge at any time during the decision making, affecting any of these conditions, this will inherently lead to different answers to the problem. Parker argues that the range of possible outcomes for a child are a matter of pure speculation. This would affect the first three conditions in such a way that the same decision maker, making two decisions on similar facts can end up making two different decisions. But even if two decision makers would come up with a similar range of outcomes in deciding on a problem, they would also have to attach the same value to each outcome. This is particularly delicate in deciding on the best interests of the child. Decisions can affect various aspects of the child's life, such as their economic situation, spirituality or psychological status and the effects of a decision may continue to influence these spheres of life indefinitely. In practice

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<sup>39</sup> Joint GC 3 and 22 (n 9) para. 31.

<sup>40</sup> GC 14 (n 32) para. 47.

applying the best interests of the child is dependent on contextual circumstances. There is no *modus operandi* for how and to what extent the child's future should be considered in determining the best interests of the child. The CRC and the right of the child to have their best interests considered no longer apply to children once they become adults legally but the impact of decisions may affect people for a lifetime.<sup>41</sup> As Mnookin wrote: "deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself."<sup>42</sup> Taking all considerations into account, it seems unlikely two decision makers would end up taking the same decision in applying the best interests of the child in any given situation.

Parker attempts to resolve this indeterminacy by arguing that customs can provide guidance in the application of article 3 CRC, just like they provide guidance in the application of other rules. Alston and Gilmour-Walsh provide examples of how customs have helped in a more uniform application of the principle of the best interests of the child in communities in cases of custody and female circumcision.<sup>43</sup> However, this would still leave room for the theory of rule scepticism, which is another often used theory to support the indeterminacy critique. Whereas rational choice theory assumes the existence of determinate rules, rule scepticism questions the ability of rules to express a desired outcome.<sup>44</sup> The theory argues that questions can be answered through different approaches, even if the problem has a finite number of answers.<sup>45</sup>

In General Comment 6, the CRC Committee presents a framework for the identification of durable solutions for unaccompanied and separated children outside their country of origin. The framework itself presents all possible options in the form of durable solutions. In the case of unaccompanied migrant children, the probability of each possible outcome is difficult to determine. For some outcomes, such as return, this depends on the country of origin. It might be difficult to assess the current or future situation in a country which might be politically or economically instable and which is far away from the host country making such an assessment. Moreover, the great value attached to family reunification by the CRC Committee on the one hand, and the value attached to return by EU Member States on the other hand, also inevitable influences the determination of the durable solution which is in the best interests of the child. The range of possible outcomes remains a matter of

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<sup>41</sup> Allsopp and Chase (n 10) 5.

<sup>42</sup> Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 260.

<sup>43</sup> Alston and Gilmour-Walsh (n 27) 29–31.

<sup>44</sup> Parker (n 36) 33.

<sup>45</sup> Alston and Gilmour-Walsh (n 27) 16.

speculation. Applying the rational choice theory to unaccompanied migrant children means that two decision makers could end up taking an entirely different decision identifying a durable solution for them when these decision-makers are taking the best interests of the child into account as a primary consideration.

Applying rule scepticism to the case of unaccompanied migrant children, decision makers can end up taking any decision and argue that the best interests of the child was taken into account. The CRC Committee has aimed to overcome this by underlining that the best interests of the child is a rule of procedure and justifications of any decision concerning children must show that article 3 (1) CRC was explicitly taken into account.<sup>46</sup> Parker aims to overcome the argument of rule scepticism by using a theory of philosopher Philip Hewitt on the influence of previous examples. According to this theory previous dealings with the best interests of the child in a particular case has set an example. Previous examples will lead someone to be inclined to pick the rule following this example rather than another possible rule. This would mean the decision maker following the example is most likely applying the best interests of the child principle and not some other rule.<sup>47</sup> Moreover, Alston and others suggest that some of the indeterminacy can be resolved when the principle of the best interests of the child is read in conjunction with the other substantive rights recognised in the CRC.<sup>48</sup> Customs may then provide additional support for more uniform assessments of the best interests of unaccompanied migrant children. In the end, the principle of the best interests of the child shall always remain somewhat open-ended, since this is how the wide scope of the principle is retained so it can be applied in all different contexts in which it may be relevant. However, it is important that decision-makers and governments are aware of the indeterminacy of the principle and how this potentially affects their decision making.

## 2.2 The principle of non-discrimination

The principle of non-discrimination, as laid down in article 2 CRC, provides an important safeguard in the protection of unaccompanied migrant children who remain or become undocumented upon ageing out. It ensures them equal rights to other children in the host State. It also ensures the best interests of the child are taken into account as a primary consideration in all decisions affecting them, regardless of their status. Article 2 CRC also imposes an active obligation upon State Parties. Redress of situations of ‘real’ inequality may require State Parties to take positive measures. In addition, State Parties must also

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<sup>46</sup> GC 14 (n 32) para. 6 (c).

<sup>47</sup> Alston and Gilmour-Walsh (n 27) 31–32.

<sup>48</sup> *ibid* 36.

take measures to address the possible misperceptions and stigmatisation of migrant or refugee children.<sup>49</sup> This is especially relevant for adolescent unaccompanied children, who risk facing additional discrimination and stigmatisation because of their status as refugee or migrant. Safeguarding the principle of non-discrimination starts upon arrival of the unaccompanied child in the host country and continues to be relevant throughout the asylum procedure and even after that. The CRC Committee has affirmed that article 2 and 3 CRC impose the obligation upon State Parties to provide access to healthcare and education to unaccompanied children whose application was rejected too.<sup>50</sup> On the regional level however, the European Court of Human Rights did accept that differential treatment because of immigration status can be justified under certain circumstances.<sup>51</sup> In practice, unaccompanied migrant children who are undocumented are often denied access to social services such as education, and health services because of their status.<sup>52</sup> Even if services are available to unaccompanied migrant children without a legal status, accessing these services may lead to detention or deportation, since this may notify authorities of their ‘illegal’ presence on the territory of the host country. This affects not just the principle of non-discrimination, but also the child’s right to the highest attainable standard of health (article 24 CRC), and to access education (art. 28 CRC), which are all rights which apply to all children, no matter if they are undocumented or not. Even though both these rights are subject to progressive realisation, they are not just abstract goals. In line with article 2 CRC, States must provide children who fled the same as it provides to children who are the States’ citizens.<sup>53</sup> Although article 2 explicitly prohibits discrimination of children in comparison to other children on different grounds, there is no prohibition on discrimination of age. Contrary, the CRC Committee allows for differentiation on the basis of age, but only when different protection needs are required. While this it is important recognition of the child’s evolving capacities, adolescents who may need less protection than younger children remain to be in a vulnerable position. Moreover, as recognised by the CRC Committee, adolescence is a source of discrimination. Adolescents risk being exposed to violence and being treated as hostile or dangerous because of their adolescent state, while at the same time they are being treated as incompetent and unable to make decisions about their life.<sup>54</sup> Unaccompanied

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<sup>49</sup> GC 6 (n 3) para. 18.

<sup>50</sup> Alston and Gilmour-Walsh (n 27) 45.

<sup>51</sup> Pablo Ceriani Cernadas, ‘The Human Rights of Children in the Context of International Migration’ in Wouter Vandenhoe and others (eds), *Routledge International Handbook Children’s Rights Studies* (Routledge 2015) 340.

<sup>52</sup> GC 20, ‘CRC “General Comment 20 on the Implementation of the Rights of the Child During Adolescence” (6 December 2016) UN DOC CRC/C/GC/20.’ para. 76.

<sup>53</sup> *Refugee Children: Guidelines on Protection and Care* (UNHCR 1994) 5 <<https://www.unhcr.org/media/refugee-children-guidelines-protection-and-care>> accessed 12 May 2023.

<sup>54</sup> GC 20 (n 8) para. 21.

migrant children who remain or become undocumented upon ageing out are often perceived as a child who is incompetent, vulnerable and in need on the one hand, and as a potential migrant who came to make an economic claim on the host country or is out to abuse the system on the other hand.<sup>55</sup> It is important for decision-makers to be aware of these potential biases when they make an assessment of the best interests of adolescent unaccompanied children.

### 2.3 The right to be taken seriously

An assessment of the child's best interests requires respect for the child to express their own views freely. Due weight must be given to these views in all decisions affecting the child.<sup>56</sup> Meaningful contribution by children requires a setting in which they are empowered to form and express their authentic views. Lundy presented a model including four elements to conceptualise child participation: space, voice, audience, and influence. Respectively, children must be given the opportunity to express their views; they must be facilitated to express their views; they must be listened to; and the expressed view must be acted upon, appropriately.<sup>57</sup> Meaningful child participation can be realised by presenting information and documentation in a manner which is comprehensible to children and through providing them sufficient time to understand and process the information. Another prerequisite are safe spaces in which children can express their views.<sup>58</sup> Unaccompanied migrant children must be informed about all the aspects of the process of their status determination and as far as possible all uncertainty surrounding this process should be taken away.<sup>59</sup> Information should be available in their own language and they might need extra assistance.<sup>60</sup> If children are not well-informed or not able to process the information they are presented with, this affects their decision making and their social wellbeing. The right to participate is then lost.<sup>61</sup>

The elements of audience and influence require decisionmakers to listen and take the child's views into account. The best interests of the child as a rule of procedure requires due weight to be given to the child's views. This requires decisionmakers to explicitly include how the child's views were taken into

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<sup>55</sup> Ingi Iusmen, 'Whose Children? Protecting Unaccompanied Migrant Children in Europe: A Case of Diffused Responsibility?' (2020) 28 *The International Journal of Children's Rights* 925, 943.

<sup>56</sup> GC 6 (n 6) para. 25.

<sup>57</sup> Laura Lundy, "'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 927, 933.

<sup>58</sup> *ibid* 934–935.

<sup>59</sup> *Refugee Children: Guidelines on Protection and Care* (n 53) 44.

<sup>60</sup> GC 12, 'CRC "General Comment 12 on the Right of the Child to Be Heard" (1 July 2009) UN DOC CRC/C/GC/12.' para. 124; GC 6 (n 3) para. 25.

<sup>61</sup> *Refugee Children: Guidelines on Protection and Care* (n 53) 15.

account in the motivation of any decision affecting children. Unlike article 3 and the best interests principle, article 12 demands not just that their views are taken as a primary consideration, they must be taken into full consideration. Adults can be wrongfully sceptic about the child's capacity to meaningfully contribute to decision-making, and thus underestimate the value of their opinions.<sup>62</sup> Children risk their views to be taken into consideration in a tokenistic manner. They are then heard, but not listened to. This is all the same for unaccompanied migrant children who remain or become undocumented upon ageing out. Any decision affecting children should therefore not just explicitly motivate how the best interests of the child were taken into account, but also how the views of the child influenced the decision. Decisions affecting children cannot be taken by adults dismissing the child's views, because this neglects the child's agency and autonomy.

Children are also the main source of information on their own situation.<sup>63</sup> According to the UNHCR, children older than sixteen years old are usually mature enough to make their own decisions about long-term solutions, while children below the age of 9 or 10 are not sufficiently mature to make an independent judgment.<sup>64</sup> The Committee on the Rights of the Child, however, explains article 12 of the Convention in such a way that age alone cannot determine the significance of a child's views. Whether a child can decide about long-term solutions by itself at age 16, should be assessed on a case-to-case basis.<sup>65</sup> But, children themselves often know best what their own best interests are and unaccompanied children and their families have often already considered the best interests of the unaccompanied child before they decided to flee to Europe.<sup>66</sup> In deciding on the best interests of unaccompanied children finding a durable solution is the ultimate aim. The impact of this decision on their life and future makes it vital for them that their views are considered in all procedures which may affect them and the determination of their status. Unaccompanied migrant children who remain or become undocumented upon ageing out are often restricted in shaping their futures by these procedures.<sup>67</sup> They are often confronted with differences between their own 'expectations, wishes and perceptions, and the

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<sup>62</sup> Lundy (n 57) 937–938.

<sup>63</sup> Christina Jespersen (n 38) 31.

<sup>64</sup> *Refugee Children: Guidelines on Protection and Care* (n 53) 64.

<sup>65</sup> GC 12 (n 60) para. 29.

<sup>66</sup> Kalverboer and others (n 21).

<sup>67</sup> Elaine Chase, 'Security and Subjective Wellbeing: The Experiences of Unaccompanied Young People Seeking Asylum in the UK' (2013) 35 *Sociology of Health & Illness* 858, 867.

regulations, rules, and guidelines in the host country. Limiting the child's control over their own future can negatively affect their wellbeing.<sup>68</sup>

Important tools in meaningful child participation are the third optional protocol to the CRC and child rights strategic litigation. The CRC third optional protocol enables children to submit communications if their rights are violated. Communications are considered by the CRC Committee, and children do not require legal representation to communicate their violation.<sup>69</sup> But the CRC Committee can only receive communications about States which have ratified this third optional protocol. Within domestic legal systems and on the regional level, child rights strategic litigation can advance the protection of children's rights by strategically litigating cases before court which may bring about positive legal and social change.<sup>70</sup> Children are limited in influencing decision-making and participating in society, because they cannot vote and they are often dependent on adults in seeking redress of rights violations in Court.<sup>71</sup> Strategic litigation can empower children and advance their rights, if pursued in a child rights consistent matter, thus taking into account the rights of the child throughout the litigation process.<sup>72</sup>

## **2.4 Non-refoulement and the right to life, survival and development**

Article 6 CRC enshrines the child's right to life, survival, and development. States must take practical measures to protect this right, such as the appointment of guardians, providing information to children about the risks they may encounter and providing follow-up to children particularly at risk.<sup>73</sup> The provision also demands State Parties to respect the principle of non-refoulement. This is a customary law principle which prohibits host countries to return people to countries where they risk being subjected to torture, other cruel, inhumane and degradable treatment or punishment, enforced disappearance or of suffering irreparable harm in any other way.<sup>74</sup> Countries should also refrain from indirect refoulement, where the country of return may not subject people to ill treatment but may not

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<sup>68</sup> *ibid* 862.

<sup>69</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011) UNGA Res (A/RES/66/138) (CRC OP 3) article 5.

<sup>70</sup> Aoife Nolan, Ann Skelton and Karabo Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice' (1 September 2022) 4 <<https://papers.ssrn.com/abstract=4318384>> accessed 5 July 2023.

<sup>71</sup> Laura Lundy, 'The Rights of Child Human Rights Defenders: Implementation Guide' (Child Rights Connect 2020) 53–82; Chase (n 67) 862.

<sup>72</sup> Nolan, Skelton and Ozah (n 70) 56.

<sup>73</sup> GC 6 (n 3) para. 24.

<sup>74</sup> Alice Sironi, Céline Bauloz, and Milen Emmanuel (eds), 'Glossary on Migration' 149 <[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)> accessed 14 June 2023.

respect the principle of non-refoulement.<sup>75</sup> As this principle applies to all people, not just children, it continues to apply to unaccompanied migrant children once they age out, regardless of their legal status. General Comment 6 does call for child sensitive application of the principle to unaccompanied and separated children. Assessment of the country of return should therefore take into account the consequences for children of insufficient food provisions and health services.<sup>76</sup>

Furthermore, article 6 CRC safeguards the holistic development of the child. Specifically, it imposes upon States the obligation to ensure the survival and development of the child. General Comment 20 on the implementation of CRC rights during adolescence recognises the rapid curve of development children live through in their transition into adulthood. The CRC Committee acknowledges that adolescence is not easily defined, but the General Comments of the CRC focus on the period of childhood. Unaccompanied children who remain or become undocumented when they turn eighteen lose the protection of the CRC because they are no longer considered to be children. However, children do not turn into adults in one day, rather, development is a process and growing into adulthood is a transition which lasts beyond the age of eighteen. The continuing development of children and their future are thus important factors in the assessment of the best interests of the child in decisions which may affect their future.

## **2.5 Assessment and determination of the best interests of unaccompanied migrant children**

Countries have the obligation to take the best interests of unaccompanied migrant children into account during the entire time these children stay under their jurisdiction, in all decisions affecting them. This requires countries to systematically conduct assessments and determination procedures. Countries are continuously taking decisions which impact unaccompanied migrant children throughout their asylum procedure and even after that, because even if a child does not qualify as a refugee, the principle of non-discrimination demands a durable solution is still identified for them. The CRC Committee's requirement to ensure more protection safeguards to consider the best interests of the child, depending on the impact of the decision, is interpreted by the UNHRC and UNICEF to mean that decisions with less far-reaching consequences for the child need a best interests assessment, while decisions with

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<sup>75</sup> 'Safety and Dignity for Refugee and Migrant Children: Recommendations for Alternatives to Detention and Appropriate Care Arrangements in Europe' (*IOM, UNHCR, UNICEF*, May 2022) 149 <<https://www.unhcr.org/media/safety-and-dignity-refugee-and-migrant-children-recommendations-alternatives-detention-and>> accessed 25 June 2023.

<sup>76</sup> GC 6 (n 3) para. 27.

greater impact on the child's life and future development require more procedural safeguards, and thus a best interests determination.<sup>77</sup> The determination of the best interests is always based on the assessment of the best interests of the child. From a viewpoint of transparency and to overcome the indeterminacy of the best interests of the child to the greatest extent possible, frameworks should be implemented to resolve which decisions require a best interests determination and for which decisions an assessment of the best interests would suffice.

