Guidelines

Promoting the Human Rights and the Best Interests of the Child in Transnational Child Protection Cases

Publisher Council of Baltic Sea States Secretariat
Stockholm, Sweden

ISBN 978-91-980572-5-6

Editor and co-author Turid Heiberg, Council of Baltic Sea States Secretariat

Author Daja Wenke

Contributors Central Board of the State Border Guards in Latvia

State Child Rights Protection and Adoption Service in Lithuania

Stockholm Social Emergency Authority in Sweden

Speakers and participants at the expert meetings in the 'PROTECT Children on the Move' project

CBSS Expert Group for Cooperation on Children at Risk

Reviewers Christoph Braunschweig, Social and Legal Department, Swiss Foundation for the International Social Service; Nina Hannemann, Special Adviser, The Danish Centre against Human Trafficking, Denmark; Philip Ishola, Independent Child Protection, Human Trafficking, Human Rights Consultant, UK; Jyothi Kanics, Independent Child Rights Advocate; Katarina Munier, Programme Officer, National Board of Health and Welfare, Department of Evaluation and Analysis, Welfare Development Unit, Stockholm, Sweden; Kerry L. Neal, Child Protection Specialist, UNICEF Headquarters; Anthony Jay, Head of Media & Communications, CBSS Secretariat.

Layout and design Laura Klimaitė

Illustrations Raquel Benmergui

Printing Printing House KOPA (www.kopa.eu)

Acknowledgements

The development of these Guidelines was made possible with the support of the speakers and participants in the expert meetings in the project Child Exploitation: Cross-National Child Protection in Practice – 'PROTECT Children on the Move' during 2014 and 2015. The Guidelines have also been influenced by other important actors in the field working with and for children on the move.

The project has been funded with support from the European Commission. This publication reflects the views only of the authors, and the European Commission cannot be held responsible for any use, which may be made of the information contained therein.

Copyright 2015
Council of the Baltic Sea States Secretariat

Guidelines

Promoting the Human Rights and the Best Interests of the Child in Transnational Child Protection Cases

The Council of the Baltic Sea States Secretariat

4 **Introduction**

6 **How to use the guidelines**

8 **Part I**

The human rights of children on the move

9 **The United Nations Convention on the Rights of the Child**

9 **Children's mobility in a human rights and development perspective**

9 Children on the move: Migrants, refugees, victims of trafficking and children at risk

12 Exploitation of children on the move

12 Respecting the rights of children on the move: A holistic perspective

15 Risk and resilience as determinants of vulnerability

16 Migration and development

17 **Part II**

Child rights principles as fundamental safeguards

18 **The best interests of the child – Towards a holistic understanding of the person**

18 Best interests' assessments and determinations: Two steps of a process

23 Inter-agency and multi-disciplinary cooperation for best interests' assessments and determinations

25 The role of central authorities in transnational child protection

28 Balancing rights and interests in best interests' determinations

28 Training, capacity and attitudes of staff

30 **The right to non-discrimination: Matters of status, access and jurisdiction**

32 Establishing jurisdiction over a non-national child

35 **The right to life, survival and development**

35 **The right to be heard: Communicating with children in the process of best interests' assessments and determinations**

37 Child-sensitive interviewing and trust

38 The relevance of age for the right to be heard

38 Gender considerations for the right to be heard

38 Forensic interviews

38 Hearing a child in investigations and proceedings

40 Quality interpretation and cultural mediation

40 Support from child rights advocates

40 Access to reporting and complaints mechanisms

40 Children's perspectives on their best interests

43 **Part III**

Step by step: Transnational cooperation in case assessments

44 Identification

47 The role of guardians and representatives in promoting the best interests of non-national children

48 Data protection and confidentiality

51 Sources of information

52 Family tracing and re-establishing family links

54 Maintaining family relations and contact

55 Assessing risk factors, resiliency and sources of support

56 **Part IV**

Transnational cooperation for the implementation of durable solutions

57 Durable solutions

57 Life projects

58 Keeping children on hold: The uncertainty at 18 in the absence of durable solutions

59 **Local integration**

59 After-care and youth support

61 Family reunification in the country of destination

61 Special safeguards for child victims of crime, including victims of exploitation and trafficking

63 **Resettlement and transfers**

63 Resettlement and integration in a third country

64 Transfers under the EU Dublin III Council Regulation

65 **Return**

66 International and regional standards governing the return of children

68 Different forms of return

69 Return of unaccompanied children whose asylum claims were rejected

70 Returning undocumented children

71 Return of child victims of trafficking

72 Return within the European Union

72 The use of international and European private law for returning children on the move

73 Immigration detention prior to return

74 Alternatives to immigration detention for children and families

75 Children's perspectives on return

77 Pre-return preparations

78 Transportation phase

78 Post-return and reintegration phase

79 Monitoring and evaluation

80 CONCLUDING REMARKS

82 **Annexes**

83 Glossary

85 Migration terminology as per definitions of the International Organization for Migration and the European Migration Network

87 Procedural safeguards in best interests' determination processes

91 The right to be heard in international and European standards

99 European law and policies relevant for children on the move: An overview of key standards

104 Index

105 List of boxes

Introduction

These Guidelines are informed by the project Child Exploitation: Cross-National Child Protection in Practice - 'PROTECT Children on the Move' and the experience and evidence shared by the numerous professionals and officials who participated in the project consultations.[1] In this context, the Council of the Baltic Sea States Secretariat and partners in Latvia, Lithuania and Sweden convened five expert meetings in 2014 and 2015 on transnational child protection.

Beyond the consultation series, the Guidelines were informed by European and international actors working with and for children on the move. They are rooted in international standards and elaborate on the best interests of the child as a human rights concept and a general principle that guides the implementation of the UN Convention on the Rights of the Child.

The Guidelines operate with the concept of 'safeguarding' children. An approach that safeguards children, recognises that protection measures need to be integrated into a continuum of services for prevention, protection and empowerment. All measures and actors have to respect and value the human rights, needs and views of the individual girl or boy in the light of her or his specific situation, background and perspectives for the future.

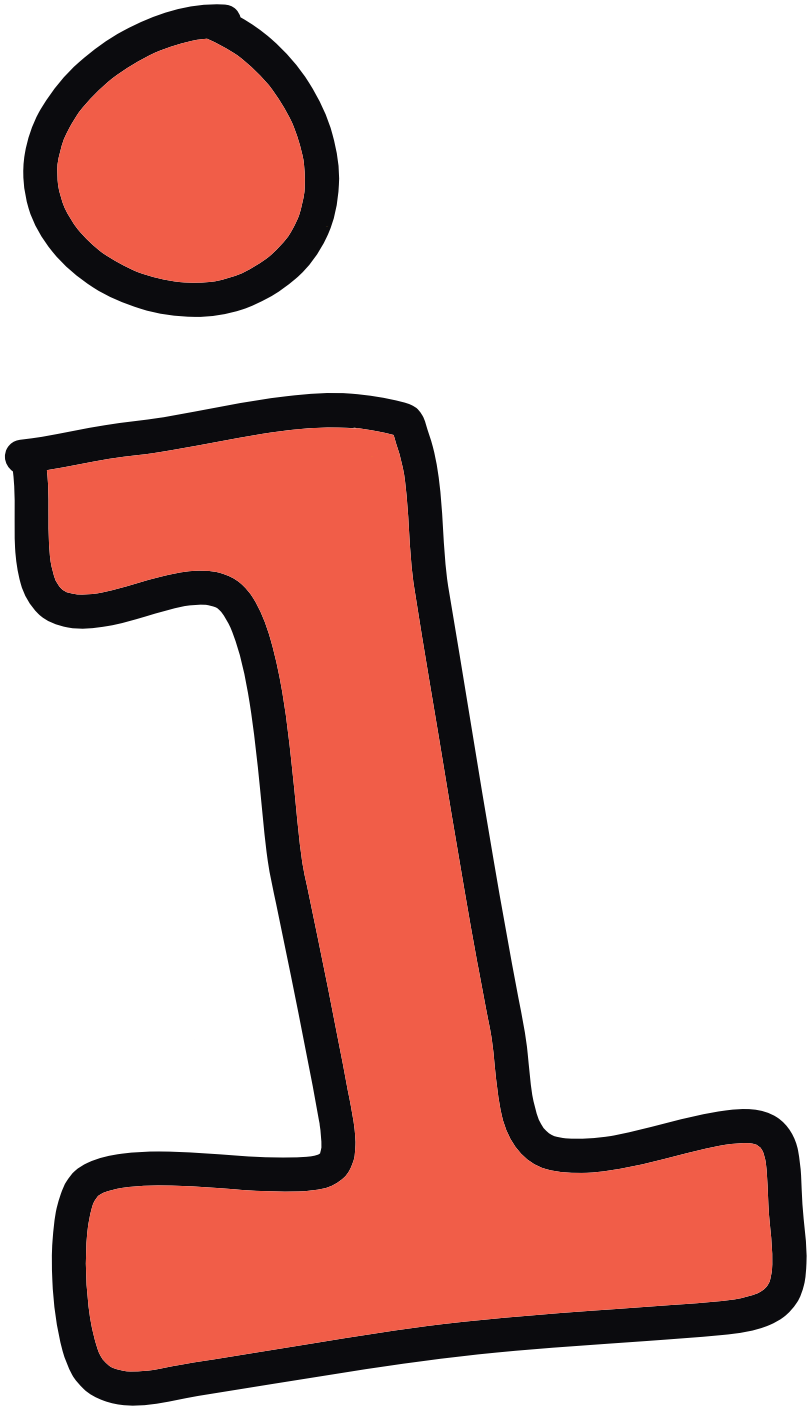
The Guidelines address the situations of children on the move who are at risk of abuse, exploitation and trafficking at any stage in their migration. They are directed at national child protection systems and asylum reception systems as main institutional entry points for promoting the human rights and the best interests of children on the move. Case management and care planning for children on the move are central to the Guidelines. They discuss step-by-step the transnational cooperation from the initial identification of the child and relevant assessments through to the identification and implementation of a durable solution, including the possibility of return.

The UN Convention on the Rights of the Child constitutes a solid basis and a common foundation for the different institutions and actors involved in responding to child migration and mobility. Child protection authorities might be envisaged as being at the centre of a 'hub' that connects the relevant public and private actors involved in transnational cases. The Guidelines aim to foster trust in the capability of national child protection systems to handle transnational cases and to support other institutions and structures in fulfilling their mandates.

On the basis of the Guidelines, a training programme will be rolled out in 2015 and 2016 in cooperation with the Nordic Council of Ministers. The training is targeted at immigration and social welfare authorities, police and prosecutors, judges, lawyers and guardians, border guards, NGOs and other relevant professionals. The training aims to enable and encourage key stakeholders to activate their capacity to protect and empower children on the move, to reduce risks and prevent harm. The learning from the training will be used to update the Guidelines for further use in the Baltic Sea Region and beyond. The Guidelines are intended for open use by interested parties.

1 Council of the Baltic Sea States, Expert Group for Cooperation on Children at Risk, Protecting Children on the Move, available at http://www.childcentre.info/protect-children-on-the-move.

How to use the guidelines



The Guidelines are directed at all professionals and officials working with and for children, such as policy makers and public officials in countries of origin, transit and destination, public and private service providers within child care and protection structures and the asylum reception system, guardians, immigration officials and case officers, border guards, and child rights advocates.

The Guidelines aspire to inform policy makers and practitioners in decision making processes concerning children on the move. A key objective is to foster the communication, cooperation and exchange among professionals and officials in countries of destination and origin, with the child at the centre. The Guidelines are envisaged to complement existing guidance, recommendations and manuals for professionals working with and for children on the move. They should be read and applied in close synergy in particular with the following:

- European Union Agency for Fundamental Rights, *Guardianship for Children Deprived of Parental Care, A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 2015.
- Swiss Foundation of the International Social Service, *Separated Children Handbook, From identification to the search for a durable solution, A practical guide for professionals*, 2015.
- United Nations High Commissioner for Refugees, United Nations Children's Fund, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014.
- Separated Children in Europe Programme, *Statement of Good Practice*, 4th Revised Edition, Save the Children, UNHCR, UNICEF, 2009.
- United Nations General Assembly, Human Rights Council, Guidelines for the Alternative Care of Children, 2009.
- United Nations Children's Fund, *Guidelines on the Protection of Child Victims of Trafficking*, UNICEF Technical Notes, 2006.
- United Nations High Commissioner for Refugees, *UNHCR Guidelines on Formal Determination of the Best Interests of the Child*, 2006.

For caseworkers and case officers working with children on the move, a Practical Guide is available to provide quick-access and an overview of key points[2] In addition, the Transnational Child Protection Portal offers access online to the content of the Guidelines as well as additional information for professionals and officials working with and for children on the move. The Guidelines recognise the diversity of children on the move and the complexity of their stories, backgrounds and situations. They are relevant to the situations of children on the move who are third country nationals, asylum seeking children as well as EU migrants and child victims of trafficking. The objective is to sensitise professionals and officials to the importance of applying universal standards and rights in a way that is tailor-made to the individual situation and needs of each girl or boy. Working with the Guidelines means to apply them in the light of the best interests of each individual child concerned.

The Guidelines are structured as follows:

Part I provides an overview of the UN Convention on the Rights of the Child and its meaning for safeguarding children in transnational situations. It reflects upon children's mobility from a human rights and development perspective.

Part II discusses key child rights principles specifically for the context of transnational child protection. The focus is on the best interests of the child, the right to non-discrimination, the right to life, survival and development, and the right of the child to be heard.

Part III informs step by step about the best interests' determination process, with a focus on the transnational elements in these assessments.

Part IV presents durable solutions for children on the move. This part describes how transnational cooperation is important for identifying and implementing durable solutions in the country of destination, in transfers to third countries or in the case of return.

The Annex provides supplementary information on relevant European law and international standards. Key terms and definitions are explained in the glossary.

2 See CBSS Practical Guide for Caseworkers and Case Officers, 2015

Part I

The human rights of children on the move

The United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child is part of a larger body of international human rights law. It affords a broad set of rights for all persons under 18 years of age and is comprehensive as it combines social, economic and cultural rights with civil and political rights in a single treaty. The Convention promotes an empowering understanding of children as rights holders. It stipulates their human rights and the correlated legal obligations of states as well as obligations of parents and caregivers, public authorities, private service providers and the private sector. In addition to its legal relevance, the Convention has a programmatic character as it guides policy makers and practitioners on how to safeguard children and promote their well-being, safety and development in a holistic way.

The Convention applies to all children within the jurisdiction of a state (Article 2). This includes children who are within the borders of a state and those who come under the state's jurisdiction while attempting to enter the country's territory, for instance at airports.[3] The rights under the Convention apply to children on the move, regardless of the purpose or conditions of their migration such as family reunification, economic migration, asylum seeking or trafficking. The Convention provides standards for care and protection, identification, case management, reporting and referral. It affords children a right to education and training, access to social services, health care and treatment and provides for the right of girls and boys to develop their evolving capacities. Children who have been exposed to acts of violence, exploitation or abuse have a right to be recognised as victims of crime, to access assistance for recovery and rehabilitation, and to access justice with due procedural safeguards. This applies to child victims of trafficking as well as all other children who have been exposed to violence and exploitation in any form.

The Convention is complemented by three Optional Protocols, one on the sale of children, child prostitution and child pornography, one on the involvement of children in armed conflict and a third and more recent Protocol on a communications procedure for children. States that have ratified the Convention report to the Committee on the Rights of the Child, the international Treaty Body mandated to monitor the implementation of the Convention by States Parties. The Committee reviews and comments on State Party reports on the implementation of the Convention and develops General Comments, in which it elaborates on specific articles of the Convention and implementation measures.

Children's mobility in a human rights and development perspective

International migration is increasingly challenging immigration procedures and causes strain on states, service providers, communities and societies in countries of origin and destination. Children's rights in relation to migration and mobility and the related institutional responsibilities remain still often unclear in the European area of freedom of movement and beyond. Migration authorities, law enforcement, child protection services, outreach or emergency services, care staff, guardians and legal representatives and the judiciary are usually involved in responding to children on the move. There is a wide margin of interpretation of the human rights and the 'best interests' of a child and who is responsible for safeguarding them in practice.

In the public debate on international migration, the mandates and interests of these different agencies and disciplines can sometimes appear to be in conflict. Evidence and experience show, however, that international human rights standards offer a common basis. The UN Convention on the Rights of the Child has a particular potential for consolidating the diverse mandates into a broader perspective, as each actor is bound by it and held to safeguard children.

Children on the move: Children at risk, migrants, refugees and victims of trafficking

Girls and boys move within countries and across borders. They make up for a significant proportion of the international migration flows, into and within Europe and globally. Children move accompanied or unaccompanied, with or without legal travel documents, as refugees and asylum seekers and economic migrants. When parents migrate or separate, children may move to another place or country with one or both parents. Children are also left behind by migrating parents and are then indirectly affected by migration.

The motivations for children to migrate are as diverse as the individuals who migrate. They include economic reasons, educational aspirations, gender-specific and cultural reasons, personal motiva-

3 Committee on the Rights of the Child, General Comment No. 6 (2005), par. 12.

Children in international migration movements: Global estimates and figures

Global estimates suggest that there are approximately 750 million persons migrating within countries and 214 million international migrants. The figures can change rapidly as migration trends are highly dynamic and the number of migrants is expected to grow over the coming years to 400 million persons by 2040. Half of the global migrant population is estimated to be female.[1]

An estimated 35 million international migrants are under 20 years of age, which makes up for approximately 15% of the total migrant population. Among them, adolescents aged between 15 and 19 years old represent the largest group and make up for approximately 11 million or 31%. The 10-14 year olds constitute the second largest group with an estimated 9 million migrants or 26%. 8 million migrants (23%) are aged between 5 and 9 years old whereas 7 million or 20% are very young between 0 and 4 years old. 62 per cent of the 35 million migrants under 20, i.e. 22 million, live in developing countries.[2]

Although children migrate globally, within and across continents, the majority of child and adolescent migrants under 20 (60%) reside in developing countries. Most South-to-South migration takes place within the same geographic regions. Approximately 13 million or 40% reside in developed countries. There are significant regional differences with regard to the proportion of child and adolescent migrants within the total migration population. In Africa, young migrants under 20 comprise the largest group (28%) of the total migrant population, followed by Asia (21%), Oceania (11%), Europe (11%) and the Americas (10%).[3]

Forced migration and displacement

In 2014, the United Nations High Commissioner for Refugees (UNHCR) noted a strong increase of global forced displacements. By the end of the year, 59.5 million persons were forcibly displaced, which constituted an increase of 8.3 million people compared to 2013 and the highest annual increase in a single year. The reasons for forced displacement were persecution, conflict, generalised violence or human rights violations. 86% of the forcibly displaced persons were hosted in developing countries. Among the forcibly displaced persons worldwide, 19.5 million persons were refugees and 51% of them were children.[4]

Asylum seekers and refugees in the European Union

Since 2012, the number of asylum applications registered in the European Union (EU) has increased each year. In 2013, a 32% increase to 431 thousand asylum applications was registered. The number rose further to 626 thousand in 2014. During the first six months of 2015, 395,000 applications were registered in the 28 Member States of the EU. In the second quarter of 2015, an 85% increase was registered compared to the same period in 2014.[5]

In 2014, about one quarter (26%) of the asylum applications registered in the EU were lodged by children under 18 years of age, i.e. approximately 163 thousand applications. Among these, 23,100 applications (14%) were lodged by unaccompanied children. In 2014, among all child applicants aged up to 14 years old 53% were boys, while three quarters of those aged between 14 and 17 years were boys. Up to 2013, approximately 3% of the applications were lodged by unaccompanied children and their number ranged around 12,000 each year.[6]

Trafficking in human beings

The Global Trafficking in Persons Report issued biannually by the United Nations Office on Drugs and Crime (UNODC) presents global human trafficking statistics. The 2014 report analyses data related to the cases of 31,766 persons who were detected as victims of trafficking worldwide in the years 2010-2012 and whose age and gender were reported. For the European and Central Asian region, the analysis of national data revealed that 18% of the identified victims of trafficking were children under 18 years of age. In Western and Central Europe, 69% of the detected victims of trafficking were nationals of the same sub-region or country where they were identified, while 31% of the cases involved trafficking victims from outside the sub-region.[7]

National child trafficking statistics need to be handled with caution. They reflect only those cases that have been officially identified and registered as child trafficking cases and there are significant biases involved with the identification of the crime, of victims and perpetrators, and the official recognition of children as victims of trafficking.[8]

1 Inter-Agency Group on Children on the Move, Why Children Matter, Experiences and lessons learnt from interventions to protect children on the move, The High Level Dialogue on International Migration and Development 2013, Side Event to the 46th Session of the Commission on Population and Development: "New Trends in Migration: Demographic Aspects", 24 April 2013, p. 1. International Organization for Migration, Gender and Migration *Fact Sheet, undated, p. 2.*
2 United Nations Children's Fund, United Nations Population Division, University of Houston, Facts and *Figures: International migrant children and adolescents (0-19 yrs), 2013.*
3 United Nations Children's Fund, United Nations Population Division, University of Houston, International Migrant Children and Adolescents, Facts and Figures, 2012. United Nations Children's *Fund, United Nations Population Division*, University of Houston, International *Migration, Children and Adolescents, Population Dynamics, 2013, p. 3.*
4 United Nations High Commissioner for Refugees, World at War, Global trends, *Forced displacement in 2014, 2015 pp. 2-3.*
5 Eurostat, Asylum Quarterly Report, latest update 16 September 2015.
6 Eurostat, Asylum Statistics, latest update 3 September 2015. Eurostat, Number of (non-EU) asylum applicants in the EU and EFTA Member States, by age distribution, 2014, last update 8 May 2015.
7 United Nations Office on Drugs and Crime, Global Report on Trafficking *in Persons, 2014, pp. 17, 29, 31, 39.*
8 United Nations Children's Fund Innocenti Research Centre, Child Trafficking in Europe, A broad v*ision to put children first, 2008, pp. 6-7. United Nations Children's* Fund Innocenti Research Centre, Child Trafficking in the Nordic Countries: Rethi*nking strategies and national responses,* A Technical Report, 2012, pp. 27-43.

tions as well as emergencies, natural disasters and climate change, persecution and humanitarian crises. Some children leave in search of better opportunities whereas others leave from situations of violence, exploitation, abuse or conflict. Often, different reasons coincide and are inter-related.[4]

Some children migrate well-protected and cared for and some succeed to achieve the goals that motivated their journeys. When migration is safe and successful, children have opportunities to increase their well-being, to access higher-quality services and to benefit from better education. Safe migration opportunities can support children significantly in their development. They will have improved life chances, including in their transition into adulthood and the labour market, with better working conditions, higher salaries and an increased potential to contribute proactively to their communities and societies, in countries of origin and destination. Adolescents and young adults might support their families through remittances and support the development of their communities of origin.[5]

Many child migrants are however exposed to harm during the journey and at destination. Children face violence, exploitation and abuse at the hands of people they encounter in transit and at destination, including employers, transporters, smugglers and traffickers. They might experience significant levels of indifference or abuse by state officials, including police, border guards, immigration officials and staff in reception or detention facilities. Some migrants die on the journey from dehydration, malnourishment, suffocation or transportation accidents or drown at sea.[6]

When children move, their risks and resiliency evolve.[7] Many children migrate under risky circumstances or live in highly precarious conditions in places of transit and destination. For children who escape difficult living situations, violence or conflict, migration can constitute an opportunity to reduce risks. Others encounter more severe risks during migration or at the place of destination.

Unsafe migration conditions, by their nature, create a situation of risk for children. In addition to the risks of experiencing acts of violence, children risk to

4 Van de Glind, Hans and Anne Kou, Migrant Children in Child Labour, A vulnerable group in need of attention, International Organization of Migration, *Children on the Move,* 2013, pp. 27-43, p. 30. Thatun, Susu and Karin Heissler, Children's Migration: Towards a multidimensional child protection perspective, International Organization of Migration, *Children on the Move*, 2013, pp. 95-108, p. 105.
5 Catholic Relief Services, *Child Migration, The Detention and repatriation of unaccompanied Central American children from Mexico*, Research Study, 2010, p. 3. Inter-Agency Group on Children on the Move, *Why Children Matter, Experiences and lessons learnt from interventions to protect children on the move*, The High Level Dialogue on International Migration and Development 2013, Side Event to the 46th Session of the Commission on Population and Development: "New Trends in Migration: Demographic Aspects", 24 April 2013, p. 3. Economic Commission for Latin America and the Caribbean, United Nations Children's Fund, Regional Office for Latin America and the Caribbean, Children and International Migration in Latin America and the Caribbean, *Challenges, Newsletter on progress towards the Millennium Development Goals from a child rights perspective*, Number 11, 2010, p. 2.
6 See: United Nations Children's Fund Innocenti Research Centre, *Child Trafficking in the Nordic Countries, Rethinking strategies and national responses*, A Technical Report, 2012. CARDET, Defence for Children International – Italy et al., *IMPACT, Improving Monitoring and Protection Systems Against Child Trafficking and Exploitation, Transnational Analysis*, 2013.
7 CARDET, Defence for Children International – Italy et al., *IMPACT, Improving Monitoring and Protection Systems Against Child Trafficking and Exploitation, Transnational Analysis*, 2013. United Nations High Commissioner for Refugees, *Conclusion on Children at Risk*, Executive Committee Conclusions, No. 107(LVIII), 5 October 2007.

come into conflict with the law when they travel without the required documents, and when they engage in illegal or criminal activities to make a living or when they are persuaded or forced by others to do so. In situations of habitual mobility or circular migration, precarious living conditions can determine the childhood of girls and boys and impact their well-being, safety and development significantly.

Some children turn 18 years old while they are on the move and might arrive at the destination as adults. Others are born to migrating parents and risk remaining stateless when their parents face obstacles in registering their birth or in acquiring a nationality for the child.[8]

Movement and migration happens within the European Union and between EU Member States and third countries. In the European area of freedom of movement, citizens of EU Member States and the EFTA States Iceland, Liechtenstein, Norway and Switzerland are entitled to enter and reside in other EU Member States for a period of up to three months without registration and are granted a permit to stay when they can demonstrate an income.[9]

For third country nationals in need of international protection, the national asylum reception systems constitute an important entry point into the EU. Filing an asylum application is often *de facto possible only within European states. It is however often difficult and sometimes life threatening for refugees to reach European countries in order to seek international protection. In the absence of legal migration channels, many migrants and refugees, including children, resort to the services of smugglers in taking these high-risk routes and are at a considerable risk of being exposed to harm on the way.*[10]

Exploitation of children on the move

Children on the move are at risk of different forms of exploitation. Risks of exploitation concern children who move with or without valid travel documents. Children can be recruited into exploitation or trafficking before their departure, during the journey, after arrival and even after having received a permit of stay in the country of destination or after return, transfer or resettlement. Children are exploited and trafficked also nationally without any border crossing involved.

Exploitation takes place in child labour, including in domestic work or as au-pairs, in factories, construction, asphalt laying, restaurants and the cleaning industry, agriculture and berry picking and in begging. Children are at risk of sexual exploitation in prostitution and pornography, including by travelling sex offenders, through web-cams, child abuse images and illegal content on the internet. There are also transnational cases of early and forced marriage of children. The exploitation of children could be organised by families, small groups or large-scale criminal networks. Children are exploited in illegal and criminal activities, including in drug production and drug trafficking, pick-pocketing or burglary.[11] Europol reported in 2015 that victims of trafficking, including children, are increasingly used by traffickers for purposes such as begging, benefit fraud, identity fraud, credit fraud and insurance fraud.[12]

Respecting the rights of children on the move: A holistic perspective

Children on the move have a right to be protected from all forms of violence, exploitation and abuse, as all children do. This right has been widely recognised. Governments in Europe have developed special protection measures for unaccompanied children and child victims of trafficking as these are considered particularly vulnerable groups.[13] Other areas of the UN Convention on the Rights of the Child, such as the realisation of social, economic and cultural rights, are however rarely addressed in laws and policies concerning children on the move. Attention to these matters tends to be conditional on a permanent residence status. The needs and rights of children on the move with regard to education and social welfare are not always addressed in an appropriate way. Adolescents might remain excluded from the formal labour market and vocational training opportunities. In addition, the needs and rights of children in relation to leisure time, play, sports and recreation and social contacts are not

8 European Network on Statelessness, *No Child Should Be Stateless*, 2015.
9 European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The European Free Trade Association (EFTA) is an intergovernmental organisation set up for the promotion of free trade and economic integration to the benefit of its four Member States: Iceland, Liechtenstein, Norway and Switzerland. See: EFTA, The European Free Trade Association, 2011.
10 European Union Agency for Fundamental Rights, *Legal Entry Channels to the EU for Persons in Need of International Protection: A toolbox*, FRA Focus, 02/2015, 2015. United Nations High Commissioner for Refugees, *Legal Avenues to Safety and Protection Through other Forms of Admission*, 18 November 2014.
11 United Nations Children's Fund Innocenti Research Centre, *Child Trafficking in Europe, A broad vision to put children first, Innocenti Insight*, 2008, p. 12. Council of the Baltic Sea States, Child Centre, Expert Group for Cooperation on Children at Risk, *Children Trafficked for Exploitation in Begging and Criminality: A challenge for law enforcement and child protection, A CBSS Project in Lithuania, Poland, Norway and Sweden*, 2013. United Nations Children's Fund Innocenti Research Centre, *Child Trafficking in the Nordic Countries, Rethinking strategies and national responses*, A Technical Report, 2012, pp. 18-20.
12 Europol, *The THB Financial Business Model, Assessing the current state of knowledge*, 2015, p. 13.
13 European Migration Network, *Policies, Practices and Data on Unaccompanied Minors in the EU Member States and Norway*, Synthesis Report, 2015.

Child trafficking: Definition and concept

Child trafficking was first defined in the UN Trafficking Protocol of 2000. The Protocol describes child trafficking as the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation. The means by which a child is trafficked or the consent of the child to any of the trafficking acts is to be considered irrelevant. The definition offers a minimum list of forms of exploitation that could constitute trafficking, "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" (UN Trafficking Protocol, Article 3. See the Glossary in the Annex for the full definition).

Child trafficking can be prosecuted even when exploitation has not yet taken place, but when it is possible to prove the intent to exploit the child. The Protocol complements the UN Convention on Transnational Organised Crime. In consequence, the Protocol's definition of trafficking in human beings needs to be read in the context of transnational organised crime.

The Council of Europe Convention on Action Against Trafficking in Human Beings (2005) adopted the international definition, identical in wording, underlining that victims shall be protected also when trafficking takes place within countries and without the involvement of large-scale organised crime.

The EU Anti-Trafficking Directive (2011) broadened the notion of exploitation in the trafficking concept. It includes explicitly the purpose of exploitation in criminal activities as part of the definition of human trafficking. Article 2.3 clarifies that the "'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain". In addition, the Directive states that "the exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur".[1]

The evolution of the trafficking concept is important as it offers opportunities to provide more inclusive support and protection of victims. The different layers of interpretation make it however challenging to distinguish child trafficking from other contexts of exploitation. It is particularly challenging to understand, which children are at risk, and to identify cases of trafficking, including proactively even before the exploitation begins or at border crossing.

Conceptual clarity: Trafficking - Smuggling - Sale of children

The United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air defines human smuggling as the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[2] A smuggler is therefore a person who facilitates the border crossing of others without the required travel documents and for financial or other gain. Once a smuggler has facilitated the border crossing or ensured the migrant's arrival at the agreed destination, the contact between the smuggler and the smuggled migrants usually ceases. Although smuggling is considered a crime against the state, persons who are using the services of smugglers might be victimised by acts of violence while being smuggled and might die due to unsafe transportation conditions.

Human trafficking is always related to the purpose of exploiting the trafficked person. The smuggling of persons across international borders can be part of the act of trafficking when it is done for the purpose of exploiting the person in the country of destination. Victims of transnational trafficking might cross borders with or without legal travel documents and with or without the assistance of smugglers. Often, persons are recruited into trafficking only after they have crossed an international border. In many cases, trafficking takes place within countries and there are no border crossings involved.

The sale of children means any act or transaction whereby a child is transferred

by any person or group of persons to another for remuneration or any other consideration. Children are sold for the purpose of exploitation, for instance for sexual exploitation or labour. While trafficking could involve the purchase and sale of persons like goods, the sale of children may lead to exploitation but does not necessarily have to.[3] Children are sometimes sold in the context of illegal adoption, for instance. In some cases, there can be an overlap between trafficking and sale as two criminal acts within a single case.

The challenges of identifying child victims of trafficking

Due to the complex definition of child trafficking, the differences in national laws and interpretations, conceptual clarity on what constitutes child trafficking has not yet been achieved. The European debate on child trafficking reveals again and again that there is no consensus on how child trafficking is to be distinguished from other contexts of exploitation, from social dumping of migrants, the sale of children and the smuggling of migrants. In light of these difficulties, the identification of child victims of trafficking is challenging, not very reliable and potentially arbitrary.[4]

The identification of child victims of trafficking is not necessarily a one-off event. In many cases, identifying child victims of trafficking takes time and requires a thorough understanding of the child's story. It can therefore be helpful to consider identification as the result of a process. The identification of child trafficking cases can be facilitated when presumed victims are granted assistance and support services to ensure their safety and to foster a trusted relationship between the child, service providers and the authorities. If service providers succeed to establish a stable and trusted relation with the child, the child might speak out and disclose experiences of exploitation and trafficking that might otherwise not be detected.

'Victim of crime' as an overarching concept

The UN Convention on the Rights of the Child prohibits the exploitation of children in any form and in any context (Articles 19, 32-36). Any child who is exposed to violence, exploitation or abuse can be considered a victim of crime and enjoys the correlated rights and entitlements, including access to assistance, protection and support, services for recovery and rehabilitation, access to justice, with due procedural safeguards in any related legal or administrative proceedings. Children at risk of exploitation have to be identified and recognised as being at risk. This implies that they have a right to be referred to appropriate assistance and support in order to prevent their exploitation or any other harm resulting from the risks.

