How do International and European law respect the protection of unaccompanied minors in relation to the Convention on the Rights of the Child?

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I. Abstract

The high influx of unaccompanied minors arriving in Europe in recent years has shaped the political attitude towards migrants. Fleeing from their countries, unaccompanied minors arrive at the shores of Europe in an especially vulnerable condition, as they often fear persecution or suffer from medical conditions such as PTSD. To protect this particular vulnerable group, special legal safeguards have been created in International law in the past decades. Their protection is mostly ruled by the United Nations Convention on Rights of the Child, which introduced the principle of the best interest of the child (Article 3) and which operates as a red thread through the Convention. As the Convention has been ratified by all European States, the question follows as to what extent this particular protection is guaranteed by the European legislation. Thus, this research will focus on the implementation of provisions and recommendations which set the legal framework for guardianship, accommodation, education as well as procedural safeguards concerning the asylum application of unaccompanied and separated minors. A further analysis will focus on the eventual consequences of age assessment procedures and detention on unaccompanied minors. Furthermore, the research will concentrate on how the rights of the child concerning unaccompanied minors are implemented the Netherlands. This introspective will give details on the national legal framework of the Netherlands, especially in regard to guardianship, asylum procedure and legal decisions of the Council of State.
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- CRC: The UN Convention on the Rights of the Child
- ECHR: European Convention on Human Rights
- IND: The Immigration and Naturalization Service
- UAM: Unaccompanied minors
IV. Main Body

1. Introduction

At the beginning of 2017, half of the planet’s forcibly displaced people were children\(^1\). With the increased demand for international and humanitarian protection of unaccompanied minors, a new phenomenon of state protectionism came to light. Thus, new forms of risk management at borders have become a modern phenomenon in which only a minority is able to successfully benefit from all the rights of free movement\(^2\). Children, whether accompanied or separated from their family, are no exception to the restrictiveness of border controls and asylum procedures. As such, the Constitution of the International Refugee Organization defines them as “unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin”\(^3\). Even though, children have socially often represented a “strong symbolic value, often portrayed as society's most vulnerable but also most valuable member”\(^4\), national legal frameworks across Europe seem reluctant to implement central child-related standards accurately.

The reluctance to implement child-related standards on national level has been undermined by the creation of a particular legal regulation from the United Nations. Thus, in 1989, the UN introduced the Convention on the Rights of the Child. This Convention has been created under the premise to inaugurate standard rights to children in regular and under challenging circumstances, such as in migration. Children with a migration background, often enter a foreign territory alone after having suffered persecution and often human trafficking. It is one of the many purposes of the Convention to establish common rules on the protection of children. Since the introduction of the following Convention, the fate of children became more and more a centre of attention. The recognition of the lack of specific child-related provisions allowed International and European law to compensate with particular legal frameworks and jurisprudence. Children eventually became subjects of law, without however losing sight of their special vulnerability. As such, this vulnerable group “fall(s) into places marked by a specific set of opportunities and possibilities, which are already established places of marginality and irregular/illegal livelihoods in the country of destination”\(^5\).

More specifically, categories of children like unaccompanied minors still nowadays represent a legal minority, regularly on the verge of marginalisation. To comply with this paradox, the Convention offers several remedies for their protection. It is in this context, that innovative principles as the *best interest of the child* have found their place in the Convention. The following principle occupies a crucial position in the Convention.

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\(^1\) M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing, p.1
\(^2\) ibid, p.18
\(^3\) ibid, p.77
on the Rights of the Child, as it works as a red thread through the entire document and the other principles contained therein. It follows that principles, such as the right to be heard (Article 12 CRC) need to be interpreted in accordance with the best interest of the child. However, although 196 parties have signed the Convention, the implementation into national law appears to have some flaws. To help the parties to the Convention apply the principle correctly, the UN increasingly provided with recommendations and suggestions. Despite the non-binding nature of the recommendations and suggestions, it helped setting the ground for the correct implementation of the best interest of the child. As such, European institutions such as the Council of Europe and the European Union have established, over the past twenty years, a solid legal framework on the protection of children, especially in the context of migration.

The purpose of this work is to carefully examine the breadth of the Convention on unaccompanied minors both in International and European law. Thus, a thorough inspection of the application of the UN Refugee Convention on unaccompanied minors will demonstrate how a precise phrasing would lead to an improved integration of child-related issues. Furthermore, it seems essential to have a deeper insight on the overall application of the best interest principle, notably in sensitive areas such as detention or age assessment procedures. Procedures as age assessments have decisive impacts on the development of unaccompanied minors. The question follows as to what extent States should rely on such procedures rather than adopting a needs-based approach which would be more in line with the best interest principle. The more, the raison d’être of such procedures might be questioned as there exists no standardised approach among States and as national authorities do not consider foreign statistics of the mental and physical development of the unaccompanied minors. The problematic of asylum-seeking unaccompanied minors further increases if one sheds light on the right of State to detain children. Although embedded in provisions of International and European Law, the detention of unaccompanied minors seems to be contrary to the best interest of the child. Hence, it seems necessary to analyse how the detention of unaccompanied minors is carried out in practice and nevertheless respects fundamental rights concerns. The importance to closely scrutinize the practice of International law in such realms lays in the small grey area between arbitrary national decisions and the respect of fundamental rights. On a smaller scale, as in European law, the reluctance of States to accurately apply the Convention becomes even more evident. It is thus, that the ECHR intervened by imposing a strict jurisprudence on the best interest assessment of children. The European Union for its part, preferred to rely on secondary law by the immediate of migration Directives, such as the Asylum Procedure Directive. Further, to illustrate how the specific protection on unaccompanied minors works, a detailed introspective of the Netherlands will guide as an example of the practice. As such, an insight of the Dutch guardianship regulations on unaccompanied minors will show the success of the integration of such minors, while on the other hand the asylum procedure appears to have some flaws. The deficiency of the asylum procedure is in a second step underlined by a somewhat arbitrary behaviour of the Dutch national courts, which seem to have no clear rule on unaccompanied minors and their families.
2. The best interest of the child as the paramount principle of the Convention on the Rights of the Child

The best interest of the child finds its origins in the UN Convention on the Rights of the Child, which has been introduced in 1989 by the General Assembly. The principle laid down in Article 3 of the Convention provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”6 It follows from the best interest of the child principle, that the State needs to ensure that the well-being of the child is guaranteed by the person legally responsible for the child and therefore, may take legislative and administrative measures if necessary. In this sense, national authorities are urged to assure that protection and health services comply with minimal standards which further entails competent supervision7. Thus, the Article sets the ground for the protection of every child, indifferent of the origins and background of the child in question.

One might already realise that the outline of the 1989 Convention is considered to be very particular since its primary focus is on children. In this sense, Article 1 of the CRC presents a child as “every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier.”8 The originality of this article is the margin of appreciation of the definition of majority. Hence, according to the phrasing of the present article, every State party is entitled to follow its definition of majority without being restricted by other national or international norms. It follows that there is no international harmonization when it comes to the majority of children which might seem problematic in some situations such as migration.

To comply with the lack of international consensus on the rights of children, the CRC is the first international legal framework to officially put child-related legal concerns into one document. Previously and still nowadays, international and national regulations only provided punctual provisions on the rights and safeguards of children. Across the world, 25 international law treaties and conventions expressly referred to children’s rights. As an example, accordingly to Article 77 of Additional Protocol I, every child should be object of respect and be protected from any indecent assault. Furthermore, about Article 4 of Additional Protocol II, every State party is required to protect children from actions of non-international conflict9.

In the present Chapter, I will illustrate in what way the best interest of the child principle works as a red thread through the Convention on the Rights of the Child. Besides explaining the special position of the principle in the present Convention, I will demonstrate how particular mechanisms, as suggestions and recommendations, work as

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6 UNCRC 2011a, para 68
7 Ibid, art. 3
8 Ibid, art. 1
9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 4
an actor to rectify the possible noncompliance with the principles held in the Convention.

2.1. The scope and the purpose of the best interest of the child

The best interest of the child principle has first been introduced by Article 3 of the Convention on the Rights of the Child. During the period of the introduction of the Convention in 1989, children were still considered as an object of protection rather than a subject of law. One that the novelty of the present Convention is that, contrary to most international Conventions, the CRC contains no derogation clause in case of emergency. In other words, the best interest of the child in this context refers, in a wider consideration, to the indivisibility of human rights. However, the only late intervention in international law to create one specific child-related document is the result of the public perception minors received from the outside. Nowadays, children have been little by little recognized as subject of law, which may be considered as a legal advance. However, back in the days, every legal category had its individual provisions on children which resulted in a “siloed” lex specialis. With the introduction of the Convention on the Rights of the Child, the situation has been partially rectified. It is in this context, that the Convention not only ends the fragmented legislation on children, but furthermore creates an environment in which States are urged to cooperate. In this sense, that Article 22 of the Convention encourages the State to take appropriate measures, such as humanitarian assistance and protection for children seeking refuge, and this in accordance with other “international human rights or humanitarian instruments to which the States are Parties”. The terminology of the Article indirectly implies cooperation between the different international and national legal frameworks to possibly attain the highest standards about the rights of children. What followed, was that various international law institutions would adopt the principle and eventually highlight the importance of the best interest of the child. Hence, the UNCRC has reiterated in its General Comment No.14 that the best interest of the child works as a red thread through the Convention and stands at the very heart of it. As such, it must be underlined that every Article contained in the Convention must be interpreted in consideration with the best interest of the child. Furthermore, according to the joint UNHCR and UNICEF report of 2014, the best interest of the child does not only serve as a red thread through the Convention but moreover needs to be a primary consideration from the beginning to the end of each procedure involving a child. In other words, in every procedure involving, for example, an unaccompanied minor,

10M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing p.79
15General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), Para. 14
authorities need to assure the protection of the child the moment the border has been crossed until the application for international protection has been rejected, and the child has been safely returned to its country of origin. The importance of protection for unaccompanied minors has likewise been highlighted by the UN Resolution of February 2001 in which States were urged to pay attention to the needs of children, especially when they find themselves in difficult circumstances. Thus, as a consequence, State parties are encouraged to implement the provisions contained in the latter Convention “to all branches of the government” which means that decisions may not be solely be taken on the executive level but also on the legislative and judicial level. In this sense, the UNCRC emphasises that the principle of the best interest of the child is treated as “an intrinsic obligation for States, is directly (self-executing) and can be invoked before a court”. In this context, it might seem important to point out several concluding points of the Committee on the Rights of the Child. The following Committee works as an independent organ of experts which goal is the correct implementation of the Convention. As such, it releases recommendations and suggestions to State parties which lack to implement the principles of the CRC correctly. As such, if one examines the considerations of the Committee as a whole, one might conclude that the provisions and obligations contained in the CRC are manifold. As such, the ratification of the Convention entails three main obligations for the State: a substantive right, a fundamental, interpretative legal principle and a rule of procedure. As a matter of the substantive right, as mentioned above, once a minor is involved, authorities need to assure that the best interest of the child is respected. Secondly, “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”, which as a consequence creates an interpretative legal principle for State parties to follow. Thirdly, once a pending decision concerns a child-related matter, the State needs to effectively assess the best interest of the child. This assures that every decision on behalf of the minor is taken with the best interest of the child in mind. Hence, as a consequence, the principle contained in Article 3 should in theory and practice work as primary consideration once a minor is involved.

