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CHILD IN THE MIDDLE

Best interests of the child in the European Court of Human Rights in cases concerning public care and contact rights

Master's thesis
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Article 3(1) of the 1989 United Nations Convention on the Rights of the Child requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Every Member State of the Council of Europe has ratified the Convention.

The European Court of Human Rights has increasingly begun to refer to the Convention on the Rights of the Child and its Articles in cases concerning children and acknowledged that the best interests of the child are of particular importance. Especially Article 8 of the European Convention on Human Rights, which protects every individual's right to respect for private and family life, home and correspondence without unjustified state interference, has been envisaged as having great potential in effectively promoting and protecting the rights of the child under the European Convention on Human Rights, which does not contain rights designed specifically for children on its own. However, the European Court of Human Rights has been criticised for failing to provide clear and coherent general principles in situations where the traditional obligations and principles under Article 8 owed to adult members of the family are to be balanced against the best interests of the child.

The thesis addresses questions relating to how the national authorities succeed in striking a fair balance in specific circumstances between different interests at stake within the meaning of Article 8 of the European Convention on Human Rights and makes an assessment of these findings in relation to the requirements set out in Article 3(1) of the Convention on the Rights of the Child.

The concept of the best interests of the child as stipulated in Article 3(1) of the CRC obliges national authorities to transparently explain how the best interests of the child have been identified, what they are considered to be and how they have been balanced against other interests. The best interests of the child also require that the child is involved in the proceedings affecting the child either by him or herself personally or through an independent representative.

The European Court of Human Rights has acknowledged that the interests of the child and those of his or her parents might not always coincide and assessed whether national authorities have struck a fair balance between these interests by considering whether the authorities could have attempted to assist the family in some other way before taking the child into care or restricting contact with the child and adult. In assessing the adequacy of the national authorities' balancing process, the Court also takes into account whether the authorities have obtained relevant opinions by professionals and experts, whether the procedural requirements inherent in Article 8 are met and whether the child is involved in the proceedings.

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International law, human rights, best interests of the child, right to respect for private and family life, Convention on the Rights of the Child, European Convention on Human Rights, European Court of Human Rights, case law, legal practice

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LIST OF SOURCES

TREATIES AND CONVENTIONS

African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entry into force 29 November 1999) OAU Doc CAB/LEG/153/Rev 2.

Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010, as amended in OJ C 326, 26.10.2012, p. 391–407

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) 213 UNTS 221

Convention on Contact concerning Children (adopted 15 May 2003, entry into force 1 September 2005) ETS No. 192

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13

Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3

European Convention on the Exercise of Children's Rights (adopted 8 September 1995, entry into force 1 July 2000) ETS No. 160

European Social Charter (adopted 18 October 1961, entry into force 26 February 1965) ETS No. 035

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3

Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entry into force 14 April 2014) 2983 UNTS

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entry into force 12 February 2002) 2173 UNTS 222

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entry into force 18 January 2002) 2171 UNTS 227

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entry into force 18 May 1954) ETS No. 009

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entry into force 1 November 1988) ETS No. 117

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restricting the control machinery established thereby (adopted 11 May 1994, entry into force 1 November 1998) ETS No. 115

Statute of the International Court of Justice (adopted as an integral part of the Charter of the United Nations 26 June 1945, entry into force 24 October 1945) 1 UNTS xvi

Vienna Convention on the law of treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331

RESOLUTIONS, REPORTS AND OTHER OFFICIAL DOCUMENTS

Council of Europe

Parliamentary Assembly Resolution 1031 (1994) adopted by the Assembly on 14 April 1994

Parliamentary Assembly Resolution 2232 (2018) adopted by the Assembly on 28 June 2018

Report of the Commission in *Wim Hendriks against the Netherlands*, Application no. 8427/78 (8 March 1982)

United Nations

Commission on Human Rights, Report of the Working Group, Question of a Convention on the Rights of the Child (10 March 1980) UN Doc E/CN.4/L.1542

Commission on Human Rights, Report of the Working Group on a draft convention on the rights of the child (17 February 1981) UN Doc E/CN.4/L.1575

Commission on Human Rights, Report of the Working Group on a draft convention on the rights of the child (2 March 1989) UN Doc E/CN.4/1989/48

Committee on the Rights of the Child, General Comment No. 14 (2013): on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), adopted by the Committee at its sixty-second session (14 January – 1 February 2013), (29 May 2013) UN Doc CRC/C/GC/14

Committee on the Rights of the Child, General Comment No. 12 (2009): The right of the child to be heard, adopted by the Committee at its fifty-first session (25 May – 12 June 2009), (20 July 2009) UN Doc CRC/C/GC/12

Committee on the Rights of the Child, General Comment No. 7 (2005): Implementing child rights in early childhood, (20 September 2006) UN Doc CRC/C/GC/7/Rev.1

Committee on the Rights of the Child, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6), (27 November 2003) UN Doc CRC/GC/2003/5

Committee on the Rights of the Child, Report on the twenty-eight session (28 November 2001) UN Doc CRC/C/111

UNGA Res 41/85, 'Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally' (3 December 1986) UN Doc A/RES/41/85

UNGA Res 217 A (III), 'The Universal Declaration of Human Rights' (10 December 1948)