Considering the difficulties of identifying children who have been trafficked and the broad protection against all forms and contexts of exploitation afforded under the Convention, a child rights-based approach prioritises the identification of child victims of exploitation or other crime and children at risk. Whether or not exploitation takes place in a context of trafficking is of subordinate relevance for the child rights and protection context. It may interest primarily the law enforcement investigations and the prosecution.[5]

---

1 The European Parliament and Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, Brussels, 15 April 2011, par. 11

2 United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime, Article 3.

3 Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Article 2(a).

4 CARDET, Defence for Children International - Italy et al., IMP*ACT, Improving Monitoring and Protection Systems Against Child Trafficking and Exploitation, Transnational Analysis, 2013, p. 18. United Nations Children's* Fund Innocenti Research Centre, Child Trafficking in the Nordic Countries, Re*thinking strategies and national responses, A Technical Report, 2012, pp. 34-41.*

5 CARDET, Defence for Children International - Italy et al., IMP*ACT, Improving Monitoring and Protection Systems Against Child Trafficking and Exploitation, Transnational Analysis, 2013, pp. 15-19. United Nations Children*'s Fund Innocenti Research Centre, Child Trafficking in the Nordic Countries, Re*thinking strategies and national responses, A Technical Report, 2012, pp. 34-44.*

6 CARDET, Defence for Children International - Italy et al., IMPACT, Improving Monitoring and Protection Systems *Against Child Trafficking and Exploitation, Transnational Analysis, 2013, pp. 15-19. World Vision International, Effective and Scalable Solutions for Violence Prevention: Policy propositions for change*, 2015.

Continuum of services for prevention protection and empowerment

Experience shows that responses to child trafficking are more effective and sustainable when they are planned and delivered through a continuum of services. Continuity means that services are planned and delivered according to

- A **holistic approach** that promotes children's right to be safe in relation to all the other rights afforded under the UN Convention on the Rights of the Child in order to reduce risks and strengthen the resiliency and resources of children and families;
- An **inclusive approach** that targets a broad group of child victims, children at risk and particularly vulnerable groups and fosters their social inclusion;
- A longer-term **continuity of care approach** that follows-up child victims and children at risk to support their recovery and rehabilitation and prevent further harm.[6]

valued in the reception of unaccompanied children to the same extent as for other children. National immigration and asylum laws and policies often remain silent on these matters. All these rights are however directly relevant for the safety, well-being and development of children on the move.

Universal services for children on the move are in place in countries of destination. In addition to this important foundation, local authorities, officials and service providers need to value the diversity of children on the move. Service providers need to be prepared to assess and understand the individual situation and needs of each girl or boy and take these into account to design a tailor-made and integrated service package that gives due account to the universal rights and the specific needs of each individual child.[14]

Risk and resilience as determinants of vulnerability

Children on the move are routinely referred to as 'vulnerable' although the meaning of the term has not been defined or clarified for the child protection context. Vulnerability is often understood as a deficit and equated with weakness and a need of protection. Looking into existing definitions of vulnerability that are in use in the context of poverty reduction, health and nutrition, the term is however much more differentiated. The way vulnerability has been defined in these contexts offers important learning for the child protection context.

The concept of vulnerability expresses a dynamic interaction of risk and resilience. Vulnerability is caused by risk and balanced by resilience. Resilience refers to the person's capacity to handle a risk. Being vulnerable does therefore not by itself imply that the child is a victim, weak or disempowered. It refers to the probability that a future adverse event or process will result in a decline of the child's well-being. This probability is higher, when a child faces high levels of risks and has only a limited resilience to cope and confront these risks. Vulnerability is strongly determined by the context and it is dynamic; it changes over time and as the child proceeds in her or his migration.

An ecological model can be useful to look into risk and resilience at different levels, such as risks and resiliency from within the child's immediate family, peer and social networks; the community structure and the family's position within the community; the socio-political, economic and cultural context that the child lives in; the normative framework of the state as well as the status and quality of implementation of national laws and policies and the level of protection and empowerment that derive from this.

The different risks that a child is exposed to are often closely intertwined and are considered cumulative. A child who is already living in a vulnerable situation, such as poverty, abuse or has dropped out of care or school, is considered even more vulnerable when additional risks come in, such as exploitative relationships or unsafe migration.[15]

Some groups of children are vulnerable to exploitation and abuse, including in the context of trafficking, because national child protection and social welfare laws are not implemented effectively in practice. From a child rights-based approach, vulnerability refers therefore also to the limited chances of a child to fully exercise her or his rights as afforded under the UN Convention on the Rights of the Child.

14 European Commission Directorate-General Justice and Consumers, 9th European Forum on the Rights of the Child, Coordination and cooperation in integrated child protection systems, Reflection paper, 30 April 2015.

15 CARDET, Defence for Children International – Italy et al., *IMPACT, Improving Monitoring and Protection Systems Against Child Trafficking and Exploitation, Transnational Analysis*, 2013, pp. 19-22.

These dimensions and layers of vulnerability need to be taken into account in the context of destination and origin. Decision makers need to understand how the risks and resiliency of the child will change on the basis of any decision taken, including with regard to continued migration, transfer to another state or return and repatriation. Risk and resiliency assessments are therefore a central component of the best interests' determination process.

Migration and development

The linkages between migration and development have been widely recognised and migration is directly relevant to the 2030 Agenda for Sustainable Development.[16] According to current demographic trends, the population in richer countries will continue to age disproportionately while the younger generations are overrepresented in lower income countries, causing strain on the labour market, social security, education and nutrition.

Migration can mitigate these population imbalances on both ends. It has a potential to increase the work force and strengthen the younger generations in numbers where needed. This entails increased contributions into the social welfare systems in higher income countries of destination and a reduced strain on the social welfare systems in countries of origin with high poverty and unemployment rates. Migration and mobility policies would ideally facilitate a mutual exchange of knowledge, capacity and human resources while preventing one directional movements and brain drain. Seen from this point of view, migration holds potential benefits for poverty reduction and for fostering more equitable and sustainable global development.[17] The linkages between migration and development have implications for policy and practice in these areas and relevant measures need to be coordinated in countries of destination and origin.

In order to maximise the positive development impacts and minimise the risks of migration, states could invest in the development of the human capital of migrants. Investments are also needed in the migration management cooperation between countries of origin and destination, in social, economic and political terms. Countries of origin and destination share the responsibility for managing migration from a human rights-based and a development oriented perspective. In order to achieve this, mechanisms need to be in place to ensure co-development with a balanced share of benefits between the states, people and communities at origin and destination.[18]

16 United Nations, *Sustainable Development Knowledge Platform, Transforming Our World – The 2030 Agenda for Sustainable Development*, 2015.
17 United Nations Children's Fund, United Nations Population Division, University of Houston, *International Migration, Children and Adolescents, Population Dynamics*, October 2013, pp. 1, 4. Cortina, Jeronimo, Children, Education and Migration: Win-win policy responses for co-development, *QScience Proceedings, Family, Migration and Dignity Special Issue*, University of Houston and United Nations Children's Fund, Bloomsbury Qatar Foundation Journals, 2013, p. 2.
18 Cortina, Jeronimo, Children, Education and Migration: Win-win policy responses for co-development, *QScience Proceedings, Family, Migration and Dignity Special Issue*, University of Houston and United Nations Children's Fund, Bloomsbury Qatar Foundation Journals, 2013, p. 2.

Part II

Child rights principles as fundamental safeguards

The best interests of the child – Towards a holistic understanding of the person

The general principle of the 'best interests of the child' is a central and all-embracing principle under the UN Convention on the Rights of the Child. Article 3 of the Convention stipulates that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

The article is considered a central principle that guides the implementation of the Convention in all matters concerning children. It relates directly to all the other articles of the Convention, including specifically the right to non-discrimination, the right to life, survival and development, and the respect for the child's views (Articles 2, 6, 12).[19]

When professionals or officials assess the best interests of a child, they need to break this broad concept down into a more practical framework. The following aspects are the cornerstones of such a practical framework as each has a bearing on the best interests of the child:

- The child's views and aspirations;
- The identity of the child, including age and gender, personal history and background;
- The care, protection and safety of the child;
- The child's well-being;
- The family environment, family relations and contact;
- Social contacts of the child with peers and adults;
- Situations of vulnerability, i.e. the risks that the child is facing and the sources of protection, resiliency and empowerment;
- The child's skills and evolving capacities;
- The rights and needs with regard to health and education;
- The development of the child and her or his gradual transition into adulthood and an independent life;
- Any other specific needs of the child.[20]

Due to the diversity of these aspects, the relevant assessments need to be handled by more than one profession or institution. Different perspectives and areas of expertise need to be combined in the country of origin and destination and information must be gathered from the child.

The best interests' principle is not only relevant for individual cases but also for children as a population group. It shall guide policy planning, budget allocation and the implementation of the Convention in practice. Applying the best interests' principle in policy planning means that a child impact assessment needs to be conducted before any new law or policy is enacted. The impact of laws and policies on children, individually and as population groups, needs to be periodically evaluated.

Best interests' assessments and determinations: Two steps of a process

Best interests' assessments and determinations are two steps of a process: They aim to identify the elements and facts relevant for a specific child and to assign weight to each in a broader consideration of the child's past and present situation and perspectives for the future.[21]

Best interests' assessments are conducted frequently, by girls and boys, parents, other caregivers or guardians and other persons who take decisions for and with children. They can be conducted informally and ad hoc or as formalised processes. Assessments concern everyday matters and decisions with more or less severe implications for the child. The best interests of a child may change significantly over time as children grow and their situations and capacities evolve. In that sense, best interests' assessments are dynamic processes and may need to be reassessed periodically together with the child. Assessing the best interests of a child means to evaluate and balance "all the elements necessary to make a decision in a specific situation for a specific individual child or group of children".[22]

Best interests' determinations are formal processes conducted with the involvement of public authorities and professional decision makers. The objective of the best interests' determination is to reach a decision based on national law that safeguards the rights of the child and promotes her or his well-being, safety and development. It requires from the decision-maker to weigh and balance all the relevant factors of the case, giving due consideration to all the rights of the child and the obligations of public authorities and service providers towards the child. The objective of the best interests' determination process is the identification of a durable solution. Best interests' determinations are carried out when the issues at stake are expected to have significant implications on the child's present and future life.[23]

19 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 4. Committee on the Rights of the Child, General Comment No.5 (2003), par. 12.

20 Committee on the Rights of the Child, General Comment No. 14 (2013), Chapter V.A.1 and par. 44.

21 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 46.

22 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 47.

23 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 47.

Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration

In 2013, the Committee on the Rights of the Child issued its General Comment No. 14 on the best interests of the child. This General Comment clarifies the concepts and procedures of a best interests' assessment and determination. It provides guidance on how to understand, interpret and apply the principle.

The General Comment presents the principle as a three-fold concept: a substantive right; a fundamental, interpretive legal principle; and a rule of procedure. As a *substantive right*, Article 3.1 is considered self-executing and directly applicable and can be invoked before a court. Each child has the right to have her or his best interests assessed and taken as a primary consideration. As a *fundamental, interpretive legal principle*, the best interests' principle offers guidance for the application of laws when there is room for interpretation and discretion. As a *rule of procedure*, the principle implies that the procedure of assessing and determining the best interests of a child needs to be documented in each decision making process. This applies to individual or groups of children or to matters concerning children in general and involves an evaluation of the possible positive or negative impact of a decision on the child. Procedural safeguards need to be in place to ensure that the decision-making process is transparent and lawful.[1]

1 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 6.

The best interests of the child in national law - An innovative example from Finland

The Finnish Child Welfare Act provides that the best interests of the child needs to be a primary consideration in the determination of welfare measures in response to the child's needs. The Act defines the key elements that need to be taken into consideration for a best interests' determination:

1) Balanced development and well-being, close and continuing human relationships;
2) The opportunity to be given understanding and affection, as well as supervision and care in line with the child's age and level of development;
3) An education consistent with the child's abilities and wishes;
4) A safe environment in which to grow up, and physical and emotional freedom;
5) A sense of responsibility in becoming independent and growing up;
6) The opportunity to become involved in matters affecting the child and to influence them; and
7) The need to take account of the child's linguistic, cultural and religious background.[1]

This provision offers legally binding guidance to professionals on how the concept of the best interests of the child should be understood. It raises awareness of the complexity of the issues under consideration and makes reference to important rights of the child such as the right to education and development, safety and well-being, respect for the child's views and the child's cultural and other backgrounds.

1 Finland, Child Welfare Act (417/2007), Chapter 1, Section 4(2).

The best interests' principle in European laws and policies

Reference to the best interests of the child has been introduced into relevant EU laws and policies, including in the context of migration, asylum, trafficking and potential return. Thus far, the wording, detail and level of priority attached to the best interests' principle are however not yet coherent between different EU laws and policies. The wording ranges between the imperative "must" and "shall" to the less prescriptive "should".

The EU Charter of Fundamental Rights provides that the principle of the best interests of the child ***must*** be a primary consideration in all actions relating to children, whether taken by public authorities or private institutions (Article 24.2). The wording chosen is even stronger than the wording under the UN Convention on the Rights of the Child Article 3, which provides that the best interests of the child ***shall*** be a primary consideration.

The EU Action Plan on Unaccompanied Minors for 2010-2014 reiterated the provision afforded under the EU Charter of Fundamental Human Rights specifically for unaccompanied migrant children. It emphasises that all children are to be treated as children first and foremost, regardless of their immigration status, citizenship or background. Special emphasis was placed on ensuring the safety and well-being of 'children in need of protection'.[1] The same wording and priority of the best interests of the child is afforded also under the 2011 EU Anti-Trafficking Directive with regard to the measures and actions that Member States put in place in order to apply the Directive in practice.[2]

The EU Dublin III Council Regulation of 2013 has chosen a less strong wording as it affords that the best interests of the child ***shall*** be a primary consideration of Member States when applying the Regulation. The 2011 EU Qualification Directive provides only that the best interests of the child ***should*** be a primary consideration. Both Directives provide additional guidance for best interests' assessments, which should take into account the possibilities for family reunification, the child's well-being and social development, safety and security considerations, in particular where there is a risk that the child is a victim of trafficking, and the child's background and views, in accordance with her or his age and maturity. Under the Dublin III Council Regulation, Member States are expected to cooperate closely when assessing the best interests of the child and identifying family members in other EU Member States. Specialised international organisations may support the tracing of the child's family.[3]

Under the 2008 EU Return Directive, the best interests of the child ***should*** be a primary consideration of Member States when implementing the Directive. The Directive emphasises specifically the respect for family life which should also be a primary consideration when implementing the Directive. Respect for family life is thereby considered at a level that is comparable to that of the best interests' principle.[4] The Directive states further that assistance by appropriate bodies shall be granted with due consideration to the best interests of the child before a return decision is being taken (Article 10(1)).

The EU Brussels II bis Regulation affords that the best interests of the child needs to be taken into consideration for decisions to establish or transfer jurisdiction in matters concerning parental responsibility (Preamble (12) and Articles 12 and 15). The best interests of the child can also constitute the grounds on which a court in one jurisdiction decides not to recognise and enforce judgments relating to parental responsibility taken in another jurisdiction (Article 23).[5]

1 European Commission, Action Plan on Unaccompanied Minors (2010-2014), COM *(2010) 213 final, Brussels, 6 May 2010, p. 3.*
2 2011 EU Anti-trafficking Directive, par. (8).
3 EU Dublin III Council Regulation, par. (13), Article 6. 2011 Qualifications Directive, par. 18.
4 2008 Return Directive, par. 22, Article 5.
5 Brussels II Regulation 2003, pp.1-29.

1) Elements of best interests' determinations in transnational cases

A best interests' assessment and determination process requires a comprehensive assessment of the child's identity and story, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.[24] Conducting the assessment is challenging in transnational cases when the authorities in the country of destination do not have access to all the required information. Effective contacts and communication with authorities or other relevant stakeholders in the countries involved is therefore a precondition for the process to succeed.

Best interests' assessments aim to gather all the evidence needed to arrive at a conclusion about the impact of any potential action, measure or decision concerning the child and her or his future. In transnational situations, this means that the assessment has to look into the current situation of the child in the country where the assessment is being made. It also needs to assess the situation of the child in her or his home country or in a transit situation, and needs to understand the underlying causes, reasons and motivations of the child's movement and the experiences the child has made on the way. When required, quality interpretation and cultural mediation are essential for the communication with the child. Independent support persons and guardians play an important role in facilitating the child's contact with the authorities, ensuring that the child has access to information about the meaning and relevance of each step in the process. It is essential that the process is clear and transparent for the child.

The central perspective for the assessment is that of the girl or boy concerned. It is therefore important to establish a trust-based relationship with the child and to communicate effectively in a language that the girl or boy understands. Officials and professionals who are conducting a best interests' assessment and determination need to consult with family members – where family contact is possible and in the best interests of the child, provided parental rights have not been denied – and with relevant professionals or officials who are or have been in contact with the child. It is important to gather, verify and cross-check information from different sources in countries of origin, transit and destination.[25] The assessments should ideally involve a multi-disciplinary team of qualified professionals.[26]

2) Procedural safeguards in best interests' determinations

As a formal process, the best interests' determination requires specific procedural safeguards and documentation. The objective is to reach a decision that best safeguards the rights of the child concerned and promotes her or his well-being, safety and development. It requires from the decision-maker to weigh and balance all the relevant factors of the case, giving due consideration to the rights of the child and the obligations of public authorities, service providers and caregivers towards the child. The objective of the best interests' determination process is the identification of a durable solution.[27]

Best interests' determination procedures should be multi-disciplinary in nature and rooted in international law, in particular the UN Convention on the Rights of the Child. They need to be conducted in a child-sensitive way, ensuring that the child is informed and involving the child closely to ensure that the child's views and statements are heard and given due consideration.[28]

The best interests' determination is an important method for ensuring dignity, protection and respect for the rights of migrant children. The best interests' determination process concerning decisions over asylum and humanitarian protection is usually regulated under migration laws and policies.[29] Parallel procedures for best interests' determinations are in place in the context of national childcare and protection, including with regard to the placement of children in alternative care. Also in this context, assessments sometimes have to be conducted across borders.

Best interests' assessments and determination processes might be lengthy in transnational cases. It is however considered to be in the best interests of unaccompanied asylum seeking children and other child migrants, that their best interests are being assessed in a timely manner. This demand can put the responsible professionals under pressure. On one side, long or delayed assessments can have adverse effects on the child. On the other, time efficient processing must not compromise the quality of the assessments and the decision making processes.

24 Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, p. 10. Committee on the Rights of the Child, General Comment No.6 (2005), par. 20, 86.

25 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 92.

26 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 94.

27 Separated Children in Europe Programme, *Statement of Good Practice*, 4th Revised Edition, Save the Children, UNHCR, UNICEF, 2009, p. 15.

28 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 47, 89-91.

29 Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, pp. 20-21.

They have to be conducted with due diligence and have to respect procedural safeguards.[30] Once a decision has been taken and implemented, it has to be reviewed periodically in order to assess the child's evolving situation and perspectives.[31]

Procedural safeguards derive from human rights standards and apply therefore to each person whose case is being assessed or handled otherwise by public authorities. They apply to unaccompanied children as well as children accompanied by their parents or guardians. The following safeguards need to be in place for all formal processes in which the best interests of a child are being assessed and determined:

- Child-friendly information in a language that the child understands, enabling the child to form an opinion and to express her or his views.
- The right of the child to express her or his views and to have them taken into account: In any judicial or administrative procedure, children have the right to be heard and to have their views taken into account. The process of hearing the child needs to be documented, with clear description of how the child's views are balanced against other views and other information sources. The communication with the child has to be effective and child-sensitive and might require quality interpretation and cultural mediation. In cases of unaccompanied or separated children, the role of the guardian or representative is essential to facilitate the communication between the child and the authorities.[32] The right to be heard entails also the right to a hearing when the decision making body is a court. The hearing should be held without delay in a child-sensitive way and prevent secondary victimisation of child victims and witnesses in judicial proceedings.[33] Safeguarding children's right to speak and to have their views taken into account requires due consideration for the child's age, gender and background, the child's level of development and evolving capacities.
- Quality interpretation: Children who do not speak the language of the country of destination have a right to translation and interpretation. Interpretation should be made available free of charge and with a neutral bearing when interpreters are directly involved.
- Guardianship and representation: Unaccompanied children have a right to an independent representative or guardian who is competent and equipped to represent and promote the best interests of the child.[34]
- Legal representation: In cases where the best interests of a child are to be formally determined by a court or other competent bodies, the child is entitled to competent legal representation, legal information and defence. Legal counselling, assistance and representation are of fundamental importance in judicial or administrative proceedings, including for children applying for asylum or special protection as victims of crime.[35]
- Legal reasoning: Any decision taken needs to be documented, motivated in detail, justified and explained. It needs to be explained how the decision is considered to relate to the best interests of the child and how the underlying considerations have been balanced to arrive at the decision.[36]
- Mechanisms to review or revise decisions: Formal mechanisms have to be in place to reopen or review decisions on the best interests of a child. Children need to be supported in accessing and using these mechanisms. It has to be clearly established when a case or decision can be reopened or reviewed, as for instance when there is new evidence or when the authorities have not been able to implement the first decision.[37]
- Right to appeal: Best interests' determinations have to be subject to legal remedies. Children need to have access to appeal to a superior authority or court, with the necessary support, such as legal assistance and representation. The implementation of decisions needs to be suspended for the duration of the appeal procedure.[38] For decisions concerning transfer or return of a child to another country, sufficient time must be available between the decision and the implementation of the decision, to enable the child to hand in an appeal or request a review of the decision.

30 PROTECT 4th Expert Meeting, Riga, November 2015, presentation by Kerry L. Neal, Child Protection Specialist, UNICEF.
31 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 93.
32 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 90.
33 Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, pp. 22-23.
34 Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, pp. 22-23.
35 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 96. See also: European Council of Refugees and Exiles, *Right to Justice: Quality Legal Assistance for Unaccompanied Children, Annex 1: Guiding principles for quality legal assistance for unaccompanied children*, 2014.
36 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 97.
37 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 98. United Nations High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, 2008, p. 79.
38 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 98.

Elements of a best interests' assessment and determination process in transnational cases

- Establishing the child's identity and the identity of any accompanying persons and the quality of their relations
- Case assessment, including the following:
  - Hearing the child
  - Assessment of the child's situation, background and needs
  - Social situation and family assessment
  - Gathering evidence including through forensic examinations and interviews
  - Risk and security assessments
  - Mapping sources of support, skills, potentials and resources for empowerment
- Developing a life project
- Comprehensive child impact assessment of any potential decisions
- Identification of a durable solution
- Continued assessments during the implementation of the durable solution with due follow-up, review and monitoring, and adjustments to the durable solution arrangements, if and as required, according to the best interests of the child

International guidance on best interests' determinations

The United Nations High Commissioner for Refugees (UNHCR) has issued operational guidelines for the best interests' determination process for the context of refugee children.[1] Many of the methodological and procedural elements of the guidelines might inform processes in other areas as well, including with regard to cases of migrant children and children who have been trafficked or are considered at risk.[2] In addition, UNHCR and UNICEF have elaborated good practice examples on best interests' assessments and determinations for children on the move with specific reference to the European context.[3]

1 United Nations High Commissioner for Refugees, UNHCR Guide*lines on Determining the Best Interests of the Child, 2008*.

2 Tamas, Ana-Maria, Helmut Sax et al., Sociological Research *Handbook on Child Trafficking, Twinning Project PHARE RO/2006/IB/JH 08 Supporting the Institutional Capacity to Prevent Trafficking in Human Beings in Romania, 2009, p. 42.*

3 United Nations High Commissioner for Refugees, United Nations Children's Fund, Safe and Sound, What States *can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014,

Inter-agency and multi-disciplinary cooperation for best interests' assessments and determinations

There are different channels of how transnational child protection cases are managed. At the ministerial and policy making level, a range of different actors are involved, including ministries of justice, social affairs, the interior and foreign affairs. Certain competences rest with ministries of health and education.

For asylum seeking children, the immigration authorities have usually a leading role in assessing the child's case in order to decide about the child's stay within the country, return or transfer to another country.

Social welfare institutions get involved when there are needs for social welfare, assistance and care. In many countries, social service providers and NGOs are providing support to families at risk in transnational situations. Social services or child protection authorities are commonly in charge of making decisions on care arrangements and placement of children deprived of parental care, including non-nationals. Cases of children and families who are migrating within the European area of freedom of movement are often handled directly by the municipal authorities and social services. When there is a need to contact the authorities in countries of origin, local authorities might get directly in contact with their counterparts abroad. They can also work through central authorities for child protection or embassies.

Law enforcement agencies get involved in a case when children are reported missing, when police investigations become necessary and when judicial or administrative decisions have to be enforced. In

some countries and for some groups of children, police officers or border guards are making decisions concerning children, including with regard to access to the territory and immigration detention. When a child is presumed to be a victim of trafficking, or has been officially recognised as such, different forms of short- or longer-term residence permits are available for recovery, assistance and participation in criminal proceedings.[39]

The involvement of courts of law in the decision making processes is regulated differently from country to country. The judiciary is commonly involved in transnational cases as a decision making body in judicial proceedings, including with regard to matters of jurisdiction and ordering the enforcement of decisions.

In addition, individual professionals can have an important role in transnational child protection cases such as lawyers, guardians and representatives of children, mediators, psychologists, medical staff and other experts.

Considering the high number of institutions, officials and professionals involved in transnational child protection cases, fostering trusted partnerships, multi-stakeholder and inter-disciplinary cooperation within countries and across borders is an imperative. Particularly so as best interests' assessments and determination processes require the knowledge and perspectives from different professional groups in order to achieve a holistic understanding of the child's situation and background. The various authorities involved in the case of a child might take different approaches to gathering and balancing relevant information:

- Social workers are trained to conduct assessments and care planning in a child-centred way, giving due consideration to the rights and needs of the child.
- Law enforcement officials are competent to conduct investigations and security assessments in civil and criminal cases.
- Immigration authorities have access to country of origin information, including child-specific information, and focus their assessments on the general situation of the child in the country of origin.

Strengthening and institutionalising the cooperation and consultation among these authorities is essential for ensuring that all the human rights of the child are given due weight in the process and that they are considered as inter-related and indivisible.[40]

Inter-agency and multi-disciplinary cooperation:

- Means that officials and professionals from different backgrounds work together – with the child at the centre – to assess, plan and manage a specific case and feed information into the decision making process;
- Involves communication, information exchange and case discussions between different professionals and officials – and possibly volunteers or caregivers – who are in direct contact with the child concerned;
- Requires a basis of trusted professional partnership and time, a common understanding of key concepts, terms and definitions, familiarity with the mandates of each partner, clear regulations of working routines, including clear regulation of data protection and confidentiality, and rules for the division of tasks and leadership, ideally in an institutionalised context;
- Is important as it holds the key to reaching a better understanding of the different laws and regulations concerning the child as well as the child's situation, experiences, needs and aspirations;
- Is a precondition for ensuring a balanced and holistic approach to the assessment and determination of the child's best interests;
- Helps to ensure that the views of the child inform the action of each professional or official while reducing the number of interviews or formal hearings with the child to a minimum;
- Offers opportunities to work more effectively and efficiently, especially when approaches are child-sensitive and child-centred, giving the child meaningful opportunities to be informed and heard, reducing risks of secondary victimisation during investigations and procedures, while also reducing the strain on individual professionals or agencies;
- Is essential to ensure that decision making processes are safe and sound and lead to rights-based and sustainable outcomes.

In inter-agency and multi-disciplinary cooperation on individual cases, regulations for data protection and confidentiality need to be clearly established, known and respected by all participating agencies and professionals.

39 2011 Anti-Trafficking Directive, Article 11.6. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. Council of Europe Convention on Action against Trafficking in Human Beings, Articles 13 and 14.

40 United Nations Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Commentary*, 2010, p. 165.

Right to consular assistance

Children who are outside of their country of residence have a right to assistance by embassies and consular offices representing their countries. Consular staff can play an important role in supporting and assisting children abroad, establishing supportive contacts and referral, and mobilising help. Consular staff can contact central authorities or national contact points to seek technical advice in cases involving children and need to be informed and trained in this regard.

Under the 1963 Vienna Convention on Consular Relations of the United Nations, consular functions consist, among others, in helping and assisting nationals of the sending state. This could involve measures to safeguard, within the limits imposed by the laws and regulations of the receiving State, the interests of children who are nationals of the sending State, particularly when a guardian needs to be appointed (Article 5e and h). The authorities of the country of destination have the duty to inform the competent consular office without delay when the appointment of a guardian for a child is considered. The laws and regulations of the receiving State concerning the appointment of a guardian apply and are not affected by the information sharing with the relevant consular offices (Article 37b).

The Council of the Baltic Sea States Task Force Against Trafficking in Human Beings jointly with the International Organization for Migration developed a Handbook for diplomatic and consular personnel on how to assist and protect victims of human trafficking. The handbook provides an overview and easy-to-access information on how to strengthen the protective capacities of consular staff.

The role of central authorities in transnational child protection

Central authorities for child protection play an essential role in facilitating the cooperation of child protection services within countries and across borders. They are often administratively located within national ministries or attached to them. Central authorities work closely with national and local authorities and provide technical expertise, information and guidance. Central authorities have been established mainly with a mandate to work in the area of international private law and transnational family matters, such as parental child abduction, inter-country adoption and cross-border disputes over parental responsibility. In the absence of unified standards and provisions, the mandates of central authorities differ however from country to country.

The legal framework regulating the work of central authorities for transnational child protection is rooted in the UN Convention on the Rights of the Child, the 1996 Hague Convention on Child Protection, the 1980 Hague Child Abduction Convention and the EU Brussels II bis Regulation as well as the practice of the European Court of Justice. All these standards have in common the requirement that institutions involved in decision making processes concerning children have to be guided by the best interests of the child, as afforded under Article 3 of the UN Convention on the Rights of the Child.

The EU Brussels II bis Regulation states that EU Member States shall designate at least one central authority as a competent body handling cases under the Regulation. The main function of these central authorities is to help ensure effective communication between the child welfare authorities in Member States (Article 55).

The Hague Conventions on child protection and international family law refer to central authorities as the bodies that have the jurisdiction to take protection measures for a child. They act as main contact points for requests and communications from abroad, provide assistance in locating a child and make relevant assessments. States might establish a single central authority or devolve the responsibility to central authorities in its autonomous territories. In cases of cross-border parental child abduction, central authorities are responsible for securing the *voluntary return* of the child.[41]

41 The Hague Convention No. 34 of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Chapter V. The Hague Convention No. 28 of 25 October 1980 on the Civil Aspects of International Child Abduction, Chapter II. The Hague Convention No. 33 of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Chapter III.

Good practice examples of inter-disciplinary cooperation for best interests' assessments and determinations

The **Children's House** model provides multi-disciplinary services for child victims under the same roof. The model has been internationally recognised and evaluated as a good practice. The Children's House staff conduct forensic interviews with child victims and witnesses of crime and with children who have potentially been exposed to abuse. Children's Houses and comparable models have been in place for many years in Iceland, Norway and Sweden and are being established also in other European countries. This model would be well-prepared to conduct interviews with children on the move and to assess their cases. It can guide professionals in developing child-sensitive and child-centred approaches to interviewing child asylum seekers and child victims of trafficking.[1]

In Finland, an initiative was developed in 2008 that aimed to strengthen the cooperation of social workers and immigration officials in best interests' assessments for unaccompanied asylum seeking children.[2] In the context of this initiative, social workers based within reception centres have a right to participate in the asylum interviews with children or, alternatively, write a statement to the Finnish Immigration Service on what they consider to be the best interests of the child. Due to their direct engagement with the children at the reception centres, social workers have more possibilities than immigration officials to meet with the child and to build a trusted relationship. As social workers gather detailed information on the child's background and experiences, they can make important contributions to the asylum procedure and can support the child in being heard. A standardised interviewing model has been developed that guides social workers in assessing the psycho-social situation of each unaccompanied child and helps them to prepare a statement about the child's best interests. These statements are handed in to the immigration officials and inform the processing of the child's asylum application.[3]

1 PROTECT 1st Expert Meeting, Stockholm, 2014, presentation by Bragi Guðbrandson, Government Agency for Child Protection, Iceland.
2 United Nations Children's Fund Innocenti Research Centre, Child Trafficking in the Nordic Countries, *Rethinking strategies and responses*, Technical Report, 2011, pp. 61-62.
3 Mustonen, Henna, Unaccompanied Minors in the Finnish Asylum Seeking Process*: The best interests of the child and psychosocial expertise*, Nordic Network for Research on Refugee Children, 2010.

Central authorities are important actors in transnational child protection. They act as first points of contact for transnational cases and coordinate national and cross-border measures. They are hubs of data, knowledge and expertise and strengthen the child protection services nationally and transnationally. The caseload handled by central authorities includes parental child abduction cases, social cases and migration cases where citizens need support abroad or are to be returned, the cross-border placement of children in alternative care, transnational cases of violence, abuse and neglect, as well as family matters concerning parental responsibility, contact between parents and children and maintenance. When receiving requests from abroad, central authorities often have to conduct assessments from a social and from a legal perspective.

In order to handle such a diversity of cases, central authorities need to be equipped with a broad mandate. They also need to be well-connected with other relevant authorities within their countries and abroad. Their multi-faceted mandates and the combined role for national and cross-border cooperation is a key for creating a strong safety net for children in transnational situations.

Cross-border cooperation in the area of child protection is often time consuming. When a request for information comes in from abroad, the central authorities are frequently asked to send a prompt response, sometimes within 48 hours, but it is hardly possible to make all the assessments in such a short time. There is currently no standardised information form for transnational cooperation in case assessments. The conclusions and decisions taken on the basis of the relevant case assessments might differ between countries of origin and destination countries and there may be different interpretations of what constitutes the best interests of the child.

Social workers do not always work through central authorities or other relevant international networks like the one provided by the International Social Services. Sometimes, social workers decide to travel abroad in order to make the assessments themselves.

Promoting national and transnational social service cooperation: The Child Protection and Adoption Service in Lithuania[1]

In Lithuania, the central Child Protection and Adoption Service is a unique model for strengthening the cooperation and information exchange on child protection cases within the country and across borders. Located within the Ministry of Social Security and Labour, it is the central authority for all child protection matters within Lithuania and in transnational cases.