Further, to fully respect the protection and best interest of the child, the Convention further provided with an anti-discrimination clause. As such, Article 2(1) underlines that every State Party to the Convention needs to ensure that the best interest applies to every child without discrimination. Hence, authorities need to guarantee that the fundamental

16 Ralf Roskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.32
17 ibid, p.32
18 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), Para. 6(a)
19 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), Para. 6(b)
20 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), Para. 6(c)
21 Ralf Roskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.34
right contained in the Article is enforced “irrespective of the child’s or his parent’s or legal guardian’s, birth or other status” and thus sets the ground for the prohibition of discrimination. To strengthen the anti-discrimination principle as well as the right contained in Article 3, Article 12 sets the legal framework for every child to express their views and to be heard in any administrative proceeding. Thus, procedural safeguards such as being heard and to defend oneself are intrinsically linked to the best interest of the child as it includes the right to have a proper representation. However, it needs to be underlined that the latter right might be limited since the views of the child are “being given due weight in accordance with age and maturity” in this sense, this wording might give the authorities the capacity to decide on the maturity of the minor and eventually the potential to ignore the gravity of the situation. By believing to know what is best for the child without considering their reflection, we find ourselves in a situation where we refuse the minor to enjoy its rights to the fullest and act in contradiction to the purpose of the present Convention. The interference of state power in the former case might depict one deficiency of the phrasing of the Convention. One might believe that such a broad text gives national authorities the power to abuse, and if one carefully analyses the other articles contained in the Convention, Article 12 seems to be no exception. Thus, for example, the intervention of the States in child-related matters is required in case of protection and specialised assistance. To ensure the best interest of the child, the State is obliged according to Article 20, to ensure that every child temporarily or permanently deprived of his or her family environment, is entitled to special protection and assistance. In theory, it seems that every child is guaranteed to have a right to protection. However, on the other hand, every State is permitted to set their level of assistance and protection, which thus leads to unharmonized standard across the different nations. The problematic further increases since the scope of Article 20 needs to be nuanced as States are entitled to act in their right of limitation in the context of public security. This means that once a minor is considered to be a public threat, in reason of, for example, previous criminal activities, the State may decide to reject every protection or assistance. Despite the right of the State to act in in favour of the public interest, national authorities need to avoid any bias towards the unaccompanied minor. In this context, to regulate eventual arbitrary decisions from the side of the governments, a specific control mechanism has been set up. The previously mentioned Committee on the Rights of the Child does not only supervise the correct implementation of the CRC but also introduced several new procedures to avoid discretionary behaviour from the part of State authorities. Thus, to safeguard the respect of the Convention and the

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22 The UN Convention on the Rights of the Child, art. 2
23 The UN Convention on the Rights of the Child, art. 12(2)
24 The UN Convention on the Rights of the Child, art. 12(1)
26 The UN Convention on the Rights of the Child, art. 20
27 Ralf Rosskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.33
28 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), Para. 18
principle contained therein, the Committee on the Rights of the Child is therefore responsible for controlling the compliance of the present Convention with international and national law. Although, the organ is not allowed to take binding measures, it figures as an agent for “positive international morality” in the sense that it creates recommendations and suggestions for contracting parties to the Convention\textsuperscript{29}.

In this meaning, the UN General Assembly opted for a third Optional Protocol which introduced a new procedure. The latter procedure consists of allowing complaints once a doubt of a violation of the CRC has been detected. Regrettably, the Protocol has only been signed by 28 States which highly suggests that its enforceability has a limited outcome and largely depends on what one might call the “human rights culture”\textsuperscript{30}. This explains that to the present day, only one complaint has been filed which has been rejected since it was inadmissible. The case involved an unaccompanied Ghanaian minor who filed a complaint against unreliable age assessment, but since the events happened before the Protocol entered in force, it has been dropped\textsuperscript{31}.

Besides, there is still another option to file a complaint which consists of directly approach the UN Human Rights Committee. In 2011, a claim was brought against a Dutch decision to return a Chinese minor to his country of origin even though it was decided in violation to the right to protection and the prohibition of torture. Since the outcome of the Committee is a non-binding measure, the Dutch authorities regretfully didn’t give any effect to the complaint\textsuperscript{32}.

After all the procedures to file complaints, the UN Committee for Human Rights, in collaboration with UNICEF, created the Best Interest Assessment (BIA). This particular procedure is thought to be used before every decision concerning for example the placement of the unaccompanied minor or family reunification\textsuperscript{33}. This means that if a State opted for the BIA, it needs to assess the situation of the child before every decision. For example, in the case of an unaccompanied minor, after the demand for international protection has been refused and before being sent back to the country of origin, the State authorities need to assure that the environment is adequate for the child’s physical and mental development.

As a concluding remark, one might note that the creation and implementation of the Convention on the Rights of the Child has been a considerable factor towards the legal and societal recognition of children. With the introduction of Article 3, which incorporates the best interest of the child principle, children have become a subject of law. To assure that their interests and protection are best applied, the Committee on the Rights of the Child, on behalf of the Convention, clarified the standards which State parties need to follow once a minor is involved. Thus, in theory as well as in practice,

\textsuperscript{29}M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.31

\textsuperscript{30}ibid, p.31

\textsuperscript{31}ibid, p.31

\textsuperscript{32}M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.53

\textsuperscript{33}M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.47
the best interest of the child needs in every pending decision of an unaccompanied minor to figure as a primary consideration. The importance of the principle is further highlighted as it acts as a red thread through the entire Convention. Hence, provisions as Article 2 (Prohibition of discrimination) and Article 12 (Right to be heard) assist the best interest principle to attain the highest respect of child-related issues. In this meaning, the introduction of the several procedures to claim the noncompliance of national law with the Convention, improved the correct implementation of the Convention. Despite the non-binding nature of these procedures, States are pressured to correctly implement the standards contained in the present Convention.
3. The legal protection of unaccompanied minors – Divided between humanitarian claims and State sovereignty

The previous Chapter illustrated the principle of the best interest of the child and how it has been introduced into international legal frameworks. The end of a “lex specialis” of child-related matters, enabled minors to be considered as a subject of law. The question follows as to what extent, the protection of unaccompanied minors, and therefore their best interest, is incorporated in asylum-related legal frameworks. Thus, it seems crucial to first study the compliance of the UN Refugee Convention with the Convention on the Rights of the Child. Although, unaccompanied minors are most likely to benefit from the Refugee Convention, the terminology of the latter Convention suggests that there is space for improvement to show further interest in the principle contained in Article 3 of the Convention on the Rights of the Child (Section 3.1). In the same context of asylum, unaccompanied minors regularly need to endure age assessment procedures which goal it is to deter migration and to waive the right for unaccompanied minors to be considered under a holistic approach. An adequate development in age assessment procedure seems only possible if European institutions would consider a standardised approach, which would acknowledge the best interest of the child principle (Section 3.2). In a last paragraph, an illustration will be made on how the Convention on the Rights of the Child, and eventually European law, applies to the detention on unaccompanied minors. The latter might on some grounds be detained, either to await deportation or in reason of criminal records. In either case follows the question to what extent a possible detention of an unaccompanied minors might be considered lawful in regard to the best interest of the child (Section 3.2).

3.1. The compatibility of the Convention with Refugee Law

As the migrant influx has considerably increased over the past decade, the way underage migrants have been perceived has accordingly changed. Nowadays the perception of the of unaccompanied minors predominantly depends on their legal and residential status34. Repeatedly, unaccompanied minors, in contrast to their national coordinates, do not enjoy the same rights in reason of their special status. Hence, a limited right to specialised care, the restriction to the right to free movement and their lengthy asylum procedures are obstacles to the exercise of the rights enshrined in the Convention35. If objectively perceived, one might come to the first conclusion that the virtue as Hannah Arendt has put it “the right to have rights” of unaccompanied minors is conditional of their legal status36. Thus, in this section, we will evaluate the harmony of the rights

35M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.27
36Hannah Arendt, Politics, History and Citizenship
enshrined in the Convention and international refugee law. It will further discuss how
the age of minors might seem problematic to file a demand for international application
The right to have rights put forward by the philosopher Hannah Arendt describes a
phenomenon in which people, according to their status enjoy a different standard of
rights or none at all. In the present situation of unaccompanied minors on the run, one
might perceive the first differentiation in the treatment of fundamental rights. As such,
the anti-discrimination principle preserved in Article 2 CRC is repeatedly violated by
States when discerning national minors from foreign unaccompanied minors. To attain
their best interest and fundamental human rights, their legal status needs to be
determined. Hence, unaccompanied minors are left alone with only a few alternatives
such as an application for international protection to fall under the protection of the
State.
As such, the following paragraph will analyse the situation in which a separated minor
applies for international protection, thus in the hope of receiving refugee status and
therefore the respect of his best interest. The 1951 Refugee Convention sets the legal
framework under which conditions the refugee status might be obtained. According to
Article 1(2) every person in “fear of being persecuted for reasons of race, religion,
nationality, membership of a particular social group or political opinion, is outside the
country of his nationality and is unable or, owing to such fear, is unwilling to avail
himself of the protection of that country; or who, not having a nationality and being
outside the country of his former habitual residence as a result of such events, is unable
or, owing to such fear, is unwilling to return to it” is in the position to apply for
international protection.
The phrasing of the Article implies that the fear of being persecuted must be a reason
contained in the latter article. This might be, for example, on the grounds of religion or
nationality. In order words, there needs to be a link between the risk of being persecuted
and an enumerated conventional ground. However, the grounds listed in the present
article do not presume that the conventional ground may be associated with the person
in question. Strictly speaking, this means that a child’s parents may be adherents of a
particular religion or ethical group, which is in some situations enough reason for the
minor to be persecuted himself. Lastly, as illuminated by the majority of international
law guidance, it is not necessary that the conventional ground is the only factor
contributing to persecution. It might occur that a different element than the ones
enumerated in the Convention might be the reason for persecution and that the
conventional ground stands in addition to the first factor. In such a case, it is accepted
to grant international protection even though the reason for persecution might not be
included in the list of Article 2(1).
Regrettably, experts often claim that the reason for persecution evoked by the minor is
not taken seriously in reason of their age. It is said that children have a different
perception of the gravity of the situation. The UNCHR, however, underlines in its