UNGA Res 1386 (XIV), 'Declaration on the Rights of the Child' (20 November 1959) UN Doc A/RES/1386(XIV)

UN Human Rights Committee, Communication no. 201/1985, Views adopted on 27 July 1988, Appendix I, in *Report of the Human Rights Committee*, UN Doc A/43/40 (1988) Annex VII

UN High Commissioner for Refugees, Conclusion No 47 (1987) on 'Refugee Children' in *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR*

INTERNATIONAL CASES

International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgement, I.C.J. Reports 2010, p. 639

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgement, I.C.J. Reports 2002, p. 625

Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgement, I.C.J. Reports 1994, p. 6

European Court of Human Rights

A. v. The United Kingdom, Application no. 25599/94 (23 September 1998)

Anayo v. Germany, Application no. 20578/07 (21 December 2010)

B.B. and F.B. v. Germany, Application no. 18734/09 (14 March 2013)

Bronda v. Italy, Application no. 22430/93 (9 June 1998)

C. v. Finland, Application no. 18249/02 (9 May 2006)

Cossey v. The United Kingdom, Application no. 10843/84 (27 September 1990)

Elsholz v. Germany, Application no. 25735/94 (13 July 2000)

Eriksson v. Sweden, Application no. 11373/85 (22 June 1989)

Fröhlich v. Germany, Application no. 16112/15 (26 July 2018)

Glaser v. The United Kingdom, Application no. 32346/96 (19 September 2000)

European Commission on Human Rights

Committee on the Rights of the Child

BOOKS AND ARTICLES

Aisling Parkes, Caroline Shore, Conor O'Mahony and Kenneth Burns, 'The Right of the Child to Be Heard: Professional Experiences of Child Care Proceedings in the Irish District Court' (2015) 27 Child & Fam L Q 423

Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 J Legal Analysis 171

Ann Skelton, 'Committee on the Rights of the Child (CRC)', *Max Planck Encyclopedia of International Law* (last updated October 2017)

Benedetto Conforti, *The Law and Practice of the United Nations* (1st edition, Springer Netherlands 1996)

Caroline Sawyer, 'One Step Forward, Two Steps Back – The European Convention on the Exercise of Children's Rights' (1999) 11 Child & Fam L Q 151

D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018)

Dubravka Hrabar, 'Bringing the Non-Protection of Children's Rights through the Optional Protocol to the CRC on Communications Procedure and a Future European Court' (2017) 8 Croat Acad Legal Sci YB 13

Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995)

Helen Keller and Reto Walther, 'Balancing Test: United Nations Human Rights Bodies', *Max Planck Encyclopedia of International Law* (last updated April 2018)

Jan Klabbers, *International Law* (1st edition, CUP 2013)

John Wall, 'Human Rights in Light of Childhood' (2008) 16 Int'l J Child Rts 523

Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) International Organization vol. 54, no. 3, 421–456

Lucius Caflisch, ‘Attribution, Responsibility and Jurisdiction in International Human Rights Law’ (2017) 10 ACDI 161

Malcom N. Shaw, *International law* (5th edition, CUP 2003)

Michael D Daneker, ‘Moral Reasoning and the Quest for Legitimacy’ (1993) 43 Am U L Rev 49

Michael Freeman, ‘Article 3. The Best Interests of the Child’ in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007)

Michael Freeman, ‘Why it remains important to take children’s rights seriously’ in Michael Freeman (ed), *Children’s Rights: Progress and Perspectives: Essays From the International Journal of Children’s Rights* (eBook, Brill 2011) 5–25

Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edition, eBook, EUP 2017) 1–17

Olivier de Schutter, *International Human Rights Law* (2nd edition, CUP 2014)

Philip Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 Int’l JL & Fam 1

Pia M. van den Boom, ‘Adnvacing Children’s Rights through Parent Support Services’ in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (eBook, Brill 2017) 801–813

Rebeca Rios-Kohn, ‘The Convention on the Rights of the Child: Progress and Challenges’ (1998) 5 Geo J on Fighting Poverty 139

Sarah Spronk, ‘Realizing Children’s Right to Health; Additional Value of the Optional Protocol on a Communications Procedure for Children’ (2014) 22:1 Intl J Child Rts 189

Sietske Dijkstra, ‘Listening to Children and Parents: Seven Dimensions to Untangle High-Conflict Divorce’, in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations*

Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead (eBook, Brill 2017) 857–878

Stacey Platt, 'Set Another Place at the Table: Child Participation in Family Separation Cases' (2016) 17 Cardozo J Conflict Resol 749

Stephen Michael Cretney and Judith M. Masson, *Principles of Family Law* (6th edition, Sweet & Maxwell 1997)

Suzanne Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child; A Mini-Step Forward for Children' (2014) 22 Int'l J Child Rts 205.

Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 Erasmus L Rev 130

Ton Liefaard and Jaap E. Doek, 'Litigating the Rights of the Child: Taking Stock After 25 Years of the CRC' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (eBook, Springer 2014) 1–11

Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999)

Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (eBook, Springer 2014) 193–209

William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015)

OTHER

Handbooks and Guidelines

Council of Europe, European Court of Human Rights: Guide on Article 8 of the Convention – Right to respect for private and family life, part of the series of Guides on the Convention published by the European Court of Human Rights (last update 31.8.2019)

European Union Agency for Fundamental Rights, the Council of Europe and Registry of the European Court of Human Rights, Handbook on European law relating to the rights of the child (Luxembourg 2015)

Implementation Handbook for the Convention on the Rights of the Child, United Nations Children's Fund, Fully revised third edition (September 2007)

Marta Santos Pais, Special Representative of the Secretary-General on Violence against Children, 'Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure', (14 December 2009) UN Doc A/HRC/WG.7/1/CRP.7

Peter Newell, 'Submission to Open-ended Working Group of the Human Rights Council, considering the possibility of elaborating an Optional Protocol to provide a communications procedure for the Convention on the Rights of the Child', (9 December 2009) UN Doc A/HRC/WG.7/1/CRP.2

UNHCR Guidelines on Determining the Best Interests of the Child, United Nations High Commissioner for Refugees (May 2008)

Websites

Committee on the Rights of the Child, jurisprudence accessible on https://juris.ohchr.org/en

HUDOC database for the judgements of the European Court of Human Rights accessible on https://hudoc.echr.coe.int/eng

Members of the CRC Committee and their academic and professional background accessible on https://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx

Status of treaties and lists of declarations and reservations accessible on https://treaties.un.org

LIST OF ABBREAVIATIONS

CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECECR	European Convention on the Exercise of Children's Rights
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
OPCP	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
UDHR	Universal Declaration of Human Rights
UN	United Nations
VCLT	Vienna Convention on the law of treaties

1 INTRODUCTION

1.1 Preliminary issues and research question

The United Nations Convention on the Rights of the Child (the CRC)[1] is the guiding legal framework for the development and implementation of legislation and policies concerning the human rights of children and it has had an evident impact on international human rights jurisprudence.[2] The CRC has reached almost universal ratification as at the time of writing there are 196 State Parties to the CRC, making it the most widely ratified agreement ever.[3] Generally, the aim of the CRC is to protect all children everywhere under the age of 18 and to recognize every child as an individual holder of human rights and fundamental freedoms.[4]

The CRC introduced 40 distinct rights for children, some of which were already recognized to some extent in the League of Nations 1924 Geneva Declaration of the Rights of the Child and in the United Nations 1959 Declaration for the Rights of the Child.[5] The general purposes of the rights conferred to children in the CRC have been described as the "4 P's", namely prevention, protection, provision and participation.[6] The Convention endeavours to prevention of harm to children, protection of children against discrimination, neglect and exploitation, provision of assistance for children's basic needs and participation of children in decisions affecting them.[7]

In addition, the CRC established and partially reaffirmed two principles of interpretation in international law, namely the evolving capacities of the child and the principle of the best interests of the child.[8] The focus of this thesis is on the latter. The principle draws its content

[1] Adopted 20 November 1989, entry into force 2 September 1990, UNTS 1577.
[2] See e.g. Ton Liefaard and Jaap E. Doek, 'Litigating the Rights of the Child: Taking Stock After 25 Years of the CRC' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).
[3] The only state that has not ratified the CRC is the United States.
[4] According to Article 1 of the CRC, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. For more about the universality and effects on international law in general, see e.g. Olivier De Schutter, *International Human Rights Law* (2nd edition, CUP 2014), p. 67, John Wall, 'Human Rights in Light of Childhood' (2008) 16 Int'l J Child Rts 523 and Rebeca Rios-Kohn, 'The Convention on the Rights of the Child: Progress and Challenges' (1998) 5 Geo J on Fighting Poverty 139.
[5] However, the CRC widened the scope of the rights recognized in these earlier declarations and it contains 18 "new" rights. For more detailed comparison, see John Wall, 'Human Rights in Light of Childhood' (2008) 16 Int'l J Child Rts 523.
[6] See e.g. Stephen Michael Cretney and Judith M. Masson, *Principles of Family Law* (6th edition, Sweet & Maxwell 1997), p. 585.
[7] See e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), p. 15.
[8] Ibid. p. 45.

primarily from Article 3(1) of the CRC according to which the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

The second feature of this thesis is based on the European Convention on Human Rights (ECHR)[9], which was drafted in post-cold war circumstances and in the light of the 1948 Universal Declaration of Human Rights (UDHR)[10] within the Council of Europe. The ECHR entered into force in 1953. All 47 Member States of the Council of Europe have ratified the Convention and it is now a political obligation of membership to the Council to become a party to the ECHR.[11] Thus, it probably is understood that both of the just mentioned treaties bind all the CoE Member States. What makes the ECHR distinct from other human rights conventions, such as the CRC, are the strong enforcement mechanisms it provides, namely individual and state applications. Both of these applications go to the European Court of Human Rights (ECtHR) which is a permanent court composed of full-time judges.[12]

The ECHR was partly a reaction to serious human rights violations that occurred during the Second World War and its purpose was to protect civil and political rights, which were considered as "essential for a democratic way of life".[13] Obviously, the recognition of children's rights back then was not as enlightened as today, which becomes evident from the text of the Convention. The Convention does not confer rights specifically adjusted for children nor contain many explicit references to children's rights[14] and certainly not to their best interests. However, Article 8 of the ECHR has been recognized for a while to have great potential for promoting children's rights within the CoE jurisprudence since it secures the right for *everyone* to enjoy respect for their private and family life, home and correspondence without unjustified state interference. From the potential of Article 8 to be interpreted and developed in a way of securing and promoting the rights of the child, I have drawn my

