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MIGRANT CHILDREN IN THE CONTEXT OF CHILD RIGHTS CONVENTION

Master thesis

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### **LIST OF ABBREVIATIONS**

CRC – Convention on the Rights of the Child

ECHR – European Convention on Human Rights

EU – European Union

IOM – International Organization for Migration

RC – 1951 Convention Relating to the Status of Refugees

UNCRC – Committee on the Rights of the Child

UNICEF – United Nations Children's Fund

UNHCR – United Nations High Commissioner for Refugees

## INTRODUCTION

### Problem of research.

According to the World Migration Report 2020, there were 37.9 million migrants under the age of 20 in 2019, 14 per cent of the world's migrants. After analyzing the number of migrant children over the past 20 years (2000 – 27,8 millions, 2005 – 29,8 millions, 2010 – 31,9 millions, 2015 – 34,5 millions, 2019 – 37,9 millions), it can be concluded that these indicators are growing significantly<sup>1</sup>. Currently, not only quantitative growth but also the situation of migrant children has become more complicated.

States at the level of the United Nations and International Law have declared the need and further protection of migrant children. There was emphasizing that the primary document on protecting the rights of children, even in conditions of migration, must be the CRC:

[w]e will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child. This will apply particularly to unaccompanied children and those separated from their families; we will refer their care to the relevant national child protection authorities and other relevant authorities. We will comply with our obligations under the Convention on the Rights of the Child [...].<sup>2</sup>

Despite the obligation of states at the international level to protect migrant children to a greater extent, since due to age, biological, psychological, etc. characteristics they are more vulnerable than adults, migrant children still face a lot of difficulties. Thus, children in situations of migration are often at risk<sup>3</sup>. They are often subjected to sexual or economic exploitation, human trafficking, various types of detention, and other challenges, connected with their natural vulnerability<sup>4</sup>. Unaccompanied children may be denied access to asylum procedures. There are still no special provisions allowing migrant children to enjoy all the rights and freedoms of child citizens in some countries. As a result, they are subject to discrimination in comparison with other children and do not have access to food, housing, health care, education, and other rights and benefits<sup>5</sup>.

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<sup>1</sup> “World Migration Report 2020: Chapter 8 Children and Unsafe Migration”, International Organization for Migration, Accessed 10 February 2020, <https://publications.iom.int/books/world-migration-report-2020-chapter-8>.

<sup>2</sup> “Resolution adopted by the General Assembly on 19 September 2016”, United Nations, Accessed 03 November 2019, [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/1](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1).

<sup>3</sup> “Side Event prior to the United Nations Day of General Discussion (DGD) on “The rights of all children in the context of international migration”, Platform for International Cooperation of Undocumented Migrants, Accessed 26 April 2020, <https://picum.org/children-and-irregular-migration/>.

<sup>4</sup> “UNICEF’s Agenda for Action for Refugee and Migrant Children”, United Nations Children's Fund, Accessed 01 May 2020, <https://www.unicef.org/eca/emergencies/unicefs-agenda-action-refugee-and-migrant-children>.

<sup>5</sup> “Vulnerability of unaccompanied and separated child migrants”, European Parliament, Accessed 15 March 2020, [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2016\)595853](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)595853).

In addition, migrant children are often deprived of housing, food and standard living conditions that meet their age characteristics<sup>6</sup>. Due to the fact that many children migrate without documents, they can be discriminated against, and it is sometimes challenging for them to establish their identity by restoring documents and restoring contact with their families. In some cases, such children are simply deprived of the right to refugee status<sup>7</sup>.

While almost all of these issues are affected and regulated by the CRC, these problems of migrant children remain unresolved or are not being addressed effectively. The main questions of the master thesis are: a) how the CRC protects children in conditions of migration (on the examples of family reunification of migrant children, refugee and asylum-seeking children and detention of migrant children) and, b) whether this protection is sufficient or not so to resolve the underlying problems that migrant children have.

### **Relevance of the final thesis.**

“Migration is considered to be one of the defining global issues of the early 21st century, as more and more people are on the move today than at any other point in human history.”<sup>8</sup>

Human migration, in general, and child migration, specifically, have a long history, but the words, which were taken from the New York Declaration for Refugees and Migrants, adopted by the Resolution of General Assembly of the United Nations on 19 September 2016, is only small evidence of the thesis that the problem of migration is one of the most pressing challenges of our time:

[w]e are witnessing in today's world an unprecedented level of human mobility. More people than ever before live in a country other than the one in which they were born. Migrants are present in all countries in the world. Most of them move without incident. In 2015, their number surpassed 244 million, growing at a rate faster than the world's population. However, there are roughly 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons.<sup>9</sup>

Unfortunately, there is no specific information about the children who are migrants in this quote.

That is why, many of migrant children are forced to live in difficulties because of the problems they face. Indeed, some of these children migrate to safe conditions for themselves,

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<sup>6</sup> “Migration and Children”, United Nations Children's Fund, Accessed 01 May 2020, <https://www.unicef-irc.org/article/606-migration-and-children.html>.

<sup>7</sup> “A home away from home for refugee and migrant children”, United Nations Children's Fund, Accessed 01 May 2020, [https://www.unicef.org/eca/sites/unicef.org/eca/files/A\\_home\\_away\\_from\\_home\\_29\\_08\\_2016.pdf](https://www.unicef.org/eca/sites/unicef.org/eca/files/A_home_away_from_home_29_08_2016.pdf).

<sup>8</sup> Danguolē Seniutienē, “The challenges of migration and critical issues”, *Border security and management = Robežu drošība un pārvaldība : 6th international scientific and practical conference, 11-12.05.2016. Journal of internal security and civil defence sciences / State Border Guard College, Rezekne Academy of Technologies. Rezekne : State Border Guard College, 1/6 (2016): p. 98.*

<sup>9</sup> “New York Declaration for Refugees and Migrants. Resolution adopted by the General Assembly on 19 September 2016”, United Nations, Accessed 03 November 2019, [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/1](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1).

while the rest migrate vice versa to dangerous situations that require increased attention of adults or state authorities that are obliged to protect migrant children.

Given this, the appropriateness and relevance of the study of child migration, the problems of migrant children and means of their protection in the CRC as in one of the main acts in International Law on the protection of children, is very high.

### **Scientific novelty and overview of the research on the selected topic.**

The relationship of the CRC with migrant children is disclosed fragmentarily in separate works of scientists. There are several researches, written by Jr. A. Glenn Mower<sup>10</sup>, T. Hammarberg<sup>11</sup>, T. Morag<sup>12</sup>, Dominic McGoldrick<sup>13</sup>, Rachel Hodgkin and Peter Newell<sup>14</sup>, Jacqueline Bhabha<sup>15</sup> etc., which devoted to the CRC and its importance for children.

Despite that, it can be seen a lack of investigative works of scholars about the protection of migrant children by the CRC. Only some aspects of the CRC as a protective mechanism for migrant children have been studied. For example, there are some papers of scholars about the protection of refugee children by the CRC: S. Arnold<sup>16</sup>, G. S. Godwin-Gill<sup>17</sup>, Margaret McCallin<sup>18</sup>, Elena Fiddian-Qasmiyeh<sup>19</sup> and others.

Separately, the fundamental book “The Child in International Refugee Law”<sup>20</sup> of J. M. Pobjoy should be mentioned, in which the author describes the importance of the CRC for refugee children and the mechanisms of the CRC, which protect them. However, J. M. Pobjoy in his book considered the RC as the main protective tool for the refugee children, he examined all the components of the concept “a refugee child” precisely under the RC and only mentioned the

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<sup>10</sup> Jr. A. Glenn Mower, *The Convention on the Rights of the Child. International Law Support for Children* (London: Greenwood Press, 1997).

<sup>11</sup> Hammarberg T., “The UN Convention on the Rights of the Child – and How to make it work”, *Human Rights Quarterly*, 12 (1990).

<sup>12</sup> Tamar Morag, “The principles of the UN Convention on the Rights of the Child and Their Influence on Israeli Law”, *Michigan State International Law Review*, Vol. 22:2, 545, <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1139&context=ilr>.

<sup>13</sup> Dominic McGoldrick, “The United Nations Convention on the Rights of the Child”, *International Journal of Law and the Family*, 5 (1991).

<sup>14</sup> R. Hodgkin and P. Newell, *Implementation handbook for the Convention on the Rights of the Child* (UNICEF, 1998).

<sup>15</sup> Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (New Jersey: Princeton University Press, 2014), 8.

<sup>16</sup> Jameson Parker, “Samantha Arnold: Children’s Rights and Refugee Law Conceptualizing Children within the Refugee Convention”, *Journal of Youth and Adolescence*, 47 (2018): 1794.

<sup>17</sup> Guy S. Godwin-Gill, “Who to Protect, How ..., and the Future?”, *International Journal of Refugee Law* 9, 1(1997).

<sup>18</sup> Margaret McCallin, “The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children”, *International Journal of Refugee Law* 3, 1 (1991).

<sup>19</sup> Elena Fiddian-Qasmiyeh et al., *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, University Press), 2014.

<sup>20</sup> Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017).

connection between the RC and the CRC. This thesis will focus more precisely on the CRC as a separate mechanism in International Law to protect the migrant children.

Wherein, there are practically no comprehensive studies about the challenges that migrant children face when they are trying to reunite with their families and how the CRC protects children during these processes. The scientific novelty of this study becomes evident, since it has not been the subject of thoroughly studied research by scientists.

#### **Significance of research.**

The theoretical importance of this scientific research lies in the disclosure and refinement of the provisions of the CRC regarding the protection of migrant children. The main theoretical conclusions and materials that became its basis can be used in the development of conceptual ideas about the international legal protection of the rights of migrant children. They also can be useful in solving the problems faced by children in the conditions of migration.

The practical significance of this master thesis is that an attempt in this research to define the concept of ‘migrant children’, which is not enshrined in International Law, some aspects and analysis can be used in the drafting process of new legal acts in International Law or national legal systems in the field of migrant children.

Particular conclusions of the thesis can be used in the practical activities of specialists in the field of migration law and the protection of human rights, as well as in higher education institutions in such courses as International Human Rights Law, International or European Migration Law, Refugee Law.

The recommendations can help to the legislator to improve the situation of migrant children by amending or through broad interpretations of certain acts of International Law, namely the CRC, and the EU.

#### **The aim of research.**

The research aims to examine the role of the CRC in the legal regulation of migrant children through a comprehensive analysis of the relevant articles of the Convention and legal problems related to the migrant children.

#### **The objectives of research.**

The main objectives of the research are the following:

1. to specify the genesis, notion, content and scope of the concept ‘migrant children’ in International Law;
2. to analyze comprehensively what place among other international legal documents and what significance the CRC has in the framework of the protection of migrant children;

3. to examine the notion, normative consolidation and weight of the best interests of the child principle in the context of the protection of migrant children in the CRC;
4. to consider how the CRC protects rights and freedoms of migrant children in such problematic situations, as family reunification and detention of migrant children;
5. to outline the level of protection of refugee and asylum-seeking children in the CRC.

### **Research methodology.**

The basis of the research is constituted of the following methods. The statistical method allowed to investigate dynamics of legal regulation in the number of migrant children over the past 20 years. The general scientific dialectic method allowed to determine the notion and scope of the basic concepts and categories, for example, ‘migrant children’ or ‘unaccompanied migrant children’, and highlight the conceptual aspects of the research topic. The formal legal and linguistic methods were used to analyze international treaties and other international legal acts, especially, the CRC, case-law, comments (legal position) of Committee on the Rights of the Child etc. The comparative legal method allowed to identify similarities and differences in approaches to legal regulation of the protection of migrant children in researches of different scholars. The critical method was used in order to consider the personal opinion of the author on the set topic and the problems of the research. The widespread use of logical methods permitted to generalize conclusions.

### **Structure of research.**

The master thesis is divided into the following parts: introduction and two substantial parts that are separated into smaller sections, conclusions and recommendations, bibliography and summary.

The first chapter “Situating the Migrant Children in International Law” is part, where the basic concepts of the topic of the thesis, considered the place of the CRC among the list of legal instruments, which have a task to protect children during migration and analyzed the role of the best interests of the child principle among the general principles of protection of migrant children under the CRC were examined.

The second chapter “Some Problematic Aspects of Migrant Children and Their Solution in the Convention on the Rights of the Child” is part, where the three most spread challenges of the migrant children were examined. This chapter included the problematic aspects: 1) unity and reunification of migrant children with their families and guarantees under the Articles 9 and 10 of the CRC; 2) special protection of the category of refugee and asylum-seeking children in Article 22 of the CRC; 3) detention of children due to their immigration status and their protection under the Article 37 of the CRC.



Conclusions contain results of the thesis and recommendations illustrate the ways of increasing the effectiveness of the CRC in the legal regulation of migrant children.

**Defence statements.**

1. The Convention on the Rights of the Child is an effective legal instrument in the framework of the protection of migrant children among other international legal documents.
2. Legal problems, which migrant children have, could be addressed through the best interest of the child principle, which is enshrined in the Convention on the Rights of the Child.
3. The international bodies expand the protective mechanisms of the Convention on the Rights of the Child in relation to migrant children beyond the literal provisions of the Convention.

## CHAPTER 1. SITUATING THE MIGRANT CHILDREN IN INTERNATIONAL LAW

In this chapter, a concept of migrant children will be defined and a problem of international protection of migrant children from the perspective of historical development till nowadays will be outlined. The place of the CRC among the list of legal instruments, which have a task to protect children during migration, will be examined. At the end, the weight the best interests of the child principle has among the general principles of protection of migrant children under the CRC will be analysed.

### 1.1. Notion of the Concept 'Migrant Children'

An age criterion is determining and inalienable in the concept of a child due to physical and mental immaturity, the child needs to be presented with special rights and additional protection. Since migrant children are even more in danger than other categories of children, the importance of their legal protection is greatly increasing. Despite the fact that child migration is contemporary phenomenon, International Law did not regulate directly the protection of migrant children separately from adults till the adoption of the CRC in 1989, since it was believed that they are always attached to parents or other older people, who are legally replacing parents (adoptive parents or other entities, such as special educational authorities, etc.), which should provide them with rights and protection. It is understandable that it was not very correct because children are human beings and therefore entitled to the same human rights that adults have, their youth means that they are also entitled to other rights that adults don't have or need<sup>21</sup>.

At the same time, the provisions about the relevance of protecting children were nevertheless included in some acts of International Law. In 1924, the Fifth League of Nations Assembly adopted the Declaration of the Rights of the Child, where it was declared, that “the child must be the first to receive relief in times of distress”<sup>22</sup>. However, the 1924 Geneva Declaration did not proclaim the specific rights of migrant children, it was in abstract form. Still, this international document fulfilled the main task: for the first time at the international level, and attention was drawn to the need for special protection of children and care for them<sup>23</sup>.

There were also provisions about the special protection measures for children in para. 2 of Article 25 of Universal Declaration of Human Rights: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall

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<sup>21</sup> Paula Gerber, “What Rights Do Children Have Under International Law?,” Accessed 03 November 2019, <http://web.b.ebscohost.com/skaietykla.mruni.eu/ehost/detail/detail?vid=0&sid=f7149b5a-5685-40c3-b8a9-3c17addb141f%40pdc-v-sessmgr01&bdata=JnNpdGU9ZWWhvc3QtbGl2ZQ%3d%3d#AN=32059985&db=a9h>.

<sup>22</sup> “Geneva Declaration of the Rights of the Child,” UN Documents, Accessed 05 November 2019, <http://www.un-documents.net/gdrc1924.htm>.

<sup>23</sup> Н. Н. Неровная, “Обеспечение и защита прав ребенка на международном уровне”, *Вестник Челябинского государственного университета*, 27 (2013): 38.

enjoy the same social protection”<sup>24</sup>. Two International Covenants of 1966 also included special provisions of children’s protection: para. 1 of Article 24 of International Covenant on Civil and Political Rights: “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”<sup>25</sup>; and para. 3 of Article 10 of International Covenant on Economic, Social and Cultural Rights: “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law”<sup>26</sup>.

In the 1959 Declaration of the Rights of the Child, which was adopted by the United Nations, the provision that children need “special protection” was singled out as a separate principle No. 2<sup>27</sup>. It can be seen that the 1959 Declaration has become more extensive for the protection of children, including the category of migrant children. However, reading this Declaration, it can be supposed that the main subject of rights were not children, but were adults, parents, non-governmental organizations, states and other actors, who must protect children. That is why children were not still as ‘bearers of rights’.

Indeed, in parallel with the international protection of human rights, the international protection of the rights of children were developing. Finally, when the United Nations realized the need to create a separate legal instrument specifically for protecting children, the CRC was adopted in 1989. The most important achievement of the CRC was resolving the question of the legal definition of the concept of ‘child’ at the universal level and about all areas of the protection of children. The meaning of ‘the child’, which is obligatory for 196 states-parties of the CRC<sup>28</sup>, declares that “a child is every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier”<sup>29</sup>.

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<sup>24</sup> “Universal Declaration of Human Rights”, United Nations, Accessed 05 November 2019, <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>25</sup> “International Covenant on Civil and Political Rights”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>26</sup> “International Covenant on Economic, Social and Cultural Rights”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

<sup>27</sup> “Declaration of the Rights of the Child (1959)”, The Circumcision Reference Library, Accessed 05 November 2019, <http://www.cirp.org/library/ethics/UN-declaration/>.

<sup>28</sup> “11. Convention on the Rights of the Child”, United Nations Treaty Collection, Accessed 05 November 2019, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en).

<sup>29</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

There is no universal definition of the minor immigrant, at an international level. According to the United Nations High Commissioner for Refugees the minor immigrant is defined as the: „child under 18 years of age – only if, in accordance with the legislation applying to the minor, the legal age was not reached before – separated from his parents and who is not under the guardianship of an adult who, based on the usual law, is responsible for him.”<sup>30</sup>

According to Article 2 of the CRC, “states shall respect and ensure the rights of the CRC to each child within their jurisdiction without any kind of discrimination”<sup>31</sup>. It means that the CRC covers all children, including migrant children. It was also confirmed by the General Comment №6 of the UNCRC: “The principle of non-discrimination [...] prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.”<sup>32</sup>

It should be noted that the CRC separately mentions some groups of children who are in especially difficult situations: children who are seeking refugee status or who are considered refugees (Article 22); disabled children (Article 23); children deprived of liberty (Article 37); children in armed conflict and emergency situations (Article 38). No doubt, that his highlighting of certain categories of children will not be a violation of the principle of non-discrimination, but rather emphasizes the fact that these children are more vulnerable and need in-depth protection.

In order to establish the scope of the concept ‘migrant children’, it is now necessary to establish the concept and scope of concepts ‘migrant’ and ‘migration’ under International Law. Defining this concept is very difficult because it is considered through the prism of sociology, geography, law, demography, statistics, and other sciences.