37M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum
Practices, Routledge Research in Asylum, Migration and Refugee Law, p.27
38UNHRC Refugee Convention 1951, art. 1A (2)
Guidelines that “dismissing a child’s claim based on the assumption that perpetrators would not take a child’s views seriously or consider them a real threat could be erroneous”. Hence, even though in some cases the child’s age is considered to be a concluding factor in the decision-making process, in the case of a persecution claim the age of the child can’t be presumed to be determinative.40

Still, it is noted that the terminology and interpretation of the present Article seem especially problematic for children. Children often might not be able to connect the fear to the reason for persecution. It recurrently happens that as a precaution, children at a young age are forcibly sent away by their parents in the hope of a safer environment.41 In such a situation, unaccompanied minors might not fully understand the reason for their flight. Additionally, the problematic further increases as the Article of the Refugee Convention applies in the same way to children as to adults. Despite their particular vulnerability, the encountered fear needs to be “well-founded”. The Article contains a subjective and objective perspective in the sense that the fear of the person being persecuted is being evaluated subjectively and the ground is analysed objectively.42 Authorities do not always recognize the magnitude of the situation in which the minor finds itself. As such, the grounds for persecution would need to be extended to child-related grounds. Hence, to correctly encounter international protection in reference to children, one would need to reform the category of forms of persecution from the classic ones to child-related ones. Such a special category would inter alia include underage recruitment, child trafficking, forced underage marriage or female genital mutilation.43

In this sense, the UNHCR stated in its 2009 Guidelines that: “a contemporary and child-sensitive understanding of persecution encompasses many types of human rights violations. Including violations of child-specific rights. In determining the persecutory character of an act inflicted against a child, it is essential to analyse the standards of the CRC and other relevant international human rights instruments applicable to children.”44

Therefore, it is essential for national authorities when analysing the reasons for the international protection application to take into consideration the standards contained in the Convention on the Rights of the Child. Thus, it is recommended that the term “persecution” contained in Article 1(2) of the Refugee Convention is read in association with the CRC.

Besides the lack of authorities to consider child-related grounds for persecution, every State Party has the option to refuse international protection on the grounds of international crime. Thus, according to Article 1(F) anyone who “has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international

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42 M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing, p.100
43 M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.50
44 UNHCR GUIDELINES ON INTERNATIONAL PROTECTION: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (22 December 2009), Para. 13
instruments drawn up to make provision in respect of such crimes”45. There is no clause which excludes children from this provision. In other words, this provision may in practice have a tremendous impact on, for example child soldiers. The problematic in this situation, lays in the fact that minors, especially unaccompanied minors, were forced to commit a crime in their country of origin or during their journey to the borders of Europe. In such a case, the maturity of the particular child should still be evaluated to determine whether he or she has the mental capacity to be held responsible for the crime in question46. Children often find themselves in dangerous environments in which it is difficult to flourish in the same way as most children do. As such, minors who are born into civil wars do often not have the capacity to assert the situation and carry out crimes to protect their lives and the lives of their families.

The illustration of the compliance of refugee law with the Convention on the Rights of the Child, has shown that, even though the child-related principles are well-embedded in the former Convention, there is still space for legal improvement. Although the creation of the Refugee Convention in itself can be seen as a fundamental rights progress, the lack of specific child-related provisions however makes the way for severe interpretations of the legal framework. In reason of their often very young age, such minors are incapable to apprehend the weight of their situation. As such, it might be difficult for minors, especially unaccompanied minors, to connect their fear of persecution to a conventional ground. As a consequence, their application for international protection is regularly declined because they are not able to deliver serious ground for persecution. The same statement can be made in relation to Article 1(F) which allows the rejection of an international protection application in reason of having committed a crime. Minors who originate from countries with a civil war background, might find themselves in a situation in which forcibly supported their country by acting as child soldiers. As above mentioned, the phrasing of Article 1(F) of the Refugee Convention does not suggest the application for particular rules for children. As such, the Convention is applied without making direct reference to children in its most crucial provisions. What could be suggested as a way of improving the shortcoming of child-related provisions in the Refugee Convention may be concluded in Mary Crocks argument that “what is needed is a re-orientation in approach to the situation of children within the asylum regime, acknowledging harms when they threaten children and hearing the voices of children when they speak. This needs to occur both at the level of decision-making and advocating the claims of children seeking asylum – most particularly children seeking asylum alone”47.

3.2. Discretionary humanitarianism in the context of age assessment of unaccompanied minors

45 UNHRC Refugee Convention 1951, art. 1F
The before explained limited credibility of minors has several more or less severe impacts on their application for international protection. As such, authorities regularly find themselves in a situation in which they doubt or rather search for every possibility to question the age of the minor. The indicated doubt most commonly arises in a case in which the unaccompanied minor is undocumented and thus is not able to provide official documents to proof their age\(^48\). Although Article 7 of the CRC provides the right for every child to be registered\(^49\), some regions of the globe have a relatively low number of birth registrations. For the most part, African States from which originate most of the migrants coming to Europe, show a relatively low birth registration of only 10% compared to 90% in Europe\(^50\). Thus, to neutralize this general suspicion, national authorities recurrently permit themselves to access to age assessment procedures on minors. Consequently, in this section, we will have a broad representation of the body-politics in migration. Such body-politics not only include the systematically employment of age assessment procedures but moreover reflects the attitude of the States towards unaccompanied minors. In this meaning, it is essential to point out the different inconsistencies concerning age assessment procedures and how a holistic approach would lead to a better understanding of the best interest of the child.

In this context, the before mentioned “the right to have rights” regularly seems to be attained after the unaccompanied minor has been subject to an age assessment procedure. Once the chronological age of the minor is determined, and the latter is presumed to be a child, it is in the position to claim considerable safety guarantees and an adequate environment for its development. The age assessment procedure does not present in itself a problem, but rather the attitude of the State towards unaccompanied minors. As we will see, State have to some extent a narrow view on age assessment procedures, as they often tend to reject a universal approach. While the age of the minor is determined by the procedure, States regrettably do not consider the varieties in development across the world, which may lead to an erroneous result of the test. It follows that this procedure is employed by national authorities for the purpose to avoid that the special care, reserved for underaged minors, will be extended to young adults. In this context, one needs to note that nowadays age assessment procedures are methodically performed on minors with the hope to find a “fraud” in the asylum application\(^51\). This ambiguous procedure to determine the age of unaccompanied minors may be performed by the use of several methods such as X-Ray scans. Most commonly, X-Ray scans of the teeth, the wrist or collarbone are applied to ascertain a person’s age\(^52\). However, it needs to be noted that although age assessment procedures seem to be accepted in the European asylum context, to this day no harmonised and standardised

\(^48\)Separated Children in Europe Program, Position Paper on Age Assessment in the Context of Unaccompanied Children in Europe (2012), p.8  
\(^49\)The UN Convention on the Rights of the Child, art. 7  
\(^51\)Ilse Derulyn, A Critical Analysis of the Creation of Separated Care Structures for Unaccompanied Refugee Minors, Children and Youth Services Review 92 (2018), p.23  
\(^52\)Separated Children in Europe Program, Position Paper on Age Assessment in the Context of Unaccompanied Children in Europe (2012), p.8
approach has been established among European States. Amidst other inconsistencies in regard to age assessment procedures, the introduction of a harmonized approach to such a procedure would make the way to securitise the fate of the unaccompanied minor in the asylum procedure.

The consequence of such a recurrent behaviour from the side of national authorities is that the body of the migrant invariably becomes paramount and stands in line with Malkki argument of 1996 that “their bodies were made to speak to doctors and other professionals, for the bodies could give a more reliable and relevant accounting than the refugees’ stories”\(^53\). The result of this development is that the body more and more works as a *passe-partout* mechanism for border controls and subsequently for the obtainment of international protection. The logical consequence is that a needs-based approach to assessing the best interest of the minor is progressively replaced by an objective approach which will solely be based on the characteristics of the body\(^54\). This means that accounted experiences from minors of their home country and their subsequent timelines will not stand the credibility against an age assessment procedure.

However, such an approach seems condemnable, especially when one bears in mind that physical appearance is more a social construct than a scientific understanding. In this context, many experts suggest that a holistic assessment would be more equitable rather than solely concentrating on the chronological age of the minor\(^55\). A holistic assessment would imply that not only the X-Ray scans could determine the age of the presumed minor, but would further include the experiences told by the latter, consider its previous environment and finally would calculate the impact of mental illnesses such as PTSD on the body of the minor. The argument for using a universal approach in age assessment stands in line with the European Migration Network, which suggests that a multidisciplinary approach among the European States. Regrettably, the latter European States currently only focus on dental or bone assessments\(^56\). Thus, in order to determine the age of an unaccompanied minor, authorities are urged to take trauma and stress into consideration considering that mental issues have a significant impact on the child’s physical and psychological development\(^57\). Hence, the lack of consideration for a holistic assessment for determining the age of a person may result in inaccurate and erroneous results. According to the International Organisation for Migration, there are multiple variations in development among children between third state countries and the European States. Such divergences in development are often the result of stress, nutrition, education and the specific environment of the minor\(^58\).