[9] Formally the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) 213 UNTS 221.
[10] UNGA Res 217 A (III), 'The Universal Declaration of Human Rights' (10 December 1948).
[11] See Council of Europe, Parliamentary Assembly Resolution 1031 (1994) para 9.
[12] See e.g. Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014). The CoE is Europe's leading human rights organization.
[13] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), pp. 3–5.
[14] Article 5 of the Convention refers to children in relation to the detention of a minor and Article 6 is concerned with the public hearing in cases concerning juveniles.

attention to the ECtHR which shows growing use of the principle of the best interests of the child and the CRC in general as a guiding legal instrument by increasingly referring to the CRC in cases concerning children.[15]

A group of common individual applications arising out of alleged violations of Article 8 are concerned with cases where national authorities have taken the child into public care without consent from the child's parents. In these situations, the applicant or applicants might allege a violation only on their behalf or on behalf of the child or children concerned as well. The questions relating to the adult's standing to bring a complaint on behalf of the child are not considered in this thesis due to the presumption that in all decisions affecting a child or children, the interests and rights of them are to be considered by the competent authority in any event.[16] Consequently, as the situations where a child has been taken into care involve adults and a child, the child's rights might be protected only indirectly as the focus of the Court is on assessing the balancing of the interests and rights of all parties concerned and not solely on the protection of the child.[17]

While assessing the domestic authorities' procedure relating to the balancing of competing and/or conflicting rights and interests, the Strasbourg Court has been criticised for not giving clear guidance as to how the best interests of the child affects the proceedings, how they should be taken into account and what weight is to be given to different factors considered to be in the child's best interests. The Court has reached consensus on the applicability of the principle but is criticized from not giving clear guidance as to the substantive issues

[15] See e.g. Michael Freeman, 'Article 3. The Best Interests of the Child' in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden 2007), p. 12 and Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014). For case law, see e.g. *Popov v. France,* Application nos. 39472/07 and 39474/07 (19 January 2012), para. 139 where the Court states that "[- -] taking into account of international conventions, in particular the Convention on the Rights of the Child".

[16] This assumption is derived from Article 3(1) of the CRC. For more, see chapter 2.

[17] See e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 239–240. According to Article 34 of the ECHR, the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of violation by one of the High Contracting State Parties of the rights set forth in the Convention or the Protocols thereto. Thus, in practice, children too are permitted to bring complaints to the Court by themselves or through their representatives. However, usually parents have been allowed to bring a complaint on behalf of their children as long as they are empowered to that effect. Nevertheless, the ECtHR usually examines the applications from the parents' perspective. For more, see also Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).

concerning the concept and due weight to be given to the it in the process.[18] Consequently, this absence of guidance can place CoE Member States to legally unpredictable and uncertain situation. There are scholars who have addressed this legal uncertainty and called upon judges to clarify the relevant factors and the weight to be attached to them in determining the best interests of the child.[19] However, just recently, in the case of *Strand Lobben and Others v. Norway*, judges Kjølbro, Poláčková, Koskelo and Nordén observed that the Court still has difficulties in formulating general principles with "desirable clarity and coherence" in cases where the general obligations and principles under Article 8 are to be balanced against the best interests of the child.[20]

Having pointed out the legal uncertainty and the non-existence of clear general principles guiding implementation and application concerning the best interests of the child and the obligations under Article 8 of the ECHR, inevitably this problem is central to my research. Within the range of Article 8 of the ECHR, I will look into the question "how, in a specific set of circumstances, should national authorities balance the interests and rights of the child on the one hand and the interests and rights of other members of the family on the other hand in cases concerning public care and contact rights?". The authority for finding answers being the institution under whose scrutiny the decisions made by domestic authorities under the scope of the ECHR can ultimately be placed – The European Court of Human Rights. In addition, I will assess the extent in which the ECtHR takes into account Article 3(1) of the CRC in the defined cases and in order to make this assessment and somewhat comparison I will look into the question "what does the concept of best interests require from national authorities in cases concerning public care and contact rights?".

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[18] In *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 204, the Court stated, "In so far as the family life of a child is concerned, the Court reiterates that there is a broad consensus, including in international law, in support the idea that in all decisions concerning children, their best interests are of paramount importance". See also *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07 (6 July 2010), para. 135 and *X v. Latvia*, Application no. 27853/09 (26 November 2013), para. 96. In the case of *Neulinger and Shuruk v. Switzerland*, the ECtHR also referred to the Implementation Handbook for the Convention on the Rights of the Child, United Nations Children's Fund, Fully revised third edition (September 2007) and the UNHCR Guidelines on Determining the Best Interests of the Child, United Nations High Commissioner for Refugees (May 2008) in seeking guindace to the content of the best interests of the child. This case was concerned with international child abduction and thus, not considered in this thesis in more detail.

[19] See e.g. Ton Liefaard and Jaap E. Doek 'Litigating the Rights of the Child: Taking Stock After 25 Years of the CRC' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).

