



**Out of the Frying Pan into Despair:**

## **Family Reunification Problems of Refugees**



**By Eda DOĞAN**

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Supervisor: **Nagy BOLDIZSÁR**

**Budapest, Hungary**

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## Executive Summary

The right to family life has an important place in European human rights law and refugee law. It is hard for refugees to settle their lives without having their families, as they need support from them. They are concerned about their family members left behind in their home country, even when they have safety and protection in Europe.<sup>1</sup> The issue gets even more sensitive for separated children who need the support of their families; without their families, they lack safety and support. However, the lack of certain family definitions, except the nuclear family which is defined (spouse and children) cause problems in the reunification process. The right to a family life cannot be completely provided to the extended family members by the states in their sovereign powers.

This thesis examines the family reunification problems of refugees with a focus on return the scope of the family unit (analyzing the family definition under various concepts together with related problems such as length, immigration tools and document requirements). The objective of this thesis is to provide solutions to the family reunification problems by interpreting the various case-laws (mainly the European Court of Human Rights), legislation and states' implementations.

A universal family definition should be recognized and it should, at least, include extended family members. Furthermore, states should be obliged to pay not minimum but maximum necessary attention to refugee families. States should apply family reunification regarding the facts, special circumstances, and cultural variations, economical and emotional factors.<sup>2</sup>

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<sup>1</sup> The European Convention on Human Rights Article 8§1

<sup>2</sup> Adopted at the expert roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, in the context of the Global Consultations on International Protection (Geneva, Switzerland, 8-9 November 2001).

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Finally, I would especially like to thank my family for the support they always give me. And especially to my mum, who ignored her tears, respected my choices and put blankets and warm clothes in my backpack every time I left to work in an asylum seekers centre. Of course thanks to my dad as well, *who could never understand why his daughter did not become a lawyer in a private law firm*, but still listened to my never-ending stories for days.

I am also grateful to David Karas for his patience, endless supports and passwords without which I could not have reached all the possible e-journals in the world. And more importantly, I owe my apologies to my dear 8-years-old cousin Burcum, *who has decided not to write a thesis in her lifetime after watching the last days of this thesis process*, for the early damages caused by me in her future academic career.

However this thesis would not have been coherent as it is now, without all the things I learned during my internships and voluntary works at the Netherlands Markelo Asylum Seekers Centre (AZC), International Catholic Migration Commission (ICMC) Istanbul and United Nations High Commissioner for Refugees (UNHCR *BO Ankara*)

**And most importantly; this thesis would not exist without all the asylum seekers and refugees who passed through my life. They were thinking I was helping them. But the truth is they were helping a young fellow to draw her way to the future. This thesis is dedicated to all the asylum seekers and refugees who passed through my life with their great smiles and warm hands.**

## Abbreviations and Acronyms

<b>ACHR</b>	American Convention on Human Rights
<b>ACHPR</b>	African Charter on Human and Peoples' Rights (also known as the Banjul Charter)
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>CCR</b>	Canadian Council for Refugees
<b>COE</b>	Council of Europe
<b>CRC</b>	Convention on the Rights of the Child
<b>CSRP</b>	Protocol relating to the Status of Refugees of 31 January 1967
<b>DNA Testing</b>	Deoxyribonucleic acid Testing
<b>Dublin II Regulation</b>	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
<b>ECHR</b>	Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Right
<b>ECtHR</b>	European Court of Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>EMN</b>	European Migration Network
<b>ESC</b>	The European Social Charter
<b>EU</b>	European Union
<b>EURODAC</b>	European Dactyloscopie
<b>EXCOM</b>	Executive Committee of the High Commissioner's Programme
<b>FGM</b>	Female genital mutilation
<b>HRC</b>	United Nations Human Rights Committee
<b>HRW</b>	Human Rights Watch
<b>LGBT</b>	Lesbian, gay, bisexual, and transgender
<b>NGO</b>	Non-Governmental Organization

<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>Refugees Convention 1951</b>	The United Nations Convention Relating to the Status of Refugees
<b>Social Policy Convention</b>	Convention Concerning Social Policy in Non-Metropolitan Territories
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations International Children's Emergency Fund
<b>Yogyakarta Principles</b>	Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity
<b>The UNESCO Universal Declaration on Cultural Diversity</b>	The United Nations Educational, Scientific, and Cultural Organization Universal Declaration on Cultural Diversity
<b>ILO</b>	International Labor Organization
<b>IOM</b>	International Organization for Migration
<b>IRC</b>	International Rescue Committee
<b>PA</b>	Principal Applicant
<b>Policy on Refugee Children</b>	UNHCR Policy on Refugee Children
<b>RSTP</b>	Refugee Sponsorship Training Program
<b>Temporary Protection Directive</b>	COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
<b>1967 Protocol</b>	1967 Protocol to the 1951 Geneva Convention



## Introduction

*“You know, Papa left us with Mama. He won’t be coming back. I’ve prayed a lot for him to come, but he won’t. Now I have to look for another Papa.”*

Child separated from his father by slow family reunification processing.<sup>3</sup>

“Il me manque vraiment tellement,”<sup>4</sup> said the man, talking about a decrepit photo of a little boy he removed from his purse. In a chilly summer night in a refugee center in Holland, a refugee man from the Ivory Coast told his story. He looked as if he were in his mid-50s, although he claimed to be 34-years-old. He had been an asylum seeker for the last eight years. His wife and son were refugees in France, and he was waiting to join them. I just wanted to say something to comfort him so I said, “I know it is hard and I know you miss them BUT...” and he interrupted my sentence saying, “NO, don’t say it, every single word, and every single sentence starting with *BUT* is meaningless. Please do not talk to me unless you have a sentence that does not use that word, because I am so fed up with hearing that word. Just listen to me, just listen how I suffer here. It is enough for me because I know that you will not be able to do anything either, so please just listen to me and let me speak my language for a while.”<sup>5</sup>

Another refugee, the eldest son of Irénée, who has been waiting to be reunited with his wife and six children in Canada, asked one of the officials if the Canadians themselves could accept being separated from their families for 2-3 years.<sup>6</sup> Family reunification is an important issue both for refugees and for states. For refugees already going through hard times, the separation from family members becomes another psychological burden. This thesis will

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<sup>3</sup> More Than A Nightmare. CANADIAN COUNCIL FOR REFUGEES, 2004. source: <http://www.ccrweb.ca/nightmare.pdf>, (accessed: 30 November 2008).

<sup>4</sup> French: I really miss him.

<sup>5</sup> Personal experience of the author, Netherlands Markelo Asylum Seekers Centre, July, 2006.

<sup>6</sup> Campaign for Speedy Family Reunification. source: <http://www.ccrweb.ca/reunificationen.html> (accessed 29 November 2008).

focus on the problems of refugees who are fed-up with hearing the word “*but*” while they are waiting to be reunited with their families.

The right of everyone to enjoy their private life and family life is protected under many international and regional human rights instruments.<sup>7</sup> The European Convention on Human Rights (ECHR) protects the right to respect for family life under Article 8, while the Civil and Political Covenant article 23, and Economic, Social and Cultural Covenant article 10 (1) protect family and also oblige the states to protect the right to respect for private and family life under Article 8. The report of the 32<sup>nd</sup> Session of the United Nations states that: “*in application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.*”<sup>8</sup> It is clear from the report that the limit for the enforcement of this right is the phrase “every effort,” which can also be interpreted as permitting states to exercise their own authority in enforcing this right.

Regarding the family reunification of refugees, the definition of family is central. The Family Reunification Directive, one of the main instruments in the field, limits family reunification to the nuclear family members of lawful resident third country nationals excluding the different members of the family. These limitations of the nuclear family limit the right of family reunification<sup>9</sup>. On the other hand, it is also to the state’s benefit to provide family reunification to refugees. Refugees integrate better in society when they are with their families. States should also note that providing the reunification is also in their best interest.

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<sup>7</sup> Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and Articles 17 and 23 of the International Covenant on Civil and Political Rights, Article 10 of the International Covenant on Economic, Social and Cultural Rights; Article 9 of the Convention on the Rights of the Child; Article 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and Article 16 of the Universal Declaration of Human Rights, Article 7&33 European Social Charter

<sup>8</sup> Report of the 32<sup>nd</sup> Session: UN Document A/AC.96/601, para 57-4.

<sup>9</sup> Clare McGlynn: *Families and the European Union, Law, Politics and Pluralism* (Cambridge University, Cambridge 2006) p. 28.

(UNHCR Note, 1999) The court looks at the scope of the families as they balance the compelling interests of the state and the refugees (H Lambert, 2009).<sup>10</sup>

The fundamental dichotomy is that states proved willing to comply with an increasing corpus of international agreements to guarantee refugee rights to family reunification, yet they are also reluctant to relinquish their own discretion in deciding which claims are legitimate. Thus, there is a tension between the application of international human rights and state sovereignty that has led to unsatisfactory jurisprudence trying to adjudicate between these two extremes. The aim of this paper is to review the deficiencies of the existing system and plead for better implementation of binding international human rights tools as it has become clear that the present system frequently sacrifices refugees' rights for the sake of state sovereignty. In effect, a series of questions arises from the existing status quo: Do the problems relative to family reunification cause a violation of the right to respect of family life (Article 8 of the ECHR)? If yes, how does it violate these rights? Should everyone in the family be recognized as eligible for family reunification? If all alleged members of a "family" should be afforded equal status and rights, how shall one limit the scope of the very concept of family? Who is to decide who is a legitimate member of a family, and where families end? Should the Convention of the Child (CRC) be regarded as an appropriate binding tool for family reunification?

I will analyze this problem along six chapters. The first chapter will define the common meanings of the terms that are central to explain for the aims of this thesis. While the refugee definition is explained, family definition will be first explained under its common meaning, then the question of "what is the definition of family under international law?" will be explained replying to the question of "why should the refugee family be protected?"

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<sup>10</sup> Helene Lambert. *The European Court of Human Rights and the right of refugees and other persons in need of protection to family reunion*: International Journal of Refugee Law, July 1, (1999).

The second chapter presents the legal framework and historical context of the legislation, which includes international law and soft law, such as UN instruments and documents of the United Nations High Commissioner for the Refugees (UNHCR). First, it will explore family unity as a principle, and then it will specifically analyze the right to respect for family life. Finally, it will frame family unity and the right to respect for family life within the right to family reunification. The need to interpret this right will be explained with further instruments, as it is not specifically mentioned in the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention). Subsequently, the most important instrument, the Directive on the right of third country nationals legally staying in a Member State to family reunification (Family Reunification Directive) of the European Union (EU), will be analyzed on the grounds of its shortcomings. The case of *European Parliament v. Council of the European Union* (case C-540/03) will be put in perspective with the above mentioned problems and shortcomings.

The third chapter moves away from an analysis of legislation in order to address the most vulnerable people of the family unit: children and refugee mothers. Goodwin- Gill, references to the UNHCR handbook in the chapter named “children as asylum seekers”. The authors review the legal status of the children of an asylum seeker through the UNHCR handbook on Procedures and Criteria for Determining the Refugee Status. They conclude that the required elements mentioned in the 1951 convention to be able to grant a refugee cannot be applied to a refugee child as their circumstances are completely different because of their needs and the international standards for the protection of the children.<sup>11</sup>

First third chapter examines the grounds for providing special protection to children under current legislation, especially based on the Convention on the Rights of the Child (CRC), and it explains these regulations within the aim of protecting children. Second, it

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<sup>11</sup> Guy S. Goodwin-Gill and Jane McAdam: *The Refugee in International Law, Children as Asylum Seekers*, (Oxford University Press, Oxford, 1996) pp. 356-358.

explores the vulnerability of refugee mothers and argues that they should be provided with specific protections, similar to children. Subsequently, this claim will be explored through the existing case-law.

In the fourth chapter, I shall review the core problems of family reunification. James Hathaway notes that: “*international law constrains the scope of a state’s right to define family for itself only in a minimalist way.*”<sup>12</sup> in his book “*The Rights of Refugees under International Law*”. Thus, this chapter will attempt to broaden this minimalist approach of the states and it will argue for the desirable extension of the nuclear family definition. For this reason, it will be argued that adult unmarried children, adult and minor siblings, same-sex partners, unmarried and registered partners, polygamous marriage spouses, elderly family members, other less closely related family members such as uncles, aunts, nephews and nieces. While these categories of people will be analyzed in detail, cultural diversity will be the back-up argument for redefining the scope of the families, such as polygamous couples, same-sex couples or elderly independent members of the family. From a liberal perspective, it should also be noted that the dependency criteria which states use as a requirement to acknowledge families outside of the scope of nuclear families will not be necessarily protected for these arguments. As the family definition is argued to be extended as much as possible, the criteria of dependency, which I believe restricts the definition to the minimum grounds, will be ignored on all the possible grounds. Cultural diversity is used to justify polygamous couples. I will argue for recognition of polygamous couples if they are already married when one of the spouses gets refugee status. The idea of cultural diversity also applies to the recognition of same-sex couples. However, the recognition of same-sex couples will be also grounded on the recognition of unmarried or registered partners. It should be noted that this thesis does not argue that the family definition should be removed and that states should take for granted the

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<sup>12</sup>James C. Hathaway: *The Rights Of Refugees Under International Law* (Cambridge University Press, London, 2005) 553.

statements of refugees, and let every possible person that claims that he is a refugee get refugee status. What will be argued here is that the concept of family should be re-defined or in other words “the nuclear family should include the people who will be analyzed in this chapter”. I will attempt to explain why I believe the definition of family should be governed by law, why the definition should be universally recognized, why it would be safer to institutionalize this definition, and why the criteria, such as dependency, should also be governed by law.

The fifth chapter will underscore the problems posed by the state’s discretion and the limits of positive obligations of the states to ensure the unity or reunification of families. These obligations will be viewed in light of Paragraph 5 of General Comment 19 of the UN Human Rights Committee of 1990 on “Protection of the family, the right to marriage and equality of the spouses” which reads as:

When State parties adopt family planning policies; they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.<sup>13</sup>

Finally, in the sixth chapter, I will inquire as to whether an extension of the definition of family membership is sufficient for solving these problems. Procedural delays, document requirements and the DNA test application will be framed as additional problems obstructing the family reunification of refugees.

It should also be noted that this paper will not analyze asylum seekers in detail with respect to the protection of asylum seeker families. It is not because their right to a family should be ignored, but rather because asylum seeker status and its consequences are issues outside the scope of the present study. It should be noted that asylum seekers do not have certain futures, and for this reason, it is hard to provide family reunification when it is not

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<sup>13</sup> UN Human Rights Committee, “General Comment No. 19: The Family” (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 149 §.5.

known where they will reside or, more importantly, if they will reside in the hosting country. However, “Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national” (Dublin II) will be analyzed within possible protections that can be afforded to asylum seeker families or individuals who want to reunite with their families in the hosting states.

This thesis attempts to analyze possible family reunification problems in the field. In a broad sense, today there are various studies and academic documents regarding the subject of this paper. However it is common knowledge that international law, especially human rights law, and its instruments are not static. They change through time. For this reason, the need to explore the problems never disappears. Existing sources do not contain recent case law and their interpretations, just as this paper will soon be outdated and will not contain the most relevant case law. Researcher need to investigate this issue through new cases over time.

## CHAPTER I What and Who?

### I.1. What is a family?

*“The happiest moments of my life have been the few which I have passed at home in the bosom of my family.”* Thomas Jefferson

Family: **1.** A group of persons connected by blood, by affinity, or by law esp. within two or three generations. **2.** A group consisting of parents and their children. **3.** A group of persons who live together and have shared a commitment to a domestic relationship<sup>14</sup>.

Anna P. Copeland and Kathleen M. White, the authors of the book *“Studying Families”*, note the difficulty of defining the term “family” under the chapter entitled “What is a Family?” At first glance, this may seem to be an easy question, and, according to the writers, the simple answer would be “the mother, father and the children.”

Enormous social change in the past several decades has raised new questions about what constitutes a family. It has challenged traditional definitions. Social change has dramatic consequences on the family reunification problems of the refugees. The strict definition of a nuclear family is discussed by several authors who have come to the conclusion that the very term “family” did not exist until the eighteenth century<sup>15</sup>. I argue that international law should take into account the tremendous socio-political transformations that the concept of family underwent recently. It is crucial to point out that the “family” establishes the smallest unit of society and that that society is affected by family values.<sup>16</sup>

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<sup>14</sup> Bryan A. Garner (ed.): *Black’s Law Dictionnary 8th edition* (Thomson/West, St Paul, MN, 2004).

<sup>15</sup> Hathaway. *op. cit.*, p. 536.

<sup>16</sup> UNHCR Note on Family Protection Issues, EC/49/SC/CRP.14, June 1999, point 16: “the family unit has a better chance of successfully...integrating in a new country rather than individual refugees. In this respect, protection of the family is not only in the best interest of the refugees themselves but is also in the best interests of the States.” available at: [http://www.ecre.org/resources/ECRE\\_actions/270](http://www.ecre.org/resources/ECRE_actions/270), (accessed 21 November 2008).



The United Nations Human Rights Committee does not define a family, as it notes that the concept of family may differ from state to state, and even from region to region within a state, and that it is therefore not possible to give the concept a standard definition:<sup>17</sup>

It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, **adult unmarried children, unmarried or registered partners** as well as, in the event of a **polygamous marriage, minor children of a further spouse** and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation.<sup>18</sup>

What are different definitions that countries could use? As it is noted in the book “*Studying Families*”, it is a complex issue for a researcher to state who shall be included in the term “family.” Considering the wide scope of potential answers, the question remains: what normative definitions do countries use in their domestic legislation? Who do they consider legitimate to be included in the concept of family?

The legal protection or measures a society can provide to families can differ from state to state and it depends on various social, economic, political, and cultural conditions and traditions. Nevertheless, these protections and measures afforded by states should not violate the non-discrimination principle and equal protection should be provided for these people. Thus the protection of family unity should not vary with the sexual orientations of couples.<sup>19</sup>

As mentioned above, states use different definitions. While some do not accept the broader definition of a family and stick to the traditional nuclear family definition, some have flexible approaches, like recognizing same sex marriages, which will be further discussed.

<sup>17</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/45139bd74.html> (accessed 28 March 2009).

<sup>18</sup> COUNCIL DIRECTIVE 2003/86/EC of 22 September 2003 on the right to family reunification available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF> (accessed 1 September 2009).

<sup>19</sup> Nihal Jayawickrama: *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence* (Cambridge Press, Cambridge 2002) p.767.

## I.2. Who is a refugee?

The word refugee is a technical term whose meaning follows from its use in general international law<sup>20</sup>. The everyday understanding of the word, which is not as specific, indicates someone who is attempting to escape from a dangerous or life-threatening situation. “It is not important where the refugee is trying to get to, only that they mean to escape the intolerable situation in which they find themselves.”<sup>21</sup>

According to the 1951 Convention relating to the Status of Refugees:

Refugee is the one who is owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>22</sup>

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<sup>20</sup> Black’s Law Dictionary defines refugee as *A person who flees or is expelled from a country esp: because of persecution and seeks haven in another country.*

<sup>21</sup> Guy S. Goodwin-Gill and Jane McAdam, *op. cit.* p.3.

<sup>22</sup> Article 1 of the Convention relating to the Status of Refugees Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

## Chapter II. International Law and Family Reunification of Refugees

### II.1. Legislation of Refugees

Article 14 of the Universal Declaration of Human Rights created the right to seek asylum in another country because of persecution in 1948.<sup>23</sup> But what is persecution? Following this article, two years later on 28<sup>th</sup> July 1951, the 1951 United Nations Convention Relating to the Status of Refugees came into effect. The term persecution was defined in this convention at the universal level.

With the adoption of the Convention, there occurred a noticeable increase in geopolitical instability in many parts of the world. This change was due to the process of decolonization, which eventually led to a growing number of refugees worldwide, bringing the problem of refugee status on top of state's agendas.<sup>24</sup>

The 1951 Convention is described as the “*cornerstone of modern international refugee law*”<sup>25</sup> and, together with its 1967 Protocol, is currently used for the protection of refugees. However the convention was “*silent on gender-based crimes and family reunification or the particular needs of refugee women and children.*”<sup>26</sup> The need to go deeper into international human rights law is particular important when it comes to family reunification, as there are not any specific rules for family reunification in the refugee convention. The details are explained below under the family reunification legislation. As will be discussed below, the existing international treaties treat family reunification and refugee status as if they were two separate issues.

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<sup>23</sup> ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’

Universal Declaration of Human Rights, UNGA Resolution 217 A (III), 10 Dec. 1948, Art. 14§1.

<sup>24</sup> Paul Weis: *The Refugee Convention, 1951: The Travaux Préparatoires Analysed* (Cambridge International Document Series Volume 7, Grotius Publications, 1995) p. xi

<sup>25</sup> Hathaway. *op. cit.*, p.91

<sup>26</sup> Summary Record of the 540th Meeting Held at the Palais des Nations, Geneva, on Thursday, 7 October 1999, at 10 a.m EXCOM Reports, 12 October 1999.

## II.2.Right to Family Unity Under International Law

In 1947, the Convention Concerning Social Policy in Non-Metropolitan Territories<sup>27</sup> brought protection to the family unit regarding the needs of worker families in areas such as “*food and its nutritive value, housing, clothing, medical care and education.*”<sup>28</sup>

However, there was no other specific legislation protecting family unity until the Universal Declaration of Human Rights (UDHR). For the UDHR, the right to family unity was not the primary concern of states, even though it was discussed in 1947. The first proposal for Article 16 during the *travaux préparatoires* of the UDHR opened the way to “family protection” against unjustified interferences.<sup>29</sup> However, these provisions were narrow and only aimed at protecting the institution of marriage by stating, “*Everyone has the right to contract marriage in accordance with the laws of the state.*” One can easily find the reasons for not having a particular “family definition” in the UDHR by looking at the *travaux préparatoires* of the UDHR. Strong opposition emerged between the cultural values of Muslim and Western countries which would explain the reason for the lack of a family definition.<sup>30</sup>

After several debates between states, the final article reads:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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<sup>27</sup> No. 82 - Social Policy (Non-Metropolitan Territories), 1947.

<sup>28</sup> Article 9 Para 2: 2. In ascertaining the minimum standards of living, account shall be taken of such essential family needs of the workers as food and its nutritive value, housing, clothing, medical care and education.

<sup>29</sup> Stephanie Lagoutte and Agust Thor Armason, *Article 16* in Gudmundur Alfredsson and Asbjørn Eide (eds.): *The Universal Declaration of Human Rights: a common standard of achievement* (Kluwer Law, Cambridge MA 1999) p.326

<sup>30</sup> *Ibid.*

Clare McGlynn points out to this lack arguing that the lack of family definition can be interpreted to the nuclear family as the UDHR referred to “the” family however she comes to the conclusion that protection is for everyone;

Thus, in a declaration that protects the rights of individuals we can see that broader social units, families are also to be cherished and respected. This is confirmed by Article 29(1) which states that everyone has duties to the community in which alone the free and full development of his or [her] personality possible.<sup>31</sup>

Likewise, questions regarding the definitions of the “protection of society” and the “protection of the state” arose as a result of Paragraph 3. The UDHR did not set benchmarks for protection. As a result, later conventions extended and defined the scope of protection.

The UDHR started a trend towards the protection of family unity within states’ powers. After the adaption of the UDHR in 1948, the family was recognized as the fundamental unit of society.

Three years later after the adoption of the UDHR, on 4 November 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights (ECHR)) was signed by Member States and came into effect in September 1953. Respect for family life was guaranteed under Article 8, along with the right to respect for private life<sup>32</sup>. There was neither family definition nor specific details regarding the scope of family life. Thus, limitations to and justification of state interference were more detailed compared to the protection of the UDHR, which merely stated that: *“Everyone has the right to the protection of the law against such interference or attacks.”*

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<sup>31</sup> Clare McGlynn Families and the European Union: law, politics and pluralism (Cambridge University Press, 2006) p.13

<sup>32</sup> Article 8. Right to respect for private and family life: 1 everyone has the right to respect for his private and family life, his homeland his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The ECHR formulated situations where states can interfere with family unity. Article 8 (2) lists the valid grounds for interference:

- a. In accordance with the law.
- b. Necessary in a democratic society.
- c. In pursuance of a legitimate aim – i.e. protection of national security, public safety, economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, for the protection of rights and freedoms.
- d. Proportionate to the aim.