Although no consensus on the method of age assessments might be found among the different Member States, some basic rules and rights are enshrined in the Directives

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\(^{56}\)Ilse Derulyn, A Critical Analysis of the Creation of Separated Care Structures for Unaccompanied Refugee Minors, Children and Youth Services Review 92 (2018), p.17


establishing standard asylum rules. The legal permission to carry out age assessment procedures in the European States can be found in Article 25(5) of the recast Asylum Procedure Directive, which clarifies the process for unaccompanied minors. Thus, the first article of the latter Directive provides that:

*Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant’s age.* If thereafter, Member States are still in doubt concerning the applicant’s age, they shall assume that the applicant is a minor.59

It follows from the last sentence of the article that the *dubio pro reo* rule will be applied. This means that if after the procedure a doubt of the minor’s age still persists, the unaccompanied minor will have the benefit of doubt. The importance of this rule lays in the fact that as a consequence of the benefit of the doubt, it opens the door for the unaccompanied minor to take advantage of the several procedural and legal safeguards established for underage children. Moreover, the present Article implies that Member States need to ensure that every medical examination is carried out:

*In a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination.*60

In respect to the best interest of the child principle, the article further emphasises that the reject of a medical assessment by the minor should not be the sole ground to dismiss a minor’s application for international protection. Implicitly, this means that once the presumed child has refused to undergo an age assessment procedure, alternatives must be found to prof their age. In such a case, the introduction of a multidisciplinary and holistic approach has found its *raison d’être.*

The position of the UN Committee on the Rights of the Childs also seems essential to be resumed in this context. The former Committee emphasises that age assessment procedures need to be “conducted in a scientific, safe, child and gender-sensitive fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity”61. In order to avoid any risk of violation of physical integrity, such procedures should be carried out by professionals such as paediatricians who are working independently and possess adequate expertise with children. This expertise

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should further imply to have particular regard to their social and cultural background.\(^{62}\) Thus, the Committee suggests that Member States should “train asylum and migration officials in the application of the legislation governing asylum and complementary protection, including training in taking into consideration child-specific forms of persecution.”\(^{63}\) Child-related expertise and training in such a sensible field as age assessment is crucial for the respect of the legal order. The Committee on the Rights of the Child has in this sense noted that “those responsible for taking the child’s best interest into account are not always sufficiently trained to conduct a thorough case-by-case assessment of the best interest of the affected child.”\(^{64}\)

The problematic of age assessment procedures leads us to the conclusion that the approach is torn between fundamental safeguards established by the UN and the EU and the sovereignty of national authorities to control immigration. As the Separated Children in Europe Programme emphasises “the primary aim of age assessments should be the protection of unaccompanied minors rather than immigration control.”\(^{65}\) We find ourselves in a “pedagogical paradox” in which state authorities seem to swing between a sort of “pity” and “control” when faced with the fate of unaccompanied minors. Although States have a moral responsibility to follow a needs-based approach to encounter the fate of unaccompanied minors, they yet reduce the magnitude of the situation by objectifying it and putting the bodies of unaccompanied minors to the front.\(^{66}\) As a result of automatic access to age assessment procedures, the person as an individual with a proper story moves to the background as their anatomy seems to reveal more about them. Furthermore, the establishment of standardised regulations to age assessment procedures would frame eventual discretionary decisions from the part of the national authorities. Additionally, clear regulations on age assessment procedures would consider the varieties in the mental and physical development of children coming from other continents, which would minimize the erroneous outcome of the procedure and thus contributing to the best interest of the unaccompanied minor.

### 3.3. Detention as a measure of last resort

Over the last decade, European and International powerholders have tested new alternatives to deter oversea migration. As such, detention has developed into an original common method to control the migration of undocumented and illegally staying third-country nationals. Although in theory, asylum seekers should not be detained under the premise of irregular entry to a country, detention of even unaccompanied and separated minors has become a standardized approach in practice. However, it might seem a little

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\(^{62}\) The UN Convention on the Rights of the Child, art. 20

\(^{63}\) UNCRC 2011a, para 68

\(^{64}\) M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.44


\(^{66}\) Ilse Derulyn, A Critical Analysis of the Creation of Separated Care Structures for Unaccompanied Refugee Minors, Children and Youth Services Review 92 (2018), p.27
controversial to detain a person on the sole ground to seek international protection. Regrettably, detention of irregular migrants has become common practice, both in countries part to the Refugee Convention and such that are not. In the following section, we discuss how the Articles contained in the CRC collide with European and International law.

As before mentioned, unaccompanied minors who are not able to certify their identity promptly find themselves in situations in which they are confronted with the severeness of national authorities. One might think that unaccompanied minors, because of their vulnerability, would not find themselves detained in reason of irregular migration, but sadly in practice, unaccompanied minors are not exempt from detention provisions. The Convention on the Rights of the Child, in this case, indicates particular regulations in Article 37. Hence, the Article provides that “no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

In the same context, the Return Directive of the European Union implies the conditions in which the detention of minors may be allowed. Hence, following the wording of the CRC, detention should only be considered as “a measure of last resort and for the shortest appropriate period of time”. Furthermore, the best interest of the child should always be a primary consideration (Paragraph 4) which shall include the possibility to engage “leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education”.

Article 26 of the Asylum Procedure Directive provides that the application for international protection shall not be the sole ground for detention and that Member States are urged to ensure judicial review of the decision of detention. By the wording of both Directives, the European Union assured the respect of the Convention. Not only, shall detention correspond to a measure of last resort, which in any case must respect the best interest of the child, but goes further in the Asylum Procedure Directive. The latter, as above mentioned, specifies that an application for international protection shall not be the sole ground for detention and that Member States are urged to ensure judicial review of the decision of detention. The other alternative for detention might only be the detention in case of deportation. In this case, the minor is detained because of safety reasons which could hinder its deportation.

The Council of Europe also seems to align with the broad wording of detention provisions. It thus follows, that in Article 5(1) of the ECHR, no category of persons seems to be excluded from the possibility of detention. Therefore, same as in held in European Union law, detention on the grounds to await deportation, might, in theory,

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68 The UN Convention on the Rights of the Child, art. 37
70 Ralf Roskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.82
be practicable in minors\textsuperscript{71}. However, in order to be considered as lawful, the detention of adults as well as minors needs to be carried out in good faith, needs to serve the purpose of deportation and must not exceed this purpose and the facilities and accommodation need to be appropriate. In this sense, the Court in Rahimi v. Greece ruled that even though the time spent in detention by the minor could not be considered as unreasonable, however, the automatic application of the measure to put the minor in detention has been judged as not respecting the best interest of the child as laid out by Article 3 of the CRC. The automatic application of a detention measure needs to be carried out in good faith. Thus, the good faith of authorities in deciding to detain a minor can only be considered lawful to the Convention when no less restricted measure can have been implemented\textsuperscript{72}. The Court also further discussed the impact on the development of the detained minor. Hence, in Kanagaratnam and others v. Belgium, the Court under the premise of Article 3 ECHR, held that detention of the minor in question has an influence on the child’s balance and development and further reiterates that in reference to the child’s special vulnerability, the principle of liberty has not been respected\textsuperscript{73}. The last paragraph of Article 37 of the CRC guarantees the access to legal assistance which further entails the right “to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

In line with the ECtHR, the Committee on the Rights of the Child strongly suggests in its 2012 Comment that detention of children should cease when it’s on the basis of their immigration status. The result of systematic detention of minors, according to the International Detention Coalition, will pave the way to anxiety issues, depression and even to violent and self-destructive behaviour\textsuperscript{74}. However, in case the minor is nevertheless detained as a measure of last resort, the Committee emphasises that “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”\textsuperscript{75}. The UN Committee for the Rights of the Child further positioned in the context of minor detention by reiterating that detention shall be excluded as a mechanism to control migration as it exposes underage children to a harmful development and increases their mistrust towards national authorities and migration officials which will have a consequence on the cooperation of both sides\textsuperscript{76}. To respect the best interest of minors, especially of unaccompanied minors who are on their own, an even stricter framework of the detention provisions would help to solve part of the problem. The focus of the State tends, yet again, to be the control of immigration instead of approaching a needs-based

\textsuperscript{71}European Convention on Human Rights, art. 5
\textsuperscript{72}M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing, p.149
\textsuperscript{73}Kanagaratnam and others v. Belgium, ECtHR App. No. 15297/09 (13 December 2011), para. [68].
\textsuperscript{74}M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.30
\textsuperscript{75}M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.49
\textsuperscript{76}M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing, p.149
method to unaccompanied minors. A reformation of the provisions which would suggest to prohibit the detention of the minor which awaits deportation would more strongly support the theory of the best interest elaborated by the Convention on the Rights of the Child.

4. The influence of the Convention on European Law

In the previous Chapters, a study on International law illustrated how the best interest of the child is applied in different areas touching asylum-related issues. Despite the example of the legal intervention of European institutions on the detention regime of unaccompanied minors, the way these institutions implement the best interest of the child still needs to be specified. What needs to be noted first, is that on the European level, two different institutions partially work as a legislator for their Member States. These institutions, notably the Council of Europe and the European Union intervene by legal provisions and court decisions in national law. On the one hand, the Council of Europe interferes by imposing the decisions of the European Court of Human Rights. While the Council of Europe lacks precise child-related provisions in the European Convention on Human Rights, the European Court of Human Rights came to the fore and established an interesting and diverse jurisprudence on unaccompanied minors. As the problem of the migration crisis increased steadily over the years, the latter judicial organ started to face the importance of fundamental rights towards asylum-seeking and undocumented children. In the same context, the European Union included several fundamental rights safeguards in its primary legislation, such as the Charter of Fundamental Rights of the European Union. While Article 24 of the present Charter explicitly refers to the best interest of the child as a primary consideration, more precise details on the implementation of the best interest principle may be found in the Directives. As migration itself touches a very difficult area, the European Union took care to provide with several Directives, which touch upon asylum procedures, returns and the fate of unaccompanied minors. The result is a nourished debate of both institutions on the rights of especially vulnerable categories of persons, such as unaccompanied minors. In this respect, the following Chapter will first draw the outline of the case law of the European Court of Human Rights and will eventually evaluate the respect of the EU primary and secondary legal framework in favour of the best interest of the child.
4.1. The jurisprudence of the ECHR as a compensator for the lack of child-related provisions in the Convention

The evolution of European law has since the establishment of the Council of Europe adapted itself on international standards. The following rules are mostly contained in the European Convention on Human Rights, which since its ratification of the several Member States, has a considerable impact on national legal provisions. As a reference, the Council of Europe looks upon a larger scale of international law, to correctly implement the provisions elaborated in the UN Conventions. It follows that all the 47 States which are part of the Council of Europe have ratified the Convention on the Rights of the Child. As a result, every Article contained in the ECHR needs to be interpreted accordingly to the standards of the CRC\textsuperscript{77}. The following section allows to analyse if the principles of the Convention on the Rights of the Child are contained in the ECHR and how they are developed.

The best interest of the child as such is not a primary guideline of the ECHR and thus does not work like a red thread through the latter Convention contrary to the CRC. However, to ensure the respect of the principle, several legal frameworks such as the European Social Charter work implicitly to guarantee special safeguards for children. The 1961 established Charter aims to implement European safeguards in regard to health, education or social assistance and especially to vulnerable categories such as children\textsuperscript{78}. To this day, the latter Charter is considered a common legal source since 43 out of 47 States have ratified it\textsuperscript{79}. It follows that, according to Article 17(1), each State who has ratified the European Social Charter needs to assure the “effective exercise of the right of mothers and children to social and economic protection” which subsequently includes “the establishment or maintenance of appropriate institutions or services”\textsuperscript{80}. Consequently, the Council of Europe makes sure that every State who has ratified the Charter provides special protection to mothers and children concerning health care, accommodation and education. As such, Article 17 goes hand in hand with the best interest of the child principle contained in the CRC. If one analyses the precise wording of both articles, one might conclude that both contain similarities.