[20] Joint dissenting opinion on the merits of the case in *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), paras. 8–10.

1.2 Outline and key terms

As the focus of this thesis is on the CoE institution, I will not consider regulation and jurisprudence of the European Union, such as the EU Charter of Fundamental Rights at any stage.[21] In addition, I will not examine the application and interpretation of the concept of the best interests of the child by the Strasbourg Court in relation to any other Article than Article 8 of the ECHR. Thus, even though children's rights are considered under other ECHR Articles as well, such as Article 3[22], only alleged violations concerning the right to respect for private and family life are examined. Nor will I consider promoting and securing children's rights through the CoE's other key human rights treaty, namely the European Social Charter, albeit decisions of the European Committee of Social Rights, set up by the Charter, are fully informed by the CRC as well.[23]

The studied cases concern situations where a child or children have been placed in public care without consent from their parents. Closely connected with alternative care issues are questions concerning right of access and contact with the child. Decisions concerned with these matters can be seen as interconnected since the way in which a care order is implemented has direct impacts on contact between the "original" family members. I do not examine and take into account cases concerning, *inter alia*, adoption, immigrant children or international child abduction because the concept of the best interests of the child has been given different content and more specific definitions in the field of these matters. Also, the ECtHR considers removal of parental responsibilities and adoption as particularly far-reaching measures which are to be applied only in exceptional circumstances and

[21] OJ C 83, 30.3.2010, as amended in OJ C 326, 26.10.2012, p. 391–407. The Charter became legally binding instrument with the entry into force of the Treaty of Lisbon (OJ 2007 C 306) on 1 December 2009. The Charter contains a dedicated provision on children's rights as Article 24 articulates the child's right to express their views freely in accordance with their age and maturity, the child's right to have their best interests taken as a primary consideration in all actions relating to them and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents. Thus, it is important to understand the difference between these two instruments.

[22] E.g. in the case of *A. v. The United Kingdom*, Application no. 25599/94 (23 September 1998) a child complained that he had suffered inhuman and degrading treatment by his father and the State was liable for it. This case has been described as a "milestone" to protect children with ECHR and the fact that the ECtHR referred to the CRC in order to fill in the gaps in the ECHR provides an example how the Court applies the Convention to children positively and dynamically. For more details, see e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 11–12 and 186.

[23] The European Social Charter entered into force on 26 February 1965, ETS No. 035. Nevertheless, the individual petitioning system under the ECHR provides a more substantial contribution to children's rights advancement. For more about the comparison between these two instruments, see Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).

consequently the assessment of the interests of those concerned is based on slightly different principles. These mentioned outlines facilitate the examination of the best interests of the child as stipulated in Article 3(1) of the CRC.

What comes to the key terms of the thesis, the concept "take a child into care" includes various situations, such as emergency care orders, normal care orders, foster families as care holders, children's homes and other public institutions as carers, amongst other alternative carers. Accordingly, the concept is to be understood as a wide one without any specific definition or a regular form. Furthermore, the thesis addresses questions relating to the right to maintain contact between, *inter alia*, the natural family members who have been separated. This matter is addressed with either "right of access" or contact rights. In addition, in circumstances where a child has been placed in a foster home or with some other carers than his or her biological parents, there are number of individuals involved in the case and thus, when reference is made to natural parents or biological parents, the ones who have actually conceived the child are meant.

1.3 Approach and sources

In order to answer my research question, I have been focusing on and analysing the relevant sources of international law in accordance with Article 38 of the Statute of the International Court of Justice.[24] The list of sources includes international conventions, international custom and general principles of law as primary sources and judicial decisions and teachings of the most highly qualified publicists as subsidiary means for the determination of rules of law. Thus, the method and approach I have deployed is doctrinal and the aim of the thesis is to systemize and clarify the legal status of the best interests of the child in the practice of the ECtHR in the outlined area by focusing on the relevant sources of international law. Throughout the thesis, I have also taken into account the inherent critical element of the doctrinal approach by evaluating the relevant and examined sources.[25]

I have also studied and taken into account legally non-binding and/or non-enforceable instruments, mainly in relation to the CRC, in order to better understand and familiarize with

[24] Statute of the International Court of Justice (ICJ Statute), adopted as an integral part of the Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945), 1 UNTS xvi.

[25] For more about the doctrinal research method, see e.g. Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edition, eBook, EUP 2017) and Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 Erasmus L Rev 130.

the concept.[26] These include General Comments and recommendations given by the Committee on the Rights of the Child (the CRC Committee) which was established with the CRC. The CRC Committee consists of 18 experts of "high moral standing and recognized competence" in the field covered by the CRC.[27] Thus, the documents issued by the Committee can be considered to be "teachings of the most highly qualified publicists" within the meaning of Article 38 of the ICJ Statue.[28] State Parties elect the members of the CRC Committee from among their nationals who serve in their personal capacity.[29] Membership in the CRC Committee is for a term of four years but the members are eligible for re-election if they are nominated again.[30]

The CRC Committee examines the progress made by State Parties in achieving the realization of the obligations undertaken in the Convention.[31] States Parties are under an obligation to submit reports on the measures they have adopted which give effect to the rights recognized in the CRC and on the progress made on the enjoyment of those rights to the CRC Committee.[32] The Committee is authorized to make suggestions and general recommendations based on, *inter alia*, the information it receives pursuant to the reports made by the State Parties.[33] Subsequent to the entry into force of the Optional Protocol to the CRC on a Communications Procedure (OPCP)[34], the Committee is also authorized to examine and give its views together with possible recommendations to a State Party in relation to communications submitted by individuals complaining to be subjects of violations of the CRC.[35]

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[26] For more about the term "soft law" and its usage, meaning and inconsistencies, see e.g. Jan Klabbers, *International Law* (1st edition, CUP 2013), pp. 21–40 and Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 J Legal Analysis 171. For the advantages of "soft law" instruments, see e.g. Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) International Organization vol. 54, no. 3, 421–456.