In 1961, the European Social Charter brought protection to family life with Article 16, repeating that family is the fundamental unit of society and thus contracting parties are under an obligation to protect family life.<sup>33</sup>

In 1966, two Covenants brought special protections to the family unity as inspired by the UDHR<sup>34</sup>. The first paragraph of Article 10 of the International Covenant on Economic, Social and Cultural Rights stated that: *“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”*

The first paragraph of Article 23 of the International Covenant on Civil and Political Rights also defined the family as the natural and fundamental unit of society entitled to protection by society and the State. ICCPR Article 17 and Article 23 protect the right to find a family and the right to marry. Directly inspired by Article 16, with some minor differences,<sup>35</sup>

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<sup>33</sup>European Social Charter Turin, 18.X.1961 Article 16 – The right of the family to social, legal and economic protection With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

<sup>34</sup> International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, 16 December 1966.

<sup>35</sup> Lagoutte and Arnason state that Article 23 of CCPR mentions exactly the same rights as Article 16 yet there are two differences: 1. *The equal rights of the spouses were formulated more realistically considering the domestic laws of the states as it was seen impossible to have the same standards for the strict equality of rights of couples.* 2. *Children was also protected under the convention in cases of divorces. Therefore both legitimate and illegitimate children would be protected.*

the CESPR differs as much as it puts greater emphasis on the social and economic protection of family together with defining these rights in a more detailed manner.<sup>36</sup>

The Convention on the Rights of the Child also contains provisions relevant to family reunification.<sup>37</sup> The first Paragraph of Article 10 states: “in obligations of States Parties under Article 9, the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner.”<sup>38</sup>

In 1969, the American Convention on Human Rights (ACHR) used the same exact terms as the previous provisions for the protection of family unity.<sup>39</sup> However, the provisions of Article 17 evoke the first version (during the *travaux préparatoires*) of Article 16 of the UDHR. It seems to be more focused on the “right to marriage” and considers marriage as the essential part of setting a family. It should be noted that children born out of wedlock are protected under the ACHR.<sup>40</sup> The ACHR also gave rise to the provisions of responsibilities of family members within the family unit. Under Chapter 5 on personal responsibilities, Article 32 “*Relationships between Duties and Rights*” pointed out the importance of responsibilities of family members towards each other.<sup>41</sup>

In 1975, for the first time, EXCOM No. 1 (XXVIII) emphasized the severity of family reunification in stating that: “*members of refugee families should be given every opportunity to be reunited by being allowed to leave their country of origin.*”<sup>42</sup>

<sup>36</sup> Aldredson and Eide (eds.), op. cit., p.344.

<sup>37</sup> Campaign for Speedy Family Reunification. <http://www.ccrweb.ca/reunificationen.html> (accessed 29 November 2008).

<sup>38</sup> The Convention on the Rights of the Child Art. 10 (1): In accordance with the obligations of States Parties under article 9, paragraph 1, 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. [...]

<sup>39</sup> Article 17. (1): The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

<sup>40</sup> Article 17§5: 5.The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

<sup>41</sup> ... 1. Every person has responsibilities to his family, his community, and mankind.

<sup>42</sup> Executive Committee, Conclusions NO. 1 (XXVIII) 1975, ESTABLISHMENT OF THE SUB-COMMITTEE AND GENERAL (f).

In 1977, the importance of family reunification was reiterated specifically by EXCOM No. 9 on family reunification.<sup>43</sup>

In 1979, EXCOM went a step further and stated that family reunification should be guaranteed at least be held for “*the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted.*”<sup>44</sup>

In 1981 the EXCOM conclusion stated the importance of family unity in the times of large-scale influx.<sup>45</sup>

In 1981, the African Charter on Human and Peoples’ Rights (ACHPR) also brought specific provisions to family unity. As mentioned above, the UDHR was the cornerstone for future conventions in setting up provisions and instruments for the protection of family unity. Different from the several related instruments, the ACHPR did not even mention the term “marriage.”<sup>46</sup> Inspired by the American Convention on Human Rights, the ACHPR conferred the responsibilities of family members within the family unit.<sup>47</sup>

In my opinion, the ACHPR is the most significant example of this evolution of family protection under the human rights instruments, as Article 18 prohibited discrimination against women and children. Protection of the elderly and the disabled was also included within the same article. However the ACHPR is vague in its definition of the family unit. While the first paragraph of Article 18 defines the family as the natural unit and basis of society and states that the family shall be protected by the state. Protection of the elderly and the disabled is also guaranteed by paragraph 4 of the same article. Thus, one would not be

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<sup>43</sup> Executive Committee No. 9 (XXVIII) FAMILY REUNION.

<sup>44</sup> Executive Committee No. 15 (XXX) REFUGEES WITHOUT AN ASYLUM COUNTRY Sec (e).

<sup>45</sup> Executive Committee No.22 (XXXII) PROTECTION OF ASYLUM-SEEKERS IN SITUATIONS OF LARGE- SCALE INFLUX Sec (h) *Family unity should be respected.*

<sup>46</sup> Alfredsson and Eide (eds.), op. cit., p. 350.

<sup>47</sup> Article 27 (1) 1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

Article 29 (1) The individual shall also have the duty: ... to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;



wrong to assume that elderly and disabled people are indirectly included within the family definition under the ACHPR, regardless of their potential dependence on relatives.

In 1988, Article 17 was extended with the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights in the “Protocol of San Salvador.” The Additional Protocol is more detailed on family unity compared to the instruments mentioned previously. It does not only define and guarantee the protection of family unity; it also requires special obligations for the social benefits of the mothers<sup>48</sup> and children regarding their educational concerns.<sup>49</sup>

In 2000, Article 7 and Article 33 of Charter of Fundamental Rights of the European Union<sup>50</sup> mostly designed the legal, economic and social protection of families including the “paid maternity leaves” of parents however there was still no specific definition for the family<sup>51</sup>. It is surprising that the Charter ignored the changes in the society and also the need to adopt specific definitions for the members of the family. Instead the charter followed the same protection clauses with UDHR which was drafted exactly 52 years before the charter<sup>52</sup>.

### II.3. International Law and Family Reunification

In the Refugee Convention there is no specific provision protecting family reunification, as the drafters thought that family members would also be recognized as refugees even if they are not recognized as refugees under the term “fear of persecution.”<sup>53</sup> During the *travaux préparatoires* of the refugee convention in 1951, states avoided giving any specific protection to the family unit. They conceived of the family unit as the fundamental

<sup>48</sup> ... a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;

<sup>49</sup> To guarantee adequate nutrition for children at the nursing stage and during school attendance years;

<sup>50</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01).

<sup>51</sup> Article 33: 1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

<sup>52</sup> Article 7: Respect for private and family life: Everyone has the right to respect for his or her private and family life, home and communications.

<sup>53</sup> Hathaway, op. cit., p.541.

unit of society. States claimed that family law could not be put in a scope, as it varies with the customs, history and domestic laws of a country.<sup>54</sup>

In 1951, realizing the lack of family reunification provisions in the field, the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons<sup>55</sup> adopted protection for minors and unaccompanied children and girls, with special reference to guardianship and adoption.<sup>56</sup>

However UNCHR recommendations and conferences were only recommendations which left much to the discretion of individual states and there was still no binding provision for the reunification of refugee families<sup>57</sup>. As mentioned in the previous chapters, states have too wide of a scope for applying the UNHCR's recommendations. This topic will be widely analyzed under the chapter of "States' Positive Obligations."

Meanwhile, legal instruments such as resolutions, declarations of the UN, statements, principles and all the other non-treaty obligations, also known as soft law, have been developed in the field. However, due to legislations and concerns, the development of this issue can be seen clearly by referring the speech from the American Immigration Conference in 1958, when some states began to revise their humanitarian policies. Australia adopted a family reunification scheme for families who were inadmissible due to health problems but had sponsor relatives in Australia. New Zealand declared that it was ready to grant refugee

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<sup>54</sup> Dr Paul Weis states that Turkey and France supported the Israeli representative's suggestion in point of that the concept of personal status would be determined by the law and customs of each country, with due regard to the preparatory work of the Convention. See Weis, op. cit., p. 90.

<sup>55</sup> Latter this conference was declared as customary law.

<sup>56</sup> RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country:

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption." UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, available at:

<http://www.unhcr.org/refworld/docid/40a8a7394.html> (accessed 15 June 2009).

<sup>57</sup> UNHCR Guidelines on the Protection of Refugee Women Legal publications, 1 July 1991

<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d4f915e4&query=%20family%20%20reunification> (accessed 23 August 2009).

status for up to 20 families, including handicapped refugees. Canada was noted to consider reunification in some significant cases where close family members had been rejected under immigration criteria. Finally, the United States made it easy for refugees to reunite- most surprisingly even if the relative was affected by tuberculosis- a very serious problem at the time.<sup>58</sup>

Article 74 of the Additional Protocol 1 of 1977 to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 1949 emphasized the importance of the reunion of families stating that :“ *...the high contracting parties and the parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts.*”

In 1977, the Executive Committee adopted a conclusion specifically dealing with family reunification.<sup>59</sup> Not surprisingly the conclusion was too general, and thus did not completely solve the problem.<sup>60</sup> Several states kept applying restricted rules. Therefore, the UNHCR asked states to work together in order to solve the main issue, namely to facilitate the reunification of refugee families. The UNHCR recommended another liberal approach that was to include at least the “*economically dependent*” family members within the reunification of the family, pointing out the fact that the “*economic and social viability of the member of the family remains dependent on the main family nucleus.*”<sup>61</sup> Only two months later, after publishing the note on family reunification in October 1981, the Executive Committee

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<sup>58</sup> Statement by Dr. Auguste R. Lindt, United Nations High Commissioner for Refugees, to the United Nations Economic and Social Council (ECOSOC), Geneva, 20 July 1995 source: <http://www.unhcr.org/3ae68fb714.html>, (accessed 16 September 2009).

<sup>59</sup> The Executive Committee of the UNHCR Programme - 28th Session (1977): The Executive Committee, (a) Reiterated the fundamental importance of the principle of family reunion; (b) Reaffirmed the coordinating role of UNHCR with a view to promoting the reunion of separated refugee families through appropriate interventions with Governments and with intergovernmental and non-governmental organizations; (c) Noted with satisfaction that some measure of progress has been achieved in regard to the reunion of separated refugee families through the efforts currently undertaken by UNHCR.

<sup>60</sup> Note on Family Reunification International Protection (SCIP), 13 August 1981 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68cd48&query=%20family%20%20reunification> (accessed 17 October 2009).

<sup>61</sup> *Ibid* . See Conclusion (e).

adopted the EXCOM conclusions on family reunification. Differing from the previous regulations, the liberal approach was described as “*to identify those family members who can be admitted with a view of promoting a comprehensive reunification of the family.*”<sup>62</sup>

UNHCR, HC Statement dated 28 November 1980 recommended the diffusion of a more liberal approach left the strict nuclear family definition, as recommended by the UNHCR, pointing out that minimum protection should be the granting of refugee status to all nuclear family members.<sup>63</sup>

In 1983, the UNHCR Guidelines on Reunification of Refugee Families was adopted. The nuclear family was defined as a husband and wife, parents, and children. This makes clear that adult and single children who are dependent on their families should be reunited as well.<sup>64</sup> It was also recommended that certain additional individuals should also be eligible for family reunification: dependent parents of adult refugees and other dependent relatives and other dependent members-lacking biological ties- of the family unit. In discussions the development of the reunification right of families in international concept law, it is important to add that, in 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted a special provision for the family reunification of migrant families.<sup>65</sup>

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<sup>62</sup>Executive Committee No. 24 (XXIV), Family Reunification, 21 October 1981 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68c43a4&query=%20family%20%20reunification> (accessed 8 November 2009)

<sup>63</sup> Report by Paul Hartling, United Nations High Commissioner for Refugees, on The International Symposium of Diakonisches Werk of the Protestant Church in Germany, in cooperation with the International Union for Inner Mission and Christian Social Work, under the auspices of the United Nations High Commissioner for Refugees in Geneva, 28 November 1980 source: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68fb04&query=%20family%20%20reunification> (accessed 20 September 2009).

<sup>64</sup> *Ibid*, p.iii

<sup>65</sup> Article 44§1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers. 2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children. 3. States of employment, on humanitarian

In 1991, the Guidelines on the Protection of Refugee Women again reinforced the fact that the reunification of families separated during flight was still a burning issue calling for proactive measures by states by highlighting the importance of the lack of male member of the family as girls and women of the family are especially potential victims of physical abuse and rape when they are separated from male members during the chaos of flight or when the male member dies<sup>66</sup>.

Additionally, 1997 was an important year for the asylum policies of states. The adoption of the Amsterdam Treaty would be an essential ground to new regulations on family reunification in the following years<sup>67</sup>. On 15-16 October 1999, political guidelines on policies and legislations regarding asylum and immigration were adopted in a summit in Tampere, Finland.<sup>68</sup>

As setting the minimum standards on asylum policy was the objective, family reunification issues were discussed within below legislative instruments. The following key instruments were also adopted in relation to family reunification within the EU:

- Temporary Protection Directive in July 2001
- The Dublin Convention<sup>69</sup> (1990) and the Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II)
- Family Reunification Directive in September 2003

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grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

<sup>66</sup>§32 UN High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, July 1991, available at: <http://www.unhcr.org/refworld/docid/3ae6b3310.html> (accessed 3 September 2009).

<sup>67</sup> Agreed by the European Union's political leaders on 17 June and signed on 2 October 1997, is the culmination of two years of discussion and negotiation in a conference of member state government representatives. It has now entered into force after being ratified by the fifteen member states of the European Union under their respective constitutional procedures.

<sup>68</sup> Special Meeting of the European Council in Tampere, 01.09.1999.

<sup>69</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (1990) OJ 1997 C 254/1.

- Qualification Directive in April 2004

II.3.ii. Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national” (Dublin II)<sup>70</sup>

The Dublin II regulation was criticized as insufficient by states and authorities. Claiming that Dublin does not raise protection concerns, states found there to be an absence of common evidentiary standards and compatible procedures for Dublin cases between the EU Member States. Additionally, they claimed that the convention did not distribute responsibility on an equal basis between the states, and instead, Member States with external borders received more responsibility in differentiating asylum claims. More importantly, the regulation was criticized for not providing the necessary protection, such as proper counseling or material assistance, to the family unit.<sup>71</sup> Finally, but not surprisingly, the regulation kept the family definition limited to nuclear family members.

Family unity issues in Dublin II will be widely analyzed below.<sup>72</sup>

1. If an unaccompanied minor wants to reunite with a member of his/her family in the Dublin II area,<sup>73</sup> then the hosting state of the family member shall examine the application of the unaccompanied minor regarding the child’s best interest (Article 6). However, in the 2006 report of the UNHCR, it is shown that although Member States are under the obligation to provide for the best interest of an unaccompanied minor, states do not

<sup>70</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national  
OJ 2003 L 50/1

<sup>71</sup> An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR, *European Series, Vol.1, No.3* European Series, 1 September 1995 p.26 source: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=46e65e1e2&query=%20family%20%20reunification> accessed 20 September 2009

<sup>72</sup> Dublin II available at: [http://www.asylumlaw.org/firstaid/dublin\\_ii/#article8](http://www.asylumlaw.org/firstaid/dublin_ii/#article8) (accessed 4 November 2009)

<sup>73</sup> It is important to point out the fact the states bound with Dublin II: Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Spain, United Kingdom, Slovakia, Slovenia, Sweden, Norway and Iceland.

apply the obligation in the same manner. States keep using their discretion, as it is clearly demonstrated in the case of an Iraqi asylum seeker, who was a 16-year-old unaccompanied minor. He arrived in Finland via Greece and Sweden and registered as an unaccompanied minor in Finland. It was also seen that he also registered as an unaccompanied minor in Sweden<sup>74</sup>. Sweden asked Greece (his first entry state) to take back the minor. The states involved did not take the applicant's age into consideration, stating that the applicant was mature proven by the fact that he could travel alone all the way from Iraq to Finland. The applicant was finally transferred back to Greece regardless of his best interest which was to be in Finland where he already travelled all way long as an unaccompanied minor.<sup>75</sup>

2. If there are multiple family members applying with the minor, states should evaluate the applications regarding the family unity principle under Article 14<sup>76</sup>. However, states fail to apply this provision completely, and the failure to do so during the application process may cause family separation. This can be seen in the case of an Armenian family whose application was rejected by Germany. The father was sent back to his country, leaving his family behind in Germany. Later, he returned to Europe and went to Belgium and filed another application in Belgium with his family. Belgium asked Germany to take back all of the family members. However Germany only accepted the mother and the children, stating

<sup>74</sup> By the system of Eurodac which requires fingerprints of asylum seekers for the comparison of fingerprints for the effective application of the Dublin Convention. For more see: 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.

<sup>75</sup> The Dublin II Regulation A UNHCR Discussion Paper April 2006 Pg: 23 Illustration 6 [http://refugeelawreader.en.mediacenter8.hu/index.php?option=com\\_docman&task=doc\\_view&=&gid=874&lang=en&ml=5&mlt=system&tmpl=component](http://refugeelawreader.en.mediacenter8.hu/index.php?option=com_docman&task=doc_view&=&gid=874&lang=en&ml=5&mlt=system&tmpl=component) (accessed 19 March 2009).

<sup>76</sup> Article 14: Where several members of a family submit applications for asylum in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to them being separated, the Member State responsible shall be determined on the basis of the following provisions:

(a) responsibility for examining the applications for asylum of all the members of the family shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of family members;

(b) failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.

that the father was sent back to his country of origin. Finally, Belgium accepted the family all together for the protection of family unity.<sup>77</sup>

3. If a member of an asylum seeker's family, such as a spouse or natural and adopted children, has been recognized somewhere in the Dublin II area, the Member State is obliged to determine the family's reunification eligibility and examine the application of the asylum seeker in terms of the family reunification principle of refugees (Article 7). It is important to highlight the fact that the family member in the host state must be defined as refugee under the 1951 Refugee Convention to benefit from the protection under Article 7.

4. If a member of an asylum seeker's family is still in the asylum process somewhere in the Dublin II area, then the Member State is also obliged to provide family reunification and examine the asylum seeker's claim and all the family members' claims (Article 8).

5. If the members of the same nuclear family separate during their flight enter different Member States and lodge their applications in different states, Article 9 should be applied for the sake of family reunification and one of the hosting states should take responsibility and examine all of the applications from the family members. Thus, this is not a definite obligation for the states as the regulation did not bring any explanations for the family members applying for asylum in different states at the same time.<sup>78</sup> The UNHCR suggested that Member States should adopt guidelines for these kinds of situations under Article 9, both for the benefit of family members and for the states, as it would be easier for states to examine joint applications.<sup>79</sup>

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<sup>77</sup> *ibid* A UNHCR Discussion Paper April 2006 Pg: 34.

<sup>78</sup> An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR, *European Series, Vol.1, No.3* European Series, 1 September 1995 pg:29.

<sup>79</sup> Implementation of the Dublin Convention: Some UNHCR Observations WorldWide Operations, 1 May 1998 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43662e1b2&query=%20family%20%20reunification> (accessed 16 November 2009).



6. If the asylum seeker is not a nuclear family member or his/her application falls outside of the refugee scope and he/she does not apply for asylum but applies for reunification with the family member, then states may examine the application, but they are not under an obligation to do so. In this case, the application will be analyzed under the humanitarian clause based on family or cultural concerns only if the family member gives his/her consent to the reunification (Article 15). It should be noted, however, that this humanitarian clause is under Member States' sovereignty and they are not obliged to apply it.<sup>80</sup>

### **II. 3. Directive on the right of third country nationals legally staying in a Member State to family reunification. (Family Reunification Directive)<sup>81</sup>**

*“Chapter IV of the Amsterdam Treaty, which was added on 1 May 1999 aimed to provide an area of freedom, security and justice to the asylum and immigration policies for the purpose of family reunification.”<sup>82</sup>* Latter, following this process The Council Directive 2003 was politically approved on 28 February 2003 and adopted on 22 September 2003 after several amendments.<sup>83</sup> The aim of the directive was to protect third-country nationals who hold a residence permit valid for at least one year, or refugees, to be reunited with their families through the family reunification procedure. Thus, the directive did not broaden the scope of the family and limited the right to reunification to the applicant's spouse and legitimate,

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<sup>80</sup> European Council on Refugees and Exiles, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008, source: <http://www.unhcr.org/refworld/docid/47f1edc92.html> (accessed 21 August 2009).

<sup>81</sup> European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, 2003/86/EC, available at: <http://www.unhcr.org/refworld/docid/3f8bb4a10.html> (accessed 23 October 2009).

<sup>82</sup> K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers, T. Strik: *The Family Reunification Directive in EU Member States; the First Year of Implementation*, (Centre for Migration Law, Radboud University Nijmegen Nijmegen, Willem-Jan and René van der Wolf, May 2007) p.6.

<sup>83</sup> Amended Commission Proposal for a Council Directive on the Right to Family Reunification COM (2000) 624, OJ 27.2.2001 C62 and Amended Commission Proposal for a Council Directive on the Right to Family Reunification, COM (2002) 225, OJ 27.8.2002 C203.

natural and adopted children of the couple.<sup>84</sup> The Directive did not necessarily protect people outside the scope of the nuclear family, however it used the word “may” for the unmarried partners, adult dependant children as well as other dependent members thus states were again given the discretionary powers to define the family scope.

Unmarried couples, including homosexual couples, were said to be given the same rights as nationals of the state, if domestic laws protected unmarried couples.<sup>85</sup> The aim was to protect family unity under Article 8. The main reason for the adoption of the Directive was to set-up common rules of community law for the right to family reunification of third-country nationals residing lawfully on the territory of the Member States.<sup>86</sup> Persons enjoying refugee status within the 1951 Geneva Convention on the Status of Refugees and its 1967 Protocol (Arts 3 (1) and 9 (1)) are the targets of the Directive, as well as persons under temporary protection. However, persons benefitting from the subsidiary protection are excluded from the protection of the Directive.

### **II.3.i. European Parliament v. Council of the European Union<sup>87</sup>**

The European Parliament requested that the European Court of Justice review the legality of the Directive on Family Reunification on the basis that it failed to guarantee the protection of family and respect of family life under the European Convention on Human

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<sup>84</sup> The right of family reunification for third-country nationals recognised by a Directive Family reunification-European Commission Update: July 2006  
[http://ec.europa.eu/justice\\_home/fsj/immigration/family/fsj\\_immigration\\_family\\_en.htm](http://ec.europa.eu/justice_home/fsj/immigration/family/fsj_immigration_family_en.htm) (accessed 8 October 2009)

<sup>85</sup> Conclusions of the Tampere European Council: Bull. 10-1999, point 1.6.1  
<http://europa.eu/bulletin/en/9912/p105004.htm> (accessed 12 October 2009). For more see:  
<http://europa.eu/bulletin/en/200304/p104006.htm> (accessed 12 October 2009).

<sup>86</sup> Summaries of EU Legislation: Family Reunification  
[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133118\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133118_en.htm) (accessed 12 October 2009).

<sup>87</sup> Court of Justice Judgment of 27 June 2006 on the action for annulment brought by the European Parliament against the Directive (Case C-540/03), 26 June 2006, available at:  
<http://www.unhcr.org/refworld/docid/4a54bc1cd.html> (accessed 22 August 2009).

Rights and the UN Convention on the Rights of the Child.<sup>88</sup> By its application, the European Parliament sought the annulment of the final subparagraph of Article 4(1), Article 4(6) and Article 8 of the Council Directive.