Regrettably, besides the European Social Charter, there is no explicit provision referring to the protection of children. Thus, to comply with the lack of child-related provisions, the Council has proposed a non-binding recommendation on Protection and Assistance for Separated Children Seeking Asylum\textsuperscript{81}. The latter points out that Member States often fail to adequately confront the needs of minors because of the shortfall of trained and specialized experts in the field. As beforementioned, migration officials are often not trained to interact with children, especially not when their trauma leads to gaps in

\textsuperscript{77} M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing, p.146
\textsuperscript{80} European Social Charter 1961, art. 17
\textsuperscript{81} Recommendation n. 1703(2005), Protection and assistance for separated children seeking asylum, adopted on 28 April 2005
memories. Moreover, the Recommendation emphasizes the need to intensively cooperate with the UNHCR to establish common standards for registering information on unaccompanied minors in order to facilitate identification, tracing and comparability. The introduction of a further Recommendation and Resolution in 2011, does not only propose 15 common principles to address the fate of unaccompanied minors, but directly calls upon the European Union to harmonise the provisions on the best interest of the child. Therefore, the Resolution recommends “to consider proposing new legislative standards to close existing protection gaps in European Union law for all unaccompanied children, irrespective of whether they seek asylum”. The intention of these 15 common standards is primarily that children should be treated according to their circumstances as children with the best interest as primary consideration rather than be treated as illegal migrants. The Parliamentary Assembly further provided an additional Recommendation on undocumented children in an irregular situation, which intends to strengthen the fundamental rights of children including the right to be assisted by a legal guardian, education, housing as well as health care. Furthermore, this recommendation aims to guarantee these rights even over the age of majority, which is considered as being a crucial and challenging period for unaccompanied young migrants. Even though the Parliamentary Assembly, as well as the Committee of Ministers, have a limited capacity concerning making binding recommendations, the latter has indicated that:

The Charter treats children as individual rights’ holders since human dignity inherent in each child fully entitles her/him to all fundamental rights granted to adults. [The] specific situation of children, which combines vulnerability, limited autonomy and potential adulthood, requires States to grant them specific rights, such as those enshrined [in the ESC].

The statement highlights that not only adults but moreover children should be considered as subjects of law. Furthermore, it underlines the indivisibility of human rights, which are inherent to every person. The result is an implicit recognition of vulnerable categories of people, such as children, which should be endowed with specific guarantees according to their status.

As the before-mentioned recommendations have a non-binding legal nature, the European Court of Human Rights calls upon the enforceability of its decisions. Thus, although the existence of child-related regulations is somewhat limited, the European Court of Human Rights has developed an interesting and manifold jurisprudence to fill the gaps in the European legal framework. As every Court decision is binding for every contracting State, the Member States of the European Union are urged to comply with

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82 Recommendation 1969 (2011) and Resolution (2011), Unaccompanied children in Europe: issues of arrival, stay and return
83 Recommendation 1969 (2011) and Resolution (2011), Unaccompanied children in Europe: issues of arrival, stay and return, para. 6.2
84 Ralf Roskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.42
86 Defence for Children International (DCI) v. The Netherlands, European Committee of Social Rights, Complaint No. 47/2008 (20 October 2009), para. 25
every ruling. In this sense, the importance of the best interest of the child has been highlighted by the *Jeunesse v. the Netherlands*. In the latter law case, a Surinamese woman entered the territory of the Netherlands with a tourist visa and eventually got married to a Dutch citizen with whom she created a family. As her application for a residence permit was dismissed on several occasions, she ultimately found herself awaiting deportation to her country of origin\(^{87}\). The question referred to the Court concerned the respect of Article 8 in the context of family life. It was ruled that: 
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\text{[w]hile alone [best interests] cannot be decisive, such interests certainly must be afforded significant weight},
\]

furthermore underlining that especially regarding migration "children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status\(^{88}\). This ruling comes in light of the right to have a family. Thus, the Court, in this case, has established that it would not be in the best interest if the children’s mother were to be deported to her country of origin. In the present decision, the best interest assessment has outweighed the legal status as an illegal migrant. Further, to ensure that the needs of every vulnerable child are fulfilled, States are encouraged to adopt an individualised rights-based approach which inter alia includes a multidisciplinary approach of the best interest of the child\(^{89}\). This rights-based approach was underlined in *Neulinger and Shuruk v. Switzerland* where a Swiss Israel-based mother wanted to return to Switzerland to protect her child from the alarming and dangerous behaviour of the father of the child\(^{90}\). The national court in Switzerland thereupon ordered the return of the child to Israel. The Court, in this case, noted, however, that:

*Neither the working group during the drafting of the Convention nor the Committee on the Rights of the Child has developed the concept of the child’s best interests or proposed criteria for their assessment, in general, or in relation to specific circumstances. They have both confined themselves to stating that all values and principles of the Convention should be applied to each particular. In addition, the Committee has emphasised on various occasions that the Convention must be considered as a whole, with the relationship between the various articles being taken into account. Any interpretation must be consistent with the spirit of that instrument and must focus on the child as an individual having civil and political rights and its own feelings and opinions*\(^{91}\).

By the wording of the decision, first, States need to ensure that the best interest is considered in every circumstance and every procedure in which a child might be involved. Furthermore, it notes that the minor needs to be regarded as a political and civil rights holder and as a consequence must be pointed out that every article contained in the Convention is connected which needs to be acknowledged in every interpretation.

\(^{87}\)Jeunesse v. the Netherlands [GC], <http://hudoc.echr.coe.int/eng/?i=002-10151>  
\(^{88}\)Jeunesse v. The Netherlands, ECHR (GC) App. No. 12738/10 (3 October 2014), para. [118].  
\(^{89}\)Ralf Roskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p. 49  
\(^{90}\)Neulinger and Shuruk v. Switzerland [GC], <http://hudoc.echr.coe.int/FRE?i=002-880>  
\(^{91}\)Neulinger and Shuruk v Switzerland (Application No. 41615.07), para. 51.
In the same light Tarakhel v. Switzerland, calls upon the vulnerability of unaccompanied minors and the special safeguards which need to be assured in their regard. In this particular law case, it further has been reiterated that Article 3 of the CRC is most frequently used by the action of Article 3 ECHR, which protects the prohibition of torture and degrading treatment. The case concerned an Afghan family with six children who first arrived by boat in Italy and eventually migrated further to Switzerland. The Swiss immigration authorities refused to look into the asylum application since they claimed that according to the Dublin Regulation, Italy was the country responsible for the asylum application. First, the Court noted, that in reference to the 2012 UNHCR Recommendations, Italy had been subject to some deficiencies such as the problematic access to legal aid, health care and psychological assistance. It follows that the Court ruled that the Swiss authorities failed to make sure that the Italian facilities were adapted to the age and necessities of the children. As such, the ECtHR ruled that in case a migrant child is under the responsibility of a State Party, the latter must ensure that once a vulnerability in the child is detected that this is the decisive factor “which takes precedence over considerations relating to the status of illegal immigrant”.

Concerning the particular vulnerability of unaccompanied minors, the Court in 2011, for the first time positioned itself to the issue. The case concerned an Afghan national who entered the European Union over Greece to, later on, arrive in Belgium. The Belgium authorities eventually sent him back to Greece where he was detained and lived under degrading conditions. For the first time in the jurisprudence of the Court, it was recognized in M.S.S v. Greece that the asylum seeker status might be linked to a category of extreme underprivileged and vulnerable people. The Court here implicitly refers to unaccompanied minors who wish to seek asylum in Europe. Hence, once the Court acknowledged that unaccompanied and separated form a category of vulnerable persons, the margin of appreciation of Member States concerning restrictions of fundamental rights has been considerably limited. The present margin of appreciation has moreover been subject in Nunez v. Norway. The case treated a Dominican Republic citizen who had previously been deported from Norway and later on re-entered the country under a false name. For several years, the immigration control had not been aware of the woman even though she had already created a family and worked in Norway. In was only until 2005 that the authorities began the expelling process. The issue referred to the Court treated the compatibility of forced expulsion in the context of the public interest with family life. In this case, the Court ruled that in order to uphold their power of decision, States needs to ensure a “fair balance” between the public interest and the best interest of the child. The Court decided that the argument of the public interest was void since it took the authorities four years to order the

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92Tarakhel v. Switzerland [GC], <http://hudoc.echr.coe.int/fre?i=002-10343>
93Tarakhel v. Switerland, ECtHR, para. 99
94M.S.S. v. Belgium and Greece [GC], <http://hudoc.echr.coe.int/fre?i=002-628>
95Ralf Roskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.54
97Ralf Roskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p. 62
expulsion of the woman. Thus, in this context, the best interest of the children, who were accommodated to the presence of their mother, outweighed public interest arguments. It follows from the established jurisprudence of the Court that although the best interest of the child does not figure in the Convention, the Court refers to the principle in various ways concerning unaccompanied minors. The Court consistently refers to the principle by highlighting the need for authorities to consider the minor as a subject of law and their special vulnerability. This happens through the Courts claim for national courts and authorities to carry out best interest assessments. These best interest assessments are most commonly performed under the angle of Article 3 (Prohibition of torture) and Article 8 (Right to a family life) of the European Convention on Human Rights. Through the implicit use of the best interest principle contained in the Convention on the Rights of the Child, the Court adopts a needs-based perspective about minors in especially vulnerable conditions. It follows from this approach that the Court explicitly wants to frame the margin of appreciation of national authorities when it comes to asylum-related issues of unaccompanied minors. In this sense, national courts are urged to follow the “fair balance” between the interest of unaccompanied minors and the States interest in asylum issues. From this point, the Court demonstrated its position towards the importance of the best interest of the child and thereby comes up for the lack of legal provisions in the Convention.