[27] For more about the current members and their academic and professional background, see https://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx. The Committee originally consisted of ten experts in accordance with Article 43(2) of the CRC but in 1995 the number was increased to 18. For an overview about the CRC Committee, see e.g. Ann Skelton, 'Committee on the Rights of the Child (CRC)', *Max Planck Encyclopedia of International Law* (last updated October 2017).

[28] The ICJ has referred to the Human Rights Committee's recommendations in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Merits, Judgement, I.C.J. Reports 2010, p. 639, paras. 66 and 77.

[29] Article 43(2) of the CRC.

[30] Article 43(6) of the CRC.

[31] Article 43(1) of the CRC.

[32] Article 44(1) of the CRC.

[33] Article 45(d) of the CRC.

[34] Adopted by UNGA Res 66/138 (19 December 2011), entry into force 14 April 2014, 2983 UNTS.

[35] For more about the communications procedure, see chapter 2.3.

The CRC Committee is internationally the highest institution that interprets specifically the content of the CRC. To understand the content and meaning of Article 3(1) of the CRC, the comments, observations and recommendations issued by the CRC Committee must be taken into account. The fact that the Committee has been authorized to examine individual complaints by State Parties to the CRC supports the view of acknowledging the Committee's status as the authoritative source for the CRC. I too consider the documents of the Committee as highly relevant ones and for my purposes most importantly because the ECtHR cites and refers to them in its judgements.[36] Thus, even though the General Comments are not legally binding or enforceable, they must be regarded as giving great guidance on the interpretation of the CRC.[37]

1.4 Structure

In order to gain a preliminary understanding about the concept of the best interests of the child as stipulated in Article 3(1) of the CRC, I will start the thesis in chapter 2 by explaining the drafting process and general acceptance of the concept. I will first go through the preparatory work of the CRC and place the concept in its context. I will then turn on to it in more detail and explain its content and purpose as well as the obligations it imposes to all 196 State Parties. The criticism which the principle has come across is addressed as to the widest extent as possible throughout chapter 2. This chapter also contains a sub-chapter which provides examples about how the CRC Committee has implemented and applied the concept. The last chapter concludes the previous chapters by demonstrating important aspects of the findings in chapter two in relation to situations concerning public care and contact rights.

I will turn on to the second cornerstone of the thesis in chapter 3 by giving an outline of the right to respect for private and family life as stipulated in Article 8 of the ECHR and introducing the general principles of interpretation applied by the European Court of Human Rights in relation to the Convention. In addition to this introductory section, chapter 3 consists of two approaches to the right stipulated in Article 8, firstly from the viewpoint of

[36] E.g. in *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 207, the ECtHR stated that "it is incumbent on the Contracting States to put in place practical and effective procedural safeguards for the protection of the best interests of the child and to ensure their implementation" and referred to the CRC Committee's General Comment No. 14 (2013), UN Doc CRC/C/GC/14, paras. 85 and 87.

[37] See e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 14–16 and Benedetto Conforti, *The Law and Practice of the United Nations* (1st edition, Springer Netherlands 1996), p 275–276.

the adult members of the family and secondly, in respect of the child. The purpose of chapters 2 and 3 is to provide a basic theoretical understanding about the content and interpretation of the key articles before examining their application in the ECtHR practice.

In chapter 4 I will turn to the case law of the European Court of Human Rights in cases concerning public care and contact rights. The first two chapters explain generally the procedure in the ECtHR and the general principles relating to the matters under examination. Chapters 4.3 and 4.4 are exclusively concerned with issuing care orders and their implementation and these chapters focus on the balancing of the interests of the natural family members. Chapters 4.5 and 4.6 on the other hand examine the case law concerning balancing the interests of the child and other members of the child's "family" within Article 8 of the ECHR. Chapters 4.7 and 4.8 are concerned with more general issues which the ECtHR has taken into account when balancing the interests of the parties concerned, namely the child's participation in the proceedings and the issue of prolonged proceedings. Throughout chapter 4, the case law and considerations of the ECtHR are reflected to the findings in chapter 2.