An assessment of the best interests of the child takes into account the development of the child, its views and the outcome which would ensure in the best possible way that the child can access the rights it's entitled to according to the CRC. According to the CRC Committee, an assessment of the best interests of the child starts with considering the specific elements and contextual circumstances which make a child unique.<sup>78</sup> This first element refers to the child's identity in the broadest sense of the world, and may include cultural identity, gender, sexuality, personality, and other characteristics. The second element comprises the child's views, which must be considered.<sup>79</sup> This ensured by obliging the decisionmaker to clearly state if and if so, why, the decision differs from the views of the child.<sup>80</sup> A third element to include in the assessment is how children can retain access to information about their culture and about their biological family, to preserve their identity.<sup>81</sup> Other elements are preservation of family unity and the right of the child to not be separated from their parents; the child's care, protection and safety needs, including the child's development and wellbeing and including the possibility of future harm and other consequences of the decision for the child's safety; the child's vulnerability; the child's right to health and their health condition; and the child's right to education. The list is non-exhaustive and in assessing the best interests, some elements may be given more weight than other elements.

In making a decision which takes the best interests of the child into account as a primary consideration, the Committee urges decision-makers to consider measures which can be adjusted according to the evolving capacities of the child over measures which are definitive and irreversible. Taking the rational choice theory into account, determining what outcome would be in the best interests of the child requires an assessment of all the probable outcomes, and an assessment of the consequences of the decision on the future of the child. Decision-makers should do this by determining possible short- and

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<sup>77</sup> Christina Jespersen (n 38) 20.

<sup>78</sup> GC 14 (n 32) para. 49.

<sup>79</sup> *ibid* para. 66 – 79.

<sup>80</sup> Joint GC 3 and 22 (n 9) para. 97.

<sup>81</sup> GC 14 (n 32) para. 55.

long-term scenarios of the development of the child.<sup>82</sup> For unaccompanied children, the identification of durable solution is the ultimate aim. Such identification of a durable solution must take the best interests determination, based on the best interests assessment, as the primary consideration. This is the case for all unaccompanied children, regardless of their status. Kalverboer et al established a complementary “best interests of the child model” (BIC-model) to assess and determine the best interests of unaccompanied children in migration. As continuity and stability are vital elements for children to develop in a positive way, the BIC-model assesses the child’s past, current, and future situation.<sup>83</sup> The assessment of the child’s future situation ensures decisionmakers also consider the possible outcomes and the probability of these outcomes. This is helpful for a more consistent, and therefore more determinate, procedure. The BIC-model is comprised of fourteen indicators to assess. The assessment is based on a self-report conducted by the child, and by consulting various professionals.<sup>84</sup> Whereas General Comment 14 does not present non-discrimination as an element to be included in the best interests assessment, Kalverboer’s BIC-model includes an assessment of how the child is respected in the current situation as well as an assessment of the children and adults present in the child’s life to set adequate examples regarding social norms and values.<sup>85</sup> The entire CRC and all aspects of the child’s life must be taken into consideration, because a decision which would violate any of the child’s rights can never be in their best interests. The BIC-Model clearly points out to which CRC rights each indicator corresponds, and together, all indicators cover almost the entire CRC. The BIC-model is a valuable complementary framework because it is more specified to the situation of children in migration. The explicit incorporation of almost all the CRC provisions, and the child’s past, current and future situation, make the BIC-model a complete, transparent and holistic complementary model to assess the best interests of unaccompanied migrant children. The various forms which have to be filled in by the child and by professionals and on which the assessment is based, provide safeguards which make the argument of rule scepticism void to a great extent. After the different elements which comprise the best interests of the child are weighed against each other and assessed, a best interests determination is made. This is followed by a decision in which the interests of the child are taken as a primary consideration. Article 3 CRC as a rule of procedure requires child-friendly procedural safeguards to be put in place, such as legal reasoning, the possibility to appeal a decision, and the

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<sup>82</sup> Joint GC 3 and 22 (n 9) para 84.

<sup>83</sup> Kalverboer and others (n 21) 121.

<sup>84</sup> *ibid* 121–126.

<sup>85</sup> *ibid* 136–137.

previously mentioned requirement to explicitly consider the child's views. These safeguards ensure the best interests of the child are actually taken into account as a primary consideration.

## **2.6 Conclusion of chapter**

The best interests of the child must be a primary consideration in all decisions concerning children. This right is relevant in a wide range of situations and in many different contexts. To retain a wide scope of applicability, the provision as laid down in article 3 CRC is vague and open-ended. Decision makers must be aware of the indeterminacy of the principle and how their own perceptions and values potentially influence the decision. What they decide is in the best interests of the child may differ from what another decision maker would end up deciding or what the child itself or their parents or guardians perceive as the best interests. Customs are helpful to ensure consistency in assessments and determinations of the best interests of the child. In any case, the best interests of the child must be read in conjunction with the other rights enshrined in the CRC.

The assessment and determination must consider the child's development beyond the age of eighteen, because they inform a decision which will affect children for a long time after their eighteenth birthday. In assessing the possibility of return, extra attention must be given to the principle of non-refoulement, to prevent the child from returning to a country with food and healthcare scarcities. Kalverboer et al's BIC-model, specified on children in migration, takes all of this into account. Furthermore, General Comment 14 provides a framework of procedural safeguards to ensure that decision makers truly take the child's view and their best interests into account. This alleviates much of the indeterminacy argument according to which any outcome could be reached in applying the right of the best interests of the child or any rule could be applied coming to a decision affecting children without truly applying right of the best interests of the child. Together, General Comment 14 and Kalverboer et al's BIC model provide a potentially consistent framework for assessing the best interests of unaccompanied migrant children in theory.

The assessment of the best interests of the child informs the determination of the best interests of the child, and the final decision to be made. The long-lasting impact of decisions regarding the legal stay and durable solutions, require a transparent procedure, protected by procedural safeguards. The child's views must be considered, and if the decision differs from these views, a clear motivation must accompany the decision. The decision must be motivated and provide a clear balancing between different interests, including the best interests of the child as a primary consideration. The assessment and determination of the best interests of unaccompanied migrant children preceding this decision must

assess all possible options and possible outcomes of the decision to be made, regardless of the child's legal status. In the case of unaccompanied children, a determination procedure identifies a durable solution which is in the best interests of the child. The next chapter will focus on this process of identifying durable solutions for unaccompanied children who remain or become undocumented upon ageing out.

### 3. Durable solutions for unaccompanied migrant children who remain or become undocumented upon ageing out

This chapter will explain how the current framework identifies durable solutions for unaccompanied migrant children, and it will assess the workability of this framework. Moreover, this chapter presents the elements which are necessary to identify durable solutions which are in the best interests of unaccompanied migrant children, and which address the issue of unaccompanied migrant children who remain or become undocumented upon ageing out. The first section presents the three durable solutions recognised by the UN High Commissioner for Refugees (UNHCR) and explains why these durable solutions are unattainable for refugees. After this, different guidelines on the treatment of unaccompanied children are compared and the shortcomings of these different guidelines are pinpointed. Based on the first two sections, the third section will argue that durable solutions are not durable. The fourth section explores the concept of belonging and connects this concept to the importance of a secure legal status for solutions to be durable as well as for the potential of complementary pathways for unaccompanied migrant children to prevent or overcome their legal limbo.

#### 3.1 What are durable solutions?

The UNHCR is mandated to find permanent solutions for refugees who fall within the scope of protection of the 1951 Refugee Convention and its supporting documents.<sup>86</sup> Traditionally the UNHCR recognises three durable solutions: voluntary repatriation, local integration, and resettlement in a third country.<sup>87</sup> They aim to solve statelessness of individuals and to create a permanent situation for refugees in which they regain full citizenship.

The first one, voluntary repatriation, entails the voluntary return to the country of origin, by the refugee, in safety and with dignity.<sup>88</sup> Refugees have the right to repatriate: to return to their own country.<sup>89</sup> The principle of non-refoulement requires repatriation by refugees to be voluntary. It was and is the durable solution preferred by the UNHCR and State Parties to the 1951 Convention. Many

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<sup>86</sup> Statute of the Office of the United Nations High Commissioner for Refugees (adopted 14 December 1950) UNGA Res 428 (v) (UNHCR Statute) para 1.

<sup>87</sup> Katy Long, 'Rethinking "Durable Solutions"' in Elena Fiddian-Qasmiyeh, Gil Loescher and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP Oxford 2014) 59.

<sup>88</sup> *Handbook on Voluntary Repatriation: International Protection*. (UNHCR 1996) 4.

<sup>89</sup> Geneva Convention IV relative to the Protection of Civilian Persons in Time of War ((adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) art. 134

scholars have argued that the focus on voluntary repatriation mainly reflects host States' political interests to control migration flows and Northern States' unwilling attitude towards burden-sharing.<sup>90</sup> The second durable solution is local integration. In a legal sense, naturalisation is required for integration to be durable. In the first six months of 2022, 11.73% of the refugees finding a durable solution integrated in their host State.<sup>91</sup> This while it is supposed to be one out of three durable solutions, and while the number of refugees finding a durable solution anyway is low: less than 232 thousand refugees found a durable solution last year, compared to the 103 million people that were forcibly displaced at the time.<sup>92</sup> Local integration as a durable solution is also referred to as 'forgotten' and 'evaded.'<sup>93</sup> According to Long, States fear that refugees, once they are integrated, may make claims on limited resources, and this can lead to conflict with the States' citizens.<sup>94</sup> The third durable solution is resettlement in a third country. This is promoted by UNHCR as a useful tool for international cooperation and responsibility sharing.<sup>95</sup> It provides refugees permanent resettlement in a third country, where they can potentially acquire citizenship. However, since it is not a right of refugees which they can claim, States do not have the duty to provide resettlement opportunities.<sup>96</sup> Only a limited number of countries do so, and therefore only few refugees can resettle to a third country permanently.<sup>97</sup> In the last few years, the UNHCR has published a Strategy, and subsequently a Roadmap, to work towards the long-term objective in which thirty countries will provide resettlement opportunities.<sup>98</sup> The three traditional durable solutions have been scrutinised, because they are only attainable for very few refugees.<sup>99</sup> The lack of political solutions for conflicts

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<sup>90</sup> See e.g. Katy Long, 'Refugees, Repatriation and Liberal Citizenship' (2011) 37 *History of European Ideas* 232, 37; Bhupinder S Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23 *Refugee Survey Quarterly* 66.

<sup>91</sup> 'Mid-Year Trends 2022' (UNHCR 2022) 23 <<https://www.unhcr.org/statistics/unhcrstats/635a578f4/mid-year-trends-2022.html>> accessed 3 June 2023.

<sup>92</sup> *ibid* 5–23.

<sup>93</sup> Lucy Hovil and Nicholas Maple, 'Local Integration: A Durable Solution in Need of Restoration?' (2022) 41 *Refugee Survey Quarterly* 240 <<https://academic.oup.com/rsq/article/41/2/238/6564683>> accessed 23 May 2023.

<sup>94</sup> Long (n 87) 481.

<sup>95</sup> United Nations High Commissioner for Refugees (UNHCR), 'Chapter 7: Solutions for Refugees', *The 10-point Plan in Action* 191 <<https://www.unhcr.org/media/31475>> accessed 3 June 2023.

<sup>96</sup> Meltem Ineli-Ciger, 'Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework' (2022) 24 *European Journal of Migration and Law* 27, 28.

<sup>97</sup> 'Mid-Year Trends 2022' (n 91) 25.

<sup>98</sup> 'Third Country Solutions for Refugees - Roadmap 2030' (UNHCR 2022) 12 <<https://globalcompactrefugees.org/sites/default/files/2022-08/Third%20Country%20Solutions%20for%20Refugees%20-%20Roadmap%202030.pdf>> accessed 11 June 2023.

<sup>99</sup> See e.g. Cathrine Brun and Anita H Fábos, 'Mobilizing Home for Long-Term Displacement: A Critical Reflection on the Durable Solutions' (2017) 9 *Journal of Human Rights Practice* 177, 177 or; Long (n 87).

and situations in violence, results in displacements dragging on for twenty years on average.<sup>100</sup> The increase of refugees living in protracted situations led the UNHCR to adopting the Global Compact on Refugees in 2018. As voluntary repatriation is often not possible, inter-state solidarity is lacking for resettlement to be an option and countries evade integration, the Global Compact also includes complementary pathways. These include humanitarian visas, labour mobility programs, educational opportunities, etcetera, can facilitate protection and solutions for refugees.<sup>101</sup>

### 3.2 Safeguards for unaccompanied children

Complementing the recognised durable solutions, different guidelines and frameworks have been published on the treatment of unaccompanied children. In General Comment 6, the CRC Committee provides guidance on the treatment of unaccompanied and separated children outside their country of origin. The general comment encourages States bear in mind the UNHCR Guidelines on the Protection and Care of Refugees and the Inter-Agency Guiding Principles on Unaccompanied and Separated Children. The latter were jointly established by the Inter-Agency Working Group, comprised of the Red Cross, UNHCR and UNICEF together with two more organisations.

Contrary to the Inter-Agency Working Group and the UNHCR, the CRC Committee does not differentiate between children who were granted asylum or a status on humanitarian grounds, and children who were not granted a status. The principle of non-discrimination does not allow for such a differentiation. The starting point of General Comment 6 is not the legal status of the child, but rather the best interests of the child. According to the CRC Committee, “The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child’s view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.”<sup>102</sup>

The child’s right to not be separated from their parents and to grow up in a family environment demand the identification of durable solutions to start by family tracing and exploring the possibilities of family reunification.<sup>103</sup> The UNHCR Guidelines and the Inter-Agency Principles follow the CRC Committee in the prioritisation of family reunification. While the child’s right to family unity must be safeguarded,

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<sup>100</sup> European Commission, ‘Forced Displacement: Refugees, Asylum Seekers and Internally Displaced Persons (IDPs)’ (*European Civil Protection and Humanitarian Aid Operations*, 8 July 2022) 1 <<https://civil-protection-humanitarian-aid.ec.europa.eu/system/files/2022-10/fst%20Forced%20displacement%20EN.pdf>> accessed 4 June 2023.

<sup>101</sup> ‘UNGA “Report of the United Nations High Commissioner for Refugees, Global Compact on Refugees (Part II)” UN GAOR 73rd Session Supp No 12 UN Doc A/73/12 (Part II) (2018)’ para. 95.

<sup>102</sup> GC 6 (n 3) para. 79.

<sup>103</sup> Preamble and article 9 CRC.

family reunification in the country of origin is not always in the best interests of the child. People leave their country of origin for an array of reasons, and almost never just one. Economic reasons can be a factor, but the decision to move can also be driven by family issues such as forced marriage or female genital mutilation (FGM) for women or inheritance issues and other personal problems for men.<sup>104</sup> If the child's family constituted a reason for the child to leave their country of origin, either to get away from their family or to help their family, returning the child to their family in the country of origin will most likely not serve their best interests. Moreover, often the child and their family will have made an assessment themselves on what is in their best interests, before the child leaves the country of origin.<sup>105</sup> For a solution to be durable, it should last beyond the child's eighteenth birthday. The CRC Committee has communicated mixed messages on the durability of durable solutions. Despite the CRC only protecting children below the age of eighteen, the CRC Committee has acknowledged that a sustainable solution should serve the long-term best interests of the child to the greatest extent possible. The outcome of such a durable solution should aim to enable the child to develop into adulthood in an environment which meets the child's needs. In General Comment 6, the CRC Committee also suggested local integration based on a secure legal status is the preferred durable solution for children who cannot return to their country of origin due to legal or factual reasons, or because this is not in their best interests. The CRC Committee did not clarify whether such a secure legal status should always entail naturalisation immediately or whether this could also be provided through a temporary residence permit. In Joint General Comment 3 and 22, the CRC Committee takes a stance on the matter by stating that durable solutions could also entail medium-term options or temporary integration too.<sup>106</sup> This dilutes the sustainability of durable solutions, because medium-term options or temporary integration are not durable if they do not allow the child to stay beyond their eighteenth birthday. As said, the UNHCR Guidelines and the Inter-Agency Guiding Principles differentiate between refugee children and children whose asylum request was rejected. The Guiding Principles present durable long-term solutions as an issue related specifically for refugee children.<sup>107</sup> For children whose asylum request was denied, return is the preferred solution, according to the Inter-Agency Working Group and

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<sup>104</sup> 'Scaling Fences | United Nations Development Programme' (n 6) 43.

<sup>105</sup> Kalverboer and others (n 21) 128.

<sup>106</sup> Joint GC 3 and 22 (n 9) para. 32 (j) – 33.