Within Lithuania, the authority acts as a central information, coordination and monitoring body. It communicates information on new laws and procedures in the area of child protection and supports their application in practice throughout the country. The Child Protection and Adoption Service keeps a central registry of families at risk in Lithuania. It receives data from the local social services and from abroad and feeds the data into the national registry. This database is an important tool to keep track of families and children who move within the country, to monitor the situation of children in families at risk, and to manage information received from abroad, in line with national data protection standards.

When a family is inserted into the central registry, the Municipal Child Rights Protection Unit is tasked to follow a certain procedure of assessments, service provision and monitoring of the family's situation. The Unit conducts an assessment of the family's needs with regard to social services and proceeds to deliver the services to the family, including the children, accordingly. The family situation is periodically assessed in order to determine whether the service provision should be adjusted to their evolving needs. When the risk situation of the family has ended, the Municipal Child Rights Protection Unit informs the central registry of the developments and the family is removed from the registry.[2]

In transnational cases, the central authority acts as the primary contact point for child protection authorities from abroad and coordinates all activities at the national level, including the engagement of the local child protection services in Lithuania. The central authority provides information on individual cases upon requests from authorities abroad, organises the return of children to Lithuania and assists in cases where children are under the supervision of social services abroad or have committed a crime abroad. The Child Protection and Adoption Service is therefore a key actor for the transnational referral of children and oversees all actions from the initial assessments through to the identification and implementation of a durable solution.

1 Council of the Baltic Sea States, Children's Unit, Expert Group for Cooperation on Children at Risk, Children Trafficked for Exploitation in Begging and Criminality: A challenge for law enforcement and child protection, 2013, p. 25. Council of the Baltic Sea States, Children's Unit, Expert Group for Cooperation on Children at Risk, Family Support and *Alternative Care in the Baltic Sea States - Background Paper, 2015, pp. 77-78.*

2 Lithuania, Order No. A1-212 of 28 July 2006 of the Minister of Social Security and Labour on the Approval of the Procedure of Record Keeping of Social Risk Families Raising Children in a Municipal Child Rights Protection Unit, last amendment No. A1-676, 15 December 2009.

Their assessments of situations abroad and decisions based on such assessments might however not be admissible in court. It would therefore be important to strengthen the cross-border cooperation in order to build mutual trust and common standards for assessments and decision making in transnational child protection cases.

While central authorities have a mandate in international private law, cases of unaccompanied children are rarely referred to them. A notable exception is Lithuania, where the central authority for child protection operates with a more comprehensive approach and addresses also cases of migrating children and child victims of trafficking. Many of the countries of origin of unaccompanied children arriving in Europe are however third countries that do not participate in the EU Brussels II bis Regulation and have not ratified the Hague Conventions. Cases of children on the move are therefore usually handled without the support of central authorities.

Balancing rights and interests in best interests' determinations

The Committee on the Rights of the Child advises that the assessment and determination of the best interests of a child involves the balancing of all the elements necessary to make a decision for an individual child. There may be different elements to consider and some of them may appear to be competing or in contradiction.

Professionals and officials working with and for children are indeed often confronted with situations, in which decisions about the best interests of the child are difficult to make. There may be different rights and interests of the child that appear to be in conflict. In some cases, for instance, a child who has been trafficked may wish to be reunited with the caring family in the place of origin. The wish for family reunification may stand in conflict with the child's safety when it will be difficult to protect the child in the place of origin from reprisals by traffickers or new recruitment, especially when the child has acted as a witness in criminal investigations and proceedings. In such a case, deciding for the child to return will pose ethical dilemmas as it may compromise the child's security, while a decision not to return the child will compromise the child's right to reunite with her or his family. Family reunification in the country of destination or in a third country may be a solution to be explored.

Another dilemma arises when child protection workers would like to refer a child to a secure accommodation in order to prevent any contact with recruiters, exploiters or traffickers. In the absence of other solutions to protect the child, the obligation of the authorities to protect the child from the recruitment into exploitation or trafficking is then in direct conflict with the child's right to liberty.

Dilemmas may arise from the stark differences between standards in countries of origin, transit and destination, for instance with regard to standards of living, care, security and protection, health or education. Such dilemmas may occur in the context of return as well as in transfers under the EU Dublin III Council Regulation.

Officials who are making decisions over the best interests of a child are often bound by institutional demands and constraints. Immigration quotas may play a role. Children from countries that are considered 'safe countries of origin' for instance, may have their asylum applications assessed in a fast track procedure with little attention to their individual situations and possible child-specific grounds of persecution.

In cases involving criminal investigations and proceedings, as for instance when a child is presumed to be a victim of trafficking, the mandates and interests of the law enforcement agencies and child protection services may appear to be in conflict. Law enforcement agencies may have an interest to hold on to the child in the place of destination in order to have sufficient time available for forensic interviews, investigations and for having the child testify in court. Child protection authorities may however come to the conclusion that the child should be promptly reunited with her or his family or caregivers in a different country. A solution could be to enable child victims and witnesses to testify through video-recorded statements taken prior to the child's return or from a distance.

All agencies are bound by the premise to make the best interests of the child a primary consideration. As such, the general principle of the best interests of the child can guide the inter-agency cooperation towards achieving a more holistic approach, balancing the different mandates and interests and finding innovative solutions that safeguard the interests of the child.

Carefully balancing different solutions and being inventive with proposing solutions, can help to overcome conflicts of interests. When officials and professionals involved in best interests' determination procedures find themselves confronted with dilemmas and unresolved questions, it may be worthwhile to bring these cases to the attention of policy makers, monitoring bodies and other relevant institutions. The balancing of different rights and interests should be given specific attention in monitoring and evaluation and the learning should lead to improvements in policy and practice. Clarifying mandates and priorities can help to define better the scope of action and discretion available to decision makers who are held to balance the interests of the child with other interests, demands and constraints. It is important to review national laws, policies and practice from a perspective focused on the best interests of the child, in order to identify incoherent and inconsistent laws and policies and deviations from the best interests' principle in practice.

Training, capacity and attitudes of staff

The knowledge, awareness and attitudes of social workers, law enforcement and immigration officials, guardians, interpreters and other professionals can play a decisive role in safeguarding children on the move. In some cases, the attitudes, limited knowledge or awareness of staff might inhibit rights-based and holistic approaches in best interests' assessments and determinations. On the other side, well-informed staff and the right attitudes can help to reduce risks and to prevent children from being recruited into exploitative situations. In order to equip professionals and officials with everything they need to fulfil their demanding

Committee on the Rights of the Child: General Comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration

The Committee on the Rights of the Child recognises that there may be conflicting interests and rights when the best interests of the child are being assessed. It recommends that "potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general, have to be resolved on a case-by-case basis. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonisation is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best."[1]

The United Nations Children's Fund (UNICEF) and the United Nations High Commissioner for Refugees (UNHCR) give the following advice for balancing rights and interests in situations where different interests are in conflict:

- The possibility of harm outweighs other factors;
- The child's right to be brought up by her or his parents is a fundamental principle;
- A child's best interests can generally best be met with her or his family, except where there are safety concerns;
- The survival and development of the child are generally ensured the best by remaining in or maintaining close contacts with the family and the child's social and cultural networks;
- Matters related to health, education and vulnerability need to be assigned weight; and
- Continuity and stability of the child's situation are considered important.[2]

1 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 39.

2 United Nations High Commissioner for Refugees, United Nations Children's Fund, Safe and Sound, What States can *do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, p. 43.

mandates, there is a need for effective and sensible methods, tools and adequate support:

- Professional training and information are required to support social workers and other professionals and officials involved in case assessments and best interests' determinations.
- Awareness raising and sensitisation are important to overcome prevailing stereotypes about different population groups and to be prepared to meet each girl or boy as an individual who enjoys universal human rights and has a unique story, aspirations and needs.
- In addition to a strong legal mandate, there is also a need for effective tools and methods that support the relevant professionals or officials in conducting best interests' assessments and determinations in a child-sensitive, rights-based and holistic way.
- Professionals and officials need to be trained and skilled to communicate effectively with the children whose cases they are assessing and to listen to what the child says.
- Furthermore, it is essential that the competent professionals or officials have access to legal and technical advice, supervision and coaching on how to strengthen their performance. Access to technical assistance, information and professional advice from a central body, such as a central authority, and case conferences with a multi-disciplinary team can be useful to provide this kind of support.
- In order to achieve a holistic approach in case assessments, care planning and case management, professionals and officials need to have the time, resources and structures in place to work closely with other professionals. They need to be aware of the opportunities and benefits of multi-disciplinary cooperation and the importance of building protective networks around children at risk. Inter-agency and multi-disciplinary cooperation allows the professionals to develop holistic and effective approaches while working also more efficiently with their own resources as part of a broader protection network.

The right to non-discrimination: Matters of status, access and jurisdiction

The UN Convention on the Rights of the Child affords a broad protection from discrimination. It stipulates that "States Parties shall respect and ensure the rights set forth in the ... Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." (Article 2.1)

Considering the prohibition of discrimination on the grounds of status, the rights afforded under the Convention shall apply to non-national children, regardless of their immigration status or the migration status of their parents and including children who are visiting, refugees, children of migrant workers and undocumented children.[42]

The right to non-discrimination entitles each child to immediate assistance and support while the situation of the child and her or his best interests are being assessed. Non-discrimination does not imply that a child is granted an automatic permit of stay, but that a decision is taken, on the basis of the best interests' determination, whether a child shall be returned to the state that holds jurisdiction or whether the country of destination assumes jurisdiction over the child.

There are many potential grounds of discrimination that derive from migration, such as the child's or the parents' nationality, immigration status, language or religion. It is therefore important to ensure that the right to non-discrimination is reflected in public policies concerning migrant children and their families and the related services, procedures and practice.

In addition to legal prohibition of discrimination, there is a need for proactive measures to prevent discrimination in all its forms. Ensuring active non-discrimination does however not imply that all children should be treated the same. Affirmative action, i.e. the "legitimate differentiation in treatment of individual children" is important to prevent and redress marginalisation, exclusion and discrimination and to promote the inclusion of groups or individuals who are particularly disadvantaged and vulnerable.[43]

In relation to best interests' assessments and determinations, this means that there is a need to apply the same or comparable standards to national and non-national children. In order to ensure that non-national children benefit from these standards to the same extent as national children, there may be a need to put in place proactive measures, as for instance quality interpretation and cultural mediation, to ensure effective communication with a child who does not master the national language.

The degree to which the child's right to non-discrimination is being respected in a country of origin can also be decisive for the determination of the best interests of the child and the identification of a durable solution. In this context, it is important to assess possible grounds of discrimination in the child's place of origin, including due to minority status, gender or gender identity, religion, disability or the national origin of the child or the parents, or statelessness.

Preventing and combating discrimination is not only a human rights imperative. It is also in the interests of societies and states. Discrimination leads to marginalisation and exclusion. It reduces the person's opportunities to fully enjoy her or his rights and to develop their potentials. Persons at any age who are discriminated against, or who are otherwise marginalised and excluded, are prevented from participating in and contributing actively to the society with their resources and potentials.

Discrimination, exclusion and differential treatment manifest themselves in national laws and policies that regulate the quality and scope of services provided to non-national children. In addition, there are often many barriers in practice that hamper the access of non-national children to services that they would be entitled to under the law. Preventing and addressing discrimination requires therefore not only inclusive policies but also the capability of states and service providers to identify barriers that create exclusion and to develop effective solutions to remove them.

Structural challenges may cause or contribute to the exclusion, marginalisation or discrimination of individual children or special population groups. 'Structural' refers to issues that are inherent within the way that public administrations are organised and operate in practice. Structural challenges include, for instance, the following:

- The high degree of fragmentation of institutional mandates and responsibilities with regard to different thematic areas concerning children, as for instance, child protection, social services, education, health, immigration and justice, and weak cooperation and coordination across all these sectors.

42 United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child,* Fully Revised Edition, Rachel Hodgkin and Peter Newell, 2002, p. 26.

43 United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child,* Fully Revised Edition, Rachel Hodgkin and Peter Newell, 2002, p. 19.

Transnational family mediation: A good approach for balancing the best interests of the child and parental interests in international family disputes[1]

Mediation is a structured process whereby a mediator facilitates the communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict. The mediation process is rooted in international standards. Mediation has to be a voluntary process to which both parties give their informed consent. The mediator has to take a neutral role, be independent, impartial and fair. The process is based on confidentiality and consideration for the interests and welfare of the child. These principles are provided for in the Guide to Good Practice in relation to the 1980 Hague Child Abduction Convention. The Guide to Good Practice has been translated into the official languages of the European Union as well as Russian, Arabic and Mandarin. It offers useful guidance on how to start international mediation and how to implement the agreement resulting from the mediation, including in transnational cases.

Mediation offers many advantages. Experience shows that mediation can help to resolve many cases and that it is worthwhile to consider mediation as an alternative to court proceedings. In practice, it remains however a challenge to obtain the consent of parents to participate in mediation in transnational family matters involving children, such as disputes about parental responsibility and contact or parental child abduction cases. Some parents reject the mediation process due to the high costs related to it.

When parents are occupied with court proceedings in different countries and with their own perspectives and arguments in the case, mediation can help to focus on the best interests and the well-being of the child. Mediation has procedural advantages as it helps to maintain the prescribed tight time-frame of six weeks to resolve a case (Article II of the EU Brussels II bis Regulation and Article 2 of the 1980 Hague Convention). In cases of parental child abduction or interrupted contact, the left-behind parent can spend time with the child during the period allocated for mediation. In the European Union, the 2008 EU Mediation Directive regulates mediation and provides, among others, for social assistance for mediation, including in family matters.

It is important to work with trained and qualified mediators who have different cultural backgrounds, language skills and professional areas of specialisation, such as lawyers, social workers or psychologists. Co-mediation is considered useful in transnational cases to offer bi-lingual, bi-national and bi-cultural mediation, to ensure a gender balance in mediation and to combine the different professional backgrounds of the co-mediators.

It can be useful to provide parents and lawyers who are involved in a transnational family conflict with standardised written information on the mediation process, ideally with translations into the main languages of the parents. Experience shows that personal information about the benefits of mediation works best. Financial support from the government could help to promote mediation as a viable alternative to court proceedings. It is often difficult to mediate in a case when the parties are not in the same place. Mediation through telephone calls or online video communication can help to overcome the distance.

Even if mediation does not lead to a final agreement, there is a potential that the mediation process improves the relation and communication between the parents. The parents might be become aware of different ways of solving the situation and might understand better the consequences of their decisions and actions for the child. They might take more consciously their own and joint responsibility for the child. Depending on the age of the child, the child could be involved in the mediation as well in order to ensure that her or his opinion is heard. The parents might start to trust each other again, because it may be the first time after their separation that they talk again to each

1 This box draws substantially on the PROTECT 4th Expert Meeting, Riga, November 2014.

other and listen. So the mediation process may also generally prepare the grounds for the parents to respect and adhere to court decisions if mediation does not lead to a decision, and the parents might refrain from appealing against the court's ruling.

Experience shows that a mediated agreement is usually more sustainable than a court order. A mediation agreement, approved by the court or a court decision based on a mediated agreement will be recognised and enforceable in all other Contracting States of the 1996 Hague Convention (Articles 23 and 28). The respect of mediated decisions can be strengthened further when they are reinforced by mirror orders. A mirror order is issued by the court of another state to which a child shall be taken. It mirrors the court order from the child's country of habitual residence as it contains the same terms and conditions. The mirror order enables and obliges a court in the other state to enforce the decision without modifying the order. This includes also an obligation to ensure the prompt return of a child in the case of parental abduction.

- The 'categorisation' of children according to their immigration status, national origin, minority or other status, which leads to categorised policy making and service provision, for instance, for unaccompanied asylum seeking children, child victims of trafficking, child victims of sexual abuse, children in conflict with the law or children in alternative care. When standards and procedures are developed separately for different groups of children, there are risks that services are provided primarily on the grounds of the child's status and not her or his individual needs.
- The devolution of competences in federal and decentralised administrations where it leads to regional disparities in the scope and quality of services offered.
- The different treatment afforded to children of different ages as adolescents receive less support and have different entitlements in some countries than younger children.
- The degree to which prevailing stereotypes and attitudes influence service provision for different groups of children.

Establishing jurisdiction over a non-national child[44]

The UN Convention on the Rights of the Child affords universal standards that apply to each child within the jurisdiction of a state (Article 2). Being on the territory of a state, and therefore *within* the state's jurisdiction, entitles a non-national child to immediate care and assistance if and as required. The provision of services for immediate care and assistance, however, does not automatically imply that the authorities in the country of arrival *have the jurisdiction* over the child.

Decisions in civil law matters such as the longer-term care arrangements for the child, contact with family members, maintenance and parental responsibility may fall under the jurisdiction of another state. While assessing the child's case and situation, state authorities have a responsibility to clarify which state has the jurisdiction over a child and, if required and appropriate, transfer or establish jurisdiction in the country of destination.

The authorities in the country of destination need to know if there are any formal proceedings pending in another country:

- There could be a case pending at court in which the child is involved,
- Social services in another country may have been monitoring the child and her or his family;
- The child's situation may have been under law enforcement investigations in another countries, including where child trafficking is suspected;
- The child may have handed in an asylum application in another country;
- The child may be registered as a 'missing child' abroad.

In the vast majority of cases, the authorities in destination countries do not make any attempt to clarify, transfer or establish jurisdiction over non-national children. In most cases, the jurisdiction rests with the child's country of origin or habitual residence. When a child is granted asylum or other forms of residence status such as a permit of stay on the grounds of being a victim of trafficking, the jurisdiction over the child is however usually assumed fully by the country of destination, at least for a specified period of time.

44 This section draws extensively on the 4th PROTECT Expert Meeting, Riga, November 2014, presentations by Kerry Neal, UNICEF, and Philippe Lortie, Hague Conference on Private International Law.

Access to information, technical assistance and specialised expertise

Many transnational child protection cases are complex and difficult to assess, especially when criminal acts are involved, such as exploitation and trafficking, and when the child's identity, relations and aspirations are not entirely clear. In order to address such cases effectively, it is important that expertise in child protection, social affairs, family mediation, criminal law and security matters, migration issues, interpretation and cultural mediation is available.

Specialised knowledge and experience with complex cases may not be available in each municipality, especially in small towns and in rural areas. For officials and professionals working with and for children, it is therefore important to know whom to contact in order to seek information, technical assistance and specialised expertise.

The following are some key contact points to approach:

- National institutes, commissions or Ombuds Offices for human rights or children's rights
- Central authorities for child protection, which are in place for different themes and are usually connected to the Hague Conventions on child protection and international family law and to the EU Brussels II bis Regulation
- The national migration authorities
- The national branches of the International Social Service in the countries involved in the case
- NGOs and child rights advocates focusing on matters concerning children on the move and/or child victims of crime
- National helplines for missing and sexually exploited children
- National institutions supporting victims of crime
- National Rapporteurs or observatories on human trafficking
- National or regional offices of the United Nations Children's Fund (UNICEF), the United Nations High Commissioner for Refugees (UNHCR) or the International Organization for Migration (IOM)

Committee on the Rights of the Child: General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin

"State obligations under the Convention apply within the borders of a state, including with respect to those children who come under the state's jurisdiction while attempting to enter the country's territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State Party and must, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness."[1]

1 Committee on the Rights of the Child, General Comment No.6 (2005), par. 18. United Nations High Commissioner for Human Rights, Study on challenges and best practices in the implementation of *the international framework for the protection of the rights of the child in the context of migration, A/HRC/15/29, 5 July 2010. Committee on the Rights of the Child, The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, p. 10.

Establishing and transferring jurisdiction: Rules and regulations under the EU Brussels II bis Regulation and the Hague Conventions[1]

Establishing jurisdiction is a precondition for a cross-border child protection case to be tried by a court in a country that is not the habitual residence of the child. Under the EU Brussels II bis Regulation Article15, the court of a Member State may rise the question of transfer of jurisdiction when

- It is in the best interests of the child that the Member State becomes the habitual residence of the child;
- It was the former habitual residence
- of the child;
- It is the country of the child's nationality;
- It is the habitual residence of a holder of parental responsibility; or
- It is the country where the child's property is located.

When a case is passed to the court and the court finds that it has no jurisdiction to take a decision in the case, Article 17 of the EU Brussels II bis Regulation applies. The article provides that the court declares that it does not have the jurisdiction and notifies the authorities in the child's country of habitual residence. The notification is usually sent through the central authority.

Under the 1996 Hague Convention Article 8, the central authority of a Contracting State may consider the transfer of jurisdiction if they consider that the authority of another Contracting State would be better placed to assess the best interests of the child, when the state is that of a child's nationality or where the child's property is located or where the child has substantial connections.

The experience of central authorities reveals however that there are often doubts about which state holds the jurisdiction or how to transfer it. Against this background, further guidance on how to transfer the jurisdiction under the 1996 Hague Convention is needed. Currently, the Convention is not yet applied consistently by courts and it is not always clearly accessible on what basis decisions are taken.[2]

1 This box draws extensively on the PROTECT 1st Expert Meeting, Stockholm, January 2014 and the PROTECT 2nd Expert Meeting, Riga, May 2014.

2 PROTECT 4th Expert Meeting, Riga, November 2014.

Recommendations for creating trust

- Demonstrate that you care for and respect the child as a person.
- Ask the girl or boy how she or he is, how she or he feels at the accommodation and if there is anything she or he needs.
- Engage in a gentle conversation with the child about day-to-day matters.
- Show empathy and express positive feelings and talk to the child about things that are important to the child and that interest her or him.
- Sense if the child is comfortable talking with you, reassure the child and give the child a feeling of control of what is happening.
- Make the meeting room child-friendly, even with minor accessories and gestures.
- Introduce yourself and explain your professional role.
- Explain the purpose of your meeting and what the meeting is about, why you are there to talk to the child and what will happen afterwards.
- Allocate sufficient time to speak to the child and to listen.
- Make available quality interpretation and cultural mediation wherever required.
- Give the child time to reflect about the information you shared, to digest it and to come back for a second or third meeting, if and as required and appropriate.
- Ask the child if she or he has understood the information and to explain what they understood, and take time to ask the questions you need to ask.

A formal process for establishing or transferring the jurisdiction starts usually when a case is tried before a court of law. This is common in transnational cases of parental responsibility and contact or parental child abduction. Such cases fall within the remit of international private law.

For cases under international private law, including transnational matters of parental responsibility and contact, parental child abduction and protection, the Hague Conventions provide guidance on how to establish and transfer the jurisdiction. They provide that the country of habitual residence of the child holds jurisdiction and that other Contracting States under the Conventions are held to promptly enforce decisions taken in the country of habitual residence. The concept of habitual residence has not been clearly defined in the Hague Conventions. It is however preferred over the concept of nationality or citizenship as it refers to the place where the child has the centre of her or his life and where the child is living for a longer-term period. There remains thus a margin of interpretation of the meaning of habitual residence.

Within the European Union, the EU Brussels II bis Regulation provides a parallel framework applicable for EU Member States to regulate the establishment of jurisdiction in civil law matters and transnational child protection.

Unresolved questions about the jurisdiction over a child can delay or hamper the case assessment and decision making processes. It may lead to situations of unclear institutional responsibilities, which might eventually place the child at risk when decisions are not well informed or taken in a unilateral way. As long as the jurisdiction over a non-national child is not explicitly established, the child risks staying in a state of uncertainty and might benefit only from temporary services and protection measures, until the child's status is fully regularised or the child returns to the country holding jurisdiction.

The right to life, survival and development

In best interests' assessments and determinations, the child's right to life, survival and development is paramount, in line with Article 6 of the UN Convention on the Rights of the Child. These rights are related to physical survival, security and health as well as the mental, spiritual, moral, intellectual, cognitive, emotional and socio-cultural development of the child. Safeguarding this fundamental right of the child requires that due attention and equal importance is given to the physical, psychological and social rights and needs of the child.[45]

The United Nations High Commissioner for Refugees (UNHCR) recommends that the following main factors need to be taken into account when assessing the development needs of a child in the context of best interests' determination procedures, with reference to the relevant Articles of the UN Convention on the Rights of the Child:

- The right to preserve her or his identity, including nationality, name and family relations (Article 8);
- The continuity in the child's care and upbringing, with due regard to the child's ethnic, religious, cultural and linguistic background (Article 20);
- The right of the child to enjoy the highest attainable standard of health (Article 24);
- The right of every child to a standard of living adequate to the child's physical, mental, spiritual, moral and social development (Article 27);
- Access to education (Articles 28 and 29);
- The right of the child to rest and leisure, to engage in play and recreational activities appropriate to her or his age (Article 31).

The quality of childcare, including stability and continuity of care, have a direct impact on the development of the child. Safeguarding and promoting the child's rights and needs with regard to development means therefore also to enable the child to grow up in her or his family of origin or in a family-based or family-like alternative care placement, whatever is in the best interests of the child. When assessing the child's developmental needs, due attention needs to be given therefore to the care arrangements as well as access to quality services for health and education.[46]

The right to be heard: Communicating with children in the process of best interests' assessments and determinations

The UN Convention on the Rights of the Child imposes legal obligations on states to assure that the child who is capable of forming her or his views has the right to express those views in all matters affecting her or him, and that these views are given due weight in accordance with the age and maturity of the child (Article 12). Article 12 embraces children's participation in social and political matters (Article 12.1) as well as in judicial and administrative proceedings (Article 12.2). As a general principle, the child's right to be

45 This section draws significantly on the UNHCR Guidelines on the Formal Determination of the Best Interests of the Child, p. 36.

46 Council of the Baltic Sea States, *Family Support and Alternative Care in the Baltic Sea Region*, Background Paper, Expert Group for Cooperation on Children at Risk, 2015, pp. 40-42.

The use of communication technology and video recording for taking evidence

In some cases, the presence of the child or a parent at court may not be possible, for instance in custody proceedings concerning an child who has been abducted to another country and can therefore not be heard personally in court. Recital 20 in the EU Brussels II bis Regulation provides for the possibility that the child be heard by using the means laid down in the Council Regulation (EC) No 1206/2001 on the taking of evidence. This regulation provides that cooperation for the taking of evidence be improved, simplified and accelerated in cases with a cross-border element. It affords a possibility to employ communication technology, in particular videoconferencing (Article 10(4)). The Practice Guide for the application of the Regulation offers more detailed guidance on how this could be handled in practice.

Hearing children at court: Advice from judges[1]

When handling a transnational case of parental responsibility, contact or abduction, it is important for the judge to hear the child, even at a very young age. The judge will not ask direct questions about the child's relationship to the mother or father, but will enquire about the child's views of the situation and her or his relationship to other family members. It is important to conduct the hearing in an appropriate environment and by trained judges or other competent professionals. Training should be delivered by specialised professionals, including by psychologists, as judges need to be aware of the parents' or other persons' direct and indirect influence on the child.

Small things can help managing the situation and establishing a positive atmosphere in the hearing, for example not sitting directly in front of the child in a confrontational way, good time management to not keep the child waiting in the court building, a child-friendly environment, ensuring transparency and that the child is informed and understands the process. Sometimes, children may be afraid to talk to the judge about details, as for instance the new partner of the mother or father. They might be afraid that the judge will disclose later on to the parent what they said. It is in the judge's discretion, how and to what detail the parents are informed and it is important that the judge addresses these issues openly with the child.

When a judge understands the views and feelings of the child, it is easier to work with the parents to find a solution. The child might be asked to speak about her or his own ideas of how the situation could be improved or solved. The child's views and suggestions can sometimes help to mediate between the parents.

1 PROTECT 4th Expert Meeting, Riga, November 2014.

The 'participatory rights' of children

The right to be heard (Article 12), relates closely to other articles under the Convention, which together form the so-called 'participatory rights' of children and underline the understanding of children as citizens who are rights holders. These articles include in particular the child's right to seek, receive and impart information (Article 13) and other civil rights regarding the freedom of thought, conscience and religion (Article 14) and the freedom of association (Article 15).[1]

1 United Nations Children's Fund, Implementation Handbook for the Convention on the *Rights of the Child*, Fully Revised Edition, New York, 2002, p. 159.

heard reflects the concept of children's 'agency', viewing children not only as vulnerable human beings in need of protection, but also as informed decision makers, rights holders and active members of society.

The provisions under Article 12 of the UN Convention on the Rights of the Child have been reiterated by European regional standards, including EU Directives as well as Conventions and recommendations issued by the Council of Europe. The Committee on the Rights of the Child has dedicated its General Comment No. 12 (2009) to the right to be heard. A list of excerpts and citations from international and European standards on the right of the child to be heard in transnational situations, in civil and criminal investigations and proceedings and in service provision is enclosed in the Annex.

Many children feel reluctant to share information with the authorities in the country of arrival due to fears that disclosing information might not be in their interest and that telling their story might lead to return. In the countries of origin, return could be associated with a perceived shame about the 'failed' migration project, unmet debts within the family or with smugglers that cannot be repaid or other pressure factors. Children might have been instructed by third persons to reveal only certain parts of their story, there might be threats and fears of reprisals involved and the child might not trust that the police and local authorities will be able to protect them.

A reception system that demonstrates respect and upholds the dignity of the child is essential to foster a sense of trust in the child towards the officials and professionals whom she or he meets with. Staff need to be trained and skilled to communicate with children in a child-sensitive way and to take the views of a child into due consideration. In addition, privacy considerations and procedural safeguards must be respected in hearing children.

Child-sensitive interviewing and trust

Establishing trust with the child is a fundamental prerequisite for best interests' determinations. Gaining the trust of a migrant child is a demanding task and requires time. It is a constant challenge, as social workers, immigration officials and law enforcement officers are often managing high caseloads.

In accommodating the child, providing care and support, and in interviews with the child, it is important to ensure a child-friendly environment. Officials and professionals who meet with the child can make a difference when they demonstrate with their behaviour and communication that they respect the child as a person and care for her or his well-being. Making child-friendly information available and discussing it with the child is important to enable children to rectify any misinformation from other sources, as for instance from communities of origin, from smugglers or traffickers.

In their places of origin or during the journey, some children have acquired a culture of distrust with regard to public authorities, the police and other state officials. Loyalties within social networks, even if these are abusive or exploitative, might undermine the trust-building process between the child and the professionals and officials in the country of destination. When a child distrusts immigration officials and social workers, the child might lose out on support, protection and other services that she or he is entitled to. In these situations, some children decide to leave the care home or temporary accommodation and move on.[47]

47 PROTECT 4th Expert Meeting, Riga, November 2014, presentation by Kerry L. Neal, UNICEF.

The relevance of age for the right to be heard

National laws usually define age limits, in order to regulate as of what age children have the right to contact social services on their own initiative, to be heard in judicial and administrative procedures, to act as a litigant or party to a case, to appeal against decisions, to complain and seek redress. The age limits defined under national law differ between countries and, in some cases, also between the various laws applying to different groups of children and contexts. The right of younger children to be heard is often not addressed in the same way as the right of adolescents. Special measures need to be in place to ensure that younger children are not excluded from exercising their rights under Article 12 of the UN Convention on the Rights of the Child.[48]

In the cases of younger children or children with impaired cognitive skills, participation can be encouraged through adequate communication methods such as drawing or play, observation of the child's behaviour in interaction with family members, care staff and the environment. Adapting the language to the age and development of the child is imperative to ensure that the child can understand the issues at stake and to express her or his feelings and views.

Gender considerations for the right to be heard

For some girls and boys, it can make a difference whether they are interviewed by a man or a woman. The same is true for the role of the interpreter, cultural mediator, guardian or care staff. The relevance of gender depends on the experiences that children have previously made with men and women in their homes and communities, during the journey or in places of destination. Traditional gender roles and relations can also play a role. The gender identity of the child should be respected.

Forensic interviews

Research and experience show that the interview style and the type of questions asked matter for the quality of the interview. They can have a direct impact on the child's readiness to disclose information. They influence also the type and quality of information, and the level of detail, that the child is able and willing to share.[49]

The interviewer can facilitate the child's disclosure by prioritising open questions while avoiding closed and focused questions, suggestive prompts and leading questions. It is particularly important that interviewers take on a neutral bearing, that they are open and empathic, while avoiding criticism and confrontations. The same applies to interpreters who need to be aware of these details in order to transmit the interview style and bearing accordingly.

Hearing a child in investigations and proceedings

As a general rule, child victims of crime have a right to be protected from harm and secondary victimisation during investigations and proceedings.[50] The UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the 2011 EU Anti-Trafficking Directive and other relevant standards provide that child victims should be protected from further victimisation during criminal proceedings. Unnecessary repetition of interviews shall be avoided during the investigation, prosecution and trial. The Council of Europe Convention and the EU Directive encourage the use of video recorded interviews or other appropriate communication technologies, in order to avoid that child victims or witnesses have to give evidence in open court and to prevent visual contact between victims and defendants. Interviews with child victims shall be carried out by specially trained professionals and, if possible, the same person shall conduct all the interviews with the child.[51]

In court proceedings, the in-person hearing of the child is important because it is usually easier for a judge to come to a decision when taking into account the child's views. Hearing the child is not only important for gathering the facts. It is about understanding the views and perspectives of the child and ensuring that they are taken into consideration as they are critical for the decision making.

In addition to hearing the child in person, the court can seek additional information by requesting a report

48 Committee on the Rights of the Child, General Comment No. 12 (2009). UNHCR Guidelines on Child Asylum Claims.
49 PROTECT 2nd Expert Meeting, Riga, May 2014, presentation by Ann-Christin Cederborg, University Stockholm.
50 See also: United Nations Children's Fund, *Let's Talk, Developing effective communication with children victims of violence and trafficking,* 2004. United Nations High Commissioner for Refugees, *The Heart of the Matter, Assessing credibility when children apply for asylum in the European Union*, 2014. European Commission, *Practice Guide for the Application of the Brussels IIa Regulation*, 2014.
51 2011 EU Anti-trafficking Directive par. (20), Articles 12.4 and 15.