Although, no specific reference to the Convention on the Rights of the Child and its paramount principle has been made, the ECHR does not lack of implicit references. It follows that even though no distinct Article containing the best interest of the child has found its way to the ECHR, the European Social Charter compensates this lack by creating child and family-related provisions. Besides, the non-binding recommendations of the Council of Europe do not only promote cooperation between the Member States, the UN and the European Union, they further call upon the need to harmonize the legal standards about unaccompanied minors in an irregular situation. To compensate this lack of non-binding legal recommendations, one comes across the various law cases in which the Court did not miss the opportunity to repeat the importance of the best interest assessment. This particular interest in the fate of unaccompanied minors results in the recognition of the vulnerability of these children. By explicitly recognising this particular group of persons, a needs-based assessment on the best interest of the child has been developed. Thus, the best interest of the child is not only an issue concerning the best development of the child in regard to health and education, but further includes the right to a family life and the prohibition of torture. Hence, although Article 3 of the CRC might not be explicitly mentioned in a case, Article 3 and 8 of the European Convention on Human Rights support the principle of the best interest of the child. One concludes to note that, over the years as the impact of the migration crises deepened, the Court the more and more cleared its position towards children and the special vulnerability they represent when in confrontation with migration issues.
4.2. The plenitude of the Directives of the European Union in favour of the best interest of the child

In order to comply with international standards of child-related issues, the European Union, across its several legal frameworks, sets the ground for the protection of the best interest of the child. More specifically, the European Union does not only recognise the best interest of the child but also acknowledges a special legal category for unaccompanied minors in the context of migration. The application of the principle works because of the ratification of the Convention on the Rights of the Child by every EU Member States. Hence, the latter Convention has been implemented with barely any exception and should therefore in theory work as a limited margin of appreciation for States in regard to child-related issues. The EU also works in accordance with the principles held in the Geneva Convention of 1951. Thus, the aim of the Treaty on the Functioning of the European is to “develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement”. The conditions of the present protection are laid down in several Directives, which specify the legal approach to unaccompanied minors in an irregular situation. The asylum-related Directives are directly influenced by the Convention on the Rights of the Child and Article 24 of the European Charter of Fundamental Rights. The aim of the following section is to focus on European primary and secondary law in the context of the best interest of unaccompanied minors and how their assistance and protection find their place in the European legal framework.

The importance of the protection of the child is underlined by its inclusion in one of the founding treaties, namely in Article 3(3) of the TEU. The founding treaty in this article does not only guarantee social justice and protection equally for men and woman, but furthermore promotes the protection of the rights of the child. From this premise, the rights of the child have been an object in several migration-related Directives as well as the European Charter of Fundamental Rights. Under the assumption of the latter, one finds a specific reference to the rights of the child under Title III Equality. Thus, according to Article 24 of the latter Charter:

*Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether made by public authorities or private institutions, the child’s best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship*

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98 M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing, p.89
99 Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE - Chapter 2: Policies on border checks, asylum and immigration, Article 78 para.1
100 Consolidated version of the Treaty on European Union, Article 3
and direct contact with both his or her parents unless that is contrary to his or her interests.\textsuperscript{101}

By the wording of the article, one realizes that the European authors clearly took the CRC as the primary source of inspiration. Thus, principles such as the best interest of the child (Article 3 CRC), the right to be with one’s parents (Article 9 CRC), the right to be heard (Article 12 CRC) and the right to be informed are enshrined in the recent article. To support the purpose of Article 24, the Commission in March 2014 noted that “vulnerable migrants, in particular women, young migrants and unaccompanied minors should receive targeted support and a ‘best interest of the child’ approach should be practically applied in accordance with the UN Convention on the Rights of the Child.”\textsuperscript{102}

It follows that not only the provisions held in the ECHR but also the provisions stemming from European Union law shall be interpreted in compliance with the CRC. In the same sense, the web of secondary law provides a large amount of child-related rights, which are mostly contained in the main migration Directives. Thus, in the Qualification Directive, unaccompanied minors are described as:

\textit{Third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person or minors who are left unaccompanied after they entered the territory of the Member States.}\textsuperscript{103}

In contrast to Article 1 of the CRC, the Union sets a strict age of majority and accordingly to the law of every Member States, the majority is attained at the age of 18. Thus, once the unaccompanied minor reaches the age of 18, every special safeguard provided by the directives is void. However, before the age of majority, Point 27 of the same Directive indicates that “when the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.”\textsuperscript{104} The latter point needs to be considered in the context of an international protection application. Once the unaccompanied minor introduces an international protection claim, Member States first need to ensure that the latter is sufficiently taken care of in another part of his country of origin before rejecting the application. The ethic of the introductory point is to not only ensure that the best interest of the child is respected but also to fortify the non-refoulement principle.

Farther in the context of migration, the EU Reception Directive implements the best interest by requiring that “Member States shall ensure a standard of living adequate for

\textsuperscript{101}EU Charter of Fundamental Rights, art. 24
\textsuperscript{103}Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, art. 2(l)
\textsuperscript{104}Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Point 27
the minor’s physical, mental, spiritual, moral and social development”\textsuperscript{105}. Thus, to fulfil these conditions, Member States are urged to ensure “that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health”. In addition to an adequate standard of living, the Directive further asserts that this must contribute to the child’s “physical, mental, spiritual, moral and social development”\textsuperscript{106}. This right, to have an adequate standard of living entails the rights for the minor who is seeking international protection to be protected from any form of discrimination in the context of accommodation\textsuperscript{107}, which is in line with Article 2 of the CRC. This particular right entails not only the practical part of protection but further calls for the psychological well-being of the child. To assure the psychological well-being of the minor, officials who are part of the application process need to make sure they are trained adequately to help minor mentally and physically through the migration process. Another provision of the same Directive treating the fate of unaccompanied minors is Article 24, which refers to family reunion. The present article specifies that once the international protection application is made by the minor, the State shall start tracing the family. During this period, the State is urged to comply with the best interest of the child and needs to ensure that the protection and safety of the family in the country of origin is not jeopardised\textsuperscript{108}. We learn from the wording of this article that the protection of the minor is not the sole consideration of the authorities but the integrity of the close relatives as well\textsuperscript{109}. Finally, in the context of a possible return of the minor, Article 10 of the Return Directive sets the conditions and the procedure of the return. Thus, before deciding the return of an unaccompanied minor a best interest assessment needs to be carried out by assisting bodies other than the authorities who are competent to enforce the return\textsuperscript{110}. For the return may pass the best interest assessment of the child’s situation, the State needs to ensure that “he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return”\textsuperscript{111}.

To contribute to the best interest of the minor and the well-being of the latter, the State is urged to stick to procedural necessities. It follows from the Queen case (C-648/11).

\textsuperscript{105}M. Crock and L.B Benson, Protecting Migrant Children, Edward Elgar Publishing, p.89
\textsuperscript{106}Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, art. 23
\textsuperscript{107}Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, art. 32
\textsuperscript{109}Ralf Rosskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.87
\textsuperscript{110}Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 10
\textsuperscript{111}Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 10
that the Court found that “it is important, as is evident from paragraph 55 of the present judgment, not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status”112. Procedural safeguards such as enshrined in the latter case law, are of importance for unaccompanied refugee minors since authorities tend to delay processing in order for the person to attain the age of 18.

The principle of the best interest of the child is not only inserted in the EU legal framework but likewise makes way for discussion in the Mid-term report on the implementation of the Action Plan on Unaccompanied Minors. The Commission consecrated that “the explicit recognition of the best interests of the child as guiding principle has contributed to provisions that ensure increasing protection in the new EU legislative instruments for this particularly vulnerable group of migrants” and thus recognizing the importance of the best interest principle113. The purpose of the above-mentioned Action Plan is seeking “to provide concrete responses to the challenges posed by the arrival of significant numbers of unaccompanied minors in the EU territory”.

Although it is difficult to see how the different Member States perform child protection measures on unaccompanied minors in practice, in theory, the authors of the European legal framework leave little space for interpretation. The European Union created a solid legal framework on the issue of unaccompanied minors by implementing the principle in its primary legal sources, which underlines the importance of the principle. Finally, by providing with several asylum-related Directives, the EU clarifies the conditions applicable on unaccompanied minors on the run, an approach which leaves little space for legal uncertainties.

112Queen case (C-648/11), para. 61
113 Ralf Rosskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.89
In line with the other European States part of the European Union as well as the Council of Europe, the Netherlands have ratified the Convention on the Rights of the Child. The latter entered into force on the 8th of March 1995. The necessity to correctly implement the standards held in the CRC stems from the relatively high influx of unaccompanied minors in the Netherlands. Thus, at the end of 2015, 6099 UAM from 85 different countries were registered in the Netherlands. Most of the minors crossing the border to arrive in the Netherlands come from countries with long history civil war backgrounds such as Afghanistan, Syria or Eritrea. In reaction to the inflow, the Dutch Government in 2016 provided with a specific definition of unaccompanied minors. The latter are thus considered being a person “who was under 18 on arrival in the Netherlands, whose country of origin is outside the European Union, and who travelled to the Netherlands without a parent or other person exercising authority of the child”.

This definition follows the legal framework of most European countries, which also define a minor of being a person under the age of 18. The implementation of international legal standards into Dutch law seems, in theory, to be relatively simple. The Dutch legal system is considered as being a monistic system. In this sense, Article 94 of its Constitution stipulates that provisions of international law are superior to national provisions. It follows, accordingly to Article 93, that international provisions included in treaties or conventions are legally binding and directly applicable after ratification. Thus, since its ratification in 1995, the principles held in the CRC prime over Dutch national law. The best interest of the child has already been common good in Dutch legislation as it was also integrated into family law and was primarily influenced by the European Court of Human Rights. This was confirmed by the Dutch Supreme Court, which ruled that the best interest of the child should be a primary consideration, without however losing sight of other possible interests. However, the national authorities seem to believe that other legal categories than migration law should apply the best interest of the child. They consider other legal categories such as family law as more suitable to treat the issue. It follows that, even though the CRC has rightfully been implemented in the Dutch legal system, legal experts argue that the

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120 M. Sedmak, B. Sauer and B. Garnik, Unaccompanied Children in European Migration and Asylum Practices, Routledge Research in Asylum, Migration and Refugee Law, p.59
Articles contained therein, such as the best interest of the child, are not actively used in court decisions. The Court, in its decisions, often only implicitly refers to the best interest when in violation of Article 3 or 8 of the ECHR. Thus, Article 8 ECHR (the right to have a private and family life) stands in direct connection to the best interest of the child since it concerns child protection\textsuperscript{121}.

In a first step, it seems crucial to apprehend the organisation of the national guardianship of unaccompanied minors in the Netherlands (Section 4.1). Although, no specific reference to age assessments and detention of minors will be made, it seems necessary to closely analyse if the national law is built around the best interest of the child and how the government provides necessities such as accommodation and education. In a second step (Section 4.2), we will have a look on the asylum procedure, which unaccompanied minors need to follow, as well as at the procedural safeguards to which they are entitled. In the same sense, it seems necessary to look at the tendency of national courts in the Netherlands towards unaccompanied minors. A comparative analyse between the Dutch judicial organs and the European Court of Human Rights will have a look into the legal approach towards the best interest assessment of unaccompanied minors and their families.

5.1. The responsibility of Nidos in the guardianship and the integration of the unaccompanied minors in the Netherlands

Accordingly to the high number of unaccompanied minors arriving on the territory of the Netherlands, a specific regime has been created to accompany minors who wish to seek asylum. Thus, on the grounds of Article 1:253 of the Dutch Civil Code:

“If the moral or mental developments of a minor or his health are seriously endangered, and other measures to avert this danger have failed or, as must be expected, shall fail, then the Juvenile Court may place this minor under custodial control of a Foundation as meant in Article 1 under point (f) of the Youth Care Act”\(^\text{122}\).