<sup>107</sup> 'Inter-Agency Guiding Principles on Unaccompanied and Separated Children' (ICRC, IRC, SCUK, UNICEF, UNHCR, WVI 2004) 5 <<https://www.icrc.org/en/publication/1101-inter-agency-guiding-principles-unaccompanied-and-separated-children>> accessed 30 June 2023.

the UNHCR.<sup>108</sup> Return to the country of origin differs from voluntary repatriation, because it is a measure rather than a right. Furthermore, return does not include the component of voluntariness. Regardless, States must still take the principle of non-refoulement into consideration before they return a person, since it is customary law. Unaccompanied children are entitled to extra safeguards prior to their return. These safeguards are derived from their right to grow up in a family environment, or to receive extra protection and assistance by the State if they are temporarily or permanently deprived from their family environment.<sup>109</sup> As such, a parent or other adult, or agency, able and willing to take responsibility over the care of the child must be present in the country of origin before the child is returned. But this safeguard is wrongfully taken by countries as the sole indicator to determine whether the child can be safely returned to the country of origin. The sole presence of parents or other care arrangements in the country of origin, does not guarantee that the child would be safe if it were returned to that country. Other elements from the best interests assessment should be considered to determine if return to the country of origin is in the child's best interests. According to the CRC Committee, inter alia the safety and security conditions, including socio-economic conditions in the country of origin, the child's views and the child's level of integration, among other elements must be included in this determination.<sup>110</sup> If the presence of care arrangements is the only indicator for a safe return, unaccompanied children risk being deported to the insecure and unsafe situations they were trying to escape. Taking Afghanistan as an example of a country in which the security situation has been volatile since 2001, and Greece returned unaccompanied children to this country while the situation was worsening.<sup>111</sup> A few years later, between 2011 and 2014, the United Kingdom, Netherlands, Norway, Sweden, Belgium, and Denmark initiated an attempt to return children to Afghanistan through a European Return Platform for Unaccompanied Minors (ERPUM). The project was scrutinised and, in the end, not a single child was deported through ERPUM.<sup>112</sup> Returning unaccompanied children to a country such as Afghanistan back in 2008, or between 2011 and 2014,

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<sup>108</sup> 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 13; 'Inter-Agency Guiding Principles on Unaccompanied and Separated Children' (n 107) 61.

<sup>109</sup> Article 20 CRC.

<sup>110</sup> GC 6 (n 3) para. 84.

<sup>111</sup> Dr Martin Lemberg-Pedersen, 'The Rise and Fall of the ERPUM Pilot' [2015] RSC Working Paper Series 27; 'Security Situation in Afghanistan "Markedly" Worse, Reports Secretary-General' (*UN News*, 29 September 2008) <<https://news.un.org/en/story/2008/09/275862>> accessed 1 July 2023.

<sup>112</sup> Martin Lemberg-Pedersen and Dawn Chatty, 'ERPUM and the Drive to Deport Unaccompanied Minors' 1 <<http://rgdoi.net/10.13140/RG.2.2.30973.61926>> accessed 1 July 2023.

would threaten the safety of these children and would not be in their best interests.<sup>113</sup> Moreover, circumstances threatening the safety of children can be as threatening to adolescents over the age of eighteen. While these countries were setting up the pilot to return unaccompanied children to Afghanistan, the initiating countries were already returning adults and ‘aged-out’ minors. Belgium, during this time *inter alia* deported a 20-year-old boy to Afghanistan who had lived in Belgium for four years after his father had been assassinated in Afghanistan.<sup>114</sup> In case return of the child is in their best interests, the best interests of the child should also be taken into account in the process of returning the child to their country of origin. This may *inter alia* include giving the child sufficient time to mentally, and practically, prepare for return and providing counselling and support.<sup>115</sup> These safeguards may also be helpful to ensure voluntary return of people over the age of eighteen. Return is most sustainable if it is voluntary.<sup>116</sup> Consensual return requires working with people on their return to their country of origin, rather than removing them from the territory of the host country and supporting them in their reintegration in the country of return. To support children in reintegration in the country of origin, the host country and the country of origin should coordinate to ensure children their education is not interrupted. In practice, however, there is a lack of knowledge, or interest, of host countries in the situation in the country of origin.<sup>117</sup> Reintegration in the country of origin then becomes the sole responsibility of the returnee. The lack of support poses challenges to successful reintegration and may lead to them leaving the country again.<sup>118</sup>

Ten years after the Inter-Agency Guiding Principles were published, the UNHCR and UNICEF released an informative joint publication on the protection of the best interests of unaccompanied and separated children in Europe, and how the determination of a durable solution in the best interests of the child relates asylum procedures and status determination.<sup>119</sup> According to the guidelines, an assessment of the best interests of the child is made to inform the asylum procedure, and a best interests

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<sup>113</sup> Jan Murk, ‘Children’s Rights in Return Policy and Practice in Europe: A Discussion Paper on the Return of Unaccompanied and Separated Children to Institutional Reception or Family’ (UNICEF 2015) 5 <<https://resourcecentre.savethechildren.net/pdf/54e4854c4.pdf>> accessed 30 June 2023.

<sup>114</sup> Lemberg-Pedersen (n 111) 18.

<sup>115</sup> Initiative for Children in Migration, ‘Durable Solutions and the Best Interests of the Child in the Context of Return Processes’ (Initiative for Children in Migration 2019) 6 <[https://picum.org/wp-content/uploads/2019/09/2019\\_Durable\\_solutions\\_joint\\_brief\\_ENG.pdf](https://picum.org/wp-content/uploads/2019/09/2019_Durable_solutions_joint_brief_ENG.pdf)> accessed 2 June 2023.

<sup>116</sup> ‘Chapter 9: Return Arrangements for Non-Refugees and Alternative Migration Options (2016 Update)’, , *The 10-Point Plan in Action*, (2016) 230 <<https://www.unhcr.org/media/10-point-plan-action-2016-update-chapter-9-return-arrangements-non-refugees-and-alternative>> accessed 6 June 2023.

<sup>117</sup> Allsopp and Chase (n 10) 12.

<sup>118</sup> *ibid* 13; Jan Beise and others, ‘A Child Is a Child’ (United Nations Children’s Fund (UNICEF) 2017) 32 <<https://www.unicef.org/reports/child-child>> accessed 28 June 2023.

<sup>119</sup> Christina Jespersen (n 38).

determination would follow, after the asylum procedure is completed. The outcome of the asylum procedure informs the determination of the durable solution but does not overturn the outcome of the asylum procedure.<sup>120</sup> However, the protection needs of unaccompanied children would be better served if the child's best interests were reassessed after the completion of the asylum procedure. The decision on the asylum application changes the situation of the child. They are then either recognised as a person qualifying for international or subsidiary protection, or as a person who is residing on the territory of a Member State illegally. Moreover, the best interests assessment made to inform the asylum procedure on those factors relevant to assess whether the child qualifies for a form of protection under the Qualification Directive. Other factors, such as access to education or access to health and food services, may be overlooked.

### **3.3 Why durable solutions are not durable**

Host countries have an interest to return individuals who remain without a legal status because they do not qualify for asylum, in order to control migration flows.<sup>121</sup> This is the same for unaccompanied migrant children whose asylum application was rejected or who did not lodge such an application. As seen in the previous section, this focus on return encaptures the risk that the child's rights and best interests of the child are overlooked, because children risk being returned to unsafe countries.

Providing children whose return cannot be returned a temporary right to stay which expires upon their eighteenth birthday, interrupts their development because the loss of legal status also limits them in their participation in society.<sup>122</sup> The country's interest to return unaccompanied migrant children on the one hand, and the potential violation of unaccompanied children's best interests and other CRC rights preventing their return on the other hand, pushes them into a legal limbo upon ageing out. When adolescents lose the protection of the CRC because they age out, the host State no longer has the obligation towards them to find a durable solution which is in their best interests. At this point, the undocumented adolescent is no longer protected by any specific framework. The elements which were considered to assess and determine the best interests as a child in the identification of a durable solution, do not become void in the life of the adolescent when they turn eighteen. Adolescents who are returned upon their eighteenth birthday might be returned to a country which was and is unwilling or unable to provide them the safety they need. If we imagine that a child cannot be returned to their

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<sup>120</sup> *ibid* 44.

<sup>121</sup> 'Chapter 9: Return Arrangements for Non-Refugees and Alternative Migration Options (2016 Update)' (n 116) 230.

<sup>122</sup> Van der Vennet (n 13) 34.

country because the socio-economic conditions in the country of origin are in a state which insufficiently guarantees the safety of the child, it seems insensible and even inhumane to return this former child upon ageing out, simply because they legally became an adult.

### 3.4 Proposals for alternative durable solutions

#### 3.4.1 Safety and a sense of belonging

The European social construct of nation-states has created the belief that every person should belong to a space which is defined by borders.<sup>123</sup> It is a static notion of belonging, which ignores the reality that belonging entails more than solely *de jure* citizenship. While the legal right to stay provides important protection to refugees and migrants, it does not necessarily equal belonging. Hovil, in her book on the search of belonging by refugees, provides examples of refugees who found a sense of belonging without being recognized as a citizen, as well as examples of refugees who regained citizenship in a host country, but remained excluded from the community.<sup>124</sup> European policies hold on to the static view of persons belonging to a nation-state and they are largely based on the assumption that young migrants belong to their country of origin. This neglects the experiences of unaccompanied migrant children who remain or become undocumented upon ageing out, and it harms their holistic development.<sup>125</sup>

Belonging is a layered concept, and every unaccompanied migrant adolescent has their own sense of belonging. Some might still feel connected to their country of origin, while others feel a sense of belonging in the country of origin as well as in the host country. Some left their country of origin at a very young age and have become unfamiliar with it. For them, the host country might have started to feel like home. Some do not have a sense of belonging at all.<sup>126</sup> Safety, belonging and opportunities to build a future are fundamental for children who grew up in vulnerable situations, to build a stable life.<sup>127</sup> The sense of belonging is important for the holistic development and wellbeing of unaccompanied migrant adolescents. Unaccompanied migrant adolescents go through a period of liminality, which can be defined as a period in which people release themselves from old structures, while they are not identified with new structures yet. They are transitioning from childhood to

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<sup>123</sup> Lucy Hovil, *Refugees, Conflict and the Search for Belonging* (Springer International Publishing 2016) 18  
<<http://link.springer.com/10.1007/978-3-319-33563-6>> accessed 9 June 2023.

<sup>124</sup> *ibid* 24–75.

<sup>125</sup> Dr Elaine Chase and Jennifer Allsopp, “‘Future Citizens of the World’? The Contested Futures of Independent Young Migrants in Europe’ 24.

<sup>126</sup> *ibid* 25.

<sup>127</sup> Kohli (n 18) 315.

adulthood, and from their country of origin to a new host country.<sup>128</sup> During this period, access to education is what provides children a daily routine, as well as opportunities for their future, which allows them to move on from past traumatic events.<sup>129</sup> In addition, a supportive environment positively affects the adolescent's wellbeing.<sup>130</sup> A supportive environment can be provided by a social network, inter alia through foster families, small scale accommodation and through a guardian or social worker. The UNHCR recommends adolescents be placed in small group homes with guidance from adults to support them in their transition into adulthood.<sup>131</sup> The UNHCR guidelines also affirm the importance of after-care for adolescents who have left their care environment. The guidelines do not say until what age after-care should be provided, but rather state that 'such services must be available to young adults as long as considered necessary.'<sup>132</sup> This is hardly attainable for unaccompanied migrant children. In practice, children who remain or become undocumented upon ageing out, face challenges in accessing education, accommodation and social support.<sup>133</sup> The structures providing them continuity and a sense of belonging are interrupted. If migrant adolescents had conformed themselves to new structures through which they outgrew the state of liminality, the loss of a legal status and disruption of continuity at eighteen years old throws them back into a state of liminality, which harms their development as adolescent.<sup>134</sup> Risks are numerous and various, such as being pushed into criminality, exploitation, or becoming homeless.<sup>135</sup> Deteriorating mental health may also lead undocumented adolescents to resort to self-harm.<sup>136</sup> A durable solution in the best interests of the child therefore should align with the experience of the unaccompanied migrant child and their sense of belonging, and should allow them to shape their own future.

### 3.4.2 Secure legal status beyond ageing out

The holistic development of unaccompanied migrant children who remain or become undocumented upon ageing out is affected by the insecurity about their legal status and the fear to be returned. The loss of rights is experienced at the age of eighteen, when the status of the adolescent formally changes

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<sup>128</sup> Safoura Ghaemina, 'Volwassen worden tussen tegenstrijdige grenslijnen' (Vrije Universiteit Amsterdam 2022) 46.

<sup>129</sup> *ibid* 48; Chase (n 67) 866.

<sup>130</sup> Chase (n 67) 866.

<sup>131</sup> 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' (n 108) para. 10.7.

<sup>132</sup> *ibid* para. 10.9.

<sup>133</sup> Oxfam & Greek Council for Refugees, 'Teach Us for What Is Coming' (2021) 29–30 <[https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2021-06/Teach%20us%20for%20what%20is%20coming%20report\\_2.pdf](https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2021-06/Teach%20us%20for%20what%20is%20coming%20report_2.pdf)> accessed 29 April 2023.

<sup>134</sup> Ghaemina (n 128) 174.

<sup>135</sup> Van der Venet (n 13) 15.

<sup>136</sup> Oxfam & Greek Council for Refugees (n 133) 30.

from child to adult. But children who remain or become undocumented are aware of this before they reach this age, and their wellbeing is affected also by the foresight of these changes. Chase conducted a study in the UK among 54 unaccompanied young people between the ages of 11 and 23. Most of these children communicated that the insecurity about their legal status and thus future constituted an overriding concern in their lives.<sup>137</sup> In Sweden, a resignation syndrome was observed first in the 1990s. Children showed extreme stress reaction to the trauma's they experienced in their country of origin and the fear of return. They became apathetic, muted, having to be fed through tubes. Over 700 children were registered to suffer from this syndrome, many of them between the ages of fifteen. Although it was first observed in Sweden, it has also been registered to appear in other countries.<sup>138</sup>

The insecurity on children's legal status can thus affect their wellbeing in different periods of their life. The detrimental effects of this to their mental health disregard their right to survival and development as well as their right to the highest attainable standard of health.<sup>139</sup> Employment, accommodation, social security and other services which allow someone to participate in society are all inaccessible without a legal status.<sup>140</sup> A durable solution based on a secure legal status is thus of vital importance for unaccompanied children who remain or become undocumented upon ageing out. To this end, some States offer children an extension to their legal status. Last year, civil society organisations in Greece issued a joint statement on this issue calling upon the Greek authorities to establish a transitional residence permit which would last until the age of 21. Spain and Italy have already adopted such a practice.<sup>141</sup> While such a permit does allow adolescents a few more years to transition into adulthood, it can also be regarded as a stay of execution. The existence of such a longer lasting permit on its own does not solve the problem of an uncertain legal status. At the minimum, it should be accompanied with appropriate guidance of the adolescent to plan with them how they can acquire a legal status either in the host State or in a different country after their 21st birthday, or a reassessment of the best interests with the possibility to continue their legal stay in the host country. Another possible solution, proposed by Ghaemina, is for host countries to set a predetermined period in which return must be realised and provide the undocumented adolescent a residence permit if the return decision is not effectuated within

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<sup>137</sup> Chase (n 67) 862.

<sup>138</sup> Laetitia Van der Vennet, Roos-Marie van den Bogaard, and Michele LeVoy, 'Navigating Irregularity: The Impact of Growing up Undocumented in Europe.' (Platform for International Cooperation on Undocumented Migrants (PICUM) 2021) 22 <[https://picum.org/wp-content/uploads/2021/03/Navigating-Irregularity\\_EN.pdf](https://picum.org/wp-content/uploads/2021/03/Navigating-Irregularity_EN.pdf)> accessed 4 July 2023.

<sup>139</sup> Article 6 and article 24 CRC.

<sup>140</sup> Van der Vennet (n 13) 34.

<sup>141</sup> 'Joint Statement: Undocumented Children, Children in Danger. Until When...?' (*International Rescue Committee (IRC)*, 6 July 2022) <<https://www.rescue.org/eu/report/joint-statement-undocumented-children-children-danger-until-when>> accessed 21 June 2023.

this period. Ghaemina clarifies such a period should be long enough for the host country to determine whether the facilities in the country of return are adequate, and short enough to provide the adolescent certainty on their future.<sup>142</sup> Nevertheless, this would inevitably leave them in a legal limbo for at least some time, which still restricts them in shaping their future and will also affect their wellbeing.

### **3.4.3 legal migration and complementary pathways**

The UNHCR presents study-to-apprenticeship-to-work programmes and study-to-work-to-long-term residency programmes as complementary pathways to durable solutions.<sup>143</sup> Refugees who are admitted to migrant worker and immigration programmes of States that have a shortage in workforce, might later naturalise through these programmes.<sup>144</sup> Legal migration alternatives similarly provide pathways for people to migrate through labour schemes or for study. Currently, these pathways focus on refugees and on people outside of the host country. They become available to undocumented people in the host country, after these people have returned to their country of origin.<sup>145</sup> Undocumented migrants are thus forced to go around in a circle, leaving the host country for their country of origin, to return to the host country through a legal pathway. However, these pathways may potentially provide a durable solution to unaccompanied migrant children who remain or become undocumented upon ageing out. This way, they can retain their legal status beyond their eighteenth birthday. Reinforcement of the workforce can be beneficial for the host countries' economy too. In this vein, the UNHCR encouraged host State to regularise their irregular labour force.<sup>146</sup> Adolescents who study, may later become part of a country's labour force. Providing unaccompanied migrant children, the opportunity to retain their legal status upon ageing out, reduces the number of unaccompanied migrant children who remain or become undocumented upon ageing out. This would reduce the number of undocumented people in host countries in general and thus would cater to countries' interest to control migration flows. The potential downside to these pathways is that they do not necessarily provide unaccompanied children a durable solution directly.<sup>147</sup> However, they can contribute to lasting solutions, as it provides them the tools to

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<sup>142</sup> Ghaemina (n 128) 182.