Parliament submitted its concerns about the discretionary powers of states. The parliament held that certain provisions of the Directive could be interpreted as derogations from the states obligations and states could infringe upon fundamental rights by applying these provisions.<sup>89</sup>

The council submitted its defense, stating that states were obliged to apply the Directive respecting these fundamental rights.<sup>90</sup> The issue lay in the possible conflicts between national law and fundamental rights that could arise while interpreting the Directive. Thus, it was decided that the interpretation of the Directive was to be held within the rules of customary rules of interpretation.<sup>91</sup>

### **II.3.ii. Annulment of Article 4 §1<sup>92</sup>**

Parliament stated that the “condition for integration” should have been “objective of integration.” Concepts of integration, they stated, should have been defined in the Directive, not to restrict the family reunification.<sup>93</sup> States could interpret the term “condition for integration” within their national laws; however this would be inconsistent with the Best Interest of Child Principle, as it would complicate the family reunification of a child with its family.<sup>94</sup>

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<sup>88</sup> European Council on Refugees and Exiles, *Broken Promises - Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection. Tampere 1999 - Brussels 2004*, 1 June 2004, available at: <http://www.unhcr.org/refworld/docid/4124b3cc4.html>, (accessed 22 August 2009).

<sup>89</sup> *Ibid* §15.

<sup>90</sup> *Ibid* § Para 16.

<sup>91</sup> *Ibid* §Para 19.

<sup>92</sup> Article 4§1. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorizing entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

<sup>93</sup> *Ibid*. § 41.

<sup>94</sup> *Ibid*. § 40.

Parliament highlighted the fact that interferences with the right of family reunification could be justified under Paragraph 2 of Article 8 of the ECHR (Namely national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others). However, the Directive did not mention any of these legitimate objectives. Parliament aimed at preventing the creation of any other legitimate objectives, which would be justified under the interpretation of the Directive.<sup>95</sup>

This was not an illogical demand of the Parliament. The conflict between domestic law and fundamental rights has been an issue through history, not only for refugee rights or family reunification issues but also for the whole human rights field. Was it necessary to give states any other opportunities to give superiority to national laws?

As a counter argument, the Council argued the objectivity of the final subparagraph of Article 4(1) of the Directive, stating that the objective aim was to provide effective integration by encouraging migrant families to bring their children to hosting states before they reached 12-years of age.<sup>96</sup> Twelve was decided upon, as it was believed that integration of a child into the society would be easier<sup>97</sup> for minors below 12-years of age.<sup>98</sup>

Additionally, the issue of discrimination between spouses and children above 12-years old became another issue in the debate. While spouses were not asked for any conditions for integration, children over 12-years were asked for conditions for integrations. Parliament argued that it was the violation of prohibition of discrimination under Article 14 of the ECHR. On the other hand, it should be noted that the differentiation of the ages is also discriminating against children below and above 12-years-old. This was not irrational either, as the

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<sup>95</sup>*Ibid* § 42

<sup>96</sup>*Ibid* §47.

<sup>97</sup> Court referred to the decision of *Ahmut v the Netherlands*, judgement of 26.10.1996, Case no. 21702/93 and *Gül v Switzerland*, judgement of 19.02.1996, Case no. 559645/93.

<sup>98</sup>*Ibid* §47.

Convention on the Rights of the Child defines everyone under the age of 18 as children.<sup>99</sup> Thus, there was still no objective reason for states to discriminate against the children above 12-years-old who stood to benefit from family reunification.<sup>100</sup> The Council's response to the argument of discrimination between spouses and children was that: "*a condition for integration for the children over 12 years old was necessary as they would spend a greater proportion of their lives in the host Member State than their parents.*"<sup>101</sup> The court agreed with the commissions, and applied a different view that held that a minor over 12 would not live with the family for a long time; however a spouse would stay longer with the husband than the child would.<sup>102</sup>

The Council put forth the argument that the right to respect for family life is not equal to the right to family reunification. Can it be said that the right to family reunification was not considered at the same value of right to family life under Article 8?<sup>103</sup>

The court stated that the lack of definition of the concept of integration did not mean that states had unlimited powers to act contrary to fundamental rights.<sup>104</sup> The limitations of a 12-year-old were also stated as necessary for the best interest of the minor, as it would be difficult for a minor above 12-years-old to integrate in another society that (s)he was not used to.<sup>105</sup>

Therefore, it can be concluded that both the court and the commission put the secondary benefits toward children before the child's being with the family. The best interest of a child above 12-years-old is stated to be the well integration into society even if the minor is away from his or her family.

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<sup>99</sup> CRC Article 1 : For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

<sup>100</sup> Directive see *Ibid.* §44.

<sup>101</sup> *Ibid.* § 49.

<sup>102</sup> *Ibid.* § 75.

<sup>103</sup> *Ibid.* § 46.

<sup>104</sup> *Ibid.* § 70.

<sup>105</sup> *Ibid.* § 74.

Looking at the issue in another way, while the court aimed at protecting the minor's social ties within the locality, the court failed to consider the importance of family support during the adolescence period, which is a crucial period between the ages of 13-19:<sup>106</sup> *"the communication between adolescents and their parents may protect them from situations of risk, promote self-identity, and enhance adolescents' social competence with respect to their ability to voice their own opinions and emotions."*<sup>107</sup> The court did not consider the need of the family during adolescence as a crucial factor or related to and within the best interest of children. Clearly, the court ignores the famous saying of *"you don't have to suffer to be a poet; adolescence is enough suffering for anyone."*<sup>108</sup>

### II.3.iii. Annulment of Article (4) § 6<sup>109</sup>

Parliament submitted the same objections (infringes on the right to respect for family life and the prohibition on discrimination on grounds of age) toward paragraph 1 regarding the age limitations, this time before the age of 15. The Council again repeated that the objective was to encourage families to have their children come to their host country at a very young age, which would facilitate their integration into society. Thus, the limitation was legitimate and complied with the aim pursued under Article 8 (2) of the ECHR.<sup>110</sup> The age limit of 15 was described as reasonable, as there was a waiting period of 3 years in

<sup>106</sup>Ego Psychologists Erik Erikson defines this period as; *"During adolescence, the transition from childhood to adulthood is most important. Children are becoming more independent, and begin to look at the future in terms of career, relationships, families, housing, etc. During this period, they explore possibilities and begin to form their own identity based upon the outcome of their explorations. This sense of who they are can be hindered, which results in a sense of confusion ("I don't know what I want to be when I grow up") about themselves and their role in the world."* **Erikson, Erik H. (Erik Homburger)**, Identity, youth, and crisis, New York, W. W. Norton [1968]

<sup>107</sup> Frank Pajares and Tim Urdan (eds.): *International perspectives on adolescence* (Information Age Pub., Greenwich, Conn. 2003). p.85

<sup>108</sup> John Ciardi US poet (1916 - 1986).

<sup>109</sup> Article (4) § 6: By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorize the entry and residence of such children on grounds other than family reunification.

<sup>110</sup> § 79

Article 8 of the Directive and the issuing of residence permits to persons, who would reach the age of maturity during the waiting period, could be avoided by the institution of this age limitation.<sup>111</sup> The court agreed with the commission, stating that Member States are still obliged to examine the applications submitted by minor children under the effects of Article 4 (6), which authorized Member States to not apply the general conditions of the first paragraph.<sup>112</sup> However, the court failed to see the breach of Article 10 of the UNCR,<sup>113</sup> which obliged states to apply family reunification of a child with *positive, humane and expeditious manners*.<sup>114</sup>

### II.3. iv. Annulment of Article 8<sup>115</sup>

Parliament argued that the time restrictions of two years and three years of restricted the right to family reunification, and therefore should be annulled.<sup>116</sup> The council argued that these time limits were legitimate for the immigration policies of the states.<sup>117</sup> The court agreed with the council, stating that the mentioned time limits permit the Member States to apply their immigration policies in favorable conditions, and that the 3 year limit did not violate Article 8 of the ECHR.<sup>118</sup>

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<sup>111</sup> § 83.

<sup>112</sup> § 88.

<sup>113</sup> CRC Article 10: ... reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family. ..

<sup>114</sup> European Council on Refugees and Exiles, *Broken Promises - Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection. Tampere 1999 - Brussels 2004*, 1 June 2004, Pg: 14 available at: <http://www.unhcr.org/refworld/docid/4124b3cc4.html> (accessed 22 August 2009).

<sup>115</sup> Article 8: Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her. By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.

<sup>116</sup> §91.

<sup>117</sup> § 93.

<sup>118</sup> § 98.

## CHAPTER III. Most vulnerable members of the family: Children and Women

This chapter focuses on the two most vulnerable members of the family unit: children and women.<sup>119</sup> Refugee children suffer twice. On the one hand, just like other refugees, their rights were violated and on the other hand they are already the most vulnerable, as they are children, in a vulnerable population consist of refugees.<sup>120</sup> The protection of refugee children is often linked to “the best interest of the child principle.” The linkage between the principle and the family reunification of an unaccompanied minor will be explained through the family reunification of refugee children. Furthermore, this chapter will explicitly state the particular importance of the adoption process of an unaccompanied minor, arguing that adoption should be the last resort for the protection of the refugee children.

The purpose of this chapter is also to critically examine the situation of refugee mothers. Individual family members, especially mothers and women, may become very vulnerable during periods of family reunification. Refugee woman are more vulnerable when they are alone and without their families. Being a mother and leaving a child behind makes a refugee woman more vulnerable because of the psychological effects. Therefore, the need of women and mothers for special attention will be discussed to reduce the possibility of their facing violence and going through emotional problems during the family reunification process.

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<sup>119</sup> “A few well-known counter-intuitive facts of experience should be mentioned here. Despite the commonly assumed scale of vulnerability of different categories of refugees, going from children (most vulnerable), to women (the second most vulnerable category) to men (who are supposedly the least vulnerable group, who can the best fend for themselves and for their families), when it comes to adjusting to refugee life and coping with new situations, the scale or hierarchy are exactly the reverse.” Otto Hieronymi Refugee Children and their Future Refugee Survey Quarterly Advance Access published on August 1, 2008, DOI 10.1093/rsq/hdn058. Refugee Survey Quarterly 27: 6-25 , (2008:4).

<sup>120</sup> Statement by Mr. Dennis McNamara, Director, Division of International Protection, UNHCR: A Human Rights Approach to the Protection of Refugee Children (London School of Economics, 14 November 1998) DIP Statements, 14 November 1998 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=42a00a6c2&query=%20family%20%20reunification> (accessed 16 September 2009).



Finally, this chapter examines the lack of specific provisions for the protection of refugee mothers. Diana Zacharias states:

International humanitarian law contains a series of norms governing the protections available to mothers. Article 38 No. 5 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), in the context of the treatment of refugees, reads that pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.<sup>121</sup>

### III.1. “Children Are Our Future” but What about Their Present?: Family Reunification from the Perspective of the Child<sup>122</sup>

*"Sometimes I cry for my parents, when I see some girls or boys walking with their parents. I can feel that I don't have anybody in this world. I sometimes miss my mother when I am ill or hungry. I miss my father when I am ill or when I need someone to tell me stories. And I miss my sister and brother when I need someone to make fun."*

Kayi Da Silveira, 15, Togolese refugee in Ghana<sup>123</sup>

The concern and needs of unaccompanied children are investigated in several literatures concluding that unaccompanied minors are vulnerable and they need their families. Children lacking the support of their families under difficult conditions are affected in a significant level. Although it cannot be directly related to the situation of refugee children with their families, Fred Ahearn, focusing mainly on forced migration and separated children in his article, looks at the effects another perspective. The researches of Freud and Burlingham regarding “children Psychology during world war” showed that children evacuated from London during the bombing Blitz of World War II experienced greater emotional stress compared to the children who stayed with their families<sup>124</sup>. Ahearn Loughry

<sup>121</sup> Diana Zacharias., *The Protection of Mothers in British and German Constitutional Law: A Comparative Analysis and a Contribution to the Implementation of the European Convention on Human Rights in the Domestic Legal Area* GERMAN LAW JOURNAL (2008:1) [http://www.germanlawjournal.com/pdfs/Vol09No01/PDF\\_Vol\\_09\\_No\\_01\\_27-58\\_Articles\\_Zacharias.pdf](http://www.germanlawjournal.com/pdfs/Vol09No01/PDF_Vol_09_No_01_27-58_Articles_Zacharias.pdf).

<sup>122</sup> The title is inspired by the children chapter of the book of *Human Rights Lexicon*. Article is using the saying to explain that children should not be approached instrumentally. Their lives are shaped by the social and economic relations in which they are enmeshed and by the local, national, and global forces that intersect those relations.” Susan Marks and Andrew Clapham: *International human rights lexicon* (Oxford University Press, Imprint Oxford and New York, 2005) p.32

<sup>123</sup> Refugees Magazine Issue 95 (The international year of the family) - My family Refugees Magazine, 1 March 1994 <http://www.unhcr.org/3b53f2d64.html> (accessed: 10.11.2008).

<sup>124</sup> Dorothy T. Burlingham, Anna Freud, *War and Children* (New York, Medical War Books, 1943).

and Ager also define the separation of the children from their families as a clear reason for emotional disorders.<sup>125</sup>

The Geneva Conventions and the Additional Protocols consider the reunification of the child with the family as a fundamental guarantee.<sup>126</sup> Although the family is considered to be the most important basic unit of the society, many states such have put reservations regarding the CRC's articles that ensure the family unity.<sup>127</sup> According to the Policy on Refugee Children (1993), the UNHCR declares that: "preserving and restoring family unity are of fundamental concern" and asserts that "actions to benefit refugee children should be directed primarily at enabling their primary care givers to fulfill their principal responsibility to meet their children's needs."<sup>128</sup>

Legal instruments relating to the protection of children systematically refer to 'the best interests of the child.' The principle has also been the subject of extensive consideration in academic and operational literature. Article 3 of the Convention on the Rights of the Child defines the principle as:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest<sup>129</sup> of the child shall be a primary consideration.

The best interests of the child are different from the interests of adults. The best interests of the child should be provided with appropriate measures such as the family

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<sup>125</sup>Ahearn, F., Loughry, M., and Ager, A., 'The Experience of Refugee Children'. In A. Ager (ed.), *Refugees. Perspectives on the Experience of Forced Migration*. Pinter: London and New York, 1999.

<sup>126</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Article 4.3.b.

<sup>127</sup>UN Concluding Observations of the Committee on the Rights of the Child : Liechtenstein. Twenty-sixth session, 21/02/2001 CRC/C/15/Add.143.

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CRC.C.15.Add.143.En?OpenDocument> (accessed: 5 April 2009)

<sup>128</sup> Protecting Refugees, Field Guide for NGOS, 2003, Page 94, 95, Protecting Refugee Children and Adolescents.

<sup>129</sup> CRC, Art. 3(1): In all actions concerning children... the best interests of children shall be a primary consideration. ICCPR, Art. 24(1): Every child, without any discrimination, is entitled to measures of protection as are required by his status as a minor, on the part of his family, society and the State. ICESCR, Art. 10(3): Special measures of protection are to be taken on behalf of children without discrimination.

environment, education, physiological counseling, protection of the child, access to health and food.

The UNHCR Guidelines on Determining the Best Interests of the Child express that the protection of unaccompanied minors needs to identify the requirements of the children first, such as setting up mechanisms which are sensitive to the needs of an unaccompanied minor, such as the appointment of a guardian, the provision of temporary care and monitoring, refugee status determination, individual documentation, tracing, verification of family relationship, family reunification, and identification and implementation of durable solutions. The Guideline also adds that through these aims, the principle of the best interest of the child should be upheld. The best interest principle should be carefully examined and used to establish the necessary safeguards and mechanisms to strengthen the protection of children.<sup>130</sup> The UNHCR asks states to give particular attention to unaccompanied refugee children while they are waiting to be reunited with their families and affirms that adoption should only be considered when the family reunification of the child is not possible by any means.<sup>131</sup>

The judgment of *Görgülü v. Germany*<sup>132</sup> is a crucial case in understanding the court's point of view for family ties between parents and children and the interpretation of the best interest of the child. The applicant, of Turkish origin but residing in Germany, had an illegitimate son and he was no longer together with the child's mother. The baby was given up for adoption by his mother immediately after birth, and therefore the applicant lost touch with his son. Two months later, the applicant found out that his son was given to a foster family, and so he applied to adopt his son, especially as the mother of the child had no intention of seeking custody. However, the applicant was denied information about his son. In January

<sup>130</sup> UN High Commissioner for Refugees, UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html> (accessed 10 May 2009) Page: 13 (accessed 30 October 2008).

<sup>131</sup> UN High Commissioner for Refugees, Protection of the Refugee's Family, 8 October 1999, No. 88 (L) - 1999, available at: <http://www.unhcr.org/refworld/docid/3ae68c4340.html> (accessed 30 October 2008).

<sup>132</sup> ECtHR, judgment of 26 February 2004, No 74969/01, *Görgülü v. Germany*.

2000, the applicant applied to the court for the custody of his son, submitting proof of parentry, including as blood samples and a birth certificate. The district court decided to allow the applicant to see his son ‘*six consecutive Saturdays for first one, later two, then three, and then eight hours.*’ In the next proceedings, the district court was convinced that the applicant was willing and able to give his son a home and family, and thus granted the applicant sole custody, a move which was in the child's best interest. However, the district court later reversed its ruling and decided to give custody to the foster parents, suspending the applicant’s permission to see his son. The court reasoned that returning the child to his foster family was in the best interest of the child because “*a deep social and emotional bond was said to have evolved between the child and his foster family*”. The applicant claimed that it was a violation of Article 8. The ECtHR analyzed whether there was interference to the applicant’s rights under ECHR and, if so, whether the interference was prescribed by law. Following its analysis, the court stated there was an interference with the right, as applicant’s demand to have custody of his own son was rejected and it was prescribed by national law with the principle of best interests of the child.

The ECtHR continued analyzing whether the interference could be recognized as ‘*necessary in a democratic society.*’ The fair balance between the best interest of the child and his parents was discussed by the court. The conclusion highlighted the importance of the child’s health for balancing the interests.<sup>133</sup> Finally, the court upheld the violation of Article 8, giving priority to natural family ties by risking the child’s current psychology to avoid the possible long-term effects on child’s psychology in the future.

Regarding the suspension of the applicant’s right to see his son, the court referred to the margin of appreciation of states and declared that the state did not apply proportionality

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<sup>133</sup> *Ibid.* §43.

when restricting the parental rights of the applicant. Thus, the measures applied by the state could not be recognized as necessary in a democratic society.

The best interests of the refugee, if an unaccompanied child, should be family reunification. If the child has a family, reunification should be carried out, as the best interest of the child in these circumstances is to be with the family. This interest is protected under Article 22§2 by the CRC.<sup>134</sup> For family reunification and the protection of these children, the determination of refugee status is based on the best interest of the child. According to the UNHCR Guidelines, while identifying the best solution for unaccompanied minors, carefully balanced measures should be taken. Children can be significantly affected by decisions regarding family reunification, repatriation, resettlement and local integration. Therefore, best interest determinations should be carried out to make sure that the best interests of the child is protected regarding the possible fundamental and long-term impacts.<sup>135</sup>

*“Among refugee children, the most vulnerable are those who have been separated from their parents or usual guardian or care giver.”*<sup>136</sup> When a minor is unaccompanied and his/her family cannot be traced, there is an obligation on the part of the state to secure the adoption of the child if it is regarded as being in the child’s best interests under Article 20<sup>137</sup> (Protection of a Child without a Family), Article 21<sup>138</sup> (Adoption) and Article 22 (Refugee Children)<sup>139</sup> of the Convention on the Rights of the Child.

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<sup>134</sup> ...For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family”

<sup>135</sup> UNHCR Guidelines on Determining the Best Interests of The ChildPage: 39.

<sup>136</sup> UNHCR, Protecting Refugees: A Field Guide for NGOs - Produced Jointly by UNHCR and its NGO Partners Legal publications, 1 September 1999 Pg: 59

<sup>137</sup> Article 20(1): A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

<sup>138</sup> Article (21): States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall...

<sup>139</sup> Article 22(1): States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person...

Ultimately, the UNHCR's policy on adoption approaches family reunification of the child with real family members very carefully.<sup>140</sup>

It is UNHCR's policy that adoption should not be carried out if:  
 there is reasonable hope for successful tracing and family reunification in the child's best interests;  
 a reasonable period (normally at least two years) has not yet elapsed during which time all feasible steps to trace the parents or other surviving family members have been carried out;  
 it is against the expressed wishes of the child or the parent; or voluntary repatriation in conditions of safety and dignity appears feasible in the near future and options in the child's country of origin would better provide for the psychosocial and cultural needs of the child than adoption in the country of asylum or a third country.

The aim, as stated, is to protect the best interests of the child and provide “*for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding*” as it was stated in the preamble of Hague conference on the Convention on Protection of Children and Co-operation in Respect to Inter Country Adoption. Several safeguards were provided to prevent misuses of adoption. Most importantly, it was highlighted several times that a child should not be given up for adoption if there is a possibility of finding family members.<sup>141</sup> In my opinion, these provisions are wide-open. What is the definition of “reasonable hope” in this case? What if there is a reasonable possibility that states do not figure out? In one case, 14-year-old refugee girl and her family were going to Europe illegally and, during some transfer, the refugee girl found herself on another ship, while her family got caught on the internal seas of Greece. While the police came and took the family to the detention centre, the daughter managed to make it to Turkey. She arrived at the UNHCR branch office in Ankara and applied for asylum as she was advised to do so by other asylum seekers. Her family was somewhere in Greece

<sup>140</sup>UNHCR Policy on Adoption of Refugee Children Global Consultations, 1 August 1995 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3bd035d14&query=%20family%20%20reunification>

<sup>141</sup>Dixon-Fyle, Kanyhama: ‘*Children get lost; people stay behind to look after elderly parents or sick relatives; others may have been thrown into prison, have gone into hiding, or be lying in a mass grave. Or they may simply be in a different refugee camp a few kilometres away.*’ 1994, Putting the Family First. Geneva: United Nations High Commission on Refugees. [www.unhcr.ch/issues/children/rm09502.htm](http://www.unhcr.ch/issues/children/rm09502.htm). (accessed 9.11.2008).

but she did not know it.<sup>142</sup> Although she gave the names of her family members, it took a while to trace their whereabouts. In the meantime, her family was seeking asylum in Greece. They were not under the protection of the Convention and, thus, they were not granted their right to family reunification. What happens in a case like this? Should the girl be given up for adoption? If the family members are traced, should she be sent to Greece for reunification? Or should she stay in Turkey where she has a high risk of being deported? Furthermore, the UNHCR has paid necessary attention to the issue and the best interest of the child,<sup>143</sup> thus recognizing<sup>144</sup> that in these kind of involuntarily separation situations, the UNHCR should advocate for a flexible approach to family based protection. UNHCR recommend that a minimum period of two years must lapse before giving the minor for adoption. If it seems to be necessary and/or tracing seems possible in the light of the circumstances, then the period can be extended or reduced depending on the best interests of the child.<sup>145</sup>

In my opinion, judgment of *Görgülü v. Germany* is a valuable safeguard against the states' margin of appreciations that separates the child and the families. In other words, it can be said that the ECHR narrowed the margin of appreciation of states regarding natural family ties. After this decision was made, states should not deny family ties between a child and its parents by claiming that they belong to the people taking care of them rather than their families and the family ties no longer exist between families and the children.<sup>146</sup>

<sup>142</sup> This is the author's actual experience from a refugee status determination interview in Ankara UNHCR in 2004 (attended as an observer).

<sup>143</sup> [*..Thus, reunification with parents will generally be in the best interests of a child...*] Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum Para: 9.8 Legal publications, 1 February 1997 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d4f91cf4&query=%20family%20%20reunification> (accessed 17 July 2009).