The Oxford Learner’s dictionary provides that “migration is the movement of large numbers of people from one place to another”<sup>33</sup>. The other Oxford dictionary expands this definition of the reason that people migrate “to find work or better living conditions”<sup>34</sup>.

P. Kok defined the migration as ‘controversial activity’, which includes the movement of people over some distance (or at least from one “migration-defining area” to another) and from one “usual place of residence” to another. He added that migration is best defined (in

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<sup>30</sup> U.N.H.C.R., Refugee Children: guidelines on protection and care, Geneva, 1994, quoted in Andy Corneliu Pusca, “The minor immigrant and the effects of juvenile migration in Europe”, *Acta Universitatis Danubius: Juridica* 11, 3 (2015): 7.

<sup>31</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>32</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

<sup>33</sup> “Migration”, Oxford Learner’s Dictionaries, Accessed 11 November 2019, <https://www.oxfordlearnersdictionaries.com/definition/english/migration?q=migration>.

<sup>34</sup> “Migration”, Lexico, powered by Oxford, Accessed 11 November 2019, <https://www.lexico.com/en/definition/migration>.

general terms) as the crossing of a spatial boundary by one or more persons involved in a change of residence<sup>35</sup>.

O. Vorobyova and A. Topilin explained the migration as territorial displacements, but only those displacements that are associated with a change in the place of residence (change in the state, region, or locality in which a person, family or other, the broader community of people lives). The main sign of population migration is the change in people's place of residence, which can be permanent, long-term, or temporary<sup>36</sup>.

According to B.R.K. Sinha's treatise "Human migration: concepts and approaches", migration is one of the most critical and complex components of population change. He defined migration as the physical transition of an individual or a group from one society to another, which usually involves abandoning one social setting and entering another different one. Consequently, Sinha concluded that the definition of migration remains inconclusive, but it always includes such obligatory elements as residential change (preferably permanent), distance travelled, place of birth, kind of boundary crossed, the intention of stay and length of time spent in the new place or residence area<sup>37</sup>.

There is no universal definition of migration in International Law. IOM published that migration is "the movement of persons away from their place of usual residence, either across an international border or within a State"<sup>38</sup>. IOM also explains, that migrant is "a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons"<sup>39</sup>.

"The Special Rapporteur of the Commission on Human Rights has proposed that the following persons should be considered as migrants:

- Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State;
- Persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of refugee, naturalised person or of similar status;

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<sup>35</sup> Pieter Kok, "The definition of Migration and its application: making sense of recent South African Census and survey data", *SA Journal of Demography* 7, 1(1999): 19, [https://www.commerce.uct.ac.za/Organisations/Demography/SA\\_Journal\\_of\\_Demography/SAJD/Volume%207/SA\\_JDem\\_1999\\_7\\_1\\_Kok.pdf](https://www.commerce.uct.ac.za/Organisations/Demography/SA_Journal_of_Demography/SAJD/Volume%207/SA_JDem_1999_7_1_Kok.pdf).

<sup>36</sup> Воробьева О.Д. и Топилин А.В., *Миграционное движение населения: теория, политика, практика, перспективы* (Москва: Московский психолого-экономический институт, 2013), 12.

<sup>37</sup> B.R.K. Sinha, "Human Migration: concept and approaches", *Földrajzi Értésítő LIV.*, Évf. 3-4 (2014): 403, [http://www.mtafi.hu/konyvtar/kiadv/FE2005/FE20053-4\\_403-414.pdf](http://www.mtafi.hu/konyvtar/kiadv/FE2005/FE20053-4_403-414.pdf).

<sup>38</sup> "Key Migration Terms", International Organization for Migration, Accessed 15 November 2019, <https://www.iom.int/key-migration-terms>.

<sup>39</sup> Ibid.

- Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements.”<sup>40</sup> Under this proposition, the scope of 'migrant' does not include refugees, asylum seekers, forced migrant and so on, that makes this definition very narrow. This proposal applies to migrant children too.

Contrary to the above, Hans van de Glind and Anne Kou wrote that there are five main groups of reasons for migration, including children migration: economic push factors, education, gender and cultural reasons, personal push factors and emergencies<sup>41</sup>.

However, the 2010 Working Paper by International Labour Organization listed conflict, natural disaster and the resulting search for safety and better opportunities as the main reason why children migrate<sup>42</sup>. Consequently, they expand the scope of 'migrant children'.

Moreover, S. Castles in his paper "International migration at the beginning of the twenty-first century" tried to include all types of migration and then brought a complete, at our discretion, categorization of the concept of "migrant child", which, among other categories, includes:

- irregular migrants – “people, who enter a country, usually in search of employment, without the necessary documents and permits”<sup>43</sup>;
- forced migration – “in a broader sense, this includes not only refugees and asylum seekers but also people forced to move due to external factors, such as environmental catastrophes or development projects”<sup>44</sup>;
- family members – “people sharing family ties joining people who have already entered an immigration country under one of the above mentioned categories”<sup>45</sup>;
- return migrants – “people who return to their countries of origin after a period in another country”<sup>46</sup>.

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<sup>40</sup> “Report on the Human Rights of Migrants submitted by the Special Rapporteur of the Commission on Human Rights (9 August 2002)”, United Nations, Accessed 16 November 2019, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjdr-346bPnAhVus4sKHfdNARoQFjAAegQIBBAB&url=https%3A%2F%2Fwww.iom.int%2Fjahia%2Fwebdav%2Fshared%2Fmain%2Fpolicy\\_and\\_research%2F%2F57%2FA\\_57\\_292\\_en.pdf&usg=AOvVaw2F-Z4XDD6c\\_ExBfhcftDCe](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjdr-346bPnAhVus4sKHfdNARoQFjAAegQIBBAB&url=https%3A%2F%2Fwww.iom.int%2Fjahia%2Fwebdav%2Fshared%2Fmain%2Fpolicy_and_research%2F%2F57%2FA_57_292_en.pdf&usg=AOvVaw2F-Z4XDD6c_ExBfhcftDCe).

<sup>41</sup> Hans van de Glind and Anne Kou, “Migrant children in child labour: A vulnerable group in need of attention”, Chapter 4 of the publication “Children on the Move”, IOM, (2013): 30-31, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwi8n6LR6rPnAhVQxosKHXL-C6cQFjAAegQIARAB&url=http%3A%2F%2Fwww.ilo.org%2Fippecinfo%2Fproduct%2Fdownload.do%3Ftype%3Ddocument%26id%3D23755&usg=AOvVaw0v64Y7xnoI0zwAlc9mWAXb>.

<sup>42</sup> Ibid, 32.

<sup>43</sup> S. Castles, "International migration at the beginning of the twenty-first century", *International Social Science Journal*, 52 (2000): 270-271, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/issj.12185>.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

In Emergency handbook of the UNHCR was enshrined, that the term 'migrant' is “increasingly used as an umbrella term to refer to any person who moves away from their usual place of residence, whether internally or across a border, and regardless of whether the movement is 'forced' or voluntary”<sup>47</sup>. “ ‘Migrant’ is thereby used as a neutral term to describe a group of people who have in common a lack of citizenship attachment to their host country. It is without prejudice to the protection regimes that exist under International Law for specific legal categories of people, such as refugees, stateless persons, trafficked persons and migrant workers”<sup>48</sup>.

The IOM in its 2020 World Migration Report also did not bypass the scope of the concept ‘migrant children’

The migration of children includes both journeys where children accompany adult relatives and situations where children need to undertake journeys alone; it includes situations that result in enduring improvements to the quality of children’s lives, in terms of educational opportunity or familial security, and situations where exposure to exploitation or risk leads to enduring trauma. [...] International child migration includes children who travel for family reasons, for safety or survival, at the behest of traffickers, for opportunity, and frequently for more than one of those reasons<sup>49</sup>.

The Report also includes the categories of migrant children that also need protection: separated children from their families because of wars, famine and environmental disaster; children – victims of human trafficking; unaccompanied children<sup>50</sup>. At the same time, the IOM does not consider the division of child migration into “forced” or “voluntary”, replacing it with the concept of "children on the move”<sup>51</sup>. It is notable that it is very logical, because when, for example, parents migrate, they probably would not ask or seek advice from their children or if even the child is unaccompanied and migrates from one state to another because of war, it would not be a voluntary migration. Due to his age, children will not think about whether he wants or he need to migrate, other older people will think for him or it will follow because of the situation in his country (war, crisis, etc.).

The term “children in migration” was also determined during 10th European Forum on the rights of the child in 2016:

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<sup>47</sup> “Migrant definition”, United Nations High Commissioner for Refugees, Accessed 17 November 2019, <https://emergency.unhcr.org/entry/44937/migrant-definition>.

<sup>48</sup> “Differentiation between migrants and refugees”, United Nations Human Rights Office of the High Commissioner, Accessed 15 November 2019, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf>.

<sup>49</sup> World Migration Report 2020: Chapter 8 Children and Unsafe Migration”, International Organization for Migration, Accessed 10 February 2020, <https://publications.iom.int/books/world-migration-report-2020-chapter-8>.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.



[a]ll (*one*) country national children who migrate from their country of origin to and within the territory of (*another country*) in search of survival, security, improved standards of living, education, economic opportunities, protection from exploitation and abuse, family reunification or a combination of these factors. They may travel with their family or independently (unaccompanied child) or with an extended family or a non-family member (separated child). They may be seeking international protection, family members, dependents of labour migrants, victims of trafficking, and/or undocumented migrants.<sup>52</sup>

Futhermore, it should also be noted some categories of migrant children, which are considered as the most vulnerable. First of all, this is about refugee children, because “while a clear majority of the world’s migrants are adults, children now comprise half of all refugees”<sup>53</sup>. The category of refugee children will be examined in the Chapter 2.2.

These categories should include separated children and unaccompanied minors. Human Rights Watch explained their vulnerability

[t]he thousands of unaccompanied children arriving in foreign lands without parents or care-givers find themselves ‘trapped in their status as migrants, with officials giving little consideration to their vulnerabilities and needs as children. They may be denied access to adequate medical services and education, abused and mistreated by police, guards, and other detainees, and unable to seek asylum. They may languish in jail-like detention facilities, in conditions that are often degrading and inhumane, and many children are held in cells with adults who are strangers. Children held in detention, particularly for long periods with no release in sight, suffer lasting consequences, physically and mentally.’<sup>54</sup>

The legal meaning of these categories of migrant children can be found in the General Comment No 6 of the UNCRC “Treatment of unaccompanied and separated children outside their country of origin”: “unaccompanied children (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so” and “separated children are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members”<sup>55</sup>.

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<sup>52</sup> “General background paper of 10th European Forum on the rights of the child “The protection of children in migration” (29-30 November 2016)”, EU European Commission, Accessed 16 February 2020, [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=34456](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34456).

<sup>53</sup> “Uprooted. The growing crisis for refugee and migrant children”, United Nations Children's Fund, Accessed 16 February 2020, <https://www.unicef.org/videoaudio/PDFs/Uprooted.pdf>.

<sup>54</sup> “Vulnerability of unaccompanied and separated child migrants”, European Parliament, Accessed 15 March 2020, [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2016\)595853](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)595853).

<sup>55</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.



Summarizing all the abovementioned, the term ‘migrant children’ could be interpreted as human beings below the age of eighteen years, who, because of some reasons away, voluntary or involuntary moves from their place of usual residence across the state border or not, for a short period of time or permanently. As the concept ‘migrant children’ is narrower, than the concept of ‘children’, all legal instruments, which regulate children rights, apply to the rights of migrant children. The concept of ‘migrant children’ may be used as a comprehensive concept, which may include refugees, asylum seekers, economic migrants, labour migrants, separated children or unaccompanied minors, temporary or permanent migrants and so on.

## **1.2. Importance of the Convention on the Rights of the Child in the Legal Protection of Migrant Children**

Previously, to combine all rights of children was needed to examine a large number of documents relating to various areas of law. The agreement within the United Nations to draft a specific convention on children’s rights was reached in the late 1970s. In 1989, after 10 years of drafting, a comprehensive list of human rights relating to children was adopted<sup>56</sup>. The CRC, which was adopted by the United Nations General Assembly in 1989 and entering into force in 1990, is the main object of our thesis.

The CRC consists of 54 articles, and includes a list of children's rights, which are applicable to the migrant children too. Articles of CRC are expressed in basic rights, an approach and treatment to children, their survival, protection and development and their place in society.

Moreover, the children’s rights under the CRS are not subject to derogation in times of emergency, that is very important, concerning migrant children. The UNCRC underlines in its report:

[...] States parties have undertaken to respect and ensure all the rights set forth therein to all children within their jurisdiction (Article 2). States parties have also made a commitment to adopt all appropriate measures in order to achieve such a purpose (Article 4) and that, in all actions taken, the best interests of the child shall be a primary consideration (Article 3). None of these general provisions admit a derogation in time of war or emergency.<sup>57</sup>

A. Glenn Mower emphasized that the CRC's significance lies first in the fact that it breaks new ground by being the first global instrument to explicitly recognize the child as

<sup>56</sup> A. Eide et al., *Economic, Social and Cultural Rights*, 2<sup>nd</sup> ed. (Netherlands: Kluwer Law International, 2001), 353-372.

<sup>57</sup> “Committee on the Rights of the Child. Report adopted by the Committee at its 46th Meeting, on 9 October 1992.”, Accessed 15 November 2019, <http://webcache.googleusercontent.com/search?q=cache:K1IIYbwrYcAJ:docstore.ohchr.org/SelfServices/FilesHandler.ashx%3Fenc%3D6QkG1d%252FPPRiCAqhKb7yhstNhF5cEWxGUyayaCeBK2fdFqxQKib3j3e2uM4Zy5PSacw9nhSNbDfyQXGJ9PFs%252BP0ewJqO0VKglGjDJWXYoiI8%253D+&cd=1&hl=ru&ct=clnk&gl=pl&client=safari>.

possessing rights that states parties undertake to "respect and ensure"<sup>58</sup> (Article 1). The status, thus, accorded the child and his or her rights reflects the realization that the child is a particularly vulnerable member of society and, therefore, requires and deserves special protection<sup>59</sup>.

The CRC recognized that all children around the world have their rights as a vulnerable group "by reason of his physical and mental immaturity"<sup>60</sup> (Preamble to the CRC) and that each state must protect these rights. "The CRC represents a radical shift away from the conception of a child as a passive dependent tethered to a parent, evident in the earlier, largely protectionist instruments, which focused attention on a child's need to be cared for".<sup>61</sup>

The authors of the CRC did not identify any groups or generations of human rights. It can be seen that it is possible to highlight rights that are guaranteed in the CRC, by the following spheres:

- 1) civil rights – right to life (Article 6), right to name and nationality (Article 7), right to preserve identity (Article 8), prohibition of torture (Article 37), right to protection from all forms of violence, abuse or sexual exploitation (Article 19, 34), right to privacy (Article 16) and so on;
- 2) political rights – the right to express views (Article 12, 13), the right to freedom of thought, conscience and religion (Article 14), the rights to freedom of association and to freedom of peaceful assembly (Article 15);
- 3) socio-economic rights – right to education (Articles 28, 29), right to health protection (Article 24), right to social security (Article 26), protection from economic exploitation (Articles 32, 36);
- 4) cultural rights – the right to rest and leisure, to engage in play and recreational activities (Article 31).

"Democratic states tend to integrate immigrants by offering them and their children citizenship"<sup>62</sup>. The CRC provides all list of these rights, that migrant children need.

It must be pointed out that the including of the CRC not only civil and political groups of rights, but socio-economic and cultural rights of migrant children is very vital. Many places and countries where children migrate do not have a foundation for accepting migrants. Namely, local population may not know the language, schools may not be ready to teach such children in

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<sup>58</sup> "Convention on the Rights of the Child", United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>59</sup> Jr. A. Glenn Mower, *The Convention on the Rights of the Child. International Law Support for Children* (London: Greenwood Press, 1997), 14. (19!)

<sup>60</sup> "Convention on the Rights of the Child", United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. (1!)

<sup>61</sup> Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017), 19.

<sup>62</sup> Stephen Castles, "International migration at the beginning of the twenty-first century: global trends and issues", *International Social Science Journal*, 52 (2000): 278.

their native language, etc. Usually, this is all due to cultural differences, as a result of which a migrant child may be denied access to education, medical care, and other socio-economic and cultural benefits. Julie Park wrote concerning that if these rights are not provided for in International Law, then this can be a long-term problem for migrant children:

[s]chools may be ill-equipped to incorporate children of immigrants who are not proficient in English or are from different backgrounds. For immigrant children specifically, the schools may not be equipped to handle limited or non-English speakers. The schools may also not know how to involve immigrant parents because of linguistic, cultural, or social barriers. Besides the expected difficulty of moving to a new place, these immigrant children may also face a social environment that may be particularly difficult to navigate. [...] Given the strain that all members of the family feel, it can have negative consequences for these children in the longer term.<sup>63</sup>

All the above considered, the CRC has become the international document that combines civil, political, social, economic and cultural rights in one legal instrument, while implying the fact that there is no hierarchy in the rights of children, including migrant children.

Otherwise, some scientists group rights under the CRC. For example, Dr Paula Gerber divided these rights on 4 groups:

- 1) survival rights – the right to life and to have the most basic needs met (e.g., (e.g., adequate standard of living, shelter, nutrition and medical treatment)<sup>64</sup>;
- 2) development rights – the rights enabling children to reach their fullest potential ((e.g. education, play and leisure, cultural activities, access to information and freedom of thought, conscience and religion)<sup>65</sup>;
- 3) participation rights – rights that allow children and adolescents to take an active role in their communities (e.g., freedom to express opinions and to have a say in matters affecting their own lives)<sup>66</sup>;
- 4) protection rights – rights that are essential for safeguarding children and adolescents from all forms of abuse, neglect and exploitation (e.g., special care for refugee children; protection against involvement in armed conflict, child labour and sexual exploitation)<sup>67</sup>.

In some works of T. Hammaberg, we can meet with such “conventional” criteria “3Ps”:

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<sup>63</sup> Steven J. Gold and Stephanie J. Nawyn, *The Routledge International Handbook of Migration Studies* (Routledge: 2013), 317.

<sup>64</sup> Paula Gerber, “What Rights Do Children Have Under International Law?,” Accessed 03 November 2019, <http://web.b.ebscohost.com/skaiytkla.mruni.eu/ehost/detail/detail?vid=0&sid=f7149b5a-5685-40c3-b8a9-3c17addb141f%40pdc-v-sessmgr01&bdata=JnNpdGU9ZWZWhvc3QtbGl2ZQ%3d%3d#AN=32059985&db=a9h>.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

- 1) provision – “rights under the CRC, that ensure the satisfaction of the basic needs of a child” (e.g. right to education, right to health care, right to rest and leisure)<sup>68</sup>;
- 2) protection – “rights under the CRC, that guarantee protection against harmful actions on the child by the family, society” (protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse)<sup>69</sup>;
- 3) participation – “rights under the CRC for independent actions and participations in society” (right to freedom of expression, right to have own opinion)<sup>70</sup>.