<sup>143</sup> United Nations High Commissioner for Refugees (UNHCR) (n 95) 195.

<sup>144</sup> 'UNHCR "Protracted Refugee Situations: A Discussion Paper Prepared for the High Commissioner's Dialogue on Protection Challenges" (Geneva 20 November 2008) UNHCR/DPC/2008/Doc. 02 (Discussion Paper on Protracted Refugee Situations).' para. 94.

<sup>145</sup> 'Chapter 9: Return Arrangements for Non-Refugees and Alternative Migration Options (2016 Update)' (n 116) 254.

<sup>146</sup> *ibid* 250.

<sup>147</sup> United Nations High Commissioner for Refugees (UNHCR) (n 95) 195.

meet their own economic needs, and this is crucial for long-term protection.<sup>148</sup> Moreover, providing them the autonomy to pursue such a pathway in the host country or a third country gives them the agency to shape their own future.

### **3.5 Conclusion of chapter**

In a world based on borders and nation-states, citizenship remains a prerequisite to exercise basic rights which allow individuals to participate in society, such as access to healthcare and social security.

Therefore, the three conventional durable solutions ultimately aim for refugees to acquire citizenship in either the country of origin, the host country or a third country. Durable solutions for unaccompanied children, according to the CRC Committee, should address the child's protection needs and should aim to overcome the child's situation of being unaccompanied. The child's right to grow up in a family environment requires the process of identification of durable solutions to aim for family reunification and return of children must be preconditioned on the guarantee that parents, or other adults who can take responsibility over the care of a child, are present in the country of return. However, countries wrongfully take this as the sole indicator to determine whether return to the country of origin is safe and in the best interests of the child. Moreover, if safe return of children cannot be realised, providing them a legal status which expires upon their eighteenth birthday interrupts their development. This leads to children ageing out into undocumented adulthood, which affects their wellbeing.

The identification of durable solutions for unaccompanied children should not be based on their legal status or led by the decision on their asylum application but on their best interests. A determination of a durable solution in the best interests of the child should include the child's views, an assessment of the safety and security conditions in the country of origin, their time away from the country of origin, and the level of integration in the host country. For a durable solution to be lasting, it should serve the child's long-term interests to the greatest extent possible, and it should aim to prevent interruption of the child's development into adulthood. Such a determination can of course conclude that return is in the best interests of the child. Return is sustainable when it is voluntary and when additional support is provided so that the child can reintegrate in the country of origin. For children who cannot return to the country of origin, educational and labour opportunities may provide them opportunities to shape their future. Holistic development and the wellbeing of unaccompanied migrant children require that they

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<sup>148</sup> Katy Long, 'Extending Protection? Labour Migration and Durable Solutions for Refugees' 5 <<https://www.refworld.org/docid/4f719bcd2.html>> accessed 9 June 2023.

are provided agency to shape their future. Prerequisites for this are access to social services, education and the labour market and a secure legal status.

## 4. Transitioning into undocumented adulthood in the European Union: migration management and the legal limbo

To analyse how the identification of durable solutions in the best interests of unaccompanied children relates to the EU's and States' interests to control migration flows, the latter's interests and migration policy will have to be analysed first. Therefore, this analysis starts with a discussion of the evolution of the Common European Asylum System (CEAS). By tracing the origins of the European migration management and discussing the influences which shaped this policy, the first section of the chapter provides an understanding to why the Common European Asylum System is shaped in the way it is. The second section of the chapter relates the European migration policy to the identification of durable solution in the best interests of unaccompanied migrant children who remain or become undocumented upon ageing out by assessing how the best interests of the child are implemented in CEAS and by exploring the effects of the European migration policy on the protection of children in CEAS. The protection gaps identified through this analysis are set out in the third section of the chapter. The fourth section offers a potential solution to harmonise the best interests of the child with the interest of the EU and Member States to control migration flows.

### 4.1 Migration management in the EU

#### 4.1.1 Evolution of CEAS

The interests of States to control their borders and migration flows are pursued through migration management by implementing policy, legislative and administrative frameworks on a national and international level.<sup>149</sup> After the establishment of the Schengen area and the European Union (EU), both in the 1990s, a common interest emerged to control the external borders of these areas. The fear to lose control over who enters the EU incited the Member States to establish a Common European Asylum System (CEAS), which aims to combat irregular migration.<sup>150</sup> The EU's desire to control migration flows can be traced back to the 1980s. The mass migration flows after the Second World War were managed because displaced people could replace the workforce lost during the war and thus even facilitated a rapid recovery of the European Union.<sup>151</sup> By 1950, the demand of workforce even lead States to recruit workers from outside Europe. However, in 1974 Europe entered an economic recession, and immigration was no longer wished for. The collapse of communism eliminated the

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<sup>149</sup> Alice Sironi, Céline Bauloz, and Milen Emmanuel (n 74) 139.

<sup>150</sup> 'Council of the European Union "Presidency Conclusions, Tampere European Council, 15-16 October 1999" (16 October 1999)'.

<sup>151</sup> Chimni (n 90) 57.

ideological divide which had shaped the way in which the Western world had dealt with refugees. This is when the focus on resettlement as the preferred durable solution shifted to voluntary repatriation. The collapse of communism and additional political unrest in other parts of the world in the 1980s created another mass influx in asylum applications in Europe. The closure of the borders diffused the lines between refugees and migrants, and States but this time around, the growing pressure caused States to adopt a stricter asylum policy. Consequently, more people tried to enter the EU illegally.<sup>152</sup>

When the Council convened in Tampere in 1999, it observed that the freedoms and security offered by the EU acted as a draw to third country nationals. The commitment to establish CEAS was expressed there and then.<sup>153</sup> While the EU intended to accept “those whose circumstances lead them justifiably to seek access to [the] territory,” the Tampere conclusions also clearly expressed the intent to control external borders and stop illegal immigration.<sup>154</sup> By 2005, six legislative instruments had been adopted to establish minimum standards on migration: The Dublin Regulation replaced the Dublin Convention and establishes which Member State is responsible for examining the asylum application.

- The EURODAC Regulation was designed to support this determination of responsibility and it determines when law enforcement authorities may access the EU database on fingerprints of asylum seekers.
- The Reception of Asylum Seekers Directive ensures minimal standards on the conditions upon arrival in a Member State, and the Asylum Procedures Directive imposes safeguards during the application process.
- The Qualification Directive provides rights to refugees and beneficiaries of international protection.
- Finally, the Temporary Protection Directive allows a unique regulation at a time of a mass influx of persons in need of international protection.<sup>155</sup>

These first instruments did not reach the level of solidarity and common practice the EU had aimed for, as State practices were still too divergent from each other. Therefore, a first round of reforms was initiated in 2008.<sup>156</sup> In the end, revised versions of the Asylum Procedures Directive, the Reception

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<sup>152</sup> Peter Stalker, ‘Migration Trends and Migration Policy in Europe’ (2002) 40 *International Migration* 151, 154.

<sup>153</sup> Tampere Conclusions (n 150) para. 10.

<sup>154</sup> *ibid.*

<sup>155</sup> ‘Common European Asylum System’ (*European Commission*) <[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en)> accessed 22 June 2023.

<sup>156</sup> Policy, ‘Commission “Policy Plan on Asylum” COM(2008) 360 Final.’ 4 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>> accessed 19 June 2023.

Conditions Directive, and a new Dublin Regulation and EURODAC regulation were adopted in 2013. The Qualification Directive had been revised in 2011. By this time, the Treaty of Lisbon had expanded the powers of the European Parliament. This supranational institution now had co-legislative powers on the common asylum policy, together with the Council.<sup>157</sup> Nevertheless, the impact of this first round of reforms was minimal.

In 2015 and 2016, Europe was again faced with a mass influx of refugees. This again created a fear of losing control over who entered the Union.<sup>158</sup> Moreover, the crisis exposed the shortcomings of CEAS. Member States at the border of the EU were overburdened by the number of asylum claims, because according to the Dublin Convention the first EU Member State the refugee enters is the responsible Member State to handle the asylum application. The lack of solidarity between Member States, the overburdening of these border States and the lack of safeguards in CEAS to protect refugees resulted in major human rights violations.<sup>159</sup> For example in transit zones and hotspots, where asylum seekers were arbitrarily detained, faced violence and were denied the right to apply for international protection.<sup>160</sup> However, rather than increasing solidarity and protection of human rights, the Commission and the Council decided to further enhance border control. One outing of this is the Commission's recommendation on how States can make return more effective, in which the Commission calls upon Member States to increase the effectiveness of their return procedures inter alia by using detention as needed and as appropriate and by removing domestic legislative barriers to place children in detention.<sup>161</sup> The reforms, however, were minimal. Trauner and Ripoll Servent compared the legislative instruments as they were established between 1999 and 2005 to the first reforms after 2008 and argue that the revised instruments were so similar to their original versions, because the policy core had already been established when the Council first discussed the matter of a common asylum policy in Tampere in 1999. Jenkins Smith and Sabier came up with the concept of a policy core. Policy core are the fundamental policy positions concerning the basic strategies for achieving the normative, existential

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<sup>157</sup> article 65 Treaty of Lisbon jo. Article 294 TFEU.

<sup>158</sup> Andrew Geddes, 'Tampere and the Politics of Migration and Asylum in the EU: Looking Back to Look Forwards.' in Sergio Carrera, Deirdre Curtin, and Andrew Geddes (eds), *20 year anniversary of the Tampere programme: Europeanisation dynamics of the EU area of freedom, security and justice*. (European University Institute (EUI) 2020) 13–14 <<https://data.europa.eu/doi/10.2870/66646>> accessed 17 June 2023.

<sup>159</sup> Simas Grigonis, 'EU in the Face of Migrant Crisis: Reasons for Ineffective Human Rights Protection' (2016) 2 *International Comparative Jurisprudence* 93, 93.

<sup>160</sup> Leonie Ansems De Vries and Elspeth Guild, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2019) 45 *Journal of Ethnic and Migration Studies* 2156, 5–6.

<sup>161</sup> Commission Recommendation (EU) 2017/432 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council [2017] OJ L 66/15 para. 10 (a) - 14.

belief systems of political elites, which underlie a policy system. These belief systems of political elites comprise the ‘deep (normative) core.’<sup>162</sup> The strong policy core, which was settled in 1999, had made it difficult to change the course of asylum policy afterwards. The European Parliament underwent elections in 2009, which had changed the political composition. Meanwhile, Member States preferred to hold on to the policy core settled in 1999, which made the Council less compromising in their negotiations with the Parliament.<sup>163</sup> So although the Lisbon Treaty did transfer more powers to the EP, the asylum policy remains difficult to change. As long as Member States are satisfied with the core policies of the European asylum system, the new ‘ordinary legislative procedure’ does not allow for a shift away from securitisation. Nevertheless, in yet another attempt to increase return rates and to hinder refugees in legally accessing Europe and successfully apply for asylum, the EU is currently working on a new Pact on Migration and Asylum.

#### **4.1.2 the influence of discourse on migration policy**

Media coverage on migration has a huge impact on public opinion, which, in turn, influences policy making. This was extremely visible during the 2015 - 2016 refugee crisis, due to the amount of coverage on the events occurring during that period. Media coverage at the time influenced public opinion in two significant ways. First of all, by virtue of calling it a crisis, the EU’s responsibility in the debacle was denied. As if the mass influx of people was an event that happened to Europe, solely caused by external factors.<sup>164</sup> There was a mass influx of people, however, it turned into a crisis because the European asylum system was unfit to handle the influx. This installed the perception that there was a lack of control, which needed to be restored.<sup>165</sup>

Secondly, the media portrayed refugees as a homogeneous group, unskilled. They were portrayed as ‘the other.’<sup>166</sup> This presumption of refugees as a burden, making claims on limited State resources is not new.<sup>167</sup> Neither is the suspicion towards them. These were already drivers of the restrictive policies

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<sup>162</sup> Florian Trauner and Ariadna Ripoll Servent, ‘The Communitarization of the Area of Freedom, Security and Justice: Why Institutional Change Does Not Translate into Policy Change’ (2016) 54 *JCMS: Journal of Common Market Studies* 1417, 1423-1424.

<sup>163</sup> *ibid.*

<sup>164</sup> Daniel Trilling, ‘How the Media Contributed to the Migrant Crisis’ *The Guardian* (1 August 2019) <<https://www.theguardian.com/news/2019/aug/01/media-framed-migrant-crisis-disaster-reporting>> accessed 25 June 2023.

<sup>165</sup> Andrew Geddes (n 158) 13..

<sup>166</sup> Myria Georgiou and Rafal Zaborowski, ‘Media Coverage of the “Refugee Crisis”: A Cross-European Perspective’ (*Council of Europe Publishing*) 10 <<https://edoc.coe.int/en/refugees/7367-media-coverage-of-the-refugee-crisis-a-cross-european-perspective.html>> accessed 25 June 2023.

<sup>167</sup> Stalker (n 152) 163..

installed in Europe in the 1980s.<sup>168</sup> According to Geddes, the overall sentiment towards migration the EU has not become more negative, but rather, the public has attributed more importance to the subject.<sup>169</sup> This increased importance attributed to migration has made the topic more politicised. Asylum policy is based on fear, values and beliefs, and party politics and normative framing have increased influence on asylum policies.<sup>170</sup> This underpinning of ideologies create an environment where policies are adopted on the basis of emotion, rather than on the basis of rationality. Crisis communicates fear, and in this vein, the 2015 - 2016 crisis served as a catalyst for further securitisation of the EU.<sup>171</sup>

#### 4.1.3 Combating illegal migration through external border management

Migration management is based on the pillars of tackling the drivers of irregular migration, border management, the provision of protection and asylum by the EU, and through legal migration and integration.<sup>172</sup> However, responsibility and solidarity sharing to allow for legal pathways, and protection and integration of refugees and migrants have proven to be notoriously difficult for the EU.<sup>173</sup> The establishment of common standards and harmonisation would lessen the discretion of Member States in the implementation of asylum policies, which essentially means they would have less control over migration flows. Consequentially, CEAS is largely focused on tackling drivers of irregular migration and managing external borders. This is reflected in the EU's funding. 56% of the migration and border management is spent on border management. The other half is distributed over the Asylum, Migration and Integration Fund (AMIF) and other decentralised agencies.<sup>174</sup> Out of the 38% allocated

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<sup>168</sup> Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S. Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century: Legal Aspects - The Hague Academy of International Law Center For Research* (Martinus Nijhof 2015) 669

<<https://www.unhcr.org/africa/media/legality-safe-third-country-notion-contested-insights-law-treaties>> accessed 25 June 2023.

<sup>169</sup> Andrew Geddes (n 158) 15.

<sup>170</sup> Bastian A Vollmer, 'Public Discourses and Politics on Migration: A Precarious Situation and Dismal Outlook?' (2021) 1 *Zeitschrift für Migrationsforschung* 147, 152.

<sup>171</sup> Sergio Carrera, 'Tampere Programme 20 Years on: Putting EU Principles and Individuals First' in Sergio Carrera, Deirdre Curtin, and Andrew Geddes (eds), *20 year anniversary of the Tampere programme: Europeanisation dynamics of the EU area of freedom, security and justice*. (European University Institute (EUI) 2020) 54

<<https://data.europa.eu/doi/10.2870/66646>> accessed 17 June 2023.

<sup>172</sup> 'Commission "Progress Report on the Implementation of the European Agenda on Migration" COM(2019) 126 Final.' <[https://home-affairs.ec.europa.eu/system/files/2019-03/20190306\\_com-2019-126-report\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2019-03/20190306_com-2019-126-report_en.pdf)> accessed 25 June 2023..

<sup>173</sup> Minos Mouzourakis, 'Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union' [2014] RSC Working Paper Series.

<sup>174</sup> European Commission, 'Multiannual Financial Framework 2021-2027 (in Commitments) - Current Prices' <[https://commission.europa.eu/system/files/2021-01/mff\\_2021-2027\\_breakdown\\_current\\_prices.pdf](https://commission.europa.eu/system/files/2021-01/mff_2021-2027_breakdown_current_prices.pdf)> accessed 23 June 2023.

for AMIF, 36% is spent purely on integration, and the other 41% is spent on combating irregular migration and indirect management largely made up of projects focused on voluntary return and reintegration, and on preventing migration by working on awareness and capacity building in places from which a lot of migrants and refugees originate.<sup>175</sup> Drivers of irregular migration are tackled through the EU Trust Fund for Africa, which aims for economic and employment opportunities, strengthened resilience of communities, and improved migration management, governance and conflict management. Another strategy to combat irregular by brokering partnerships with countries who have questionable reputations regarding rule of law and democracy, and human rights and the protection of migrants and refugees, such as Tunisia and Turkey.

The EU's external borders are managed by Frontex, through which illegal migration is combatted.<sup>176</sup> Frontex has been condemned for conducting illegal pushbacks and for gross human rights violations.<sup>177</sup> Pushbacks can lead to breach of the principle of non-refoulement. The aim to combat irregular migration through external border management is questionable, as has been pointed out by numerous NGOs and in academic literature.<sup>178</sup> By preventing illegal immigrants from entering the territory of the EU, they are already classified as such before they were able to apply for international protection.