<sup>144</sup> . .... *When refugee children are separated from their families, the separation often (but not always) occurs involuntarily and in circumstances such that the whereabouts and even the survival of the other family members is unknown to the child, and vice versa..*

<sup>145</sup> Recommendation Concerning the Application to Refugee Children and Other Internationally Displaced Children of the Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption adopted on 21 October 1994 Pg:26

<sup>146</sup> ECtHR See more: *Ahmut v. The Netherlands* p.84, *Sen v. the Netherlands* p.85

Finally, the African Charter on the Rights and Welfare of the Child states that a refugee child should be given all the possible care “*whether unaccompanied or accompanied by parents for their appropriate protection and humanitarian assistance*”<sup>147</sup>. Thus it can also be argued that the decision of *Görgülü v. Germany*, together with the related international legal instruments aiming at protecting the best interests of the child, can inspire the margin of appreciation of the state in the cases where the child is sent abroad by the family to be protected from persecutions, such as forced military recruitment, female genital mutilation<sup>148</sup> and forced child marriage. In these cases, states decide whether to apply the reunification for the unaccompanied child’s family. Some states, like Canada and Poland, do not accept the reunification of an unaccompanied child for fear that it encourages families’ to send their children abroad to benefit from the state’s protection and provide family reunification for his/her family down the line.<sup>149</sup> This restriction motive is not appropriate though states give priority to their immigration policies, but not to the unaccompanied minor. The restriction does not comply with international obligations for the best interest of the child and family reunification. In EXCOM conclusion No:84, UNHCR urges the states to prevent the separation of children and adolescent from their families and promote care, protection, tracing and family reunification for unaccompanied minors.<sup>150</sup> Therefore it is not acceptable even under the state’s margin of appreciation to leave a refugee minor alone without the support of his/her family and ignore the positive obligations for the protection of children.<sup>151</sup>

<sup>147</sup> Article 23: Refugee Children Para 2 AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

<sup>148</sup> FGM is accepted as grounds on asylum under the 1951 criterias as a valid reason for fear of persecution. A woman or a child alone can be considered a *refugee* if she or her daughter/s fear being forced to undergo *FGM* against their will.

<sup>149</sup> Erika Feller, Volker Türk, Frances Nicholson (eds,) *Refugee protection in international law: UNHCR's global consultations on international protection*, , Office of the United Nations High Commissioner for Refugees, (Cambridge: Cambridge University Press,2003) P: 560.

<sup>150</sup> EXCOM No. 84 (XLVIII) CONCLUSION ON REFUGEE CHILDREN AND ADOLESCENTS Sec (b) (i)

<sup>151</sup> Kate Jastram, Kathleen Newland, Family unity and refugee protection, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press Edited by Erika Feller, Volker Turk and Frances Nicholson Chapter: 9.1 Pg.563.



Furthermore, the ECtHR even protected the mutual relationship between children and their blind parents by rejecting the placement of a child in a public care on account of the parents' inability to provide them with adequate care and upbringing. In this recent decision, *Saviny v. Ukraine*, the court reiterated the importance of the relationship between a child and a parent concluding that the “*mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life.*”<sup>152</sup> By interpreting this decision, it should be noted one more time that reunification of children and parents should be of paramount interest to states, and thus states' immigration policies can not be accepted for suspending the family reunification of a child and parents.

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<sup>152</sup> ECtHR, judgment of 26 December 2008, No 39948/06, *Saviny v. Ukraine* . §:47

### III.2. Refugee Mothers and the Protection of Women's Rights through Family Reunification

*“Most mothers there had long ceased  
to care but not this one; she held  
a ghost smile between her teeth  
and in her eyes the ghost of a mother's  
pride as she combed the rust-coloured  
hair left on his skull and then -  
singing in her eyes - began carefully  
to part it...In another life this  
must have been a little daily  
act of no consequence before his  
breakfast and school; now she  
did it like putting flowers  
on a tiny grave.”<sup>153</sup>*

As mentioned in the introduction, the integration of refugees is important both for society and for the refugees themselves. Family reunification problems for a mother would make her integration harder into the third state, because the special protection that she may require may not be available. In some cases, refugee women risk their lives and attempt to go their home countries to rejoin their children. In another situation, a refugee woman who cannot support her children without her husband cannot try to go back to her country with her children in order to be able to take care of their children with the additional support of her

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<sup>153</sup> Chinua Achebe, Poem, Refugee Mother and A Child: Retrieved: <http://knowledge4africa.com/english-poetry/refugee-mother-b.htm>, (accessed 29 November 2008).

husband. Returning to her husband may also protect her from falling victim to traffickers.<sup>154</sup> To prevent these problems, in its conclusion Number 85, the UNHCR urged states to apply family reunification as soon as possible, especially in cases “*where the head of the family has been admitted as a refugee to another country.*”<sup>155</sup>

Consider this example, which was used in the Speedy Family Reunification Campaign. T, a refugee woman from the Democratic Republic of Congo arrived in Canada after fleeing from persecution without her children ages 2 and 7. She had to leave them while she was escaping. She was granted refugee status in June 2004. However, after more than three years, she is still waiting to be united with her children. The children are being taken care of by their old grandparents, even though they are not fit to be taking care of young children, at age 81 and 76.<sup>156</sup> In this case, how can it possible to say that the mother is specifically protected under Article 8? Here again, the role of special protection of refugee mothers plays a crucial role.

In sum, as a necessary protection, the acquisition of rights of refugee mothers under domestic or international laws are not based on specific protections, but rather follow simply and automatically from the fact of substantive satisfaction of Article 8. As Zacharias noted:

The ECHR does not fully reflect the ideas regarding the protection of mothers which are grounded in the universal human rights instruments. Article 8 of the ECHR protects the relationship between mother and child, Article 8 of the ECHR gives mothers a right to repel measures which would kill the child during the period of pregnancy, and Article 14 of the ECHR prohibits discrimination on the grounds of maternity and pregnancy. But none of these provisions acknowledge that the mother as such needs special protection. The ECHR does by no means privilege the status or function of the mother.<sup>157</sup>

<sup>154</sup> Jastram, Family unity and refugee protection in Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, Cambridge 2003) Pg. 555.

<sup>155</sup> EXCOM No. 85 (XLIX) - Conclusion on International Protection Sec (v) (v) *Recommends* that Governments take appropriate measures to ensure that the unity of the family is maintained, particularly in cases where the head of the family has been admitted as a refugee to a particular country;

<sup>156</sup> Campaign for Speedy Family Reunification. <http://www.ccrweb.ca/reunificationen.html> (accessed 29 November 2008).

<sup>157</sup> Zacharias *op. cit.*, p.14 §2.

## CHAPTER IV- A dark garment sewn with white cotton<sup>158</sup>: Definition of family

Being a refugee is a painful experience that often traumatizes both refugees and families. Refugees depend on one another for physical and financial support for their survival. During the flight or the journey till the hosting country, they may lose their family members and end up setting mutual relationships with other families thus the scope of the family members even varies on the basis of the refugee experience and family members expand from the nuclear family. In her book, *"Families and the European Union: Law, politics and pluralism"*, McGlynn noted that *"pluralism is the most intriguing theoretical solution to the jurisprudential challenges posed by the experience of European Integration"* thus she suggests that for the protection of the families; required approach should be on the grounds of pluralism, which should be more positive and constructive, thus to respect the diversities and differences of the family unit<sup>159</sup>. The UNHCR encourages states to have a flexible approach for these families while adopting culturally sensitive procedures.<sup>160</sup>

In the recent landmark case of *Singh v. Entry Clearance Officer*, the United Kingdom appellate immigration authority referred to human beings as social animals as they all depend on others, stating the metaphor as:<sup>161</sup>

Para 18: Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.

<sup>158</sup> Referring to the saying of Judge Sir Gerald Fitzmaurice in his dissenting opinion of the case *Marckx v. Belgium* §15.

<sup>159</sup> Clare McGlynn: *Families and the European Union, Law, Politics and Pluralism* (Cambridge University, Cambridge 2006) p. 22.

<sup>160</sup> UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries, and non-governmental organizations (NGOs), Geneva, 20–21 June 2001 Sec. I-c <http://www.unhcr.org/refworld/pdfid/4ae9aca12.pdf> (accessed 20 September 2009).

<sup>161</sup> Judgments - Huang (FC) (Respondent) v. Secretary of State for the Home Department (Appellant) and Kashmiri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals) SESSION 2006-07 <http://www.bailii.org/uk/cases/UKHL/2007/11.html> (accessed 7 August 2009).

This chapter will highlight the importance of the factors mentioned above arguing that they are affected by enormous changes in social and religious life over time, decreasing interest or belief in the institution of marriage, positive attitudes of society toward same-sex relations and, finally, by developments in reproductive science, such as having children via artificial insemination.<sup>162</sup> It then argues for the extension of the nuclear family. This paper's view is that the definition of family should go beyond the limits of the nuclear family as mentioned previously.<sup>163</sup> In her article, *Family Unity: The New Geography of Family Life*, Jastram underlines a variety of different conceptions of families and suggested that the “*best determination for the family definition should be determined on a case-by-case basis.*”<sup>164</sup> Thus, several case laws will be used in this chapter. There will be some immigration related cases but migration should not be confused with the concept of a refugee. In particular, I am using immigration related cases to show the court's view on the extension of the family definition.<sup>165</sup>

This chapter will discuss the possible extensions of family unit to include:

#### 4.1 Adult Unmarried Children

#### 4.2 Siblings

##### 4.2.3.Minor Siblings

<sup>162</sup> Singh v Entry Clearance Officer, Delhi [2004] EWCA Civ 1075; [2004] INLR 515Case 370/90 Para: 62.

<sup>163</sup> “Where diverse concepts of the family, “nuclear” and “extended”, exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.” UN Human Rights Committee (HRC), CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, Para 2 27 July 1990. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/45139bd74.html> (accessed 28 March 2009).

<sup>164</sup> Kate Jastram, *Family Unity: The New Geography of Family Life* May 2003, <http://www.migrationinformation.org/Feature/display.cfm?ID=118> (accessed 29 March 2009).

<sup>165</sup> Erika Feller, *Director, Department of International Protection United Nations High Commissioner for Refugees*, highlights the importance of the nuance between the term refugee and immigration stating that the confusion not only causes mistakes in terminology but also causes important problems for the distinctions between the migration control and refugee protection. For this reason, I find it important to state one more time that the aim of using the migration related cases in this thesis leans upon the aim of showing the court's point of view on family reunification and family unit. [Erika Feller *Refugees are not Migrants Refugee Survey Quarterly* 24: 27-35.].

#### 4.2.4. Adult Siblings

- 4.3 De facto same sex couples
- 4.4 Unmarried or registered couples
- 4.5 Polygamous marriages
- 4.6 Elderly family members
- 4.7 Other relatives

### IV.1. Adult Unmarried Children

*“The ECHR accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted “family life.”<sup>166</sup>*

One of the crucial cases where the definition of family was extended and applied for the benefit of an adult individual was the 1995 case of *Nasri v France*.<sup>167</sup> The conflict between public order and the right to a family was the central issue in this. The applicant, an Algerian national, who was born deaf and dumb in June 1960 in Algeria and was the fourth of ten children, one of whom is deceased and six of whom are French nationals. The state ordered his deportation, claiming him as a public threat to the community under domestic law. The issue was whether the expulsion or deportation of a foreigner would affect the relations of the applicant with his parents and siblings under Article 8. The court found a violation of Article 8. Thus, regarding the applicant’s being dependent on other family members; the “family” definition was extended to include parents and siblings, with this judgment accepting the adult unmarried child within the family definition.<sup>168</sup>

<sup>166</sup> ECtHR, judgment of 22 March 2007, No:1638/03, *Maslov v. Austria*

<sup>167</sup> ECtHR, judgment of 13 July 1995, No: 19465/92, *Nasri v France*

<sup>168</sup> §34: *Like the Commission and the Government, the Court takes the view that the execution of the impugned measure would amount to an interference with the exercise by the applicant of his right to respect for his family life.*

The case of *Boultif v. Switzerland*<sup>169</sup> developed the *Boultif Criteria*, which was applied in several later cases. The applicant was again an Algerian national who entered Switzerland with a tourist visa and then married a Swiss national. He was sentenced to prison for robbery and other minor offences during his stay, and thus his residence permit was not renewed by the state. Boultif claimed a violation of Article 8, stating that since his wife could not speak Arabic and did not have any cultural ties with Algeria, she could not be expected to join him if he were deported. The balance test was applied by the court, who took into account whether the applicant's crimes were sufficient to be defined as a "threat to the public order," and his potential deportation was the issue: "*The Court has held the 'Boultif criteria' to apply all the more so (a plus forte raison) to cases concerning applicants who were born in the host country.*"<sup>170</sup> Therefore the ECtHR ruled in his favor, held the violation of Article 8. The ECtHR protected the best interests of the adult child specifically considering the difficulties the applicant would face in case of deportation and the social, cultural and family ties within the hosting country<sup>171</sup>. It should be noted that the protection by the court did not specifically referred to the protection of family unit but it was also one of the decisive factors for the protection and it is important for the case of adult children as the family ties keep being important for the adult children as well. It should also be noted that the protection of family ties with an adult child and his/her family is not only for the child's benefit.

The recognition of adult children is not always solely for the benefit of the children, but also for the benefits of the parents. In some cases, the sponsor can be dependent on family members due to emotional and health issues. In the case of *Chengjie Miao v. Secretary of*

<sup>169</sup> ECtHR judgment, *Boultif v. Switzerland*, 54273/00, Council of Europe: European Court of Human Rights, 2 August 2001, available at: <http://www.unhcr.org/refworld/docid/468cbc9e12.html> (accessed 27 October 2009).

<sup>170</sup> *Ibid.* Maslov v. Austria § 58.

<sup>171</sup> Ján Šikuta, Eva Hubáľková, *European Court of Human Rights: Case-Law of the Grand Chamber 1998-2006* (Cambridge University Press, 2007) P.430.

*State for the Home Department*,<sup>172</sup> the main asylum claim of the applicant was rejected, yet he still wanted to stay in the United Kingdom to look after his father, a recognized refugee, who was suffering from chronic depression and post-traumatic stress disorder. The treating psychiatrist of the father also stated that the father would present a high suicide risk without the care of his son and daughter-in-law. In this case, the father was dependent on the married adult child and his wife who were not refugees. The appeal was allowed.

It should also be noted that, in some cultures, adult children are considered to be part of the family unit until they marry.<sup>173</sup> In several cultures, especially in Muslim cultures, girls are expected to stay under the roof of their families until they marry. Thus, they remain dependent on their family, regardless of their occupations. In some cultures, especially in small villages or tribes, girls can be brought up "*traditionally, totally unprepared intellectually*" and "*without any knowledge of life in the city, highly disciplined working conditions or production standards.*"<sup>174</sup> An adult child raised in such an environment cannot be expected to be left alone without family support. Regarding these cultural diversities, adult children should be included within the family concept without any restrictions.

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<sup>172</sup> Neutral Citation Number: [2006] EWCA Civ 75 Case No: C5/2005/1819 IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL <http://www.bailii.org/ew/cases/EWCA/Civ/2006/75.html> (accessed 7 October 2009).

<sup>173</sup> Kate Jastram and Kathleen Newland, *Family unity and refugee protection* in Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, Cambridge 2003) p.585.

<sup>174</sup> In the article of "*The Multiple Worlds of Turkish Women*" author Canan Topçu focuses on the difficulties of integration for the Turkish woman residing and working in Germany and it is stated that it is difficult for these mentioned people to integrate and enter into a complex society for working. *This article was previously published in Development and Cooperation 03/2005.* [http://www.qantara.de/webcom/show\\_article.php/c-478/\\_nr-276/i.html](http://www.qantara.de/webcom/show_article.php/c-478/_nr-276/i.html) (accessed 5 August 2009).



## IV.2. Siblings

*“..Faced with the emotional and financial burdens of caring for aging parents, those without siblings have no one to help out.”<sup>175</sup>*

Siblings are not directly recognized in family reunification, and thus the distinction above is necessary while arguing that they should be recognized. While minor siblings should be reunited with other siblings for their best interests, reunification of an adult sibling mostly depends on the dependency criteria (see above: *Nasri v France*) as will be discussed below in section ii.

### IV.2.i. Minor Siblings

Although minor siblings can be considered included under the provisions for the protection of children and related instruments, states still have a wide area of discretion for the reunification of a minor sibling with an adult sponsor. For instance, minor siblings can be left alone in their home country without any family or care-givers. In this case the best interest would be reunification with an older brother or sister. However, states do not always give priority to the reunification of siblings. The UNHCR suggests including minor siblings within definition of the family definition for the protection of the best interest of the child under the UN Convention on the Rights of the Child (CRC). The UNHCR goes one step further by pushing for the reunification with a minor sibling, even if the applicant or the sibling is married.<sup>176</sup> This reunification is supposed to be given priority, as the support that brothers and sisters can provide to each other is highly important for a minor.<sup>177</sup>

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<sup>175</sup>Erica E. Goode The Secret World of Siblings 1/2/94 US NEWS [http://www.usnews.com/usnews/culture/articles/940110/archive\\_012211\\_8.htm](http://www.usnews.com/usnews/culture/articles/940110/archive_012211_8.htm) (accessed 5 August 2009).

<sup>176</sup> UN High Commissioner for Refugees, *UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008)*, 13 March 2009, available at: <http://www.unhcr.org/refworld/docid/49ba8a192.html> (accessed 29 March 2009).

<sup>177</sup> UNHCR, *Resettlement Handbook*, Division of International Protection Geneva, July 1997 Revised edition July 2002 : Chapter 5 and Chapter , Chapter 4.6.7.pg 21 [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/\\$file/hcr-resettlement-jul97.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/$file/hcr-resettlement-jul97.pdf?openelement) (accessed 29 March 2009).

#### IV.2.ii. Adult Siblings

If a sibling is over 18-years-old, then again states have wide discretion to decide the reunification.

In 1991, the ECtHR covered the relationships between brothers and sisters, taken together<sup>178</sup> with those between parents and children with the judgment of *Moustaquim v. Belgium*.<sup>179</sup>

Abderrahman Moustaquim was a Moroccan national who lived in Liege in Belgium for 19 years until he was deported. The applicant had seven brothers and sisters, three of them were born in Belgium and one of his elder brothers had Belgian nationality.

The applicant was charged with several offences (as a minor with 147 charges, including 82 aggravated thefts) while he was residing in Belgium.<sup>180</sup> His deportation was ordered for the protection of public order. The state mentioned that the maintenance of public order must prevail over the social and family considerations set out by the board,<sup>181</sup> which can be true regarding the crimes committed by the applicant. However, the issue which needs to be discussed in this case is the “proportionality” of the safeguards applied to the applicant by the state, such as in the case of Berrehab. Following Moustaquim’s expulsion order, he was diagnosed with depression caused by the leaving of his family behind.<sup>182</sup>

Belgium decided that family ties were non-existent based on the applicant’s prison stay. One can’t help wondering: does this also mean that all of the other prisoners are also no longer connected to their families? Helen Cuddy, author of *The Shadow of Prison*, notes the

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<sup>178</sup> *Ibid.* p.222

<sup>179</sup> ECtHR judgment, *Moustaquim v. Belgium*, 26/1989/186/246, Council of Europe: European Court of Human Rights, 25 February 1991, available at: <http://www.unhcr.org/refworld/docid/3ae6b7018.html> (accessed 2 April 2009).

<sup>180</sup> §10: While the applicant was still a minor in criminal law, that is to say in the period up to 28 September 1981, the Liège Juvenile Court dealt with 147 charges against him, including 82 of aggravated theft, 39 of attempted aggravated theft and 5 of robbery. It made various custodial, protective and educative orders. On ten occasions between January 1980 and May 1981, for instance, it ordered Mr Moustaquim to be detained in Lantin Prison for periods not exceeding fifteen days.

<sup>181</sup> *Ibid.* § 18.

<sup>182</sup> *Ibid.* § 23.

importance of family support for the prisoners. She states that: “*the family support, which is not necessarily the same as the maintenance of family ties, can make a fundamental contribution to preventing reoffending after release and also, such as where family contacts provide post-release accommodation or employment opportunities, can assist in the community re-entry of offenders.*”<sup>183</sup>

The court agreed that there had been a violation of Article 8, stating that although the applicant was committed to jail several times, he had never severed relations with his family. The balance exercise was applied to the case for the protection of the applicant’s rights and the ECtHR balanced the punishment for the crimes of applicant with the expulsion order concluding on the violation of Article 8§1.<sup>184</sup>

Consequently, family ties with siblings were once again recognized in this case.

### IV.3. Unmarried or registered partners

The concept of family life does not depend exclusively on official marriages. Several factors affect the definition of the family and this definition should be extended if necessary. Relevant factors include the length of the couple’s living together, having children, or any other relevant factors when deciding whether or not a relationship can be defined as “family.”<sup>185</sup> Therefore in its judgment, *Kroon and others v. The Netherlands* the ECtHR recalled its view on the de facto family ties and stated one more time;

The notion of the family in Article 8 of ECHR is not confined solely to marriage based relationships and may encompass other de facto family ties where the parties are living together outside of marriage<sup>186</sup>.

<sup>183</sup>Helen Cuddy, *The Shadow of Prison: Families, Imprisonment and Criminal Justice*, Portland, Willan Publishing; First Edition 2008 Pg: 27

<sup>184</sup>*Ibid.* § 36: *The measure complained of resulted in his being separated from them for more than five years, although he tried to remain in touch by correspondence. There was accordingly interference by a public authority with the right to respect for family life guaranteed in paragraph 1 of Article 8 (art. 8 1).*

<sup>185</sup>Marianne Bruins, Pieter Boeles Case law on Article 8 of the European Convention of Human Rights Institute of Immigration Law, Leiden November 2006

[http://media.leidenuniv.nl/legacy/Case\\_law\\_on\\_Article\\_of\\_the\\_European\\_Convention\\_of\\_Human\\_Rights\\_a\\_survey\\_Institute\\_of\\_Immigration\\_Law%5B.pdf](http://media.leidenuniv.nl/legacy/Case_law_on_Article_of_the_European_Convention_of_Human_Rights_a_survey_Institute_of_Immigration_Law%5B.pdf) (accessed 19 September 2009).

<sup>186</sup>*Kroon and others v. The Netherlands*. For more see p.80

According to the UNHCR, countries apply several methods for recognizing unmarried or registered partners. For instance, Ecuador asks for at least a two year stable relationship, (such as under common law marriage of a man and a woman). However, a shorter duration is accepted if the common law partners have children borne out of their relationship. Finland also requires two years for same-sex partners. Sweden has a more broad approach and considers a relationship if the cohabiting partner (including same-sex partner) is over 18-years-old and the individual has permanent residence.<sup>187</sup>

The UNHCR recognizes unmarried couples “*who are actually engaged to be married, who have entered into a customary marriage, or couples who have lived together for a substantial period.*”<sup>188</sup>

The European Court of Human Rights includes the cohabitating non-marital partners within the definition of family in several cases:

In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*<sup>189</sup> the court looked at the issue of unmarried partners and registered partners. The three applicants were legally and permanently residing in the United Kingdom. They asked to be reunited with their husbands, so that their husbands could join them in United Kingdom. Their request was denied according to the immigration rules in force at the time (the 1980 Rules).

The first applicant was a permanent resident in the United Kingdom, and she was stateless. Her family, including her mother and father, had settled in United Kingdom years ago. She was married to a Portuguese national, Ibramobai Abdulaziz. He was admitted to the

<sup>187</sup> UNHCR Handbook January 2008 Pg:140.

<sup>188</sup> UNHCR *Resettlement Handbook*, Division of International Protection Geneva, July 1997.

*Revised edition July 2002 : Chapter 5 and Chapter , Chapter 4.6.7.a*

[http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/\\$file/hcr-resettlement-jul97.pdf?openement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/$file/hcr-resettlement-jul97.pdf?openement)

UNHCR, Geneva, Switzerland, January 1992 (accessed 30 October 2009).

<sup>189</sup> *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 15/1983/71/107-109 , Council of Europe:European Court of Human Rights, 24 April 1985, available at: <http://www.unhcr.org/refworld/docid/3ae6b6fc18.html> (accessed 30 October 2009).

United Kingdom as a ‘non-patrial’<sup>190</sup> for six months as a visitor. At the end of this time, he was asked to leave by the state, yet in the meantime the couple had a baby. The state found that Portuguese law allowed the couple to settle in Portugal, and therefore their family unity would not be interrupted. Mr. Abdulaziz claimed that his wife had been in the UK for a long time. She had a family there, and her lack of knowledge of Portuguese would make it difficult for her to integrate in Portuguese society. *“The Government maintained that there is no obstacle whatever to her going with her husband to live in Portugal”*<sup>191</sup>.

The second applicant, Mrs. Arcely Cabales, was a permanent and lawful resident of the United Kingdom with Pilipino nationality. She was employed in the host state while her family remained in the Philippines. The applicant married Mr. Ludovico Cabales, a Philippine national, when she was on a holiday in the Philippines. Thus, she applied for a U.K visa for her husband on the grounds of family reunification. Her husband also applied to join his wife in the United Kingdom. The application was rejected by the state on the grounds that the wife was not a citizen of the United Kingdom. The reasoning of the state was the same as in the above case, which held that the couple could live together in the Philippines<sup>192</sup>. The government also stated that the applicant could use her job skills to support her family financially back in the Philippines<sup>193</sup>.