The Children's Rights Bureau: Legal advice and support for children on the move in Sweden

Child rights organisations can also support children in their contact with the authorities. A positive example is the work of the Children's Rights Bureau[1] in Stockholm, Sweden, which supports children on the move and young adults at a low threshold. The Children's Rights Bureau offers legal advice and practical assistance, supports children and young adults in accessing services, explains the asylum procedure and the options available and accompanies children and young adults to meetings with public authorities. Having access to this type of independent support can help children and young people to feel more respected and cared for and to gain confidence and hope for their current situation and their future.

1 Children's Rights Bureau, Stockholm, Sweden.

Strategic litigation to strengthen case law on the best interests of the child

The judicial systems established under the Council of Europe and the European Union have contributed to enhancing legal clarity in the interpretation and application of the best interests' principle. Relevant case law from the European Court of Human Rights and the European Court of Justice has helped to promote the human rights of children and the best interests' principle at the national and regional levels.[1] The European Court of Justice, for instance, ruled in 2013 that it would be an infringement of EU law to transfer children to the state where they had first been registered as asylum seekers. The ruling was based on European law and the obligations under the UN Convention on the Rights of the Child. It recognised the UN Convention on the Rights of the Child and the principle of the best interests of the child as an integral part of EU law. As a result, unaccompanied asylum seeking children were formally exempted from the transfers under the EU Dublin Regulation.[2]

Whereas this and other relevant case law constitute an important achievement for promoting children's rights in Europe, it is also pointing to shortcomings and gaps in the way that European states are implementing the Convention and other international or regional standards. Taking cases to the European courts constitutes a huge burden for any individual, especially for a child. It requires access to legal, financial and other support throughout the entire process, which is often lengthy.

Strategic litigation is a powerful method to enhance the implementation of international and regional standards and should therefore be pursued more actively, including with the support of child rights advocates. The case law that individual children and child rights advocates fight for will have a positive effect on children in similar situations. Governments need to reform their national laws, policies and practice in light of the European courts' jurisprudence and this, in turn, will help children enjoy their human rights without having to actively claim them at court.

1 For an overview of the case law and analysis, see: European Union Agency for Fundamental Rights, Handbook on European Law Relating to the Rights of the Child, 2015

2 PROTECT 1st Expert Meeting, Stockholm, January 2014, presentation by Johanna Schiratzki, Ersta Sköndal University College, Sweden. Court of Justice of the European Union, The Member State responsible for examining an asylum application made in more than one Member State by an unaccompanied minor is the State in which the minor is present after having lodged an application there, Press Release No 71/13, 6 June 2013.

from the social services or child protection services, from other relevant authorities or experts as well as the child's guardian or representative.

Quality interpretation and cultural mediation

The right of the child to have her or his views heard and taken into account in immigration and asylum proceedings depends significantly on language and communication. Non-national children who apply for asylum or another residence permit and immigration officials assessing their applications do not always have the language skills required to communicate on the complex issues at stake. The same applies to other contexts where non-national children are in contact with the authorities or service providers in the place of destination, including in service provision, investigations and criminal proceedings.

Interpreters are powerful participants in interviews with children. Their performance can influence the information gathering process in criminal investigations and asylum procedures as they have an impact on how the child's disclosure is understood and perceived. Inaccurate translation might compromise the child's statement to the effect that decisions in asylum procedures are taken on the basis of incorrect information. This relates not only to the content translated but also to the style and semantic choices made by the child and how these are rendered by the interpreter.[52]

When qualified interpretation services are unavailable, children who do not speak or understand the official language of the country may *de facto* be discriminated against. In addition to training and recruiting qualified interpreters, it is important to provide for the following:

- Clarify, which authority is responsible for providing interpretation.
- Make the participation of an interpreter mandatory whenever a child does not master the official language of the interview.
- Avoid the use of informal interpreters, such as family members, other children, other asylum seekers or staff.
- Use telephone interpretation when a qualified and suitable interpreter is not available locally. Distance interpretation may be preferable to protect the child's privacy when sensitive issues are at stake and when the diaspora representing the needed language in the country of destination is particularly small.
- Train law enforcement officers, immigration officials and other interviewers as well as the interpreters on how to collaborate in the context of interviews with children.
- Develop standard procedures with due consideration to quality and ethical standards of interpretation and confidentiality rules.
- Train interpreters to act also as cultural mediators.

Support from child rights advocates

For children who are separated from their families or caregivers, it is important to have access to independent advice and support that is focused on the rights, needs and perspectives of the child.[53] Independent support is important to help unaccompanied children understand the procedures that they are involved in, such as asylum procedures as well as civil or criminal procedures in which children are involved as victims, witnesses or defendants. Child rights advocates can help children to access and understand information and relevant services. They can guide the child through the procedure and help the child understand the roles and mandates of the different professionals and officials whom the child has to meet with. Independent child rights advocates play an important role in helping the child understand and trust the authorities in the country of arrival.

Access to reporting and complaints mechanisms

Within the national system for childcare and protection, reporting procedures and complaint mechanisms for children are usually in place. They differ in form and structure and include reporting and complaints mechanisms within childcare institutions, mechanisms within the public administration such as appeals boards, helplines operated by public and private agencies, as well as independent reporting and complaints mechanisms operated by national human rights structures and Ombuds offices for children.

An important contact point for cases of children on the move are the national hotlines for missing and

52 PROTECT 2nd Expert Meeting, Riga, May 2014, presentation by Ann-Christin Cederborg, University Stockholm. See also: Crawley, Heaven, *Working with Children and Young People Subject to Immigration Control, Guidelines for best practice*, Second Edition, Immigration Law Practitioners' Association, 2012.

53 United Nations High Commissioner for Refugees, United Nations Children's Fund, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, p. 32.

Children leaving care and reception places without informing the authorities

In countries of destination, many children leave care arrangements without informing the authorities of their whereabouts. When children go missing, they face high risks of being exposed to harmful and destitute living conditions. They might get exposed to violence, exploitation and abuse or are at risk and their chances for development into adulthood and an independent life are significantly reduced.

Some of the children who 'go missing' move on to other countries in Europe or beyond. Children may refuse to lodge an asylum application and move further afield. Some children do not wait for the decision on their asylum application before leaving reception centres and others leave when their applications have been rejected. Some might continue their journey in order to reach their final destination, to join family members or other contacts in another country. Others might be trafficked and follow the routes determined by their exploiters and/or traffickers. Transnational cooperation to locate these children and ensure their safety becomes then important.

The European Migration Network identified good practices in preventing children from going missing. Of fundamental importance is that care staff, guardians and service providers succeed to establish a trust-based relation and communication with the child and that children are able to integrate socially into the community of destination. Close and steady contact with the child and monitoring the child's safety and well-being are important to prevent children from going missing. Social contacts and support networks may help prevent that children go missing from homes and care institutions or reception facilities. Identification and registration of children, including their photographs, can help looking for them. When children have mobile phones and e-mail accounts and share their contact details with care staff or trusted persons, remaining in contact can be a way for reconnecting children to services once they have left. National protocols for missing persons can guide the cooperation of different authorities in preventing and tracing missing children and should ideally be extended across borders. A fundamental safeguard to prevent children from going missing is that their views, needs and aspirations are heard and taken into account in a meaningful way at all stages of their reception, referral and care and in the best interests' determination.[1]

When an unaccompanied child goes missing, the police have to investigate the case in the same way as cases of missing national children. This is required under the obligations of the state to ensure the safety and well-being of any child within its jurisdiction, as afforded under the UN Convention on the Rights of the Child, in particular the principle of non-discrimination under Article 2. The child's guardian, social services and care staff and the child's lawyer, where applicable, shall be informed about the progress of the investigations. Guardianship arrangements do not cease when a child is missing. In practice, cases of unaccompanied children who are missing are not always followed up to the same extent as missing national children, which is partially related to the uncertainty among institutions and service providers of who is responsible for ensuring the safety, care and well-being of the child.

1 European Migration Network, *Policies, Practices and Data on Unaccompanied Minors in the EU Member States and Norway*, Synthesis Report: 2015, pp. 28-32.

sexually exploited children, which can be reached at the number 116000 in most European countries.

Many of these mechanisms are however not easily accessible for children. For children on the move, special proactive measures are required to ensure they are informed about their rights to complain and where to do so. Children on the move need to be able to seek advice, report and complain in an easily accessible, child-sensitive and confidential manner. Guardians and other professionals working with and for children on the move play an important role in supporting children in accessing reporting and complaints mechanisms. Reporting and complaints mechanisms need to be mandated and equipped to react promptly and in an appropriate way to the complaints they receive and to ensure follow-up that safeguards the child and fosters trust.

Children's perspectives on their best interests

Children's own perspectives on their best interests are not always given due consideration in case assessments and decision making processes. When a child leaves a reception centre without informing the authorities of her or his whereabouts, the child's decision to leave constitutes a strong statement about what the child considers is in her or his best interests in light of the limited choices available. Particularly so, when a child leaves after her or his asylum application has been rejected and when return is pending. A child who prefers to remain in Europe as an undocumented migrant, living in highly precarious and risky conditions, expresses that returning to her or his country of origin would be an even worse alternative. The child's position constitutes a statement on the interests of the girl or boy concerned that authorities, case workers and service providers need to take seriously into account when assessing or re-assessing the case.[54]

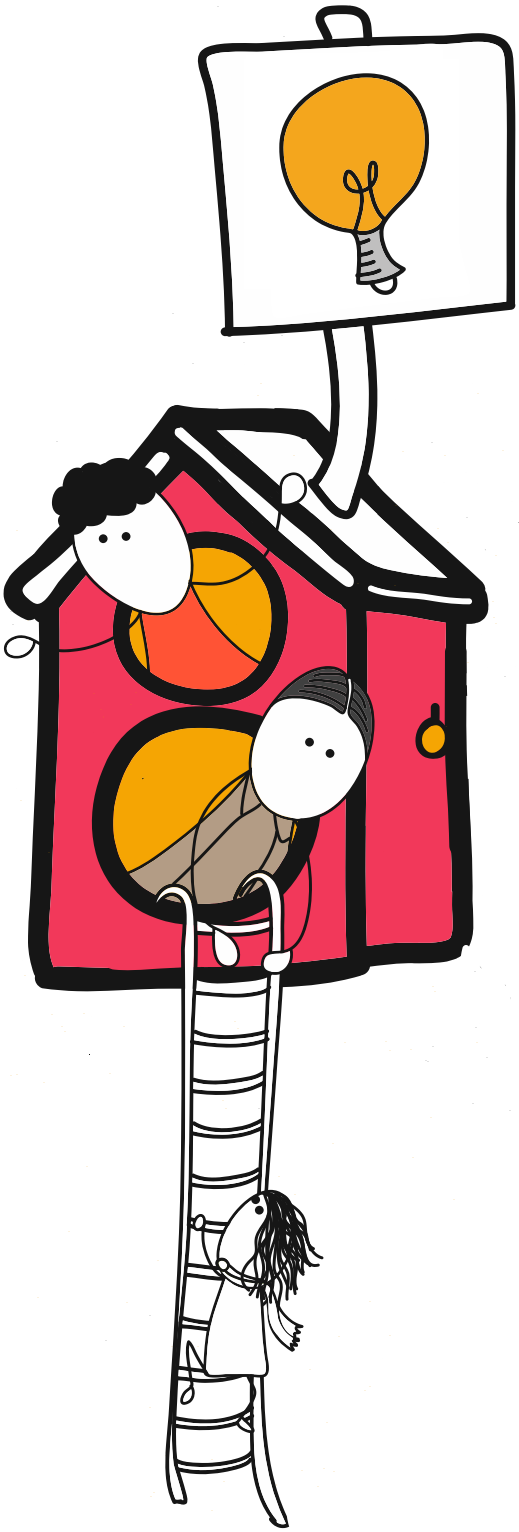
In some cases, children are encouraged or induced by parents, family members, peers or traffickers to migrate to or within Europe, and sometimes family members involve children in illegal or exploitative situations. In the isolated and precarious conditions of these children, exploiters or traffickers might be the most important persons of 'trust' for the children, especially when they are their only points of reference. They might also coerce the child into 'loyalty' by threatening to harm the child or their families. It is therefore important to understand loyalties, expectations and pressures imposed on children and how these may impact the child's behaviour and statements in relation to representatives of authorities in countries of origin or destination.

Many children on the move are struggling with serious dilemmas imposed upon them. On one side, there may be the expectations of the family or community of origin, debts incurred for their travels, demands to succeed in their migration projects and to support the family at home through remittances. On the other, the limitations of the European asylum reception and child protection systems make it often impossible for children to access legal employment and to earn an income in legal and safe conditions. The need to earn money could be in conflict with the child's rights to health and education. Understanding the relation between expectations of the child, the child's aspirations and the opportunities available to the child in the place of destination is essential for making a realistic best interests' assessment. Professionals and officials need to address these matters openly with the child in order to understand the child's needs and aspirations and possible risks.

54 PROTECT 1st Expert Meeting, Stockholm, January 2014, PROTECT 5th Expert Meeting, Stockholm, March 2015, presentations by the Children's Rights Bureau, Stockholm, Sweden.

Part III

Step by step: Transnational cooperation in case assessments



When a non-national child gets in contact with public authorities and service providers, a series of checks and assessments sets in to identify the child and to assess her or his situation. This chapter discusses the specific considerations and procedures for assessing the best interests of children on the move towards determining a durable solution. It looks specifically at the human rights and best interests of the child in the following major steps of the case management process and their transnational components:

- Information gathering from different sources and case assessment, including the identification of the child and her or his background, story and status;
- Establishing jurisdiction over the child, if and as appropriate;
- Guardianship and representation;
- Family tracing;
- Family assessment;
- Risk and security assessments;
- Assessments of resources, skills, resiliency and potentials.

The assessment process should be carried out in a safe and friendly atmosphere by qualified professionals who are trained in age- and gender-sensitive interviewing techniques, who apply multi-disciplinary approaches and have profound knowledge of child rights and protection.[55]

Identification

A basic precondition to safeguarding children on the move is their identification. Assessing the child's identity in the course of a best interests' assessment requires information about the nationality, upbringing, ethnic, cultural and linguistic background of the child. The assessment should also identify particular vulnerabilities and protection needs connected to the child's identity and background.[56]

In many cases, especially when children cannot present valid identity and travel documents, establishing the identity of children on the move is a process that requires communication and information exchange between countries of origin and arrival. It entails the identification of a child's name and age, national and ethnic origin, family relations as well as the circumstances of the child's mobility. The identification process might also require an assessment of the nature of the relations between a child and the accompanying persons.

Authorities may be confronted with an identity established in a country of transit that appears to be incorrect or that either the child or the authorities would like to rectify. This could be the case with erroneous statements or assessments of age made in a first point of arrival and challenged or contested by the child or the authorities later on.

Establishing the age of the person is relevant for a range of matters. Age is decisive for understanding whether the person is a 'child' and therefore eligible to enjoy the rights afforded under the UN Convention on the Rights of the Child and national laws concerning children. Age can make a difference for the referral of the person to shelters and support services not only for differentiating between accommodation for adults and children but also because younger children and adolescents may fall under the responsibility of different authorities. In addition, age is instructive in the decision about the appointment of a guardian, the child's right to access work and legal employment, as well as criminal responsibility. Age is further decisive for the child to exercise her or his right to be heard and to have their views taken into account, including in legal and administrative proceedings, to act as party to proceedings, to appeal decisions independently and to have access to legal assistance and representation.

Age matters when children have been granted a temporary protection status ('leave to remain') until they turn 18 years old.[57] This practice puts children on a waiting period and deprives them of their right to benefit from a thorough best interests' determination, which should lead to the identification and implementation of a durable solution. The uncertainty during the waiting period and the abrupt return at 18, as adults and with little support, undermines significantly the development of the children and young people concerned.

As is the practice in the context of alternative care for national children, after-care services and support for the transition into adulthood and independent life would be important beyond the individual's 18th birthday. All the investments made into the safety and development of children risk being undermined when they cease instantly upon turning 18. In some countries, after-care and support services are therefore granted for young adults who are awaiting a decision on their asylum application or who have been granted a residence permit.

55 Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, p. 10. Committee on the Rights of the Child, General Comment No.6 (2005), par. 20, 86.

56 Committee on the Rights of the Child, General Comment No.6 (2005), par. 20. Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, p. 10.

57 European Migration Network, *Policies, Practices and Data on Unaccompanied Minors in the EU Member States and Norway*, Synthesis Report: May 2015.

Quality care for children on the move

An important reference point for developing quality care for children on the move is the national child protection system. It is important that transnational cases are managed according to the same quality standards and principles that apply in national cases. They include the following, with reference to the relevant articles of the UN Convention on the Rights of the Child:

- The right to non-discrimination (Article 2);
- The overarching principle of the best interests of the child (Article 3);
- The right to life, survival and development (Article 6);
- The right to be heard and to have her or his views taken into account (Article 12);
- Equality in care;
- Ethic of care;
- Stability and permanency of care for as long as the child is staying in a country;
- Continuity of care within the country of destination and when the child is transferred or returned to another country.

Important guidance for quality care can be drawn from the existing procedures and methods used in national cases, including with regard to case assessment, effective communication with the child and the development of supportive and protective networks.

Support and assistance for children on the move is likely to be more effective and sustainable when integrated into a continuum of services for prevention, protection and empowerment. This means that an approach of emergency response, rescue and immediate assistance has to be integrated into longer-term care planning. This needs to draw on the resources of the child and the family, invest in building resilience and support the child's holistic development towards adulthood and independent life.

Child protection actors and systems do have the knowledge, tools and skills to achieve this in practice for national and non-national children. Where immigration procedures take precedence over general principles of childcare and protection, there is a need to revisit these frameworks with a view to enabling a rights-based and child-centred approach.

Considering the complexity of transnational cases, national child protection services need to cooperate with other actors in the country of destination and origin in order to develop holistic approaches for safeguarding the child. The UN Convention on the Rights of the Child can guide child protection and other actors on the main issues that need to be considered in order to achieve this in practice.

Basic human rights principle: Access to the territory

When a child is identified at border entry points, with or without identity documents, the state authorities must grant the child access to the territory of the state and to relevant support or reception structures. Granting access to the territory means that a child cannot be held in immigration detention at borders, ports or airports and that a child shall be registered and referred to child protection and immigration authorities at first point of contact in the state of arrival. This imperative derives from the obligations of states to promptly identify children in need of protection, to grant access to the asylum procedure and to conduct a best interests' assessment and determination for each child.[1]

1 United Nations Convention on the Rights of the Child, Articles 1, 3, 20 and 22. United Nations 1956 Convention Relating to the Status of Refugees. Committee on the Rights of the Child, General Comment No. 6 (2005), par. 20 and Chapter VI. Committee on the Rights of the Child, General Comment No.6 (2005), par. 20. Committee on the Rights of the Child, The Rights of All Children in the Context *of International Migration, Background Paper*, Day of General Discussion, 2012, p. 10.

Age assessments

Many children on the move arrive without valid identity documents or the validity of their documents is questioned. When a child has not been registered at birth, which may not be uncommon among children from less developed countries, reliable information about their age and identity may not be easily or not at all accessible for the authorities in countries of destination.[1] In these cases, authorities might resort to an age assessment.

Common methodologies for age assessment include medical and physical examinations and social observations. X-rays of the person's wrist or other physical examinations have been criticised for being invasive of the person's privacy and physical inviolability. They are also known to have a significant margin of error.

International guidelines recommend that, in cases of doubt, the person whose age is unclear shall be assumed to be under 18 years old, be referred to child protection services and appointed a guardian. When an age assessment is considered pertinent, the assessment shall be multi-disciplinary in nature and take the child's origin and background into account while not compromising the physical integrity of the person and respect for her or his dignity.[2] Multi-disciplinary means that one authority, ideally the social services, take the lead in the assessment and engage all other relevant agencies involved with the case in order to achieve a holistic approach while avoiding unnecessary repetition of interviews with the child or examinations by different agencies.

Age assessment procedures shall involve a hearing of the person and be conducted in a child- and gender-sensitive way, with the informed consent of the person. Cultural matters, environmental and living conditions as well as the individual physical, psychological and cognitive development can have a strong impact on the way a young person is perceived. In some cultures, children under 18 are considered adults as soon as they perform an initiation rite, regardless of their biological age, and their behaviour may appear very mature. Poor living conditions, nutrition and hygiene can lead to stunted growth and development of children coming from contexts characterised by poverty. A purely physical examination is therefore unlikely to lead to reliable results.

When an age assessment is conducted, the person shall be assisted by a guardian or another competent support person. The person shall be informed about the procedure and the implications of its outcomes. There must also be a possibility and the necessary support to appeal against the results of the assessment and the margin of error should be applied giving the benefit of the doubt in the individual's favour.[3]

1 Save the Children, Transnational Coor*dination Mechanisms for the Protection of Children on the Move in the Context of International Migration and the Fulfilment of their Human Rights, Submission to the United Nations Committee on the Rights of the* Child, Day of General Discussion, The Rights of All Children in the Context of International Migration, 28 September 2012, p. 7.

2 Separated Children in Europe Programme, Position Paper on *Age Assessment in the Context of Separated Children in Europe, 2012, pp. 7-8.*

3 United Nations High Commissioner for Refugees, UNHCR Guidelines on Unaccompanied and Separated Children Seeking Asylum, 1997. UNICEF, Age Assessment: A technical note. UNHCR Guidelines on International Child Protection: Child asylum claims, 2009. Separated Children in Europe Programme: Statement on Good Practice and Position Paper on Age Assessment in the Context of Separated Children in Europe. EU 2011 Anti-trafficking Directive, Article 13.2. EU Asylum Procedures Directive, Article 25.5. CRC General Comment No 6, par. 31(i). UNICEF and UNHCR Safe and Sound, p. 34. UNICEF Guidelines on the Protection of Child Victims of Trafficking, par. 3.1.2. European Asylum Support Office, Age Assess*ment Practice in Europe*, 2013.

While the age of the person is relevant for many issues, it can be questioned, how much priority should be attached to it. From a human rights perspective, and considering the importance of continuity and stability of care, a longer-term perspective supporting the young person's development into adulthood and independence is essential, including in the context of return.

When a child moves on, is transferred to another state or returns to the country of origin, decisions taken on the basis of an age assessment may have an impact on the child's situation, rights and entitlements in the other state. There are currently no procedures in place to provide for the mutual recognition of age assessment decisions in the context of transfers under the EU Dublin III Council Regulation establishing criteria to determine the EU Member State responsible for examining an asylum application. Asylum seekers who move on after they have been registered as adults in the first country of arrival may be considered children in the next country of arrival. When transferred back to the first country, they may be treated as adults again. When the age of a person has been assessed in one EU Member State and the person has been registered in the Eurodac database and the Visa Information System (VIS)[58], the recorded information about the person is considered reliable by any other Member State. In the absence of unified methods, standards and procedures for age assessment decisions, the practice of automatic recognition of age decisions can lead to situations where incorrect age decisions are maintained by two or more countries. Mutual recognition of decisions within EU Member States and throughout the Union would be preferable, provided that the standards are harmonized throughout the EU.[59]

The timing and duration of a best interests' assessment in transnational child protection cases varies from case to case. When a non-national child comes to the attention of the authorities and is considered to be in need of support or at risk of any form of violence or exploitation, authorities are often struggling to establish contact and a stable relationship of trust with the child. This would be a precondition for all the relevant assessments into the child's personal and family situation. The requirement to take prompt decisions on the best interests of the child may be in conflict with the scrutiny required for making thorough assessments.

In some cases, authorities choose to isolate, detain or otherwise limit the freedom of movement and communication of the child until the first assessments have been made. Under international standards, detention is never considered to be in the best interests of the child. It must not be arbitrary or unlawful, should be ordered only as a measure of last resort and for the shortest appropriate period of time. Placement in a closed shelter shall be ordered by a court of law and the child should have access to legal assistance to challenge such a placement and access to an effective complaints mechanism.[60]

The role of guardians and representatives in promoting the best interests of non-national children

Guardians hold a key responsibility for representing and promoting the best interests of the child and supporting the child in contact with the authorities and service providers. The guardian shall therefore be involved in care planning and decision making processes, in hearings concerning immigration matters and appeal, as well as all other matters relevant for the identification of a durable solution. The mandate of a guardian or representative does not usually comprise legal advice. Children who are involved in administrative or judicial proceedings, including asylum proceedings, should therefore be provided also with a lawyer and legal assistance.[61]

The laws, procedures and organisation of guardianship and representation for unaccompanied children differ from country to country. In some countries, the status of the child and her or his national background matter for determining the applicable guardianship model. In such cases, the guardianship model for unaccompanied asylum seeking children differs from the model available for national and resident children or EU citizens, and different institutions are responsible. The structures in place to arrange guardianship for children during the asylum procedure is also referred to as the 'representative system', whereas guardianship for national children and children who have obtained a residence permit is regulated under the 'guardianship system'.[62]

58 Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. European Commission, Migration and Home Affairs, *Visa Information System (VIS)*, 2015.

59 Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, p. 11.

60 United Nations Convention on the Rights of the Child Article 37. Committee on the Rights of the Child, General Comment No.6 (2005), par. 61-63. Reception Conditions Directive Article 11. Return Directive Article 17.

61 Committee on the Rights of the Child, General Comment No.6 (2005), par. 33, 36.

62 Save the Children Denmark, et al., *Closing a Protection Gap, Core standards for guardians of separated children*, Danish Report, 2010-2011, p. 7.

Guardians or representatives of unaccompanied children assess the child's best interests in relation to accommodation, day-to-day matters and well-being. In some countries, guardians and representatives act as volunteers, in others, their performance is loosely regulated and supervised or they act as professionals bound by clear regulations. Their capacity to conduct such complex assessments varies, however, according to the training they receive, the competences and resources assigned to them and the possibilities to hold them accountable.

The General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin offers guidance for guardianship. The European Union Agency for Fundamental Rights has developed a Handbook on guardianship for children deprived of parental care, with a special focus on guardianship for child victims of trafficking. Defence for Children International and partners have elaborated Core Standards for guardians.

When unaccompanied children are referred to different placement locations within the country of destination, they often experience a disruption of their care arrangements. Discontinuity of accommodation, relations and care arrangements is however known to be detrimental to the best interests of the child, as it impacts the child negatively in her or his attachments, relations, social contacts, well-being and development. When children are moved to different shelters, reception centres or foster families within the country of destination, continuity of guardianship arrangements has to be considered a priority.

It would be important to clarify the role of guardians of unaccompanied children in relation to return procedures and to increase opportunities and standards for the cooperation between guardians in countries of destination and return as well as the hand-over of care and guardianship responsibilities across-borders.[63]

The transfer of guardianship is also commonly regulated in cases of *forced return* of unaccompanied children but there are no unified procedures in cases of *voluntary return*.[64] *Voluntary return* of unaccompanied migrant children usually requires the consent of the child's legal guardian. For guardians, it can however be challenging to discuss the option of return openly with children and to understand the child's views and best interests in relation to the possibility of return. In the absence of trusted and effective communication with the child, it is unlikely that guardians are competent to assess what constitutes *voluntary return* for the child and the implications that return will have on the child's immediate and longer-term development.[65]

In the Netherlands, the guardian of an unaccompanied child maintains her or his mandate in return cases until the guardianship responsibility has formally been handed over to a guardian in the country of return or transfer.[66] Also in Estonia, Norway and Portugal, the guardian can escort the child during the journey to the country of return. Considering that monitoring of the post-return phase is not always ensured, the guardianship arrangements from the host country could be extended until a new guardian has been appointed in the country of return or transfer.[67]

The 1996 Hague Convention on Child Protection determines the state whose authorities have jurisdiction to take measures for the protection of a child. It also determines the law applicable to parental responsibility, including guardianship, and provides for the recognition and enforcement of protection measures in all Contracting States. The Convention establishes the framework for cooperation between the authorities of Contracting States as may be necessary to achieve the purposes of the Convention.[68] These provisions can be applied for the transfer of guardianship when children are returned across borders. Many countries to where children on the move are being returned are however not a party to this Convention or do not have guardianship systems in place.

Data protection and confidentiality[69]

The gathering, storage, use and sharing of personal information is regulated by international, regional and national standards on data protection, confidentiality

63 Fonseca, Ana, Anna Hardy and Christine Hardy, Unaccompanied migrant children and legal guardianship in the context of returns: The missing links between host countries and countries of origin, International Organization of Migration, *Children on the Move*, 2013, pp. 45-61, p. 47, 53.
64 European Council on Refugees and Exiles, Save the Children, *Comparative Study on Practices in the Field of Return of Minors, Final Report*, European Commission Directorate General Home, HOME/2009/RFXX/PR/1002, December 2011, p. 82.
65 Fonseca, Ana, Anna Hardy and Christine Hardy, Unaccompanied migrant children and legal guardianship in the context of returns: The missing links between host countries and countries of origin, International Organization of Migration, *Children on the Move*, 2013, pp. 45-61, p. 52.
66 PROTECT 3rd Expert Meeting, Vilnius, September 2014, presentation by German Lourens, Nidos, The Netherlands.
67 European Council on Refugees and Exiles, Save the Children, *Comparative Study on Practices in the Field of Return of Minors, Final Report*, European Commission Directorate General Home, HOME/2009/RFXX/PR/1002, December 2011, pp. 81, 86.
68 The Hague Convention No. 34 of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Articles 1 and 3.
69 This section draws substantially on the 4th PROTECT Expert Meeting, Riga, November 2014, presentations by Philip Ishola, Independent Child Protection, Human Trafficking, Human Rights Consultant, UK and Aiga Balode, Deputy Director, Data State Inspectorate of Latvia. See also: KOK e.V, Data Protection Challenges in Anti-Trafficking Policies, A practical guide, 2015.

Guardianship in EU law and policies

Under EU law, guardianship and representation for unaccompanied children is explicitly stipulated only for asylum seeking children and child victims of trafficking. Parallel provisions for non-asylum seeking children and EU migrants have not yet been developed and the relevant laws and regulations leave a margin of interpretation for EU Member States in this regard.[1] It is however essential that a guardian is appointed for each unaccompanied child, regardless of the child's status or background.

The 2003 EU Asylum Reception Directive provides that Member States "shall ... take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation."[2] A representative shall be appointed as soon as possible after the child has been identified by the authorities. The Directive foresees the following tasks for the representative: to inform the child about the meaning and possible consequences of the asylum interview, to attend the asylum interview with the child and to make comments during the interview. The appointment of a representative is not mandatory for children who are at least 16 years old, when the first instance decision over the child's asylum application is expected to be taken after the child has reached adulthood, when the child can avail her- or himself of a legal adviser free of charge who would take on the tasks of a representative, or when the child is married.[3] Once a representative has been appointed, the representation needs to be periodically reviewed. The exception for children who are married constitutes a grey area in the European law, as child marriage is prohibited under the law of most European countries and the provisions on guardianship for asylum seeking children do not include any special consideration to the possibility that a child may have been exposed to child marriage against her or his will and best interests.[4]

The 2011 EU Qualification Directive affords that Member States shall take the necessary measures to ensure that unaccompanied children who were granted international protection status are afforded legal representation by a legal guardian or an organisation in charge of the care and well-being of children. The Directive provides that the appointed guardian or representative is responsible to meet the needs of the child, whereas there is no specific reference to the rights of the child in this regard, which could be considered a weakness of this provision.[4]

In addition to the 'representative' provided for under the EU Asylum Procedures Directive, other forms of guardianship for non-national children are also provided for to varying degrees in different countries. They include legal guardians or custodians who take on a role comparable to that of a child's parent or caregiver who is primarily responsible to look after the child's well-being and be involved in day-to-day matters and decisions concerning the child.[5]

As the EU Action Plan on Unaccompanied Minors noted, there is no unified understanding of the mandates, tasks and qualifications of representatives and guardians, there is a need for closer monitoring and supervision of their performance and access to a complaints mechanism for children.[6] Despite the existing provisions and regulations on representation and guardianship, many challenges have been identified in the way that these are being applied and implemented in practice. In consequence, unaccompanied children are often deprived of their right to have a representative and/or guardian promptly appointed and to be represented in an appropriate way. Inconsistencies have been reported in the way that representation and guardianship are being offered in different municipalities and with regard to different groups of children.[7]

The 2011 EU Anti-Trafficking Directive[8] affords that Member States shall take the necessary measures to ensure that, where appropriate, a guardian and/or representative is appointed for child victims of trafficking. The guardian and/or representative is tasked to safeguard the best interests of the child. The role of the guardian and/or representative can be performed by a legal person or an institution or authority. A guardian or representative shall be appointed from the moment the child

victim of trafficking is identified by the authorities when there is a conflict of interests between the holders of parental responsibility and the child, which might have implications on the best interests of the child. The guardianship regulations apply therefore to unaccompanied as well as accompanied children.

1 European Commission, Action Plan on Unaccompanied Minors (2010-2014), COM(2010)213 final, Brussels, 6 May 2010, p. 9.
2 Council of the European Union, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Official Journal of the European Union, 6 February 2003, Article 19.
3 Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the European Union, 13 December 2005, Article 17. Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM(2009)554 final, proposal on Article 1(n) of the directive.
4 European Union Agency for Fundamental Rights, Separated, Asylum-seeking Children *in European Union Member States, Comparative Report, Conference Edition, 2010, p. 75.*
5 The European Parliament and the Council of the European Union, 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, Official Journal of the European Union, 20 December 2011, Article 31.2.
6 Nidos Foundation, Towards a European Network *of Guardianship Institutions, Amsterdam, 2010, p. 10.*
54 European Commission, Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010*-2014), COM(2010)213 final, 6 May 2010, p. 9.*
7 European Union Agency for Fundamental Rights, Separated, Asylum-seeking Children in European Union Member States, Comparative Report, Conference Edition, 2010, p. 76. *CARDET, Defence for Children, et al., GATE, Guardians Against Child Trafficking and Exploitation, European Report, 2012.* Cazenave, Pierre, *Protecting Migrant Children in a Freedom of Movement Area, Transnational monitoring of return procedures involving Romanian and Bulgarian migrant children in Greece and France, Terre des Hommes, 2012.*
8 2011 Anti-trafficking Directive par. 23, 24, Article 14.2 and 16.3.

