1 Introduction and methodology

1.1 Motivation for this study

The right to respect for family life is a recognised human right.[1] In many international and regional instruments, as well as in the constitutional traditions of most states, the right to respect for family life has a prominent position.[2] In the Universal Declaration of Human Rights, which is not a binding instrument of international law, the family is positioned as the natural and fundamental group unit of society. From this wide range of obligations, it can be derived that states may not arbitrarily interfere in family life.[3] There is, however, no single instrument or even provision in international (and regional) human rights law that protects the right to family unification: the right of family members to live together in one state. In this age of globalisation, in which more persons than ever have direct family members holding a different citizenship,[4] the question of whether there is a human right to family unification has become topical.[5] The right to family unification is closely linked to the right to respect for family life.[6] It is in fact an example of the right to respect for family life, like the right to marry for example. The right to family unification is the branch of the right to respect for family life that deals with families who seek to reside together in one state but who are limited in doing

1 In Art 16(3) UDHR and in Art 23(1) ICCPR the family is positioned as the natural and fundamental group unit of society that is entitled to protection by society and state.

2 See for instance Art 12 UDHR, Art 17 ICCPR and Art 8 ECHR.

3 See Art 17(1) ICCPR, which states that "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*" Similar, although not exactly the same, protection is provided for in Art 8 ECHR.

4 In this dissertation, the notion of citizenship is used to refer to a person holding the passport of a certain state. In this context, often also the term nationality is used. If, in this dissertation, a different meaning is ascribed to the notion of citizenship, this is mentioned in the text of the footnotes.

5 The terms 'human right to family unification' and 'right to family unification' are used interchangeably in this dissertation. Both terms are meant to refer to the 'human right to family unification'. Whenever this is not the case, this is specifically mentioned, or should be inferred from the context.

6 Cholewinski reported that "it is not such a significant step to take" from the protection of family life to the recognition of the right to family unification. Cholewinski R, 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right' (2002) 4 EJML p 275.

so by immigration law. Boeles reported in 2001 that a right to family unification has generally not been acknowledged, but nuanced this by referring to the constitutional traditions of several member states of the EU.[7]

In this dissertation, the existence of a human right to family unification is the object of inquiry. Based on an analysis of international and European human rights law, EU law and the domestic law of selected states, it is argued that a right to family unification exists as a branch of the right to respect for family life. There is ample scholarship on the issue of family unification.[8] Important research has been conducted on specific issues related to family unification, such as integration measures.[9] Others have focussed on the negotiation of EU legislation in the field of family unification.[10] From a historical perspective, policy making in the field of family unification in the Netherlands has been reported on extensively.[11] In a comprehensive country study, recent developments in the field of family unification in the United Kingdom were analysed.[12] On a more specific level relating to specific instruments, the case law of the European Court of Human Rights (ECtHR) has been analysed thoroughly on different aspects.[13] In the field of EU law, the interpretation of the Family Reunification Directive (FRD),[14] the impact of the Citizenship Directive on family unification law[15] and in general the fragmentation of EU family unification law have been examined.[16] From a philosophical perspective, the

7 Boeles P, 'Directive on Family Reunification: Are the dilemmas resolved?' (2001) 3 EJML.

8 Walter A, *Familienzusammenführung in Europa: Völkerrecht, Gemeinschaftsrecht, Nationales Recht* (Nomos 2009).

9 De Vries K, Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law (Hart 2013); Wehner M, *Der Sprachnachweis beim Ehegattennachzug von Drittstaatsangehörigen* (Verlag Dr. Kovaè 2013); Leuschner, J, *Das Spracherfordernis bei der Familienzusammenführung. Zur Vereinbarkeit des § 30 I 1 Nr. 2 AufenthG mit dem Schutz von Ehe und Familie im Verfassungs-, Europa- und Völkerrecht* (Wissenschaftlicher Verlag Berlin 2014).

10 Strik T, *Besluitvorming over asiel- en migratierichtlijnen: de wisselwerking tussen nationaal en Europees niveau* (Boom Juridische Uitgevers 2011); Guèvremont S, *Vers un traitement équitable des étrangers extracommunautaires en séjour régulier* (E.M. Meijers Institute for Legal Research 2009).

11 Van Walsum S, *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms* (Cambridge Scholars Publishing 2008); Bonjour S, *Grens en Gezin: Besluitvorming inzake Gezingsmigratie in Nederland, 1955-2005* (Aksant 2009).