Following other attempts by the applicants to the validity of the marriage was questioned by the state. Under Philippine Civil Code, the state considered the marriage void.<sup>194</sup> The applicant’s counsel claimed that the marriage should be recognized as a

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<sup>190</sup> The Immigration Act 1971: Patriots: Have the right to abode in the United Kingdom. Non-patrials: Do not have the right to abode in the country. § ibid 13

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.* § 46.

<sup>193</sup> *Ibid.* § 49.

<sup>194</sup> § 48: Under Articles 53 and 80 of the Philippine Civil Code, a marriage solemnized without a license was to be considered void, save in the case of a "marriage of exceptional character", that is one between persons who have lived together as husband and wife for at least five years (Article 76). The Cabales marriage contract recited that the ceremony the couple went through in 1980 had been performed, without a licence, under Article 76. The parties had stated in a contemporaneous affidavit that they had previously cohabited for at least five years, but according to Mrs. Cabales' version of the facts this could not be so since she had not met Mr. Cabales until 1977

common-law marriage. The court found the commitment of the relationship; couple's acting in the way that they are married is enough to recognize the marriage of the applicants.<sup>195</sup> It should be noted that court recognized the de facto marriages with this decision finding them as "*believing to be married and wishing to cohabit.*"

Third applicant, Mrs. Sohair Balkandali, was an Egyptian national who had a permanent and lawful right to remain indefinitely in the United Kingdom. She married to a UK national, thus obtained 'patril' status under the civil code. However, she divorced her husband when she obtained the status. Soon after her divorce, she met Mr. Balkandali, a Turkish citizen who entered the country as a visitor with a temporary visa and obtained a student visa allowing him to remain. He applied again after the expiration of his student visa. The state claimed that he was not a genuine student as he did not attend classes, and thus issued a deportation order<sup>196</sup>. Meanwhile, the couple had a son in the host state and applied for recognition of the right of a husband to remain in the country as the husband of a woman legally residing in the United Kingdom.

By rejecting Mr. Balkandali, the court provided the very same reasoning as the other two applications above: "*that the couple could live together in Turkey and that there were not sufficient compelling compassionate circumstances to warrant exceptional treatment outside the immigration rule*"<sup>197</sup>. The applicant rejected the decision stating that she had strong ties in the host country and, as she had an illegitimate child, "*she would have been treated as a social outcast in Turkey*"<sup>198</sup>.

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(see paragraph 45 above). According to the Government, the requirements of Article 76 were therefore not satisfied and the marriage thus had to be considered void.

<sup>195</sup>§ 63: The Court does not consider that it has to resolve the difference of opinion that has arisen concerning the effect of Philippine law. Mr. and Mrs. Cabales had gone through a ceremony of marriage and the evidence before the Court confirms that they believed themselves to be married and that they genuinely wished to cohabit and lead a normal family life. And indeed they subsequently did so. In the circumstances, the committed relationship thus established was sufficient to attract the application of Article 8

<sup>196</sup> *Ibid* §50

<sup>197</sup> *Ibid* §52

<sup>198</sup> *Ibid* §54

The ECtHR has tended to uphold state refusals to allow entry with this judgment.<sup>199</sup> The court accepted all three applications under the "family life" for the purposes of Article 8. Thus, Article 8 was found to be applicable. The court followed the "respect for family life" reasoning, like in the judgment of *Marckx v. Belgium* which will be analyzed under the section of "*Recognition of Elderly Family Members*", referring to the positive obligations of the state. However, the court did not find any violation of Article 8 taken alone, highlighting the fact that all of the applicants were aware of the situation at the time of their marriages and they should have known the rules and the consequences in the light of draft provisions already published.<sup>200</sup>

Another case where de facto family ties were analyzed and recognized for the couples living outside of the marriage<sup>201</sup> was the 1986 case of *Johnston and others v. Ireland* in.<sup>202</sup> The applicants, a father, mother and daughter born out of the wed-lock, were all legally residing in Ireland. As domestic law (Article 43.3 of Irish constitution) did not allow for divorce, the first applicant, who was married before, could not get a divorce from his first marriage and, thus, could not marry his partner (the second applicant). The child was therefore illegitimate. One of the claims in the case regarded the illegitimacy of the child. The ECtHR did not intervene in domestic law, which does not permit divorce. The court investigated the situation of the child and stated that the child should be recognized under the positive obligations of the state and under these positive obligations the state should let the

<sup>199</sup> Volker Türk, Feller, Nicholson (eds.), *op. cit.*, p.581.

<sup>200</sup> §68: Mrs. Abdulaziz knew that her husband had been admitted to the United Kingdom for a limited period as a visitor only and that it would be necessary for him to make an application to remain permanently, and she could have known, in the light of draft provisions already published, that this would probably be refused; Mrs. Balkandali must have been aware that her husband's leave to remain temporarily as a student had already expired, that his residence in the United Kingdom was therefore unlawful and that under the 1980 Rules, which were then in force, his acceptance for settlement could not be expected.

In the case of Mrs. Cabales, who had never cohabited with Mr. Cabales in the United Kingdom, she should have known that he would require leave to enter and that under the rules then in force this would be refused

<sup>201</sup> Clare Ovey and Robin White: *Jacobs&White: European Convention on Human Rights Third Edition*, (Oxford University Press, Oxford 2002) p.219.

<sup>202</sup> ECtHR, judgment of 18 December 1986, No:9697/82, *Johnston and others v. Ireland*.

integration of the child within the family recognizing the family ties despite the non-marriage of the parents. Thus the court held the violation of Article 8.<sup>203</sup>

In conclusion; with these so-called liberal decisions,<sup>204</sup> the ECtHR, together with Article 14, expanded the family definition to a wider concept, stating the possibility of setting up a family relationship without marriage. Furthermore, “*dilemma either of moving abroad or being separated from one’s spouse is not consistent with the obligation of a state to respect private and family life.*”<sup>205</sup>

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<sup>203</sup>ECHR: *Jonhston and others v. Ireland* Publication: A 112:

<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/d0cd2c2c444d8d94c12567c2002de990/168d953b21206267c1256640004c2304?OpenDocument> (accessed: 22.09.2009).

<sup>204</sup>Gerda A. Kleijkamp, *Family life and family interests: a comparative study of the influence of the European Convention of Human Rights on Dutch family law and the influence of the United States Constitution on American family law*, (Martinus Nijhoff Publishers, 1999) Chapter 4 Page: 140 “initially liberal way in which the Dutch Supreme Court expanded the interpretation and application of this article..”

<sup>205</sup>Author of the quoted paper (“*Community law immigration rights, unmarried partnerships and the relationship between European Court of Human Rights jurisprudence and community law in the Court of Justice.*”) above, ASSOC Prof. Helen Toner discussed that the denial of the same-sex partnerships not only constitutes the violation of Article of 8 but also 14 on the grounds prohibition on discrimination thus she argued that if a state accept the registered/unmarried partners, same sex partners should also be recognized on the grounds of prohibition of discrimination. However the author notes the fact that states are not obliged to provide the equality between married and unmarried partners. (In my opinion it should also be noted that this paper was written in 2001, several changes happened in the domestic laws and the international law in 8 years however the paper is a n efficient source to realize how slow is the development).



#### IV.4. Human Rights v. Cultural Diversity v. Margin of Appreciation: Polygamous marriages of Refugees

*"Once when Mark Twain was lecturing  
in Utah,  
a Mormon acquaintance argued with  
him on the subject of polygamy.  
After a long and rather heated debate,  
the Mormon<sup>206</sup> finally said,  
"Can you find for me a single passage  
of Scripture which forbids polygamy?"  
"Certainly," replied Twain.  
"No man can serve two masters."<sup>207</sup>*

Polygamous marriages are not recognized by most states and family reunification related instruments do not bring any protection to polygamous marriages. Thus, these limitations create significant problems, such as the dissolution of families, by requiring an individual to select one spouse over another.<sup>208</sup> Most Member States forbid polygamy within their national laws. I will not attempt to defend polygamous marriages, however, I will attempt to defend the rights of polygamous marriages of refugees who were already engaged in polygamous relationships before the sponsor hold the refugee status in the hosting country. The problem of the reunification of polygamous families will be discussed within this chapter, limiting the subject to the issue of *"why should polygamous marriages be included in the family concept for the refugees."* Thus, anti-polygamy laws and the issue of freedom of religion will not be analyzed in this chapter, as it is not related to this thesis.<sup>209</sup> The situation of refugees who had polygamous marriages *before* their residence in the third country and its

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<sup>206</sup>It is important to point out the fact that Mormon religion no longer practise the polygamy. <http://www.mormon-polygamy.org/mormon-polygamy>.

<sup>207</sup> Louis Utermeyer in *A Treasury of Laughter: Consisting of humorous stories, poems, essays, tall tales, jokes, boners, epigrams, memorable quips, and devastating crushers* (Simon and Schuster, London 1946).

<sup>208</sup> Background note for the agenda Item: family reunification in the context of resettlement and integration - protecting the family: challenges in implementing policy in the resettlement context Resettlement, 1 June 2001 § 19.

consequences will be discussed here under the protection criteria. The main issue is whether the margin of appreciation of states is enough for the protection of polygamous families, especially for the children born out of these marriages.

Polygamy is defined as the state of being married to more than one spouse (a marriage contracted between a male and more than one female person). It is historically criminalized in European communities.<sup>210</sup> However, many Islamic countries<sup>211</sup> allow polygamous marriages today.

The clashes between the international legal community and the co-existing cultural diversity have raised the question of the possibility of having human rights in a culturally diverse world.<sup>212</sup> All societies have their own cultures and their own moral values.<sup>213</sup> Moral terms like 'shameful' and 'honorable' change from culture to culture, and these differences create diversity of humanity.<sup>214</sup> In his article "*Culture and Morality*" Hatch defines Tolerance,

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<sup>210</sup> George Monger : *In 1603 in Britain it was an offense to marry a second husband or wife if the former husband or the wife is still living*. An encyclopedia of marriage rites, traditions, and beliefs from around the world, ranging from ancient [Book]. - California : ABC-CLIO Inc., 2004. p. 31

<sup>211</sup> The religion of Islam (Chapter: Surah 4. An-Nisa' (Women)) lets man marry more than once up to 5 wives under the condition of treating all the wives equal: "*And if you be apprehensive that you will not be able to do justice to the orphans, you may marry two or three or four women whom you choose. But if you apprehend that you might not be able to do justice to them, then marry only one wife, or marry those who have fallen in your possession*"

<sup>212</sup> "Comment 14: States parties' reports disclose that polygamy is practiced in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention." United Nations International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty*, 12 May 2003, HRI/GEN/1/Rev.6, available at: <http://www.unhcr.org/refworld/docid/403f2a344.html> (accessed 1 November 2009) Pg: 183 Para: 24, Pg:253 Comment 14.

<sup>213</sup> "Ideas of right and wrong, good and evil, are found in all societies, though they differ in their expression among different peoples. What is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history". American Anthropological Association, Statement of Human Rights 49 Amer. Anthropologist No.4, 539 (1947).

<sup>214</sup> Henry J. Steiner, Philip Alston, Ryan Goodman, International Human Rights in Context: Laws, Politics and Morals, 3rd edition, Oxford University Press, UK, 2008.Pg: 521 Elvin Hatch, Culture and Morality: The Relativity of Values in Anthropology, 1983.

as the keyword when it comes to cultural diversity and the freedom of foreign people to live as they choose.”<sup>215</sup>

In the preamble of The UNESCO Universal Declaration on Cultural Diversity; Culture is defined as:<sup>216</sup>

...the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

The limits of tolerance in relation to cultural diversity and the clashes of cultural relativism and human rights have a significant relevance in regards to the polygamous marriages of refugees. Thence, the dilemmas of universal human rights and cultural diversity will be discussed in this chapter.<sup>217</sup>

What is cultural diversity? Article 1 of the UNESCO Universal Declaration on Cultural Diversity defines diversity as “*the common heritage of humanity linked to the time changes, uniqueness and plurality of the identities of the groups.*”<sup>218</sup>

On the other hand, together with arguments in support of cultural diversity, the United Nations Human Rights Committee has declared that polygamy is “*an attack on the dignity of women and offends all human individuals*”.<sup>219</sup>

<sup>215</sup> In his Article Elvin Hatch refers to the Boasian ethical relativism and the moral principles of tolerance for the protection of the foreigner’s life”. Elvin Hatch, Culture and Morality: The Relativity of Values in Anthropology (1983) pg:522 in Henry J. Steiner, Philip Alston, Ryan Goodman, International human rights in context: law, politics, morals : text and materials, (Oxford University Press US, 2008).

<sup>216</sup> This definition is in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982), of the World Commission on Culture and Development (Our Creative Diversity, 1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998) Unesco Universal Declaration on Cultural Diversity.

<sup>217</sup> Diana Ayton-Shenker, The Challenge of Human Rights and Cultural Diversity Published by the United Nations Department of Public Information DPI/1627/HR--March 1995 <http://www.un.org/rights/dpi1627e.htm> (accessed 9 February 2009).

<sup>218</sup> “*the common heritage of humanity: Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.*”

<sup>219</sup> Human Rights Committee Eightieth Session 2178<sup>th</sup> and 2179<sup>th</sup> Meetings (AM & PM), Press Release HR/CT/651 <http://www.un.org/News/Press/docs/2004/hrct651.doc.htm> (accessed 7 March 2009).

According to the synthesis report of European Migration Network<sup>220</sup> (January 2008), “*Swedish legislation does not stipulate any limitations for children in polygamous households to receive a resident permit based on family reunification.*” What happens when a male refugee from Tanzania<sup>221</sup> is accepted as a refugee in the Netherlands where polygamy is banned by law? The refugee, married with two wives in his home country where polygamous marriages were not illegal, did not ask to marry another woman in the Netherlands where the act is unconstitutional. What if he chooses to be with the first spouse who is legally residing in the host state with him? What are the psychological and social consequences for the family members and for the status of the former spouse left in the home country? Cultural diversity should protect the rights of wives.<sup>222</sup> States should show more flexibility in order to maintain family unity.<sup>223</sup> If not, one of the wives would be accepted by the host state and the other wife would be left in the home country and even worse the one left in the home country can be pregnant to the sponsor’s baby. What happens in this case? Is the “best interests of the unborn baby” protected here for the reunification of the family? Do the human rights begin at birth or does the fetus have human rights? Questions in this case are various. However, even if the unborn baby can not be accepted for the protection of family under Article 8, CRC defines everyone under 18 years old as a child. Thus, a new born baby should be protected under the

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<sup>220</sup>This EMN Synthesis Report focuses on the family reunification procedures on grounds of family reunification directive comparing and discussing nine National Contact Points (Austria, Estonia, Germany, Greece, Latvia, Romania, Sweden, Netherlands and the United Kingdom) of the European Migration Network. For more see: Family Reunification produced by European Migration Network January 2008, <http://emn.sarenet.es/Downloads/prepareShowFiles.do?jsessionId=0AFA3F9D02761725066D9322C13A9126?directoryID=105> (accessed 8 January 2009).

(EMN), on family reunification.

<sup>221</sup> LAW OF MARRIAGE ACT, 1971: Polygamy in Tanzania is permitted with consent of first wife; upon registration, parties are to declare whether marriage is polygamous, potentially polygamous, or monogamous, and marriage may be 'converted' to polygamous or monogamous by joint declaration Obedience/Maintenance: maintenance of wife or wives is husband's duty; becomes wife's duty in cases where husband is incapacitated and unable to earn a living; Courts may order maintenance under limited circumstances where husband refuses or neglects to maintain wife. See more: <http://www.lrct.or.tz/documents/marriage.pdf> (accessed 8 January 2009).

<sup>222</sup> Natalie O'Brien | June 26, 2008 Probing polygamy Article from The Australian <http://www.theaustralian.news.com.au/story/0,25197,23922968-5010800,00.html> (accessed 8 January 2009).

<sup>223</sup> UN High Commissioner for Refugees, *Self-Study Module: Resettlement Learning Programme*, October 2009, Rev., available at: <http://www.unhcr.org/refworld/docid/4ae6b9b92.html> (accessed 1 November 2009) Pg:102.

“best interests of the child” principle. And it is a well-known fact that “the best interests” of the new-born baby is to be with both of the parents.

Additionally, if the state accepts de facto relationships, the relationship between the husband and the second wife should be considered to be de facto relationship, and thus the wife should have the right to be reunited with her husband. Under these positive obligations, states should consider cultural diversity together with women’s rights in using their margin of appreciations. Thus, without any “*cultural arrogance*”,<sup>224</sup> states should display a certain flexibility regarding polygamous marriages of refugee families.

It cannot be argued that people would take advantage of recognition of polygamous partners for family reunification because, contrary to immigrants, refugees cannot go back to their countries and get married after they obtain refugee status.<sup>225</sup> The distinction between a refugee and an immigrant is important in this case. The directive on family reunification should define the possibility of polygamy for refugees, and it should not be left to the margin of appreciation of the states. Inherent flexibility is one of the easiest ways to protect the rights of women.

The conflict can be illustrated better through a hypothetical example. An Afghan man, who has been officially married to an infertile woman for 15 years, gets married to another woman and has a child with her in Afghanistan.<sup>226</sup> What happens in this situation?<sup>227</sup> The host

<sup>224</sup> In the book of *Multiculturalism without culture* by Anne Philip, the term cultural arrogance is defined as the court’s ignoring the cultural differences and applying the same standards which are applied to the citizens. Pg 79, (Princeton University Press, 2007).

<sup>225</sup> An article by REAL Women of Canada - (Realistic, Equal, Active, for Life) Polygamy Around the Corner: “Canada, however, isn’t the only nation facing the problem of polygamous marriages. For example, Norway’s Directorate of Immigration has reported that, despite the illegality of polygamy in Norway, it is becoming increasingly prevalent, since Norway liberalized the “marriage” laws by allowing legal civil unions for same-sex couples. Now Norwegian men travel abroad to meet and marry women, where polygamy is legal. Then they bring their new “wives” to Norway to live together under legal civil unions, in one, happy, polygamous harem.” [http://www.childbrides.org/canada\\_REAL\\_polyg\\_around\\_the\\_corner.html](http://www.childbrides.org/canada_REAL_polyg_around_the_corner.html) (accessed 26 October 2009).

<sup>226</sup> The Afghan Constitution and Islamic Sharia law both support polygamy, allowing men to take up to four wives.

<sup>227</sup> According to the report of Afghanistan Research and Evaluation Unit (AREU): Infertility is recognized as one of the reasons of polygamous marriages. The belief of “a man should marry again” if his current wife had not given him any children is an unanimous belief within the countries where the polygamy is legal. To see more: Afghanistan Research and Evaluation Unit (AREU), *Decisions, Desires and Diversity: Marriage Practices in*

state should accept the wife because they are officially married and also the children born out of wed-lock of the second partner stayed in the home country. Looking to previous case laws, having children has been considered to be “demonstrating *“their commitment to each other by having children together.”* The state should be under the obligation to accept the second partner in the polygamous marriage as they have strong family ties, because they showed their commitment by having a baby together.

The UNHCR Guidelines on Determining the Best Interests of the Child indicates that most resettlement countries that forbid polygamy only accept one spouse under their own domestic legislation. Thus, the children of the other spouses are separated from their father. For this reason, the best interest of the child should be given priority and children should be able to stay with both parents.<sup>228</sup> However, the UNHCR suggests the states should not split up families in e cases where the receiving state does not accept polygamous marriage. For this reason the UNHCR suggests that states not split families and instead, explore different solutions, like providing resettlement to the family in another receiving state that would allow the family reunification of all the family members.<sup>229</sup>

Acknowledging the problems and the human rights violations due to polygamous marriages, the UNHCR declared that, polygamous marriages should be respected under the family reunification principle if a relationship of dependency exists, especially when children are involved and the polygamous marriage is recognized in the country of origin of the refugees. It would violate Article 9 of CRC to reject polygamous marriages and rejecting family reunification would put the refugees in a more vulnerable position than they already

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*Afghanistan*, February 2009, available at: <http://www.unhcr.org/refworld/docid/4992cc722.html> (accessed 1 November 2009).

<sup>228</sup> UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: Pg:41 <http://www.unhcr.org/refworld/docid/48480c342.html> (accessed 1 November 2009).

<sup>229</sup> UNHCR *Resettlement Handbook*, Division of International Protection Geneva, July 1997  
*Revised edition July 2002 : Chapter 5, Chapter 4.6.7.a* [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/\\$file/hcr-resettlement-jul97.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/$file/hcr-resettlement-jul97.pdf?openelement)  
 UNHCR, Geneva, Switzerland, January 1992 (accessed 1 November 2009).

are. Not recognizing polygamy can also cause one/some of the spouses to be left behind in the first country of asylum. Women who are left behind can be subject to abuse, violence, exploitation and social exclusion.<sup>230</sup>

In the decision of *MS and Others Somalia v. Secretary of State for the Home Department*,<sup>231</sup> the court gave priority to the state's compelling interest to reject polygamous unions:

Para 5: It is accepted that polygamous unions are not recognised in English law. I find in public law...a polygamous union is *void ab initio*....I find that for the reasons I have set out the fact that polygamous unions are voidable in Ethiopian law does not confer validity on them in UK immigration law which I take to be governed by principles of public law.

The Netherlands followed a rational path by accepting polygamous marriages and although the polygamous marriages are banned by law, polygamy of Muslim immigrants is accepted if the documents are authentic and the husband does not have Dutch nationality.<sup>232</sup> Although there are several recommendations for the protection of the members of polygamous families, they are not enough if they are left to the margin of appreciation of the states.

Some states, such as the United Kingdom, might still reject the applications and the resettlement of polygamous families on the grounds of public good.<sup>233</sup> Some states reject the applications automatically, regardless of the protection merits for resettlement.<sup>234</sup>

<sup>230</sup> UN High Commissioner for Refugees, *Self-Study Module: Resettlement Learning Programme*, October 2009, Rev., available at: <http://www.unhcr.org/refworld/docid/4ae6b9b92.html> (accessed 1 November 2009).

<sup>231</sup> *MS and Others (Family Reunion: "In Order to Seek Asylum") Somalia v. Secretary of State for the Home Department*, [2009] UKAIT 00041, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 15 September 2009, <http://www.unhcr.org/refworld/docid/4ad5cb4e2.html> (accessed 1 November 2009).

<sup>232</sup> NIS Dutch News in English 12.08.2008 Rotterdam- [http://www.nisnews.nl/public/120808\\_1.htm](http://www.nisnews.nl/public/120808_1.htm) (accessed 7 August 2009).

<sup>233</sup> Chapter 2 A: *The UK has additional criteria outlining that the applicant (and his/her dependants) must co-operate with UK officials and any other body involved in Gateway; not be in a polygamous marriage; and not have an active application lodged for the Mandate programme*. UN High Commissioner for Refugees, *Resettlement Handbook (country chapters last updated September 2009)*, 1 November 2004 pg:423, available at: <http://www.unhcr.org/refworld/docid/3ae6b35e0.html> (accessed 1 November 2009).

<sup>234</sup> UN High Commissioner for Refugees, *UNHCR Handbook for the Protection of Women and Girls*, January 2008 pg:179, available at: <http://www.unhcr.org/refworld/docid/47cfc2962.html> (accessed 1 November 2009).

The UNHCR recommends limited solutions to states for family reunification of refugees under polygamous marriages.<sup>235</sup>

1. to split the polygamous family unit into two or more cases, whereby one spouse and his /her biological children, if any, are included in one RRF (Compilation of Resettlement Registration Form), and the other spouse and his / her children are included in a separate RRF (Compilation of Resettlement Registration Form) that is linked to the first case.
2. to include all children by the same parent in the primary RRF and await subsequent family reunification of the other parent(s) through the link with the children
- 3 .to include all the family members on the same RRF, but in some cases, it may be better to submit them in separate but clearly linked RRFs, where it is clear that one case should not be accepted without the other. Consultation with Regional Hubs and Headquarters is useful in considering such complex submissions.