Recommendations from professionals

The State Data Protection Inspectorate in Latvia has noted that there is a lack of data protection provisions regarding personal data transfers in international cases. The instruments used for transnational data transfers in the public sector are not the same as in the context of the private sector as, for instance, special clauses on data protection rights are missing. The level of privacy protection within public sector transnational data transfers should therefore be enhanced and it would be important to promote a standardised approach to avoid discrepancies. With regard to cases handled under the EU Brussels II bis Regulation, it would be important to have a standard template and guidelines for data transfer.[1]

1 4th PROTECT Expert Meeting, Riga, November 2014, presentation by Aiga Balode, Deputy Director, Data Inspectorate of Latvia.

and the right to privacy. Professionals and officials working with and for children have to follow strict rules of data protection, while there may also be requirements to share information between different authorities or professionals within countries of destination and across borders. According to how they are being used, data protection regulations can support or obstruct efforts to safeguard children's right to protection.

The Universal Declaration of Human Rights affords certain rights in relation to the respect for private and family life. It protects the individual's private sphere against intrusion from others, especially from the state (Article 12). The Universal Declaration influenced the development of human rights instruments in Europe. The European Convention on Human Rights affords a right to protection with regard to the collection and use of personal data (Article 8). This forms part of the right to respect private and family life, home and correspondence. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data is the first European legally binding instrument dealing explicitly with data protection. Under EU law, data protection was regulated for the first time by the 1995 EU Data Protection Directive.

National laws on data protection, professional confidentiality or secrecy, information sharing and consent, as well as laws about reporting obligations, are often

fragmented and complex. Despite their complexity and importance, data protection matters are however not yet systematically addressed in professional and academic training. Professionals and officials working with child protection cases are often struggling to know and understand all the relevant legal provisions and regulations and how to apply them in practice.

The following are fundamental principles to guide the processing of personal data. Personal data shall be:

- Given with informed consent;
- Processed fairly and according to national law;
- Obtained only for clearly specified and lawful purposes;
- Adequate, relevant and not excessive in relation to the purpose for which they are processed;
- Accurate and kept up to date;
- Not be kept for longer than is necessary for that purpose;
- Processed in accordance with the rights of data subjects, which implies the right and possibility of the person concerned to access and amend data;
- Adequately protected, which implies appropriate technical and organizational measures against unauthorized or unlawful processing of personal data;
- Not transferred to any country or territory outside the European Union and the European Economic Area without adequate level of protection for the rights and freedoms of data subjects.

In child protection cases, the need for multi-disciplinary cooperation routinely requires that data and information on individual children be shared between professionals, officials and the different institutions and agencies involved. While data sharing is a precondition for handling the case and assessing the child's best interests, it constitutes a challenge from the perspective of the child's right to data protection and confidentiality.

In the case of asylum seekers, confidentiality rules need to be observed when information is sought from or transferred to countries of origin. The authorities that receive and assess an asylum application must not inform the authorities of the applicant's country of origin about the asylum claim and must not share any information about the applicant with the country of origin. The confidentiality rules apply also for the communication with countries of origin that are considered safe. When an asylum application has been rejected and all legal remedies are exhausted, the country of destination is authorised to share limited personal data with the authorities of the country of origin in order to facilitate return. This may be necessary when the person has no valid identity documents. The fact that the person has applied for asylum must however not be disclosed to the authorities in the country of origin.[70]

Sources of information[71]

The assessments feeding into best interests' determinations need to be based on a diversity of information sources, which need to be verified and cross-checked in order to arrive at a reliable understanding of the child's situation and background:

- The central source of information is the child. It is fundamental that the story, the background, the views, needs and aspirations of the child are heard and taken into account.
- The knowledge and views of professionals from different backgrounds should be heard in order to take into account their perspectives, expert reports and opinions, including with regard to the child's history and needs in relation to health and education, care, protection and development.
- Information about the child's experiences during the journey as well as the reasons and conditions of the departure should be collected and considered. National and local authorities in countries of origin and transit can be important sources of information. When contacting authorities in countries of transit and origin, professionals and officials in the country of destination need to be certain to make these contacts in line with the best interests of the child and in respect of confidentiality rules, especially for children who are applying for asylum.
- Family tracing and assessment constitutes another important source of information. National central authorities, ministries, regional or local social services may provide relevant information as well as contacts established through international networks such as the International Committee of the Red Cross, the International Social Service or the International Organization of Migration. In some cases, local social services take contact directly with their counterparts in the child's country of origin. The information gathering and sharing with these sources should respect national data

70 United Nations High Commissioner for Refugees, Asylum Processes, Fair and Efficient Asylum Procedures, Global Consultations on International Protection, EC/GC/01/12, 31 May 2001, par. 50 (m). EC Asylum Procedures Directive, 2013/32/EU, Recital 52 and Article 48.

71 This section draws on PROTECT 4th Expert Meeting, Riga, November 2014, presentation by Kerry L. Neal, UNICEF.

International information gathering in the context of court hearings

The inquiry by the judge (inquiry *ex ufficio*) is the most important means in proceedings concerning children in cross-border situations. It involves, among others, the inquiry, written evidence, court hearings, including in-person hearing of the parents and the child, hearing the guardian *ad litem* of the child, the youth office, seeking expert opinions, and other sources, such as reports from the school or kindergarten, the central authority, direct judicial communications, and the national branch of the International Social Service. The experience and practice of requesting social reports from the authorities abroad are still limited, although they could constitute an important source of information. This source of information is scarcely used due to time concerns, as decisions in international child protection cases usually have to be taken promptly.

When the court receives a case from a central authority for transnational child protection, the information that is considered necessary for the court has usually already been gathered and compiled. If the court needs further information, it can ask the central authority to gather and provide that information. In international cases, courts usually work with written evidence provided by the central authority, statements from other countries and oral hearings. The court and the judge have the possibility to seek information from other countries through the Secretariat of the Hague Conference for Private International Law. There is the possibility to make direct judicial communications and contacts through the international Hague Network of Judges.

protection laws and regulations and any matters of confidentiality related to the asylum procedure.

- Child-specific and gender-specific country of origin information needs to be developed and used as it is critical that child-specific forms of persecution are recognised. Country of origin information is available from national migration authorities and their networks, as well as the European Asylum Support Office, UNICEF and the United Nations High Commissioner for Refugees.[72]
- Law enforcement agencies may be important sources of information in cases involving law enforcement investigations, in civil or criminal matters. Europol, Interpol and national police liaison officers based abroad, constitute important points of entry for law enforcement enquiries in international cases.
- Judges may seek access to regional and international networks of judges in order to gather information if a trial involves a transnational case that has been heard by a court of law in another country (see box above).

Family tracing and re-establishing family links

Family tracing is the first step towards re-establishing the contact between an unaccompanied child and her or his family of origin. It is part of the services provided to unaccompanied children in host countries and informs the assessment of a child's background, current situation and best interests. There are different approaches to family tracing and different actors involved throughout Europe. Family tracing can be initiated upon the request of the child or upon the initiative of the authorities. Family tracing should be done with the informed consent of the child and the child's views about family tracing should be heard prior to initiating the process. If the child is against family tracing, the dialogue with the child should be sought to understand the child's position. Family tracing shall only be conducted when it is considered to be in the best interests of the child; this means that tracing and restoring the family ties is expected not to cause the child or the family any harm or other adverse effects.

72 Committee on the Rights of the Child, General Comment No.6 (2005), par. 75. United Nations High Commissioner for Refugees, Guidelines on International Protection, Child Asylum Claims, 2009, par. 11.

EU Reception Conditions Directive[1]

Article 6.4

For the purpose of applying Article 8 [*reception conditions for minors*], the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child. To that end, that Member State may call for the assistance of international or other relevant organisations, and may facilitate the minor's access to the tracing services of such organisations.

Article 24.3

Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.

1 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.

The UN Convention on the Rights of the Child affords for asylum seeking children, that "States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating 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" (Article 22.2).

Family tracing can take place in the child's country of origin or another country to where the family has migrated, within the European Union or in third countries, according to the family situation and their history of migration or displacement. The 2013 EU Reception Conditions Directive offers guidance for each of these scenarios.

The International Committee of the Red Cross and local Red Cross organisations are assisting children in tracing their families and act upon the direct request from the child or the child's guardian. When the initiative for family tracing is taken by the state authorities, the International Organization of Migration and the International Social Service are often involved. Some countries employ the services of their embassies to gather information about an unaccompanied child's family. Whatever the procedure, the child's guardian can play an important role in requesting and ensuring family tracing.[73]

The EU Action Plan on Unaccompanied Minors (2010-2014) noted that family-tracing is a key condition for ensuring family unity. Family-tracing is relevant for the implementation of obligations under EU law. Family tracing must be conducted during the best interests' determination process which leads to the identification of a durable solution. Family tracing has to be conducted in any case ***prior*** to deciding about the possibility for a non-national child to return to her or his country of origin or to be transferred to a third country. A child can, as a general rule, not be returned if she or he is not returned to a family member, a guardian or adequate reception facilities in the country concerned. The Action Plan notes however also that Member States do encounter difficulties in family tracing. It foresees therefore that the Commission will support Member States through the definition of a common approach to family-tracing and

73 European Council on Refugees and Exiles, Save the Children, *Comparative Study on Practices in the Field of Return of Minors, Final Report*, European Commission Directorate General Home, HOME/2009/RFXX/PR/1002, December 2011, pp. 60-62.

supporting mutual assistance in family tracing. The objective is that functioning networks established in specific countries of origin by one Member State become accessible also for others.[74]

The 2011 EU Qualification Directive[75] reinforced provisions on family tracing for unaccompanied children who are granted international protection status. If family tracing did not take place or was unsuccessful before, Member States are held to start the family tracing as soon as possible after the international protection is granted, in respect of the best interests of the child and ensuring confidentiality where appropriate.[76]

For children who migrate within the EU and who have lost contact with their families, the authorities in the country of destination might take the initiative to trace and assess the child's family before returning the child to her or his country of origin, as part of a best interests' assessment and the determination of a durable solution for the child. These assessments are usually done in cooperation with the authorities in the country where the family lives. The authorities in the country of destination can however also decide to return the child to the country of origin without conducting family tracing when the country is considered safe. This is common practice within the European Union as all Member States are considered safe and national child protection authorities are considered competent and qualified to trace a family, to assess the best interests of the child with regard to family reunification and to provide quality alternative care if necessary. An individual assessment for each child is however required in order to ensure that return without prior family tracing is in the best interests of the child and to exclude any risks to the child in the country of origin.

For child victims of trafficking who have been officially recognised as such in a country of destination, family tracing would be conducted in order to explore the possibilities of returning the child to the family of origin, and to assess any possible risk factors as well as sources of protection in the family environment.

Locating a child's family can be challenging as the institutional responsibilities for data checks and verifications are not clearly defined. Even the verification of basic information such as checking the child's birth registration can be difficult. It would be important to reach clarity, at the national level and for the European context, on how to handle these challenges in information gathering and data checks. One possibility is to establish a common desk of EU Member States in countries of origin to help European countries of destination to gather information from countries of origin.[77] Experience with transnational child protection cases reveals that the actors on the ground in countries of origin can be used effectively for family tracing and family assessments. They include the country and field offices of the United Nations, international organisations, NGOs, as well as local communities. When the child's case is being assessed, there is a need for home studies in the country and community of origin. These studies and their results have to feed into the decision making process over the child's best interests and asylum claim.

The International Social Service, for instance, has developed a regional network in West Africa, which operates through active contact points and effective communication channels for case assessments. This network constitutes an important asset for family tracing and information gathering for children from the region.[78]

Maintaining family relations and contact

Children who are unaccompanied or separated from their family have a right to remain in contact and to maintain family relations, wherever this is not contrary to the best interests of the child (Convention on the Rights of the Child Article 9.3). Many unaccompanied children maintain contact with their families and peers in their home community. Some may however not be able to locate their family or may need support to trace and contact them.

In asylum proceedings and in cases of unaccompanied child migrants who are not seeking asylum, family tracing is not always initiated promptly when the child is identified. Efforts to promote the family relations and contact of unaccompanied children may depend on the initiative of care staff. Some children may not have the support they need to locate and contact their families and their contact might be interrupted for prolonged period of times, sometimes years.

A study on the return of young Afghan asylum seekers in the UK noted that interrupted family contacts and relations led to a situation where the chil-

74 European Commission, *Action Plan on Unaccompanied Minors (2010-2014)*, COM(2010)213 final, Brussels, 6 May 2010, p. 11.
75 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.
76 2011 Qualifications Directive, Article 31. European Commission, *Report from the Commission to the Council and the European Parliament, Mid-term report on the implementation of the Action Plan on Unaccompanied Minors*, COM(2012) 554 final, Brussels, 28 September 2012, p. 7.
77 PROTECT 2nd Expert Meeting, Riga, May 2014.
78 PROTECT 2nd Expert Meeting, Riga, May 2014, presentation by Christoph Braunschweig, Swiss Foundation of the International Social Service. The following countries participate in the West Africa Network: Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

dren and young people increasingly lost their social contacts and support networks in their home countries, which might cause them to feel increasingly alienated and unwilling to return.[79]

A holistic approach to safeguarding children on the move requires therefore due attention to family relations and contact. The importance of family relations and contact has also been recognised in the context of children's placement in alternative care where it is often regulated by law. Legal regulations for unaccompanied children are however not always in place to the same extent. In the absence of legal regulations, the support of care staff, guardians and other relevant professionals is essential to ensure that unaccompanied children maintain relations and contact with their home countries, communities and families, wherever this is in their best interests and in accordance with confidentiality standards during the asylum procedure.

Assessing risk factors, resiliency and sources of support

Risk assessments are an inherent part of any case assessment for children on the move. A child can only be effectively protected from violence, exploitation and abuse, when the risk factors concerning the child are known and understood. Risk assessments are conducted at different moments in the reception and care of a child and are part of social inquiries and best interests' determinations. Assessing possible risks is important for:

- Decisions about the child's referral, placement and arrangements for care and security;
- The identification of a durable solution;
- In relation to criminal investigations and proceedings, when the child is known or presumed to be a victim of trafficking or other crime and when the child acts as witness;
- When the child has been involved in illegal or criminal activities and there are reasons to assume that the child has been exploited or abused in this context;
- When a child is transferred to another country under the EU Dublin III Council Regulation; and
- When the possibility and conditions for a child to return are being assessed.

Risk assessments analyse individual, family and structural or institutional factors that could cause or increase the risks of a child. These assessments offer an important opportunity to assess and understand also the resiliency of the child and the family as well as sources of support that are available from within the family or community, from social support networks and service providers. Mapping sources of risk and resiliency for the child and the family is a precondition for preparing a safety plan for the child in her or his individual situation.

With regard to the *child, a risk assessment needs to take into account:*

- Age- and gender-specific risks, including gender identity,
- The child's awareness and understanding of risks,
- The knowledge about rights, entitlements and sources of support and the access and use of these,
- Previous experiences of violence, exploitation and abuse,
- Any emotional or behavioural problems, and
- The educational background of the child and caregivers.

At the *family level,* the quality of the family relations needs to be looked into as well as the socio-economic situation of the family and their social inclusion or exclusion within the community. The assessments need to look into the awareness within the family of childcare and protection, parenting skills and the prevalence of domestic or gender-based violence. The assessments need to understand also to which degree the family has access to and is using social support networks and family support services.

With regard to the *institutional and structural level,* a risk assessment needs to consider the capacity of local service providers to support the child and the family effectively through services for protection, rehabilitation and the prevention of further harm. Socio-political dynamics, such as the prevalence of gender-based and other discrimination, stark inequalities or exclusion of certain population groups or minorities, including sexual minorities, are important. In addition, the level of tolerance of violence, including specifically violence against women and children, needs to be assessed.

Risk assessments are stronger and more meaningful when they are multi-disciplinary in nature, involving the child and the family, the authorities and key professions in the country of destination and origin. Risk assessments give very concrete hints about what kind of support is needed to build resiliency, to strengthen the protective resources and capacities of the child, the family and the social context.

79 Gladwell, Catherine and Hannah Elwyn, *Broken Futures: Young Afghan asylum seekers in the UK and in their country of origin*, United Nations High Commissioner for Refugees, Research Paper No. 244, 2012, p. 22.

Part IV

Implementation of durable solutions

Durable solutions

A durable solution for an unaccompanied or separated child is understood as "a sustainable solution that ensures that the unaccompanied or separated child is able to develop into adulthood, in an environment which will meet his or her needs and fulfil his or her rights as defined by the UN Convention on the Rights of the Child and will not put the child at risk of persecution or serious harm. Because the durable solution will have fundamental long-term consequences for the unaccompanied or separated child, it will be subject to a best interests' determination. A durable solution also ultimately allows the child to acquire, or to re-acquire, the full protection of a state."[80]

Under the EU Action Plan on Unaccompanied Minors (2010-2014), the term durable solution is considered to comprise three different options:

- The return and reintegration in the country of origin;
- The granting of international protection or other legal residence status allowing children to integrate in the Member State of residence; or
- Resettlement to a third country.[81]

The durable solution is identified on the basis of a best interests' determination. The right to a best interests' determination process applies to all unaccompanied and separated children, including refugees and asylum seekers and children who are victims of trafficking. The durable solution is oriented at longer-term objectives ensuring the child's safety, well-being and development. It leads to family reunification or alternative care arrangements according to the best interests of the child.[82] The identification and implementation of a durable solution involves different agencies and the child's guardian, while the child is at the centre of the process and her or his views have to be heard and taken into due consideration.[83]

When the best interests' determination process concludes that a child has no grounds for international protection and that transfer to a third country is not an option, the possibility of returning the child to the country of origin will be assessed. The assessment needs to look for updated information on the following matters:

- The safety and security situation in the place of return;
- The conditions awaiting the child upon return, including socio-economic conditions;
- The availability and appropriateness of care arrangements for the child according to her or his individual needs;
- The continuity in a child's upbringing, care arrangements and development;
- The views of the child and the caretaker(s) regarding return;
- The child's level of integration in the country of destination;
- The duration of absence from the country of origin and the quality of the child's relations and contact with the home country;
- The child's right to preserve her or his identity, including nationality, name and family relations;
- The child's ethnic, religious, cultural and linguistic background.[84]

When these assessments conclude that return is indeed in the best interests of the child, return will be ordered and the preparations for return will set in. In any other case, where there are doubts that return corresponds to the best interests of the child or where the assessments do not lead to satisfactory outcomes, alternatives to return must be reconsidered.

Life projects

In 2007, the Committee of Ministers of the Council of Europe adopted a recommendation on 'life projects' for unaccompanied children. The recommendation aims to promote the identification of "lasting solutions for and with unaccompanied migrant minors that will help them to build life projects guaranteeing them a better future".

A 'life project' is described as an individual tool designed to help unaccompanied children and the competent state authorities to jointly confront the challenges that result from the child's migration. The tool helps planning and implementing a sustainable solution for the child. A life project is explained as follows:

80 United Nations High Commissioner for Refugees, United Nations Children's Fund, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, p. 22.

81 European Commission, *Action Plan on Unaccompanied Minors (2010-2014)*, COM(2010)213 final, Brussels, 6 May 2010, p. 12.

82 Committee on the Rights of the Child, General Comment No.6 (2005), par. 20, 86., par. 79. United Nations Children's Fund, *Guidelines on the Protection of Child Victims of Trafficking,* September 2006, p. 3. United Nations High Commissioner for Refugees, UNHCR Guidelines on Determining the Best Interests of the Child, 2008, p. 30.

83 Separated Children in Europe Programme, *Statement of Good Practice*, 4th Revised Edition, Save the Children, UNHCR, UNICEF, 2009, p. 15, 33.

84 Committee on the Rights of the Child, General Comment No.6 (2005), par. 84.

> "Life projects aim to develop the capacities of minors allowing them to acquire and strengthen the skills necessary to become independent, responsible and active in society. In order to achieve this, life projects, fully in accord with the best interests of the child, as defined in the Convention on the Rights of the Child, pursue objectives relating to the social integration of minors, personal development, cultural development, housing, health, education and vocational training, and employment. ... They define the minor's future prospects, promote the best interests of the child without discrimination and provide a long-term response to the needs of both the minor and the parties concerned."[85]

Life project planning should set in as early as possible and proceed in parallel to the best interests' determination process. Life projects do not anticipate any decision about the child's stay in the destination country, return or resettlement. Life project planning supports therefore the identification and implementation of a durable solution, without interfering with the decision about where the durable solution is implemented. The responsibility for developing life projects rests primarily with the authorities of the destination country, while the implementation might involve also the countries of origin or other states. In follow-up to the Council of Europe recommendation on life projects, states have to clarify the institutional responsibility, leadership and multi-disciplinary cooperation for its implementation. Strengthening the transnational cooperation between the relevant authorities is critical for the development and implementation of life projects.[86]

The Council of Europe recommendation calls upon states to support children developing and implementing their life projects, including through guardianship, information, access to education and possibilities of entering the labour market, social integration and consideration to cultural issues. The life projects are conceived as a mutual commitment by the unaccompanied child and the authorities, and its implementation is subject to periodic review, monitoring and evaluation.[87]

The recommendation issued by the Council of Europe was complemented by a Handbook to assist professionals in applying the concept of a life project in practice.[88]

Keeping children on hold: The uncertainty at 18 in the absence of durable solutions

In many European countries, unaccompanied children are granted a time-limited humanitarian permit of stay up to the age of 18 years old. This is a common practice when a child's asylum application has been rejected because grounds for international protection could not be identified, and when a parent or caregiver cannot be identified in the country of origin to whom the child could be returned. It implies that the child has to leave the country at the age of 18.

During the waiting period, children have to master the difficult balance between starting to integrate in the country of destination while also being prepared for an abrupt return at the age of 18. The absence of longer-term perspectives can significantly undermine the children's integration and social inclusion in the place of destination.

The waiting period for children who know that they will be ordered to leave the country upon turning 18 years old, has an adverse impact on the well-being and development of the girls and boys concerned. Return at 18 means an abrupt transition from being a looked-after unaccompanied child in the country of destination, to being treated as an adult and failed asylum seeker who is ordered to return.[89] It is known to demotivate children, to create a sense of insecurity and anxiety and it erodes trust and confidence in public authorities and service providers. It has a negative impact on the development of the personal capacities, potentials and resources of the children and young persons.[90]

From a human rights perspective, granting time-limited residence permits up to the age of 18 is contrary to the best interests of the child and the child's right to development. Each unaccompanied child has a right to a best interests' assessment and

85 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors, 2007, Appendix, par. 1-2.
86 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors, 2007, Appendix, par. 7-8. Cazenave, Pierre, *Protecting Migrant Children in a Freedom of Movement Area, Transnational monitoring of return procedures involving Romanian and Bulgarian migrant children in Greece and France*, Terre des Hommes, 2012, p. 38.
87 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors, 2007, Appendix, par. 15-32. Council of Europe, Explanatory Memorandum to the Recommendation CM/REC(2007)9 of the Committee of Ministers to Member States on Life Projects for Unaccompanied Migrant Minors, European Committee on Migration (CDMG), 2007, pp. 5, 7.
88 Drammeh, Louise, Life Projects for Unaccompanied Migrant Minors, A handbook for front-line professionals, Council of Europe, Migration Collection, 2010.
89 Gladwell, Catherine, No Longer a Child: From the UK to Afghanistan, University of Oxford, Refugee Study Centre, *Forced Migration Review, Detention, alternatives to detention and deportation*, Issue 44, 2013, pp. 63-64.
90 Brekke, Jan-Paul, While We Are Waiting: Uncertainty and empowerment among asylum-seekers in Sweden, Institute for Social Research, 2004.

determination process, the purpose of which is to come up with a clear and well-founded conclusion on the best interests of the child with regard to stay, transfer or return.[91] Having clarity, which of these options is best for the child, is a fundamental precondition for ensuring the child continuity of care and development. Regardless of the decision on the durable solution, consideration needs to be given from the beginning to the child's development perspectives and her or his transition into adulthood and independent life. The human rights of the child apply to all persons under 18 years of age but they are only meaningful if they are understood in the continuum of the child's development into adulthood and independence. This continuum of development starts in early childhood and does not stop short at the age of 18. Safeguarding the human rights of a child is therefore only meaningful if embedded into a longer-term perspective that accompanies the child in her or his early adulthood and in becoming independent.

From an investment and development oriented perspective, the practice of granting time limited residence permits up to 18 years of age and returning the persons as young adults is considered futile. It is harmful for the child and young persons concerned, for the receiving state, which is financing the costly temporary stay, and for the country and community of origin who receive back a young adult who has experienced a set-back in her or his development and whose resources have been significantly undermined.[92]

Local integration

After-care and youth support

The asylum reception systems for unaccompanied children in Europe are targeted at girls and boys who are under 18 years of age. A large proportion of the unaccompanied children seeking asylum are 16 or 17 years old and many children turn 18 years old during the asylum procedure or shortly after they have received a decision on their asylum claim. Care arrangements and services for these children and young people need to integrate measures to support their transition into adulthood and independent life.

The moment an unaccompanied girl or boy turns 18 years old, the special support granted to children ceases and the young persons are subjected to the same rules as adults. They lose the support of a guardian or representative and the right to accommodation in a special home or in a foster family. They lose child-specific social, economic and educational rights and might be detained when their immigration status has not been regularised or when they have been ordered to leave the country. Children are however not always aware of how their situation and rights change when they turn 18. Considering the difficult experiences that many unaccompanied children have lived through in their places of origin and/or during their migration, it is unrealistic to assume that their need of support ceases at 18. Yet, in practice, they have to become self-sufficient and independent with very little support.

Considering the formative years they have spent in the destination country, it would be important to continue offering support at least until the young migrants graduate from school or vocational training. Continued support through after-care services is sensible from a perspective focused on the human rights of the child to development and support. It is an imperative from an investment perspective and for reasonable migration management, to ensure that the impact of the costly child protection and reception services provided over years will not be undermined by the young person's unsupported transition into adulthood.[93]

Some countries have made good experience with expanding the young person's stay in reception homes for children until appropriate accommodation has been found. After-care support is offered to young adults ageing out of care up to the age of 21 or 25 in some European countries, including to unaccompanied asylum seeking children turning 18. Life projects and after-care plans are particularly useful to prepare for the child's transition into adulthood and independent life as early as possible.[94]

Against this background and considering the unreliability of age assessments, the Council of Europe Parliamentary Assembly adopted a Resolution in 2014 on the rights of migrant children upon turning 18.[96] The Resolution recognises that it is often difficult or even impossible for young migrants who are ageing

91 PROTECT 1st Expert Meeting, Stockholm, January 2014, PROTECT 3rd Expert Meeting, Vilnius, September 2014.
92 Brekke, Jan-Paul, While We Are Waiting: Uncertainty and empowerment among asylum-seekers in Sweden, Institute for Social Research, 2004.
93 Gladwell, Catherine and Hannah Elwyn, *Broken Futures: Young Afghan asylum seekers in the UK and in their country of origin*, United Nations High Commissioner for Refugees, Policy Development and Evaluation Service, New Issues in Refugee Research, Research Paper No. 244, 2012, pp. 8-10.
94 European Migration Network, Policies, Practices and Data on Unaccompanied Minors in the EU Member States and Norway, Synthesis Report, 2015, pp. 33-35.
95 Council of Europe Parliamentary Assembly, Migrant Children: What rights at 18?, Resolution 1996 (2014).
United Nations High Commissioner for Human Rights and Council of Europe, Unaccompanied and Separated Asylum-Seeking and Refugee Children Turning Eighteen, What to celebrate?, 2014.

out of the care and reception services for unaccompanied children to access housing, decent work and justice. These difficulties can prevent young migrants from attaining financial independence as young adults and render them more vulnerable. Children and young adults in these situations are at risk of becoming homeless or substance abuse. They are also at risk of exploitation, including in labour, in illegal activities such as drug dealing, in prostitution or in trafficking in human beings. Supporting the transition of unaccompanied children into adulthood and an independent life is therefore considered also an important prevention measure.

In the resolution, the Council of Europe Parliamentary Assembly calls upon the Member States to develop life projects for unaccompanied children, in line with the previous Council of Europe recommendation. Life projects take account of the young migrant's past and cultural identity and constitute an important basis for developing their autonomy and sense of responsibility. The Parliamentary Assembly Resolution calls further upon Member States of the Council of Europe to establish a transition category for young migrants aged between 18 and 25 years old to facilitate their successful transition into adulthood and independent life and their economic, social and cultural integration. During the transition period, states shall take political measures to ensure that young migrants benefit from welfare assistance, education, health care and housing and have access to information on the relevant administrative procedures. Social workers and other relevant professional groups shall be trained specifically to support young migrants. The Parliamentary Assembly recommends further that local authorities demonstrate empathy and creativity in developing programmes to support the integration and participation of young migrants in public life.

The UNHCR Guidelines on Child Asylum Claims state explicitly that protection and support needs to be provided in light of the needs and level of development of the individual. In some cases, this can imply the necessity to extend services to young people aged 18 or above. The UNHCR Guidelines are therefore oriented at the level of vulnerability of the person rather than the biological age: "For the purposes of these Guidelines, 'children' are defined as all persons below the age of 18 years. Every 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. Thus, there may be exceptional cases for which these guidelines are relevant even 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."[96]

In the context of alternative care for children, it has been widely recognised that young people leaving care at the age of 18 years old need continued support for their transition into adulthood. The UN Guidelines on Alternative Care for Children provide that aftercare and support should be offered to children who are leaving care. Aftercare should be prepared as early as possible and well before the child leaves the care setting. In addition, the UN Guidelines provide for ongoing educational and vocational training opportunities, life skills education for young people leaving care in order to help them to become financially independent and generate their own income. They underline also the importance of continued access to social, legal and health services, together with appropriate financial support for young people leaving care and during aftercare.[97]

In the context of juvenile justice, young adults are also considered a group in need of special protection. The UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') call upon governments to extend the rules and principles to young adult perpetrators.[98] The Council of Europe reiterates this position and recognises in the 2003 Council of Ministers Recommendation on the role of juvenile justice that there is an extended transition into adulthood and that it should therefore be possible for young adults under 21 years old to be treated in a way comparable to juveniles.[99] It would be important to apply these standards equally to nationals and non-nationals who are in conflict with the law. Raising awareness of the possibility that young people get into trouble with the law due to pressure exerted from exploiters or traffickers is particularly important, including in transnational cases.

96 United Nations High Commissioner for Refugees, Guidelines on International Protection, Child Asylum Claims, 2009, par. 7

97 United Nations General Assembly, Human Rights Council, Guidelines for the Alternative Care of Children, A/HRC/11/L.13, 15 June 2009, par. 133-135.

98 United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, 29 November 1985, Rule 3.3.

99 Council of Europe Committee of Ministers, Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, 2003, par. 11.

Family reunification in the country of destination

Family reunification is part of the durable solution for an unaccompanied child, wherever this is in the best interests of the child (UN Convention on the Rights of the Child, Articles 3 and 9). Family reunification could take place in the country of destination or origin, or in a third country. Wherever family reunification is not possible or not in the best interests of the child, service providers shall assess if it is in the best interests of the child to maintain family relations and active contact and support the child in this regard.[100]

The Committee on the Rights of the Child underlines that "family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a 'reasonable risk' that such a return would lead to the violation of fundamental human rights of the child."[101] Such risks have to be assessed and understood as part of the best interests' determination for the child and the processing of the child's asylum application.

When the immigration authorities in the country of destination grant international protection to the child, family reunification in the child's country of origin is not an option. When the child's asylum application is rejected, there can nonetheless be concerns about the child's safety in the country of origin, which exclude return for family reunification. This might be the case when a high level of general violence poses risks to the child. In these cases, the child's rights to life, survival and safety outweighs the child's interests to reunite with the family in the country of origin. In consequence, the possibilities for family reunification in the destination country or in a third country need to be assessed.[102]

The legal basis for the child's right to family reunification is provided for by the UN Convention on the Rights of the Child: Article 9 affords that children shall not be separated from their parents against their will. Article 10 states that "applications 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" and "shall entail no adverse consequences for the applicants and for the members of their family" (Article 10(1)). Countries of origin must respect "the right of the child and his or her parents to leave any country, including their own, and to enter their own country" (Article 10(2)).

Unaccompanied children should be informed about the possibilities and procedures for family reunification. It is important that a child has access to support when applying for family reunification. As this still constitutes a challenge in practice, professionals and officials require clear guidance from policy makers on the institutional leadership for safeguarding children's right to family reunification. In most cases, this may practically rest with the immigration authorities, although child protection authorities also need to be involved.

The UNICEF Guidelines on the Protection of Child Victims of Trafficking point out that family reunification can be delicate when the child has been separated from her or his parents for a long time, has only limited memories of the family and when the child has developed a strong attachment to the caregiver(s) in the country of destination. In these cases, the best interests of the child need to be assessed with particular consideration to balancing the rights and interests of the child. Where a best interests' determination concludes that the child shall not be reunited with the family, alternatives have to be identified and support for re-establishing family ties, relations and contact might be important where this is in the best interests of the child. In other cases, family reunification needs to be carefully prepared and monitored. In all cases, it is important to prevent or reduce emotional distress to the child, while taking into consideration risks of secondary victimisation or stigmatisation.[103]

Special safeguards for child victims of crime, including victims of exploitation and trafficking

The UN Convention on the Rights of the Child provides in Article 39 that states "take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child." The safeguards under Article 39 apply to all children who have been exposed to violence, exploitation and abuse, including asylum seeking children who have been exposed to criminal acts, children who have been exploited in prostitution or in the context of child labour, and child victims of trafficking.[104]

100 CRC General Comment No. 6 (2005), par. 81-83. Swiss Foundation of the International Social Service, Separated Children Handbook, From identification to the search for a durable solution, A practical guide for professionals, 2015, p. 110.
101 CRC General Comment No. 6 (2005), par. 82.
102 CRC General Comment No. 6 (2005), par. 82.
103 United Nations Children's Fund, Guidelines on the Protection of Child Victims of Trafficking, UNICEF Technical Notes, 2006, p. 29.
104 United Nations Children's Fund, Implementation Handbook for the Convention on the Rights of the Child, Fully Revised Edition, Rachel Hodgkin and Peter Newell, 2002, p. 580.