12 Wray H, *Regulating Marriage Migration into the UK: A Stranger in the Home* (Ashgate 2011).

13 Spijkerboer T, 'Structural Instability. Strasbourg Case Law on Children's Family Reunion' (2009) 11 EJML; Smyth C, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 EJML.

14 See for instance Groenendijk K et al (eds), *The Family Reunification Directive in EU Member States: the first year of implementation* (Wolf Legal Publishers 2007) .

15 See for instance Costello C, 'Metock: Free movement and "normal family life" in the Union' (2009) 46 CMLRev.

16 Groenendijk K, Family Reunification as a Right under Community Law (2006) 8 EJML; Staver A, 'Free Movement and the Fragmentation of Family Reunification Rights' (2013) 15 EJML.

justification for the right to family unification as a channel for migration has been discussed at length.[17] None of these contributions have solely focussed on the question of whether there is a (human) right to family unification and how states may derogate from this right.

A distinction must be made between whether a human right exists and whether it is realised in an individual case. Even though there is no generally accepted definition of what a human right is, it can be categorized as

> "*a legally enforceable claim or entitlement that is held by an individual human being vis-à-vis the state government, for the protection of the inherent human dignity of a human being.*"[18]

A human right is a right that is believed to belong to every person. Human rights regulate the relationship between a state and the individuals under its jurisdiction.[19] A human rights norm is a minimum standard which must be respected. States may offer a higher level of protection, but may not fall below the minimum threshold. Concluding that a right to family unification exists in particular circumstances does not necessarily imply that a human right to family unification exists. It could also be that a state exercises discretion when it comes to which persons it grants residence. In this regard it is important to determine whether states are under an obligation to grant family unification in particular circumstances or whether it is merely a discretionary competence to do so. In this context it is important to remark that whatever conception of the human right to family unification is developed, this right is not absolute. Like the right to respect for family life, states may make derogations from the right to family unification. This makes the right to family unification a qualified right.[20] Interferences in the right to family unification are allowed if the legal grounds for interference are adhered to and may be subject to derogations.[21]

The individual human right to family unification stands in opposition to the sovereign right of states to control immigration.[22] Traditionally, it has been a sovereign right of states to determine which foreign nationals are allowed to enter and reside in its territory. However, like the human right to respect for family life, the right of states to control immigration is not

17 Carens J, *The Ethics of Immigration* (OUP 2013); for a different perspective see Honohan I, 'Reconsidering the Claim to Family Reunification in Migration' (2009) 57 Political Studies.

18 Victor Condé, H, *A Handbook of International Human Rights Terminology* (2nd ed University of Nebrasca Press) p 111.

19 De Schutter O, *International Human Rights Law: Cases, Materials, Commentary* (2nd ed Cambridge University Press 2014) p 11.

20 Bantekas I & Oette L, *International Human Rights: Law and Practice* (Cambridge University Press, 2013) p 75.

21 Ibid.

22 Goodwin-Gill G, *International Law and the Movement of Persons Between States* (Clarendon Press 1978) p 3.

absolute. States are limited in exercising this right in various ways.[23] Firstly, international human rights law sets limits on states in exercising their sovereign right to control immigration. The proliferation of human rights in the twentieth century has led to a system of human rights obligations on states which vastly restrict state competence in controlling immigration. International tribunals still recognise the sovereign right of states to control immigration, but nevertheless make it subject to adherence to human rights standards.[24] Secondly, states have limited the competence to regulate immigration matters by concluding bilateral and multilateral agreements with other states. An example of this is the harmonisation of laws in the context of the EU, which has led to the foundation of a right to family unification under EU law in a number of situations.[25]

The sovereign right of states to control immigration, including the limitations as outlined above, form the main source of derogations from the right to family unification as a branch of the right to respect for family life. It makes it possible for states to set requirements for family unification in order to achieve public policy goals. In the context of human rights, this is not an unusual ploy. Take for example the freedom of assembly. As the freedom of assembly is not absolute, states may interfere with the freedom of assembly, if legal grounds for interference are adhered to. The fact that there are derogations from a right does not make it less of a human right. It only means that the right is not absolute but qualified. This makes the realisation of the right to family unification a balancing exercise in which the human right to family unification of the applicant must be weighed against the interests of the state holding the sovereign right to control immigration.