Paying more attention to protecting the rights of migrant children, it is necessary to highlight some specific articles of the CRC concerning migrant children. Article 3 of the CRC contains the principle of the best interests of the child, which must be observed in the context of migration. The CRC also proclaims the principle of non-discrimination (Article 2), which is also essential in the context of migrant children.

One of the most fundamental provision, concerning not only migrant children, but all children, is Article 6 of the CRC, which consists of two parts: 1) the inherent right to life of every child; 2) obligation of state to ensure to the maximum extent possible the survival and development of the child<sup>71</sup>. Subsequently, the Committee referred this article to the general principles of the CRC<sup>72</sup>.

Following Article 7 of the CRC, States provide the child with immediate registration after birth, right to name and nationality, which is an automatic protection against statelessness<sup>73</sup>, and therefore, by Article 8, “States undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”<sup>74</sup>.

Also, states shall protect children, including migrant children, from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

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<sup>68</sup> Hammarberg T., “The UN Convention on the Rights of the Child – and How to make it work”, *Human Rights Quarterly*, 12 (1990): 100.

<sup>69</sup> Hammarberg T., “The UN Convention on the Rights of the Child – and How to make it work”, *Human Rights Quarterly*, 12 (1990): 100.

<sup>70</sup> Ibid.

<sup>71</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>72</sup> “Committee on the Rights of the Child. General Comment No. 5. General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)”, United Nations, Accessed 15 November 2019, <https://undocs.org/CRC/GC/2003/5>.

<sup>73</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>74</sup> Ibid.

including sexual abuse (Article 19)<sup>75</sup>. Adding to these provisions, the CRC guarantees any child “temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, be entitled to special protection and assistance provided by the State”<sup>76</sup>(Article 20).

Migrant children are often without parents or other relatives and need new family. Therefore, Article 21, which can be called “The right to adoption” guarantees the child, including the migrant child, that the state recognizes and allows the adoption system with mandatory consideration of the best interests of the child principle. Also, under this Article, states sets standards for adoption, ensuring that the adoption of a child is authorized only by competent authorities. Article 21 devotes great attention to inter-country adoption, which is also important for migrant children who travel from their home country to a foreign country<sup>77</sup>.

The most crucial place for refugee and asylum-seeking children as a separate category of migrant children is occupied by Article 22, which will be examined in detail in the Chapter 2,1.

Guarantee of “the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development”<sup>78</sup>, according to the Article 32, should be included in the legal regulation of migrant children, which are very often exploitable.

It was previously written that the CRC became a document that incorporated some aspects of early international instruments. Confirmation of this is that in Article 37(a), the CRC guarantees that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment<sup>79</sup>, just as proclaimed in Article 7 of the International Covenant on Civil and Political Rights<sup>80</sup>. No less crucial role in the cases of detention of migrant children plays Article 37 (b) of the CRC, where said that “no child shall be deprived of his or her liberty unlawfully or arbitrarily”.

Finally, the CRC established in Article 40 safeguards for children who “alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Article 6: 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. “International Covenant on Civil and Political Rights”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society”<sup>81</sup>. Undoubtedly that this is especially important for migrant children, as they often illegally cross the border of other states, thus violating their criminal or administrative laws.

The other one significance of the CRC was establishing the UNCRC in Article 43, “for the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present CRC.”<sup>82</sup> By introducing such a control mechanism in the CRC, in a way, the authors were convinced and confident that it will be a vital legal instrument that should be implemented and respected correctly. Researching issues of children's rights, it is essential to turn to the General Comments of UNCRC, which are reliable presentation on how states can better deal with implementation, specific problems and challenges of the CRC.

As required by the UN Committee on the Rights of the Child General Comment No 5, 21 states should ensure, by all appropriate means, that the provisions of the CRC are given legal effect within their domestic legal systems. UN Human Rights Treaty bodies (*the UNCRC is one of such bodies*) and UN Special Procedures can play a role in ensuring the protection of the rights of child migrants, including through explicitly recognising trafficking of children for the purpose of exploitation as torture, in their monitoring and enforcement procedures and in all standard setting.<sup>83</sup>

Hans E. Andersson emphasized that the UNCRC by its nature is not a judicial body: “The implementation of the CRC is monitored internationally by a body of independent experts – the UNCRC. The committee is not a court, but to assist states in fulfilling their obligations it describes subjects of concern and gives recommendations”<sup>84</sup>. Continuing the characterization of the legal nature of the UNCRC, it can be added a description by A. Glenn Mower: “The implementary system emerging from the convention's preparatory phase [...] with the main element being a Committee on the Rights of the Child. This committee was created to perform,

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<sup>81</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>82</sup> Ibid.

<sup>83</sup> “A Child Rights Response to Child Migration and Migrant Children at Risk”, The International Bar Association, Accessed 05 November 2019, <https://webcache.googleusercontent.com/search?q=cache:veKzB2J4Wk0J:https://www.ibanet.org/Document/Default.aspx%3FDocumentUId%3Da9e81c7a-56f1-43ca-93ea-091c3e2c8832+&cd=1&hl=ru&ct=clnk&gl=ua&client=safari>.

<sup>84</sup> Hans E. Andersson, “International Conventions and the Regulation of Migration: The Convention on the Rights of the Child and Sweden”, *International Journal of Children's Rights*, 20 (2012): 128.

basically, the functions [...] the ad hoc group [...] related to the United Nations on the Convention on the Rights of the Child.”<sup>85</sup>

Doubtless, the provisions of the CRC concerning migrant children will be "living" and operating norms of International Law only in case, when states implement and comply with them. According to the UNCRC General Comment no. 5, “[s]tates parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems”<sup>86</sup>.

Despite all the positive aspects of the CRC in the regulation of the protection of children and migrant children, in particular, there is still one problematic aspect that can be decisive in the application and compliance of the CRC as a “live” and “non-declarative” international tool. This problem is the formulation by the state-parties of reservations to the CRC, which on the one hand is a recognized practice in International Law, and on the other hand, affects the efficiency of the CRC.

1969 Vienna Convention on the law of treaties permits states to enshrine only provision in Article 19 concerning formulation some reservations in the text of international treaties: “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty [...]”<sup>87</sup>. It means that although authors of the CRC could forbid the right of the state-parties to make reservations to the CRC, there is no such prohibition in Article 51<sup>88</sup> of the CRC. There is only one limitation in para. 2 of Article 51: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted”<sup>89</sup>. Thus, generally, reservations to the CRC are permitted and more than 70 state-parties<sup>90</sup> have made reservations to the CRC today, which indicates that not all countries want to fulfill the full list of undertaken obligations under the CRC.

Some states have made reservations that could potentially threaten the implementation of the CRC relating to migrant children by this state. Using the example of the reservation of Thailand to the Article 22: “The application of articles 22 of the Convention on the Rights of the

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<sup>85</sup> Jr. A. Glenn Mower, *The Convention on the Rights of the Child. International Law Support for Children* (London: Greenwood Press, 1997), 64.

<sup>86</sup> “UNCRC, General Comment No 5 (2003): General Measures of Implementation of CRC (2003), CRC/GC/2003/5”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/docid/4538834f11.html>.

<sup>87</sup> “Vienna Convention on the law of treaties (1969)”, United Nations, Accessed 15 February 2020, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

<sup>88</sup> Para. 1 of Art. 51: 1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession. “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>89</sup> Ibid.

<sup>90</sup> “11. Convention on the Rights of the Child”, United Nations Treaty Collection, Accessed 05 November 2019, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en).



Child shall be subject to the national laws, regulations and prevailing practices in Thailand”<sup>91</sup>, it can be seen, that Thailand made a primacy of its national laws under the CRC, the RC or other International human rights acts concerning children who are seeking refugee status or who are considered as refugees.

If Thailand exalted its legislation only above Article 22, Singapore, in its reservation, has entirely created the primacy of national legislation over the Preamble and the provisions of the Convention: “The Constitution and the laws of the Republic of Singapore provide adequate protection and fundamental rights and liberties in the best interests of the child. The accession to the Convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution”<sup>92</sup>. Thus, it can be concluded that the formulation of such reservations to the CRC can significantly affect the enforcement of the rights guaranteed to migrant children of the CRC and can neutralize the CRC as a whole International act and of some articles in particular.

The CRC allows states to amend the text of the CRC, as described in Article 50: “Any State Party may propose an amendment and file it with the Secretary-General of the United Nations [...]”<sup>93</sup>. Since migrant children are a particularly vulnerable category of children, it would be appropriate to amend Article 51 of the Convention and prohibit countries from formulating reservations concerning migrant children.

Consequently, the importance of the CRC for the migrant children lies in these facts: 1) the CRC contains a complete list of civil, political, economic, social and cultural rights that states are obliged to grant; 2) the CRC requires states to protect children to a greater extent than adults, and at any time, whether peaceful or during an emergency, that is especially important for migrant children; 3) the CRC introduces the special agency – UNCRC – that must monitor how states fulfil their responsibilities under the CRC. The CRC will be more effective if states fulfil all their obligations under this key legal act in the sphere of children’s rights protection.

### **1.3. Best Interests of the Child as the General Principle of Protection of Migrant Children under the Convention on the Rights of the Child**

One of the most significant achievements of the Convention is that it has enshrined the general principles of the protection of children at the international level, which are subsequently

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<sup>91</sup> Ibid.

<sup>92</sup> “11. Convention on the Rights of the Child”, United Nations Treaty Collection, Accessed 05 November 2019, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en).

<sup>93</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.



subject to implementation at the national level. Thomas Hammarberg emphasized that these are basic values about the treatment of the children, their protection and participation in the society<sup>94</sup>.

UNCRC defined four general principles for protecting the rights of children, including migrant children, which are prescribed by the CRC:

- 1) Article 2 – “the obligation of States to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind”<sup>95</sup>;
- 2) Article 3 – “the best interests of the child as a primary consideration in all actions concerning children”<sup>96</sup>;
- 3) Article 6 – “the child’s inherent right to life and States parties’ obligation to ensure to the maximum extent possible the survival and development of the child”<sup>97</sup>;
- 4) Article 12 – “the child’s right to express his or her views freely in “all matters affecting the child”, those views being given due weight”<sup>98</sup>.

The principle that applies in all issues of protecting the rights of children, especially migrant children, is the best interest of the child principle, which is anchored in Article 3 of the CRC: “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”<sup>99</sup>. Ann Estin named this principle as “a powerful directive, with broad implications”<sup>100</sup> for migrant children.

The UNCRC clarifies this article as follows: “[...] the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others”<sup>101</sup>.

The CRC was not the first international instrument to incorporate the principle of the best interests of the child. “The child shall enjoy special protection, and shall be given

<sup>94</sup> A. Eide et al., *Economic, Social and Cultural Rights*, 2<sup>nd</sup> ed. (Netherlands: Kluwer Law International, 2001), 353-355.

<sup>95</sup> “UNCRC, General Comment No 5 (2003): General Measures of Implementation of CRC (2003), CRC/GC/2003/5”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/docid/4538834f11.html>.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>100</sup> Ann Estin, “Child migrants and Child welfare: toward a best interests approach”, *Washington University Global Studies Law Review*, 17 (2018): 593.

<sup>101</sup> “Committee on the Rights of the Child. General Comment No. 14. 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)”, United Nations Human Rights Office of the High Commissioner, Accessed 01 December 2019, [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration”<sup>102</sup> – was manifested in principle 2 of the Declaration of the Rights of the Child (1959). “... [i]t being understood that the interest of the children is the primordial consideration in all cases” and “... in all cases the interests of the children shall be paramount”<sup>103</sup> – were set down in Article 5 and Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (1979).

The CRC also explicitly refers to the child's best interests in other articles: Article 9: separation from parents; Article 10: family reunification; Article 18: parental responsibilities; Article 20: deprivation of family environment and alternative care; Article 21: adoption; Article 37 (c): separation from adults in detention; Article 40, para. 2 (b) (iii): procedural guarantees, including presence of parents at court hearings for penal matters involving children in conflict with the law.<sup>104</sup>

Also, the best interest of the child principle laid down in all optional protocols to the CRC:

1) para. 9 of the Preamble of Optional Protocol to the CRC on the involvement of children in armed conflict: “[a]n optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children”<sup>105</sup>;

2) para. 3 Article 8 of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography: “States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration”<sup>106</sup>;

3) Article 2 of Optional Protocol to the CRC on a communications procedure: “In fulfilling the functions conferred on it by the present Protocol, the Committee shall be guided by

<sup>102</sup> “Declaration of the Rights of the Child (1959)”, The Circumcision Reference Library, Accessed 05 November 2019, <http://www.cirp.org/library/ethics/UN-declaration/>.

<sup>103</sup> “Convention on the Elimination of All Forms of Discrimination against Women (1979)”, United Nations Human Rights Office of the High Commissioner, Accessed 03 December 2019, <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>.

<sup>104</sup> “Committee on the Rights of the Child. General Comment No. 14. 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)”, United Nations Human Rights Office of the High Commissioner, Accessed 01 December 2019, [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

<sup>105</sup> “Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)”, United Nations Human Rights Office of the High Commissioner, Accessed 03 December 2019, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>.

<sup>106</sup> “Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)”, United Nations Human Rights Office of the High Commissioner, Accessed 03 December 2019, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

the principle of the best interests of the child. It shall also have regard for the rights and views of the child, the views of the child being given due weight in accordance with the age and maturity of the child”<sup>107</sup>.

Concerning the law of EU, on the level of primary legislation, the best interest of the child principle is embodied in the Charter of Fundamental Rights of the EU: “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration (para. 2 Article 24)”<sup>108</sup>. Under the “Explanations relating to the Charter of Fundamental Rights”, this article of the Charter of Fundamental Rights of the EU is based on the CRC<sup>109</sup>.

Also, this principle is enshrined in provisions of some secondary legislation of the EU: Article 20 of the 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 the content of the protection granted<sup>110</sup>; Article 6 of the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person<sup>111</sup>; Article 5 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification<sup>112</sup>; Article 5, 10 and 17 of 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

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<sup>107</sup> “Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011)”, United Nations Human Rights Office of the High Commissioner, Accessed 03 December 2019, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx>.

<sup>108</sup> “Charter of Fundamental Rights of the European Union (2012/C 326/02)”, EUR-Lex, Accessed 05 December 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>.

<sup>109</sup> Explanation on Article 24 – The rights of the child: “This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof [...]. “Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)”, EUR-Lex, Accessed 06 December 2019, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29#ntr1-C\\_2007303EN.01001701-E0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29#ntr1-C_2007303EN.01001701-E0001).

<sup>110</sup> “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”, EUR-Lex, Accessed 06 December 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

<sup>111</sup> “Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604>.

<sup>112</sup> “Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0086>.

nationals<sup>113</sup>; Article 11 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection<sup>114</sup>; etc.

The UNCRC notes that: “[t]he fact that the child is very young or in a vulnerable situation (e.g. [...] is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child’s views in determining his or her best interests. The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must [...] ensure their full participation in the assessment of their best interests”<sup>115</sup>.

It should be agreed with Jason M Pobjoy, that the best interest of the child principle is particularly relevant for migrant children: “[...] the CRC, and Article 3 in particular, playing an increasingly significant role in decisions involving the admission or removal of a child from a host State”<sup>116</sup>. He called this principle as “an independent source of protection, that [...] may, for instance, proscribe the removal of a child notwithstanding the fact that the child is not eligible for protection as a refugee or protection under the non-refoulement obligations in international human rights law [...]”<sup>117</sup>. Undoubtedly, even if, according to the laws of this host state, the child does not fall within the concept of international protection, then in his interests he will not be expelled from this country since his welfare will be better here.

The best interests of the child principle, which applies to all children, including, particularly, citizens of a State, foreign nationals, stateless, asylum-seekers or refugees, can be called not only as “an independent source of protection, but as a substantive right (the right of the child to have her or his best interests assessed and taken as a primary consideration), a fundamental, interpretative legal principle (meaning that 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) and a rule of procedure (whenever a decision is made that will affect a specific child, group of children or children in general, the decision-making process must include

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<sup>113</sup> “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”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115>.

<sup>114</sup> “Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>.

<sup>115</sup> “Committee on the Rights of the Child. General Comment No. 14. 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)”, United Nations Human Rights Office of the High Commissioner, Accessed 01 December 2019, [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

<sup>116</sup> Jason M Pobjoy, “The best interests of the child as an independent source of international protection”, *International and Comparative Law Quarterly*, 64 (2015): 328, [http://journals.cambridge.org/abstract\\_S0020589315000044](http://journals.cambridge.org/abstract_S0020589315000044).

<sup>117</sup> Ibid.

an evaluation of the possible impact (positive or negative) of the decision on the child concerned)”<sup>118</sup>.

Continuing Pobjoy’s thought, it will be relevant to mention G.S. Goodwin-Gill, who claims that the best interest of the child principle, which is codified in Article 3 of the CRC, provides a more appropriate basis for assessing the protection needs of at-risk children<sup>119</sup>. This opinion explains that this principle is vital for migrant children because migrant children are always at risk, despite the reasons for their migration and regardless of what status they have.

Overall, states should always adhere to this principle in their migration legislation, namely, in migration policy in general and specifically in matters of decision-making on migrant children.

The UNCRC summarized the practice of states and highlighted the following positive aspects of the application of the principle in relation to migrant children: “access to social rights for all children, irrespective of status (particularly access to education and health care); regularization programs; individual best interests of the child assessments and determinations; the provision of support and services that were sensitive and adapted to age, gender and culture; guardianship arrangements; mechanisms of redress; due process safeguards for children; family tracing and reunification schemes which are centered on the best interests of the child; and, the development of community-based non-custodial arrangements for children (with or without families) as alternatives to detention”<sup>120</sup>. Such positive effects indicate the importance of implementation of the best interest of the child principle and stress that this principle should be given priority in matters of migrant children.

Furthermore, in General comment No. 14 (2013), the UNCRC states that “the flexibility of the concept of the child’s best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development”<sup>121</sup>. The situation with migrant children also falls within this flexibility.

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<sup>118</sup> “UNHCR Guidelines on assessing and determining the best interests of the child (2018)”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/pdfid/5c18d7254.pdf> (page 25).

<sup>119</sup> G. S. Goodwin-Gill, “The United Nations Convention on the Rights of the Child and Its Application to Child Refugee Status Determination and Asylum Processes: Introduction”, *Journal of Immigration, Asylum and Nationality Law* 226, (2012): 228, quoted in Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017), 80.

<sup>120</sup> “Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration (2012)”, United Nations High Commissioner for Refugees, Accessed 10 February 2020, <https://www.refworld.org/docid/51efb6fa4.html>.