Transposition of the EU Victims of Crime Directive

At the level of the European Union, the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime[1] is the key legislation safeguarding the right of victims of crime. It includes special safeguards for children, including children who have been exposed to sexual exploitation and child victims of trafficking. Member States had to transpose the Directive into national law by 16 November 2015. One of the objectives is to ensure that victims of crime can rely on the same level of rights irrespective of their nationality and regardless of where in the EU the criminal offence took place. The Directive relates to the 2011 EU Anti-trafficking Directive and the 2011 EU Directive on combating the sexual abuse and sexual exploitation of children to address the specific situation of victims of these crimes.[2]

The Directive affords that "children's best interests must be a primary consideration [*in applying the Directive*], in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child …. Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their own views" (Recital 14).

1 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, replacing Council Framework Decision 2001/220/JHA.
2 European Commission, DG Justice, DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, December 2013.

Child victims and witnesses have been defined by the UN Guidelines on Justice in Matters Affecting Child Victims and Witnesses of Crime as "children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders".[105] The term 'victim' is connected to important safeguards under international standards, including rights to guardianship, legal assistance, protection, regularisation of immigration status, the right to compensation, and rights to act as a party, or plaintiff, in criminal proceedings.[106]

An important safeguard for child victims of crime is the 'non-punishment clause'. It means that child victims of criminal offences, including human trafficking, are to be protected from sanctions or prosecution for acts that they committed in relation to their situation as victims. The non-punishment clause is critical for protecting children who are exploited in illegal or criminal activities and child victims of exploitation and/or trafficking who were made to enter a country without valid travel documents.

The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime emphasise that "children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses."[107] The guidelines provide that child victims have to be protected from prosecution irrespective of any form of 'consent' or their active involvement in an offence and irrespective of the child's age in relation to national laws defining the age of criminal liability.[108] A child victim should be considered and treated as such "… regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders".[109]

The Office of the High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking and the UNICEF Guidelines on the Protection of Child Victims of Trafficking reiterate the right to non-crim-

105 United Nations Economic and Social Council, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council Resolution 2005/20, 22 July 2005, par. 9(a).
106 United Nations Children's Fund, Guidelines on the Protection of Child Victims of Trafficking, UNICEF Technical Notes, 2006. United Nations Economic and Social Council, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council Resolution 2005/20, 22 July 2005.
107 United Nations Economic and Social Council, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council Resolution 2005/20, 22 July 2005, par. 7e.
108 United Nations Economic and Social Council, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council Resolution 2005/20, 22 July 2005, par. 6.
109 United Nations Economic and Social Council, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council Resolution 2005/20, 22 July 2005, par. 9a.

inalisation specifically in relation to the situation of victims of trafficking who are to be protected from criminal liability for "any criminal offence that was a direct result from being trafficked".[110] This provision is further strengthened by the non-punishment clause of the 2011 EU Anti-trafficking Directive and the Council of Europe Convention on Action against Trafficking in Human Beings, and is therefore made binding upon States Parties: "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so." (Article 26).

Resettlement and transfers

Resettlement and integration in a third country

When the best interests' determination process concludes that there is no durable solution for a child in the country of destination or origin, the possibility of resettlement to a third country needs to be assessed as a possible alternative.

Resettlement might be an option when it enables safe family reunification in the resettlement country, in line with the best interests of the child. Resettlement can also be an alternative to protect a child against *refoulement* or persecution or other serious human rights violations in the country of destination. The latter might be the case when a child victim of trafficking has to be protected from reprisals or renewed recruitment by traffickers. The Committee on the Rights of the Child advises that "the decision to resettle an unaccompanied or separated child must be based on an updated, comprehensive and thorough best interests' assessment, taking into account, in particular, ongoing international and other protection needs."[111]

Before a decision on resettlement is taken, the best interests' determination process needs to look specifically at the following matters, with reference to articles under the UN Convention on the Rights of the Child:

- The envisaged duration of legal or other obstacles to a child's return to her or his home country;
- The child's age, sex/gender, emotional state, educational and family background;
- The child's right to preserve her or his identity, including nationality and name (Article 8);
- The desirability of continuity in a child's upbringing and care, including with regard to the child's ethnic, religious, cultural and linguistic background (Article 20);
- The right of the child to preserve her or his family relations (Article 8) and related short, mid- and long-term possibilities of family reunification either in the home, host or resettlement country.[112]

When the option of resettlement is explored for the purpose of family reunification, the child and the family member located in a third country need to consent and express their wish to reunify. The child welfare or social services authorities in the country of resettlement need to be contacted in order to make the relevant assessments and to ensure their continued involvement for service provision and monitoring after resettlement.

When resettlement is explored as an option motivated by other reasons than family reunification, the assessments need to consider whether resettlement could pose any obstacles to family tracing, family reunification or maintaining family relations and contacts. Considering the distance between the place of resettlement and the child's family and the existing communication infrastructure in the places and countries involved is important in this regard.

An important precondition for resettlement in these cases is that it does not undermine the possibility of family reunification in the future, provided that family reunification is considered to be in the best interests of the child. In addition to hearing the child's views, also the child's parents need to be informed, consulted and heard in the assessment and resettlement process, unless this poses any risks to the child.[113]

110 United Nations Economic and Social Council, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2002/68/Add.1, 20 May 2002, p. 3. United Nations Children's Fund, Guidelines on the Protection of Child Victims of Trafficking, UNICEF Technical Notes, 2006, p. 20.

111 CRC General Comment No. 6 (2005), par. 92. United Nations Children's Fund, Guidelines on the Protection of Child Victims of Trafficking, UNICEF Technical Notes, 2006, pp. 29, 30.

112 CRC General Comment No. 6 (2005), par. 93.

113 United Nations High Commissioner for Refugees, *UNHCR Guidelines on Formal Determination of the Best Interests of the Child*, 2006, pp. 34-35. Separated Children in Europe Programme, *Statement of Good Practice*, 4th Revised Edition, Save the Children, UNHCR, UNICEF, 2009, Chapter D.13.

Transfers under the EU Dublin III Council Regulation

The EU Dublin III Council Regulation is an agreement among EU Member States, Iceland, Liechtenstein, Norway and Switzerland that regulates, which country is responsible for examining a person's asylum application.[114] It provides for the possibility to transfer persons to the responsible state.

The Regulation is based on the assumption that the Common European Asylum System is in place and fully operational. Under this precondition, adults and children could be transferred to another participating State without compromising the right of the person to international protection with appropriate standards of reception and care. The EU Dublin III Council Regulation was developed on the basis of the previous Regulation and several judgments by the European Court of Human Rights and the European Court of Justice concerning the transfer of asylum seekers.[115] The transfer of asylum seekers to the country where they were first registered risks to generate a particular burden on the countries at the outer borders of the European Union where high numbers of asylum seekers arrive such as Italy and Greece.

The EU Dublin III Council Regulation provides that the best interests of the child should be a primary consideration of Member States when applying the Regulation, in accordance with the UN Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union. The Regulation requires Member States that are assessing the best interests of the child to:

- Take due account of the child's well-being, social development, safety and security, and background;
- Take into account the views of the child in accordance with her or his age and maturity;
- Develop specific procedural guarantees for unaccompanied children with due consideration to their particular vulnerability;
- Cooperate closely between Member States for conducting best interests' assessments under the Regulation.[116]

The EU Dublin III Council Regulation attaches priority to the respect for family life and the principle of family unity. For unaccompanied children, this implies that the presence of a family member or relative on the territory of another Member State who can take care of the child should become a binding criterion for determining the state responsible.[117] The Regulation stipulates that evidence of the presence of family members, relatives or other family relations of the applicant on the territory of another Member State shall be produced before a decision about the applicant's transfer is taken and on the condition that a first instance decision on the previous application has not yet been taken.[118]

The responsibility of a Member State to process the asylum application of a child applicant is determined as follows:

- When the applicant is an unaccompanied child under 18 years of age, the Member State responsible shall be the one where a family member or a sibling of the child is legally present, provided that it is in the best interests of the child to have her or his application assessed in that state.
- In cases where a relative of an unaccompanied child is legally present in another Member State, an individual assessment shall be made to establish that the relative can take care of the child. If the assessment is positive, the child shall be united with the relative if this is in her or his best interests and that Member State becomes thereby responsible.
- In cases where family members and relatives are found in different Member States, the decision on which Member State is responsible shall be guided by the best interests of the child. In cases, where family members or relatives cannot be identified, the Member State responsible shall be that where the unaccompanied child has lodged the asylum application, if this is in the best interests of the child.[119]

The process for determining the Member State responsible shall start as soon as an asylum application is lodged.[120] Once a Member State receives a request to take charge of an applicant, the decision shall be taken within a period of two months. In particularly complex cases, this term may be extended by one additional month.[121]

During the procedure, the applicant shall not be held in detention for the sole reason that her or his case is reviewed under the EU Dublin III Council Regulation. In cases, where there is "a significant risk of

114 See: European Commission, Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014.
115 The practice of automatic transfers under the previous EU Dublin II Council Regulation had been critiqued due to the risks involved for asylum seekers transferred to countries that offer sub-standard reception conditions, with case law concerning especially Greece, and the overburden of the countries where the majority of asylum seekers enter the European Union, in particular Greece, Italy, and Spain. Library of the European Parliament, Transfer of Asylum-Seekers and Fundamental Rights, Library Briefing, 30 November 2012.
116 EU Dublin III Council Regulation, 2013, par. (13), Article 6.
117 EU Dublin III Council Regulation, 2013, par. (14), (16).
118 EU Dublin III Council Regulation 2013, Article 7.
119 EU Dublin III Council Regulation 2013, Article 8.
120 EU Dublin III Council Regulation 2013, Article 20.
121 EU Dublin III Council Regulation 2013, Article 22.

absconding", Member States may however detain the person on the basis of an individual assessment and when detention is proportional and other less coercive alternatives cannot be applied effectively. In cases where the Member State fails to comply with the deadlines for submitting a request to another Member State to take charge of or receive an applicant back, the person shall no longer be detained after six weeks.[122] Special provisions for children are not provided for in this context, which is a weakness of the Regulation. The human rights of the child as afforded under the UN Convention on the Rights of the Child apply in this context and should take precedence where they afford stronger protection, in line with the principle of the child's best interests.[123]

The Member States should transmit information about an applicant when requesting another state to take charge of or receive the person back, including information about immediate needs of the applicant and contact details of family members, relatives or other family relations in the Member State to which the persons is transferred. For children, this includes information about the child's education and the age assessment. The written approval of the applicant is required for the communication of such information. The applicant has a right to be informed about the data that is processed concerning her or his case and is entitled to have such data corrected or erased when they are incomplete or incorrect.[124]

Member States may decide to use a certain level of discretion in applying the provisions concerning the determination of the responsible state and may assume the responsibility for examining an asylum application. The responsible Member State may also, at any time before a first instance decision over the asylum application has been taken, request another Member State to take charge of an applicant in order to reunite family members. This may be requested on humanitarian grounds particularly for family or cultural considerations. The persons concerned need to consent to this procedure in writing.[125]

The EU Dublin III Council Regulation provides for the right to information. This means that the competent authorities shall inform each applicant of the Regulation and its implications for the person. Information shall include the criteria for determining the Member State responsible and their hierarchy, the submission of information about family members present in the Member State and the possibility to challenge a transfer decision or apply for it to be suspended. In addition, applicants shall also be informed about the relevant procedures for recording data, data protection or modification. This information shall be provided primarily through a leaflet, including a leaflet intended specifically for unaccompanied children. Oral information and explanation is not provided for in a mandatory way but only in cases where this is considered necessary.[126] In order to effectively safeguard the right of children to access information in a language that they can understand, it is important to communicate effectively with children, including through quality interpretation, to ensure that a child applicant fully understands the procedure and her or his related rights.

The EU Dublin III Council Regulation affords the applicant the right to effective remedy against decisions taken under the Regulation, in the form of an appeal or review, before a court or a tribunal, including the right to legal assistance and interpretation. In case of appeal or review of a decision, the transfer is automatically suspended and the applicant has a right to remain in the Member State pending the outcome of the appeal or review.[127] The responsibility of the Member State ceases when there is evidence to ascertain that the person concerned has left the territory for at least three months. After this period, the person has to lodge a new application for asylum.[128]

Return

The option of return has to be considered as part of the best interests' determination and life project planning for unaccompanied children in the country of destination. Matters concerning the possibility of return are cross-cutting to all relevant assessments and information gathering processes. Return is however only ordered when it is considered to be in the best interests of the child on the basis of all relevant assessments and clear evidence.

When the best interests' determination concludes that return is in the best interests of the child, the preparations for return are set in motion. Prior to ordering return, the authorities of the destination country need to ensure that the child will be received in safe care and looked after in the country of return. Some of the assessments that were conducted for the best interests' determination may need to be repeated

122 EU Dublin III Council Regulation 2013, Article 28.
123 Committee on the Rights of the Child, General Comment No. 14 (2013).
124 EU Dublin III Council Regulation 2013, Articles 31, 35.
125 EU Dublin III Council Regulation 2013, Article 31.
126 EU Dublin III Council Regulation 2013, Article 4.
127 EU Dublin III Council Regulation 2013, Article 27.
128 EU Dublin III Council Regulation 2013, Article 19.

The principle of *non-refoulement*

The 1951 United Nations Refugee Convention provides for the principle of *non-refoulement*, which prohibits the return of a person to a place where her or his life or freedom is at risk or where it is threatened on grounds of the person's nationality, race, religion, political opinion, or membership of a particular social group. The principle of *non-refoulement* was reinforced under the UN Convention against Torture (Article 3), which prohibits returning a person to a place where she or he faces torture. The International Covenant on Civil and Political Rights provides in Article 7 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Under the European Convention on Human Rights, national governments have to refrain from sending children back to places where they face a risk of inhuman and degrading treatment, and they must take measures to exclude that a child is at risk of such treatment before taking decisions about return.[1]

The European Court of Human Rights (ECtHR) has underlined the importance of such proactive measures in its jurisdiction. The Court ruled that governments must take "requisite measures and precautions" against inhuman and degrading treatment when a child is being returned.[2] This implies that a thorough case and risk assessment has to be made for each child prior to ordering return, considering that the circumstances of what constitutes inhuman or degrading treatment may differ for children and adults. Situations that may be considered to amount to inhuman or degrading treatment include the risk of ill-treatment or abusive situations. Children who have been exposed to domestic violence may therefore not be returned to the same environment, as well as child victims of trafficking may not be returned to situations where they are at risk of new recruitment or reprisals from traffickers.

1 United Nations Convention Relating to the Status of Refugees, 1951, 189 U.N.T.S. 150, Article 1(2). United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 3. ECHR, Article 3.

2 Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (Application no. 13178/03), October 12, 2006, par. 68-71. Nsona v. The Netherlands, (23366/94), Judgment of 26 June and 26 October 1996; 63/1995/569/655, par. 92(c). Human Rights Watch, Lost in Transit, Insufficient *Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport*, 2009, pp. 52-53.

in order to ensure that the findings are still up to date. Where any of these assessments have not been made previously to inform the best interests' determination, this may give grounds for the child to appeal against the decision on her or his best interests.[129]

International and regional standards governing the return of children

When returning unaccompanied children, states are bound by their legal obligations under international, regional and national law. At the international level, the human rights standards of the United Nations, such as the UN Convention on the Rights of the Child, the UN Refugee Convention, and the UN Convention against Torture apply. Under European law, the European Convention on Human Rights, other Council of Europe standards and EU laws relevant to child protection, asylum, migration and, specifically, return, apply. These norms have to be respected in all areas where the state exercises jurisdiction, on its territory, on board of ships, at the border and in the airport transit zones.

The Committee on the Rights of the Child emphasised that the return of an unaccompanied or separated child needs to take place in a safe, child-appropriate and gender-sensitive manner.[130] For child victims of trafficking, the Council of Europe Convention on Action against Trafficking in Human Beings provides that res-

129 See also: The European Council on Refugees and Exiles, Save the Children, *A Checklist to Achieve Good Practice When Considering the Return of Children to Third countries: A tool for quality planning for Member States, Comparative study on best practices in the field of return of minors*, European Commission – DG Home, HOME/2009/RFXX/PR/1002, 2011.

130 Committee on the Rights of the Child, General Comment No.6 (2005), par. 87.

EU policies and positions on return

The return and transfer of migrants to countries of origin or transit is an important part of the migration policy of the European Union and its Member States. The European Pact on Immigration and Asylum provides the overarching framework for the development of the return policy of the EU and its Member States. It focuses in particular on the return of undocumented migrants and promotes the cooperation of EU Member States and the Commission with countries of origin or transit on these matters. The return policy gives preference to *voluntary return* and aspires to promote return with due regard to the dignity of the persons concerned. With regard to the return of children who are staying in the EU without the required permits, the Justice and Home Affairs Council stated in its conclusions adopted in 2010 that a "comprehensive response at Union level should combine prevention, protection and assisted return measures, while taking into account the best interests of the child".[1]

In EU law, the primary instrument regulating the return of migrants is the 2008 EU Return Directive. It applies to third country nationals who do not, or no longer, possess a valid permit of stay for the country they are staying in. The Directive applies to all EU Member States and countries participating in the Schengen agreement.[2] In transposing the Directive into national law, Member States are bound by their obligations under other international and regional law, including the standards afforded under the UN Convention on the Rights of the Child. Considering the Directive in light of these standards is essential to ensure that terms and principles are understood, interpreted and applied in coherence with the rights of the child, including the general principle of the best interests of the child.

The Return Directive aims primarily to establish an EU wide system for the removal and repatriation of "illegally staying third country nationals" to their country of origin or a transit country. Persons can be removed also to a third country if the returnee agrees and if the country will accept the person. Under the Directive, Member States are obliged to issue return decisions to migrants who do not possess valid travel or residence permit to stay in the EU. They are also free to grant a right to stay to third country nationals for compassionate, humanitarian or other reasons.

The Directive recognises that "voluntary return should be preferred over forced return where there are no reasons to believe that this would undermine the purpose of a return procedure and a period for voluntary departure should be granted" (Recital (10)). In order to promote voluntary return, Member States should offer assistance and counselling programmes.[3] The persons concerned should be granted a reasonable period of approximately 30 days that allows them to arrange for voluntary departure. During the period of voluntary departure the persons concerned are entitled to access emergency health care and essential treatment and children are allowed to attend school.

Pre-removal detention is admissible under certain circumstances, for a period of six months, with a possibility of extension for a maximum of 18 months. During detention, families have to be accommodated separately from other detainees. Children are entitled to engage in leisure time activities, including play and recreational activities and, depending on the length of their stay, have a right to access education. Unaccompanied children shall, however, be detained only for the shortest possible period of time and as a measure of last resort. The Directive authorises Member States to impose entry bans in certain cases.

Member States are held to take the best interests of the child into account when implementing the Directive. The Directive emphasises also the importance of considering issues of family life, the state of health of the returnee, and the principle of *non-refoulement* (Article 5). This implies that the period of voluntary departure may be extended when so required by the school attendance of dependent children, social links and family ties.

Children, including unaccompanied children, are considered a vulnerable group under the Directive.[4] A child is however not explicitly defined as any person under 18 years of age, so there is room for different national age limitations. Special consideration for the needs of vulnerable

groups is required under Article 14, which provides safeguards during the period for voluntary departure, pending return. In addition, the principle of family unity is to be given due account during this period. Specific provisions concerning children, and the implications of the principle of family unity for unaccompanied children who have a family member legally residing in the Member State, are however not provided for in this context.

For the return of unaccompanied children who are 'illegally staying third country nationals', the Directive provides that assistance shall be granted to the child before a decision about return is taken. Such assistance is to be granted by a body other than the authorities in charge of enforcing the return. Before the actual return is executed, the authorities need to ascertain that the child will be returned to a *family member*, a *nominated guardian* or an *adequate reception facility*.[5] The concrete meaning of the terms assistance, family member, guardian or adequate reception facility is a matter of debate. General safeguards derive, however, from the UN Convention on the Rights of the Child, European and national standards on child rights and protection, and Member States are bound by these in their application of the Return Directive.

Member States are entitled to exclude from the safeguards afforded under the Return Directive those third country nationals who entered the EU without valid travel documents. Children are not explicitly excluded from this waiver, although they enjoy more general safeguards afforded under the UN Convention on the Rights of the Child, the EU Charter of Fundamental Rights and the Council of Europe Conventions. This example illustrates however that there continues to be a need to promote and ensure policy coherence between child rights standards and the migration regime at the level of the European Union and Member States.[6]

1 Council of the European Union, Council Conclu*sions on the Follow-up of the European Pact on Immigration and Asylum*, 2010, p.4.
2 European Commission, The Schengen Area and Cooperation, 3 August 2009. The Schengen Area encompasses most EU States, except for Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom. Bulgaria and Romania are in the process of joining the Schengen Area. Of non-EU States, Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Area. See: European Commission, Migration and Home Affairs, Schengen Area, 13 November 2015.
3 2008 Return Directive, par. 10, Articles 6-9.
4 2008 Return Directive, Article 3.9.
5 2008 Return Directive, Article 10.
6 European Commission, Action Plan on Unaccompanied Minors (2010-2014), COM(2010)213 final, Brussels, 6 May 2010, p. 12.

idency and return decisions should be taken in accordance with the child's best interests (Articles 14 and 16).

International and regional law provides for procedural guarantees for children who are ordered to return. As a basic principle, the European Convention on Human Rights affords the right to effective remedy (Article 13).[131] Children have therefore a right to access an effective remedy if there is a risk that the ordered return constitutes an infringement against their rights under the Convention. This implies, as a basic precondition, the right to legal representation and the right to appeal decisions over return.

Different forms of return

There are different forms of return of migrants with different degrees of voluntariness and assistance.[133] In general, for the state and the person concerned, *assisted and voluntary return programmes* are considered preferable over *forced return* as they are considered to be more humane and dignified, more cost-effective and more sustainable.[132]

Return programmes and procedures differ for different groups of children. The legal safeguards and the forms and types of support offered to children depend to a significant degree on the child's national background, whether the child is a migrant with or without valid travel documents, a rejected asylum seeker or a victim of trafficking.

131 'Remedy' refers to the manner in which a right is enforced by a court or another competent authority in cases where the rights of a person have been infringed upon.

132 See Glossary in the Annex.

Children who consent to participate in an assisted return programme receive incentives and benefits. Unaccompanied children are escorted during the journey usually only in the context of 'voluntary assisted return'. The transfer of care and custodial arrangements to the country of return, reintegration assistance and monitoring of the post-return phase are also mostly offered in the context of 'voluntary assisted return' programmes.[133]

When the return of a family is being assessed, the accompanied children are often treated together with the cases of their parent(s) or other accompanying caregivers. The same rights that apply to unaccompanied children are however equally applicable to children accompanied by a caregiver. This includes the right to an individual best interests' determination and the assessment of child-specific grounds of asylum and generally the right of the child to be heard and to have her or his views taken into account in the asylum procedure. This applies for the assessment of the possibility of return as well as any other context.[134]

The results of a best interests' determination concerning return do not always coincide with the child's wishes or the priorities of migration authorities. In some cases, children express the wish to return home and to reunite with their families but the competent authorities might not assess return to be safe. Children might also wish to return and the authorities consider that return is indeed in the best interests of the child. These two scenarios do happen but they are not too common. In other cases, a best interests' determination might conclude that a child shall return against the wishes of the child. In many cases where the asylum procedure does not identify any international protection grounds of a child but where prompt return is considered risky, the child is granted a temporary permit of stay up to the age of 18 years old. Upon turning 18, the young person would then be returned as an adult.

In each case scenario, the competent authorities have to document how the child's views were taken into account and how different facts were weighed to arrive at a conclusion about the best interests of the child with regard to the possibility of return. Social services and immigration authorities might approach these matters from different perspectives. Ideally, they could work together to arrive at a more holistic and balanced decision. Where children wish to return but return is considered risky, the child's motivations for wanting to return need to be understood. If family reunification is driving the child's wish to return to a high risk place of origin, family reunification could also be achieved in the country of destination. This is in particular an option to be considered for unaccompanied children entitled to international protection as refugees or on humanitarian grounds as well as child victims of trafficking. In assessing and negotiating the child's views and options, it is essential that the child has access to information that she or he understands in order to enable the informed consent of the child if and as applicable.

In organising returns, governments collaborate to varying degrees bilaterally, with the International Organization for Migration, with NGOs and other national and international partners.

Return of unaccompanied children whose asylum claims were rejected

The return of unaccompanied children whose asylum applications have been rejected are rare but not uncommon. These returns are often very costly for the returning state, as they require a significant degree of assessment and service provision in preparation for return and in follow-up monitoring. In some cases, children may request to be returned upon their own initiative, so that the return procedure takes the form of voluntary repatriation.

When the return of an unaccompanied child is being assessed, some basic principles need to be taken into consideration for the quality of care after return. The best interests of the child should be a primary consideration, including with regard to prioritising family-based over institutional care for children deprived of parental care, and giving due consideration to safety and security concerns, including the prevention exploitation and recruitment into trafficking.

The immigration authorities of the country of destination lead the return process and cooperate with the authorities in the country of origin to prepare and execute the return. The collaboration with local partners and case workers in countries of return is essential. They are engaged in family tracing and assessment and take the lead on the reintegration processes from the moment the child arrives in the country of return.

In many cases, children are unwilling or reluctant to return. When an unwanted return is the only option available to a girl or a boy in the country of destination, they might choose to leave the reception centres and

133 European Migration Network, *Programmes and Strategies in the EU Member States Fostering Assisted Return to and Reintegration in Third Countries,* March 2011, p. 8.

134 Cazenave, Pierre, *Protecting Migrant Children in a Freedom of Movement Area, Transnational monitoring of return procedures involving Romanian and Bulgarian migrant children in Greece and France*, Terre des Hommes, December 2012. European Council on Refugees and Exiles, Save the Children, *Comparative Study on Practices in the Field of Return of Minors, Final Report*, European Commission Directorate General Home, HOME/2009/RFXX/PR/1002, December 2011, pp. 14-15.

Assisted Voluntary Return through IOM

In the Baltic Sea Region, national governments cooperate with the International Organization for Migration (IOM) on the return of non-nationals to their countries of origin through the so-called 'assisted voluntary return' programmes. Specific programmes are available for children and adults who are victims of trafficking as well as children and young persons who were under 18 years old when they entered the country from which they are to be returned. The IOM Office in Helsinki acts as a regional office for the Baltic and Nordic States.

The IOM return programme for victims of trafficking provides special assistance for children. The services offered include a pre-departure assessment of the child's family and her or his risk of re-trafficking. A report on these assessments is given to the legal guardian of the child and the child welfare services which have to make an informed decision on the child's return. IOM organises the reunification with parents or legal guardians in the country of origin, provides support to accessing school or other forms of education, a subsistence allowance, accommodation at a rehabilitation centre, as well as psycho-social and health care support. IOM monitors the situation of the returnee in her or his home country and offers follow-up services for a minimum period of three months for adults and six months for children. After this period, IOM sends a report on the returnee's situation to the authorities of the country from where the person was returned.[1]

1 International Organization for Migration, IOM Office in Helsinki, Assisted Voluntary Return and Reintegration. *European Migration Network, Policies on Reception, Return and Integration Arrangements for, and Numbers of, Unaccompanied Minors - An EU Comparative Study*, 2009, pp. 40-41.

continue a life as an undocumented migrant or move on to another country. The competent authorities need to understand the motivations of the child and how the child assesses her or his own best interests. On that basis, the official decision could be reassessed and reconsidered in order to prevent children from leaving reception centres on their own initiatives as this bears high risks. Open communication and a trusted, humane relation with the child is an imperative in order to understand the child's views and recognise any risks early on. A flexible mandate of the competent authorities and the willingness to identify innovative solutions together with the child can help to gain the child's trust, to make children stay and be safe.

Returning undocumented children

Undocumented migrants are in particularly difficult situations as they have little opportunities to exit their irregular situation. The main channels for the return of undocumented migrants from third countries are returns under the 2008 EU Return Directive or readmission agreements.

Children who remain in a country after their asylum application has been rejected may feel threatened by the idea of returning to their origin country or a transit country or may consider that remaining in the destination country with an irregular status is a better alternative than returning. Families with children who have grown up in the destination country and who are integrated into the school system might feel even more reluctant to leave. Yet, there are also irregular migrants who would like to return, for instance when the situation in the origin country or their personal situations have improved. When the person lacks the financial means or valid identity and travel documents for return, accessing support is difficult.

It is important to reach out to undocumented migrants, including unaccompanied children and families, and to offer support, assistance and information. Where low-threshold services exist, they are being used by this particularly marginalised group. Valuable services are being offered by social outreach programmes, drop-in centres and street social workers or hotlines as well as information and health centres for undocumented migrants. Making such services available and accessible for undocumented migrants can help to understand better the number and composition of the undocumented population in the country, their needs and the risks and difficulties they are facing. Children who stay undocumented are particularly at risk of violence, abuse and exploitation, including in the context of trafficking. Safeguarding these children is a legal obligation of states under the UN Convention on the Rights of the Child, on the same terms and conditions as other children living within the jurisdiction of the state.

Readmission agreements

Readmission agreements are bi- or multi-lateral agreements that aim to facilitate the return of undocumented migrants to their countries of origin. The existing EU readmission agreements apply also to children. In general, readmission agreements are bi- or multi-lateral agreements that regulate the return procedures and the cooperation between the authorities of the countries involved. Usually, they do not provide specific safeguards and provisions for accompanied or unaccompanied children.[1] Returns executed under a readmission agreement, however, have to respect the safeguards afforded for children under relevant European and national law.

With the entry into force of the Treaty of Amsterdam in 1999, the power for negotiating readmission agreements with third countries was conferred from the individual Member States to the European Union. The European Community Readmission Agreements (ECRA) supersede previous bilateral agreements, with the exception of those of Denmark, Ireland and the UK, which can exercise their right not to take part in the Community agreements. These agreements provide for the reciprocal obligations of the EU and the third country to facilitate the return and transit of 'illegally residing persons' and provide for detailed administrative and operational procedures and cooperation between authorities.[2]

1 European Commission, Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014), *COM(2010)213 final, Brussels, 6* May 2010, p. 12.
2 European Migration Network, Programmes and Strategies in the EU Member States Fostering Assisted Return to and Reintegration in *Third Countries, 2011, pp. 48-50. By September 2015, the European Council has authorised the European Commission to negotiate EU readmission agreements* with the Albania, Algeria, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Cape Verde, China, the Chinese Special Administrative Regions of Hong Kong and Macao, Georgia, the Former Yugoslav Republic of Macedonia, Montenegro, Morocco, Pakistan, the Republic of Moldova, the Russian Federation, Serbia, Sri Lanka, Ukraine, Tunisia and Turkey. The agreements with Armenia, Azerbaijan, Cape Verde, the two Chinese Special Administrative Regions, Georgia, Pakistan, the Republic of Moldova, the Russian Federation, Sri Lanka, Ukraine, the Western Balkan countries, and Turkey have entered into force. See: European Commission, Irregular Migration and Return, 10 September 2015.

Return of child victims of trafficking

The 2011 EU Anti-Trafficking Directive provides that the competent authorities need to take measures to identify a 'durable solution' for each child victim of trafficking, based on an individual assessment of the child's best interests. A durable solution might imply return and reintegration in the country of origin or the country of return, integration in the host country, granting of international protection status or another status under national law.[135] The Directive affords victims of trafficking the right to legal counselling and representation, which has to be provided free of charge for child victims.[136]

Under the Council of Europe Convention on Action against Trafficking in Human Beings, the country where a child is identified to be at risk of or exposed to trafficking is primarily responsible for protecting the child. A child shall not be returned if return is not considered in the best interests of the child, in particular when a risk and security assessment reveals that there are doubts about the child's safety and security. Returns of victims of trafficking shall preferably be voluntary and shall give due regard to two aspects, one is the rights, safety and dignity of the returned person, the other is the status of any legal proceedings related to the trafficking case (Article 16).

The views of the child have to be heard and taken into account in all cases where return is an option. Children who have been abused, exploited or trafficked may not always fully understand the risks posed to themselves or others in the place of origin. In order to ensure a child is protected, it may be necessary to make decisions which are at variance to the wishes of a child. In these circumstances, ongoing consultation with the child to inform and hear their understanding of the risks, future decisions and their recovery is of the highest importance.

Under the Council of Europe Convention, States parties have to develop repatriation programmes for

135 European Council on Refugees and Exiles, Save the Children, *Comparative Study on Practices in the Field of Return of Minors, Final Report*, European Commission Directorate General Home, HOME/2009/RFXX/PR/1002, December 2011, pp. 12-13, 27.

136 2011 Anti-trafficking Directive, Article 16 and par. 23.

victims of trafficking with the aim of preventing re-victimisation and supporting the reintegration of the person in the society of the state of return, including reintegration into the education system and the labour market, if applicable. With regard to children, reintegration programmes include measures to ensure adequate care by the family or appropriate care structures upon return. States Parties shall take the necessary measures, where appropriate in cooperation with other States Parties, to make available to victims of trafficking the relevant contact information of structures that can assist them in the country of return, such as law enforcement offices, non-governmental organisations, legal professionals able to provide counselling and social welfare agencies (Article 16).

Return within the European Union

Within the European Union area of freedom of movement, all citizens have a right to move freely and reside in any Member State without registration for a period of up to three months. The movement of unaccompanied children within this area has however not been explicitly regulated. Due to the absence of border controls in the Schengen area, it is often close to impossible for local and national authorities to know about the stay of EU child migrants, to verify their length of stay and monitor their situation. Within the area of freedom of movement, unaccompanied children might therefore move in a legal limbo and the local or national authorities of Member States are left in uncertainty how to handle these cases.