Three important assumptions or premises are made in this dissertation. The existence of the right to respect for family life as the foundation of the right to family unification is the first of these assumptions. In its most minimalistic form, the right to respect for family life also applies in the context of families who seek to live together but are limited in doing so through immigration law. This is what is meant by the right to family unification in this dissertation. The second premise is that the right to family unification is not absolute; grounded in the sovereign right of states to control immigration is the assumption that states have legitimate interests in doing so. The fact that states have legitimate reasons to control immigration – even if this means that this interferes with and derogations are made from the right to family unifica-

23 Ibid p 21.

24 See for example the restrictive stand of the Human Rights Committee, which only opened the door for human rights implications for immigration policy slightly (see section 2.4). On the other hand, the European Court of Human Rights, while in each and every judgment recognising the right of states to control immigration, has ruled a number of times that the state is under the positive obligation to allow for the residence of an immigrant on its territory on the grounds of Art 8 ECHR (see chapter 3).

25 See chapter 4.

tion – is not disputed. That does not mean that any ground used by a state to legitimise derogations from the right to family unification is appropriate and justifiable. This should be determined on an individual basis using the legal grounds that are applicable in the situation at hand. The third assumption is that different types of obligations arising from different legal systems together shape the right to family unification. As there is no single human rights instrument protecting the right to family unification, in this dissertation a number of different sources of the right to family unification are investigated.

The focus of the analysis partly lies on the law of the European Union (EU). The reason for this being that the right to family unification is only acknowledged in a multinational context in EU law.[26] In the past twenty years, the EU has gained competence in the field of immigration policy and has developed various legal instruments to implement this competence.[27] Member states were motivated to harmonise their immigration policy because of the removal of border controls between the member states to which the Schengen framework applies. Within the context of the EU, there are two main trends with regard to policy on family unification. Firstly, almost since the beginning of the European project, the free movement of persons has been one of the fundamental freedoms of the EU. This initially only applied to economically active persons and EU citizens, but nowadays this fundamental freedom implies that in principle all EU citizens and their family members irrespective of their citizenship are free to move and reside within the territory of the EU.[28] The requirements for exercising this right are marginal. The free movement of persons within the EU also applies to non-EU citizens who are family members of an EU citizen who makes use of the free movement of persons. In this way, the free movement of persons includes a right to family unification for those EU citizens who do make use of their right to the free movement of persons. Secondly, non-EU nationals who lawfully reside in one of the member states of the EU have a right to family unification based on Directive 2003/86/EC on the right to family reunification (FRD) subject to the requirements set forth in this Directive.[29] This Directive however does not apply to EU citizens.

This very brief overview of EU family unification law already demonstrates the fragmented nature of the right to family unification in the EU. What furthermore contributes to this fragmentation is the role international (human rights) law plays in family unification law. Most notably, Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) plays an important role in European family unification law. It serves as a source of inspiration for EU and domestic law, but also in itself contains obligations for

26 Cholewinski (n 6) p 276.
27 A. Wiesbrock, *Legal Migration to the European Union: Immigration law and policy in Europe* (Martinus Nijhoff Publishers 2010).
28 Barnard, C, The Substantive Law of the EU: The Four Freedoms (4th ed OUP 2013) p 229.
29 See section 4.3.

states in the field of family unification. The European Court of Human Rights (ECtHR) has derived both the obligation of contracting states not to expel a person as well as the obligation to admit a person in the territory based on the right to respect for family life. Although from the outset, it must be emphasised that generally the ECtHR grants a wide margin of appreciation to states in controlling immigration.

Increasingly, both the legal and policy developments at the EU level as well as the case law of the ECtHR are being influenced by children's rights. Although the UN Convention on the Rights of the Child (CRC), which is signed and ratified by all member states of the EU, does not contain a right to family unification,[30] it is an important source of inspiration in both EU law and the case law of the ECtHR. Article 3(1) CRC, which states that the signatory states must make the best interests of the child a primary consideration in all actions concerning children, is repeated both in Article 24(3) of the Charter of Fundamental Rights of the EU (ChFR) and in Article 5(5) FRD. Even though the case law of the ECtHR lacks consistency,[31] it can be held that the importance of the best interests of the child concept is increasing in this case law. It is rather straightforward that for the discipline of family unification law, children's rights are of utmost importance. This clearly follows from the fact that most cases discussed in this dissertation involve children in one way or another. That is why it has been selected as a central element of the human right to family unification.[32]