<sup>121</sup> “Committee on the Rights of the Child. General Comment No. 14. 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)”, United Nations Human Rights Office of the High Commissioner, Accessed 01 December 2019, [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

Considering the problem of migrant children, it is essential to pay attention to the RC. Under Article 41 of the CRC, the CRC does not deny that issues of children who are seeking refugee status or who are considered refugees will be regulated by the RC<sup>122</sup> and Protocol relating to the Status of Refugees 1967<sup>123</sup>. It should be stressed that it is also one of the demonstrations of the best interest of the child principle, because “the higher standard must always apply”<sup>124</sup>.

The UNHCR, a United Nations agency with the mandate to protect refugees, also did not bypass the best interest of the child principle. Due to its 2008 Guidelines on Determining the Best Interests of the Child, “a best interests determination describes the formal process designed to determine the child’s best interests for particularly important decisions affecting the child, that require stricter procedural safeguards. Such a process should ensure adequate child participation without discrimination”<sup>125</sup>.

The UNHCR in its 2008 Guidelines emphasized that the best interest of the child principle is particularly relevant for migrant children. This agency identifies 3 situations in which this principle has a crucial role:

- 1) “the identification of the most appropriate durable solution for unaccompanied and separated refugee children”<sup>126</sup>,
- 2) “temporary care decisions for unaccompanied and separated children in certain exceptional circumstances”<sup>127</sup>, and
- 3) “decisions, which may involve the separation of a child from parents against their will”<sup>128</sup>.

It should be noted that these situations are directly related to one of the main problems that migrant children face, e.g., detention of migrant children or impossibility of access to asylum applications for migrant children. Chapter 3 of these 2008 Guidelines includes strict procedural norms and decision-making rules designed to determine the child’s best interests, related to these 3 situations.

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<sup>122</sup> “Convention relating to the Status of Refugees (1951)”, United Nations Human Rights Office of the High Commissioner, Accessed 08 December 2019, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>.

<sup>123</sup> “Protocol relating to the Status of Refugees (1967)”, United Nations Human Rights Office of the High Commissioner, Accessed 08 December 2019, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>.

<sup>124</sup> “UNHCR Guidelines on Determining the Best Interests of the Child”, United Nations High Commissioner for Refugees, Accessed 10 December 2019, <https://www.unhcr.org/4566b16b2.pdf> (page 15).

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.



Following the opinion of Dutch scientists, this principle should be in the first place in migration matters: “Children who are forced to leave their home country [...] run an increased risk of suffering mental health problems because of the stressful events [...]. According to Article 3 CRC [...], decisions in migration procedures should be based on the best interests of the child, taking into account the diverse vulnerabilities migrant children may face [...]”<sup>129</sup>.

Essentially, the use of the best interest of the child principle in the situation of migrant children helps to avoid the violation of the rights and freedoms of migrant children, as well as prevent discrimination of these children on various grounds.

In his treatise about the principle of the CRC, Tamar Morag raised two discussion points regarding the implementation of this principle: about its connection with the other principles and rights of the CRC and about the significance of this principle. Explaining the first point, the author turned to the UNCRC, which has recurrently stressed that the CRC must be read as a whole. It means that all rights of the CRC must be taken into account. In this case, “[t]he child’s best interest is not in tension or in contrast with specific children’s rights, including children’s liberties and their right to participation. All are bound to the principle of the child’s best interest, and all must be taken into account when examining this principle”<sup>130</sup>. As for the second point, the scientist explained that “[t]he child’s best interest must be actively considered prior to considering the rights of others, even though other considerations also enter into play”<sup>131</sup>. He added, that this principle must always be reviewed of the legal arrangements in its light.<sup>132</sup>

Despite all the positive aspects of this principle in the CRC, Thomas Hammarberg noted that the CRC does not give precise norms on how the best interests should be assessed<sup>133</sup>. One can disagree with this statement. Generally, the principle is enshrined in the CRC in the form of a norm-goal, a norm that obliges countries and institutions to adhere to this principle. Particularly with the situation of migrant children, the fact that this is an umbrella term and it covers many cases, e.g. refugees, asylum seekers, economic migrants, labour migrants, temporary or permanent migrants, etc., has been repeatedly addressed. The CRC cannot cover

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<sup>129</sup> Margrite Kalverboer, Daan Beltman, Carla van Os, Elianne Zijlstra, “The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures”, *International Journal of Children’s Rights*, 25 (2007): 127.

<sup>130</sup> Tamar Morag, “The principles of the UN Convention on the Rights of the Child and Their Influence on Israeli Law”, *Michigan State International Law Review*, Vol. 22:2, 544, <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1139&context=ilr>.

<sup>131</sup> Ibid, 545.

<sup>132</sup> Ibid, 545.

<sup>133</sup> Thomas Hammarberg, “The principle of the best interests of the child – what it means and what it demands from adults (lecture)”, Council of Europe, Strasbourg, 30 May 2008, <https://rm.coe.int/16806da95d>.

and foresee all these situations. In addition to this position, the CRC, which is constantly interpreted and examining the state's progress by the UNCRC, is a "living" tool.

To sum up, the best interest of the child principle is essential at all stages and in all situations of protecting the rights of the child, because it reduces the potential for violating children's rights. In the situation of migrant children, this principle is important when deciding on the whereabouts of the child and his legal status, providing temporary or permanent protection, detention and unification or separation from parents, return to the country of origin, ensuring appropriate care, etc.



## **CHAPTER 2. SOME PROBLEMATIC ASPECTS OF MIGRANT CHILDREN AND THEIR SOLUTION IN THE CONVENTION ON THE RIGHTS OF THE CHILD**

In this chapter will be examined some difficulties that migrant children still face a lot and will be shown how these problems are resolving by the CRC. First of all, it will be studied the problems of the reunion of migrant children with their families or individual members of their families and effects of Articles 9 and 10 of the CRC on its solution. Secondly, the situation of refugee children will be analysed and the level of their protection under the CRC. Thirdly, the issue of the detention of migrant children and its relation with Article 37 of the CRC will be undertaken.

### **2.1. Articles 9 and 10 of the Convention on the Rights of the Child in the Context of Family Unity and Family Reunification of Migrant Children**

Family is particularly significant for migrant children, who, due to their age or mental characteristics and vulnerable position, need special care by parents, other family members or the family as a whole. “Children should be able to maintain relationships with their family when they are in separate countries. This is particularly true in deportation cases where strict immigration rules can lead to a parent being deported from a given country when the child has a legal right to stay”<sup>134</sup>. In confirming this thought, it should be mentioned the position of Jacqueline Bhabha and Mike Dottridge, who wrote:

A primary obligation of the child protection system for [...] migrant children is to support family unity or reunification where this is in the child’s best interests, and to provide safe referral systems, irrespective of their migration status (or that of their families), to appropriate services, information, assistance and protection. Where appropriate, the system should also assist these children in making safe and rights protecting choices for themselves.<sup>135</sup>

There are different problems which children who left their homes and families face in a process of realization their right to family unity and reunification. First of all, “[u]ndocumented (*children*) migrants face particularly severe hardships in the process of family reunification. Their irregular status effects their earning capacity, their access to secure accommodation, and of course the legal basis on which to seek entry for [...] children”<sup>136</sup>. Secondly, long separation from their families has a huge negative impact on migrant children. “Some countries prohibit

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<sup>134</sup> “Article 10: Family reunification”, Child rights international network, Accessed 29 February 2020, <https://archive.crin.org/en/home/rights/convention/articles/article-10-family-reunification.html>.

<sup>135</sup> Jacqueline Bhabha and Mike Dottridge, “Child rights in the global compacts: Recommendations for protecting, promoting and implementing the human rights of children on the move in the proposed Global Compacts”, UN: Refugee and Migrants, Accessed 27 February 2020, [https://refugeesmigrants.un.org/sites/default/files/stocktaking\\_initiative\\_on\\_child\\_rights\\_in\\_the\\_global\\_compacts.pdf](https://refugeesmigrants.un.org/sites/default/files/stocktaking_initiative_on_child_rights_in_the_global_compacts.pdf).

<sup>136</sup> Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (New Jersey: Princeton University Press, 2014), 54.

separated children who are recognized as refugees from applying for family reunification; others permit reunification but impose conditions so restrictive as to make it virtually impossible to achieve.”<sup>137</sup> Thirdly, “[a]t the border, and without any assessment of their age, minors can also be rejected, under the condition of family reunification in their country of origin, or may be considered simply as irregular migrants, without any age discrimination”<sup>138</sup>. The UNCRC also acknowledges the problematic aspects of family reunification for migrant children: “[t]he lack of regular and safe channels for children and families to migrate contribute to children taking life-threatening and extremely dangerous migration journeys. The same is true for [...] lack of timely family reunification opportunities and lack of avenues for regularization”<sup>139</sup>.

Thus, migrant children face number of problems, concerning with family unity and family reunification issues, like the refusal by the countries of this right, the special delay of procedural moments, the psychological and traumatic consequences for the health of these children because of separation with families, etc. Also a significant problem is that each country has its own interpretation of the concept of “family” and very often children who do not have biological parents cannot be reunited with foster parents or other close people.

International Law in general, and the CRC in particular, regulate abovementioned problems to some extent. The rights and principles relating to family life, family unity and family reunification are found in some acts of International Law before the CRC. Article 16 of the Universal Declaration of Human Rights proclaims that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”<sup>140</sup>. Two Covenants of 1966 – on civil and political rights<sup>141</sup> and on economic, social and cultural rights<sup>142</sup> also called the family as “the natural and fundamental group unit of society”. The United Nations Human Rights Office of the High Commissioner in its “2016 Recommended principles to guide

<sup>137</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

<sup>138</sup> Giovanni Carlo Bruno, Fulvio Maria Palombino, Adriana Di Stefano, *Migration Issues before International Courts and Tribunals* (CNR edizioni, 2019), 180.

<sup>139</sup> “Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration”, United Nations, Accessed 10 March 2020, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/343/59/PDF/G1734359.pdf?OpenElement>.

<sup>140</sup> “Universal Declaration of Human Rights”, United Nations, Accessed 05 November 2019, <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>141</sup> Article 23: “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

“International Covenant on Civil and Political Rights”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>142</sup> Article 10: “The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society[...].”

“International Covenant on Economic, Social and Cultural Rights”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

actions concerning children on the move and other children affected by migration” declares that “states shall not separate children from their families, for example by instituting onerous and protracted family reunification procedures”, emphasizing the value of this issue<sup>143</sup>.

1951 Convention Relating to the Status of Refugees does not make reference to family unity or family reunification “word by word”. Although three days before the adoption of the RC on the 28<sup>th</sup> of July, 1951, in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the family unity was called as “an essential right of the refugee, and that such unity is constantly threatened”, the unity of the refugee family was proclaimed and the need to protect minor refugees, in particular unaccompanied children and girls, with special reference to guardianship and adoption, was emphasized<sup>144</sup>.

There is also no direct provision about family unity or family reunification of migrants in Article 8 of the ECHR: “Everyone has the right to respect for his private and family life, his home and his correspondence”<sup>145</sup>. However, following the judicial practice, the European Court of Human Rights includes these rights in the scope of Article 8 of the ECHR: “The Court has defined the scope of Article 8 broadly, even when a specific right is not set out in the Article”<sup>146</sup>. The issue of family reunification was raised in some cases, for instance, in *Jeunesse v. the Netherlands*<sup>147</sup>, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*<sup>148</sup>, *Rodrigues da Silva and Hoogkamer v. the Netherlands*<sup>149</sup>, etc. It can be stressed that some jurisprudence of the European Court of Human Rights can be practical for migrant children.

In *Case of Tanda-Muzinga v. France* “[...] the Court considers that the national authorities did not give due consideration to the applicant’s specific situation, and concludes that the decision-making process did not offer the guarantees of flexibility, promptness and effectiveness required in order to secure his right to respect for family life under Article 8

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<sup>143</sup> “Recommended principles to guide actions concerning children on the move and other children affected by migration”, United Nations Human Rights Office of the High Commissioner, Accessed 02 March 2020, [https://www.ohchr.org/Documents/HRBodies/CMW/Recommended-principle\\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/CMW/Recommended-principle_EN.pdf).

<sup>144</sup> “Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. 25 July 1951”, The United Nations High Commissioner for Refugees, Accessed 02 March 2020, <https://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html>.

<sup>145</sup> “European Convention on Human Rights”, European Court of Human Rights, Accessed 27 February 2020, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>146</sup> “Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence”, European Court of Human Rights, Accessed 27 February 2020, [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf).

<sup>147</sup> “*Case of Jeunesse v. the Netherlands*, 4 December 2012, no. 12738/10, §107”, European Court of Human Rights, Accessed 27 February 2020, [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-115732\"\]}](https://hudoc.echr.coe.int/eng#{\).

<sup>148</sup> “*Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, no. 9214/80; 9473/81; 9474/81, §67-68”, European Court of Human Rights, Accessed 27 February 2020, [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-57416\"\]}](https://hudoc.echr.coe.int/eng#{\).

<sup>149</sup> “*Case of Rodrigues da Silva and Hoogkamer v. the Netherlands*, 31 January 2006, no. 50435/99, §38”, European Court of Human Rights, Accessed 27 February 2020, [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-72205\"\]}](https://hudoc.echr.coe.int/eng#{\).

[...]”<sup>150</sup>. In other words, the family reunification procedure must be completed within a reasonable time and must be very transparent concerning all migrants and, especially, migrant children. In other decision of the European Court of Human Rights, *Case Sen v. the Netherlands*, there was examined the balance between the right of the child to family reunification and the interests of the society of the host state. The European Court of Human Rights confirmed that “[i]n order to establish the extent of the obligations of a State in relation to nationals of third countries, [...] the Court took into account the age of the child concerned, her situation in her country of origin and the level of dependence in relation to her parents”<sup>151</sup>. Concerning this judgment, it can be added that the obligation of the state to provide for migrant children the right to family reunification is also fixed in the CRC, although there is no one mention about the balance between child's interests and state policy.

Studying the regulation of family unity and family reunion of migrant children in the framework of the Council of Europe, it is necessary to take into account the recommendations of the Commissioner for Human Rights. In 2017 paper “Realising the right to family reunification of refugees in Europe”, the problem of family reunification was called “as a pressing human rights issue” and was recommended by the Commissioner for Human Rights to “[e]nsure that the best interests of the child is a primary consideration in all family reunification decisions and that refugee children’s requests for family reunification are dealt with in a positive, humane and expeditious manner”<sup>152</sup>.

Additionally to the International Law provisions, the CRC “goes further than other legal instruments in defining what the right to family life entails”<sup>153</sup> and includes provisions relating to family life, family unity and family reunification, “expanding the normative perspective to promote awareness of children’s [...] individuality”<sup>154</sup>. The CRC enshrined the obligations of States parties to ensure the integrity and inviolability of the family: not to separate the child from their parents; respect his right to maintain personal relationships and direct contacts with parents; provide information to the parents, child, or other family member about the whereabouts of the absent family member; facilitate family reunion (Articles 9 and 10).

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<sup>150</sup> “*Case of Tanda-Muzinga v. France*, 10 July 2014, no. 2260/10, §82”, European Court of Human Rights, Accessed 27 February 2020, [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-145653\"\]}](https://hudoc.echr.coe.int/eng#{\).

<sup>151</sup> “*Case Sen v. the Netherlands*, 21 December 2001, no. 31465/96”, European Database of Asylum Law, Accessed 20 March 2020, <https://www.asylumlawdatabase.eu/en/content/ecthr-sen-v-netherlands-application-no-3146596-21-december-2001>.

<sup>152</sup> “Realising the right to family reunification of refugees in Europe”, Council of Europe, Accessed 29 February 2020, <https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0>.

<sup>153</sup> “The Right of the Child to Family Reunification”, United Nations Children's Fund, Accessed 27 February 2020, [https://www.unicef.org/eca/sites/unicef.org/eca/files/ADVOCACY\\_BRIEF\\_Family\\_Reunification\\_13\\_10\\_15.pdf](https://www.unicef.org/eca/sites/unicef.org/eca/files/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf).

<sup>154</sup> Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (New Jersey: Princeton University Press, 2014), 254.

Experts from the UNCRC suggested that Articles 9 and 10 of the CRC should always be taken into account together when resolving issues related to the family reunion of migrant children<sup>155</sup>. First of all, Article 9 of the CRC should be examined. It involves a right of the child, as well as migrant children, not to “be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”<sup>156</sup>. This provision is a fundamental principle for migrant children.

At the same time, Jason Pobjoy emphasized, that “[a]lthough the drafters of the Convention acknowledged the importance of ensuring the unity of the family, and issued a non-binding declaration to that effect, the Convention itself contains no right to family unity”<sup>157</sup>. No doubt, there is not a clear norm about family unity for children in the CRC, but to some extent, the Preamble of the CRC covers it: family is defined as “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, which should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”<sup>158</sup>. It means that one of the main tasks of the family is to ensure the well-being of children and the state, in turn, is obliged to protect the family life and family unity and provide the necessary assistance in case of anything.

It must be pointed out that any decision to separate the migrant child from the family should be according to best interests of this child, because “for children, the process of family reunion can be particularly painful and dangerous, as immigration restrictions increase, as crossing borders becomes increasingly militarized and criminalized, as (*different*) pressures restrict immigration quotas”<sup>159</sup>. Paragraph 1 of the Article 9 also contains examples, when separation can be necessary, for instance, in case “involving abuse or neglect of the child by the

<sup>155</sup> “Committee on the Rights of the Child. CRC/C/SR.216. 1 June 1995”, United Nations Human Rights Office of the High Commissioner, Accessed 27 April 2020,

[https://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwiWm\\_To2YjpAhXj0qYKHAYQD2UQFjABegQIAhAB&url=http%3A%2F%2Fdocstore.ohchr.org%2FSelfServices%2FFilesHandler.ashx%3Fenc%3D6QkG1d%252FPPRiCAqhKb7yhsialUb%252BZGftp59yZHGEX788eI7BQuKGBjvCNKvIvrrksjRZQkWz0pz9vr%252Fe%252FeCT4o6RSYfQ49jrC5sOEWKSuN3olnkjfoJhGhW1Y8Q%252Fg8WH%252B&usg=AQvVaw1hUCApBfz4QjZX3Prz-Ab](https://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwiWm_To2YjpAhXj0qYKHAYQD2UQFjABegQIAhAB&url=http%3A%2F%2Fdocstore.ohchr.org%2FSelfServices%2FFilesHandler.ashx%3Fenc%3D6QkG1d%252FPPRiCAqhKb7yhsialUb%252BZGftp59yZHGEX788eI7BQuKGBjvCNKvIvrrksjRZQkWz0pz9vr%252Fe%252FeCT4o6RSYfQ49jrC5sOEWKSuN3olnkjfoJhGhW1Y8Q%252Fg8WH%252B&usg=AQvVaw1hUCApBfz4QjZX3Prz-Ab).

<sup>156</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>157</sup> Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017), 70.