The procedures for returning EU migrant children within the EU have not been developed and defined by national and EU law to the same extent as the return of children who are third country nationals, rejected asylum seekers or child victims of trafficking. A particular gap is the fact that there are no standardised procedures for conducting the required assessments prior to returning a child within the EU and for implementing the return. The institutional responsibilities for assessments and decision making differ from country to country. In countries of origin, the responsible institutions for transnational reporting and communication on cases are often the Ministries of Foreign Affairs and diplomatic representations, whereas in countries of destination, child protection authorities, law enforcement or the judiciary are usually in charge of taking decisions over children from other EU Member States. In Member States that have established central authorities for child protection or specialised bodies to manage and coordinate the return of children from abroad, the institutional responsibilities are more visible and accessible from within the country and abroad.[137]

Standardized social inquiry templates, including for risk and security assessments and family assessments, and standardised procedures and channels for transnational communication on individual cases could be helpful to facilitate the cross-border collaboration and to better safeguard the rights and interests of the children concerned.[138]

The use of international and European private law for returning children on the move

The EU Brussels II bis Regulation[139] regulates parental responsibilities in transnational cases and guides social welfare services when they are considering to take protection measures in cases of children who are EU nationals. The Regulation provides that contacts should be made with the child's home country. The authorities in the home country shall provide information on the situation of the child, the parents and any official decisions or actions concerning parental responsibility or other relevant matters. Whereas the Regulation applies primarily to civil law matters concerning the parental abduction of children and parental responsibility across EU Member States, it is also being applied for the protection and return of EU migrant children, including children living on the streets or involved in street based activities and those who are at risk of or exposed to exploitation and trafficking.

The EU Brussels II bis Regulation mirrors some of the provisions afforded under the Conventions of the Hague Conference on Private International Law, in particular the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. In addition to the Member States, the European Union is also a Member of the Hague Conference on Private International Law and acceded to some of the more recent Hague Conventions.

137 The European Parliament and Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, Brussels, 15 April 2011, par. (19).

138 Cazenave, Pierre, *Protecting Migrant Children in a Freedom of Movement Area, Transnational monitoring of return procedures involving Romanian and Bulgarian migrant children in Greece and France*, Terre des Hommes, December 2012, pp. 18-19.

139 Cazenave, Pierre, *Protecting Migrant Children in a Freedom of Movement Area, Transnational monitoring of return procedures involving Romanian and Bulgarian migrant children in Greece and France*, Terre des Hommes, December 2012, pp. 19, 34, 46.

The Hague Conventions concerning matters of transnational child protection and family law are rooted in international standards, in particularly the UN Convention on the Rights of the Child. The Conventions have the following common features:

- They enable and facilitate the cooperation between the Contracting States, including through the establishment of central authorities as national lead agencies responsible for the implementation of the Convention and the relevant operations and proceedings related to it.
- They put in place a transnational system that ensures the automatic mutual recognition of official decisions taken by one Contracting State in other Contracting States.
- They establish unified procedures to facilitate practical matters, such as the translation of documents, information exchange and the use of standardised model forms, aiming to simplify and expedite procedures and the enforcement of official decisions.
- They promote the use of new information technologies to reduce costs and delays in the processing of international claims.

The Hague Conventions are innovative as they work primarily with the concept of 'habitual residence' of the child, rather than 'nationality', in order to determine the State having jurisdiction over the case.

The Hague Conventions are routinely applied in transnational civil law cases concerning children, particularly in matters of international adoption, parental child abduction and parental responsibility as well as the placement of children across borders. The procedures established under the Hague Conventions are however not systematically in use for the protection of migrant children and the return of children to their countries of habitual residence.[140]

When children are returned in international family law cases, the central authority of the returning state is the leading body managing the return. The mandate of a central authority who arranges for the return of a child ends usually when the child arrives in the country of habitual residence. It is however important to offer follow-up services as are provided, for instance, by the International Social Service. National branches of the International Social Service can provide support with the practical arrangements for the child's return to the country of habitual residence, translation of social evaluation reports and providing expert opinions.[141]

Immigration detention prior to return

The UN Convention on the Rights of the Child provides that "no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time" (Article 37(b)). The Committee on the Rights of the Child considers that the detention of unaccompanied or separated children falls under the scope of Article 37(b) of the Convention.[142] It commented that "... unaccompanied 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."[143]

In 2012, the Committee clarified that "human rights mechanisms have stressed that the deprivation of liberty is never in the best interests of the child and that it is a punitive measure rather than a protection measure. ... The Working Group on Arbitrary Detention has affirmed that mandatory or automatic detention must be considered arbitrary in all cases. Depriving children of their liberty is a violation of their human rights."[144]

The conditions of immigration detention are rarely appropriate to children, especially when detention is ordered for extensive periods of time. In immigration detention, children often face challenges in accessing education, appropriate health services, adequate food and accommodation and may have limited opportunities for leisure time and recreational activities.[145] Detention is a highly distressing experience, especially for migrants and asylum seekers. It has a harmful impact on the mental health, well-being and development of children. The experience of detention can cause or exacerbate previous traumatisation.[146]

140 European Commission, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal L 338 , 23/12/2003, pp. 1-29.

141 PROTECT 4th Expert Meeting, Riga, May 2014, presentation by Christoph Braunschweig, Swiss Foundation of the International Social Service.

142 Committee on the Rights of the Child, General Comment No.6 (2005). Shabas, William and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty,* Martinus Nijhoff Publishers, Leiden, Boston, 2006, pp. 59-62.

143 Committee on the Rights of the Child, General Comment No.6 (2005), par. 61.

144 United Nations Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, p. 23.

145 European Council on Refugees and Exiles, Save the Children, *Comparative Study on Practices in the Field of Return of Minors, Final Report*, European Commission Directorate General Home, HOME/2009/RFXX/PR/1002, 2011, pp. 14, 73-78.

146 Cleveland, Janet, Psychological harm and the case for alternatives, University of Oxford, Refugee Study Centre, *Forced Migration Review, Detention, alternatives to detention and deportation*, Issue 44, September 2013, pp. 7-8. Kotsioni, Joanna, Aurélie Ponthieu and Stella Egidi, Health at Risk in Immigration Detention Facilities, University of Oxford, Refugee Study Centre, *Forced Migration Review, Detention, alternatives to detention and deportation*, Issue 44, September 2013, pp. 11-13.

Minimum standards that states must respect in cases where migrant children are detained[1]

- The deprivation of liberty of migrant children, accompanied or not, should be temporary and for the shortest period possible.
- Migration-related detention centres should be separate from prisons and should not bear similarities to prison-like conditions.
- Centres where child detention takes place should have child protection officials specifically trained in the care and protection of children.
- Children and adolescents should be separated from adults unless it is considered to be in their best interests (CRC Article 37(c)). Centres should ensure the opportunity for regular contact
- with family members and friends.
- Centres must ensure regular and confidential contact with legal and consular representatives.
- While staying in a detention centre, even temporarily, children should be guaranteed the full enjoyment of economic and social rights such as education, health care, recreation, food, water and clothing.
- States must guarantee the existence and operation of independent mechanisms for the inspection and monitoring of the conditions in detention facilities, including by independent bodies.

1 Committee on the Rights of the Child, The Rights of All Children in the Context of *International Migration, Background Paper*, Day of General Discussion, 2012, pp. 24-25.

The Committee on the Rights of the Child noted that migrant children are sometimes detained together with their families under the pretext to prevent family separation in cases where parents are being detained for immigration matters. The Committee recommended however, when it is in the best interests of the child to remain with her or his parents that "states should abstain from depriving the parents of their liberty and should consider the adoption of alternative measures for the whole family to avoid its separation".[147]

The United Nations High Commissioner for Refugees (UNHCR) reiterates this imperative and strongly recommends that immigration detention of children must be used as a measure of last resort, and when used, must have at its core an "ethic of care"[148] approach, prioritising the best interests of the child above immigration enforcement.

In 2013, the UN Committee on the Rights of the Child urged states to "expeditiously and completely cease the detention of children on the basis of their immigration status".[149] In the interim, while immigration detention of children continues to be practiced, states should impose strict time limits to the child's detention in order to minimise the loss of education and to prevent a negative mental health impact. Recognising that the practice of detention continues although it is considered a violation against the rights of the child stipulated under international law, the Committee developed a set of minimum standards for the detention of migrant children.

Alternatives to immigration detention for children and families

The concept of 'alternatives to detention' refers to laws, policies or practice that allow returnees to reside within the community rather than in detention facilities, while they are subject to certain conditions or restrictions on their freedom of movement. The use of alternatives to detention has to respect human rights standards and comply with general principles of legality, necessity and proportionality, giving due respect to the dignity of the person concerned and safeguarding the right to non-discrimination. For unaccompanied children specifically, alternatives to detention should be planned, monitored and reviewed in line with the UN Guidelines for the Alternative Care of Children.[150]

147 United Nations Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, pp. 23-24.
148 United Nations High Commissioner for Refugees, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, par. 52.
149 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, February 2013, para 78.
150 United Nations High Commissioner for Refugees, *UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012. United Nations Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, p. 24. United Nations High Commissioner for Refugees, *Beyond Detention, A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019*, 2014. International Detention Coalition, *Captured Childhood, Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention*, 2012. International Detention Coalition, *Child Sensitive Community Assessment Model,* 2015.

Alternatives to detention include registration and reporting requirements, deposit of documents, bond or bail, designated residence, case management or supervised release, supervision in the community, electronic monitoring, home curfew or house arrest. Countries that work with alternatives to detention have made positive experience and noted that these alternatives work in practice. Asylum seekers usually comply with the requirements imposed upon them in the context of alternative measures to detention.[151] The intention is that the control of the returnees through detention is replaced by a process of management and supervision with respect to the human rights of the persons concerned, which is also more cost-effective for the state.[152]

The 2012 UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention address different aspects of the right to liberty and the prohibition of arbitrary detention of asylum seekers. They are rooted in international refugee and human rights law and guide governments in the development and implementation of asylum and migration policies by addressing particularly the matters related to detention and possible alternatives. The guidelines are also targeted at decision makers, including judges, and support them in assessing cases of individual asylum seekers with regard to detention.

The Committee on the Rights of the Child noted that "states should always use the least restrictive means necessary as alternative measures of detention. Particularly in the case of children, it is important to examine the effect that applying an alternative model will have on the rights and dignity of the individual. Children released from detention centres should, for example, be provided with appropriate alternative care, and not be left destitute on the streets."[153]

Children's perspectives on return

Many children and young adults who are ordered to leave the country or who are voluntarily returning home are worried about their future. A UK study based on interviews with young people who were returned from the UK to Afghanistan revealed a high degree of fear and distress. The young people did not see any opportunities in their country of origin, considered their life and safety to be at risk there and felt that they had already integrated into the society in the UK. Consenting to *voluntary return* is perceived to be connected with shame even for those children and young people who would be happy to return home, as their families had often invested a lot into their migration.[154]

Young Afghans forcibly returned from the UK had difficulties in re-connecting with their family and social networks after return. A particular challenge was posed by the high expectations that the families had set in the young migrants and the investments made in their migration. The return to a situation of insecurity and poverty in Afghanistan had a strong impact on the psycho-social situation and well-being of the young persons. They suffered especially from the lack of opportunities for education and employment. Their migration experience had resulted in a certain degree of 'westernisation', which was real or perceived, and distinguished them from the communities to which they returned. This hampered their social reintegration. Many of the young people contemplated the possibility to migrate again, often under even more risky conditions than in the first migration.[155]

Children and young people who do not view return as a viable option may instead choose to live as an undocumented migrant in the destination country rather than returning to their country of origin. As undocumented migrants, they face higher risks of acute poverty, destitution and precarious living situations. They are also particularly vulnerable to exploitative or harmful working situations, including labour exploitation. These conditions and concerns have a harmful impact on their physical and mental health and development.[156] For children and young adults who are living in an undocumented situation and those who

151 United Nations Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, Day of General Discussion, 2012, p. 24. Edwards A., *Back to Basics, The right to liberty and security of the person and "alternatives to detention" of refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, 2011. International Detention Coalition, *There are Alternatives, A handbook for preventing unnecessary immigration detention*, 2011. United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, p. 6.

152 Sampson, Robyn, Thinking outside the fence, University of Oxford, Refugee Study Centre, *Forced Migration Review, Detention, alternatives to detention and deportation*, Issue 44, September 2013, pp. 42-43, p. 43.

153 United Nations Children's Fund, *The Rights of all Children in the Context of International Migration, Key messages and recommendations,* 2012, par. 9.

154 Gladwell, Catherine and Hannah Elwyn, *Broken Futures: Young Afghan asylum seekers in the UK and in their country of origin*, United Nations High Commissioner for Refugees, Policy Development and Evaluation Service, New Issues in Refugee Research, Research Paper No. 244, August 2012, pp. 16-20. PROTECT 1st Expert Meeting, Stockholm, January 2014.

155 Gladwell, Catherine, No Longer a Child: From the UK to Afghanistan, University of Oxford, Refugee Study Centre, *Forced Migration Review, Detention, alternatives to detention and deportation*, Issue 44, September 2013, pp. 62-64, pp. 63-64.

156 Gladwell, Catherine and Hannah Elwyn, *Broken Futures: Young Afghan asylum seekers in the UK and in their country of origin*, United Nations High Commissioner for Refugees, Policy Development and Evaluation Service, New Issues in Refugee Research, Research Paper No. 244, August 2012, pp. 20-27. PROTECT 1st Expert Meeting, Stockholm, January 2014.

Immigration detention in EU law and policies

European countries have different approaches to immigration detention. In some countries, unaccompanied children are protected from detention for immigration reasons. When children are wrongly assessed as adults in age assessment procedures, they might however not benefit from this protection. The practice of detaining accompanied children together with their families is more widespread in Europe. Many countries provide for alternatives to detention, such as imposing reporting duties or restricting the place of residence.[1]

It has been debated whether immigration detention is in line with the European Convention on Human Rights (ECHR). The ECHR provides in Article 5.1(f) that no-one may be deprived of their liberty, with certain exceptions. The exceptions are related to criminal justice matters as well as immigration matters, namely to prevent a person from entering a country without the required travel document or prior to deportation or extradition. In 1996, the European Court of Human Rights ruled in relation to this provision that immigration detention need not be restricted to preventing individuals from absconding and refrained from defining clearly the scope of immigration detention. This ruling opened up the possibility of using immigration detention also for disciplinary purposes.[2] In 2006, a ruling by the European Court of Human Rights provided however that the detention of an unaccompanied child jointly with adults may amount to inhuman and degrading treatment.[3]

Under the 2008 EU Return Directive, the use of detention for the purpose of removal is justified only to prepare the return or to carry out the removal process. It should be limited and proportional to the means used and the objectives pursued. It is considered a general rule that detention should take place in special detention facilities, in a humane and dignified way and with respect for the fundamental rights of the person concerned, in line with international and national law. Detention conditions shall be subject to periodic review.[4] The Return Directive can be interpreted to promote a disciplinary approach to detention as it provides that detention may be ordered in cases where the person concerned obstructs the removal process, and it can be prolonged when the person does not collaborate in the return or removal process.[5]

Children are not explicitly exempted from detention for the purpose of removal, but their detention is foreseen only as a measure of last resort and for the shortest appropriate period of time. There are special regulations for the detention of unaccompanied children and children within families. Families who are detained prior to removal shall be provided with separate accommodation. Children shall have the possibility to engage in recreational and leisure time activities, and shall have access to education, depending on the length of the detention period. Unaccompanied children shall, as far as possible, be accommodated in institutions where personnel and facilities take into account the needs according to their age. The best interests of the child shall be a primary consideration in the context of detention pending removal.[6]

1 European Council on Refugees and Exiles, Save the Children, Comparative Study on Practices in the Field of Return of Minors, Final Report, European Commission Directorate *General Home, HOME/2009/RFXX/PR/1002, December 2011, pp. 14, 73-78.*
2 ECtHR, Chahal vs GB, 1996. Cited in: de Senarclens, Clément, State Reluctance to Use Alternatives to Detention, University of Oxford, Refugee Study Centre, Forced Migration Review, Detention, alternatives *to detention and deportation, Issue 44, September 2013, pp. 60-62, p. 61.*
3 ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, October 12, 2006, par. 50-59. Cited in: Human Rights Watch, Lost in Transit, Insufficient Protection for Unaccompanied Mig*rant Children at Roissy Charles de Gaulle Airport, 2009, p. 24. Europe*an Court of Human Rights, Migrants in Detention, Fact *Sheet, July 2014.*
4 2008 Return Directive, par. 16-17, Articles 15-16.
5 de Senarclens, Clément, State Reluctance to Use Alternatives to Detention, University of Oxford, Refugee Study Centre, Forced Migration Review, Detention, alternatives *to detention and deportation, Issue 44, September 2013, pp. 60-62, p. 61.*
6 2008 Return Directive, par. 16-17, Article 17.

cannot be returned to their home country, it would be essential to offer mechanisms that help them to regularise their immigration status and to develop realistic life projects for their future.

A UNICEF study on boys and girls repatriated from Germany to Kosovo together with their families illustrates the negative impact of the return. Half of the children described their return as the worst experience of their lives. Children who were born and had grown up in Germany and those belonging to a minority group in Kosovo were particularly severely affected by the return. Some of the repatriated children suffered from post-traumatic stress syndrome, were affected by depression with some reporting that they had thought about suicide. The study reaffirmed that the best interests of a child with regard to return needs to be determined through individual case assessments that take due account of the personal circumstances of each child and respect the child's views, identity and sense of belonging.[157]

Pre-return preparations

Thorough preparations for return, including all relevant assessments and safeguards are essential to ensure that returns are dignified, safe and rights-based. It is also essential to make the return a positive experience for the person concerned with good prospects for sustainability.

When return is considered to be in the best interests of the child, an assessment and planning process is initiated to determine the possibility and details of the return. An individual return and reintegration plan is to be developed for each child prior to return in order to plan step-by-step each phase of the return from preparations through to settlement, reintegration and follow-up monitoring, to determine the needs of the child and appropriate support services. In addition to the detailed care plan for the child after return, a return plan shall give due consideration to ensuring continuity of the care arrangements for the child from the country of destination to the country of return. This includes consideration for the following:

- Continuity of education and vocational training: Children may have to return to their country of origin before having graduated from school or vocational training. Before departure, it is important to ensure that the child receives certificates of any education that the child has completed in the country of destination. It would be important to enable the child to complete school years or special training prior to return, wherever this is not contrary to the best interests of the child.
- Continuity of health services and medical treatment: Children may have been using regular services of health care and treatment in the country of destination. Prior to return, it is essential to ensure continuity of treatment or to identify viable alternatives.
- Continuity of guardianship arrangements: Where a child is not returned to her or his parents or primary caregivers, the continuity of guardianship needs to be ensured.

In preparation for return, children and young people need access to training relevant to the country of origin. It is essential that children and young people have an opportunity during their stay in the destination country to acquire skills that are relevant to the context they will return to and that will allow them to lead an independent life as adults and to gain an income so that return can become a positive experience and sustainable. This includes life and social skills, academic and professional training, as well as entrepreneurial skills and negotiating capacities. In addition to learning the language of the destination country, it is critically important that the young returnees are literate in the language(s) of the country and community to which they return. School and training in the country of destination do however not necessarily support children gaining proficiency in their mother languages and targeted support may be needed to prepare the child accordingly.[158]

Pre-return counselling is important. Return can be a significant source of distress and concern for the child, even when it is considered to be in the best interests of the child. Access to information and counselling, including psycho-social counselling, prior to return, can help the child to gain confidence and to feel safe and empowered about her or his return and the options thereafter.

157 Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration, Background Paper*, 2012 Day of General Discussion, August 2012, p. 25.

158 Gladwell, Catherine and Hannah Elwyn, *Broken Futures: Young Afghan asylum seekers in the UK and in their country of origin*, United Nations High Commissioner for Refugees, Policy Development and Evaluation Service, New Issues in Refugee Research, Research Paper No. 244, August 2012, p. 48.

A monitoring tool rooted in the UN Convention on the Rights of the Child and the best interests of the child

The HIT Foundation[1] and partners have developed a monitoring tool to assess the well-being of children after return, the economic situation of the parents and the longer-term development of the child. The monitoring tool is based on a model for best interests' assessments that is rooted in the UN Convention on the Rights of the Child.[2] The tool translates all articles of the Convention into 40 conditions that tell something about the child's living situation and development, the family situation, social networks, economic situation, education, health and other areas.

The monitoring tool comprises four questionnaires to assess the status of the development of the child in the context of her or his environment after return. The questionnaire can be completed in 2.5 hours. It includes an interview with the child, a self-assessment by the child her- or himself, and other information gathered from the family. The tool gathers data on 14 different child rearing and development conditions that can guide an analysis of the child's situation after return:

1) Adequate physical care
2) Safe direct physical environment
3) Affective atmosphere
4) Supportive, flexible childrearing structure
5) Adequate examples or role models by parents
6) Interest
7) Continuity in upbringing conditions
8) Safe physical wider environment
9) Respect
10) Social network
11) Education
12) Contact with peers
13) Adequate examples or role models in society
14) Stability in life circumstances

The analyses gives an indication about the chances that the return and integration of the child will be sustainable. The information that has been gathered through the administration of the questionnaires was also used to develop quality standards for the situations that children are returned to, for instance with regard to living conditions, health care and education. The application of the tool is not costly, which is an important factor when considering to roll-out the tool at a larger scale.

1 "Stichting Hersteld vertrouwen In de Toekomst" ('Restored Confidence in the Future' Foundation), http://hitfoundation.eu/.

2 HIT Foundation, Monitoring of Returned Minors.

Transportation phase

Unaccompanied children who are returned after receiving a negative decision on their asylum application and who participate in a programme for 'voluntary assisted return' are usually escorted during the journey to the country of return. The escorting of unaccompanied children is a general rule in returns implemented by the International Organization for Migration in cooperation with EU Member States.[159]

Children who do not participate in *assisted voluntary return and reintegration* programmes are not necessarily escorted during the return journey. In these cases, the practice in returns within the EU and to third countries varies significantly. An escort is however important to ensure that the child arrives safely and is met by the responsible authorities and guardian or caregiver upon arrival.

Post-return and reintegration phase

After return, the support and services available to young returnees depend significantly on the status of the child or young adult and whether she or he participates in a return and reintegration programme. There are short-term, medium-term and longer-term programmes to support returnees in resettling and reintegrating in

159 European Migration Network, *Programmes and Strategies in the EU Member States Fostering Assisted Return to and Reintegration in Third Countries,* March 2011, p. 67.

160 European Migration Network, *Programmes and Strategies in the EU Member States Fostering Assisted Return to and Reintegration in Third Countries,* March 2011, p. 77.

the country of return. The primary objective of these support programmes is to protect the young returnees and to make returns safe and sustainable. They offer assistance to the person concerned and support her or him so that return becomes a positive, constructive and successful experience.

Experience with return programmes suggest that there are some important preconditions to sustainable returns that are rights-based and child-centred:

- Cooperation between the authorities of the country of destination and the implementing partners and relevant networks in the countries of return;
- On-site and ongoing provision of quality care, support and assistance to the young returnees and counselling services in the country of return;
- Monitoring and evaluation of return programmes, specifically with regard to the reintegration support, the appropriateness and sustainability of the measures, with due attention to the views and the best interests of the returnees and ensuring periodic review and adjustments of care arrangements and support services if and as applicable.[160]

The sustainability of return is also a key criterion for the cost-efficiency of migration management policies and return programmes. It is therefore a central objective of the authorities ordering and executing the return. Well-prepared returns and concerted support for the child's reintegration, safety, well-being and development after return are essential to make it sustainable.

Monitoring and evaluation

As public authorities are generally responsible and accountable for their decisions and the impact on children within their jurisdiction, they are accountable also for returning children to their countries of origin and the impact of return. Thus far, there has however been little attention in the public debate on the impact of returns on the children concerned, the families and communities, and the quality of the follow-up services provided.

Effective monitoring of the post-return and reintegration phase is essential to gather information, knowledge and experience that can help making return programmes and reintegration support safer, rights-based and eventually also more cost-efficient and sustainable. The outcomes of monitoring might inform the child-specific country of origin information and this, in turn, could contribute to decision making in future cases.

Post-return monitoring is essential to protect the persons concerned. It is also a key to revealing the strengths and weaknesses of national policies on migration and asylum as well as their implementation and impact in practice. Post-return monitoring can help to identify those cases in which applications for asylum were falsely rejected and where return was in hindsight not in the child's best interest. This, in turn, could help to strengthen the quality of assessments and decision making processes. Monitoring needs to look at:

- The quality of interactions between officials and service providers and the returnee, in countries of origin and destination;
- The quality of preparations and the information and counselling available to the child prior to return;
- The conditions in waiting and detention areas, if applicable;
- The files of returnees and the transparency and quality of documentation they provide;
- The continuity of services of care, protection, health and education as well as guardianship, where applicable;
- The quality of childcare and the child's relations to parents or other caregivers;
- The social and economic situation of the returnee, the support available to her or his transition into adulthood and independent life and the child's integration in the community after return;
- The possibility for child returnees to access reporting and complaints mechanisms that support them in claiming their rights after return.[161]

Monitoring needs to be conducted periodically over an extended period of time, with the involvement of the child returnee her- or himself in the monitoring, including through self-assessments. It needs to evaluate the outcomes of the return against the human rights of the child and guiding principles of quality care for children, continuity of care, safety and the right of the child to life, survival and development. National child protection systems and referral mechanisms play an important role to ensure that monitoring takes place and that the findings of the monitoring are taken into account to inform prompt adjustments of the care arrangements and other issues concerning the child returnee, if and as appropriate. The outcomes of monitoring activities should be reported publicly in countries of return and destination, identifying strengths, good practices as well as challenges and gaps in the process.[162]

161 Podeszfa, Leana and Friederike Vetter, Post-deportation Monitoring: Why, how and by whom?, University of Oxford, Refugee Study Centre, *Forced Migration Review, Detention, alternatives to detention and deportation*, Issue 44, September 2013, pp. 68-69, p. 68. See: European Commission DG Justice, Freedom and Security, *Comparative Study on Best Practices in the Field of Forced Return Monitoring*, November 2011. See also: Refugee Council, *Between a rock and a hard place: the dilemma facing refused asylum seekers*, December 2012.

162 Podeszfa, Leana and Friederike Vetter, Post-deportation Monitoring: Why, how and by whom?, University of Oxford, Refugee Study Centre, *Forced Migration Review, Detention, alternatives to detention and deportation*, Issue 44, September 2013, pp. 68-69, p. 68. See: European Commission DG Justice, Freedom and Security, *''Comparative Study on Best Practices in the Field of Forced Return Monitoring'*, November 2011. See also: Refugee Council, *'Between a rock and a hard place: the dilemma facing refused asylum seekers'*, December 2012.

CONCLUDING REMARKS

The situation of children in migration and mobility is complex and dynamic. It bears risks and opportunities for children and holds challenges for caseworkers and case officers who are mandated to respond. Making case assessments across borders, being sensitive to cultural differences and the necessity to make difficult and important decisions in a short time pose immense challenges for caseworkers and case officers. Bound by demanding mandates rooted in international law and equipped with limited human and financial resources, professionals and officials often struggle to live up to the high expectations placed upon them and their own professional commitment.

These guidelines aim to facilitate case work in transnational situations by breaking down the complexity of assessments, decision making processes and collaboration into a step-by-step guide for case assessment and decision making.

As children's migration and mobility is dynamic and the relevant international and European frameworks are evolving, the guidelines are intended as a living document that can be adjusted and amended in light of future trends and developments. They are part of a broader package for promoting transnational child protection and the best interests of children on the move. These guidelines are complemented by a Practical Guide for caseworkers and case officers and the Transnational Child Protection Portal as an online tool.[163] They provide an overall framework in which national tools and methods can be applied and combined to promote the human rights and the best interests of the child in transnational situations.

163 For more information please visit www.childcentre.info/protect

Annexes

Glossary

Child

A 'child' is understood as every human being below the age of 18 years, according to the UN Convention on the Rights of the Child, Article 1.

Child protection

'Child protection' is commonly understood to refer to the protection of children from all forms of violence, exploitation, abuse and neglect, in the home, in institutions and in the context of formal or informal procedures, in line with CRC Article 19.

Some countries use a different terminology to refer to this concept, such as 'child welfare', or consider child protection to be integrated into 'social welfare' or 'social affairs'.

Child protection system

There is no single international definition yet of a 'child protection system'. In these Guidelines the term is used in line with the definition developed by UNICEF.

UNICEF defines a 'child protection system' as "the set of laws, policies, regulations and services needed across all social sectors – especially social welfare, education, health, security and justice – to support prevention and response to protection-related risks. These systems are part of social protection, and extend beyond it. At the level of prevention, their aim includes supporting and strengthening families to reduce social exclusion, and to lower the risk of separation, violence and exploitation. Responsibilities are often spread across government agencies, with services delivered by local authorities, non-State providers, and community groups, making coordination between sectors and levels, including routine referral systems, a necessary component of effective child protection systems."[1]

Child sensitive

'Child-sensitive' denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views.[2]

Child trafficking

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, defines 'trafficking in human beings' as follows:
a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (*a*) of this article shall be irrelevant where any of the means set forth in subparagraph (*a*) have been used;
c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
d) "Child" shall mean any person under eighteen years of age.[3]
UN Trafficking Protocol, Article 3.

The Council of Europe Convention on Action Against Trafficking in Human Beings (2005) adopted this international definition, identical in wording, underlining that victims shall be protected also when trafficking takes place within countries and without the involvement of large-scale organised crime.

The EU Anti-Trafficking Directive (2011) defines trafficking in human beings as follows:
"1. (...) The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.
4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.
5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.
6. For the purpose of this Directive, 'child' shall mean any person below 18 years of age."
EU Anti-Trafficking Directive, Article 2.

1 United Nations Economic and Social Council (2008), *UNICEF Child Protection Strategy*, E/ICEF/2008/5/Rev.1, par. 12-13.

2 United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, 2005, Paragraph IV.9.d.

3 United Nations General Assembly, Resolution Adopted by the General Assembly, 55/25, United Nations Convention against Transnational Organised Crime, A/RES/55/25, Fifty-fifth Session, 8 January 2001, pp. 32-33.

Children on the move

For the purpose of these guidelines, the concept of 'children on the move' is used in line with the definition developed by the European Forum on the Rights of the Child in 2012: "'Children on the move' covers the broad range of children who migrate from their country of origin to and within the territory of the EU 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 or with non-family members. They may be seeking asylum, victims of trafficking, or undocumented migrants. The status of children on the move may differ at various stages on their journey and they may encounter many differing situations of vulnerability."[4]

Deprivation of liberty

'Deprivation of liberty' is defined under the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty and refers to "... any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority."[5] This definition is used also by the Committee on the Rights of the Child.[6]

Durable solution

A durable solution for an unaccompanied or separated child is understood as "a sustainable solution that ensures that the unaccompanied or separated child is able to develop into adulthood, in an environment which will meet his or her needs and fulfil his or her rights as defined by the CRC and will not put the child at risk of persecution or serious harm. Because the durable solution will have fundamental long-term consequences for the unaccompanied or separated child, it will be subject to a best interests' determination. A durable solution also ultimately allows the child to acquire, or to re-acquire, the full protection of a state."[7]
Under the EU Action Plan on Unaccompanied Minors (2010-2014), the term durable solution is considered to comprise three different options:

- The return and reintegration in the country of origin;
- The granting of international protection or other legal residence status allowing children to integrate in the Member State of residence; or
- Resettlement to a third country.[8]

Habitual residence

Habitual residence is a common concept used in private international law. The Conventions concerning transnational child protection and family matters of the Hague Conference on Private International Law operate with the concept of habitual residence rather than nationality or citizenship. While the concept has not been defined, it is understood to refer to the place where the child has the centre of her or his life and where the child is living for a longer-term period. In applying the Hague Conventions and other international standards, there is thus a margin of interpretation of the meaning of habitual residence.

Ratification

International standards of the United Nations, once adopted by the General Assembly of the United Nations, are open to signature and ratification by UN Member States worldwide. Ratification means that a national government expresses its commitment to the standards afforded under an international or regional Treaty or Convention. It is a sign of the government's political will to ensure the implementation of the standards afforded under the Treaty or Convention in national law and practice. A government that has ratified an international Treaty or Convention has to ensure that the standards contained therein are translated into national law and policy and become therefore legally binding and enforceable in the country. By ratification, a state becomes a State Party to a Treaty or Convention, or a 'Contracting State', which is the common terminology in use for the states that have ratified Conventions of the Hague Conference on Private International Law.

The same procedure of ratification applies to the Conventions of the Council of Europe and the Hague Conference of Private International Law. In addition to the Member States of these inter-governmental organisations, non-Member States can also accede to the Conventions.

Within the European Union, EU Directives are legally binding and constitute EU law that needs to be transposed into the national law of Member States within a prescribed period of time.

When countries infringe against or violate European standards that are in force within the country, the European Courts offer the possibility to seek legal remedy and to claim the rights afforded under international or European law.

In addition to legally binding Conventions, Treaties and Directives, the UN, the Council of Europe and the European Union develop also a strong body of political recommendations, regulations and guidelines, which are not legally binding but have nonetheless an important value as they inform the interpretation and implementation of legal standards.

Unaccompanied and separated children

The Committee on the Rights of the Child defines unaccompanied and separated children as follows:
"Unaccompanied children (also called unaccompanied minors) are children ... who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. "Separated children are children ... 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."[9]

4 European Forum on the Rights of the Child, *Background Paper for Workshop No. 3, The role of child protection systems in protecting children on the move*, Brussels, 13-14 November 2012, pp. 1-2.
5 Office of the United Nations High Commissioner for Human Rights, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990, Rule 11(b). The Rules apply to any child under 18 years of age. (Rule 11(a)).
6 United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child,* Fully Revised Edition, prepared for UNICEF by Rachel Hodgkin and Peter Newell, New York and Geneva, 2002, p. 549.
7 United Nations High Commissioner for Refugees, United Nations Children's Fund, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, p. 22.
8 European Commission, *Action Plan on Unaccompanied Minors (2010-2014)*, COM(2010)213 final, Brussels, 6 May 2010, p. 12.
9 Committee on the Rights of the Child, General Comment No.6 (2005), par. 7 and 8.

Migration terminology as per definitions of the International Organization for Migration and the European Migration Network[10]

Assisted Voluntary Return

Administrative, logistical, financial and reintegration support to rejected asylum-seekers, victims of trafficking in human beings, stranded migrants, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin.