1.2 Objectives and main research question

The object of this study is to construe a human right to family unification from the various national, constitutional and international obligations arising from international and European human rights law and the law of the EU. The first aim of the study is to determine to what extent a right to family unification exists in international and European human rights law and EU law. The second aim of the study is to find out to what extent a right to family unification exists at the domestic level of selected member states. Part of the analysis in this context is to study to what extent the obligations arising from international and European human rights law and EU law have been implemented by the selected member states. The object is not to make a full study on the compliance with international and European law of the selected member states. Rather, the study aims at discovering how the different international obliga-

30 Art 10 CRC does contain an obligation for states to examine applications for family unification in a positive, humane and expeditious manner.

31 See Spijkerboer (n 13) and the analysis in chapter 3 of this dissertation.

32 See section 1.4. below.

tions have been implemented. The main research question of this dissertation is:

> *Does a human right to family unification exist in international and European law and the domestic law of selected member states and what elements does this right consist of considering that the different legal systems involved affect each other?*

The different jurisdictions investigated in this research affect each other, which influences the character and content of the right to family unification.[33] The aim is not to offer a full study on the compliance of the international norms analysed, as this would go beyond the objectives of the research. This does not mean that failures of compliance are not identified, but the context in which this is done is limited to the question of whether a right to family unification exists. For example, in Chapter 7 the competence of the member states to impose pre-entry integration conditions on applicants for family unification is discussed. It is widely debated whether such pre-entry integration requirements are compatible with the FRD. Concerning this topic, this alleged incompliance is identified to the extent that such requirements may form an illegitimate restriction to the right to family unification. The significance of the non-compliance solely within the context of EU law falls outside the scope of this research.

1.3 STRUCTURE AND SUB-QUESTIONS

Answering the main research question requires an analysis of international and European law on family unification. However, an analysis of the various sources of international and European law is not sufficient to answer the question whether a right to family unification exists. As immigration law is structured around states who hold the sovereign right to control immigration but find themselves restricted by different forms of international obligations, applications for entry and residence must be made at the level of the state. Therefore, an analysis of the question whether a right to family unification exists must include an assessment of how international and European law affect the domestic law of the member states. If international and European law do provide for a right to family unification, but this does not materialise in domestic law, the internationally acknowledged right to family unification would be illusory.

33 The use of the word 'affect' to describe the relationship between different legal systems was previously used in Battjes H, *European Asylum Law and International Law* (Nijhoff 2006).

In Part I of this dissertation, the right to family unification in international and European law is analysed. This section is structured around the various (international) jurisdictions.

In *Chapter 2*, different sources of international (human rights) law are investigated. The research question addressed in this chapter is which sources of international (human rights) law are relevant for the right to family unification and whether a right to family unification can be derived from these sources. In this chapter various sources of international law are analysed. Even where a particular source does not contain an explicit right to family unification, it is investigated whether the source is indirectly relevant to family unification law.

In *Chapter 3*, the focus of the analysis lies on the European Convention of Human Rights (ECHR). The research question addressed in this chapter is what the role of Article 8 ECHR and Article 14 ECHR in family unification law is and whether a right to family unification can be derived from the ECHR. The chapter includes an analysis of the case law of the ECtHR in family unification cases. Besides the abovementioned provisions relating to the right to respect for family life and the prohibition of discrimination, the relevance of the right to an effective remedy for family unification law, as enshrined in Article 13 ECHR, is evaluated.

Chapter 4 is devoted to an analysis of the EU law on family unification. It is observed from the outset that EU family unification law has a highly fragmented character.[34] The relevant sources of law include the Citizenship Directive and the Family Reunification Directive, from which a right to family unification, subject to the restrictions mentioned in the directives, can be derived. The research question investigated in this chapter is under which circumstances can a right to family unification be derived from EU law. An analysis of the relevant case law of the Court of Justice of the European Union (CJEU) is included in this chapter.

Part II of this dissertation analyses the implementation of the norms derived from international and European law in the domestic law of selected member states. The structure of the comparison is not based on jurisdictions, but on different themes within family unification law. The themes investigated are the definition of the family, substantive and procedural requirements and the domestic implementation of Article 8 ECHR and the *Ruiz Zambrano* ruling of the CJEU.