Finally, in his book “*The Rights Of Refugees Under International Law*” Hathaway refers to *stricto senso*<sup>236</sup> universality when discussing the polygamous marriages of refugees. According to Hathaway, there is always room for variations and family should take advantage of the *stricto senso* universality as it is crucial to protect the family unit. In my opinion, polygamous marriages should be recognized with certain definitions and requirements under the directive and, where impossible, states should recognize more flexible approaches and give the priority to the reunification of the family as a positive obligation not to cause more violations.

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<sup>235</sup> UN High Commissioner for Refugees, *Self-Study Module: Resettlement Learning Programme*, October 2009, Rev., available at: <http://www.unhcr.org/refworld/docid/4ae6b9b92.html> (accessed 1 November 2009) Pg:102 103

<sup>236</sup> Hathaway, *op. cit.* p.553, footnote: 1311.



#### IV.5. Are they really separate but equal:<sup>237</sup> De Facto Same Sex Couples

“In a letter to "Dear Abby" a reader complained that a gay couple was moving in across the street and wanted to know what he could do to improve the quality of the neighborhood. Her suggestion - 'You could move.'”<sup>238</sup>

As already discussed in the previous chapters, unmarried and registered couples should be given the same rights as married couples. This chapter will argue for the recognition of same-sex couples on grounds of cultural diversity discussed in polygamous partners' chapter, and also under the prohibition of discrimination on grounds of Article 14 of ECHR. However Article 14 can be applied only when facts fall within the scope of one of other articles of the convention.<sup>239</sup> Thus, Article 14 will be argued to be complementary to Article 8 for the protection of same-sex couples.

Although it might be thought that UDHR excludes same sex couples by stating that: “the right of men and women of marriageable age to marry and to found a family shall be recognized,” Hathaway suggests that Article 23 (2) of the UDHR reflects to the equality of men and women, and thus it should not be interpreted narrowly as excluding the same sex couples.<sup>240</sup>

In the twentieth century, pink triangles<sup>241</sup> are not used anymore to identify homosexuals and punish them; instead they are worn proudly as an international symbol of

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<sup>237</sup> Botts, Tina. "Separate But Equal Revisited: The Case of Same Sex Marriage" *Paper presented at the annual meeting of the The Law and Society Association*, Jul 06, 2006 <Not Available>. 2009-05-25 [http://www.allacademic.com/meta/p95675\\_index.html](http://www.allacademic.com/meta/p95675_index.html) (accessed 8 June 2009).

<sup>238</sup> Dear Abby is the title of a popular advice column founded in 1956 by Pauline Phillips <http://www.uepress.com/dearabby/bio.html> . (accessed 7 July 2009).

<sup>239</sup> A. H. Robertson and J.G. Merrills: *Human Rights in Europe* (Manchester University Press, Manchester, 1996) p.248.

<sup>240</sup> Hathaway, *op. cit.* p.555.

<sup>241</sup> Pink Triangle was an mandatory badge worn by the homosexual people who were held prisoner in the Nazi concentration camps. For more see: Dr. Jörg Hutter Auschwitz Concentration Camp: The Pink-Triangle prisoners, 2000 <http://www.joerg-hutter.de/auschwitz.htm#Auschwitz> (accessed 8 October 2009).

the gay movements<sup>242</sup> Today homosexuality rights are protected through various legal instruments.<sup>243</sup> This paper will not argue for or against the legalization of gay marriages but examine it whether it is possible to set up a family in the family reunification concept of refugees for LGBT couples. Can a gay/lesbian couple be included in the family definition? Despite the continuing reactions of the religious authorities,<sup>244</sup> the description of the family has also been changing through time. LGBT (Lesbian, gay, bi-sexual and transgendered) rights are recognized by the universal declarations.<sup>245</sup>

The family definition is expanded through the changes in society and the laws of some states, like Canada, which adopted the gender-neutral definition for same-sex couples. Same-sex and opposite-sex common-law relationships have been accorded the same status as married spouses.<sup>246</sup> One can think that one of the reasons that many states have demanded official marriages can be to avoid gays and lesbians demanding to be reunited with their partners. The 1951 convention defines homosexuality as a reason to the fear of persecution. It can be thought that if the convention respects homosexuality by protecting it, then it is ironic

<sup>242</sup> LAWRENCE ET AL. v. TEXAS 539 U.S. 558 Justice Kennedy: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual...."

<sup>243</sup> UN Gen. Assembly Statement Affirms Rights for all First ever statement on sexual orientation and gender identity at the UN General Assembly:  
[http://ilga.org/news\\_results.asp?LanguageID=1&FileID=1211&FileCategory=44&ZoneID=7](http://ilga.org/news_results.asp?LanguageID=1&FileID=1211&FileCategory=44&ZoneID=7) (accessed 8 October 2009).

<sup>244</sup> . Proclamation of The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints (September 23, 1995): "The first commandment that God gave to Adam and Eve pertained to their potential for parenthood as husband and wife. We declare that God's commandment for His children to multiply and replenish the earth remains in force. We further declare that God has commanded that the sacred powers of procreation are to be employed only between man and woman, lawfully wedded as husband and wife." For more see: *The Family: A Proclamation to the World This proclamation was read by President Gordon B. Hinckley as part of his message at the General Relief Society Meeting held September 23, 1995, in Salt Lake City, Utah*  
[http://lds.org/ldsorg/v/index.jsp?vnextoid=e1fa5f74db46c010VgnVCM1000004d82620aRCRD&locale=0&sourceId=1aba862384d20110VgnVCM100000176f620a\\_\\_\\_&hideNav=1&contentLocale=0](http://lds.org/ldsorg/v/index.jsp?vnextoid=e1fa5f74db46c010VgnVCM1000004d82620aRCRD&locale=0&sourceId=1aba862384d20110VgnVCM100000176f620a___&hideNav=1&contentLocale=0) (accessed: 17 September 2009).

<sup>245</sup> When the UDHR was drafted gay rights were unconstitutional and unacceptable in the society. This is why there is not a specific article about the LGTBB rights in the convention though the protection is provided on the grounds of Article 14, Prohibition of anti discrimination.

<sup>246</sup> Family reunification: Canadian Council for Refugees - Proposed new developments for family reunification for refugees resettled to Canada  
Annual Tripartite Consultations on Resettlement 18-19 June 2002 Para:7 <http://www.unhcr.org/3cfb2bd14.html> (accessed 19 September 2009).

that there are not any provisions protecting homosexual couples under the refugee legislations.

Professor Robert Wintemute, School of Law, King's College, University of London, notes that there has been an increasing acceptance of lesbian and gay couples in national legislatures and courts in the Council of Europe (COE) since 1989. According to him, lesbian women and gay men can fall in love with a same-sex partner, and therefore can establish a serious relationship and even raise children like heterosexual couples. He further notes that national institutions have also recognized same-sex couples; giving them the ability to claim the same rights and obligations as heterosexual couples.<sup>247</sup>

In the “navigation guide on Lesbian, gay, bisexual and transgender (LGBT) refugees and asylum seekers” the author, Anisa de Jong, interprets the rights of unmarried couples, together with the legislation on the introduction of partnership registration for same-sex couples and concludes for LGTB couples that in the UK there is a possibility for the family reunification of same-sex refugee couples to be exceptionally allowed if there are compelling and compassionate circumstances as exceptionally criteria applies to unmarried partners when they fit the criteria. However, the lack of the recognition of same-sex couples under the family scope makes this exception impossible<sup>248</sup>.

In November 2006, the Yogyakarta principles were developed by a group of human rights experts acknowledging the diverse forms of the family concepts. Although it is not a binding instrument it is a hopeful development thus it can be taken into consideration by the

<sup>247</sup>Application No. 11313/02, *M.W. v. United Kingdom* European Court of Human Rights, Fourth Section Submitted on 5 November 2008 WRITTEN COMMENTS OF FIDH, ICJ, AIRE CENTRE & ILGA-EUROPE

<sup>248</sup> Anisa de Jong, *Navigation guide on Lesbian, gay, bisexual and transgender (LGBT) refugees and asylum seekers*, September 2003, (the Information Centre about asylum and refugees in the UK) Pg.20 <http://www.icar.org.uk/1810/legal-aspects/private-life-and-family-life.html> (Accessed: 22.10.2009).

court. The main objective of the principles was to broaden the scope of the protection of sexual orientation and gender identity.<sup>249</sup> Principle 24 reads:

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

According to Helen Toner, if immigration procedures and rules discriminate against same-sex couples and violate their rights under Article 8, It also violates Article 14.<sup>250</sup>

However she states that this is a vulnerable argument from two points:

The first is the extent to which it may apply to discrimination against same sex couples. The second is the extent to which policies which discriminate in favor of married couples and against all unmarried couples, regardless of their sexual orientation, can and should be seen to be inherently discriminatory against same sex couples.<sup>251</sup>

In 1981, in the case of *Dudgeon v. United Kingdom*,<sup>252</sup> the complainant alleged that his Article 8 right to privacy was breached by the continuing threat in Northern Ireland of prosecution for homosexual conduct. The court stated that the decriminalization of homosexuality did not imply approval of homosexuality, therefore the court acknowledged there was an increased consensus among Member States regarding the rights of gay men and lesbians. The majority of Member States saw that it was no longer necessary or appropriate to impose criminal law sanctions on homosexual practices. In light of that, the Court interpreted that there had been changes on the national level and stated that there was no ‘pressing social need’ for such legislation, concluding that it was not enforced by Irish national authorities and no public objection to the non-enforcement of laws was expressed.

Twenty-one years (11 July 2002) later the Dudgeon case, as the public morals and the ideas changed over time, the ECtHR afforded a narrow margin of appreciation to the states in

<sup>249</sup> Yogyakarta Principles: Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (accessed: 22.10.2009).

<sup>250</sup> Article 14 (art. 14) reads as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association, with a national minority, property, birth or other status

<sup>251</sup> Helen Toner: *Partnership Rights, Free Movement And Eu Law* (Hart Publishing, United Kingdom 2004) p.108 §1.

<sup>252</sup> ECtHR, judgment of, 23 September 1981, Series A, No. 45, *Dudgeon v. U.K.*

the case of *Christine Goodwin v. The United Kingdom*.<sup>253</sup> Different than the Dudgeon case, the Court in *Goodwin v. UK* considered the trends of consensus in European Contracting States in addition to international trends. Being transsexual was also considered a personal identity under the protection of Article 8. The Court indicated that a consensus in respect to the basic rights of transsexuals had emerged and concluded that the contracting states should enjoy narrower discretion to protect the personal identities of transsexuals.

In 24 July 2003, Siegmund Karner<sup>254</sup> applied to the court asking for having the tenancy after the death of his partner. National law allowed heterosexual couples to continue the rent contract after the death of their life-partners. Thus, the problem here was whether homosexual couples could benefit from the same rights and obligations as heterosexual couples. The applicant claimed that he was being discriminated against on the grounds of sexual orientation and he invoked Article 14 of the Convention taken together with article 8.

The court applied the common balancing test regardless of the sexual orientation of the couples and decided on the grounds of equal access and necessity that, thus, the court gave the same rights to the homosexual couples and in para 41 stated:

..the aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to Member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion.

It can be said that the court adopted a flexible yet limited approach to the protection of LGBT people. For instance, the decision of *X, Y and Z v. The United Kingdom*<sup>255</sup> is referred as the key example of the court's modern view of family definition.<sup>256</sup> The court respected the relationship, but it did not hold the violation. Applicant X, who is a female-to-male

<sup>253</sup> ECtHR, judgment of, No 28957/95, *Christine Goodwin v. the United Kingdom*.

<sup>254</sup> ECtHR, judgment of 24 July 2003, No 40016/98, *Karner v Austria*.

<sup>255</sup> ECtHR, judgment of 22 April 1997, No 75/1995/581/66, *X. and Y. v. UK*,

<sup>256</sup> § 64 *Singh v Entry Clearance Officer, Delhi* [2004] EWCA Civ 1075; [2004] INLR 515 Case 370/90 § 62

transsexual, lived with the second applicant; Y. Y had a child with the third applicant Z via artificial insemination.<sup>257</sup> The commission rejected recognizing X as a father including the same-sex couple in the definition of family as well as ignoring the sex-change of one of the applicants. Also, the child was determined to be unable to enjoy family life with Z, as they were not related by blood, marriage or adoption. Although the court concluded there was no violation of Article 8, the case gave rise to the possible family definitions including transsexual couples.

Moral ethics are different in every society and can easily change over time. Therefore, there is an emerging need to recognize homosexual couples both under international law but refugee law. If the court can interpret the convention as a changing tool over time, then the changing needs of refugee couples should also be interpreted in the same manner. The opposite would be “*far below the democratic society*”; As Judge Walsh stated in his dissenting opinion in the case of Dudgeon:

The rule of law itself depends on a moral consensus in the community and in a democracy the law cannot afford to ignore the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt.<sup>258</sup>

Consequently, we are back to the very simple yet logical conclusion of Toner who stated that Article 14 should be applicable in the case of homosexual immigrants (and refugees) as it is clearly connected to the protection of family and private life under Article 8.

Referring to the U.S case of *Plessy v. Ferguson*, the approach of the “separate but equal” doctrine should be recognized by the states. The UDHR, the ECHR and all other international instruments together with the domestic legislation should be seen as “sexual orientation blind.”<sup>259</sup>

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<sup>257</sup> AID (artificial insemination by donor): *A procedure in which a fine catheter (tube) is inserted through the cervix (the natural opening of the uterus) into the uterus (the womb) to deposit a sperm sample from a donor other than the woman's mate directly into the uterus. The purpose of this procedure is to achieve fertilization and pregnancy.* <http://www.medterms.com/script/main/art.asp?articlekey=6986>.

<sup>258</sup> Partially dissenting opinion of Judge WALSH §14.

<sup>259</sup> 163 U.S 537 (1896) Interpreting Judge Harlan in his dissenting opinion .

#### IV. 6. Recognition of Elderly Family Members: Why are they only included in the family concept only when they are on the verge of death?

*“One colleague recounted the story of an old man carrying a child during the Rwanda exodus. On arrival in the camp the child was immediately examined and provided with emergency food but nobody paid attention to the old man.”*<sup>260</sup>

The provisions for the protection of elderly people are not as developed as the protections of children. The margin of appreciation of states has an important role in relation to the protection of elderly people while applying the family reunification provisions. Similar to the family definition, the definition of elderly also differs from country to country (*as several factors such as social support, cultural background, living conditions and economic situation change from country to country*) thus; there is no specific age limit for the definition of elderly.<sup>261</sup> Some countries allow the reunification of the elderly with age limitations, and they are required to be economically dependant on the sponsor families as well as having strong ties with the family members. For instance, the United Kingdom accepts widowed parents or grandparents who are above 65-years-old. If they are below 65-years-old, then they are expected to be financially dependent on the sponsor in addition to not having any other close relatives in their countries. Together with these conditions, they are also required to have sufficient financial resources rather than the public funds to afford to live. Another possibility is that they have to be living in the most exceptional compassionate circumstances which would require the family reunification with the family members.<sup>262</sup>

The family ties of dead grandparents with an illegitimate child are recognized for the sake of inheritance rights or the elderly of the family are recognized if they are dependent on the family. While some states do not include elderly people such as grandparents, aunts,

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<sup>260</sup>UNHCR Assistance to Older Refugees EPAU Evaluation Reports, 1 March 1998 Para: 41 <http://www.unhcr.org/cgi-bin/txis/vtx/search?page=search&docid=3ae6bd450&query=older%20people>

<sup>261</sup> *Resettlement Handbook*, Division of International Protection Geneva, July 1997 (accessed 2 September 2009). Revised edition July 2002 : Chapter 5 and Chapter 4.6.7 Pg.31 [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/\\$file/hcr-resettlement-jul97.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FDJ3U/$file/hcr-resettlement-jul97.pdf?openelement) (accessed 8 October 2009).

<sup>262</sup> *Ibid.* p.34 Last §

uncles in the family definition, some accept the older ones only if they are dependent on the family.<sup>263</sup> For instance, the United Kingdom seeks *compelling compassionate circumstances* for applicants who do not fall within the family reunification policy. Together with this rule, the state also looks for genuine dependency on the sponsor while the sponsor was in his home country.<sup>264</sup>

There are various reasons that may lead elderly people to particular vulnerability in the refugee context<sup>265</sup> thus the high level of vulnerability of elderly refugees should be taken into account, even if they are not fully dependent on the sponsors. It should also be noted that “*older people have always made major contributions by caring for their family members.*”<sup>266</sup>

In some cases, the ECtHR recognizes and protects the relationships with grandparents under Article 8, as exemplified in the cases of *Marckx v. Belgium* and *Vermeire v. Belgium*.<sup>267</sup>

The court first extended Article 8 to near relatives, including grandparents, with its judgment of *Marckx v. Belgium*<sup>268</sup> in 1979. An unmarried applicant wanted to adopt her own child so that the daughter could benefit from the inheritance rights of the family members. She claimed that her right to a family was violated as she was not allowed to adopt her own

<sup>263</sup> Volker Türk, Feller, Nicholson (eds.), *op. cit.*, p.563.

<sup>264</sup> *TC (Zimbabwe) v. Entry Clearance Officer (Harare)*, [2008] EWCA Civ 1020, United Kingdom: Court of Appeal (England and Wales), 2 September 2008, available at: <http://www.unhcr.org/refworld/docid/48d3714b2.htm> Page: 21 (accessed 28 May 2009).

<sup>265</sup> *pre-flight: during genocides, younger people are killed while the elderly are left as internally displaced persons or refugees without support; younger people flee, leaving the elderly behind as “remainees” in the country of origin.*

*local integration: the elderly are left behind in camps or collective centres while younger people depart in search of greater security or employment; long-staying refugees face old age in the country of asylum without family support.*

*resettlement: younger people resettle while elderly persons are left behind, either because they are excluded under discriminatory criteria (they may not pass medical screenings, for example) or because they do not want to leave.*

*repatriation: long-staying refugees have lost touch with their country of origin and do not want to or are unable to return; elderly persons repatriate alone, leaving younger generations behind in exile.*

Protecting Refugees: A Field Guide for NGOs - Produced Jointly by UNHCR and its NGO Partners  
Legal publications, 1 September 1999 Pg: 63.

<sup>266</sup> Equal treatment, equal rights: Ten action points to end age discrimination (HelpAge International, November 2001) P.6

<sup>267</sup> ECtHR, judgment of 29 November 1991, *Vermeire v. Belgium*,: “Legal status of unmarried mothers and children born out of wedlock in Belgium”. No. 12849/87

<sup>268</sup> ECtHR, judgment of 13 June 1979, No 6833/74, *Marckx v Belgium*  
[http://www.equidad.scjn.gob.mx/IMG/pdf/Caso\\_Marckx\\_v- Belgica\\_Ingles\\_-2.pdf](http://www.equidad.scjn.gob.mx/IMG/pdf/Caso_Marckx_v- Belgica_Ingles_-2.pdf) (accessed 19 September 2009).



child, complaining that the code of civil provisions for illegitimate children violated her rights under Article 8 and Article 14.<sup>269</sup> The applicant's claim was supported by several factors, including the fact that adoption would also benefit the child's rights giving him inheritance from the mother's side of the family. The questions at stake were numerous: whether the natural ties between mother and daughter were protected by Article 8; whether the convention protected an expansion of the definition of the family, which is not widely defined in Article 8; and, if not, whether it violated Article 14 (non-discrimination principle) together with the right to respect for private and family life. The court interpreted the definition of "family" concluding that there was a violation of Article 14 of the Convention, taken in conjunction with Article 8, on the grounds of protection of morals and public order in society.<sup>270</sup>

Thus, ties between near relatives, such as those between grandparents and grandchildren were recognized by the court, which highlighted the fact that such relatives may play a considerable role in family life.<sup>271</sup>

Similarly, in the case of *Vermeire v. Belgium*, the ECtHR again analyzed the issue of the recognition of family ties with children and grandparents. Camille Vermeire and Irma Van den Berghe were married with three children. The couple's daughter, Jerome Vermeire, had a daughter who was the applicant in this case. She was born out of wedlock and thus was recognized as illegitimate under the domestic law of Belgium. The applicant had been raised by her grandparents. After the death of her grandparents, the applicant could not benefit from

<sup>269</sup> *ibid.* § 13: The applicants complain of the Civil Code provisions on the manner of establishing the maternal affiliation of an "illegitimate" child and on the effects of establishing such affiliation as regards both the extent of the child's family relationships and the patrimonial rights of the child and of his mother. The applicants also put in issue the necessity for the mother to adopt the child if she wishes to increase his rights

<sup>270</sup> *ibid.* § 40 "The Government do not deny that the present law favours the traditional family, but they maintain that the law aims at ensuring that family's full development and is thereby founded on objective and reasonable grounds relating to morals and public order (order public). The Court recognizes that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate family; the members of the "illegitimate" family enjoy the guarantees of Article (art. 8) on an equal footing with the members of the traditional family."

<sup>271</sup> Daniel Thym,, Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay? [http://journals.cambridge.org/download.php?file=%2FILQ%2FILQ57\\_01%2FS0020589308000043a.pdf&code=76a68b4d4c85dfd5be3d4e84592ebdd3](http://journals.cambridge.org/download.php?file=%2FILQ%2FILQ57_01%2FS0020589308000043a.pdf&code=76a68b4d4c85dfd5be3d4e84592ebdd3) (accessed: 20.10.2009).

inheritance rights, as she was illegitimate and the state's civil code did not grant her any of these rights. This case followed the *Marckx v. Belgium* judgment and therefore, the state did not make any separation between legitimate and illegitimate children and gave the applicant her share of the inheritance. The legitimate grandchildren (cousins of the applicant) appealed this decision. The decision of *Marckx* was not legally binding, and so the applicant pronounced that there had been a violation of Article 8 (taken in conjunction with Article 14) stating that she was deprived of her inheritance rights over the estate of her grandparents. The court investigated the dates of succession to the grandmother's and grandfather's estates separately. *"It was found that the succession to the grandmother's estate was upon her death and that the estate devolved on her legitimate heirs as of that date"*, so it was deemed to be unnecessary to reopen the file again for the inheritance of the grandmother's estate. As for the grandfather's estate, the court applied the same rule that was applied in *Marckx* (the non-discrimination principle). The court recognized the applicant's kinship between her and the grandparents. Thus, the court unanimously held that there had been a violation of Article 14 in conjunction with Article 8 of the Convention.

This case law can be interpreted as the recognition of family ties between children and grandparents, and therefore, I argue that family ties should be also recognized in the case of family reunification. Elderly people should be given priority to reunite with their families just as in the case of minors. The elderly should be included in the definition of family under the Directive.<sup>272</sup> The scope of the dependence criteria of elderly people should be extended from physical or financial to emotional dependence<sup>273</sup> (or more liberally the dependency criteria

<sup>272</sup> The European Council on Refugees and Exiles (ECRE) Position on Refugee Family Reunification July 2000 [http://www.ecre.org/resources/Policy\\_papers/241](http://www.ecre.org/resources/Policy_papers/241) (accessed 7 September 2009).

<sup>273</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification Article 10-2; *The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.*

should be annulled) and emotional dependence should also be accepted by the states.<sup>274</sup> On both sides, if an old person, such as a grandparent, is left behind and cannot be reunited with his or her family, he or she would suffer psychologically. If the elderly person is the sponsor, and asks to be reunited with his/her family (which is rare) family reunification request should be considered carefully by the state in regards to the needs of elderly.<sup>275</sup> Interpreting and citing the UNHCR'S Budapest based regional representative Lloyd Dakin: *"old people need their families to support them to be able to integrate in society. Otherwise they struggle with boredom, loneliness and depression."*<sup>276</sup> Even if the elderly person is healthy and does not depend on the family for financial support, he may still suffer from the lack of family members that reside/live in the host country. Consequently, he might face enormous difficulties in trying to rebuild what remains of his life.<sup>277</sup> He might feel abandoned due to the loss of his family members, even in the absence of medical dependence and might feel emotionally dependent on family members even if they used to live separate from the sponsor family when they were in their home countries. They would still need protection against several problems, such as physical and sexual abuses together with dispossession and theft.