Deportation

The act of a state in the exercise of its sovereignty in removing a non-national from its territory to his or her country of origin or third state after refusal of admission or termination of permission to remain.

Expulsion

An act by a public authority with the intention and with the effect of securing the removal of a person or persons (non-nationals or stateless persons) against his or her will from the territory of that state.

Expulsion en masse

Also called mass expulsion; massive, collective expulsion. Collective expulsion of non-nationals is prohibited by several instruments of international law (Article 4, Protocol 4 of the European Convention on Human Rights, 1950). According to the European Court of Human Rights, collective expulsion is any measure compelling non-nationals, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-national of the group (*Andric v. Sweden, No. 45917/99, 23 February 1999* and *Čonka v. Belgium, No. 51564/99, 5 February 2002 at par. 59*). Mass expulsion may also occur when members of an ethnic group are sent out of a state regardless of nationality.

Forced return

The compulsory return of an individual to the country of origin, transit or third country, on the basis of an administrative or judicial act.

Involuntary repatriation

The return of refugees, prisoners of war and civil detainees to the territory of their state of origin induced by the creation of circumstances which do not leave any other alternative. Repatriation is a personal right (unlike expulsion and deportation which are primarily within the domain of state sovereignty), as such, neither the state of nationality nor the state of temporary residence or detaining power is justified in enforcing repatriation against the will of an eligible person, whether refugee or prisoner of war or civil detainee. According to contemporary international law, prisoners of war, civil detainees or refugees refusing repatriation, particularly if motivated by fears of political persecution in their own country, should be protected from *refoulement* and given, if possible, temporary or permanent asylum.

Re-entry ban

Re-entry ban means an administrative or judicial decision or act preventing the migrant from re-entering into the territory of a Member State of the European Union.[11]

Readmission agreement

International agreement which addresses procedures, on a reciprocal basis, for one state to return non-nationals in an irregular situation to their country of origin or a country through which they have transited.

Reintegration

Re-inclusion or re-incorporation of a person into a group or a process, e.g. of a migrant into the society of her or his country of origin or habitual residence.

Removal

Removal is understood as the enforcement of a 'forced return decision'.[12]

Repatriation

The personal right of a refugee, prisoner of war or a civil detainee to return to her or his country of nationality under specific conditions laid down in various international instruments (Geneva Conventions, 1949 and Protocols as well as customary international law). The option of repatriation is bestowed upon the individual personally and not upon the detaining power. In the law of international armed conflict, repatriation also entails the obligation of the detaining power to release eligible

10 See: Perruchoud, Richard and Jillyanne Redpath-Cross (eds.), *Glossary on Migration*, Second Edition, International Organization for Migration, International Migration Law, No. 25, Geneva, 2011. European Migration Network, *Programmes and Strategies in the EU Member States Fostering Assisted Return to and Reintegration in Third Countries,* March 2011, pp. 16-17.

11 European Migration Network, Programmes and Strategies *in the EU Member States Fostering Assisted Return to and Reintegration in Third Countries,* March 2011, p. 17.

12 European Migration Network, Programmes and Strategies *in the EU Member States Fostering Assisted Return to and Reintegration in Third Countries,* March 2011, p. 17.

persons (soldiers and civilians) and the duty of the country of origin to receive its own nationals at the end of hostilities. Even if treaty law does not contain a general rule on this point, it is today readily accepted that the repatriation of prisoners of war and civil detainees has been consented to implicitly by the interested parties. Repatriation as a term also applies to diplomatic envoys and international officials in time of international crisis as well as expatriates and migrants.

Return

In a general sense, the act or process of going back to the point of departure. This could be within the territorial boundaries of a country, as in the case of returning internally displaced persons and demobilized combatants; or between a host country (either transit or destination) and a country of origin, as in the case of migrant workers, refugees, asylum-seekers and qualified nationals. There are subcategories of return, which can describe the way the return is implemented, e.g. voluntary, forced, assisted and spontaneous return; as well as sub-categories which describe who is participating in the return, e.g. repatriation for refugees.

Spontaneous return

The voluntary, independent return of an individual or group, including refugees, internally displaced persons, or asylum-seekers, to their country of origin, usually without the support of states or other international or national assistance.

Voluntary departure

Voluntary departure derives from the 2008 EU Return Directive (2008/115/EC) and means "compliance with the obligation to return within the time-limit fixed for that purpose in a Return Decision." Voluntary departure is therefore different from voluntary return as it does not involve an official obligation to return.[13]

Voluntary repatriation

Return of eligible persons to the country of origin on the basis of freely expressed willingness to such return. Most often used in the context of refugees, prisoners of war and civil detainees.

Voluntary return

The assisted or independent return to the country of origin, transit or another third country based on the free will of the returnee.

13 European Migration Network, Programmes and Strategies *in the EU Member States Fostering Assisted Return to and Reintegration in Third Countries,* March 2011, p. 16.

Procedural safeguards in best interests' determination processes

The table provides an overview of the procedural safeguards that need to be in place for all formal processes, in which the best interests of a child are being assessed and determined. The references to international and European standards are not exhaustive.

Procedural safeguards in formal best interests' assessment and determination processes	Reference in international and European standards
Child-friendly information	
Access to child-friendly information in a language that the child understands, enabling the child to form an opinion and to express her or his views	United Nations Convention on the Rights of the Child Article 17 International Covenant on Civil and Political Rights Article 19 United Nations Convention on the Rights of Migrant Workers Article 13 Committee on the Rights of the Child General Comment No. 14 (2013) Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Articles 6, 8, 9, 13 and 31 Council of Europe Convention on Action against Trafficking in Human Beings Articles 5, 6, 12, 15, 16 EU Directive on sexual abuse and exploitation of children Recital 32 and 50
The right of the child to express his or her views and to have them taken into account	
This implies the need to communicate information in a language that the child understands, including quality interpretation and cultural mediation and due regard to the age, abilities and evolving capacities of the child. In cases of unaccompanied or separated children, the role of the guardian or representative is essential to ensure that the child has access to information and to facilitate the communication with the authorities. Organisations and child rights advocates can also support children in contact with the authorities.	United Nations Convention on the Rights of the Child Articles 12 International Covenant on Civil and Political Rights Article 14 United Nations Convention on the Rights of Migrant Workers Articles 13 and 18 Committee on the Rights of the Child General Comment No. 12 (2009)

	Committee on the Rights of the Child, General Comment No. 14 (2013), par. 90 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Articles 14.1, 31, 35 EU Anti-trafficking Directive Recital 20, 22, Articles 12.4, 14 and 15 EU Directive on sexual abuse and exploitation of children Article 19.3 and 20
Quality interpretation	
Children have the right to be assisted by a qualified interpreter or translation free of charge, who is trained in child-sensitive communication, interpreting in child interviews, ideally with an additional qualification in cultural mediation.	International Covenant on Civil and Political Rights, Article 14.3.f United Nations Convention on the Rights of Migrant Workers Article 18.3.f EU Asylum Procedures Directive EU Dublin III Council Regulation
The establishment of facts	
Officials and professionals who are conducting a best interests' assessment for a child need to consult with the child, family members and other professionals/officials who are and have been in contact with the child in order to gather relevant facts and information on the child's case. The data need to be verified before they are used to inform the best interests' assessment.	Committee on the Rights of the Child, General Comment No. 14 (2013), par. 92
Timeliness	
Prolonged or delayed assessments may have adverse effects on the child concerned. It is therefore important to conduct assessments and to arrive at a decision about the child's best interests in a timely manner. The decision may have to be reviewed periodically in order to assess the evolving situation. The best interests of the child are likely to evolve as the child grows and this may particularly be relevant in situations of alternative care and decisions concerning treatment or placement. It is equally relevant in decisions about return.	Committee on the Rights of the Child, General Comment No. 14 (2013), par. 93

Qualified professionals	
The best interests' assessment should be carried out by trained and qualified professionals. The assessments should ideally involve a multi-disciplinary team of professionals.	Committee on the Rights of the Child, General Comment No. 14 (2013), par. 94

Guardianship and legal representation	
An independent representative or guardian needs to be appointed. This is particularly relevant in cases of unaccompanied and separated children. In cases where the best interests of a child are being formally determined by a court, and in any administrative or judicial procedures, the child needs legal representation. A legal representative is required in addition to the child's guardian and the representative of her or his views.	United Nations Convention on the Rights of the Child Articles 12.2, 14.2, 18, 37.d, 40 International Covenant on Civil, Cultural and Political Rights Articles 13, 14.2 b United Nations Convention on the Rights of Migrant Workers Article 18.3.d Committee on the Rights of the Child, General Comment No. 14 (2013), par. 90, 96 Committee on the Rights of the Child General Comment No. 6 (2005), par. 21, 24, 25, 33-38, 55, 63, 69, 72, 89, 95, 99 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Articles 31 and 35 Council of Europe Convention on Action against Trafficking in Human Beings Articles 10.4, 15.2, 16.6 EU Asylum Procedures Directive Recital 23, Articles 2(n), 7, 20-23, 25 EU Reception Conditions Directive Articles 2(j), 9, 24, 26 EU Dublin III Council Regulation Articles 2(k), 6, 27, 32.2 EU Anti-Trafficking Directive Recital 19, 23 and 24, Articles 12.2, 14.2, 15, 16 EU Directive on sexual abuse and exploitation of children Recital 31 and Article 20

Documentation of legal reasoning	
Any decision taken on behalf of a child needs to be documented, motivated in detail, justified and explained. It needs to explain how the decision is related to the best interests of the child and why it is possibly differing. The documentation should include information about how the views of the child were heard and taken into account.	Committee on the Rights of the Child General Comment No. 14 (2013), par. 97
Mechanisms to appeal, review or revise decisions and legal remedies	
There should be a formal mechanism to appeal or review decisions taken on behalf of the child as well as complaints mechanisms. Such mechanisms need to be known and accessible for each child.	United Nations Convention on the Rights of the Child Articles 9.1 and 40.2(v) International Covenant on Civil and Political Rights Articles 2, 13 and 14(5) Council of Europe Convention on Action against Trafficking in Human Beings Article 15 EU Directive on combating the sexual abuse and exploitation of children Recital 30, 32
Right to consular assistance	
Children who are outside of their country of residence have a right to assistance by embassies and consular offices. Consular staff can play an important role in supporting and assisting children abroad, establishing supportive contacts and referral, and mobilising help. Consular staff can contact central authorities or national contact points to seek technical advice in cases involving children.	Vienna Convention on Consular Relations, United Nations United Nations Convention on the Rights of Migrant Workers Articles 16.7 and 23
Child-rights impact assessments	
All laws, policies, regulations, budgets and administrative decisions should be subjected to a child-rights impact assessment. The results of such assessments should complement ongoing evaluations or monitoring.	United Nations Convention on the Rights of the Child Article 3 Committee on the Rights of the Child, General Comment No. 14 (2013), par. 6.

The right to be heard in international and European standards

United Nations Convention on the Rights of the Child

Article 12 The right to be heard

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Charter of Fundamental Rights of the European Union

Article 24.1 The rights of the child

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

2011 EU Anti-trafficking Directive

Article 14 Assistance and support to child victims

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, in the short and long term, in their physical and psycho-social recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns with a view to finding a durable solution for the child. …

Article 15 Protection of child victims of trafficking in human beings in criminal investigations and proceedings

3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations and proceedings in respect of any of the offences referred to in Articles 2 and 384:

a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;

b) interviews with the child victim take place, where necessary, in premises designed or adapted for that purpose;

c) interviews with the child victim are carried out, where necessary, by or through professionals trained for that purpose;

d) the same persons, if possible and where appropriate, conduct all the interviews with the child victim;

e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purposes of criminal investigations and proceedings;

f) the child victim may be accompanied by a representative or, where appropriate, an adult of the child's choice, unless a reasoned decision has been made to the contrary in respect of that person.

4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 2 and 385 all interviews with a child victim or, where appropriate, with a child witness, may be video recorded and that such video recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law.

5. Member States shall take the necessary measures to ensure that in criminal court proceedings relating to any of the offences referred to in Articles 2 and 3, it may be ordered that:

(a) the hearing take place without the presence of the public; and

(b) the child victim be heard in the courtroom without being present, in particular, through the use of appropriate communication technologies.

…

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

Article 14.1 Assistance to victims

Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psycho-social recovery. Measures taken pursuant to this paragraph shall take due account of the child's views, needs and concerns.

Article 31 General measures of protection

1. Each Party shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings, in particular by:

a) informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases;

b) ensuring, at least in cases where the victims and their families might be in danger, that they may be informed, if necessary, when the person prosecuted or convicted is released temporarily or definitively;

c) enabling them, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered;

d) providing them with appropriate support services so that their rights and interests are duly presented and taken into account;

e) protecting their privacy, their identity and their image and by taking measures in accordance with internal law to prevent the public dissemination of any information that could lead to their identification;

f) providing for their safety, as well as that of their families and witnesses on their behalf, from intimidation, retaliation and repeat victimisation;

g) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact.

2. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings.

3. Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings.

4. Each Party shall provide for the possibility for the judicial authorities to appoint a special representative for the victim when, by internal law, he or she may have the status of a party to the criminal proceedings and where the holders of parental responsibility are precluded from representing the child in such proceedings as a result of a conflict of interest between them and the victim.

5. Each Party shall provide, by means of legislative or other measures, in accordance with the conditions provided for by its internal law, the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention.

6. Each Party shall ensure that the information given to victims in conformity with the provisions of this article is provided in a manner adapted to their age and maturity and in a language that they can understand.

Article 35 - Interviews with the child

1. Each Party shall take the necessary legislative or other measures to ensure that:

a) interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

b) interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

c) interviews with the child are carried out by professionals trained for this purpose;

d) the same persons, if possible and where appropriate, conduct all interviews with the child;

e) the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings;

f) the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

2. Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law.

3. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, the measures established in paragraphs 1 and 2 shall be applied pending verification of his or her age.

UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime

Paragraph III.8.d Right to participation

Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

Paragraph IV.9.d

'Child-sensitive' denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views.

Paragraph VIII.21 The right to be heard and to express views and concerns

Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by:

a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above;
b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process;
c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child.

Paragraph XI The right to be protected from hardship during the justice process

29. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.

30. Professionals should approach child victims and witnesses with sensitivity, so that they:

a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;

b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;

c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;

d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

31. Professionals should also implement measures:

a) To limit the number of interviews: special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording;

b) To ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator: as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;

c) To ensure that child victims and witnesses are questioned in a child-sensitive manner and allow for the exercise of supervision by judges, facilitate testimony and reduce potential intimidation, for example by using testimonial aids or appointing psychological experts.

EU Brussels II bis Regulation

Recital 19

The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify applicable national procedures.

Article 11 (2) Return of the child

2. When applying Articles 12 and 13 of the 1980 Hague Convention , it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

Article 23 (a) and (b) Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

Article 41 (2)(c) Rights of access

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

b) all parties concerned were given an opportunity to be heard; and

c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The certificate shall be completed in the language of the judgment.

Article 42 (2)(a) Return of the child

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

b) the parties were given an opportunity to be heard; and

c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.
In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the state of habitual residence, the certificate shall contain details of such measures.
The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

The Hague 1996 Child Protection Convention

Article 23

1. The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

2. Recognition may however be refused -

a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested state;

c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

d) if such recognition is manifestly contrary to public policy of the requested state, taking into account the best interests of the child;

e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested state;

f) if the procedure provided in Article 33 has not been complied with.

European law and policies relevant for children on the move: An overview of key standards

Council of Europe Standards

European Social Charter

The European Social Charter sets out rights and freedoms and establishes a supervisory mechanism mandated to monitor how States Parties implement the Charter in practice. The rights afforded under the Charter concern all individuals in their daily lives as they relate, for instance, to housing, health, education, employment, legal and social protection, free movement of persons and non-discrimination. The Charter was first adopted in 1961 and was subsequently revised. The 1996 revised European Social Charter entered into force in 1999.

The European Committee of Social Rights issued in October 2015 a Statement of interpretation on the rights of refugees under the European Social Charter, which provides guidance on the application of the European Social Charter to refugees and asylum seekers.

http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp#Les_droits_garantis_par_la_Charte

The following Council of Europe Conventions provide specific safeguards for the protection from sexual abuse, sexual exploitation and trafficking in human beings:

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)

The Council of Europe Convention on the Protection of Children against Sexual Exploitation is the first instrument to establish the various forms of sexual abuse and exploitation of children as criminal offences, including abuse committed in the home or family, with the use of force, coercion or threats. Preventive measures outlined in the Convention include the screening, recruitment and training of persons working in contact with children, making children aware of the risks and teaching them to protect themselves, as well as monitoring measures for offenders and potential offenders.

The Convention also establishes programmes to support victims, encourages people to report suspected sexual exploitation and abuse, and sets up telephone and internet helplines for children. It ensures that certain types of conduct are classified as criminal offences, such as engaging in sexual activities with a child below the legal age and the sexual exploitation of children in prostitution and pornography. The Convention criminalises the solicitation of children for sexual purposes (grooming) and by travelling sex offenders who can be prosecuted for some offences even when the act is committed abroad. The Convention ensures that child victims are protected during judicial proceedings, for example with regard to their identity and privacy.

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201

Council of Europe Convention on Action against Trafficking in Human Beings (2005)

The Council of Europe Convention on Action against Trafficking is a comprehensive treaty mainly focused on the protection of victims of trafficking and the safeguard of their rights. It also aims at preventing trafficking as well as prosecuting traffickers. The Convention applies to all forms of trafficking; whether national or transnational, whether or not related to organised crime and whoever the victim, women, men or children and whatever the form of exploitation, sexual exploitation, forced labour or services, or other. The Convention provides for the setting up of an independent monitoring mechanism (GRETA[14]), which monitors the States Parties' compliance with its provisions.

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197

Reference sources on European Union law, child rights, asylum and immigration

Connect, Reference Document on EU Law and Policy, 2014.

European Union Agency for Fundamental Rights, Handbook on European Data Protection Law, 2014.

European Union Agency for Fundamental Rights, Handbook on European Law Relating to the Rights of the Child, 2015.

European Union Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders and Immigration, 2014.

14 GRETA is composed of representatives of 15 states who are independent and impartial and elected by the Committee of Parties to the Convention for a four-year period, renewable once. See: About GRETA – the Group of Experts on Action against Trafficking in Human Beings.

European Union Agency for Fundamental Rights, Handbook on European Non-discrimination Law, 2011.

EU Directives – EU law

Reception Conditions Directive 2003

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

This Directive sets out minimum standards of reception conditions for asylum applicants. The aim is to ensure that the applicants have a dignified standard of living and that comparable living conditions are afforded to them in all Member States. At the same time, the Directive also limits asylum applicants' secondary movements.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:l33150

Asylum Procedures Directive 2013

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

The new asylum procedures Directive 2013/32/EU repeals Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status in European Union countries and sets up EU-wide procedures for granting and withdrawing international protection (refugee status and the protection given to people who are not refugees but who would risk serious harm if returned to their country of origin).

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:23010502_1

Qualification Directive 2011

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

The Qualification Directive establishes common grounds to grant international protection. Its provisions also foresee a series of rights on protection from non refoulement, residence permits, travel documents, access to employment, access to education, social welfare, healthcare, access to accommodation, access to integration facilities, as well as specific provisions for children and vulnerable persons.

http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0095

Dublin III Regulation 2013

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.

Regulation (EU) No 604/2013 (Dublin III Council Regulation), replacing Council Regulation (EC) No 343/2003 (Dublin II Regulation), lays down the criteria and mechanisms for determining which EU country is responsible for examining an asylum application.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:23010503_1

Return Directive 2008

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

This directive establishes common standards and procedures for EU countries, whereby illegally staying non-EU nationals may be removed from their territories. It lays down provisions for terminating illegal stays, detaining non-EU nationals with the aim of removing them and procedural safeguards.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:jl0014

Family Reunification Directive 2003

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

The purpose of this Directive is to determine the conditions under which non-EU nationals residing lawfully on the territory of EU countries may exercise the right to family reunification.

The Directive aims to establish common rules of law relating to the right to family reunification. The intention is to enable family members of non-EU nationals residing lawfully on the territory of the European Union (EU) to join them in the EU country in which they are residing. The objective is to protect the family unit and to facilitate the integration of nationals of non-member countries. The Directive does not apply to Denmark[15], Ireland and the United Kingdom. In addition, it does not preclude any more favourable conditions recognised by national legislation.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:l33118

15 On 3 December 2015, Denmark held a referendum to decide about ending its 'opt-out' of EU justice and home affairs policies, including the Family Reunification Directive. See: EuroActive, *Danish Prime Minister Announces Date for EU Referendum*, 21 August 2015.

Conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service 2004

Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

This Directive is to harmonise national legislation relating to the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:l33163a

Right of Union citizens and their family members to move and reside freely within the territory of the Member States 2004

European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

A European Union (EU) Directive on the right of EU citizens to move and reside freely within EU countries brings together the piecemeal measures found in the complex body of legislation that had previously governed this matter. The measures are designed, among other things, to encourage citizens to exercise their right to move and reside freely within EU countries, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, to limit the scope for refusing entry or terminating the right of residence and to introduce a new right of permanent residence.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:l33152

Brussels II bis Regulation 2003

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

The European Union (EU) has brought together in a single legal instrument the provisions on divorce and parental responsibility, with a view to facilitating the work of judges and legal practitioners and to regulating the exercise of cross-border rights of access. This regulation represents a major step forward in the fight against abductions of children.

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33194

Victims' Directive 2012

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JH

The Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime ensures that persons who have fallen victim of crime are recognised, treated with respect and receive proper protection, support and access to justice. The Directive replaces the 2001 Framework Decision on the standing of victims in criminal proceedings and considerably strengthens the rights of victims and their family members to information, support and protection and victims' procedural rights in criminal proceedings. The Directive also requires that the Member States ensure appropriate training on victims' needs for officials who are likely to come into contact with victims and encourage cooperation between Member States and coordination of national services of their actions on victims' rights.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029

Directive on combating the sexual abuse and sexual exploitation of children 2011

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

The European Union (EU) adopts legislation aimed at combating sexual offences committed against children. The Directive covers different aspects such as sanctions, prevention, and assistance for victims. Specific provisions are provided concerning child pornography on the Internet and sex tourism.

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:jl0064

Anti-Trafficking Directive 2011

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

Trafficking in human beings is considered one of the most serious crimes worldwide. This directive establishes rules across the European Union to address this phenomenon. The EU Anti-trafficking Directive broedened the definition of trafficking in human beings and provisions for victim protection and compensation.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444940491483&uri=URISERV:jl0058

Residence permits for victims of human trafficking 2004

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

Residence permits of temporary duration may be issued to non-EU nationals who are victims of trafficking in human beings or (optionally) the subject of an illegal immigration action. It is hoped that this will encourage them to cooperate with the competent authorities whilst providing them with adequate protection.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444940491483&uri=URISERV:l33187

European Commission Communications, Resolutions and Action Plans

EU Action Plan on Unaccompanied Minors (2010-2014)

Communication from the Commission to the European Parliament and the Council of 6 May 2010 – Action Plan on Unaccompanied Minors (2010 – 2014) COM(2010) 213 final

This action plan provides a common approach to tackling the challenges relating to the arrival in the European Union (EU) of large numbers of unaccompanied minors. The action plan is based on the principle of the best interests of the child.

http://eur-lex.europa.eu/legal-content/EN/TXT/qid=1444940190901&uri=URISERV:jl0037

EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016

The Strategy sets out measures and actions to support the implementation of the 2011 EU Anti-Trafficking Directive. It is structured around the following priority areas: Identifying, protecting and assisting victims of trafficking; strengthening prevention; increased prosecution; enhanced coordination and cooperation among key actors; and increased knowledge of and effective response to emerging concerns related to all forms of trafficking in human beings.

http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0286

EU Migration Policy 2011

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 4 May 2011, COM(2011) 248

The Commission presents a set of measures aimed at establishing a comprehensive European migration policy, founded on greater solidarity between Member States and enabling the European Union (EU) to respond better to the challenges presented by migration.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:jl0059

Migration and development 2005

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - migration and development: some concrete orientations COM(2005) 390

Migration is recognised as a powerful - though challenging - development vehicle in both the country of origin and destination. As a global phenomenon, it cannot be managed by the EU alone, and to identify common interests and challenges, the EU dialogues with partner countries, including countries of origin and transit.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:l14166

Policy Plan on Asylum 2008

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 June 2008 – Policy Plan on Asylum: An integrated approach to protection across the EU [COM(2008) 360 final – Not published in the Official Journal].

This policy plan provides the road-map for completing the second phase of the Common European Asylum System (CEAS). It is based on a three-pronged strategy that focuses on the harmonisation of protection standards, practical cooperation and solidarity.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:jl0002

European Pact on Immigration and Asylum 2008

European Pact on Immigration and Asylum of 24 September 2008.

This pact is intended to be the basis for European Union immigration and asylum policies in a spirit of mutual responsibility and solidarity between Member States and a renewed partnership with non-EU countries.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:jl0038

Establishment of the European Asylum Support Office 2010

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office

Regulation (EU) No 439/2010 establishes a European Asylum Support Office to strengthen cooperation between the Member States in this area and assist them in coping with crisis situations.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444941010485&uri=URISERV:jl0022

EU Agenda for the Rights of the Child 2011

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 15 February 2011 – An EU Agenda for the Rights of the Child COM(2011) 60 final

This Agenda presented by the Commission aims at strengthening the promotion and protection of the rights of the child by implementing the principles laid down in the Charter of Fundamental Rights of the European Union (EU) and international standards in this field. It consists of a series of actions intended to foster an increase in the attention paid to the well-being and protection of children in Union policies.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444940190901&uri=URISERV:dh0006

Combating trafficking in human beings, the sexual exploitation of children and child pornography 2000

Communication from the Commission to the Council and the European Parliament on combating trafficking in human beings and combating the sexual exploitation of children and child pornography.

In its fight against human trafficking, the European Union has proposed introducing effective measures to address the whole trafficking chain of recruiters, transporters, exploiters and clients.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444940690662&uri=URISERV:l33089b

Search for missing or sexually exploited children 2001

Council Resolution on the contribution of civil society in finding missing or sexually exploited children

The European Commission considers combating the disappearance of children a priority. Through this resolution, it aims to encourage cooperation between civil society organisations and the competent authorities in finding missing or sexually exploited children.

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444940690662&uri=URISERV:l33171

Eurodac

Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Regulation.

The objective of this regulation is to establish a system for comparing fingerprints of asylum seekers and some categories of illegal immigrants. It will facilitate the application of the Dublin II Regulation, which makes it possible to determine the European Union (EU) country responsible for examining an asylum application.

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33081

Index

After-care adulthood 68
Alternatives to detention 89
Asylum 10; 28; 42; 51; 52; 55; 58; 68; 69; 78; 87; 89; 103; 104; 113; 117; 118
Best interests 20; 21; 22; 23; 24
Best interests' determination 22
Children on the move 10; 15; 16; 46; 97; 121
Children's House 27
Committee on the Rights of the Child 8; 18; 19; 20; 21; 22; 23; 24; 30; 35; 40; 42; 49; 50; 51; 52; 53; 58; 64; 65; 70; 73; 75; 77; 86; 87; 89; 90; 98; 99; 102; 103; 104; 105
Contact between children and parents 94
Council of Europe Convention on Action against Trafficking in Human Beings 25; 72; 77; 83; 102; 104; 105; 112
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 43; 102; 103; 104; 107; 112
Data protection 56
Deprivation of liberty 97
Detention 11; 66; 86; 87; 88; 89; 90; 93; 94
Durable solution 98
EU Anti-Trafficking Directive 13; 25; 43; 56; 83; 97; 104; 116
EU Asylum Procedures Directive 52; 103; 104; 113
EU Brussels II bis Regulation 20; 28; 29; 32; 34; 38; 43; 57; 85; 109; 115
EU Directive on combating sexual abuse and exploitation of children 115
EU Dublin III Council Regulation 20; 31; 51; 63; 74; 75; 76; 103; 104; 114
EU Family Reunification Directive 114
EU Qualification Directive 20; 55; 61; 113; 114
EU Reception Conditions Directive 52; 59; 60; 104; 113
EU Return Directive 20; 52; 78; 79; 82; 88; 100; 114
Eurodac 51; 118; 119
European Asylum Support Office 52; 58; 118
European Union Agency for Fundamental Rights 7; 53; 55; 113
Evaluation 2; 68; 90; 91
Exploitation 11; 12; 14; 15; 16; 29; 43; 55; 96; 102; 103; 104; 107; 112
Family assessment 48
Family reunification 31; 69
Family tracing 48; 58; 59; 60
Hague Convention 28; 32; 33; 38; 39; 54; 85; 110; 111
Information 48; 51; 58
Integration 81
International Organisation for Migration 9; 35; 81; 92; 99
Interpretation 24
Mediation 32
Monitoring 11; 14; 15; 16; 92; 93; 94
Multi-disciplinary inter-disciplinary 52
Reintegration 80; 81; 83; 92; 99; 100; 101
Resettlement 64; 73; 98
Resilience resiliency 16
Return 20; 52; 54; 60; 66; 76; 77; 78; 79; 80; 81; 82; 83; 84; 86; 88; 91; 92; 93; 94; 99; 100; 101; 110; 114
Risk; 2; 6; 11; 16; 22; 29; 30; 48; 62; 63; 86
Trafficking 2; 7; 10; 11; 13; 14; 15; 16; 20; 23; 25; 26; 43; 52; 55; 56; 64; 70; 71; 72; 73; 77; 83; 96; 97; 102; 104; 105; 112; 116
Training 33; 44
UN Convention on the Rights of the Child 6; 7; 8; 9; 14; 15; 16; 18; 20; 22; 28; 35; 36; 37; 39; 40; 42; 45; 48; 49; 50; 52; 59; 62; 64; 65; 69; 70; 71; 72; 73; 74; 75; 77; 78; 79; 82; 85; 86; 94; 96; 98; 102; 104; 105; 106
Unaccompanied 15; 20; 24; 28; 48; 50; 52; 54; 55; 60; 61; 64; 66; 68; 70; 78; 79; 80; 81; 83; 88; 92; 98; 99; 116
Undocumented 82
UNICEF 2; 7; 22; 23; 30; 35; 37; 41; 52; 57; 58; 64; 70; 71; 72; 73; 74; 90; 96; 98
United Nations High Commissioner for Human Rights 35; 68; 72; 98
United Nations High Commissioner for Refugees 7; 10; 11; 23; 24; 30; 31; 35; 39; 43; 45; 52; 58; 62; 64; 68; 69; 74; 87; 89; 90; 91; 98
Victim 14
Victims' Directive 115

List of Boxes

Children in international migration movements: Global estimates and figures 10

Child trafficking: Definition and concept 13

Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration 19

The best interests of the child in national law – An innovative example from Finland 19

The best interests' principle in European laws and policies 20

Elements of a best interests' assessment and determination process in transnational cases 23

International guidance on best interests' determinations 23

Right to consular assistance 25

Good practice examples of inter-disciplinary cooperation for best interests' assessments and determinations 26

Promoting national and transnational social service cooperation: The Child Protection and Adoption Service in Lithuania 27

Committee on the Rights of the Child: General Comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration 29

Transnational family mediation: A good approach for balancing the best interests of the child and parental interests in international family disputes 31

Access to information, technical assistance and specialised expertise 33

Committee on the Rights of the Child: General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin 33

Establishing and transferring jurisdiction: Rules and regulations under the EU Brussels II bis Regulation and the Hague Conventions 34

Recommendations for creating trust 34

The use of communication technology and video recording for taking evidence 36

Hearing children at court: Advice from judges 36

The 'participatory rights' of children 37

The Children's Rights Bureau: Legal advice and support for children on the move in Sweden 39

Strategic litigation to strengthen case law on the best interests of the child 39

Children leaving care and reception places without informing the authorities 41

Quality care for children on the move 45

Basic human rights principle: Access to the territory 45

Age assessments 46

Guardianship in EU law and policies 49

Recommendations from professionals 50

International information gathering in the context of court hearings 52

EU Reception Conditions Directive 53

Transposition of the EU Victims of Crime Directive 62

The principle of non-refoulement 66

EU policies and positions on return 67

Assisted Voluntary Return through IOM 70

Readmission agreements 71

Minimum standards that states must respect in cases where migrant children are detained 74

Immigration detention in EU law and policies 76

A monitoring tool rooted in the UN Convention on the Rights of the Child and the best interests of the child 78

The Council of the Baltic Sea States (CBSS) has a long-standing history promoting children's rights, including for children who move within countries or across borders. Children make up a significant proportion of the flow of international migration into Europe, within the European Union and in other regions of the world. Children move accompanied or unaccompanied, with or without legal travel documents, as refugees and asylum seekers, as independent or economic migrants.

Safe migration may offer important opportunities for the well-being and development of children. Many child migrants are however exposed to harm during the journey and at destination, and some die on the journey from dehydration, malnourishment, suffocation or transportation accidents or drown at sea. Children face violence at the hands of persons they encounter in transit and at destination, including employers, transporters, smugglers and traffickers. They also experience significant levels of indifference or abuse by professionals in countries of origin, in transit and in the place of arrival, including when being returned.

All girls and boys on the move are rights holders, regardless of the context of child migration and if the child's experiences can be 'categorised' as economic migration, family reunification, asylum seeking or trafficking. Children on the move have the right to be safe, to access quality education, health and medical care, and to develop their skills and capacities to the full. Children who have been exposed to violence and exploitation have a right to be recognised as victims of crime and to access justice.

These Guidelines explore challenges and opportunities in safeguarding the human rights of the child in transnational child protection work. They discuss the steps in the case management and care planning for children on the move that involve the cooperation of authorities and service providers across borders. The Guidelines provide a synthesis of the experience, knowledge and evidence shared by key officials and professionals in the expert consultation series in the framework of the project Child Exploitation: Cross-National Child Protection in Practice - 'PROTECT Children on the Move'. The work of governments, organisations and agencies is another important reference for the Guidelines. The Guidelines are inspired by an understanding of the principle of the best interests of the child that is holistic, child-centred and rights-based.

Council of the Baltic Sea States Secretariat, 2015
www.childcentre.info
www.cbss.org

Co-funded by the European Union