In *Chapter 5* the focus of the analysis shifts from international and European law to domestic law. This first chapter relating to domestic law is devoted to the research question whether structural and systematic characteristics exist in the investigated member states which shape their domestic family unification

34 See in this context Staver (n 16).

law. These different characteristics may stem from different legal traditions in the member states and from the fact that some member states have negotiated opt-outs from certain instruments of secondary EU law.

In *Chapter 6*, the definitions of the family as used in domestic family unification law are analysed. The research question addressed in this chapter is how the selected member states define the family in their domestic family unification law. As there is a difference between the family within the context of the Citizenship Directive and the Family Reunification Directive, the domestic transposition of both directives is investigated.

None of the investigated sources of international and European law grants an absolute right to family unification. Instead, the right to family unification is qualified. The member states are allowed to impose requirements on applicants for family unification and their sponsors. Therefore, *Chapter 7* is devoted to an analysis of the substantive requirements that the member states impose on applicants for family unification and their sponsors. The research question addressed in this chapter is which substantive requirements do the member states impose on applicants for family unification.

Besides substantive requirements, there are also procedural issues which may result in limitations on the right to family unification. As the imposition of procedural requirements may limit the right to family unification, for the purpose of answering the question whether a right to family unification exists it is relevant to assess these procedural requirements. In *Chapter 8*, these procedural requirements are the topic of analysis. The research question addressed in this chapter is which procedural requirements do the member states impose on applicants for family unification and their sponsor. It is assessed whether these procedural requirements can pose an obstacle to the exercise of the right to family unification.

In *Chapter 9*, the domestic implementation of the obligations arising under Article 8 ECHR is analysed. The ECtHR plays a subsidiary role in the protection of the rights laid down in the ECHR. The primary role for the protection of these rights lies with the contracting parties themselves. In this chapter, the manner in which the member states implement the obligations arising from Article 8 ECHR is investigated. The research question addressed is how the selected member states implement the obligations derived from Art 8 ECHR.

In *Chapter 10*, the domestic implementation of the *Ruiz Zambrano* ruling of the CJEU is the topic of analysis. In the *Ruiz Zambrano* ruling, the Court for the first time derived a right to family unification for sponsors who are an EU national but reside in their home member state and have never made use of their rights under the Citizenship Directive from the EU citizenship of the sponsor. This ruling, which stems from 2011, has implications for domestic family unification law which are completely new. The research question addressed in this chapter is how the member states implement the right to family unification that was attached to the status of EU citizenship in the *Ruiz Zambrano* ruling of the CJEU in their domestic family unification law.

Part III of this dissertation offers a synthesis of the findings in Part I and Part II. As was stated in the previous section, the objective of this dissertation is to analyse the extent to which a right to family unification exists and to find out of which elements it consists of considering that the different legal systems involved affect each other. The objective is not to offer a compliance study on whether the member states act in accordance with their international obligations. *Chapter 11* of the dissertation offers an overview of the findings in the substantive chapters of this dissertation. Various research questions are posed in this chapter. The first research question relates to the manner in which the different legal systems involved affect each other. The focus is specifically not on the underlying dynamics of the different actors involved at the different levels, but on how the interconnectedness of the different legal systems involved shape the right to family unification.

1.4 Elements of the right to family unification

One finding in this research is that even though there is no instrument in international human rights law that is solely devoted to the right to family unification and that the legal framework is highly fragmented, certain elements are relevant for the right to family unification in all of the selected legal systems. These elements are identified as central elements of the right to family unification. The identified elements are the principle of proportionality, the prohibition of discrimination and the rights of children. It must be noted that not all these elements are relevant to the same extent in each application for family unification. The rights of the child do not play a role in applications for family unification in cases where no children are involved. The extent to which the prohibition of discrimination is relevant in a particular case can also differ depending on the circumstances of the case. But it is true that states must have regard for these elements when deciding on an application for family unification. The degree of relevance of these elements and the weight that should be attributed to each element can vary depending on the circumstances of the case.

The first of the identified elements is the principle of proportionality. The right to family unification as part of the general right to respect for family life is not an absolute right, but is subject to interferences and derogations. It is precisely in the non-absoluteness of this right that the sovereign right of states to control migration comes into play. What follows is that a balance must be found between the individual right to family unification on the one hand and the sovereign right of states to control migration on the other. Within the context of the principle of proportionality, the state must motivate its desire to interfere with or derogate from the right to family unification. The principle of proportionality is used in each of the investigated legal systems to a certain

extent and in a certain manner. This makes the principle of proportionality one of the defining elements of the right to family unification.