An Egyptian refugee, who lives in Hungary as a refugee, has been working to be reunited with his parents who are currently asylum seekers in Macedonia, states the emotional traumas of him and the parents by stating that:

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<sup>274</sup> UN High Commissioner for Refugees, *Family Reunification for Kosovar Albanian Refugees*, 1 May 1999, available at: <http://www.unhcr.org/refworld/docid/3ae6b3384.html> [accessed 29 October 2009]: *The concept of dependent persons should, however, be understood in its broad sense to include persons who depend for their physical and also emotional existence substantially and directly on the family member with whom reunification is sought.*

<sup>275</sup> The Helpage International guidelines for best practice of Older people in disasters and humanitarian crises ; *In the research surveys, older people identified the social and psychological traumas that afflict them. Separation from, or loss of, family members leads to isolation, bereavement, and loss of support .* Pg:9 <http://www.helpage.org/Resources/Manuals> (accessed 12 April 2009).

<sup>276</sup> Elderly refugees struggle to integrate in Slovenia *Melita H. Sunjic in Maribor, Slovenia* <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=478f7e984&query=older%20people> (accessed 12 April 2009).

<sup>277</sup> "Fyle: *A 65-year-old grandmother who looked after her grandchildren in the absence of their refugee parents, and who remains alone after their departure, may not qualify for early reunification with her children and grandchildren*". *Refugees Magazine Issue 95 (The international year of the family)* - Kanyhama Dixon-Fyle Putting the family first , *See Dixon-Fyle, art. cit Refugees Magazine*, 1 March 1994.

I can tell you that after six years this summer I had a chance together with my family to go and visit them in Macedonia where they are seeking asylum and they are in Macedonia since 1999. My parents are not for sure the same as I knew them before the trauma that they got during the war it is bigger because for 10 years they are living in such a vision which is dark and they don't see any light that soon will change their life.<sup>278</sup>

He also claims that his daughter was reunited with the family after she lived with her grandparents in Macedonia for one year. She was reunited with her parents but she is traumatized from leaving her grandparents behind.<sup>279</sup>

Finally, the sudden changes in lifestyle would cause trauma and stress both for elderly in the family and children.<sup>280</sup> Age limits and the strict dependency criteria should be removed by countries, and grandparents should also be given priority for reunification with the families. In extreme cases, the elderly, who have no family, but rather emotional ties with a sponsor family should have the right to reunite with that family for protection.<sup>281</sup> After all, “*A house needs a grandma in it.*”<sup>282</sup>

<sup>278</sup> Dzavit Berisha. “RE: Some questions from an old intern.” Email to the author. October 15, 2009.

<sup>279</sup> *Ibid.* “My daughter was going through emotional damage because she was on her way to reunite with us but she left her grand parents in a refugee camp in Macedonia.”

<sup>280</sup> UNHCR Assistance to Older Refugees, EPAU Evaluation Reports, 1 March 1998, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae6bd450&query=older%20people>

<sup>281</sup> This idea is inspired by the recommendations on tracing the family members of Helpage International. In the guidelines it is recommended that reuniting older people with their families or, where this is impossible, develop ‘foster’ family links with supportive neighbours and families who are willing and able to support older people is essential. In my opinion, it is also possible to accept the elderly in the family concept by accepting the developed foster family ties for the benefits of elderly who is left alone in the home country and used to live with the foster family or neighbours.

<sup>282</sup> Louisa May Alcott: Her Life, Letters, and Journals, ( Boston : Roberts brothers, 2008) p. 95.

#### IV.7. The Others (uncles, aunts, nephews and nieces etc., less closely relatives, unrelated persons such as baby sitter, servant)

*“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”*<sup>283</sup>

The principle of dependency comes to issue here in the case of people outside the scope of the family definition. Dependency is not defined under any international instrument,<sup>284</sup> and thus the UNHCR accepts outsider family members. In its handbook for the determination of refugees, reads:

The concept of dependent persons should be understood as persons who depend for their existence substantially and directly on any other person, in particular because of economic reasons, but also taking emotional dependency into consideration.<sup>285</sup>

For instance, a 50-year-old woman, who has been babysitting the children of a refugee family since the children were born and has also lived with the family for 30 years, would normally not be included under the scope of family reunification. However, she has been dependent on the family and has nowhere else to go. Another case arises in the situation of an aunt and her children who have been living with the family for many years, doing the housework and depending on the family, with the child being financially supported by the father of the family. She considers herself a member of the family and the family accepts her and her child as family. For these situations, people who consider themselves or are considered by the family members as belonging, because of a shared life experience or

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<sup>283</sup>Moore v. East Cleveland (May 31, 1977) is a US case where the issue was whether the exclusion of a grandmother from the family definition would violate the Due Process Clause of the Fourteenth Amendment? The court hold violation as it constituted "*intrusive regulation of the family*" without any legitimate paramount state interest. Cited paragraph in the intro is the Para 15 of the judgment. <http://www.altlaw.org/v1/cases/401250> (accessed 5 March 2009).

<sup>284</sup> UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries, and non-governmental organizations (NGOs), Geneva, 20–21 June 2001.

<sup>285</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1992.

emotional ties, are accepted as a part of that family.<sup>286</sup> In these situations, reunification efforts should be on the grounds of humanitarian protection. People “*who would be left alone or destitute in the country of refuge if the refugee were to be resettled*” should be reunited with the family when it is *demonstrated that they were the part of the family unit in the country of origin and depended on it for their sustenance.*”<sup>287</sup>

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<sup>286</sup> *Commentary to the Additional Protocols* of the Geneva Conventions of 1949.

<sup>287</sup> UNHCR, ‘Background Note: Family Reunification in the Context of Resettlement and Integration’, Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries, and non-governmental organizations (NGOs), Geneva, 20–21 June 2001 § 23.

## CHAPTER V- It is Not Wisdom but Authority that Makes-and Applies- a Law: States' Practices

Article 1 of the ECHR states that; “*the High Contracting parties shall secure everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*” This chapter will discuss the possible interpretations of this Article. Article 31 of the Vienna Convention on the law of treaties requires states to act in good faith, however problem arises when the state's interests conflict with the International Treaty. The preamble states that the convention recognizes the sovereign equality and independence of all states, of non-interference in the domestic affairs of states. Hathaway stresses the issue and highlights the reality stating that:<sup>288</sup>

Since governments often seek to minimize the practical effect of their refugee law and other human rights commitments, it might be argued that this state practice should trump, or at least attenuate, the results of interpreting text purposively, in context, and with a view to ensuring the treaty's effectiveness.

This problem leads us to the limits of the state's sovereignty, hence the margin of appreciation. This chapter highlights this problem and ways of limiting states' powers under their sovereign powers. It then introduces the minimum requirements of positive obligations of states raised from Article 1 of the convention. Finally, this chapter focuses on case law in order to explain the use of positive obligations and states' misusing their powers in refugee law cases and to show states' different ways of justifying their acts under the margin of appreciation and sovereignty claims. This chapter will be based on the idea of the making and applying the law by wisdom, not only by authority.<sup>289</sup>

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<sup>288</sup> Hathaway, *op. cit.*, p.69.

<sup>289</sup> Interpreting the famous saying of Hobbes; “*It is not wisdom but Authority that makes-and applies- a law*”. A dialogue between a philosopher and a student of the common laws of England Thomas Hobbes, Joseph Cropsey (University of Chicago Press, 1997), Pg: 16.

## V.1. Margin of Appreciation under Refugee Law

**THEODOTUS**  
**CAESAR:** *you are a stranger here,  
and not conversant with our laws.  
The kings and queens of Egypt  
may not marry except with their own royal blood.  
Ptolemy and Cleopatra are born king and consort  
just as they are born brother and sister.*  
**BRITANNUS** (shocked).  
*Caesar: this is not proper.*  
**THEODOTUS** (outraged). *How!*  
**CAESAR** (recovering his self-possession).  
*Pardon him.*  
**THEODOTUSs:** *he is a barbarian,  
and thinks that the customs  
of his tribe and island are the laws of nature.*<sup>290</sup>

Margin of appreciation is the key point for recognition of people outside the nuclear family. The ECtHR gave priority to the protection of Article 8 while comparing the boundaries between the states' legislations and the right to family. In the case of *Kroon and Others v. The Netherlands*, the ECtHR reiterated this priority;

Para 31: The essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation<sup>291</sup>.

There is a clear relation between domestic laws, exercise of the powers and their interferences: Second paragraph of Article 8 of ECHR leaves the States a certain margin of appreciation. However, it is crucial to note that margin of appreciation given to the states is not an absolute power. States are limited and they can interfere Article 8 on the certain

<sup>290</sup> George Bernard Shaw, *Caesar and Cleopatra Act II*, 1st World Library, ( 1st World Publishing, 2004) Pg:49.

<sup>291</sup> ECtHR, judgment of 27 October 1994, No. 18535/91 *Kroon and Others v. The Netherlands*



grounds and all the related domestic authorities are limited with these grounds as it is stated in the case of *Handyside v The UK*;

The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its “necessity”; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.<sup>292</sup>

For this reason the domestic court should interpret its legislations carefully. In the case of *Kroon and others v. The Netherlands*, the domestic court’s margin of appreciation did not fall within the scope of allowed interceptions under Article 8§2. The ECtHR concluded that domestic law violated Article 8 by not recognizing the paternity of a father and denying recognizing his son<sup>293</sup>. The court recalled that the state was under the obligation to recognize the family ties between a child and his father therefore the recognition fell within the positive obligations of the state. The court interpreted de facto family ties ignoring the cohabitation rule of the state. Therefore the decision of the court in this case showed that general rules can be changed and interpreted to create de facto family ties and states should also take these exceptions in the consideration within their margin of appreciation.

Is there a certain obligation for states to interpret or broaden their margin of appreciations? Is there a certain obligation for a state to admit the child of alien parents who hold residence permits granted on humanitarian grounds?<sup>294</sup> In 1994, the case of *Gül v. Switzerland*<sup>295</sup> is crucial to point this problem. The applicant, a Turkish citizen born in 1947 residing at Pratteln in Switzerland, asked for reunification with his sons T. and E., who were still in Turkey. His request was dismissed due to his lack of financial resources to support the

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<sup>292</sup> ECtHR, judgment of 7 December 1976, No 5493/72, 7 *Handyside v. The United Kingdom*, Application No 5493/72. §. 48 and 49.

<sup>293</sup> *Ibid.* §36

<sup>294</sup> Mowbray, A.R. (2004). The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights. Oxford: Hart Publishing. Page: 172.

<sup>295</sup> *Gül v. Switzerland*, 23218/94, Council of Europe: European Commission on Human Rights, 10 October 1994, available at: <http://www.unhcr.org/refworld/docid/3ae6b6268.html> (accessed 21 October 2009).

family and the age of one of the sons, who was over 18.<sup>296</sup> The judgment of the court agreed with the national court, stating that the applicant could set-up a family in Turkey as well; therefore there was no violation of his right to family.<sup>297</sup> The margin of appreciation of the states was the main issue in this case. The court did not intervene in the domestic law and contrary to the judgments of *Nasri v France*, *Marckx v. Belgium* and several others, states were given the priority under Article 8. In this case, the court could not extend the family definition as a positive obligation of the state in balancing the state's interest with the individual's interests. A wide margin of appreciation was left to the state by the court, which suggested that they had more leeway in a case regarding family reunification than when interfering with existing family life.<sup>298</sup> As Oscar Wilde said, "*All authority is quite degrading. It degrades those who exercise it, and degrades those over whom it is exercised.*"<sup>299</sup>

Another crucial example of the width of the margin of appreciation given to the states is the 1988 case of *Berrehab v. The Netherlands*<sup>300</sup>. Mr. Berrehab, the applicant, who was a Moroccan citizen permanently residing in Amsterdam, applied to the court regarding his request for the renewal of his residence permit. He was granted a residence permit on the grounds of his marriage to a Dutch citizen. After the divorce, the state did not see any valid reasons to renew the resident permit, as he was no longer married to the Dutch spouse, and, thus, the state decided that renewing the permit would be contrary to the public interest. The applicant claimed that he wanted to stay in order to maintain strong ties with his daughter

<sup>296</sup> who is at present 23 years old and no longer a minor, do not enjoy the protection of Article 8 (Art. 8) of the Convention without evidence of further elements of dependency, involving more than the normal, emotional ties.

<sup>297</sup> *Ibid.* For these reasons, the Commission, by a majority, DECLARES ADMISSIBLE, without prejudging the merits of the case, the complaint under Article 8 of the Convention relating to the applicant's son E.; unanimously, DECLARES INADMISSIBLE the remainder of the application.

<sup>298</sup> Rick Lawson, Family Reunification Directive Court of Justice of the European Communities Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, *Parliament v. Council European Constitutional Law Review*, 3: 324–342, (TMC Asser Press and Contributors, 2007)

[http://journals.cambridge.org/download.php?file=%2FECL%2FECL3\\_02%2FS1574019607003240a.pdf&code=8e365fde0573a5f790aeca20ceafeb1](http://journals.cambridge.org/download.php?file=%2FECL%2FECL3_02%2FS1574019607003240a.pdf&code=8e365fde0573a5f790aeca20ceafeb1) (accessed 29 October 2009).

<sup>299</sup> Oscar Wilde, *The soul of man under socialism* (Kessinger Publishing, 2004).

<sup>300</sup> ECtHR, judgment of 28 May 1988, No 3/1987/126/177; 10730/84 *Berrehab v. The Netherlands*.

from this marriage. Thus, he claimed, Article 8 would be violated if he were deported by the state. The issue was the conflict between the state's public interest and the father's right to be with his daughter. Should Mr Berrehab be allowed to stay in the state on the grounds of being with his daughter whose custody belongs to the Dutch mother? Differing from the similar cases (*Gül v Switzerland* and *Ahmut v The Netherlands*), the state could not argue that the father could reunite with his daughter back in his home country since the mother was a Dutch citizen and she had the custody of the daughter. He was deported to Morocco and after remarrying his Dutch wife, had the chance to go back to Netherlands and apply to the court. Surprisingly, in an argument responding to the accused violation of Article 8 (1), the court went further noting that “*nothing prevented Mr. Berrehab from exercising his right of access by travelling from Morocco to the Netherlands on a temporary visa*”. Can this be a valid argument? How can the state's interest<sup>301</sup> in this case be superior to the father's wish to see his daughter frequently? Is the best interest of a child to see the father once a month (even less, considering the costs of getting a visa and a plane ticket) or to see the father more frequently than that by having a father who is living in the same country as her? Before the deportation the applicant was described as seeing his daughter four times a week for several hours at a time. How can a state think that a father can see his daughter as frequently as that while he is residing in Morocco? As it was mentioned several times in this paper, the determination of whether interference is necessary in a democratic society, on the grounds of Article 8(2), is left to the margin of appreciation of the states. The court carried out the balancing exercise between the rights of the individual and the rights of the community in

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<sup>301</sup> The state pointed out the interest as the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 (art. 8-2) rather than the prevention of disorder: the Government was in fact concerned, because of the population density, to regulate the labour market. §26.

deciding whether positive obligation of the state exist<sup>302</sup> and decided that the interference was not proportionate.<sup>303</sup>

The case of Gul inspired the court two years later than the judgment with the decision of *Ahmut v The Netherlands*.<sup>304</sup> The applicant, who had dual Moroccan and Dutch nationality, asked for reunification with his son, who was in Morocco and could not be taken care of by his elderly grandmother anymore. The court used the balance test reasoning in the case:

Article 8 does not guarantee a right to choose the most suitable place to develop family life - by sending son to boarding school, father has him to be cared for in Morocco - no need to go into the question whether son's relatives living in Morocco are willing and able to take care of him -in the circumstances, no failure on Government's part to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other. Conclusion: no violation (five votes to four).

The reasoning of the case was similar to the case of Gul, claiming the strong cultural ties of the child to Morocco. It should be highlighted that the issue and the reasoning of the court could vary if the applicant were a refugee. The positive obligations of the state would have been clearer and the effects of the refugee's not being able to go back to his country would have been analyzed by the court. This case is used here as an example of the state's wide margin of appreciation and the limits of positive obligations. In the cases of Ahmut and Gul, it should be recognized that the judgment was harsh and disproportionate.<sup>305</sup> The applicants were asked to make choices between leaving their hosting countries, homes, and jobs, to go back to their home countries, where they do not have any social and economical

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<sup>302</sup> Clare Ovey and Robin White, *op. cit.*, p.219

<sup>303</sup> Berrehab v. The Netherlands § 29: ...Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8).

<sup>304</sup> Ahmut v. The Netherlands, 73/1995/579/665.

<sup>305</sup> It is important to point out the dissenting opinion of Judge Martens and Judge Lohmus here;: Para 2: *I fear that the present decision marks a growing tendency to relax control, if not an increasing preparedness to condone harsh decisions, in the field of immigration.* Para 4: *The refusal was, without any doubt, in accordance with the law and served a legitimate aim .It was, however, in my opinion disproportionate.*

sources anymore, to be with their children.<sup>306</sup> The interests of the individuals are not balanced in these cases. The state is bound to respect the choice of immigrants who left their countries and achieved a settled status in the hosting states, thus states should admit their family members who are left behind.<sup>307</sup>

Five years after the Ahmut decision, the court applied new approach in the case of *Sen v Netherlands*<sup>308</sup> in 2001. Zeki Sen, the applicant, who resided in the Netherlands for 24 years, applied for reunification with his daughter who was being taken care of in Turkey by her aunt. As the first stage, the existence of “family ties” was analysed. The state failed to find any family ties between the parents and the daughter, stating that the daughter no longer belonged to the family and that she belonged to the family of her aunt in Turkey. The state noted that the parents in Netherlands did not financially support her. The ECtHR used the same reasoning in the judgments of *Gul* and *Ahmut* to define the family ties between child and parents. Contrary to the *Ahmut* and *Gul* decisions, the court held that there had been violation of Article 8 as the other children of the family had always been in the Netherlands. The court concluded that “*the state failed to strike a fair balance between the applicants’ interests and their own interest in controlling immigration*”.

With this decision, the court went one-step further than the previous decisions and recognized the private life of the applicant by balancing between the Article 8 and the public order of the state.

It should be noted that both the ECHR and the government fail to see the other relevant aspects in the relevant cases; the child who is in the home country can be subject to *physical and psychological abuse, sexual violence and exploitation of the care givers*. On the

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<sup>306</sup> Dissenting opinion of Judge Morenilla: §2. *To deny a father and son their right to be together when the son is at an age at which he needs his father's care and guidance, particularly since his mother has died, and to deny a national of the Netherlands the right to have his son begin an education in the adopted country of which he is a national according to the law, is in my opinion contrary not only to the European Convention of Human Rights but also to "cogent reasons of a humanitarian nature" as set forth in the national legislation (1982 Aliens Circular, Chapter B19, 1.1 and 2.5).*

<sup>307</sup> *Ibid.* §5

<sup>308</sup> ECtHR, judgment of 21 December 2001, No. 31465/96 *Sen v. the Netherlands*.

basis of its interviews with the unaccompanied refugee children, Human Rights Watch states that *some care takers use separated children as forced labor, deny them the chance to go to school, and physically and verbally abuse them*. A 15-year-old refugee girl living with a host family in a refugee camp in Mangay is one of the best examples of such a situation.<sup>309</sup>

*“She treats me bad. She discourages me. I work for her a lot. [In the morning] I sweep, get water, and clean the room. The caretaker tells me to go to the road, to sell green peas in the market. After work, I go home, fetch water, wash pots, cook. . . . She never appreciates me. I cook for the caretaker's family and myself. Sometimes she only gives me a little food. At times, when I finish cooking, she takes all the food. . . . The caretaker's children don't do anything at home. Only myself, I do all the work. Any time I work for the woman, she shouts at me, doesn't appreciate me.”*

States and the ECHR should not cause gross violations while trying to protect child's ties with the social community. It is clear that there are other aspects that matter more than reserving the social ties of the child. The child's being subject to all of the violations mentioned above is highly possible when the child is without the family support of real parents. Thus possible abuses should be taken into consideration and the best interest of the child should be recognized as often being with the parents and not simply with the social links with the home country.

Another case which was successful to challenge the domestic law for providing the family reunification of a child within the family was the case of *Tuquabo – Tekle and others v The Netherlands*<sup>310</sup> in 2005. The applicants, five Dutch nationals<sup>311</sup> and the daughter of the applicants' family, who is an Eritrean national, relied on Article 8 complaining that the states' did not comply with its positive obligations to provide them access to family unity. The daughter of the applicant was living in Eritrea with her uncle and grandmother. The state

<sup>309</sup> Human Rights Watch, “Forgotten Children of War: Sierra Leonean Refugee Children in Guinea,” 1999 [http://www.hrw.org/legacy/reports/1999/guinea/guine997-05.htm#P464\\_96954](http://www.hrw.org/legacy/reports/1999/guinea/guine997-05.htm#P464_96954) (accessed 19 July 2009).

<sup>310</sup> *Tuquabo-Tekle and Others v. the Netherlands*, 60665/00, Council of Europe: European Court of Human Rights, 19 October 2004, available at: <http://www.unhcr.org/refworld/docid/46516c092.html> (accessed 27 October 2009).

<sup>311</sup> *The first applicant, Goi Tuquabo-Tekle, born in Ethiopia in 1963, is married to the second applicant, Tarreke Tuquabo, who was born in Ethiopia in 1952, and she is the mother of the other applicants: Mehret Ghedlay Subhatu, Adhanom Ghedlay Subhatu, Tmnit Tuquabo and Ablel Tuquabo, born in 1981, 1978, 1994 and 1995 respectively. The second applicant is the father of Tmnit and Ablel, and the stepfather of Mehret and Adhanom.*

followed the same reasoning as in the *Sen . Netherlands*<sup>312</sup> decision and did not recognize the ties between the daughter and the family. She was said to belong to the latter's family more than her nuclear family. Similarly to the previous cases, the state refuted the existence of family ties between the daughter and her mother and her step-father. It was specified that the family could reunite with the daughter in Eritrea. On the other hand, the family asked for the reunification of the daughter for her benefit. When she reached the marriage age she was taken out of school by her grandmother. The state also mentioned the mother's previous ability to bring her daughter as the mother had resident for a long time in the hosting country, but the mother had not initiated an appeal until the time of this case. The applicant claimed that she could not be reunited with her daughter due to the lack of official bodies in the home country to issue a passport for her daughter at the time of her previous application. The applicants also claimed the financial support they have been providing to the daughter. The issue was whether or not Article 8 imposed on the respondent state was a positive obligation allowing the daughter to reside in the Netherlands.<sup>313</sup> A fair balance was said to be applied between the individual's competing interest and the state giving the margin of appreciation to the state.<sup>314</sup> The court recognized the existence of strong ties of the parents and the children to the Netherlands, and therefore it was decided that it was in the best interest of the family to settle in the Netherlands.<sup>315</sup>

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<sup>312</sup> *Ibid.* The comparison between two cases were stated in §47 and 48 by the court: It is in this latter context that the two cases are different: whereas Sinem Şen was 9 years old when her parents sought to be reunited with her (*ibid.*, § 10 and 13), Mehret was already 15 when her mother and stepfather applied for a provisional residence visa on her behalf (see § 11 above). The question therefore arises whether this constitutes such a material difference that the present case ought, for that reason, to be distinguished from Şen, and lead to a different outcome.

<sup>313</sup> *Ibid.* §41

<sup>314</sup> *Ibid.* §42

<sup>315</sup> The Court held unanimously that there had been a violation of Article 8 and awarded the applicants, jointly, EUR 8,000 for non-pecuniary damage and EUR 1,241.23 (less EUR 701, received by way of legal aid from the Council of Europe) in respect of costs and expenses.

## V.2. What is left when the make up is removed: Limits of positive obligations of the states

States fail to interpret their obligation to protect the rights of an individual, and instead it is tried to be proved that the state is fulfilling the obligations mot-a-mot laid in the convention.<sup>316</sup> Like covering acne with foundation, mot-a-mot obligations full fill state interests but do not protect the individuals' interests. On the other hand, states apply mot-a-mot provisions for their duties under international law however this superficial applications still do not protect the individuals' rights.

In some cases, while applying the mot-a-mot obligations, the states fulfill their obligations; however the individual's main interest and protected rights under the Convention are not protected. Therefore, when the provided obligations are ignored, the human rights violations of the states remain. The case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*<sup>317</sup> is an important example to explain the importance of interpreting the positive obligations.