## 4.2 Best interests of the unaccompanied migrant child in CEAS

The European Union has included the best interests of the child in article 24 of its Charter of Fundamental Rights. This Charter became binding when the Lisbon Treaty entered into force in 2009.<sup>179</sup> The different legislative instruments of CEAS refer to States' obligations towards the CRC and contain safeguards regarding the rights of the child and their best interests. Furthermore, in 2017, the

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<sup>175</sup> 'Directorate General for Migration and Home Affairs, "Decision on a Non-Substantial Amendment to 2025" C(2022) 8340 Final on the Financing of Components of the Thematic Facility under the Asylum, Migration and Integration Fund and Adoption of the Work Programme for 2023, 2024 and 2025' (Ref Ares (2023)3097305) Brussels, 3 May 2023.' <<https://home-affairs.ec.europa.eu/system/files/2023-05/First%20revised%202023-2025%20Work%20Programme%20AMIF%20%28non-substantial%29.pdf>> accessed 23 June 2023.

<sup>176</sup> Council and EP Regulation (EU) 2019/1896 on the European Border and Coast Guard [2019] OJ L 295/1 para 78 - 80.

<sup>177</sup> Katy Fallon, 'EU Border Agency Accused of Serious Rights Violations in Leaked Report' *The Guardian* (14 October 2022) <<https://www.theguardian.com/global-development/2022/oct/14/eu-border-agency-frontex-human-rights-violations-report>> accessed 25 June 2023. 14/07/2023 19:46:00

<sup>178</sup> See for example ECOSOC 'Written statement submitted by Pax Romana, a non-governmental organization in consultative status (Category II)' (1996) E/CN.4/1996/NGO/50 and Virginie Guiraudon, '20 Years after Tampere's Agenda on "Illegal Migration": Policy Continuity in Spite of Unintended Consequences' in Deirdre Curtin, Andrew Geddes, and Sergio Carrera (eds), *20 year anniversary of the Tampere programme: Europeanisation dynamics of the EU area of freedom, security and justice*. (European University Institute (EUI) 2020) 151 <<https://data.europa.eu/doi/10.2870/66646>> accessed 17 June 2023.

<sup>179</sup> Article 6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) Official Journal C 306, 13 December, pp 1 - 271.

European Commission adopted a communication on the protection of children in migration to address the protection gaps and needs of children arriving in Europe ranging from their reception to the identification of durable solutions. This communication affirms that the best interests of the child should be the primary consideration in all actions and decisions concerning children.<sup>180</sup> In addition, in 2021, the European Commission issued a strategy to improve the rights of children in EU and worldwide. The strategy covers six thematic areas. The rights of children on the move are addressed in different areas of the strategy. The section on child friendly justice dedicates a paragraph specifically to children in migration. Despite the safeguards included in CEAS, the strategy on the rights of the child observed that there is a lack of appropriate information, guidance, and support for children in the asylum and return procedures of children.<sup>181</sup>

#### **4.2.1 Rights upon arrival and during asylum application process**

The Reception Conditions Directive lays down standards for the reception of asylum applicants. When children enter the EU, an assessment must be made of their best interests. The possibility of family reunification must be assessed as well as the child's wellbeing and development. Particular regard must be given to their background, to safety and security considerations, and to the child's views in accordance with their age and maturity.<sup>182</sup> Children must have access to education and they must be ensured a standard of living which adequate for their 'physical, mental, spiritual, moral and social development.'<sup>183</sup> Family tracing is to begin as soon as possible after the child applies for international protection.<sup>184</sup> For the process of the asylum application, the Asylum Procedures Directive provides for unaccompanied children the safeguard that they will be assisted by a representative. This Directive also allows for age assessments of unaccompanied children, under certain circumstances. Assessing a person's age to determine whether they are a child or not is a delicate process. Numerous States have adopted harmful and inaccurate practices in this area, and they rely on medical examinations to determine a child's age. The process of such examinations affects the wellbeing of the child and the potential misidentification risks children being registered as adults with all its consequences.<sup>185</sup>

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<sup>180</sup> European Commission, Commission, 'The protection of children in migration' COM(2017) 211 final. 2017 3..

<sup>181</sup> Commission 'EU strategy on the rights of the child' COM(2021) 142 final. 14.

<sup>182</sup> Article 23 RCD.

<sup>183</sup> Article 14 RCD; Article 23 RCD.

<sup>184</sup> Article 24 RCD.

<sup>185</sup> 'Applying European and International Legal Standards at All Stages of Age Assessment Procedures' (2022) Legal Note 13 <<https://ecre.org/wp-content/uploads/2023/01/Legal-Note-13-FINAL.pdf>> accessed 25 June 2023..

Furthermore, both the Reception Directive and the Asylum Procedures Directive allow for detention. Europe has been condemned for detaining children numerous times. Article 3 CRC, on the best interests of the child, and article 37 CRC, on the deprivation of liberty of children, do in no case allow migration-related detention of children.<sup>186</sup> Detention is harmful to the child's physical and mental wellbeing and can have long lasting effects on their cognitive development.<sup>187</sup> The EU, however, holds the opinion that children can be detained as a last resort, also in the New Pact on Migration and Asylum.<sup>188</sup>

People who qualify as a refugee or beneficiary of international protection are entitled to the safeguards provided by the Qualification Directive. The requirements to qualify as a refugee under the qualification directive are similar to the requirements to qualify as a refugee under the 1951 Refugee Convention. However, over the years, it has become increasingly difficult to qualify for asylum in the EU. In hotspots, separations are made between those who are likely to qualify for asylum and those who are not as likely. These separations are made on the basis of nationality, rather than on individual circumstances.<sup>189</sup> In the same vein, the Asylum Procedures Directive contains a list of safe third countries to which asylum applicants are returned and States have adopted similar lists on national levels to deter asylum applicants to. The EU uses the notion of a 'safe third country' to which an asylum seeker may have a connection, for example because they transited through this country, to redirect them before their asylum requests were even considered.<sup>190</sup>

#### 4.2.2 The Return Directive

As the ERPUM project on returning children to Afghanistan, which was discussed in chapter 3, showed, the EU is built on the notion that children belong in their country of origin. This is also reflected in CEAS. For children who do not qualify for asylum or who did not lodge such an application there is no separate directive or framework. Rather their rights and their future perspectives are navigated by the rights of the Return Directive. Rights such as access to education, accommodation

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<sup>186</sup> Manfred Nowak, 'UN Global Study on Children Deprived of Liberty' (2019) 448  
<<https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562>> accessed 25 June 2023.

<sup>187</sup> 'Safety and Dignity for Refugee and Migrant Children: Recommendations for Alternatives to Detention and Appropriate Care Arrangements in Europe' (n 75).

<sup>188</sup> Council 'Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' 2016/0224(COD) para 40e.

<sup>189</sup> De Vries and Guild (n 160) 5..

<sup>190</sup> Violeta Moreno-Lax (n 168) 669.

or other rights which would allow for local integration, are not provided to children whose asylum application was rejected under this Directive.

Moreover, the Return Directive is inconsistent regarding the best interests of the child. Recital 22 affirms that the best interests of the child must be a primary consideration, in line with the CRC. Unlike the recital and the CRC, article 5 of the Return Directive obliges Member States to take due consideration of the best interests of the child. Likewise, return decisions must be issued with due consideration being given to the child. This formulation of 'due consideration' is not as strong as the obligation to take the interests into account as 'a primary consideration,' because it allows Member States to grant more weight to other interests.

But the Return Directive was adopted in 2008 and attempts to improve protection of the best interests of the child were made since. The Return Handbook, published in 2017 to support Member States in carrying out return decisions, acknowledges that return is only one durable solution for children and their best interests should be regarded a key consideration.<sup>191</sup> The handbook also provides tools on how the best interests of children should be taken into account in carrying out return procedures. It explains that such an assessment should consider the needs of the child, the family situation, and the conditions in the country of return.<sup>192</sup> The handbook also refers to General Comment 14 and the 2014 UNHCR-UNICEF Guidelines on ensuring respect for the best interests of unaccompanied and separated children in Europe for further guidelines on conducting best interests assessments. But, contrary to the Return Directive itself, the Return Handbook is not binding.

Another improvement in safeguarding the protection of the best interests of the child was provided by a preliminary ruling of the Court of Justice of the European Union (CJEU) which interpreted the above mentioned provisions of the Return Directive to mean that an assessment of the best interests of the child is a prerequisite to issuing a return decision. Moreover, the CJEU affirmed the child's best interests must be protected at all stages of the procedure.<sup>193</sup> This ruling will be discussed more extensively in chapter five of this thesis.

The Return Directive leaves Member States the discretion to grant unaccompanied migrant children who received a negative decision on their asylum application but who cannot be returned a temporary residence permit which expires on their eighteenth birthday. If third-country nationals remain on the

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<sup>191</sup> 'Return Handbook' 54 <[https://ec.europa.eu/eurostat/cache/metadata/Annexes/migr\\_eil\\_esqrs\\_it\\_an1.pdf](https://ec.europa.eu/eurostat/cache/metadata/Annexes/migr_eil_esqrs_it_an1.pdf)> accessed 22 April 2023.

<sup>192</sup> Article 10 Return Directive.

<sup>193</sup> Case C-441/19 *TQ v Staatssecretaris van Justitie en Veiligheid* (CJEU, 14 January 2021).

territory of the EU after their asylum application was rejected, their stay is classified as illegal.<sup>194</sup> Article 6 of the Return Directive requires Member States to either issue a return decision to any third-country national staying illegally on their territory, or to grant them a residence permit. This does prevent third-country nationals from living in a situation of limbo, where they would not be returned or deported but are also not granted a legal right to stay.

Unaccompanied migrant children who cannot be returned can be issued a residence permit which expires on their eighteenth birthday, as was also recommended in the Return Handbook.<sup>195</sup> This is a stay of execution. It prevents States from identifying durable solutions for unaccompanied migrant children on the basis of a secure legal status but instead creates a legal limbo for unaccompanied migrant children when they age out.

## 4.3 Protection gaps

### 4.3.1 Protection limbo

The rights of unaccompanied children in the EU are protected by the child rights' framework on the one hand and by the framework to protect the rights of asylum seekers under CEAS on the other hand. Upon arrival in Europe, unaccompanied children are to be referred to child protection services to ensure their access to healthcare, education, and other needs.<sup>196</sup> Furthermore, a guardian must be appointed to support and assist them.<sup>197</sup> Children who do not qualify for asylum, are entitled to child protection and the relevant protection under the host States' national youth welfare legislation.<sup>198</sup> All these before mentioned services related to the care and protection needs of children are arranged under domestic legislation and provided by domestic services. The different frameworks applicable to unaccompanied migrant children and the lack of cooperation between these frameworks cause protection gaps and exposes them to numerous risks, including trafficking and exploitation.<sup>199</sup> The perception of unaccompanied migrant children as vulnerable on the one hand, and individuals who are potentially out to make a claim on the host States' social services on the other hand, poses a contradiction in which the child's agency and rights risk being overlooked.<sup>200</sup> This is how the best interests of the child and the interest of States and the EU to control migration flows come into conflict.

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<sup>194</sup> Article 3 (2) Return Directive.

<sup>195</sup> 'Return Handbook' (n 191) 20.

<sup>196</sup> Christina Jespersen (n 38) 33.

<sup>197</sup> Article 24 Reception Conditions Directive.

<sup>198</sup> GC 6 (n 3) para. 67.

<sup>199</sup> Iusmen (n 55) 939–941.

<sup>200</sup> *ibid* 936.

In the EU, the latter is often prioritised, resulting in rights of the child being overlooked. An example of this is the UK's execution of the 2003 Dublin Regulation when they were still a EU Member State. Article 6 of the 2003 Dublin Regulation stated that if there is no family member present on the territory of the EU, the Member State responsible for examining the claim of an unaccompanied child is the Member State where the child had lodged the application for protection, provided this is in their best interests. Under the Dublin Regulation, the UK attempted to return children to the Member State where they had first applied for protection. The case of *MA and others v Secretary of State for the Home Department*, concerned three such cases of children who the UK attempted to return to the Member State where they had lodged their first asylum application. The CJEU ruled that the transfer of children to another Member State may unduly prolong their asylum procedure which would not be in their best interests. A number of Member States lack legislation on the implementation of best interests assessments and determination in asylum cases all together.<sup>201</sup> Moreover, the lack of solidarity sharing and of a common approach on asylum policy translates to a lack of a common approach on processes for the assessment and determination of the best interests and the identification of durable solutions for children, resulting in differences in treatment between Member States.<sup>202</sup>

#### **4.3.2 Ageing out into a legal limbo**

The conflict between the interest of States' to control migration flows and the best interests of the child also pushes children in a legal limbo. It is in the States' interest to return an unaccompanied child after their request for asylum was rejected.

The European Commission acknowledged the importance of clear rules on status determination for children who do not qualify for asylum but cannot return either, especially for children who have resided in the host State for a longer period of time.<sup>203</sup> Some States have translated this into legislative practices preventing children who entered after a certain age to acquire a legal status. For example, in Belgium the 'durable solutions procedure' which children can apply for, takes longer than a year. This effectively means that children older than 17.5 years cannot benefit from the procedure, and many children who apply around their 17 Birthday are also set to age out undocumented.<sup>204</sup> The Dutch law which prevented unaccompanied migrant children who do not qualify for asylum, from acquiring a residence permit was reprimanded in the CJEU TQ ruling, which will be discussed more extensively in

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<sup>201</sup> COM(2017) 211 final 14.

<sup>202</sup> *Iusmen* (n 55) 933.

<sup>203</sup> Commission, 'The protection of children in migration' COM(2017) 211 final 12.

<sup>204</sup> *Van der Vennet* (n 13) 45.

chapter 5.<sup>205</sup> Moreover, research conducted by PICUM showed that just one third of the EU Member States provides alternative ways for adolescents to regularise their status after they age out undocumented.<sup>206</sup> The provision of temporary residence permits which expire upon the child's eighteenth birthday in combination with the lack of possibilities to regularise after this, prevent unaccompanied migrant adolescents from finding the security they need to build a future for themselves.

### 4.3.3 Effects of the New Pact on Migration and Asylum

Since 2020, the EU has been working on a New Pact on Migration and Asylum. Rules regarding asylum procedures are tightened through this pact. An example of this is the plan to place people who come from a country of origin of which 20% or less requests are usually accepted, in an accelerated procedure.<sup>207</sup> Unaccompanied children can also become subject to this procedure if they came from a country which is considered a 'safe country' within the meaning of the proposed regulation.<sup>208</sup> Member States are given the autonomy to decide by themselves what a 'safe third country' is.<sup>209</sup> Although it is important that asylum applications lodged by children are processed with undue delay, examinations should also be examined carefully. The amended proposal for the regulation which is designed to replace the Asylum Procedures Directive does not clarify what an accelerated procedure entails, other than the requirement that the application must be examined within three months after it was lodged. Such an accelerated procedure may negatively affect the procedural safeguards which must be offered during an asylum process and can lead to refoulement if applications are not examined with due care.

The same proposed regulation also weakens the safeguards around the right of the child to express their views. The proposal states that competent authorities may conduct a personal interview with a child if this is in the best interests of the child and if the authority in question deems this necessary for the examination of the application. The interview may also be organised upon the request of the child or their representative. In this provision, the discretion given to authorities to decide whether a personal interview is necessary for the application, potentially compromises the child's right to be heard.

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<sup>205</sup> *TQ v Staatssecretaris van Justitie en Veiligheid* (n 193).

<sup>206</sup> Van der Vennet (n 13) 16.

<sup>207</sup> Article 40 Council, 'Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU'(Brussels, 2023) 2016/0224 (COD).

<sup>208</sup> *Ibid* article 40 (5).

<sup>209</sup> *Ibid* recital 35 – 37.

The EU Strategy on the Rights of the Child claimed the rules in the Pact on Migration and Asylum would reinforce safeguards and protection standards for migrant children by ensuring these children the necessary resources to support their needs, including their transition into adulthood.<sup>210</sup> At the presentation of the New Pact on Asylum and Migration in 2020, the Commission communicated a commitment to protect the rights of the child and ensure that the system reflects the needs of the child at every stage of the process.<sup>211</sup> The Pact is supported by different strategies and action plans. An additional strategy on accompanied, unaccompanied and separated children in the new Pact might have provided extra safeguards to their rights and needs in this newly proposed system.

#### 4.4 Pathways to regularisation

The European asylum policy also covers legal migration and provides for alternative pathways. The EU has harmonised the entry and residence of students and researchers, high qualified workers, seasonal workers, and intra-corporate transferees. In combating illegal migration through providing complementary pathways, the EU is largely focused again on the external dimension. Mobility programs in cooperation with third countries are made to provide for legal migration to the EU, and even the new Talent Pool which is set to launch this year was designed to attract third-country nationals to the European labour market in fields where there is a shortage.<sup>212</sup> At the most, the feasibility study on the EU Talent Pool expressed that the program should also be available to third-country nationals who are already residing in the EU legally.<sup>213</sup> These legal migration alternatives are not available to individuals without a legal status or individuals whose return was suspended for reasons of fact or law are excluded from all these instruments.<sup>214</sup> As discussed in chapter three, giving study or work permits to unaccompanied children whose claim for asylum was rejected provides them the opportunity to secure their legal status. Some EU Member States do have practices which allow children to stay for education or work purposes after their 18th birthday. For example, Germany provides temporary

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<sup>210</sup> Commission 'EU strategy on the rights of the child' COM(2021) 142 final 14.

<sup>211</sup> Commission, 'Communication on a New Pact on Migration and Asylum' COM(2020) 609 final. para. 2.4.