Chapter 5 concludes the findings made in the previous chapters. I will argue that the ECtHR takes the concept of the best interests of the child into account as a general rule but uses such a vocabulary in relation to the concept which can lead to confusion as to how much weight is required to be given to the interests of the child. Furthermore, I will argue that it might not be necessary for the full recognition, implementation and application of the concept of the best interests of the child for the Court to point separately how much weight it attaches to each and every factor which all together form the circumstances as a whole in a specific case. Nevertheless, I will lastly argue that three factors are of special importance when the Court considers whether the national authorities have succeeded in striking a fair balance between the competing interests. These factors include whether or not the national authorities have considered any less intrusive measures before taking a child into care, whether they have obtained expert opinions and professionals' assessment about the circumstances and whether the authorities have explicitly considered the child's interests in the first place.

2 CONCEPT OF THE BEST INTERESTS OF THE CHILD

2.1 Drafting and general acceptance

The concept of the best interests of the child was mentioned already in the United Nations 1959 Declaration of the Rights of the Child.[38] The Declaration stated that *the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.* However, in 1959 the majority of the member states of the United Nations gave their support rather to a non-binding instrument than to a legally binding treaty in the field of children's rights and the principle was not legally enforceable.[39]

At the beginning of the drafting process of the CRC 20 years later, the drafting of a legally binding treaty was not regarded as a high priority, even though theoretically the oppositions were withdrawn. The first draft submitted by Poland had only little differences with the 1959 Declaration and the proposal's aim was mainly to adopt the non-binding provisions of the Declaration in a binding treaty. Views, observations and suggestions for the first draft were received by the Secretary-General altogether from 28 member states, 15 from non-governmental organizations and 4 from specialized agencies. Based on these replies, the Commission on Human Rights established a Working Group to draft the Convention on the Rights of the Child. States, which were not members of the Commission, were also allowed to participate fully in the drafting process.[40]

The generosity and wide application of the principle as suggested in the first draft raised objections.[41] In 1980 the Working Group submitted an alternative draft according to which *"In all official actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities, the best interests of the child shall be a primary consideration"*.[42] During discussions in 1981 some delegations

[38] UNGA Res 1386 (XIV) (1959), Principle 2.
[39] See e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), p. 13–14.
[40] Ibid.
[41] Ibid.
[42] Report of the Working Group (10 March 1980) UN Doc E/CN.4/L.1542, para. 44. This formulation was suggested by the United States delegation.

considered that the first draft offered better protection to the child but in search for a compromise, the second draft was agreed to be taken as a basis for discussion.[43] One speaker expressed the reluctance to adopt the wording of the first draft by stating that the interests of the child should be *a* primary consideration in actions concerning children, as suggested in the second draft, but not overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some cases, giving medical emergencies during childbirth as an example.[44] At this stage the word "official" was deleted from the formulation but otherwise it was left unaltered.[45]

There were altogether 16 drafting groups taking part in the drafting process, which meant that theoretically many state delegates and non-governmental representatives had to take part in more than one working group at a time. The desire to finish the second reading presumably led to a rush, which consequently can be the reason why many important issues were left undiscussed in detail.[46] During the second reading it was again suggested that the interests of the child should be *the* primary consideration rather than "*a*". However, the proposal was unsuccessful. The only amendment in relation to the concept was that "legislative bodies" were added after "administrative authorities".[47]

During the drafting process it was noted that there might occur situations where competing interests of, *inter alia*, justice and the society at large should be of at least equal, if not, greater importance than the interests of the child. An observation by Finland, supported by the Netherlands, contained that the interests of the child should be "the" primary consideration only in actions involving his or her "welfare". Nevertheless, this proposal was opposed by the delegations of Portugal, Australia, Canada and Senegal as it sought to narrow the scope of children's protection.[48] In January 1989, the Working Group adopted its report and sent it to the Commission on Human Rights for consideration and further dissemination to the General Assembly. The General Assembly adopted the CRC by consensus on 20

[43] Report of the Working Group (17 February 1981) UN Doc E/CN.4/L.1575, para. 22.
[44] Ibid para. 24.
[45] Ibid paras. 25–26.
[46] See e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 14–15. For instance it has been argued that the Working Group took the meaning and content of Article 3(1) of the CRC as either for granted or of minor importance. For more, see e.g. Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1.
[47] See e.g. Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1.
[48] Report of the Working Group (2 March 1989) UN Doc E/CN.4/1989/48, paras. 117–123.

November 1989 and the CRC entered into force on 2 September 1990.[49] The principle of the best interests of the child was adopted in Article 3(1) of the CRC and it reads as follows

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

In relation to the substance of the concept, the Venezuelan representative stated that, although her delegation was not opposed to the phrase "best interests of the child" being included in the final text, she wished to "draw attention to the subjectivity of the term, especially if the Convention contained no prior stipulation that the "best interests of the child" were his all-round – in other words, physical, mental, spiritual, moral and social – development". The representative noted that it would leave the interpretation of the best interests of the child to the judgement of the person, institution or organization in question. However, number of delegations expressed their satisfaction with the phrase as it is, and thus the representative of Venezuela withdrew her suggestion.[50] Ultimately, the Working Group adopted the principle of the best interests of the child as it now stands with the following reasons:

> *"In view of the strength of reservations voiced about making the interests of the child "the" primary consideration in all situations and taking into account the fact that the delegations which felt that it should be did not insist on this revision, consensus was reached to make the interests of the child only "a" primary consideration in all actions, as it had been in the text adopted during the first reading."*[51]

As was already mentioned, the CRC has been ratified nearly universally, the United States of America being the only state that has signed but not ratified it.[52] Besides the CRC's nearly universal ratification, the general acceptance which the concept has gained can also be drawn from the way it has been used and applied in international level in general.[53] The European Commission of Human Rights made reference to the principle and its priority already in

[49] See e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 14–15.
[50] Report of the Working Group (2 March 1989) UN Doc E/CN.4/1989/48, para. 120.
[51] Ibid para. 125.
[52] For status of the treaties visit the United Nations Treaty Collection, Status of Treaties on https://treaties.un.org/.
[53] See e.g. Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1.