<sup>158</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>159</sup> Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (New Jersey: Princeton University Press, 2014), 58.

parents”, or case “where the parents are living separately and a decision must be made as to the child's place of residence”<sup>160</sup>. Guy S. Goodwin-Gill stressed that

Duly strengthened by international recognition of the principle of the best interests of the child as a primary consideration in the CRC, they highlight the questionable nature of any solution that might either seek 'officially' to remove the child from the (actual or potential) family environment, or which would have the effect of leaving the child without care and support, for example, on return to the country of origin when family have not been found and interim arrangements in the country of refuge are no longer viable.<sup>161</sup>

Despite that, it should be added that the CRC states that every child separated from his/her family has the right to maintain personal relations and direct contact with both parents on a regular basis, except if this is contrary to the child’s best interests<sup>162</sup>.

On the whole, the provision of Article 9 of the CRC is “the strongest exposition”, which is written “in near-absolute terms”, and guarantees “an unprecedented level of protection” for parents and children, involved in migration processes, explaining that “in contrast to earlier human rights accords, which prohibited only arbitrary and unlawful interference with the family unit, the unambiguous limitation in art 9 makes plain that no public interest, including immigration control measures, can be invoked to justify the separation of a parent and child”<sup>163</sup>.

The second relevant article, which should be examined, is Article 10 of the CRC. The CRC protects literally the right to family reunification, which is enshrined in Article 10: “[a]pplications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner”<sup>164</sup>. In other words, the state must make possible and support family reunification in order to reunite migrant children with their family.

The UNCRC extended the meaning of “positive, humane and expeditious manner” in the meaning of Article 10 of the CRC: “[...] positive, humanitarian, and expeditious attention to family reunification applications; options for regularization of migration status wherever possible; and family reunification policies, at all stages of migration, for enabling children left behind to join their parents (or parents to join their children) in transit and/or destination

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<sup>160</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>161</sup> Guy S. Goodwin-Gill, “Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions”, *The International Journal of Children’s Rights*, 3(1995): 414.

<sup>162</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>163</sup> Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017), 70.

<sup>164</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.



countries”<sup>165</sup>. Having analyzed, it should be noted that all of the above means the implementation by the state of a softer migration policy and migration procedures in matters of family reunification, especially families with migrant children.

Another point covered by the CRC is the return of the migrant child to the country of origin. No doubt that migrant child always wants to arrive back to his parents' home, but it is not all the time safe for him. The UNCRC points up that if “there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child”<sup>166</sup>. The CRC in Article 10 also guarantees to the migrant children the right to maintain, on a regular basis, personal relations and direct contacts with both parents where the parents reside in different States when migrant children cannot return to the country of origin<sup>167</sup>. Rachel Hodgkin and Peter Newell specify that this right is considered from two sides: on the one hand, states are obliged to allow parents of migrant children to visit their children (to simplify visa requirements or other migration processes), and on the other, the migrant child is allowed to return to their parents temporarily for the purpose of temporary reunification without harming their migration status<sup>168</sup>.

The significance of Article 10 of the CRC with respect to the right to family reunification of migrant children was mentioned in a Practitioners’ Guide of International Commission of Jurists was stated that “the CRC was the first international human rights treaty to recognize specific rights connected to family reunification, which applies in both asylum and other migration situations”<sup>169</sup>. Indeed, one should agree with this quote, since more than one previous act of International Law did not explicitly provide for such a right for a migrant child.

The UNCRC in General Comment No. 6 “Treatment of unaccompanied and separated children outside their country of origin” reaffirmed that the best interests of the child should be the primary consideration, including in issues of family reunification<sup>170</sup>. Moreover, “[t]he best

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<sup>165</sup> “The Economic, Social and Cultural Rights of Migrants in an Irregular Situation”, United Nations Human Rights Office of the High Commissioner, Accessed 05 March 2020, [https://www.ohchr.org/Documents/Publications/HR-PUB-14-1\\_en.pdf](https://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf).

<sup>166</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

<sup>167</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>168</sup> R. Hodgkin and P. Newell, *Implementation handbook for the Convention on the Rights of the Child* (UNICEF, 1998), 139.

<sup>169</sup> “Migration and International Human Rights Law”, International Commission of Jurists, Accessed 21 March 2020, <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>.

<sup>170</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

interests principle, as enshrined in Article 3 of the CRC, underpins all decisions relating to family reunification with a child or unaccompanied child”<sup>171</sup>.

In 2012, the UNCRC named the family reunification schemes which are centered on the best interests of the child” as one of the good state policies and practices. Mainly the principle of the best interests of the child is vital for unaccompanied children in the process of family reunification, since for this purpose they can be sent to a dangerous environment for their life and health under the pretext of such a reunification. Additionally, the UNCRC indicated that distinctions between forced and voluntary migrant returns with the aim of family reunification should be made<sup>172</sup>. Finally, “[t]he best interests principle, as enshrined in Article 3 of the CRC, underpins all decisions relating to family reunification with a child [...]”<sup>173</sup>. Guy S. Goodwin-Gill explained that “[t]he international legal principle of the best interests of the child (*in this meaning*) requires that, wherever possible, existing family support structures must be reinforced, which will mean effective family tracing and reunification mechanisms”<sup>174</sup>. The UNCRC emphasized that “when the child’s relations with his or her parents are interrupted by migration [...], preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification”<sup>175</sup>.

In continuation of the topic of the best interests of the child principle in family reunification matters, Olga A. Khazova and Benyam Dawit Mezmur made an accent on the fact that since the CRC changed the status of child from the object of law till the subject of law and an independent rights-holder, the CRC recognized the child’s right to have a voice in all matters affecting the child<sup>176</sup>. This can be interpreted in such a way that the special bodies of the state should first of all listen to the opinions of children on these issues (if the child can already express it), taking into account his best interests, and only then other facts should be invoked.

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<sup>171</sup> “Handbook on European law relating to the rights of the child”, European Union Agency for Fundamental Rights”, Accessed 29 March 2020, <https://fra.europa.eu/en/publication/2015/handbook-european-law-relating-rights-child>.

<sup>172</sup> “Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration”, United Nations Human Rights Office of the High Commissioner, Accessed 04 March 2020, <https://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf>.

<sup>173</sup> “UNHCR Guidelines on Determining the Best Interests of the Child (2008)”, United Nations High Commissioner for Refugees, Accessed 10 December 2019, <https://www.unhcr.org/4566b16b2.pdf>.

<sup>174</sup> Guy S. Goodwin-Gill, “Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions”, *The International Journal of Children’s Rights*, 3(1995): 415.

<sup>175</sup> “Committee on the Rights of the Child. General Comment No. 14. 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)”, United Nations Human Rights Office of the High Commissioner, Accessed 01 December 2019, [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

<sup>176</sup> Olga A. Khazova and Benyam Dawit Mezmur, “Reflections on Family Law Issues in the Jurisprudence of the CRC Committee”, Accessed 12 March 2020, <http://abelo.zlibcdn.com/dtoken/14feef29f89428aaf22c3468fa0dd3/9781780689319.021.pdf>.



It should be outlined that the scope of term “family” is not provided in Articles 9 and 10 of the CRC. That is why, such situations may arise, when states may deny migrant children the right to family reunification, if children don’t have biological parents. Resolving the problematic issue with the scope of the “family” under the CRC, the UNCRC established that “the term “family” must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom”<sup>177</sup>. “Furthermore, based on the best interests of the child, a broad definition of family should be adopted that acknowledges de facto caretaking and dependency links”<sup>178</sup>.

Considering the topic of family reunification of migrant children, it is important to point out the problem that states do not always inform migrant children about the possibilities to reunite with their family. The CRC obliges these states to respect the right of children to receive information from various national and international sources regardless of frontiers in Article 13 (“[t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice”<sup>179</sup>) and in Article 17 (“[s]tates Parties [...] shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health”<sup>180</sup>).

Frances Nicholson wrote that migrant children have a right to be informed about the possibility of family reunification with their family and the states have a corresponding positive obligation to enable respect for this right. He added that “the authorities [...] have a responsibility to ensure that beneficiaries are promptly informed as soon as they are granted protection in a language and manner that they can understand of the terms under which they may apply for family reunification, the procedures to be followed, and any deadlines that may apply”<sup>181</sup>.

The implementation of the abovementioned provisions and principles into national legislation of states and its practical application remains different from country to country as well as compliance with the recommendations of the UNCRC and other specialized

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<sup>177</sup> “Committee on the Rights of the Child. General Comment No. 14. 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)”, United Nations Human Rights Office of the High Commissioner, Accessed 01 December 2019, [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

<sup>178</sup> “Family Unity in the Context of Migration”, United Nations Children's Fund, Accessed 02 March 2020, <https://www.unicef.org/media/58341/file/Family%20unity%20issue%20brief.pdf>.

<sup>179</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>180</sup> Ibid.

<sup>181</sup> Frances Nicholson, *The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, (Geneva, 2018), <https://www.unhcr.org/5a8c413a7.pdf>.

organizations. Therefore, migrant children still have many challenges, trying to realize their right to family reunification.

Procedures for family reunification are complex and can take long – and as the numbers of refugees, asylum seekers and migrants arriving in Europe continue to rise, migration authorities are faced with the challenge of processing increasing numbers of applications, often with limited resources, whilst still being bound to afford due care and process to each claim individually. Some Member States have high procedural requirements including requests for official documents that might be difficult or virtually impossible to obtain in the country of origin. In the absence of official documents, Member States rely on further investigation. DNA tests results are also used as evidence, although in some countries of origin they are not available, or are too expensive.<sup>182</sup>

These problems may occur due to the number of migrants is constantly growing, and the authorities are not coping. Another challenge was made by Jane McAdam, who gave an example that sometimes parents put their child on any plane to another more prosperous country so that in the future, according to the family reunification program, they will be followed by their child to another, thus deceiving the authorities of the host country<sup>183</sup>.

Undoubtedly, states are trying to solve such challenges with family reunification so as not to violate the obligations assumed by the CRC. A beneficial solution should be considered the example of Germany, where the Lower House of Parliament concluded that if the law provides for a lengthy and bureaucratic procedure for the family reunion of migrant children, this law should be reviewed and amended in order to ensure that the Convention is not violated. As a result, Germany revised its migration policy, generally allowing family reunification with minor children, and accepted applications within the two-year period<sup>184</sup>. The example of Germany confirms the standpoint of the UNCRC, which considers that “time limits, discretionary powers, and/or lack of transparency in administration procedures should not hinder the child’s right to family reunification”<sup>185</sup>.

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<sup>182</sup> “The Right of the Child to Family Reunification”, United Nations Children's Fund, Accessed 27 February 2020, [https://www.unicef.org/eca/sites/unicef.org/eca/files/ADVOCACY\\_BRIEF\\_Family\\_Reunification\\_13\\_10\\_15.pdf](https://www.unicef.org/eca/sites/unicef.org/eca/files/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf).

<sup>183</sup> Jane McAdam, “Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection”, *The International Journal of Children's Rights*, 14 (2006): 258.

<sup>184</sup> “Vereinbarkeit der Regelungen des Asylpakets II betreffend die Aussetzung des Familiennachzugs für unbegleitete minderjährige Flüchtlinge mit der VN-Kinderrechtskonvention (KRK)”, Deutscher Bundestag, Accessed 14 March 2020, <https://www.bundestag.de/resource/blob/416608/6b721422cd6774314c8fbe11de359e32/wd-2-026-16-pdf-data.pdf>

<sup>185</sup> “Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return”, United Nations, Accessed 14 March 2020, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkGld%2FPPRiCAqhKb7yhsrMuIHhdD50s6dX7ewCBgoc3aRFSDc0ukyIghpiff8N%2Fk1uf0mPUJgdK2vXMEFXwBUJydRTZ4iILcOtT9GDUqemWeCc2%2Bl%2F6gJkKBzFDWgi>.

Continuing to study trends in the application and implementation of the CRC in the European region, it is considered necessary to analyze the references of EU law to the CRC in relation to the rights of migrant children to family unity and family reunification.

Directly, the right to family reunification is regulated by the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, which determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the EU Member States. In the para. 11 of the Preamble to this Directive was stated: “The right to family reunification should be exercised in proper compliance with the values and principles recognized by the Member States, in particular with respect to the rights of [...] children [...]”<sup>186</sup>. It appears that since all EU Member States are states parties to the CRC<sup>187</sup>, the CRC is the source of the rights of children, according to which the right to family reunification must be exercised in the EU.

Additionally, 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 enshrined in the Preamble, that “respect for family life should be a primary consideration of Member States when implementing this Directive”<sup>188</sup>. Article 5 of this Directive stated that Member States of the EU shall take due account of family life<sup>189</sup>. Furthermore, Article 11 guarantees the right for unaccompanied children to be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return<sup>190</sup>. Directive named family unity with family members present in their territory as one of the safeguard pending return in Article 14<sup>191</sup>. On the whole, this Directive was undoubtedly written in accordance with the provisions of the CRC, namely with Articles 9 and 10, which enshrine the rights of migrant children to family unity and family reunification.

Moreover, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person envisages that if “the applicant is an unaccompanied minor who has a relative who is legally present in another Member State of

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<sup>186</sup> “Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0086>.

<sup>187</sup> “11. Convention on the Rights of the Child”, United Nations Treaty Collection, Accessed 05 November 2019, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en).

<sup>188</sup> “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”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115>. (53!)

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

the EU and where it is established, based on an individual examination, that the relative can take care of him or her, Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor”<sup>192</sup>. It is very essential provision of the EU law for unaccompanied migrant children, which is consistent with the norms of the CRC and the practice of the UNCRC in relation to this category of children.

Taking everything into account, it can be concluded that the right of family life, family unity and family reunification of migrant children are enshrined in the CRC. Considering these rights, Articles 9 and 10 should both be taken into account. Article 9 focuses on the provision not to be separated from their parents unless it is necessary for their best interests and recognized as fundamental human rights, especially, migrant children. Article 10 provides for specific obligations of states regarding family reunification affecting the rights of migrant children. The CRC strikes a balance between the state’s interest in managing migration and the private interests of the child in family reunification and puts the child’s interests first. The effectiveness of these Articles of the CRC is manifested in the implementation by states of these norms regarding procedural and other aspects of the right of migrant children to family reunification.

## **2.2. Detention of Migrant Children and Their Rights under Article 37 of the Convention on the Rights of the Child**

Using detention of migrant children who have not committed any crime is completely contrary to the rules of the approach to children. Despite this, some countries use this type of restriction on freedom of children due to their migration status, that causes not only violation of rights but also causes significant trauma to these children.

The legislation or regulations of several countries provide for “family detention”, whereby children under a certain age are detained with their parents, either in special facilities or in separate rooms within centres for migrants or penitentiaries. Accompanied and unaccompanied children are often detained in punitive and inadequate conditions, deprived of the care, protection and rights to which they are entitled under the Convention on the Rights of the Child and other international human rights norms, including the right to education, physical and mental health, privacy, information, and rest and leisure, among others.<sup>193</sup>

Unfortunately, there is no statistical information that notifies how many migrant children are detained because of their status, because some governments do not post the numbers. “Although numbers of children in detention are not adequately collected and published

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<sup>192</sup> “Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604>.

<sup>193</sup> “UN Commission on Human Rights, Report of the Special Rapporteur on the Human Rights of Migrants: Migrant Workers, 30 December 2002, E/CN.4/2003/85”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/docid/45377ac50.html>.

[...], the statistics collected in 2016, 2017 and 2018 [...] show that the practice is prevalent and underreported”<sup>194</sup>. Based on this information, the problem of detention of migrant children of migrants is actual, and these children need special protection under International and European Law.

It is principal to establish the meaning of definition ‘detention of migrant children’ or ‘immigration detention of children’ under International Law, because different states interpret this definition in their way and there is no single approach to defining this concept yet.

The UN, in its Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, gave the broadest definition of detention as any deprivation of personal liberty except as a result of conviction for an offence<sup>195</sup>. Additionally, the UNHCR gives more precise definition of detention: “the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities”<sup>196</sup>. As a result, this definition of ‘detention of migrant children’ can be proposed: deprivation of liberty of a person below the age of eighteen years old because of his or her immigration status, in a close special place which he or she cannot leave at own will.

The issue of freedom from detention and search for alternatives for immigration detention was regulated in International Law even before the adoption of the CRC in 1989. The Universal Declaration of Human Rights set the rule that “no one shall be subjected to arbitrary arrest, detention or exile”<sup>197</sup> in Article 9. Later, nearly the same provision was included in Article 9 of the International Covenant on Civil and Political Rights: “No one shall be subjected to arbitrary arrest or detention”<sup>198</sup>. The UN Human Rights Committee in its general comment No. 8 (1982) on right to liberty and security of persons noticed that Article 9 of the International Covenant on Civil and Political Rights is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, immigration control<sup>199</sup>.

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<sup>194</sup> “Child Immigration Detention in the EU”, United Nations Human Rights Office of the High Commissioner, Accessed 27 March 2020, <https://europe.ohchr.org/Documents/Publications/Paper-ChildImmigrationDetentionintheEU-EN.pdf>.

<sup>195</sup> “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment”, United Nations, Accessed 28 March 2020, <https://www.un.org/ruleoflaw/files/Body%20of%20Principles%20Detention.%20pdf.pdf>.

<sup>196</sup> “Detention Guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

<sup>197</sup> “Universal Declaration of Human Rights”, United Nations, Accessed 05 November 2019, <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>198</sup> “International Covenant on Civil and Political Rights”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>199</sup> “CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)”, United Nations High Commissioner for Refugees, Accessed 22 March 2020, <https://www.refworld.org/docid/4538840110.html>.

The two above documents are directly related to migrant children, since even if a child is in the territory of another state is illegal, this does not mean that he is not protected by applicable norms of International Law. The UN Human Rights Committee explained that “[t]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers”<sup>200</sup>. It means that these documents prohibited immigration detention of children.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as a particular act concerning migrants fixed in Article 16: “[m]igrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention”<sup>201</sup>. Although it was concerning the family of migrants, the abovementioned document does not contain any provisions, directly concerning migrant children.

The CRC became the first international act that included the provision concerning the detention of children in para. B of Article 37: “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”<sup>202</sup>. The CRC “is the banner of an international agreement for the protection and welfare of children”<sup>203</sup> in the detention issues. It can be noted that the CRC includes some aspects of detention, that were proclaimed in previous international legal acts, and even moved forward in managing of these issues.

Lexical analysis of para. b of Article 37 allows us to conclude that the CRC lays down three requirements for any detention of children:

- 1) legality (in conformity with the law, that means that the detention must be authorized by the legislation of the state where it is applicable);
- 2) used only as a measure of last resort; and
- 3) for the shortest period of time.

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<sup>200</sup> “UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/docid/478b26ae2.html>.

<sup>201</sup> “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>.

<sup>202</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>203</sup> Enid Fourie, “The UN Convention on the Rights of the Child and the Crisis for Children in South Africa: Apartheid and Detention”, *Human Rights Quarterly* 12, 1 (1990): 114.