<sup>212</sup> 'Legal Migration and Integration' <[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration_en)> accessed 25 June 2023; 'Commission "Progress Report on the Implementation of the European Agenda on Migration" COM(2019) 126 Final.' (n 172) 17.

<sup>213</sup> CHALOFF Jonathan and RENAUDIÈRE Geraldine, 'Feasibility Study on the Development of an EU Talent Pool' 15.

<sup>214</sup> See e.g. article 3 (2) (f) Council Directive (EC) 2021/1883 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment [2021] OJ 382/1 (Blue Card Directive) or article 2 (2) (b) Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ 132/21 (Student and Researchers Directive).

residence permits for educational purposes by law.<sup>215</sup> Harmonising such practices on the European level would protect the child's best interests. Moreover, as it would reduce the number of unaccompanied children ageing out into undocumented adulthood, it would also be an effective tool to combat illegal migration.

#### **4.5 Conclusion of chapter**

States have an interest to control who resides on their territory, and they do this through providing people a right to stay in the form of a residence permit or other legal status. To control this, they also have an interest to keep out those who attempt to reside on the territory illegally. In the politically turbulent 1980s the number of asylum applications in European countries increased. This was after these countries had stopped providing labour migration opportunities. Countries grew suspicious of refugees' motives to apply for asylum and implemented stricter border policies. In the 1990s, the Schengen accords and the establishment of the European Union, incited the need for a Common European Asylum System. Member States' individual interest to control who they grant permission to stay on their territory prevents a successful common asylum policy based on responsibility sharing. Union cooperation is focused on shifting responsibility away from the EU all together, rather than sharing it between Member States. This results in strict border management and policies which prevent refugees from reaching the EU's territory and lodging a successful application for asylum. The focus on external border management is driven to further extremities by political discourse on the subject. In these policies, there is little regard for the protection of children. In the EU, the interest to combat migration takes precedence over the child's best interests. The rights of the child are safeguarded to a minimal extent in directives by provisions which state that the best interests of the child must be a primary consideration in decisions affecting the child. A framework to identify durable solutions for unaccompanied migrant children who remain or become undocumented upon ageing out is missing. In addition, the different frameworks which are supposed to protect children, fail to cooperate coherently. These protection gaps prevent children from accessing the rights they are entitled to. Furthermore, the safe country notion and the external border management make it difficult for people to acquire a status as refugee or beneficiary of international protection. This is all the same for children. The principle of best interests of the child, which often prevents their return to the country of origin or a safe third country, ceases to exist when adolescents turn eighteen, which pushes unaccompanied migrant children

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<sup>215</sup> Sections 16a and 16 of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory.

into a legal limbo and affects their transition into adulthood. The next chapter will explore how the international and European framework for the identification of durable solutions in the best interests of unaccompanied migrant children affect the domestic framework, in a case study of the Netherlands.

## 5. Illustration case: the Netherlands

This final chapter will assess how the international and European framework are applied on the national level, by analysing how the States' interests in the Netherlands relate to their international human rights law obligation to identify durable solutions in the best interests of unaccompanied migrant children. As was discussed in the previous chapter, migration has become a politicised subject in the European Union. This is no less so in the Netherlands, where the government fell on Friday the 7<sup>th</sup> of July 2023 over this topic. The Netherlands has become increasingly strict in their migration policy. For example, it has adopted rules which restrict possibilities for unaccompanied migrant children to acquire residence permits.<sup>216</sup> This chapter will show how the change in legislation introduced in 2013 was so strict that it was condemned by the CJEU for being inconsistent with European law and how the situation of unaccompanied migrant children changed after this CJEU ruling. The chapter will also discuss former unaccompanied migrant children who aged out and remained or became undocumented before the CJEU ruling enforced a policy change.

### 5.1 The best interests of the child in Dutch law

As a State Party to the CRC, the Netherlands is legally bound to its provisions. The Dutch system is moderately monist. Therefore, provisions of international law have direct effect and can be invoked in Court if they are binding upon everyone. The provision must be unconditional, and the aim of the provision must be sufficiently clear. The Court decides whether this is the case for a specific provision on a case-by-case basis by appreciating the specific context in which a provision applies relating to the case brought to the Court.<sup>217</sup> The open-endedness of the best interests of the child principle generally does not allow for direct effect of the provision, and the Dutch government is therefore supposed to implement it in those pieces of legislation where the best interests of the child require due consideration.<sup>218</sup>

Regardless, the best interests of the child can be invoked as a right in front of the domestic judge in some cases. Article 3 CRC as a rule of procedure requires the rule to be directly justiciable. In any case in the Netherlands international rules take precedence over domestic rules if the two are in conflict.<sup>219</sup> Moreover, Dutch authorities are by law obliged to provide legal reasoning for each decision, and

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<sup>216</sup> Ghaemina (n 128) 65–71.

<sup>217</sup> Article 93 Grondwet voor het Koninkrijk der Nederlanden; *HR 10 October 2014, ECLI:NL:HR:2014:2928 (Staat/ Can) considerations 351 - 364.*

<sup>218</sup> RvS 7 February 2012, ECLI:NL:RVS:2012:BV3716, *JV* 2012/152.

<sup>219</sup> Article 94 Grondwet voor het Koninkrijk der Nederlanden.

decisions must be made with careful consideration, taking international law into account.<sup>220</sup> Judges will therefore consider whether the best interests of the child were taken into account sufficiently in a specific decision.<sup>221</sup> To this extent, article 3 CRC is directly justiciable in domestic Courts in so far that people can complain about the best interests not being taken into account. However, the extent to which the principle must be considered and how it is weighed against other interests is cannot directly be invoked in front of the judge. Moreover, the Netherlands has not ratified the third optional protocol to the CRC, so children in the Netherlands cannot file a complaint with the CRC Committee.<sup>222</sup>

International human rights law also obliges the Netherlands to assess and determine the best interests of the child and identify a durable solution for unaccompanied migrant children. The CRC General Comments are not directly binding upon State Parties, but they are interpretations of CRC provisions which are binding upon State Parties. Inter alia, article 2, 3 and 6 CRC, regarding the principle of non-discrimination, the best interests of the child and the holistic development of the child, require State Parties to identify durable solutions in the best interests of unaccompanied children regardless of their legal status.

The Netherlands should implement the best interests of the child into their migration law to comply with their international human rights law obligations. In the last Concluding Observation, the CRC Committee did recommend the Netherlands to include the best interests of the child in migration law.<sup>223</sup> Currently, there is no clear framework to assess the best interests of the child in the cases of unaccompanied children in the Netherlands. The law only obliges authorities to ensure the presence of adequate reception facilities in the country of return prior to the child's deportation.<sup>224</sup> An assessment of the best interests of the child is not a prerequisite to deporting an unaccompanied child from Dutch territory. Incorporation of this right into the legislation would make the procedure more transparent and consistent and would improve the protection of unaccompanied children in the Netherlands.

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<sup>220</sup> Daan Beltman and Elianne Zijlstra, 'De Doorwerking van "het Belang van Het Kind" Ex Artikel 3 VRK in Het Migratierecht: Vanuit Een Bottom-up Benadering Op Weg Naar Een Top-down Toepassing' (2013) 12 *Journal Vreemdelingenrecht* 286, 6.

<sup>221</sup> *ibid* 10.

<sup>222</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011) UNGA Res (A/RES/66/138)

<sup>223</sup> 'CRC Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Kingdom of the Netherlands (9 March 2022) UN DOC CRC/C/NLD/CO/5-6.' para. 16.

<sup>224</sup> Article 6.1 Vreemdelingencirculaire 2000 (A).

## 5.2 Treatment prior to the case of TQ

The way the Netherlands interpreted and implemented the Return Directive into its migration policy breached EU law as well as international law. The Dutch practice was condemned in the case of TQ. The case of TQ concerned a Guinean boy who was born in 2002, applied for asylum when he was fifteen years and four months old. He arrived in the Netherlands on an unknown date. In the Netherlands he fell a victim to human trafficking, which caused him serious psychological problems. TQ grew up in the Netherlands and considered his Dutch foster family to be his family. He did not know his parents or any other family in Guinea. Dutch authorities decided the boy was not eligible for a residence permit for a fixed term, because he was older than fifteen years old when he lodged his asylum application. A return decision against him was issued but he could not be deported, because there were no adequate reception facilities present in the country of return. In a preliminary ruling concerning the case of TQ, the CJEU ruled the Dutch migration policy was inconsistent with Union law. The Return Directive explicitly does not allow Member States to remove an unaccompanied child from their territory without ensuring the presence of adequate reception facilities in the country of return.<sup>225</sup> The requirement of adequate reception facilities, according to Dutch legislation, is met in case a relative (up to the fourth degree) or another adult who is not a family member who is able to take care of the child is present in the country of return, if a reception facility deemed adequate by the Dutch authorities is identified, if authorities in the country of return by regulation take care of the reception of returned unaccompanied children or if, according to general information, reception facilities in the country of return are adequate and available.<sup>226</sup>

The Dutch migration policy discriminated between children over the age of fifteen and children under the age of fifteen in determining the presence of adequate reception facilities in the country of return.<sup>227</sup> Children below the age of fifteen, who did not qualify for asylum, could receive a temporary residence permit, called a *no blame permit*, in case there were no adequate reception facilities available in the country of return. The permit can only be acquired if the child is unable to return through no fault of their own.<sup>228</sup> Children over the age of fifteen could also qualify for a *no-blame* permit. But they fell under the general provision for “aliens who cannot depart the Netherlands through no fault of their own.”<sup>229</sup> However, conditions to qualify for such a permit are even stricter. Moreover, presence of

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<sup>225</sup> Article 10 (2) Return Directive.

<sup>226</sup> Article 6.1 B8 VC 2000 (B).

<sup>227</sup> Article 6.2.1 and article 6.2.2 B8 Vreemdelingencirculaire 2000 (B) (VC 2000 (B));

<sup>228</sup> Article 6.2.1 and article 6.2.2 B8 VC 2000 (B).

<sup>229</sup> Article 4.1

adequate care facilities in the country of return are not considered in the decision on whether the *no-blame* permit is provided to someone older than fifteen. Consequently, under this old policy, children older than fifteen would receive a return decision together with their negative decision on their asylum application, but the Repatriation and Return Service (DT&V) would only start investigating whether adequate reception facilities were available in the country of return after this, prior to the actual removal of the child. The Dutch State reasoned that children who lodged their first asylum application when they were fifteen years old or above would have aged out by the end of this procedure. The *no-permit* procedure for unaccompanied children granted the DT&V a period of up to three years to investigate the presence of adequate reception facilities in the country of return. The procedure for a *no-blame permit* for unaccompanied children was meant to provide residency permits to children, so children who are older than fifteen years old at the time of their first application could never qualify for this fixed term residence permit.<sup>230</sup> The CJEU ruled this did not free the Dutch State from its obligation to investigate whether adequate reception facilities are present in the country of return before issuing a return decision against a child. The reasoning of the Dutch State therefore did not hold in front of the CJEU. The distinguishment between children younger than fifteen years old and children older than fifteen years old was deemed arbitrary and incompatible with Union law.<sup>231</sup> Moreover, this policy failed to consider the best interests of the child, as was discussed in the first section of this chapter. In the view of the Dutch government, the presence of adequate reception facilities in the country of return only has to be researched prior to the removal of an unaccompanied child. Therefore, the return decision can be lodged without such research having been conducted.<sup>232</sup> However, this does not relieve the Dutch government from assessing the best interests of the child at all stages of the procedure.<sup>233</sup> These interests must be taken into account at all stages of the procedure, and this requires an assessment to be made before a return decision is issued. Such an assessment must do more than just investigate the presence of adequate reception facilities, but requires other factors to be considered as well, such as the age, sex, vulnerability, health, social environment and education.<sup>234</sup> Lastly, by issuing a return decision against an unaccompanied child whose removal is made impossible by the lack of adequate reception facilities in the country of return, the Member State is placing the

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<sup>230</sup> *TQ v Staatssecretaris van Justitie en Veiligheid* consideration 63.

<sup>231</sup> *Ibid* consideration 62 – 68.

<sup>232</sup> *Ibid* consideration 49 – 50.

<sup>233</sup> *Ibid* consideration 51.

<sup>234</sup> *Ibid* consideration 45 – 47.

child in “a situation of great uncertainty.”<sup>235</sup> The Member State cannot issue a return decision against a child and then wait until the child turns eighteen to remove of the child from its territory.<sup>236</sup> If the Member State does not provide an unaccompanied child a residence permit on the basis of article 6 (1) Return Directive, the Member State must assess whether adequate reception facilities are available in the country of return to issue a return decision against this child and remove them. Changes to the situation which occur between the decision and the actual removal of the child must be taken into consideration.<sup>237</sup> The consequence of the Dutch policy for unaccompanied migrant children who remain or become undocumented upon ageing out, was that they would have a return decision issued against them, which could be effectuated at any time after their eighteenth birthday. Their stay on Dutch territory was tolerated during the time they were still a child, and during this time they were allowed access to education, accommodation, and support by a legal guardian. At eighteen years old, they feared to be returned to a country which might be completely estranged from them, as was the case for TQ. They feared to be removed from a country in which they had integrated. Furthermore, the loss of the right to stay on the Dutch territory at eighteen years old turned them into persons present at the territory illegally, and this limited their opportunities to participate in Dutch society and build their future.<sup>238</sup> As was discussed in chapter three, this jolt back into liminality inevitably affects their wellbeing and development.

### 5.3 Changes after the case of TQ

The Administrative Jurisdiction Division of the Council of State (ABRvS), in response to the CJEU’s preliminary ruling, concluded three situations were possible for unaccompanied migrant children who do not qualify for asylum. The first situation, in which authorities are sufficiently sure that a family member, guardian or adequate reception facilities are available in the country of origin, the decision on the rejection of the asylum application should include a return decision and a motivation on why the child cannot qualify for a fixed-term residence permit. The second situation, in which the unaccompanied child does not qualify for asylum, but presence of family members, a guardian or adequate reception facilities in the country of return are not ensured, the child must be granted a fixed-term residence permit. In the third situation, in which the investigation into the reception situation in the country of origin is still pending when the asylum request is denied, the return decision is only

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<sup>235</sup> Ibid consideration 53.

<sup>236</sup> Ibid consideration 81.

<sup>237</sup> Ibid consideration 72 – 79.

<sup>238</sup> Ghaeminia (n 128) 174.

issued once this investigation has been completed. The State Secretary will take up until one year to complete this investigation.<sup>239</sup>

The TQ judgement has scarcely improved the situation for unaccompanied migrant children who remain or become undocumented upon ageing out. The criteria to qualify for a temporary residence on humanitarian grounds are too strict and therefore unattainable for children. The statements given by the child during hearings must be perceived believable by the responsible authority and these statements lead the authority to believe that there is no family to take responsibility over the care of the child in the country of return or in any other country, to whom the child could return. The child cannot frustrate the investigation into adequate reception facilities in the country of origin or the country of return, and thus has to cooperate. The final condition is that there are no adequate reception facilities in the country of return and this situation is not expected to change in the near future.<sup>240</sup> It is difficult for children to comply with these criteria. This policy of providing children under the age of fifteen with a residence permit who could not be returned, was introduced in 2013. By 2018, two children were actually granted such a permit, leaving the vast majority of unaccompanied migrant children in the Netherlands in a legal limbo.<sup>241</sup> The judgement might have made it legally possible for unaccompanied migrant children who claim asylum at the age of fifteen or later, but the other strict criteria still prevent them from attaining a temporary residence permit if there are no adequate reception facilities in the country of origin. The judgement therefore does not prevent unaccompanied migrant children from ageing out undocumented. At the most, it prevents the State from issuing a return decision against them before their eighteenth birthday.

Furthermore, consideration for the best interests of unaccompanied migrant children has not significantly improved after the case of TQ. In a recent judgement, issued on the 29<sup>th</sup> of March this year, the State Secretary presented briefly how the best interests of the child were taken into due consideration in the investigation into adequate research facilities in the country of return. A more extensive assessment of the best interests is to follow after the completion of the investigation. The presentation of the State Secretary reads as follows:

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<sup>239</sup> *RvS 8 June 2022, ECLI:NL:RVS:2022:1530 (TQ v. Staatssecretaris van Justitie en Veiligheid) consideration. 17.*

<sup>240</sup> Article 6.2.1 and article 6.2.2 B8 VC 2000 (B).

<sup>241</sup> 'Nidos 2018 Jaarverslag' (Nidos 2018) 24 <[https://www.nidos.nl/wp-content/uploads/2019/05/jv2018\\_270519\\_LR.pdf](https://www.nidos.nl/wp-content/uploads/2019/05/jv2018_270519_LR.pdf)> accessed 9 July 2023.