The second element that has been identified as a central element in the right to family unification is the prohibition of discrimination. In all the investigated legal systems, the prohibition of discrimination plays a certain role. Some of the sources of international law in the second chapter are solely devoted to the prohibition of discrimination.[35] Within the context of the ECHR, the prohibition of discrimination plays an important role in the sense that states may not discriminate on certain grounds in the enjoyment of the rights protected by the Convention. Within EU law, the prohibition of discrimination plays a role in various contexts. Within the internal market, the abolition of discrimination based on nationality is central to achieving the aim of creating one internal market. Within the context of the role of fundamental rights within EU law, the Charter of Fundamental Rights of the EU contains a more general prohibition of discrimination. Besides these international sources, the prohibition of discrimination is also visible in the constitutional traditions of the selected member states. Even though unequal treatment on the grounds of citizenship lies at the core of immigration law, which is all about the inclusion and exclusion of people, this does not mean that states can freely restrict the right to family unification without regard to the prohibition of discrimination. Throughout this dissertation it is established that the role of the prohibition of discrimination has more potential than it currently plays in family unification law.

The third central element of the right to family unification that is identified in this dissertation is the role of the rights of the child. By nature, many applications for family unification involve children in one way or another.[36] This can be because the application concerns the migration of the child itself or the migration of (one of) the parents of the child. Implicitly or explicitly the rights of the child always play a role in such applications. For example in Section 2.4 in which the case law of the Human Rights Committee is analysed, children's rights are not explicitly mentioned. However, the only cases where a violation is found concern children. The same is true for the case law of the ECtHR as analysed in Chapter 3. Within EU law children's rights also play an important role, even though this is sometimes not acknowledged. For example, in Section 4.5.4. where the forced-to-leave-the-territory-of-the-EU-criterion is analysed, it is assumed that children's rights are not relevant because only the ability of the child to reside in the EU is the topic of inquiry, for which the residence of the parents is required. However, even here the normative belief that a child belongs with its parents and not in some kind

35 CERD, CEDAW.

36 In applications that do not involve children, this element of the right to family unification may be irrelevant for that particular case.

of state-run institution is a central normative assumption which directly, though implicitly, relates to the rights of the child.

In the absence of a concrete right to family unification laid down in a legal instrument that is solely related to this issue and applies to all categories of family unification imaginable, these three elements form the core of the right to family unification that is relevant in all applications for family unification. In all applications, the principle of proportionality should be respected. In all applications, attention must be paid to potential forms of discrimination and the question should be addressed whether discrimination is justified. Lastly, in all applications concerning children in one way or another, the rights of the child must be taken into account in the balancing of interests exercise that is inherent in the right to family unification.

1.5 Scope and demarcation

In this dissertation, the right to family unification is the topic of analysis. The choice has been made to limit the analysis to issues relating to the admission of immigrants within the context of family unification. All issues which are not related to admission fall outside the scope of this dissertation. This means that questions relating to expulsion fall outside the scope of this research. However, cases which at first sight seem like expulsion cases but which are also relevant in the context of admission are included in the analysis. These cases are referred to throughout this dissertation as 'quasi-admission' cases. A quasi-admission case is a case which formally concerns the termination of residence, but which in fact concerns issues related to admission. A few examples of such cases are:

- A person's lawful residence is terminated because the admission requirements are no longer complied with. An example of such a case is the ECtHR case *Berrehab v. Netherlands*.[37] In this case the residence permit of the applicant was withdrawn because his relationship with his wife had ended following the couple's divorce. The sole reason for the termination of lawful residence was that he no longer fulfilled the requirement of belonging to the family of the sponsor. As this was the sole reason for the termination of lawful residence, the case is identified as a quasi-admission case.
- A person's lawful residence is withdrawn with retroactive effect. An example of such a case is the ECtHR case *Nunez v. Norway*.[38] Here, the applicant had a residence permit which was withdrawn with retroactive effect after the Norwegian authorities discovered the applicant's immigration fraud. At first sight the case seems to be an expulsion case as the applicant held a residence permit, but because her residence permit was

37 *Berrehab v Netherlands* (1988) 11 EHRR 322.
38 *Nunez v Norway* (2011) 58 EHRR 17.

revoked with retroactive effect, the Norwegian authorities dealt with the case as if it concerned an admission case.