All these 3 conditions must be fulfilled together to apply the detention of migrant children. However, the current tendency of applying detention to migrant children puts forward to the use of this type of imprisonment much more requirements, which sometimes even lead to a complete ban on the application of detention of migrant children. “The detention of minors, particularly of unaccompanied minors, requires even further justification”<sup>204</sup>. Still, the biggest problem is compliance with the requirement that detention as a last measure of resort. This may be implied like all possible alternative measures should be tried before the detention and only if they are not sufficient, the detention can take place.

EU also has this logic, implementing the detention like a last measure of resort in Article 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, which declared that “[m]inors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors”<sup>205</sup>.

Previously, some years ago, states used the “mandatory” detention of migrants, when the state had the right to apply detention to migrants to establish all the facts about the asylum seeker, including information about his health, in order to find out whether this person can be allowed into society or not<sup>206</sup>. Jon Jureidini and Julian Burnside are convinced that mandatory detention of migrant children breaches the requirement of being “measure of last resort”<sup>207</sup>. Nowadays, applying of this practice is unacceptable and contrary to the norms of International Law, including Article 37 of the CRC.

The UNCRC addressed about the detention as a last measure of resort in comments to Australia, where stressed that “administrative detention (*in migration cases*) is not always used as a measure of last resort”<sup>208</sup>. The UNCRC recommended that state must “[e]nsure that children

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<sup>204</sup> “IML Information Note on the Protection of Unaccompanied Migrant Children”, International Organization for Migration, Accessed 29 March 2020, [https://www.iom.int/sites/default/files/our\\_work/ICP/IML/IML-Information-Note-Protection-of-Unaccompanied-Migrant-Children.pdf](https://www.iom.int/sites/default/files/our_work/ICP/IML/IML-Information-Note-Protection-of-Unaccompanied-Migrant-Children.pdf).

<sup>205</sup> “Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>.

<sup>206</sup> James C. Hathaway, *The rights of Refugees under International Law* (Cambridge: University Press, 2005), 433.

<sup>207</sup> Jon Jureidini and Julian Burnside, “Children in immigration detention: a case of reckless mistreatment”, *Australian And New Zealand Journal Of Public Health* 35, 4 (2011): 304.

<sup>208</sup> “Consideration of Reports submitted by States Parties under Article 44 of the Convention: Australia”, United Nations High Commissioner for Refugees, Accessed 28 March 2020, <https://www.refworld.org/docid/45377eac0.html>.



are not automatically detained in the context of immigration and that detention is only used as a measure of last resort [...]”<sup>209</sup>.

As regards the periods of detention, the CRC obliges states to observe the periods of detention of children, does not establish a maximum or minimum period, however, writes that it should be abridged to minimum. The experts wrote: “Contrary to the Convention on the Rights of the Child, many countries do not have a legal time limit for detention, leaving some children incarcerated for indeterminate periods”<sup>210</sup>. This suggests that not all countries comply with this requirement from the Convention and detain migrant children for long periods.

The best interest of the child principle, which is enshrined in Article 3 of the CRC, also refers to Article 37. It means that it also applies in detention matters. Despite the fact, that generally, e.g. in cases, when children commit some crimes, etc., the detention of children is not prohibited by the CRC and must be as a measure of last resort, the UNCRC and other international bodies and organizations emphasized that the detention of migrant children is always contrary to the best interest of the child principle and breaches their rights: “Children should not be criminalized or subject to punitive measures because of their or their parents’ migration status. The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status”<sup>211</sup>. Renate Winter, the President of the UNCRC, stressed that the detention of migrant children is never in the best interests of the child”<sup>212</sup>.

The IOM stated that the detention of children because of their migration status is never in their best interest, and this practice must be stopped all over the world. Experts of this organization explained that the detention has a lot of harmful consequences for migrant children because it leads to negative effects in the physical and psychological health of the child, is a very traumatic process for them, and therefore it is never in their best interests<sup>213</sup>.

Sometimes another situation illustrates a violation of the best interest of the child principle in relation to migrant children. This situation occurs when the state, not wanting to separate migrant children from their parents, what is contrary to the right of family unity,

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<sup>209</sup> Ibid.

<sup>210</sup> Mina Fazel et al., “Detention, denial, and death: migration hazards for refugee children”, *The Lancet Global Health*, 2 (2014): 313.

<sup>211</sup> “Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration (2012)”, United Nations High Commissioner for Refugees, Accessed 10 February 2020, <https://www.refworld.org/docid/51efb6fa4.html>.

<sup>212</sup> “UN Child Rights Experts call for EU-wide ban on child immigration detention”, United Nations Human Rights Office of the High Commissioner, Accessed 22 March 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22681&LangID=E>.

<sup>213</sup> “Child Immigration Detention is Not Only Wrong, It Is Ineffective”, International Organization for Migration, Accessed 28 March 2020, <https://www.iom.int/news/child-immigration-detention-not-only-wrong-it-ineffective>.

detained these children with parents because of their migration status. Here a certain conflict arises between the importance of maintaining family unity and the detention of a child together with parents because of their migratory status: from the one side, state can violate migrant children's right to the family unity and, from the other side, it can violate the principles of Article 2 (right not to be punished for the acts of parents) and Article 3 (detention is always contrary to the best interest of the child principle), and the right of the child to be detained only as a measure of last resort. "A decision to detain migrants who are accompanied by their children should therefore only be taken in very exceptional circumstances. States must carefully evaluate the need for detention in these cases, and rather preserve the family unit by applying alternatives to detention to the entire family"<sup>214</sup>.

This position is confirmed in the General Comment No 6 of the UNCRC, where stated that "[u]naccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof..."<sup>215</sup>. Researchers of International Detention Coalition named this position as "the very clear recommendations" and added that "immigration detention of children is in violation of State obligations under the Convention on the Rights of the Child"<sup>216</sup>. Rachel Kronick, Cecile Rousseau and Janet Cleveland explained that they also understood that the CRC has an aim to oppose the detention of the migrant children by states<sup>217</sup>. Michael Grewcock agreed and added that immigration detention of children is "fundamentally inconsistent with the Convention on the Rights of the Child"<sup>218</sup>. Thus, the detention of migrant children can constitute a violation of the rights of this category under the CRC.

International organizations proposed some alternative measures, that can be used before the detention. Mainly, the alternatives, which proposed by the UNHCR as one of the most authoritative international body, should be analyzed. The experts of the UNHCR wrote that "alternatives will be any mechanisms to support and manage individuals in the community

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<sup>214</sup> "UN General Assembly, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 2 April 2012, A/HRC/20/24", United Nations High Commissioner for Refugees, Accessed 22 March 2020, <https://www.refworld.org/docid/502e0bb62.html>.

<sup>215</sup> "Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin", United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

<sup>216</sup> "European rules for the administrative detention of Migrants. Written submission to the European Committee on Legal Co-Operation of the Council of Europe", International Detention Coalition, Accessed 28 March 2020, <https://idcoalition.org/wp-content/uploads/2017/07/CouncilofEurope-ImmigrationDetentionRules-JointSubmission-ICJIDC-ENG-2017.pdf>.

<sup>217</sup> Rachel Kronick, Cecile Rousseau and Janet Cleveland, "Mandatory detention of refugee children: A public health issue?", *Paediatr Child Health*, 16 (2011): 66.

<sup>218</sup> Michael Grewcock, "Detention, Punishment and Children's Rights: An Australian Snapshot", *The Howard Journal* 48, 4 (2009): 390.

without the use of detention”<sup>219</sup>. Further, the UNHCR introduced new terms instead of alternatives – “care arrangements” or “non-custodial measures”<sup>220</sup>, which show that the migrant child is very vulnerable and should have special protection.

As per their international obligations (UN Convention on the Rights of the Child), States should ensure that care arrangements are available for all non-national children, irrespective of their migration status. Because every child’s circumstances are unique, the best care arrangement for each child will be based on an individual assessment and may vary accordingly. Setting up appropriate care arrangements for children calls for the competent child protection authorities to be involved in finding solutions for this vulnerable group.<sup>221</sup>

Also, the UNICEF presented some alternatives to immigration detention of children, which can “include a range of options such as supported community placement, including placement with host families, bail schemes to ensure compliance with immigration proceedings or reporting requirements, or schemes whereby guarantors or sponsors agree to support the care and supervision of a migrant family in the community”<sup>222</sup>.

The IOM also has its proposals of alternatives to detention of migrant children. “[o]pen or semi-open service/reception centres, bail, bond and surety options, centres for special support to vulnerable migrants, and community-based alternatives”<sup>223</sup> can be used instead of detention. UN Special Rapporteur on the human rights of migrants provided some guidance on country legislation on the use of alternatives measures

When considering alternatives to detention, States must take full account of individual circumstances and those with particular vulnerabilities, including pregnant women, children, victims of trafficking, victims of torture, older persons and persons with disabilities. The least intrusive and restrictive measure possible in the individual case should be applied. [...] Some non-custodial measures may be so restrictive, [...] that they amount to alternative forms of detention, instead of alternatives to detention.<sup>224</sup>

Also, some non-governmental international organizations proposed alternatives to immigration detention of children. For example, scholars of International Detention Coalition, a

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<sup>219</sup> “UNHCR Beyond Detention Toolkit: Guiding Questions For The Assessment Of Alternatives To Detention”, United Nations High Commissioner for Refugees, Accessed 28 April 2020, <https://www.unhcr.org/protection/detention/5b17d9c47/guiding-questions-assessment-alternatives-detention.html>.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> “Alternatives to immigration detention of children”, United Nations Children's Fund, Accessed 28 March 2020, <https://www.unicef.org/documents/alternatives-immigration-detention-children>.

<sup>223</sup> “Global Compact Thematic Paper I Detention and Alternatives to Detention”, International Organization for Migration, Accessed 28 March 2020, [https://www.iom.int/sites/default/files/our\\_work/ODG/GCM/IOM-Thematic-Paper-Immigration-Detention.pdf](https://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-Thematic-Paper-Immigration-Detention.pdf).

<sup>224</sup> “UN General Assembly, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 2 April 2012, A/HRC/20/24”, United Nations High Commissioner for Refugees, Accessed 22 March 2020, <https://www.refworld.org/docid/502e0bb62.html>.

global network of over 300 non-governmental organisations, emphasized that these alternatives must be effective and must “allow children to remain with family members and/or guardians”<sup>225</sup>.

Even if all possible alternatives are used, and the detention has been applied to migrant children, such a category of children has additional guarantees under para. D of Article 37 of the CRC. Migrant children in detention shall have “the right to prompt access to legal and other appropriate assistance, as well as 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”<sup>226</sup>. Children in detention also have such rights under the CRC: right to appropriate medical treatment (Article 24), right to education (Article 28) and right to leisure, recreation and cultural activities (Article 31).

Concern was expressed at the placement of children in institutions, under a welfare pretext, without taking into due consideration the best interests of the child nor ensuring the fundamental safeguards recognized by the Convention, including the right to challenge the decision of placement before a judicial authority, to a periodic review of the treatment provided to the child and all other circumstances relevant to the child’s placement and the right to lodge complaints.<sup>227</sup>

Nevertheless, states often violate this right of migrant children. As the United Nations Human Rights Office of the High Commissioner demonstrated, “minors [...] can be detained for long or undetermined periods and then deported under no clear authority and on discretionary grounds, with no possibility of challenging the lawfulness of the detention before a court or other competent, independent and impartial authority”<sup>228</sup>.

UNHCR examined issues of detention of refugee or asylum-seeking children, which is generally similar to the UNCRC’s position about the detention of migrant children. The main statement of the UNHCR is that refugee or asylum-seeking children should not be detained because of immigration purposes, “irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests”<sup>229</sup>. UNHCR has an aim to promote limitation of applying the detention of migrant children by states. UNHCR’s strategy includes 3 goals how to do it: 1) to stop using the practice of the detention of migrant children; 2) to check

<sup>225</sup> “A Review of Laws that Prohibit Child Immigration Detention: Never in a child’s best interests”, International Detention Coalition, Accessed 28 March 2020, [https://idcoalition.org/wp-content/uploads/2017/06/Briefing-Paper\\_Never-in-a-childs-best-interests\\_June-2017.pdf](https://idcoalition.org/wp-content/uploads/2017/06/Briefing-Paper_Never-in-a-childs-best-interests_June-2017.pdf).

<sup>226</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>227</sup> “Report on the tenth session of the United Nations Committee on the Rights of the Child”, United Nations High Commissioner for Refugees, Accessed 28 March 2020, <https://www.refworld.org/docid/3f4772934.html>.

<sup>228</sup> “Administrative detention of migrants”, United Nations Human Rights Office of the High Commissioner, Accessed 28 March 2020, <https://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>.

<sup>229</sup> “2017 UNHCR’s position regarding the detention of refugee and migrant children in the migration context”, United Nations High Commissioner for Refugees, Accessed 28 March 2020, <https://www.refworld.org/docid/5885c2434.html>.

if alternatives to detention are implemented in legal systems of the states; and 3) to guarantee that conditions of detention (if it is necessary), meet international standards<sup>230</sup>. Thus, it can be concluded, that generally nowadays the UNHCR recommends states to end completely the practice of using detention of migrant children.

The experts of the UNHCR connected para. C of Article 37, which stated that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age”<sup>231</sup>, with the conditions of places, where children are living during detention. It means that migrant children should not lose their rights under the CRC and other International instruments while they are in detention and that these living conditions must “include protection from physical abuse, keeping the family together, access to education, and play. Asylum seekers and refugees should never be placed with common criminals”<sup>232</sup>.

About the conditions of detention and compliance by the states with obligations under para. C of Article 37, the UNCRC recommended to “[e]nsure that every child deprived of his or her liberty has access to independent advocacy services and to an independent, child-sensitive and accessible complaint procedure; Take all necessary measures, as a matter of urgency, to review the conditions of detention and ensure that all children deprived of their liberty have statutory rights to education, health and child protection equal to those of other children”<sup>233</sup>. Thus, even the state applies detention concerning migrant children, the conditions should be appropriate for their particular age qualities.

The ECHR supports the tendency to completely limit the practice of detention of migrant children. The ECHR deals with the detention of migrant children in two articles: Article 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”<sup>234</sup>) and Article 5 (“Everyone has the right to liberty and security of person”<sup>235</sup>). Generally, the immigration detention is permitted under the ECHR, but must be based on law, non-arbitrary and comply with appropriate safeguards. Concerning the detention of migrant children, the state

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<sup>230</sup> “Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019”, United Nations High Commissioner for Refugees, Accessed 27 April 2020, <https://www.unhcr.org/protection/detention/5c934bbd7/unhcr-global-strategy-beyond-detention-progress-report-2018.html>.

<sup>231</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>232</sup> United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (Geneva, 1994), 37.

<sup>233</sup> “Consideration of Reports submitted by States Parties under Article 44 of the Convention: United Kingdom of Great Britain and Northern Ireland”, United Nations High Commissioner for Refugees, Accessed 29 March 2020, <https://www.refworld.org/docid/3df58f087.html>.

<sup>234</sup> “European Convention on Human Rights”, European Court of Human Rights, Accessed 27 February 2020, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>235</sup> Ibid.

should justify why the detention is applied<sup>236</sup>. Despite the fact, that detention is legal under Article 5 of the ECHR, the Court can find a violation of Article 3 if conditions of detention may amount to degrading or inhuman treatment of migrant children.

The European Court of Human Rights judgements, in which the Court, after considering the conditions of detention of migrant children in particular cases, has expressed the opinion that the best interest of the child had not been considered and the detention constituted inhuman and degrading treatment and/or violation of the children's right to liberty and security and, consequently, was contrary to the European Convention of Human Rights<sup>237</sup>.

To illustrate the violation of the Article 3 of the ECHR by the detaining of migrant children, the case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*<sup>238</sup> can be used.

The child, who was only five years old, had been detained for almost two months in a centre that had initially been intended for adults, even though she was unaccompanied by her parents and no one had been assigned to look after her. No measures had further been taken to ensure that she received proper counseling and educational assistance from a qualified person specially assigned to her. [...] The conditions of detention had caused the child considerable distress. The authorities who had detained her could not have been unaware of the serious psychological effects that her detention in such conditions would have on her.<sup>239</sup>

The other case of the European Court of Human Rights is *Rahimi v Greece*<sup>240</sup>, where state violated Article 3 of the ECHR because of detention of an unaccompanied minor in the detention centre with shameful conditions. The Court established the connection between detention of migrant children and Article 3 of the CRC, in which the best interest of the child principle enshrined: “[l]ooking, inter alia, to IHRL standards as enshrined in the CRC, the European Court of Human Rights noted that the Greek authorities had failed to uphold or even consider the ‘best interests of the child’ principle when they made a decision to detain the applicant under domestic immigration law [...]”<sup>241</sup>.

<sup>236</sup> “Fundamental rights of refugees, asylum applicants and migrants at the European borders”, European Union Agency for Fundamental Rights”, Accessed 29 March 2020, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-coe-2020-european-law-land-borders\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf).

<sup>237</sup> “European Network of Ombudspersons for Children (ENOC). Position Statement on “Ending detention of children for immigration purposes”. Adopted by the 23rd ENOC General Assembly, 27 September 2019, Belfast”, European Network of Ombudspersons for Children, Accessed 28 April 2020, <http://enoc.eu/wp-content/uploads/2019/10/ENOC-statement-on-ending-child-immigration-detention-FV.pdf>.

<sup>238</sup> “Case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, no. 13178/03”, European Court of Human Rights, Accessed 27 February 2020, [https://hudoc.echr.coe.int/FRE#{"itemid":\["001-77447"\]}](https://hudoc.echr.coe.int/FRE#{).

<sup>239</sup> “Migrants in detention”, European Court of Human Rights, Accessed 27 March 2020, [https://www.echr.coe.int/Documents/FS\\_Migrants\\_detention\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf).

<sup>240</sup> “Case of *Rahimi v. Greece*, 05 July 2011, no. 8687/08”, European Database of Asylum Law, Accessed 27 February 2020, <https://www.asylumlawdatabase.eu/en/content/ecthr-rahimi-v-greece-application-no-868708-1>.

<sup>241</sup> “A Child Rights Response to Child Migration and Migrant Children at Risk”, The International Bar Association, Accessed 05 November 2019, <https://webcache.googleusercontent.com/search?q=cache:veKzB2J4Wk0J:https://www.ibanet.org/Document/Default.aspx%3FDocumentUid%3Da9e81c7a-56f1-43ca-93ea-091c3e2c8832+&cd=1&hl=ru&ct=clnk&gl=ua&client=safari>.



The EU law also has its own position on the issues of detention of migrant children. Article 17 of the 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 stated that “[u]naccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time”<sup>242</sup>. Thus, the detention is only limit, but not prohibit the detention of migrant children.