*“Return to the country of origin after rejection of the asylum application is further in the best interests of the child because:*

- Swift reunification with parent(s) or other adults who have custody under law or customary law is in the child's best interests.*
- A swift return to the country whose language the child speaks is desired.*
- A swift return is desired to the country where the child grew up.*
- Given the person's short stay in the Netherlands, substantial ties with the Netherlands have not yet been established.*
- There is no evidence of special vulnerability or serious physical or mental problems.”<sup>242</sup>*

Firstly, this does not read as an assessment of what would be in the best interests of the child, but rather as an argumentation for why the child must be returned. Secondly, it fails to consider the socio-economic and safety situation in the country of return. The judgement in question concerns a child whose nationality is Somalian and who was threatened by Al-Shabaab in his country of origin. The State Secretary has explicitly confirmed there is no doubt about the existence of these threats.<sup>243</sup> The assessment therefore fails to take the best interests of the child into account. Thirdly, the best interests of the child are not taken into consideration in the procedure of investigation into adequate reception facilities in the country of return. The one-year period to finish this investigation after the denial of the asylum application can be extended if the child does not cooperate with authorities or does so insufficiently.<sup>244</sup> The above judgement openly questions whether extending this period due to culpable conduct by the child is consistent with the CJEU’s case law. Culpable conduct by the child necessarily allow for their interests not to be considered or only to a lesser extent.<sup>245</sup> However, the policy at the time of writing still allows for this.<sup>246</sup> Lastly, the judge who issued the above judgement complained the State Secretary did not clarify whether the presented elements of the best interests of the child assessment are general elements or elements which specifically apply to the child who was the complainant in this case. The State Secretary did not explain either how the best interests of this child

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<sup>242</sup> *Rb. Den Haag 29 March 2023, ECLI:NL:RBDHA:2023:4262 consideration 14* (free translation).

<sup>243</sup> *Ibid* para. 3.

<sup>244</sup> IND/ SUA, ‘Informatiebericht SUA: Beslissen Op Amv Zaken Na Afdelingsuitspraken van 8 Juni 2022 (Actualisering)’ (2023) IB 2023/41 <[https://puc.overheid.nl/ind/doc/PUC\\_1306061\\_1/1/](https://puc.overheid.nl/ind/doc/PUC_1306061_1/1/)> accessed 7 July 2023.

<sup>245</sup> *Rb. Den Haag 29 March 2023, ECLI:NL:RBDHA:2023:4262 consideration 18.*

<sup>246</sup> IND/ SUA (n 244).

will be assessed after the investigation into the reception facilities in the country of return has been completed.<sup>247</sup>

Moreover, the best interests of the child as a right is still not included in Dutch migration law and the responsible authorities have not published a framework for the assessments of the best interests of the child. The State Secretary, in response to the judgement of the ABRvS, acknowledged that leaving children in a situation where a return decision is issued against them while they cannot depart to the country of return is inconsistent with the best interests of the child. The three-tier system introduced by the ABRvS became policy but the response of the State Secretary did not refer to the best interests of the child apart from this and Dutch migration policy still lacks a framework for BIC-assessments for children in migration.<sup>248</sup> While the three tier system saves unaccompanied migrant children from living in a legal limbo if there are no adequate reception facilities available in the country of return, it remains unclear how and to what extent the best interests of the child are assessed throughout the procedure.

#### **5.4 Former unaccompanied migrant children who aged out undocumented**

The policy as it was before the TQ judgement caused a lot of unaccompanied children in the Netherlands to age out into a legal limbo, and the situation of these individuals has not been improved by the TQ judgement. The Connection Law (Koppelingswet), which was adopted in 1998, prevents persons without a legal status from accessing social services.<sup>249</sup> The aim of this law is to prevent people who do not have a legal status from continuing their stay by restricting their access to social services and to discourage third-country nationals from entering the Netherlands and residing on Dutch territory without a legal status.<sup>250</sup> The Netherlands allows people with a status to work and people who first apply for asylum to work for 24 weeks, but people without a residence permit are not allowed to work.<sup>251</sup> When unaccompanied children in the Netherlands remain or become undocumented upon ageing out, they are only provided basic medical care. They are forced to leave the accommodation they were residing in as a child and are forced to move to basic shelter, such as an asylum centre or the homeless shelter.<sup>252</sup> These restrictions are similar for accompanied and unaccompanied children ageing

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<sup>247</sup> *Rb. Den Haag 29 March 2023, ECLI:NL:RBDHA:2023:4262 consideration 18.*

<sup>248</sup> Letter by the State Secretary Justice and Security of 14 July 2022 (*Kamerstukken II 2021 – 2022, 29344, nr 152*).

<sup>249</sup> *Kamerstukken II 2022 – 23, 1399, p. 2.*

<sup>250</sup> *Kamerstukken II 1994/ 95, 24233 nr. 3.*

<sup>251</sup> Article 2 – 11 *Wet arbeid vreemdelingen.*

<sup>252</sup> *Oxfam & Greek Council for Refugees (n 133) 24.*

out. There are various programs which support undocumented people in the Netherlands.<sup>253</sup> While the government allows children to finish the study they are enrolled in even after they turn eighteen, the government does not allow adolescents to start a new study after they aged out. After the request for asylum is denied, government policies are meant to focus solely on return.<sup>254</sup> All in all, children who remain or become undocumented upon ageing out in the Netherlands largely banned from participating in society. Moreover, their options to regularise their status are limited. In some cases, persons can qualify for a residence permit on the grounds of private and family life in accordance with article 8 of the European Convention on Human Rights (ECHR). If a return decision might breach the person's right to private or family life under the ECHR, the Member State must balance these interests against the interests of the State prior to issuing a return decision.<sup>255</sup> However, between 2010 and 2021 only up to 80 people every half a year were registered to apply for a permit on the grounds of private life.<sup>256</sup> It is more common for people to lodge a repeated asylum application. Nearly 1500 applications were lodged between April 2022 and April 2023.<sup>257</sup> Regardless, there were between 23.000 and 58.000 living undocumented in the Netherlands around 2018.<sup>258</sup> Replying to parliament on questions regarding undocumented persons in the Netherlands, the last State Secretary on migration stressed that an important pillar in the Dutch migration policy is the obligation imposed upon every individual residing in the Netherlands without a right to stay, to depart the Netherlands.<sup>259</sup> As a result of the Dutch policy, persons who cannot return due to any of various reasons, are trapped into a limbo. They cannot acquire a legal status in the Netherlands on the one hand, but on the other hand, since return is impossible, they are forced to stay on the territory. It therefore does not just push many third-country nationals, in the Netherlands, into illegality, but it also negatively affects the States' interest to control migration flows. Combating irregular migration remained one of the migration pillars in the government's last coalition

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<sup>253</sup> Examples of this are the ex-ama team in Utrecht who support unaccompanied migrant children after they aged out, or Vluchteling in de Knel (VIDK) who support undocumented adults in the Netherlands.

<sup>254</sup> Kamerstukken II 1994/ 95, 24233 nr. 3, 4.

<sup>255</sup> Marta Gionco, 'Barriers to Return: Protection in International, EU and National Frameworks' (PICUM 2022) 12–13 <[https://picum.org/wp-content/uploads/2022/02/Barriers-to-return\\_Protection-in-international-EU-and-national-frameworks.pdf](https://picum.org/wp-content/uploads/2022/02/Barriers-to-return_Protection-in-international-EU-and-national-frameworks.pdf)> accessed 10 July 2023.

<sup>256</sup> Wetenschappelijk medewerkers IND/SUA/O&A, 'Onderzoeksrapport Gebruik Reguliere Humanitaire En Familiegerelateerde Verblijfsregelingen Deel I: Waterbedeffecten in Aanvragen?' (IND, Ministerie van Justitie en Veiligheid 2022) 20 <<https://ind.nl/nl/documenten/07-2022/reguliere-humanitaire-en-familiegerelateerde-verblijfsregelingen-deel-i-waterbedeffecten-mei-2022>> accessed 10 July 2023.

<sup>257</sup> 'Asylum Trends Monthly Report on Asylum Applications in The Netherlands' (IND, Ministerie van Justitie en Veiligheid 2023) 6 <<https://ind.nl/nl/documenten/05-2023/at-april-2023-hoofdrapport.pdf>> accessed 10 July 2023.

<sup>258</sup> Kamerstukken II 2022 – 23, 1399, p. 1.

<sup>259</sup> Ibid.

agreement.<sup>260</sup> But the Dutch policy seems to create more irregular migrants, and not regularising the status of these people does not make them non-existent. They are still in the Netherlands, but just forced to leave in between the realms of society.

### **5.5 Conclusion of the illustration case**

In the Netherlands, the States' interests to control migration flows and to combat irregular migration is combined with a strategy to prevent people without a legal status from accessing social services with the aim to prevent them from continuing their stay. The strict policies and limited ways in which people can regularise their status after their application for asylum or a regular residence permit was denied because many people to live in the Netherlands without a legal status. Especially before the TQ ruling, the lack of framework to identify durable solutions which are in the best interests of unaccompanied migrant children caused them to age out into undocumented adulthood.

Moreover, international standards have been lowered to an extent that there is no framework to identify durable solutions in the best interests of unaccompanied migrant children. The right of the child to have their best interests taken into account as a primary consideration in all decisions concerning them has not been implemented in Dutch migration law, while the Constitution does require this. Consequently, there is no framework for best interests assessments and determinations for children in migration and it is unclear to what extent the State Secretary considers the best interests of the child in migration cases. Moreover, the Netherlands' interests to control migration and to combat irregular migration have resulted in a focus on return and a policy in which the rights of the child are overlooked.

Unaccompanied children over the age of fifteen were hit especially hard by this migration policy and the Netherlands was condemned for its policy by the CJEU in 2021. The TQ ruling improved the situation for unaccompanied migrant children and prevents them from ageing out into a legal limbo because they have a return decision issued against them but cannot be removed to their country of origin due to a lack of adequate reception facilities. Moreover, it prevents them from being returned to a country where there are no adequate reception facilities. Although the CJEU also clarified that Union law imposes upon Member States to consider the best interests of the child throughout the procedure, there is still no framework on the assessment of the best interests of the child in migration law and it is also not clear how these interests are balanced against other interests, such as the interest of the State to control migration flows. Moreover, the TQ ruling did not improve the situation for children who fell

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<sup>260</sup> VVD and others, 'Omzien Naar Elkaar, Vooruitkijken Naar de Toekomst Coalitieakkoord 2021 – 2025' (2021) 42 <<https://open.overheid.nl/documenten/ronl-f3cb0d9c-878b-4608-9f6a-8a2f6e24a410/pdf>> accessed 10 July 2023.

victim to the old migration policy before the policy based on three situations was introduced. These adolescents have already aged out into undocumented adulthood, which has affected their development and might still be affecting their development. They have limited possibilities to regularise their status and this limits their possibilities of building a life in the Netherlands, which limits them in their autonomy to shape their own future.

## 6. Conclusion

The ultimate aim in addressing the fate of unaccompanied children is to identify a durable solution which is in their best interests. This thesis started by analysing the best interests of the child. This right has a wide scope, which allows it to be applied in divergent contexts. This is important because children have the right to have their best interests taken into account as a primary consideration in every decision concerning them. According to the theories of rule scepticism and according to rational choice theory, the indeterminacy of the right bears the risk that decision-makers may end up taking a decision which does not actually take the best interests of the child into account. It is important for decision-makers and governments to be aware of this indeterminacy and how this potentially affects their decision-making. The child's views, other CRC rights and a holistic assessment which takes the child as a starting point all safeguard the best interests of the child. Moreover, safeguards must be provided to ensure the best interests of children are assessed and determined prior to a decision and to ensure that the assessment and determination are taken into account in the decision to be made.

To assess what a durable solution in the best interests of the child is, the framework of durable solutions was analysed. Family reunification, local integration, resettlement, inter-country adoption and return are all durable solutions provided in the international human rights law framework. However, for unaccompanied children who do not qualify for asylum, return is the only option. Due to their status as a child, return is preconditioned on the guarantee of care arrangements in the country of origin. If these care arrangements cannot be returned, they are offered a legal status which expires upon their eighteenth birthday. This results into them ageing out into a legal limbo. While a secure legal status does not require immediate naturalisation, connecting the right to stay to the child's age without providing children the possibility to retain their legal status beyond this age, harms their development. During the period in which they cannot be returned to the country of origin, they establish a sense of belonging and security in the host country. Consequently, children are integrating in the country of origin while they are also preparing themselves for an uncertain future without a legal status led by the fear to be deported.

This was also seen in the assessment of how this international framework is implemented in the EU. EU policies combat irregular migration through external border control and by providing legal pathways for individuals outside of the EU. In these policies, the Member States' individual and common interests to control migration flows and combat irregular migration are prioritised over the best interests of unaccompanied migrant children. The increased importance given to the topic of

migration, has caused migration to become more politicised. Consequently, the asylum policy in the EU is becoming increasingly strict.

The illustration case of the Netherlands showed how strict policies works through on the national levels. The Dutch policy, being stricter than Union law and international law allowed for, was rebuked by the CJEU. The lack of a framework to assess the best interests of the child and the focus on returning children who do not qualify for asylum even if there are no adequate reception facilities in the country of return causes children to age out into a legal limbo. Implementation of a framework to assess the best interests of the child and a framework to realise voluntary return with adequate support to reintegrate in the country of return would allow the State to return children for whom this would be the durable solution which is in their best interests.

Moreover, opening legal pathways to migration to unaccompanied migrant children who remain or become undocumented upon ageing out who are currently residing the EU, and who cannot be returned, may provide these children and adolescents a durable solution which is in their best interests. This might change the perception of unaccompanied migrant children being vulnerable beings who grow up to be irregular migrants wanting to make a claim on the host country to a perception of them as human beings with agency and a will to shape their future through learning or working. Moreover, allowing unaccompanied migrant children to retain or regularise their status beyond their eighteenth birthday would also reduce the number of irregular migrants on the territories of EU Member States. As such, this can potentially harmonise the long-term best interests of the child and combat illegal migration.

## Bibliography

### Cases

Rb. Den Haag 29 March 2023, ECLI:NL:RBDHA:2023:4262

*HR 10 October 2014, ECLI:NL:HR:2014:2928 (Staat/ Can) considerations 351 - 364.*

Case C-441/19 TQ v Staatssecretaris van Justitie en Veiligheid (CJEU, 14 January 2021).

RvS 8 June 2022, ECLI:NL:RVS:2022:1530 (TQ v Staatssecretaris van Justitie en Veiligheid).

### Official documents

#### International treaties

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

Declaration of the Rights of the Child (Proclaimed by the General Assembly, resolution 1386 (XIV), A/RES/14/1386, 20 November 1959).

Geneva Convention IV relative to the Protection of Civilian Persons in Time of War ((adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV)

International Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 157 UNTS 3 (CRC)

Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011) UNGA Res (A/RES/66/138)

Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267

Statute of the Office of the United Nations High Commissioner for Refugees (adopted 14 December 1950) UNGA Res 428 (v) (UNHCR Statute)

#### UN Documents

CMW and CRC, “Joint General Comment No. 3 (2017) and No. 22 (2017) on the General Principles Regarding the Human Rights of Children in the Context of International Migration” (16 November 2017) UN DOC CMW/C/GC/3-CRC/C/GC/22

CRC, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Kingdom of the Netherlands (9 March 2022) UN DOC CRC/C/NLD/CO/5-6

CRC, “General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin” (1 September 2005) UN DOC CRC/GC/2005/6

CRC, “General Comment 12 on the Right of the Child to Be Heard” (1 July 2009) UN DOC CRC/C/GC/12

CRC, “General Comment 14 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) UN DOC CRC/C/GC/14

CRC, “General Comment 20 on the Implementation of the Rights of the Child During Adolescence” (6 December 2016) UN DOC CRC/C/GC/20

ECOSOC ‘Written statement submitted by Pax Romana, a non-governmental organization in consultative status (Category II)’ (1996) E/CN.4/1996/NGO/50

UNGA ‘Report of the United Nations High Commissioner for Refugees, Global Compact on Refugees (Part II)’ UN GAOR 73rd Session Supp No 12 UN Doc A/73/12 (Part II) (2018)’

UNHCR EXCOM Conclusion no. 47 (XXXVIII) ‘Refugee Children’ (1987).

UNHCR, ‘Chapter 7: Solutions for Refugees’, *The 10-point Plan in Action* <<https://www.unhcr.org/media/31475>> accessed 3 June 2023

UNHCR, ‘Chapter 9: Return Arrangements for Non-Refugees and Alternative Migration Options (2016 Update)’ *The 10-Point Plan in Action*, (2016) <<https://www.unhcr.org/media/10-point-plan-action-2016-update-chapter-9-return-arrangements-non-refugees-and-alternative>> accessed 6 June 2023

UNHCR, ‘Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum’ (1997)

UNHCR, ‘Handbook on Voluntary Repatriation: International Protection.’ (1996)

UNHCR ‘Mid-Year Trends 2022’ (2022) <<https://www.unhcr.org/statistics/unhcrstats/635a578f4/mid-year-trends-2022.html>> accessed 3 June 2023

UNHCR, ‘Refugee Children: Guidelines on Protection and Care’ (1994) <<https://www.unhcr.org/media/refugee-children-guidelines-protection-and-care>> accessed 12 May 2023

UNHCR, ‘Third Country Solutions for Refugees - Roadmap 2030’ (2022) <<https://globalcompactrefugees.org/sites/default/files/2022-08/Third%20Country%20Solutions%20for%20Refugees%20-%20Roadmap%202030.pdf>> accessed 11 June 2023

## EU legislation

Council Directive (EC) 2021/1883 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment [2021] OJ 382/1 (Blue Card Directive).

Council Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ L 132/21 (Student and Researchers Directive).

Council Directive (EU) 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98 (Return Directive)

Council and EP Regulation (EU) 2019/1896 on the European Border and Coast Guard [2019] OJ L 295/1

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) Official Journal C 306, 13 December, pp 1 - 271.