- A person already resided in a country illegally, and sought to regularise his illegal stay. An example of such case is the CJEU case *Ruiz Zambrano*.[39] In this case the Columbian parents of two Belgian citizen minor children stayed in Belgium illegally and regularised their stay based on the EU citizenship of their children. The case does not concern the entry of the applicants, as they were already present in Belgium, but did concern the first time they obtained lawful residence and for that reason it is identified as a quasi-admission case.

Explicitly excluded from the scope of this dissertation are cases which concern the expulsion of a settled immigrant after a criminal conviction or in the case of other public order considerations which do not relate to no longer meeting the admission requirements. The reason that such cases are excluded is two-fold. Firstly, admission in itself is already such a wide topic for analysis that the inclusion of expulsion would make the study unfeasible. Secondly, expulsion for public order reasons raises fundamentally different legal questions than in admission cases. The requirement that an applicant may not pose a threat to public order is investigated in Chapter 7 on substantive requirements to the right to family unification within the context of admission policy.

The present study is limited to a study of legislation and case law. The underlying practice is not studied. The research for the study was completed on 1 December 2014.

1.6 METHODOLOGY

The object of the present dissertation has previously been identified as finding out to what extent a human right to family unification exists and what the elements of this right are considering that the different legal systems involved affect each other to a large extent. This objective makes this study comparative to its very core: it is an inventarisation of different jurisdictions which deal with the right to family unification.

In this research, a functional comparative method is used.[40] This means that the functions of the sources of law which are discussed are at the core of the analysis. As there is no international convention or treaty on the right to family unification, the analysis necessarily focusses on instruments which either do not solely concern family unification but are only partly relevant or sources which have a limited personal and material scope. For all of the investigated

39 Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

40 K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (3rd edition edn, OUP 1998).

sources of law, the function of the instrument is investigated and what effect this has on the right to family unification.

As family unification is a widely dispersed field in which numerous sources of law play a role, the different instruments can have fundamentally different functions. For example, the fundamental freedom of the free movement of persons in EU law does not have the explicit objective of creating a right to family unification. Instead, the inclusion of third-country national family members in this context aims to facilitate the free movement of persons or EU citizens. This influences the manner in which family unification within free movement law is shaped. In the domestic context, the explicit function attributed to a specific admission required by the legislator may be different than the implicit objective the legislator has by imposing the requirement. A possible example of this is the requirement that applicants for family unification should pass an integration exam in the country of origin. The official objective given for this requirement, which is imposed by Germany and the Netherlands, is to facilitate the integration of the migrating family member in the host member state.[41] It can be argued, however, that the intended effect of the measure is to limit the number of applicants for family unification and to select applicants based on their level of intelligence.

The comparison in this research has different dimensions. Firstly, various sources of international and European human rights law and EU law are investigated and compared with each other in Part I of the dissertation.

The different supranational jurisdictions do not exist in a vacuum. They cannot be studied in isolation as they are often interdependent. For example, the UN Convention on the Rights of the Child is applied in the case law of the ECtHR on Article 8 ECHR and plays an important role in EU family unification law. In turn, EU family unification law is heavily influenced by Article 8 ECHR. Many examples are provided of how the different international legal systems affect each other and fail to affect each other. An example of the latter that is identified in this dissertation is the prohibition of discrimination that is laid down in multiple supranational instruments but which does not prevent discrimination based on citizenship that lies at the core of EU family unification policy. In the comparison, the function of the different instruments and their specific characteristics is investigated. This means that for each of the legal sources, the question is asked what the function of the source is and whether this is realized when the source is applied in conjunction with other sources. For example, Article 3(1) CRC lays down that the best interests of the child should be the primary consideration in all actions concerning children. In the application of Article 8 ECHR, the ECtHR makes reference to this provision. In the analysis in this dissertation the question is addressed whether the approach

41 See for analysis K. De Vries, *Integration at the Border: The Dutch Act on Integration Abroad and Internation aland Immigration Law* (Hart Publishing 2013).

of the ECtHR in implementing the obligations under Article 3(1) CRC corresponds to the function of this provision.

Secondly, the manner in which legal norms from international and European human rights law and EU law are implemented in the domestic law of the selected member states is investigated and the domestic legal systems are compared to each other.