There are some states that apply immigration detention to children, not following the recommendations to limit this practice. The statistical numbers (2018: France – 2768 migrant children in detention, Hungary – 1254, Bulgaria – 736, Belgium – 326, Greece – 255, etc.<sup>243</sup>) show that the tendency is not going down. Therefore, it would be reasonable to supplement the EU legislation, Directive 2013/33/EU particularly, with norms that will restrict or prohibit the detention of children because of their migratory status. Consequently, the EU Law does not contradict the CRC; on the contrary, it goes as far as possible in one direction, limiting the detention of children, including migrants.

Taking all into account, the detention of migrant children is still a widespread practice. On the one hand, the CRC directly does not prohibit this measure and has the goal to protect migrant children at detention, however, on the other hand, the UNCRC and other International organizations try to limit, prevent and oppose using of detention of migrant children so that then it completely disappears. Article 37 of the CRC is a special provision in International Law, which aims to guarantee children their rights during detention because of their migratory status. However, it can be seen, that the current tendency is prohibition of the immigration detention of children under International Law and not all states follow it.

### **2.3. Protection of Refugee and Asylum-Seeking Children under the Article 22 of the Convention on the Rights of the Child**

Many children nowadays travel from their country of origin in search of protection against persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. “Children below 18 years of age constituted about half of the refugee population in 2018, up from 41 per cent in 2009 but similar to the previous few years”<sup>244</sup>. These

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<sup>242</sup> “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”, EUR-Lex, Accessed 07 December 2019, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115>.

<sup>243</sup> “The Countries Detaining The Most Migrant Children”, Statista, Accessed 29 March 2020, <https://www.statista.com/chart/20022/the-number-of-children-in-migrant-related-detention/>.

<sup>244</sup> “Global trends. Forced displacement in 2018”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, <https://www.unhcr.org/globaltrends2018/>.



numbers illustrate that the relevance of protecting refugee and asylum-seeking children is increasing every year.

There is no legal definition of ‘refugee children’ in the text of the CRC. Therefore, it can be searched in the RC, as “the cornerstone of the international refugee protection regime”<sup>245</sup>.

“More generally, the (*para. 1 of the*) Preamble to the (*Refugee*) Convention (“[c]onsidering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”<sup>246</sup>”) delineates the close linkage between human rights law (*the CRC is the act of human rights law*) and refugee law”<sup>247</sup>.

The RC defines who is a ‘refugee’ in Article 1: “A person who, owing to a well-founded fear of persecution 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”<sup>248</sup>.

Article 1 of the RC does not have a specific age definition; in this Article is said about ‘a person’ and did not refer to children, adolescents, adults or the elderly. About this, the UNHCR commented that “[t]he same definition of a refugee applies to all individuals, regardless of their age”<sup>249</sup>. The UN Human Rights Council gives a more definite answer whether the concept of a refugee under the Article 1 of the RC applies to refugee children: “(*The RC*) protects the rights of child refugees and asylum-seekers. Although there is no specific mention of child refugees in (*the RC*), its provisions – including article 22 which requires States to extend to refugees equal treatment as nationals in regard to education – apply equally to the situation of children”<sup>250</sup>. Consequently, the refugee children are under the scope not only the definition of a

<sup>245</sup> “Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection No. 103 (LVI) – 2005”, United Nations High Commissioner for Refugees, Accessed 16 March 2020, <https://www.unhcr.org/excom/exconc/43576e292/conclusion-provision-international-protection-including-complementary-forms.html#>.

<sup>246</sup> “Convention relating to the Status of Refugees (1951)”, United Nations Human Rights Office of the High Commissioner, Accessed 08 December 2019, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>.

<sup>247</sup> Erika Feller, “Statement in the EU Seminar on Children affected by Armed Conflict and Displacement”, *Refugee Survey Quarterly* 23, 2 (2004), 327.

<sup>248</sup> “Convention relating to the Status of Refugees (1951)”, United Nations Human Rights Office of the High Commissioner, Accessed 08 December 2019, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>.

<sup>249</sup> “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, <https://www.unhcr.org/4d93528a9.pdf>.

<sup>250</sup> “Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the

refugee from Article 1 of the RC, but under the scope of all provisions of the RC. Determining the age of asylum-seeking children can often be a problematic issue in the host state, because “[a] refugee's birth might never have been registered, or identity documents never issued. Identity papers are sometimes lost, forged, or destroyed. Even when the papers are in order, authorities might question their validity”.<sup>251</sup>

The UNHCR paid attention that it is a violation of the CRC, which applies to a child under 18 years old if there will be different provisions in legislation or migration policies of some states, which can establish the age of 16 years old or even lower age to the category of asylum-seeking children: “[e]very person under 18 years who is the principal asylum applicant is entitled to child-sensitive procedural safeguards. Lowering the age of childhood or applying restrictive age assessment approaches in order to treat children as adults in asylum procedures may result in violations of their rights under international human rights law. Being young and vulnerable may make a person especially susceptible to persecution”<sup>252</sup>. Further, the UNHCR also allowed to apply the concept of refugee children to slightly older than 18 years children: “[...] exceptional cases [...] if the applicant is 18 years of age or slightly older. This may be particularly the case where persecution has hindered the applicant’s development and his/her psychological maturity remains comparable to that of a child”<sup>253</sup>.

Thus, the UNHCR in its recommendations use the age of 18 years as a threshold of applying the child related procedural standards and allows its application in exceptional cases for persons older than age. In order to stop the practice of states in denying children over the age of 16 to exercise of rights of a refugee child, which are granted to them by the CRC, and to make the CRC a full-fledged independent defense mechanism in International Law for refugee children, it would be reasoned to consider the term “refugee child” by age criteria: “A refugee or asylum-seeking child is defined as a person under 18 years of age”.

Even though migrant children also have the right to obtain refugee status under the RC, these children still often face different challenges. The UNHCR raises questions about two most spread challenges:

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context of migration”, United Nations Human Rights Office of the High Commissioner, Accessed 10 March 2020, [https://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.29_en.pdf).

<sup>251</sup> United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (Geneva, 1994), 44. (105!)

<sup>252</sup> Ibid.

<sup>253</sup> “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”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, [https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201\(A\)2%20and%201\(F\)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees](https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201(A)2%20and%201(F)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees).

1) if the children are unaccompanied by parents, children are often not recognized by states as bearers of their own right to refugee status in this state;

2) if the children are accompanied by parents, then their application is not considered by the state separately, but only in conjunction with parents or other members of their families<sup>254</sup>.

The authors of the CRC tried to combine and solve both of the above problems concerning refugee children. “Children refugees [...] need special protection by the state, which will comply with its international obligations as envisaged by the Convention on the Rights of the Child.”<sup>255</sup>

First of all, principles, that applied to the refugee and asylum-seeking children, should be examined. Articles 2, 3, 6, 12 of the CRC as four general principles<sup>256</sup> for protecting the rights of children, which were defined by the UNCRC, are applied to the refugee children or children who are seeking refugee status. Separately, the principle of non-discrimination and the best interest of the child principle should be noted.

The first principle, provided in the CRC, is the principle of non-discrimination, which is fixed in Article 2 of the CRC, that means that states shall respect and ensure the rights set forth in the CRC to each child, including to a refugee child. The UNCRC noticed about the age ground of discrimination that there should not be the same treatment for both refugee children and adult refugees: “The Committee is concerned that unaccompanied minors applying for asylum are interviewed in the same way as adults”<sup>257</sup>. Since children cannot explain as adults due to their age-related and other reasons, the UNCRC indicated that “(children’s) unique experiences of persecution, due to factors such as their age, their level of maturity and development and their dependency on adults have not always been taken into account. Children may not be able to articulate their claims to refugee status in the same way as adults and, therefore, may require special assistance to do so”<sup>258</sup>. The UNCRC later recommended states to

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<sup>254</sup> “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”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, [https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201\(A\)2%20and%201\(F\)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees](https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201(A)2%20and%201(F)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees).

<sup>255</sup> Olga Cvejic Jancic, *The Rights of the Child in a Changing World: 25 Years after The UN Convention on the Rights of the Child* (Springer International Publishing Switzerland, 2016), 153.

<sup>256</sup> “UNCRC, General Comment No 5 (2003): General Measures of Implementation of CRC (2003), CRC/GC/2003/5”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/docid/4538834f11.html>.

<sup>257</sup> “Concluding observations of the Committee on the Rights of the Child: Finland. CRC/C/15/Add.132 16 October 2000”, United Nations High Commissioner for Refugees, Accessed 23 March 2020, <https://www.refworld.org/docid/3ae6afd514.html>.

<sup>258</sup> “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”, United Nations High Commissioner for

analyze all its legal acts with the aim “to eliminate all discriminatory elements between adults and minors as well as between refugees of different ethnic backgrounds [...]”<sup>259</sup>.

The best interest of the child principle, which is enshrined in Article 3 of the CRC, has a primary consideration and plays a role of “umbrella provision” for refugee children or children who are seeking refugee status. “In relation to refugee status determination, the best interests principle should therefore apply not only when a child independently claims asylum, but also when the child is affected by a parent's application (either through derivative status or through a subsequent family reunion application)”.<sup>260</sup> In order to simplify the application of the best interest of the child principle in asylum cases, scientists have developed assessments, which can be used in migration procedures, which “provide evidence and child-rights based information to the migration authorities, which should be taken into account when the migration decision regarding a residence permit is made; and consist of various components such as a diagnostic interview and several instruments concerning children's mental health and development. These assessments follow 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) of the UNCRC”<sup>261</sup>.

Adding about the value of the best interest of the child principle for refugee protection cases, Jacqueline Bhabha draws attention that in situations where a child independently and without the help of adults migrates from a dangerous country of origin to another safe country and then applies for refugee status here, he uses this principle without interference from government bodies or adults. And then the scientist observed the situation as a manifestation of this principle, when the child himself chooses what is in his best interests: between the danger in the country of origin and the foreign country where he seeks asylum, the child chooses a safe country<sup>262</sup>.

The CRC also includes the principle of non-refoulement in Articles 6 and 37, which is crucial not only for refugee children, but also for refugees in general. The principle of non-refoulement is a part of International customary law. The UNCRC stressed the link between the

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Refugees, Accessed 15 March 2020, [https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201\(A\)2%20and%201\(F\)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees](https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201(A)2%20and%201(F)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees).

<sup>259</sup> “Consideration of Reports submitted by States Parties under Article 44 of the Convention: Kyrgyzstan. CRC/C/15/Add.244, 3 November 2004”, United Nations Human Rights Office of the High Commissioner, Accessed 22 March 2020, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F15%2FAdd.244&Lang=ru](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F15%2FAdd.244&Lang=ru).

<sup>260</sup> Jane McAdam, “Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection”, *The International Journal of Children's Rights*, 14 (2006): 255.

<sup>261</sup> E.C.C. van Oset al., “Recently arrived refugee children: The quality and outcomes of Best Interests of the Child assessments”, *International Journal of Law and Psychiatry*, 59 (2018): 22.

<sup>262</sup> Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (New Jersey: Princeton University Press, 2014), 204.

principle of non-refoulement and Article 6 of the CRC: “States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the (CRC), either in the country to which removal is to be effected or in any country to which the child may subsequently be removed”<sup>263</sup>.

Jason M. Pobjoy also extends Article 6 of the CRC with a non-refoulement obligation of the state. Compared the non-refoulement obligations under the CRC and the RC, he concluded that the regulation of this principle is narrower under the CRC, that under the RC, “which protects against a broader range of risks through the concept of ‘being persecuted’ – and more full in allowing for no exceptions and mandating protection irrespective of the reason for the apprehended harm. Although not every violation of Article 6(2) will automatically engage a state’s non-refoulement obligations – the overarching test remains that there be substantial grounds for believing that a child is at risk of irreparable harm”<sup>264</sup>. To go in more detail, the principle of non-refoulement under the CRC is also vital for asylum-seeking children. The Convention protects those children who do not fall within the framework (cannot be a refugee under the RC) of international refugee law, but who, due to risks, still cannot be returned to their country of origin.

Article 37 of the CRC guarantees that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”<sup>265</sup>. UN Human Rights Committee explained, that states “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement (forced return of asylum seekers)”<sup>266</sup>.

Thus, this principle is crucial for this category of children. Indeed, the inclusion of the principle of non-refoulement in the meaning of Articles 6 and 37 of the CRC is very positive, despite the fact that the CRC regulates this principle in a less degree than the RC.

The CRC includes not only the principles, which applies to the refugee or asylum-seeking children, but protects this category of children with all of its standards. Christoph Bierwirth explained that general human rights instruments, like the CRC, are relevant to persons

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<sup>263</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

<sup>264</sup> Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017), 190-193.

<sup>265</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>266</sup> “CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, United Nations High Commissioner for Refugees, Accessed 16 March 2020, <https://www.refworld.org/docid/453883fb0.html>.

and individuals not explicitly or comprehensively covered by the RC. Such individuals are refugee children or asylum-seeking children. To a greater extent, all aspects of a refugee children's life are guaranteed by the CRC, for example, Articles 5, 9, 10, 14 on family rights, Article 21 on adoption, Article 24 on health rights, Article 27 on the right to an adequate standard of living, Article 28 on educational rights and so on.

Despite that, the CRC has a special Article 22, which has the aim to protect this category of children. Dominic McGoldrick in his commentary named Article 22 as “Refugee Children”<sup>267</sup>. Under para. 1 of Article 22, states “shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties”<sup>268</sup>.

Article 22 of the CRC applies not only to refugee children, but also to asylum-seeking children. It is important to note that the UNHCR is expanding the subjective scope of this article

Alternative mechanisms must be available for those who are not refugees or asylum-seekers or stateless but who need protection, including victims of trafficking and unaccompanied and separated children (UASC). It should always be recalled that people with other needs—such as victims of trafficking, stateless people, or unaccompanied children—may also require international protection as refugees. Cross-referral pathways between different services and procedures are important.<sup>269</sup>

The UNHCR added that not all asylum-seeker children would automatically get refugee status due to their age. “The child applicant must establish that s/he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. As with gender, age is relevant to the entire refugee definition”<sup>270</sup>.

In the continuation of the topic of the subjective scope of Article 22, the UNCRC made an accent that not all migrant children should automatically qualify as asylum-seeking children under Article 22 of the CRC and recommended what the state can do for this category of people

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<sup>267</sup> Dominic McGoldrick, “The United Nations Convention on the Rights of the Child”, *International Journal of Law and the Family*, 5 (1991): 145.

<sup>268</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>269</sup> “Migrant definition”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, <https://emergency.unhcr.org/entry/44937/migrant-definition>.

<sup>270</sup> “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”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, [https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201\(A\)2%20and%201\(F\)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees](https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201(A)2%20and%201(F)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees).



The Committee recommends that the State Party [...] substantially increase the resources allocated for internally displaced persons and implement targeted programmes for children in order to provide them with adequate access to food, shelter, education and health services; [...] pay additional attention to the psychosocial assistance required by children who have been displaced and provide further protection for girls against gender-based violence [...].<sup>271</sup>

The category of migrant unaccompanied and separated children are also mentioned in Article 22 of the CRC. European Parliament published that the main reason of today's "refugee crisis" is the significant increase of migrant unaccompanied and separated minors worldwide, which always face the threats<sup>272</sup>.

It must be pointed out, that other categories of migrants, except asylum-seeking and refugee children, are not protected under Article 22 of the CRC. R. Hodgkin and P. Newell wrote specifically about internally displaced persons, persons who leave their homes, but not their countries of origin, which also are not fallen under Article 22<sup>273</sup>. These scholars also added about such categories of children, that are not under scope of Article 22 of the CRC: unaccompanied children outside their country that are the so-called economic migrants fleeing poverty and lack of opportunity rather than persecution; children in foreign countries that may also have been trafficked there for exploitation as prostitutes or domestic workers<sup>274</sup>.

Article 22 of the CRC includes the right of refugee children or asylum-seeking children to "receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention". It is particularly substantial for refugee children because there are some rights of refugee children in the CRC, e.g. the right to a name and a nationality immediately after birth<sup>275</sup>, the right to preservation of identity<sup>276</sup>, etc., that are not incorporated in the RC, but occasionally relevant for refugee children.

This Article refers to "other international human rights or humanitarian instruments to which the said States are Parties". The RC as a whole and namely Article 23 of the RC can be as instances of these instruments: "The Contracting States shall accord to refugees lawfully staying

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<sup>271</sup> "Consideration of Reports Submitted by States Parties under Article 44 of the Convention", United Nations High Commissioner for Refugees, Accessed 15 March 2020, <https://www.refworld.org/docid/45377ee30.html>.

<sup>272</sup> "Vulnerability of unaccompanied and separated child migrants", European Parliament, Accessed 15 March 2020, [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2016\)595853](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)595853).

<sup>273</sup> R. Hodgkin and P. Newell, Implementation handbook for the Convention on the Rights of the Child (UNICEF, 1998), 311.

<sup>274</sup> Ibid, p. 311.

<sup>275</sup> Article 7: "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." "Convention on the Rights of the Child", United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>276</sup> Article 8: "1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." Ibid.



in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals”<sup>277</sup>.

Para. 2 of Article 22 deals with situations when children do not have family members and oblige states to provide international co-operation, that they consider appropriate to protect and assist such children and to trace their parents or family with a view to reunification of the family: “For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention”<sup>278</sup>.

This paragraph of Article 22 of the CRC is a rule, that obligates states to make efforts to encourage international and non-governmental organizations to implement different programs which secure the rights of refugee children<sup>279</sup>. The UNCRC gives an example of such organizations<sup>280</sup>, divided them by rights, which refugee children have under the CRC: right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health (Articles 23, 24 and 39 of the CRC) – UNICEF, World Health Organization, Joint United Nations Programme on HIV/AIDS and others; right to an adequate standard of living (Article 27) – UNICEF, United Nations Educational, Scientific and Cultural Organization, UNHCR and others; right and access to education (Articles 28, 29(1)(c), 30 and 32) – UNICEF, United Nations Educational, Scientific and Cultural Organization, UNHCR, etc.

Some other scholars added that when the war or internal conflict was the main reason of forced migration of the child, which in turn led to obtaining the refugee status, such organizations, like the Human Rights Watch and Defence for Children International<sup>281</sup>, are very active in collecting various information about violations of the rights of such children.

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<sup>277</sup> “Convention relating to the Status of Refugees (1951)”, United Nations Human Rights Office of the High Commissioner, Accessed 08 December 2019, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>.

<sup>278</sup> “Convention on the Rights of the Child”, United Nations Human Rights Office of the High Commissioner, Accessed 05 November 2019, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>279</sup> Margaret McCallin, “The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children”, *International Journal of Refugee Law* 3, 1 (1991): 84.

<sup>280</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

<sup>281</sup> Elena Fiddian-Qasbiyeh et al., *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, University Press), 2014, 388.