When pointing to the custodial control of a “foundation”, the Dutch legislator commonly refers to the Foundation for Protection of Young Refugees (hereafter Nidos). As such, Nidos is responsible for the organization of guardianship for refugee minors and asylum seekers such as undocumented minors. For this task, Nidos is allowed, on the grounds of Article 1:303 to exercise the same power and duties as any other legal guardian of the minor\(^\text{123}\). Thus, the approximately 180 guardians working for Nidos are ordinarily responsible for a maximum of 20 children. However, from the high influx of unaccompanied minors in the Netherlands, this number has in practice increased to approximately 23.5 children per guardian. Their responsibilities include inter alia preparing the UAM for adult life and as such make plans about their future, this according to their strengths\(^\text{124}\). Hence, on the ground of Article 5 of the CRC national authorities such as Nidos are urged to enable “to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance”\(^\text{125}\). It follows that Nidos is responsible for every important category in a minor’s life. To assure the best development for their future, special accommodation is provided by the foundation. This implies that UAM under fifteen and extra vulnerable children such as victims of human trafficking may have the opportunity to be placed in special foster families. Approximately one-third of the UAM are placed in foster families. Special attention is paid to integrate the UAM in foster families with the same ethical background, to facilitate assimilation\(^\text{126}\). The recruitment of foster families with identical ethical backgrounds as UAM arriving in the Netherlands has been successful since there cannot be shown a shortage. The wish to live a quiet normal life is best realized in an entity such as foster families\(^\text{127}\). As such, even educational safeguards for UAM in Dutch legislation have been prepared. Thus, every separated child has the right to education with no special regard to its status. In order to find the right school, the municipality in

\(^{122}\)Dutch Civil Code, art. 1:253 (1)

\(^{123}\)Dutch Civil Code, art. 1:303


\(^{125}\)Convention on the Rights of the Child, Article 5


\(^{127}\)ibid p.12
which the UAM is located is responsible\textsuperscript{128}. This right will allow children at the age of 12 for example to integrate the Internationale Schakel Klas which may be translated to International Transition Class and in which they may be educated over a period of minimum two years. Even though such a right confers to the UAM a better opportunity to integrate the country of arrival, one critic is that the teachers are often not specially trained to educate UAM, especially illiterate children\textsuperscript{129}. Regrettably, even though it is known that unaccompanied minors flourish best in special foster families, a particular regime has been created for children between the age of 15-18. This age category is most commonly placed in a registration and application centre. After a couple of days, they are usually transferred to a largescale reception centre\textsuperscript{130}. Even though Nidos task is to integrate the young adult to the Dutch everyday life, the transition into adult life is often regarded as especially harsh for unaccompanied minors turning 18. This is underlined by the fact that once the asylum application when turning 18 is rejected, the UAM needs to leave the special care facility behind and is obliged to make a living for himself. They mostly depend on charity organizations, as their educational and medical care is not supported anymore. This constant pressure to make a living for oneself goes hand in hand with the growing anxiety of running into a dark path and getting caught by the police. Special attention needs to be paid to UAM, as it has been assessed that UAM need mental health care. Compared to a percentage of 8,2\% for Dutch minors in need of mental health care, UAM show a rate of 57,8\%\textsuperscript{131}. Arriving in the Netherlands, UAM already demonstrate an unequal high level of mental issues such as PTSD, anxiety issues or depressions\textsuperscript{132}. For example, the integration in large reception centres instead of foster families triggers accelerated mental health issues in UAM. They often experience a negative atmosphere as drugs and alcohol are frequently abused, and the accommodation is usually not helpful for the successful development of the minor.

The young adult may also find itself in a situation in which, once turned 18, they need to return to their country of origin. Once they have left the country, the Dutch authorities do not consider the UAM as their responsibility anymore. Hence, research on their journey is barely existent\textsuperscript{133}. Prior to 2013, the rejection of an asylum application opened the door to a temporary residence permit for UAM until the age of 18 for whom a safe return to the country of origin was not possible. However, this policy has been abolished since the Dutch authorities feared to deliver the impression to UAM that such a residence permit could be permanent\textsuperscript{134}. It is suggested by experts that a multidisciplinary workgroup should be established to follow the safe return of the UAM to the country of origin. The workgroup task would be to ensure that the young adult’s

\textsuperscript{128}ibid, p.5  
\textsuperscript{129}ibid, p.5  
\textsuperscript{132}ibid, p.13  
\textsuperscript{133}ibid, p.15  
\textsuperscript{134}ibid, p.7
well-being is assured and that their secure development may be guaranteed accordingly to the best interest of the child.\textsuperscript{135}

At first sight, the Netherlands seem to provide with several safeguards concerning unaccompanied minors in an irregular situation. This fact follows from the establishment of a special organization, Nidos, which is responsible to find an adequate foster family or reception centre. The importance of this mechanism provided by Nidos is highlighted by its integration in the Dutch Civil Code. The safeguards provided by Nidos is supported by the integration of unaccompanied minors in special schools. However, a closer look reveals the deficiencies of the system. The integration of unaccompanied minors over the age 16 in reception centres instead of foster families, is suggesting the State’s lack of capacity or its lack of concern towards the best interest of the child. Whatever the explanation of this shortcoming is, the result in the development of the minor is tremendous. The present reception centres are often the breeding ground for racism, as well as criminality as the resources are limited. In this context, the United Nations noted that:

\textit{Concern about the situation of asylum-seekers in the State party, including the increase in hostility towards refugees and asylum-seekers among the population and opposition to the opening of new reception centres (United Nations 2015, para. 33)\textsuperscript{136}}.

The somewhat limited resources of Nidos and the resulting integration of unaccompanied over 16 in reception centres may stem from the fact that the organisation is semi-independent. It is often noted that their guardians have the responsibility to care for the child’s best interest, although it is often appealed that they feel constrained by the national migration authorities\textsuperscript{137}. The result of their dependency on migration authorities is that it stands in contradiction to Article 25 of the Asylum Procedure Directive, which requires the representative to be free from any conflict of interest. Hence, once a conflict of interest appears, the realisation of the best interest of the unaccompanied child and thus their development in a safe environment becomes increasingly endangered which puts the purpose itself of the latter foundation in question.

\textbf{5.2. The practice of the IND and the Council of State in the context of the best interest of the child}

When talking about the administrative immigration procedure of asylum-seeking minors in the Netherlands, it seems essential first to introduce one crucial actor, which is the IND. The Immigration and Naturalization Service (IND) is the Dutch organ responsible for taking every asylum relevant decision, this on behalf of the State

\textsuperscript{135}ibid, p.13
\textsuperscript{136}United Nations (2015). Committee on the Elimination of Racial Discrimination. Concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands, para. 33
Thus, every unaccompanied minor who wants to seek international protection on the Dutch territory needs to pass the procedure of the IND, which will eventually on behalf of the State Secretary decide if the minor will be granted a residence permit or not. The procedural safeguards of the asylum procedure are laid down in the Dutch General Administrative Law Act (hereby GALA). Regrettably, the act is not accurately put up to regulate the outcome of unaccompanied minors. In this section, we will analyse how the mechanism of the IND works and if unaccompanied minors may rely on procedural safeguards in Dutch immigration law. The establishment of a solid procedural legal framework goes hand in hand with the correct implementation of the interest of the child. However, to be able to claim the ultimate respect of the principle towards unaccompanied minors, it is necessary to have a closer look into two precise decisions of the Council of State, which will subsequently reveal the preferred approach of the Court.

The first step of the asylum process is marked by a rest and preparation period in which both the national authorities will gather first insights on the asylum seeker and the UAM is able to get in contact with a lawyer. The duration of this rest and preparation period depends on the inflow of migrants and thus may take a minimum of three weeks up to one year. After this phase, there are to possible ways to conduct an asylum procedure. Firstly, there is a general and fast application (Algeme Asielprocedure, AA) which continues over approximately eight days. Secondly, the extended asylum procedure (Verlengde Asielprocedure, VA) may take over a year in cases where the IND needs for example further examination on the minor. During the first days of the Algemene Asielprocedure, the minor is interviewed about his personal details and the facts of his journey. On behalf of these explanations, the IND decides whether to proceed the Algemene Asielprocedure or to opt for the Verlengde Asielprocedure. In case the IND rejects the asylum application of the minor, the latter has the possibility to challenge the decision of the IND. This right to an appeal in order for the best interest of the child to be respected is laid down in Article 10(3) of the Asylum Procedure Directive. Thus, the decision may be appealed at the District Court, which needs to include the grounds for appeal. At last resort, the lawyer of the minor has the opportunity to dispute the outcome of the appeal at the Council of State. As well as the lawyers of the minor, the IND itself has the possibility to challenge the decision of the court by

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forming an appeal\textsuperscript{143}. Finally, the Council of State decides either that the decision of the IND has not been legitimate and needs reconsideration or that the institution was right to reject the asylum application\textsuperscript{144}. In case the appeal is considered well founded, the IND is urged to retake the decision and to transpose the considerations the Court has suggested. This happens in conjunction with Article 3:2 and 3:4(2) of the GALA\textsuperscript{145}. Given the decision of the IND to reject the asylum application of the minor is well-founded, the latter decision is followed by an order to leave the country within a period of 28 days. Such a return in the context of an unaccompanied minor may only be organised if the best interest of the child is respected. In respect of the Family Reunification Directive, unaccompanied minors may only be expelled or transferred to another EU state in which the human rights standards are equal to the ones in the Netherlands. Further, if a transfer between European Union Member States is not possible, the minor may be relocated to a safe third country, however only if it can be assured that other family members reside there. In case no family may be found, a child shelter, which accommodates suitable nutrition, educational and hygiene care, may be considered in the country of origin\textsuperscript{146}.

After having given an overview of the structure of the IND, it seems necessary to point out that the system has several defaults. Firstly, no explicit mention of the best interest of the child may be found in Dutch law\textsuperscript{147}. One can only assume that, since the Netherlands have ratified the Convention on the Rights of the Child, the national courts apply the principle of the best interest of the child. However, the correct application of the principle seems problematic as the IND itself does not carry out best interest assessments in the first place, which suggests a somewhat reluctance of the IND towards unaccompanied minors\textsuperscript{148}. To comply with this lack, the lawyer of the unaccompanied minor may enforce a best interest assessment. In this scenario, the IND most commonly refers its assessment on a group of experts, which assessment it needs to follow according to Article 3:2 and 3:4(2) of the GALA\textsuperscript{149}. It seems, that even though the Directives containing the principle of the best interest of the child have been materialised into national law, Dutch administrative law is by its nature relatively reluctant to implement Article 3 of the CRC correctly\textsuperscript{150}.