The analysis of the national jurisdictions is aimed at discovering to what extent international and European human rights law and EU law affect domestic law in shaping the human right to family unification. The aim of this comparison is not to offer a comprehensive compliance study on how the supranational provisions are implemented in the domestic legal systems. Rather, the analysis focuses on the different ways in which the member states implement the obligations arising from international and European human rights law and EU law. For example, in Germany the domestic constitutional protection of the right to respect for family life is relatively strong. Therefore, Article 8 ECHR plays a limited role in the domestic German context. In the United Kingdom on the other hand, Article 8 ECHR plays an important and active role in family unification law. Also, as the analysis focuses on both member states where the FRD is applicable and on member states where this is not the case, the influence of the Directive on the domestic law is assessed. These examples illustrate that the emphasis of the analysis lies with finding similarities and differences across the selected member states, and not on the comparison between supranational law and domestic law in the sense that a compliance study is conducted. This, however, does not mean that problematic issues in the implementation of supranational norms are not identified. The various domestic legal systems that are investigated in this dissertation are also interdependent, albeit arguably to a lesser extent than international and European human rights law and EU law. The member states are not formally bound by each other to formulate their family unification policy. However, especially considering the many similarities between the selected member states, they are inspired by policy developments in other member states. For example in section 7.3.5. on integration measures, it is shown how the various domestic legal systems were influenced by each other when formulating their own pre-entry integration requirements.

Finally, in Part III of the dissertation the outcomes of the comparisons in Part I and Part II are brought together. The central question relating to the existence of a right to family unification is answered and the three central elements that are crucial for this right are presented.

Four member states have been selected as national jurisdictions to be included in this research. As the aim of the legal comparison of national jurisdictions is not to offer a comprehensive compliance study, four member states are sufficient to draw conclusions on how the international and European human rights law and EU law affect domestic law. The number of selected national

jurisdictions is restricted to four to guarantee the feasibility of the research. The selected national jurisdictions are: Denmark, Germany, the Netherlands and the United Kingdom. The selection of these member states is based on a number of factors. Firstly, in the selected national jurisdictions, family unification is an active and dynamic field in which there are many developments in policy and case law. In this sense the selected national jurisdictions can be considered similar. Secondly, in order to assess the role of the FRD, two member states were chosen where this Directive is applicable (Germany and the Netherlands) and two where the Directive is not applicable (Denmark and the United Kingdom). The objective of selecting the member states based on the applicability of the FRD is to find out how this Directive in fact influences the right to family unification. This means that on the one hand the most similar systems were selected in order to explain the similarities. The right to family unification is positioned as a human right derived from the more general right to respect for family life. As family unification is presented as a human right, it is not surprising that in four legal systems which are very active in changing family unification policies, the existence of a claim to family unification for individuals is not doubted at the core. On the other hand, the most different legal systems were selected in the sense that one of the core instruments protecting the right to family unification in EU law, the FRD, is not applicable in two of the four selected member states. This choice has been made to show to what extent the applicability of the FRD is relevant for the existence of the right to family unification in the selected jurisdictions.

1.7 Terminology and translation

Throughout this dissertation the term 'family unification' is used instead of 'family reunification'. The term 'family reunification' implies that the family has lived together as a unit before the application for family unification was made. This, however, is by no means a prerequisite for family unification. It is very possible that the family relationship started at a moment during which the family did not reside together. This is the case, for example, when two spouses only start cohabiting after family unification has been realized. Family unification is identified as the unification of a family which previously resided in different states and encompasses all forms of families which come together after previously having resided in different states.

Another issue concerns the translation of foreign terms. Throughout the analysis of the domestic law of the selected member states, non-English terminology is used to describe and to identify sources of law, names of tribunals and specific formulations of legal concepts. In order to improve the accessibility of this research, the choice has been made to translate all foreign terms. The first time the translation of a foreign term is used, the original language version will be provided in brackets.

A similar issue concerns the manner in which domestic legislation is referenced. In each of the selected member states, a different system of referring to domestic provisions is used. For example, provisions in German legislation are referred to as '§§', while provisions in the UK Immigration Rules are referred to as 'p'. In order to improve the accessibility of this dissertation, for all legal systems the term 'Article' ('Art' in the footnotes) is used when referring to a provision of domestic law.