It can be noticed that this paragraph was the result of the active participation in the work under the CRC of the Working Group of representatives of United Nations bodies and specialized agencies, including the Office of the UNHCR, the International Labour Organization, the UNICEF and the World Health Organization, as well as several non-governmental organizations, including Amnesty International, International Committee of the Red Cross and so on<sup>282</sup>. It is evident that these organizations followed the process of creating the CRC, formulated proposals, which subsequently affected the final content of the provisions of the CRC or individual wordings. And this once again confirms the fact that the CRC is a universal document that protects the rights of children in all situations, including migrant children.

One of the organizations, which importance is emphasized by the UNCRC, is UNHCR. “States shall take into account [...] positions developed by UNHCR in exercising its supervisory functions under the 1951 Refugee Convention”<sup>283</sup>. The UNHCR regularly publishes its acts of “soft law” about the protection of the refugee and asylum-seeker children, e.g., Executive Committee of the High Commissioner’s Programme “Refugee Children” No. 47<sup>284</sup>; Executive Committee of the High Commissioner’s Programme “Protection of the Refugee’s Family” No. 88<sup>285</sup>; 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”<sup>286</sup>; etc.

The IOM highlighted the most paramount principles of treatment with refugee and asylum-seeking children, which was elaborated by the UNHCR. For instance, children must be among the first to receive protection and assistance; refugee children born in a country of asylum states must be registered; refugee children must be protected from threats to their life, liberty and security, from torture and cruel, inhuman or degrading treatment or punishment, from harmful traditional practices and from sexual violence, exploitation, trafficking and abuse; adoption of refugee children should only be considered when all feasible steps for family tracing and

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<sup>282</sup> Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child (vol. 1)* (New York and Geneva, 2007), 39.

<sup>283</sup> “Committee on the Rights of the Child. General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin”, United Nations Human Rights Office of the High Commissioner, Accessed 10 November 2019, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

<sup>284</sup> “Executive Committee of the High Commissioner’s Programme, Refugee Children No. 47 (XXXVIII) - 1987, 12 October 1987, No. 47 (XXXVIII)”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/docid/3ae68c432c.html>.

<sup>285</sup> “Executive Committee of the High Commissioner’s Programme, Protection of the Refugee’s Family No. 88 (L) - 1999, 8 October 1999, No. 88 (L)”, United Nations High Commissioner for Refugees, Accessed 11 December 2019, <https://www.refworld.org/docid/3ae68c4340.html>.

<sup>286</sup> “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”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, [https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201\(A\)2%20and%201\(F\)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees](https://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html?query=GUIDELINES%20ON%20INTERNATIONAL%20PROTECTION:%20Child%20Asylum%20Claims%20under%20Articles%201(A)2%20and%201(F)%20of%20the%201951%20Convention%20and/or%201967%20Protocol%20relating%20to%20the%20Status%20of%20Refugees).

reunification have been exhausted, and then only in the best interests of the child and in conformity with international standards and others<sup>287</sup>. All these provisions are embodied in the CRC.

The connection and interrelation between the CRC and the RC rise disputes among scholars and lawyers. Thus, researchers at the International Bar Association concluded that, despite all the positive aspects of the similarities in the protection of refugee children between the CRC and the RC, International Law still lacks a document that will link these two acts: “A comprehensive declaration or framework document, commencing with the standards set out in the CRC and the Refugee Convention and its 1967 Protocol, could provide a useful starting point for strengthened implementation, action plans and timelines for states”<sup>288</sup>.

About the connection of the CRC and the RC, Samantha Arnold in book “Children’s Rights and Refugee Law Conceptualizing” added that “[i]t is clear that the CRC and the RC must be brought together to form laws for child refugees”<sup>289</sup>. Moreover, this thought is not new. Jason M. Pobjoy identified 3 aspects, in which the CRC can be pertinent for refugee children: 1) providing procedural guarantees not otherwise provided under international refugee law; 2) an interpretative aid to inform the interpretation of the RC; 3) an independent source of status outside the international refugee protection regime<sup>290</sup>.

It should be noted that the CRC mostly can be an independent source of status outside the international refugee protection under the RC, because the CRC includes the most crucial principles and provisions concerning refugee children: Article 3 – the best interest of the child principle; Article 6 and 37 – the principle of non-refoulment; Article 22 – special article concerning refugee children; etc. “The CRC can not only enable children to more actively participate in the process of refugee status determination but can act as an interpretative tool for understanding how children’s claim for protection can be understood to ‘fit’ within the meaning of the Refugee Convention”<sup>291</sup>.

Article 22 makes further stipulations related refugee children, who are to be treated similar to any other citizen child. [...] Article 22 is ‘the only provision in any human rights treaty that deals expressly with the situation of refugee children

<sup>287</sup> *Children First – Minors in the Asylum Process: A training Programme for Officials* (Helsinki: International Organization for Migration, 2002), 13-16.

<sup>288</sup> “A Child Rights Response to Child Migration and Migrant Children at Risk”, The International Bar Association, Accessed 05 November 2019, <https://webcache.googleusercontent.com/search?q=cache:veKzB2J4Wk0J:https://www.ibanet.org/Document/Default.aspx%3FDocumentUId%3Da9e81c7a-56f1-43ca-93ea-091c3e2c8832+&cd=1&hl=ru&ct=clnk&gl=ua&client=safari>.

<sup>289</sup> Jameson Parker, “Samantha Arnold: Children’s Rights and Refugee Law Conceptualizing Children within the Refugee Convention”, *Journal of Youth and Adolescence*, 47 (2018): 1794.

<sup>290</sup> Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017), 27.

<sup>291</sup> Heaven Crawley, “Book review: Jason M. Pobjoy. The Child in International Refugee Law”, *European Journal of Migration and Law*, 20 (2018) : 110.

and children seeking refugee status'. That it was included in the face of disagreement by some states wanting to restrict rights to citizen children makes this article a strong international rights-based approach to refugee children.<sup>292</sup>

Article 22 is very significant for refugee and asylum-seeking children. Daniel O'Donnell is convinced that the main aim of Article 22 is "to ensure that the claims of children to refugee status are examined on the merits, despite their status as minors, regardless of whether or not their lawful guardians are in a position to make a claim on their behalf". He added that this is only one right of refugee children under the CRC, other protection refugee children must look in the RC<sup>293</sup>. Ilene Kohn, disagreeing with this statement, explains: "A refugee child [...], who does not receive refugee status in the host country (either because the host country is not a party to the (RC) or because of limitations in national refugee status determination procedures), can now claim all CRC rights in the territory of a contracting State"<sup>294</sup>. Thus, the sphere of application of the CRC in the refugee children's cases is broader than the RC.

Indeed, Article 22 of the CRC is very influential for refugee children. "*(Article 22 of the) Convention on the Rights of the Child (can) calls for a total re-alignment of protection, away from the formalities of 1951-style refugee status towards a complete welfare approach.*"<sup>295</sup> "The CRC requires perhaps the most exacting standards for protection and assistance to minors under any international instrument"<sup>296</sup>.

Overall, the role of the CRC in regulating the problems of refugee children is constantly growing and this influence is even presented in states that are not party to the CRC:

The growing influence of the Convention on the Rights of the Child, with its foundational concept of "the best interests of the child" [...], and with its clear articulation of the rights of refugee and asylum-seeking children, "has had some impact on domestic law and practice affecting child migrants. Even the US government [...] despite nonratification of the Convention, has referenced its principles, both in its child asylum guidelines and in the regular training given to asylum officers adjudicating children's cases. In addition to the general force of key articles in the Convention, the work of the UN Committee on the Rights of the Child in the development of a General Comment dealing with migrant children is an important contribution to an evolving rights-based adjudication framework."<sup>297</sup>

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<sup>292</sup> Jeanette A. Lawrence, Agnes E. Dodds, Ida Kaplan and Maria M. Tucci, "The Rights of Refugee Children and the UN Convention on the Rights of the Child", *Laws* 8, 20 (2019): 4, <https://www.mdpi.com/2075-471X/8/3/20>.

<sup>293</sup> Daniel O'Donnell, "Resettlement or Repatriation: Screened-out Vietnamese Child Asylum Seekers and the Convention on the Rights of the Child", *International Journal of Refugee Law* 6, 3 (1994): 390.

<sup>294</sup> Ilene Kohn, "The Convention on the Rights of the Child: What it Means for Children in War", *International Journal of Refugee Law* 3, 1 (1991): 106.

<sup>295</sup> Guy S. Godwin-Gill, "Who to Protect, How ..., and the Future?", *International Journal of Refugee Law* 9, 1(1997): 6.

<sup>296</sup> Erika Feller, "Statement in the EU Seminar on Children affected by Armed Conflict and Displacement", *Refugee Survey Quarterly* 23, 2 (2004), 328.

<sup>297</sup> Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (New Jersey: Princeton University Press, 2014), 8.

The EU mentions to the CRC in its legislation on the sphere of refugee law. In the 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, which is a fundamental act in the field of international protection, including refugee protection, was referred to the best interests of the child principle in these matters under the Article 3 of the CRC: “The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child”<sup>298</sup>.

Besides, it is interesting to note that the authors of the Directive use in their terminological apparatus not the concept of a child, but the concept of a minor, that means “a third-country national or stateless person below the age of 18 years” (Article 2, k)<sup>299</sup>. UNHCR accepted the definition of ‘a minor’ under this Directive: “UNHCR welcomes the proposed definition of “minor” [...] to include all persons under 18. Aware that a number of States have used different age limits for children for the purposes of certain entitlements, UNHCR encourages all to adopt the 18-year standard, to enable all children to benefit from the Directive’s safeguards”<sup>300</sup>.

Taking everything into account, it can be concluded that refugee or asylum-seeking children are highly vulnerable. Due to some challenges, they need special care from states. The CRC contains a distinctive norm in International Law (Article 22) on the protection of refugee and asylum-seeking children. The CRC provides refugee children with the right to exclusive defense and assistance not only in particular Article 22 but in the full package of its rights. The CRC pays particular attention to the importance of international cooperation in the sphere of protecting the rights of refugee and asylum-seeking children as a particularly vulnerable category of people.

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<sup>298</sup> “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”, EUR-Lex, Accessed 06 December 2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

<sup>299</sup> Ibid.

<sup>300</sup> “UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted”, United Nations High Commissioner for Refugees, Accessed 15 March 2020, <https://www.unhcr.org/4c5037f99.pdf>.

## CONCLUSIONS

1. Migrant children are often exposed to various dangers as they are the most vulnerable groups of the population due to their age-specific characteristics. Accordingly, they need special legal protection. International Law gradually recognized this necessity, and only in 1989, the CRC as a unique protective instrument was adopted, although it was not specifically designed to address the legal problems that migrant children may face. The CRC provides a comprehensive list of rights for migrant children, including civil, political, economic, social and cultural rights, and requires all states-parties of the CRC to protect migrant children due to their vulnerability.

2. Generally, the CRC protects all categories of children, including migrant children. However, the definition and scope of the term “migrant children” are not determined in the text of the CRC. The following meaning of this term can be proposed: migrant children are human beings below the age of eighteen years, who, because of some reasons away, voluntary or involuntary moves from their place of usual residence across the state border or not, for a short period of time or permanently. International institutions and organizations, as well as researchers in the sphere of International Law, define the scope of this term sufficient widely, including many categories, such as refugee children, asylum-seeking children, economic migrants, labour migrants, separated children or unaccompanied minors, temporary or permanent migrants, etc., and affirm that the CRC protects all these categories of migrant children.

3. The best interest of the child principle as the most important principle, which is enshrined in the CRC, shall have a primary consideration in all actions towards migrant children. It means that no one issue, concerning migrant children, cannot be resolved without considering this principle. The best interest of the child principle is always necessary for better protection of migrant children in cases, which are connected with the detention of children due to their own or parental migratory status, reunification processes with the family in cases of separation, in all procedures concerning temporary protection (including obtaining refugee status) and in determining other short and long-term solutions. At the same time, the relevance of further exploration of the potential of this principle remains high, because most of the problems of migrant children are solved through its prism.

4. The CRC is the first document in International Law, where the rights of migrant children to family unity and family reunification were enshrined. The CRC protects these rights of migrant children, acknowledging that separation from family because of migration is the most problematic challenge for them. This is confirmed by the fact that, issues related to complications of the procedure for migrant children to exercise these rights or to inform children that they have these rights are also addressed in the CRC.

5. Immigration detention of children, which is always contrary to the best interests of children, is still applied in many countries. The CRC literally does not prohibit the use of this practice, only providing some guarantees for migrant children in detention. Wherein, the UNCRC, other international institutions and organizations urge states to completely abandon the detention of children due to their or parental migration status. This problem will entirely be eliminated if states will interpret the CRC as an international instrument, that prohibits the immigration detention of migrant children, or if states will amend the Article 37 of the CRC.

6. The CRC separately identifies the category of refugee and asylum-seeking children as the most vulnerable category of the migrant children and provides them special protection in Article 22. The CRC can be recognized as an effective and capable instrument of International Law in the field of protecting the rights of this category of migrant children, as it solves many problems associated with determining their legal status, including by defining basic principles for their protection, establishing an age criterion, and includes other aspects.

7. It should be noted that since the CRC was adopted more than 30 years ago, it has proved to be an effective instrument for the protection of this category of children throughout these years. However, migrant children still have challenges in some areas due to the insufficient use of the protective mechanisms of the CRC. Many contemporary problems of migrant children will be addressed more effectively if states take into consideration all the proposals and recommendations on a broad interpretation of the CRC's norms that the UNCRC, a CRC's treaty body, that engages in guidances on migrant children, other international institutions and organizations offer.



## RECOMMENDATIONS

1. In order to properly fulfil states' obligations under the CRC and to increase the level of protection by the norms of the CRC of the category of migrant children as a very vulnerable category of children, it is proposed for states parties to the CRC to consider reservations concerning migrant children as incompatible with the object and purpose of the CRC and interpret para. 2 of Article 51 of the CRC as the provision, which will prohibit formulating such reservations. If some states decide to launch the revision process of the CRC, it will be preferable to amend Article 51 of the Convention and prohibit countries from formulating reservations concerning migrant children.

2. In order to simplify the procedures related to the right to family reunification in some way for migrant children and reduce cases of denials of migrant children the right to the family reunification, that they have under Article 10 of the CRC, it would be appropriate for states parties of the CRC to interpret the term "family" under the CRC in a broad sense. The scope of this term should include not only biological or adoptive parents, but also guardians and other family members, with whom the migrant children have a family relationship or family members, with whom kinship is established by local custom rules.

3. In order to follow the recommendations of some authoritative international bodies or organizations, which have an aim to completely ban the detention of migrant children as a particularly vulnerable category of children, what is always contrary to their best interests, para. B of Article 37 should be interpreted as a provision that completely prohibits the detention of migrant children due to their or parental migratory status. If some states decide to begin the amending process to the CRC, it will be valid to add such an explicit provision to para. B of Article 37:

<i>Current para. B of Article 37 of the CRC</i>	<i>Proposed para. B of Article 37 of the CRC</i>
b) 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.	b) 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. <b>No one child shall be detained because of his or her own or parental migration status.</b>

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## ABSTRACT

Bilousov M. Migrant Children in the Context of Child Rights Convention / Master thesis in International Law. Supervisor – Prof. dr. Lyra Jakulevičienė – Vilnius: Mykolas Romeris University, Mykolas Romeris Law School, Institute of International and European Union Law, 2020.

Issues of protection by mechanisms of the International Law of migrant children is particularly relevant today because the numbers of migrant children are growing each year significantly. Master thesis “Migrant Children in the Context of Child Rights Convention” is devoted to the examining of the role of the Convention on the Rights of the Child as one of the essential instrument of protecting migrant children’s rights in the International Law through a comprehensive analysis of the relevant articles of the Convention and legal problems related to them. The Convention on the Rights of the Child contains a complete list of civil, political, economic, social and cultural rights that migrant children have and requires states to protect this category of children as the most vulnerable. The Convention on the Rights of the Child guarantees the right of migrant children to family reunification, effectively protects refugee and asylum-seeking children as a separate group of migrant children and limits the immigration detention of children what is always contrary to their best interests.

Master thesis “Migrant Children in the Context of Child Rights Convention” is divided into general and specific parts, which provide logical argumentation that the Convention on the Rights of the Child is an crucial protective instrument of migrant children in International Law. Conclusions and recommendations illustrate the effectiveness of the Convention on the Rights of the Child in the legal regulation of migrant children.

Keywords: migration, migrant children, refugee children, asylum-seeking children, Convention on the Rights of the Child.

## SUMMARY

Migrant children are often at risk and need special protection by International Law. Master thesis “Migrant Children in the Context of Child Rights Convention” examines the role of the Convention on the Rights of the Child as one of the essential instrument of protecting migrant children’s rights in the International Law through a comprehensive analysis of the relevant articles of the CRC and legal problems related to them. The main issues that were raised by the Master Thesis are how the CRC protects children in conditions of migration (on the examples of family reunification of migrant children, refugee and asylum-seeking children and detention of migrant children) and whether this protection is sufficient or not so that to solve the underlying problems that migrant children have. The main objectives of the research: 1) to specify the notion and scope of the concept ‘migrant children’; 2) to analyze the role of the CRC in the framework of the protection of migrant children; 3) to examine the weight of the best interests of the child principle for migrant children; 4) to consider how the CRC protects rights and freedoms of migrant children in such problematic situations, as family reunification and detention of migrant children; 5) to outline the level of protection of refugee and asylum-seeking children in the CRC.

The Master Thesis is divided into two parts: the first chapter “Situating the Migrant Children in International Law” is part, where the basic concepts of the topic of the thesis, the place of the Convention on the Rights of the Child among other legal instruments and analyze of the role of the best interests of the child principle for migrant children under the CRC were examined; the second chapter “Some Problematic Aspects of Migrant Children and Their Solution in the Convention on the Rights of the Child” is part, where the right to family unity and reunification of migrant children with their families, level of protection of the category of refugee and asylum-seeking children and the problematic aspects of immigration detention of children were examined.

The CRC is a unique protective instrument, that protects all categories of children, including migrant children, providing them with a comprehensive list of rights. The CRC is an effective legal instrument in the framework of the protection of migrant children among other international legal documents. Legal problems, which migrant children have, could be addressed through the best interest of the child principle, which is enshrined in the Convention on the Rights of the Child. States should interpret the Convention on the Rights of the Child, taking into consideration the recommendations and other documents of international institutions and organizations that expand the protective mechanisms of the Convention on the Rights of the Child in relation to migrant children.

## HONESTY DECLARATION

## HONESTY DECLARATION

15 / 04 / 2020Vilnius

I, Mykolas Bilausas, student of  
 (name, surname)

Mykolas Romeris University (hereinafter referred to University),

Mykolas Romeris Law School, Institute of International and  
 (Faculty / Institute, Programme title)  
European Union Law, International Law Programme

confirm that the Bachelor / Master thesis titled

"Migrant Children in the Context of Child Rights  
Convention"

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

[Signature]  
 (signature)

Mykolas Bilausas  
 (name, surname)