Thus, to coincide the Dutch procedural and administrative law and the legal theory of migration safeguards, the Study Centre for Children, Migration and Law of the

\textsuperscript{145}General Administrative Act, Art. 3:2, 3:4(2)
\textsuperscript{149}General Administrative Act, Art. 3:2, 3:4(2)
\textsuperscript{150}ibid, p.6
The University of Groningen has at the invitation of legal representatives created a multidisciplinary team to work in favour of the best interest of the child in the Netherlands. On behalf of this study, we will analyse two court decisions, one in which the appeal of the minor’s lawyer has been well-founded in favour of the best interest of the child and one in which the appeal has been rejected by the Council of State.

The first case treats a family from Iran in which the mother of the family, in order to receive a residence permit in the Netherlands, needed to return to her country of origin. The lawyer of the unaccompanied child of the potentially expelled mother, argued that the development of the minor was to be harmed if she would be expelled indefinitely, which has also been found as a result of the best interest assessment. The lawyer of the family underlined his arguments by the use of Article 3 of the CRC and Article 24 of the European Charter of Fundamental Rights. The Council of State rejected both Articles since none of which might be used to grant a person’s residence permit. Furthermore, since the expulsion might only be temporary, the court did not consider a violation of Article 8 of the ECHR which contains the right to a family life. Contrary to the previous law case of Neulinger and Shuruk v. Switzerland, the Council of State in the Netherlands has not applied the connection between the various articles. In other words, contrary to the ECHR, the Dutch national court did not explicitly connect the best interest of the child to the right to family life. The court further did not attach any importance to the best interest report, which clearly indicated the damages such an expulsion would generate on the son’s future development.

The second case, an Afghan family which has been living in the Netherlands for 11 years, was to be deported to their country of origin. The lawyer of the family argued in violation of Article 3 (Prohibition of Torture) and Article 8 of the ECHR. The Council of State accepted the argument of Article 3 since the already “westernised” children would have difficulties to adapt to the Afghan environment and the protection the youngest daughter would not have been guaranteed. In addition to the Court’s assessment of the legal invocation of Article 3, it carefully analysed the best interest report established by the experts. It thus concluded that there would be a violation of Article 3 if the family was to be expelled to Afghanistan.

As a result, to the previous illustrated law cases, we can draw a preliminary conclusion which is the arbitrary behaviour of the Council of State. In the first case, the Court did not dwell on the report established by the experts, which undoubtedly indicated the harm such an expulsion would cause for the child. However, in the second case, the Court partially based its decision on the assessment of the experts and eventually affirmed the appeal of the lawyer. In regard to the facts of both cases, it seems necessary to note that the reports drawn by the experts were equally important to set the level of harm an expulsion of the family would have caused. The difference however is that the Court

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151 ibid, p.2
152 ibid, p.12
seems hesitant to methodically refer its decisions to such reports. The outcome is an arbitrary decision-making process in which every juridical security seems to get lost. The point is further underlined by the reluctance of the Council of State to make use of the principles contained in the Convention on the Rights of the Child. This is illustrated by the first case, in which the Court rejects the argument in favour of Article 3 of the Convention on the Rights of the Child. It suggests that the Court prefers to build its judgments on the application of Article 3 and 8 of the ECHR when it comes to expulsion, rather than to directly refer to the best interest of the child principle. It seems paradoxical to reject the application of Article 3 CRC in favour of the provisions of the ECHR since the ECHR in its jurisprudence indirectly refers to the best interest of the child, established by the CRC. Thus, if one switches to a smaller, national legal scale, such as the Netherlands, one comes across the hesitancy of the authorities to make use of Article 3 CRC. Firstly, this becomes apparent in the system of the IND, which is unwilling to systematically appoint a best interest assessment. Secondly, at a higher national scale, the Council of State irregularly accepts the eminence of the reports drawn by the experts. This is underlined by the reluctance of the court to refer to the Convention of the Rights on the Child in its decisions. It seems that the Council of State rather points to the prohibition of torture (Article 3 of the ECHR) or the right to a family life (Article 8 of the ECHR) instead to directly invoke the best interest of the child.
6. Conclusion

Over the course of the previous Chapters, the application of the best interest of the child has been demonstrated, both in International and European law. The goal of this research was to particularly apply the best interest principle to unaccompanied minors in an irregular situation and to analyse the approach of legal institutions on several levels. The work has shown that the introduction of specific child-related provisions into International law has been a legal challenge over the past decades. Thus, the outdated siloed provisions contained in several international law regulations and the ignorance of children as subjects of law, made it difficult to respect the best interest of minors. The introduction of the Convention on the Rights of the Child changed the perspective and realised to put the child in the centre of attention. The result is a coherent legal Convention, in which one particular principle works as a red thread through the entire document: the best interest of the child. The baptism of the present principle, which is included in Article 3 of the Convention, enabled to establish a new consensus of legal provisions and jurisprudence concerning underage children, and in the present research, unaccompanied minors. The introduction of the best interest of the child touched upon various areas of International and European law and called for the intervention of national authorities. As for the European legislation, the inclusion of the best interest principle happened through the creation of a solid jurisprudence of the European Court of Human Rights. The Court apprehended the exclusion of an explicit mention of the principle in the European Convention on Human Rights and thus compensated the lack by implicitly using the best interest principle through the application of Article 3 and 8 of the ECHR. Thus, in Jeunesse v. The Netherlands, the Court, under the premise of Article 8, affirmed the importance of the best interest of the child, especially in relation to the lack of independency and the particular asylum status of the minor. In the same context, the Court in Neulinger and Shuruk v. Switzerland underlined the connection between the various principles in the ECHR and the best interest of the child and presents the minor as an individual endowed with political and civil rights. The Court goes further by linking the asylum status of the unaccompanied minor to a particular vulnerability (M.S.S v. Greece), which entitles the unaccompanied minor to special safeguards concerning legal aid, health and psychological assistance (Tarakhel v. Switzerland). Furthermore, the latter case law enforces States which want to expulse asylum-seekers to another State to check compliance of the destination State with human rights safeguards. Finally, the Court imposes a “fair balance” (Nunez v. Norway) between the best interest of the child and the best interest of the State, which minimizes the State’s margin of appreciation concerning unaccompanied minors. The case law by the Court is moreover supported by the European Social Charter and various non-binding legal recommendations which argue in favour of the best interest of the child and the cooperation between States and international organisations. In the same context of the protection of unaccompanied minors, the European Union inserted the best interest of the child principle in Article 24 of the European Charter of Fundamental Rights. As a result, the latter Article 24 can be presented as being directly influenced by the Convention on the Rights of the Child as important principles such as the best
interest of the child, the right to a family life and the right to be heard are included. Besides the inclusion of the principle in its primary law, the European Union took care to implement the principle in various Directives touching upon asylum regulations. In this light, the Qualification Directive took care to give a precise definition on the term of “unaccompanied minor”. Moreover, the Qualification Directive and the Reception Directive implement safeguards for the best development of the unaccompanied minor. Thus, the protection of the minor includes adequate living, health care, psychological assistance to promote the its social and moral development. To ensure the respect of the best interest of the child, the access to legal aid in pending procedure needs to be assured. One realises, that contrary to the ECHR, the European Union provided with explicit provisions in its legal framework. Yet, both institutions created a solid ground for the respect of the best interest of the child and the protection of unaccompanied minors. The result is a legal framework which leaves little space for interpretation.

Despite the nearly flawless implementation of the best interest principle into European law, not every legal area for asylum-seeking unaccompanied minors is covered. As such, one could say that the Refugee Convention lacks protection as it applies universally to adults and children. Unaccompanied minors, which need to apply for International Protection often find it difficult to formulate and explain the reason for their demand. In the same sense, Article 1(F) of the Refugee Convention does not dwell on explicitly mentioning minors when referring to the exclusion of people involved in criminal activities. There again, a punctual child-related paragraph would avoid that former forced child-soldiers would be excluded from applying to International Protection. The difficulty in the International Protection application further increases when authorities carry out age assessment procedures. These days, the body works as a universal identity card. The problem with this approach is that a needs-based approach, which would include a holistic assessment of the unaccompanied minor is not carry out by authorities since no international consensus on age assessment procedures exist. A standardized approach among European States would allow to set precise conditions on the interference of state authorities with the body of the minor which would apprehend its best interest. Further, a European consensus on the detention of unaccompanied minors would avoid a methodical recourse. As before-mentioned, the systematically approach of detention of unaccompanied minors in an irregular situation, enhances their already present trauma. Thus, besides the conditions present in the Directives, a standardized approach among national authorities would clarify the conditions and underline the importance of the best interest of the minor. The clarification of such measures, would in the same way influence the approach of national court in relation to pending asylum-decisions. As shown by the case study of the Netherlands, although specific safeguards concerning the guardianship have been established, an obligatory best interest assessment is still missing. The result is a blurry jurisprudence of the Dutch Council of State, in which the Convention on the Rights of the child is only partially included. It follows from the Dutch case law that the Council of State preferably refers to the ECHR instead of directly referring to the CRC when confronted with the best interest of the State. The reluctance of the Dutch authorities to correctly implement the best interest of the child cannot only be shown by approach of the Council of State, but
moreover by the method of the IND. The latter institution, which is responsible for the asylum procedure of the minor, only hesitantly applies best interest assessments when confronted with unaccompanied minors. The Netherlands are a good example to demonstrate the problematic relation between the best interest of the child and the best interest of the State. This research has shown that a stable international legal framework, such as the Convention on the Rights of the Child, has only a reduced impact on national regulations. Although the European Court of Human Rights as well as the Directives elaborated by the European Union represent a solid ground for the protection of fundamental rights of unaccompanied minors, the margin of appreciation of national authorities is still too considerable. Thus, punctual provisions such as special procedural safeguards need to be included in national law in order to apprehend the problem of asylum-seeking minors correctly. This would not only include the creation and implementation of child-related provisions into national law, but moreover, would introduce obligatory best-interest assessments of children which illegally crossed the border. Such a best-interest assessment would not only refer on the age of the unaccompanied minor but focus on a holistic appreciation of the situation. Lastly, to realise the respect of the best interest of the child, it seems essential to propose a standardized asylum approach across the Member States of the European Union. Such an approach would not only facilitate asylum procedures but would furthermore guarantee the respect of fundamental rights and restrict arbitrary behaviour of States. As the Secretary-General of the UN, António Guterres has put it: “For an age of unprecedented mass displacement, we need an unprecedented humanitarian response and a renewed global commitment to tolerance and protection for people fleeing conflict and persecution”\textsuperscript{154}.

\textsuperscript{154}Ralf Rosskopf, Unaccompanied Minors in International and National Law, Berliner Wissenschafts-Verlag, p.9
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