### **EU documents**

Commission, ‘Communication on a New Pact on Migration and Asylum’ COM(2020) 609 final.

Commission ‘EU strategy on the rights of the child’ COM(2021) 142 final.

Commission, ‘Forced Displacement: Refugees, Asylum Seekers and Internally Displaced Persons (IDPs)’ (*European Civil Protection and Humanitarian Aid Operations*, 8 July 2022) <<https://civil-protection-humanitarian-aid.ec.europa.eu/system/files/2022-10/fst%20Forced%20displacement%20EN.pdf>> accessed 4 June 2023

Commission, ‘Multiannual Financial Framework 2021-2027 (in Commitments) - Current Prices’ <[https://commission.europa.eu/system/files/2021-01/mff\\_2021-2027\\_breakdown\\_current\\_prices.pdf](https://commission.europa.eu/system/files/2021-01/mff_2021-2027_breakdown_current_prices.pdf)> accessed 23 June 2023

Commission, ‘Policy Plan on Asylum’ COM(2008) 360 Final.’ <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>> accessed 19 June 2023

Commission, ‘Progress Report on the Implementation of the European Agenda on Migration’ COM(2019) 126 Final.’ <[https://home-affairs.ec.europa.eu/system/files/2019-03/20190306\\_com-2019-126-report\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2019-03/20190306_com-2019-126-report_en.pdf)> accessed 25 June 2023

Commission, ‘Proposal for a Regulation of the European Union and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council’ (COM Brussels 2016) 2016/0225 (COD)

Commission, ‘Return Handbook’ <[https://ec.europa.eu/eurostat/cache/metadata/Annexes/migr\\_eil\\_esqrs\\_it\\_an1.pdf](https://ec.europa.eu/eurostat/cache/metadata/Annexes/migr_eil_esqrs_it_an1.pdf)> accessed 22 April 2023

Commission 'Recommendation (EU) 2017/432 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council' [2017] OJ L 66/15

Commission, ‘The protection of children in migration’ COM(2017) 211 final. 2017

Council, ‘Amended proposal for a Regulation **establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU**’ (Brussels, 2023) 2016/0224 (COD)

Council, ‘Presidency Conclusions, Tampere European Council, 15-16 October 1999’ (16 October 1999)

Directorate General for Migration and Home Affairs, ‘Decision on a Non-Substantial Amendment to 2025’ C(2022) 8340 Final on the Financing of Components of the Thematic Facility under the Asylum, Migration and Integration Fund and Adoption of the Work Programme for 2023, 2024 and 2025’ (Ref Ares (2023)3097305) Brussels, 3 May 2023.’ <<https://home-affairs.ec.europa.eu/system/files/2023-05/First%20revised%202023-2025%20Work%20Programme%20AMIF%20%28non-substantial%29.pdf>> accessed 23 June 2023

### **Domestic legislation and documents**

Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory.

Brief van de Staatssecretaris van Justitie en Veiligheid van 14 July 2022 (*Kamerstukken II* 2021 – 2022, 29344, nr 152).

Grondwet voor het Koninkrijk der Nederlanden 2018

Kamerstukken II 2022 – 23

Kamerstukken II 1994/ 95, 24233 nr. 3

Vreemdelingencirculaire 2000 (A).

Vreemdelingencirculaire 2000 (B)

Wet arbeid vreemdelingen

### **Secondary sources**

Allsopp J and Chase E, ‘Best Interests, Durable Solutions and Belonging: Policy Discourses Shaping the Futures of Unaccompanied Migrant and Refugee Minors Coming of Age in Europe’ (2019) 45 *Journal of Ethnic and Migration Studies* 293

Alston P and Gilmour-Walsh B, *The Best Interests of the Child, Towards a Synthesis of Children’s Rights and Cultural Values* (UNICEF 1996) <[https://www.unicef-irc.org/publications/pdf/is\\_best\\_interest\\_low\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/is_best_interest_low_eng.pdf)> accessed 1 May 2023

‘Applying European and International Legal Standards at All Stages of Age Assessment Procedures’ (2022) Legal Note 13 <<https://ecre.org/wp-content/uploads/2023/01/Legal-Note-13-FINAL.pdf>> accessed 25 June 2023

‘Asylum Trends Monthly Report on Asylum Applications in The Netherlands’ (IND, Ministerie van Justitie en Veiligheid 2023) <<https://ind.nl/nl/documenten/05-2023/at-april-2023-hoofdrapport.pdf>> accessed 10 July 2023

Bayefsky AF, ‘Office of the United Nations High Commissioner for Human Rights’ in Anne Bayefsky (ed), *The UN Human Rights Treaty System in the 21 Century* (Brill | Nijhoff 2000) <[https://brill.com/view/book/edcoll/9789004502758/B9789004502758\\_s044.xml](https://brill.com/view/book/edcoll/9789004502758/B9789004502758_s044.xml)> accessed 12 July 2023

Beise J and others, ‘A Child Is a Child’ (United Nations Children’s Fund (UNICEF) 2017) <<https://www.unicef.org/reports/child-child>> accessed 28 June 2023

Beltman D and Zijlstra E, ‘De Doorwerking van “het Belang van Het Kind” Ex Artikel 3 VRK in Het Migratierecht: Vanuit Een Bottom-up Benadering Op Weg Naar Een Top-down Toepassing’ (2013) 12 *Journaal Vreemdelingenrecht* 286

Betts A, ‘Towards a “Soft Law” Framework for the Protection of Vulnerable Irregular Migrants’ (2010) 22 *International Journal of Refugee Law* 209

Brun C and Fábos AH, ‘Mobilizing Home for Long-Term Displacement: A Critical Reflection on the Durable Solutions’ (2017) 9 *Journal of Human Rights Practice* 177

Carrera S, ‘Tampere Programme 20 Years on: Putting EU Principles and Individuals First’ in Sergio Carrera, Deirdre Curtin, and Andrew Geddes (eds), *20 year anniversary of the Tampere programme: Europeanisation dynamics of the EU area of freedom, security and justice*. (European University Institute (EUI) 2020) <<https://data.europa.eu/doi/10.2870/66646>> accessed 17 June 2023

Ceriani Cernadas P, ‘The Human Rights of Children in the Context of International Migration’ in Wouter Vandenhoele and others (eds), *Routledge International Handbook Children’s Rights Studies* (Routledge 2015)

Chase DE and Allsopp J, ‘“Future Citizens of the World”? The Contested Futures of Independent Young Migrants in Europe’

Chase E, ‘Security and Subjective Wellbeing: The Experiences of Unaccompanied Young People Seeking Asylum in the UK’ (2013) 35 *Sociology of Health & Illness* 858

‘Children in Migration - Asylum Applicants’ (*Eurostat*, 29 April 2022) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children\\_in\\_migration\\_-\\_asylum\\_applicants](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants)> accessed 29 April 2023

Chimni BS, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23 *Refugee Survey Quarterly*

‘Common European Asylum System’ (*European Commission*) <[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en)> accessed 22 June 2023

Cowden M, ‘Capacity, Claims and Children’s Rights’ (2012) 11 *Contemporary Political Theory* 362

De Vries LA and Guild E, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2019) 45 *Journal of Ethnic and Migration Studies* 2156

Discussion paper on protracted refugee situations, 'UNHCR "Protracted Refugee Situations: A Discussion Paper Prepared for the High Commissioner's Dialogue on Protection Challenges" (Geneva 20 November 2008) UNHCR/DPC/2008/Doc. 02 (Discussion Paper on Protracted Refugee Situations).'

Fallon K, 'EU Border Agency Accused of Serious Rights Violations in Leaked Report' *The Guardian* (14 October 2022) <<https://www.theguardian.com/global-development/2022/oct/14/eu-border-agency-frontex-human-rights-violations-report>> accessed 25 June 2023

'FAQs Undocumented Children' (*PICUM*) <<https://picum.org/faqs-undocumented-children/>> accessed 29 April 2023

Georgiou M and Zaborowski R, 'Media Coverage of the "Refugee Crisis": A Cross-European Perspective' (*Council of Europe Publishing*) <<https://edoc.coe.int/en/refugees/7367-media-coverage-of-the-refugee-crisis-a-cross-european-perspective.html>> accessed 25 June 2023

Geddes, 'Tampere and the Politics of Migration and Asylum in the EU: Looking Back to Look Forwards.' in Sergio Carrera, Deirdre Curtin, and Andrew Geddes (eds), *20 year anniversary of the Tampere programme: Europeanisation dynamics of the EU area of freedom, security and justice*. (European University Institute (EUI) 2020) <<https://data.europa.eu/doi/10.2870/66646>> accessed 17 June 2023

Ghaemina S, 'Volwassen worden tussen tegenstrijdige grenslijnen' (Vrije Universiteit Amsterdam 2022)

Gionco M, 'Barriers to Return: Protection in International, EU and National Frameworks' (PICUM 2022) <[https://picum.org/wp-content/uploads/2022/02/Barriers-to-return\\_Protection-in-international-EU-and-national-frameworks.pdf](https://picum.org/wp-content/uploads/2022/02/Barriers-to-return_Protection-in-international-EU-and-national-frameworks.pdf)> accessed 10 July 2023

Grigonis S, 'EU in the Face of Migrant Crisis: Reasons for Ineffective Human Rights Protection' (2016) 2 *International Comparative Jurisprudence* 93

'Guidance to Respect Children's Rights in Return Policies and Practices Focus on the EU Legal Framework' [https://picum.org/wp-content/uploads/2019/09/2019\\_Guidance\\_childrens\\_rights\\_in\\_return\\_policies.pdf](https://picum.org/wp-content/uploads/2019/09/2019_Guidance_childrens_rights_in_return_policies.pdf)

Guiraudon V, '20 Years after Tampere's Agenda on "Illegal Migration": Policy Continuity in Spite of Unintended Consequences' in Deirdre Curtin, Andrew Geddes, and Sergio Carrera (eds), *20 year anniversary of the Tampere programme: Europeanisation dynamics of the EU area of freedom, security and justice*. (European University Institute (EUI) 2020) <<https://data.europa.eu/doi/10.2870/66646>> accessed 17 June 2023

Hovil L, *Refugees, Conflict and the Search for Belonging* (Springer International Publishing 2016) <<http://link.springer.com/10.1007/978-3-319-33563-6>> accessed 9 June 2023

- Hovil L and Maple N, 'Local Integration: A Durable Solution in Need of Restoration?' (2022) 41 Refugee Survey Quarterly <<https://academic.oup.com/rsq/article/41/2/238/6564683>> accessed 23 May 2023
- IND/ SUA, 'Informatiebericht SUA: Beslissen Op Amv Zaken Na Afdelingsuitspraken van 8 Juni 2022 (Actualisering)' (2023) IB 2023/41 <[https://puc.overheid.nl/ind/doc/PUC\\_1306061\\_1/1/](https://puc.overheid.nl/ind/doc/PUC_1306061_1/1/)> accessed 7 July 2023
- Ineli-Ciger M, 'Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework' (2022) 24 European Journal of Migration and Law 27
- Initiative for Children in Migration, 'Durable Solutions and the Best Interests of the Child in the Context of Return Processes' (Initiative for Children in Migration 2019) <[https://picum.org/wp-content/uploads/2019/09/2019\\_Durable\\_solutions\\_joint\\_brief\\_ENG.pdf](https://picum.org/wp-content/uploads/2019/09/2019_Durable_solutions_joint_brief_ENG.pdf)> accessed 2 June 2023
- 'Inter-Agency Guiding Principles on Unaccompanied and Separated Children' (ICRC, IRC, SCUK, UNICEF, UNHCR, WVI 2004) <<https://www.icrc.org/en/publication/1101-inter-agency-guiding-principles-unaccompanied-and-separated-children>> accessed 30 June 2023
- Iusmen I, 'Whose Children? Protecting Unaccompanied Migrant Children in Europe: A Case of Diffused Responsibility?' (2020) 28 The International Journal of Children's Rights 925
- Jespersen C, 'Safe & Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe' <<https://www.refworld.org/pdfid/5423da264.pdf>> accessed 8 June 2023
- 'Joint Statement: Undocumented Children, Children in Danger. Until When...?' (*International Rescue Committee (IRC)*, 6 July 2022) <<https://www.rescue.org/eu/report/joint-statement-undocumented-children-children-danger-until-when>> accessed 21 June 2023
- Jonathan C and Geraldine R, 'Feasibility Study on the Development of an EU Talent Pool'
- Kalverboer M and others, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 The International Journal of Children's Rights 114
- Kohli RKS, 'Working to Ensure Safety, Belonging and Success for Unaccompanied Asylum-Seeking Children' (2011) 20 Child Abuse Review 311
- 'Legal Migration and Integration' <[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration_en)> accessed 25 June 2023
- Lemberg-Pedersen DM, 'The Rise and Fall of the ERPUM Pilot' [2015] RSC Working Paper Series
- Lemberg-Pedersen M and Chatty D, 'ERPUM and the Drive to Deport Unaccompanied Minors' <<http://rgdoi.net/10.13140/RG.2.2.30973.61926>> accessed 1 July 2023
- Long K, 'Extending Protection? Labour Migration and Durable Solutions for Refugees' <<https://www.refworld.org/docid/4f719bcd2.html>> accessed 9 June 2023

- , ‘Refugees, Repatriation and Liberal Citizenship’ (2011) 37 *History of European Ideas* 232
- , ‘Rethinking “Durable Solutions”’ in Elena Fiddian-Qasmiyeh, Gil Loescher and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP Oxford 2014)
- Louw D and Louw A, *Child and Adolescent Development* (UJ Press 2014)
- Lundy L, ‘The Rights of Child Human Rights Defenders: Implementation Guide’ (Child Rights Connect 2020)
- , ‘“Voice” Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child’ (2007) 33 *British Educational Research Journal* 927
- Mentzelopoulou M, ‘Disappearance of Migrant Children in the EU’ <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733670/EPRS\\_ATA\(2022\)733670\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733670/EPRS_ATA(2022)733670_EN.pdf)> accessed 12 June 2023
- Mnookin RH, ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226
- Moreno-Lax V, ‘The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties’ in Guy S. Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century: Legal Aspects - The Hague Academy of International Law Center For Research* (Martinus Nijhof 2015) <<https://www.unhcr.org/africa/media/legality-safe-third-country-notion-contested-insights-law-treaties>> accessed 25 June 2023
- Mouzourakis M, ‘Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union’ [2014] RSC Working Paper Series
- Murk J, ‘Children’s Rights in Return Policy and Practice in Europe: A Discussion Paper on the Return of Unaccompanied and Separated Children to Institutional Reception or Family’ (UNICEF 2015) <<https://resourcecentre.savethechildren.net/pdf/54e4854c4.pdf>> accessed 30 June 2023
- ‘Nidos 2018 Jaarverslag’ (Nidos 2018) <[https://www.nidos.nl/wp-content/uploads/2019/05/jv2018\\_270519\\_LR.pdf](https://www.nidos.nl/wp-content/uploads/2019/05/jv2018_270519_LR.pdf)> accessed 9 July 2023
- Nolan A, Skelton A and Ozah K, ‘Advancing Child Rights-Consistent Strategic Litigation Practice’ (1 September 2022) <<https://papers.ssrn.com/abstract=4318384>> accessed 5 July 2023
- Nowak M, ‘UN Global Study on Children Deprived of Liberty’ (2019) <<https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562>> accessed 25 June 2023
- Oxfam & Greek Council for Refugees, ‘Teach Us for What Is Coming’ (2021) <[https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2021-06/Teach%20us%20for%20what%20is%20coming%20report\\_2.pdf](https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2021-06/Teach%20us%20for%20what%20is%20coming%20report_2.pdf)> accessed 29 April 2023
- Parker S, ‘The Best Interests of the Child - Principles and Problems Special Issue: Part One: The Best Interests of the Child: Conceptual Issues’ (1994) 8 *International Journal of Law and the Family* 26

‘Safety and Dignity for Refugee and Migrant Children: Recommendations for Alternatives to Detention and Appropriate Care Arrangements in Europe’ (*IOM, UNHCR, UNICEF*, May 2022)

<<https://www.unhcr.org/media/safety-and-dignity-refugee-and-migrant-children-recommendations-alternatives-detention-and>> accessed 25 June 2023

‘Scaling Fences | United Nations Development Programme’ (*UNDP*)

<<https://www.undp.org/publications/scaling-fences>> accessed 11 June 2023

‘Security Situation in Afghanistan “Markedly” Worse, Reports Secretary-General’ (*UN News*, 29 September 2008) <<https://news.un.org/en/story/2008/09/275862>> accessed 1 July 2023

Sironi A, Bauloz C, and Emmanuel M (eds), ‘Glossary on Migration’

<[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)> accessed 14 June 2023

Stalker P, ‘Migration Trends and Migration Policy in Europe’ (2002) 40 *International Migration* 151

Trauner F and Ripoll Servent A, ‘The Communitarization of the Area of Freedom, Security and Justice: Why Institutional Change Does Not Translate into Policy Change’ (2016) 54 *JCMS: Journal of Common Market Studies* 1417

Trilling D, ‘How the Media Contributed to the Migrant Crisis’ *The Guardian* (1 August 2019)

<<https://www.theguardian.com/news/2019/aug/01/media-framed-migrant-crisis-disaster-reporting>> accessed 25 June 2023