The applicants, a mother born in 1970 and her daughter born in 1997, were residing in Canada. The first applicant (mother) was granted refugee status in 2001 and indefinite leave in 2003. In the meantime the applicant's five years old daughter (second applicant) was living in the Democratic Republic of Congo with her grandmother. The applicant asked her brother (K), who was a Dutch national, to take her daughter from the DRC and care for her until the mother managed to join her daughter. When K landed in the Brussels airport, he did not have the necessary documents thus he claimed the second applicant was his daughter but he could

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<sup>316</sup> For this kind of situations, Hathaway refers to the principle of *dubi mitius* which states that if the treaty provision is not clear the states have the minimum obligations under the convention. Hathaway notes that the interpretation of the lawmaking treaties should not be used alone, they should be applied in the most appropriate and meaning manner. On the other hand he also takes attention to the words of ECHR which also implies that the treaty should be applied in the most effective way rather than interpreting it to restrict the obligations of the states. Pg. 72, 73.

<sup>317</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, Council of Europe: European Court of Human Rights, 12 October 2006, available at: <http://www.unhcr.org/refworld/docid/45d5cef72.html> (accessed 3 october 2009).



not convince the immigration authorities. Canada stated that second applicant's aim to join her mother was not a valid basis for granting refugee status, regardless of the second applicant's right to join her family under the protection of Convention on the Rights of Child. The second applicant was ordered to be removed due to lack of necessary documents under domestic law and was (Act of 15 December 1980) was taken away from her uncle and put in a detention centre.

Following the testimony of the second applicant (daughter), officials traced the only family member (B) left in DRC. The applicant was related to him as his niece. Her uncle was a student living in a university campus with five other people, deemed as a suitable place for a 5-year-old child away from her mother.

This action of the government is also another form of cover up. The essential part, which was protected under several human rights instruments, was not considered. The essential issue in this case is putting the child into care that would affect her negatively as little as possible. However, the state just traced a student who was living in a dorm and reunited the daughter with him just to fulfill their obligations. In a time when the mental health of the children living in foster-care in welfare is highly discussed by the scholars and professionals and is found to be imperfect,<sup>318</sup> this act of the state can not be accepted. Again, it should be noted, this was another cover-up; the state was applying to fulfill the positive obligations *mot-a-mot*. B rejected taking care of his niece claiming he could not support a child. Despite the testimony of B, the authorities ignored him and he was not informed when the niece was sent back to the DRC.<sup>319</sup> Finally, not mentioning all the traumas of the 5 years old kid, she was removed back to DRC in 2002 with the other adults who were also being deported. When she arrived the airport, there was no one to take her. Officials expected the

<sup>318</sup> Fred Wulczyn, Mary Bruce Webb and Ron Haskins: *Child Protection Using Research to Improve Policy and Practice* (Brookings Institution Press, 2007) p.81

<sup>319</sup> § 29: "Dear Sir, I wish to confirm the message which the Embassy has received from the Department in Brussels, namely, the return of your niece Mubilanzila Tabitha to Kinshasa. (N'Djili) arriving on the Hewa Bora flight at 5.45 p.m. on Thursday 17 October 2002. Yours faithfully,

uncle to come and pick her but he did not appear (later then official from the Belgian Embassy in Kinshasa found out that he disappeared). She was taken from the airport by another official (secretary at the National Information Agency of the DRC, who offered her accommodation). Eventually the first applicant (mother) was granted refugee status and indefinite leave to remain in Canada with a work permit, therefore she was entitled to ask to be reunited with her daughter officially and she was reunited with her daughter in 2002.

In my opinion, the case illustrates how destructive putting make up on inhumanity with the tools of human rights standards can be. While the second applicant was in detention, it was officially explained that she was living under good conditions, which is essential for a child. According to the letter of the director of the centre, she was allowed to communicate with her mother and uncle by phone and she was taken good care by the staff of the centre.<sup>320</sup> One must question the positive obligations of the state here. Is it enough to take care of the child who has been put in the detention centre or is it another way of the state to show as if the positive obligations are fulfilled by providing good accommodation for a kid who is detained?<sup>321</sup> Wouldn't it be easier both from the financial and the procedural points from the side of the state to reunite the child directly with the mother? Wouldn't it be healthier and better from the perspective of a child and the mother to grant a temporary document to the child during the refugee determination process of the mother? Aren't states obliged to interpret the positive obligations regarding the different positions of individuals? Although there was no jurisdiction to question the coherence of the centre, there is no doubt that it was not enough for the state to claim that the necessary measures were taken in the detention centre for the well-being of the child.<sup>322</sup> Her detention, no matter how good the conditions were, restricted her development by putting her in an adult place, designated exclusively for

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<sup>320</sup> *Ibid.* § 37.

<sup>321</sup> In the judgment of the court it was decided that the government failed to apply the family reunification principle of an unaccompanied minor therefore it can not be said that the state fulfilled all the obligations. (§ 90).

<sup>322</sup> *Ibid.* § 50

adults, alone where the people's liberty is restricted.<sup>323</sup> Therefore for both applicants the ECtHR ruled on the violation of Article 3<sup>324</sup> of the Convention, which prohibits inhuman or degrading treatment or punishment.<sup>325</sup> Later, in the 103rd paragraph the Court highlighted “*the position of extreme vulnerability of the child in which she found herself as a result of her position as an unaccompanied foreign minor*”.

The court also highlighted the fact of state's cover up by applying other standards,<sup>326</sup> and highlighted the fact that despite a proper guardian was not found to take care of the child, she was still removed back to DRC. Therefore the government's submission that states the proper measures were taken during her flight (such as assigning an air hostess for the flight) could not be accepted as *requisite measures and precautions*.<sup>327</sup>

Under the arguments of Article 8, the court applied the balance test and examined whether the child's detention could be defined as “necessary in a democratic society” for the protection of the state's interest.<sup>328</sup> A person's physical and mental integrity is protected under Article 8, and the court found the detention of the second applicant to be unnecessary given the fact that the detention centre was for adults. The Court also noted that the state's failing to consider the rule of family reunification was a violation of Article 8.<sup>329</sup>

As well as Article 3 and Article 8, for the second applicant, the court also held there has been violation of Article 5 § 1<sup>330</sup> and Article 5 § 4<sup>331</sup> of the Convention on the grounds of

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<sup>323</sup> *Ibid.* §42

<sup>324</sup> Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>325</sup> *Ibid.* §58 ...The State had, moreover, had an array of means at its disposal. The Court is in no doubt that the second applicant's detention in the conditions described above caused her considerable distress. Nor could the authorities who ordered her detention have failed to be aware of the serious psychological effects it would have on her. In the Court's view, the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.

§ 62:....The Court has no doubt that, as a mother, the first applicant suffered deep distress and anxiety as a result of her daughter's detention...

<sup>326</sup> *Ibid.* §67

<sup>327</sup> *Ibid.* §69

<sup>328</sup> *Ibid.* §80

<sup>329</sup> *Ibid.* §85

<sup>330</sup> Article 5§1:.. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

insufficient protection provided by the state to the applicant who was extremely vulnerable and for the non-existing link between the applicant's deportation and exercise of the remedy, which was said to have been provided by the state.

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<sup>331</sup> Article 5§4: Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

## CHAPTER VI- Requirements of States vs. Family Reunification

Is it enough when the family members analyzed above are recognized? One can think that problems end when states recognize family members for family reunification. However this would be wrong. Establishment of family links and the necessary tools to do so take time and even if the family member is accepted to reunite with the sponsor, problems do not end. This chapter examines the procedural problems of refugees who face several complications through the reunification process. Most critically, again referring to the margin of appreciation of the states, the length of the procedure will be discussed as well as the documents requirements. Additionally, the new popular immigration tool of DNA testing will be discussed in this chapter.

### VI.1. Adding new wounds to existing scars that may never heal without the support of loved ones:<sup>332</sup> Length of procedure

Even if the reunification is successful, the process and the procedures take longer than is expected. Resettlement, reunification and immigration procedures for the family take so long that families are emotionally damaged. States are also affected by this delay because of the costs of procedural works. It is also crucial to mention the possibility of human trafficking in the cases of a long waiting process.<sup>333</sup> Thus, in any case, time works against the separated family which is already harmed by the refugee experience.<sup>334</sup> Thus in any case time works against the separated family which is already harmed by the refugee experience<sup>335</sup>. Therefore states should act in a humanitarian and positive manner without any delays.<sup>336</sup> States should avoid demanding unnecessary requirements such as documents, detailed medical tests and

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<sup>332</sup>Kanyhama Dixon-Fyle, *UNHCR has promoted the preservation and reunification of refugee families for decades, but much more needs to be done*, Refugees Magazine 95 (1994).

<sup>333</sup>Volker Türk, Feller, Nicholson (eds.), *op. cit.*, p.560

<sup>334</sup> Kanthama Dixon-Fyle, *art. cit.*1995

<sup>335</sup> Kanthama Dixon-Fyle, *art. cit.*

<sup>336</sup> UN High Commissioner for Refugees, *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) - 1998, available at: <http://www.unhcr.org/refworld/docid/3ae68c6e30.html> (accessed 7 August 2009).

DNA testing. Avoiding processing delays should be the first consideration of the states while applying these tools.

## **VI.2. How to remember taking the documents while escaping without taking any luggage? : Documentary evidence required**

Requirements of submitting valid documents such as passports, marriage, divorce, birth and death certificates are not realistic as most refugees escape in fear and do not obtain any necessary documents as proof of their relationships. On the other hand, necessary proof documents can be missing as some countries or the previous asylum seekers camp do not have not any procedures for formally registering marriages, births or deaths.<sup>337</sup> More importantly, if a refugee cannot submit the required documents, the credibility of his/her application is likely to affect the family reunification process or worse, the application is suspected as fraud by the authorities. Thus, lack of documentary evidence should not affect the process.<sup>338</sup> The UNHCR states that the lack of obtaining necessary documents should not be taken into consideration as an impediment.<sup>339</sup> For these reasons, recently some states have started to use DNA testing for the verification of biological links of the refugee families. DNA testing will be discussed in the following section.

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<sup>337</sup> Guidelines on the Protection of Refugee Women Legal publications, 1 July 1991 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d4f915e4&query=%20family%20%20reunification> (accessed 7 August 2009).

<sup>338</sup> ECRE *Integration*, Family reunification [http://www.ecre.org/topics/integration/family\\_reunification](http://www.ecre.org/topics/integration/family_reunification) (Accessed: 09 May 2009).

<sup>339</sup> Note on Family Reunification International Protection (SCIP), 13 August 1981 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68cd48&query=%20family%20%20reunification> Family Reunification EXCOM Conclusions, 21 October 1981 Sec. 6 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68c43a4&query=%20family%20%20reunification> (accessed 7 October 2009).

### VI.3. DNA Test application: Institutionalized Xenophobia or An Efficient Immigration Tool?

*They've been in these camps for five years, 10 years, 15 years, 20 years. There is no future for them and they have a friend or a distant relative here in the United States. You know, when I put myself in that position, would I lie and say my cousin was my sister? Absolutely.*<sup>340</sup>

DNA testing is an immigration tool used to verify the kinship between refugees for purposes of family reunification. The test is used on the relatives of refugees who live in another country, individuals who are not refugees but have refugee family members elsewhere.<sup>341</sup> *"The use of DNA to establish family relationships have been available for the past fifteen years"*<sup>342</sup> DNA tests for the purpose of family reunification have been popular for the last couple of years.

In February 2008, the United States applied DNA tests to some African refugees to determine the extent of fraud.<sup>343</sup> The pilot project found that DNA testing proved relationships in only 20% of the Kenyan cases.<sup>344</sup> As a result of this pilot project, the United States suspended the resettling of African refugees on its territory because of fraudulent applications. In cases where refugees are asked to take the DNA test and, in cases where the refugee does not appear, the fraud level is considered to be very high.<sup>345</sup> As a result of the

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<sup>340</sup> Lavinia Limon, (President, U.S. Committee for Refugees and Immigrants DNA Tests Refugees' Claims Of U.S. Relatives by Jennifer Ludden July 20, 2008, National Public Radio® <http://www.npr.org/templates/story/story.php?storyId=92716733> (accessed 1 October 2009).

<sup>341</sup> UN High Commissioner for Refugees, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <http://www.unhcr.org/refworld/docid/48620c2d.html> (accessed 23 October 2009).

<sup>342</sup> *Ibid.*

<sup>343</sup> Pilot programme was an extension of the Priority Three category which was used for Family Reunification Cases: *"Individual cases granted access because they have immediate family members in the United States who were resettled as refugees or granted asylum in the United States and whose nationality is currently eligible for processing as refugees to allow family reunification"*. For more see: USRAP report on ACCESS TO THE U.S. REFUGEE ADMISSIONS PROGRAM September, 2006 by Department of State Bureau of Population, Refugees, and Migration Office of Admissions <http://www.rcusa.org/uploads/pdfs/Access%20to%20the%20U.S.%20Refugee%20Admissions%20Program.pdf> (accessed 18 October 2009).

<sup>344</sup> US mulls DNA tests for some refugees By MATTHEW LEE (AP) – Nov 5, 2009 Associated Press <http://www.icmc.net/article/us-mulls-dna-tests-some-refugees> (accessed 8 November 2009).

<sup>345</sup> *Ibid.*

DNA testing application, some cases were put on hold by the state, as their relatives did not come to the testing or they refused to supply DNA samples. The United States is considering resuming DNA tests in late 2009.<sup>346</sup>

Similarly to the United States, in early September 2009, the United Kingdom went one step further with their own pilot project, which was to apply DNA testing to determine the country of origin of the refugees and with the aim to stop fraud.

As discussed in the previous chapter, the main question is whether it is acceptable to determine family ties exclusively on the basis of blood relationship, ignoring social and cultural links.<sup>347</sup>

The issue of cultural diversity becomes the subject once again, in this case attesting to the fact that family ties differ from country to country, and some families raise children who are not their own biologically but are considered their children nonetheless.<sup>348</sup> As Professor Sir Alec Jeffreys of the University of Leicester, who pioneered human DNA fingerprinting stated: *"DNA testing can profoundly affect the lives of people."*<sup>349</sup> It is a well-known fact that in some cultures, people raise children with which they are not connected biologically. Especially during war, people unofficially adopt unaccompanied children to provide them with safety. Additionally, use of DNA testing violates privacy and family rights under Article 8 of the ECHR.<sup>350</sup>

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<sup>346</sup> DNA tests for refugees weighed The Denver Post 11/06/2009 [http://www.denverpost.com/nationworld/ci\\_13725464](http://www.denverpost.com/nationworld/ci_13725464) (accessed 1 November 2009).

<sup>347</sup> Jacqueline Weekers, a health-policy adviser at the International Organization for Migration in Geneva. "I wouldn't dare to say to establish family lines. That's the whole issue with DNA. What is a family? And what is not a family? A family can be several people connected because of social and other links." <http://www.nytimes.com/2007/11/15/world/europe/15iht-france.4.8354453.html> (accessed 1 November 2009).

<sup>348</sup> Miriam Jordan, Refugee Program Halted As DNA Tests Show Fraud, The Wallstreet Journal <http://online.wsj.com/article/SB121919647430755373.html> (accessed 1 November 2009).

<sup>349</sup> Experts Condemn asylum DNA tests 30 September 2009 [http://news.bbc.co.uk/2/hi/uk\\_news/8282654.stm](http://news.bbc.co.uk/2/hi/uk_news/8282654.stm) (accessed 1 November 2009).

<sup>350</sup> French council approves DNA testing for immigrants Doreen Carvajal November 15, 2007 The New York Times <http://www.nytimes.com/2007/11/15/world/europe/15iht-france.4.8354453.html> (accessed 1 November 2009).



In the case of *S. and Marper v. The United Kingdom*, the applicants claimed that DNA testing constituted an interference with the right to respect for their private lives. The United Kingdom submitted that the interference was in accordance with the law<sup>351</sup> and was necessary and proportionate “*for the legitimate purpose of the prevention of disorder or crime and/or the protection of the rights and freedoms of others.*”<sup>352</sup> ECHR discussed the issue of “*whether the retention by the authorities of the applicants' fingerprints, DNA profiles and cellular samples constitutes interference in their private life.*”<sup>353</sup> In its judgment the court stated that:

Para: 103. The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes... The above considerations are especially valid as regards the protection of special categories of more sensitive data and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family (see Recommendation No. R(92)1 of the Committee of Ministers on the use of analysis of DNA within the framework of the criminal justice system).<sup>354</sup>

France has also applied DNA testing as an immigration tool since October 2007. Testing is only applied in cases involving child-mother reunifications.<sup>355</sup> Consent of the refugee for DNA testing is required, and if a refugee does not consent to the test it can jeopardize the application and cause its rejection.<sup>356</sup> On the other hand, France does not define the family by biological ties. Thus, associating family ties with biological connections is discriminating and violated fundamental rights.<sup>357</sup> The law was criticized by referring to the

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<sup>351</sup> *Ibid.* p. 90

<sup>352</sup> *Ibid.* p. 91

<sup>353</sup> ECtHR, judgment of 4 December 2008, nos. 30562/04 and 30566/04 § 59, *S. and Marper v. The United Kingdom*

<sup>354</sup> *Ibid.*

<sup>355</sup> French parliament adopts DNA bill 24 October 2007 BBC News, <http://news.bbc.co.uk/2/hi/europe/7059186.stm> (accessed: 2 November 2009).

<sup>356</sup> Jill Rutter, a spokeswoman for Refugee and Migrant Justice, a London-based legal charity for asylum seekers

<sup>357</sup> Socialist deputy Arnaud Montebourg states; “*This law violates the fundamental principles of the republic which do not define family and affiliation by biology*” French parliament adopts DNA bill 24 October 2007 BBC News, <http://news.bbc.co.uk/2/hi/europe/7059186.stm> (accessed: 2 November 2009).

collaborationist Vichy government, which practiced Anti-Jewish discrimination during the Nazi occupation of World War II.<sup>358</sup>

DNA testing can be intrusive and potentially have serious negative consequences.<sup>359</sup> Use of testing can interfere with the right to privacy by revealing potential family secrets. *“Experts say that while it is legitimate for the government to try to confirm asylum seekers’ claims, it has to do that in ways compatible with the principles of a democratic society - and with a credible test.”*<sup>360</sup>

For example, a married refugee woman who has a child born from an affair, and who has not admitted it to her husband, would not give consent to a DNA testing. One can consider the situation already as unethical and unacceptable, yet it is not a state’s duty to interfere within family life and disclose the fact that the child does not belong to the husband. *“The days are past when the business of the judges was the enforcement of morals or religious belief.”*<sup>361</sup>

*“State parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant.”*<sup>362</sup> It can be argued that confidentiality should be highly protected; therefore it would not constitute any interference in a case like this. However there would still be risks (thinking of the same hypothetical situation) such as the father’s asking for reunification with his illegitimate son and finding out the truth.

<sup>358</sup> Proposal in France to Test Some Immigrants’ DNA By ELAINE SCIOLINO Published: October 11, 2007 The New York Times <http://www.nytimes.com/2007/10/11/world/europe/11france.html> (accessed: 2 November 2009).

<sup>359</sup> UN High Commissioner for Refugees, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <http://www.unhcr.org/refworld/docid/48620c2d.html> (accessed 23 November 2009).

<sup>360</sup> Genetic Tests for UK Asylum Seekers Sparks Controversy November 5, 2009 <http://www.usnews.com/science/articles/2009/11/05/genetic-tests-for-uk-asylum-seekers-sparks-controversy.html?PageNr=2&-C> (accessed 23 November 2009).

<sup>361</sup> § 64 *Singh v Entry Clearance Officer, Delhi* [2004] EWCA Civ 1075; [2004] INLR 515 Case 370/90 §: 62 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2004/1075.html&query=singh+eco&method=all> (accessed 23 November 2009).

<sup>362</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <http://www.unhcr.org/refworld/docid/453883f922.html> (accessed 23 November 2009).

Finally, family reunification is already a time-consuming process, and conducting DNA tests would result in time loss and harm the refugees, and in financial costs to the states.<sup>363</sup> Together with these, DNA testing is a sensible issue thus there is no guarantee that the testing will not cause any mistakes or misunderstandings and harm the family members and the family members. The Canadian Council of Refugees drew attention to another possible risk of the DNA testing. Possible mistakes would cause gross traumas in the families and the prestige of a family could also go down as was complained by a refugee man who was harmed due to wrong interpretations of requested DNA testing.<sup>364</sup> For all the mentioned reasons, DNA testing application should be given up or used only as the last resort.

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<sup>363</sup> Viewpoint 2008, COE "Refugees must be able to reunite with their family members"  
[http://www.coe.int/t/commissioner/viewpoints/080804\\_EN.asp](http://www.coe.int/t/commissioner/viewpoints/080804_EN.asp)? (accessed 23 November 2009).

<sup>364</sup> Canadian Council for Refugees : More than a Nightmare Delays in Refugee Family Reunification As he wrote in his letter of complaint: *"I am really disappointed and frustrated of these two current letters from the Embassy with all the mistakes made. The prestige of our family went down. What is happening is unfair and unjust. Why should the Embassy select certain cases? I wonder if it is for specific reasons these mistakes were made. These threats the Embassy is putting on the family's file are hurting us psychologically, emotionally and physically."* Pg.11

## Conclusion and Recommendations

A famous Buddhist quote states that “*An idea that is developed and put into action is more important than an idea that exists only as an idea.*”<sup>365</sup> While the aim of this thesis is to develop ideas on the family reunification rights of refugees, it can’t put these ideas into action. Its recommendations aim at helping the development of these ideas.

The failure to meet specific definitions of family is the most important and biggest challenge for refugees addressing family reunification problems. Bridging the gap of family protection in refugee law can’t be achieved with strict definitions. States should have flexible approaches when determining a family unit. A denial of the broad meaning of family currently limits the full protection of refugees, and fundamentally weakens the significance of the Convention and the Protocol for the Protection of Refugees.

A broad universal definition of family should be governed by law. However, this universal definition should not be exhaustive to such a degree as to exclude people from the definition. It is important to mention again that human rights law is not static, and, therefore, while a universal definition is recognized and governed by law, likelihood of the family unit changing over time should be considered. Nevertheless, one can never be sure what will be defined as a family member in 50 years.

Being a refugee already indicates that one’s fundamental rights have already been violated. The reason for being a refugee is to have a safe place in another country to be able to enjoy fundamental rights. For this reasons, states are obliged to provide fundamental rights to refugees.<sup>366</sup> Establishing minimum standards should not work in favor of the state’s sovereignty; standards should work in favor of the protection of refugees. A very effective strategy to extend the minimum standards starts with extending the definition of nuclear

<sup>365</sup> Siddhārtha Gautama (563 BCE to 483 BCE)

<sup>366</sup> Anders B. Johnson, “The Duties of Refugees”, *International Journal of Refugee Law* (Vol.3, No.3, 1991) pp. 573-83, in p.205 *International refugee law : a reader* / edited by B.S. Chimni (New Delhi ; Thousand Oaks, Calif. : Sage Publications, 2000).

family. Even though states can find it difficult to recognize different kinds of families that are prominent in their societies, they should understand that cultural diversity is one of the corner stones of human rights. *“For their part, third states are requested to apply more flexible criteria and more rapid procedures, especially in the context of family reunification, so that people in danger can be admitted to safety.”*<sup>367</sup>

The cases of family reunification analyzed in this thesis were mostly of European origin. However, all states should acknowledge maximum protection for refugee families. This paper might imply that the entire burden is on the Member States; however international law drafters, NGOs and society members are under the obligation to protect families, and, therefore, refugee families.

*“Good ideas are common - what's uncommon are people who'll work hard enough to bring them about”*<sup>368</sup>

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<sup>367</sup>Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the Humanitarian Issues Working Group of the International Conference on former Yugoslavia, Geneva, 18 March 1994 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68fc918&query=%20family%20%20reunification> (accessed 2 September 2009).

<sup>368</sup> *“Good ideas are common - what's uncommon are people who'll work hard enough to bring them about”* ASHLEIGH BRILLIANT English-American writer, columnist and cartoonist ("Potshots").

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