1982, when considering the interests and rights of the parent in question by stating that "where [- -] there is a serious conflict between the interests of the child and one of its parents, which can only be resolved to the disadvantage of one of them, the interests of the child must [- -] prevail".[54] The United Nations Human Rights Committee has also emphasized the importance of the principle by pointing out "the undoubted right and duty of a domestic court to decide in the best interests of the child".[55] Furthermore, the concept of the best interests of the child is mentioned in the African Charter on the Rights and Welfare of the Child[56] and the United Nations High Commissioner for Refugees has referred to the principle in multiple occasions.[57] The CoE Parliamentary Assembly has also reaffirmed that "the best interests of the child should be a primary consideration in all actions concerning children, in accordance with the United Nations Convention on the Rights of the Child".[58]

The 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women also mentions the best interests of the child in two of its Articles[59] and Article 5 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with special reference to Foster Placement and Adoption Nationally and Internationally states that "in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration".[60]

In addition to Article 3(1), the CRC mentions the concept of the child's best interest in seven other Articles as well.[61] For instance, Article 9(1) of the CRC requires that a child shall not be separated from his or her parents against their will, unless such separation is necessary

[54] Report of the Commission in *Wim Hendriks against the Netherlands*, Application no. 8427/78 (8 March 1982), para. 124.
[55] Communication no. 201/1985, Views adopted on 27 July 1988, Appendix I, in *Report of the Human Rights Committee*, UN Doc A/43/40 (1988) Annex VII, para 1.
[56] The Charter entered into force in 1999 and at the time of writing 49 out of 55 Member States of the Organization of African Unity have ratified it. According to Article 4(1)*"in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration"*.
[57] See e.g. Conclusion No 47 (1987) on 'Refugee Children' in *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR*.
[58] Parliamentary Assembly Resolution 2232 (2018) adopted by the Assembly on 28 June 2018, para. 4
[59] 1249 UNTS 13. According to Article 5(b), State Parties are under an obligation to take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interests of the children is the primordial consideration in all cases. Article 16(1)(d) states that in all matters relating to marriage and family relations, the best interests of the children shall be paramount.
[60] UNGA Res 41/85 (1986) UN Doc A/RES/41/85.
[61] Reference to the child's best interests is made in Articles 9, 10, 18, 20, 21, 37(c) and 40(2)(b)(iii).

for the best interests of the child. Optional Protocols to the Convention on the Rights of the Child on sale of children, child prostitution and pornography[62] and on the involvement of children in armed conflict[63] as well as the OPCP all refer to the concept as well.

2.2 Interpretation, scope and obligations

2.2.1 In general

The rules concerning treaty interpretation are codified in the Vienna Convention on the law of treaties (VCLT) which entered into force in 1980.[64] The general rules of treaty interpretation are stated in Article 31 of the VCLT but these rules are also regarded as reflecting customary international law.[65] According to Article 31(1), treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(2) states that the context for the purpose of the interpretation of a treaty shall comprise first the text, including its preamble and annexes as well as any agreement or instrument made by the parties in connection with the conclusion of the treaty. The ICJ has emphasized the text of the treaty in its interpretation.[66]

It should be noted that none of the CoE Member States have made a reservation in respect of Article 3(1) of the CRC.[67] Even if a reservation was made by a State Party in relation to Article 3(1), the acceptability of such a reservation can be questioned, as Article 3(1) appears to "undermine the basic philosophy" of the CRC.[68] Thus, making a reservation in relation to the best interests principle could be deemed unacceptable in accordance with Article 19(c) of the VCLT according to which, a State may formulate a reservation unless the reservation is incompatible with the object and purpose of the treaty.

Undisputedly there exists neither consensus of what constitutes children's interests or their best interests for that matter nor consensus of factors, which should be taken into account

[62] Adopted by UNGA Res A/RES/54/263 (25 May 2000), entry into force 18 January 2002, 2171 UNTS 227.
[63] Adopted by UNGA Res A/RES/54/263 (25 May 2000), entry into force 12 February 2002, 2173 UNTS 222.
[64] 1155 UNTS 331. There are 116 State Parties to the Convention.
[65] See e.g. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgement, I.C.J. Reports 2002, p. 625, para. 37 and *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgement, I.C.J. Reports 1994, p. 6, para. 41.
[66] Ibid.
[67] For more about declarations and reservations, visit https://treaties.un.org.
[68] For more discussion about reservations in relation to Article 3(1) of the CRC, see e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 51 and 396–399. The general rules concerning reservations and declarations made in relation to treaties are codified in the VCLT section 2.

when considering what would be in the child's best interests in a particular case. Thus, the concept of the best interests of the child is frequently criticized as leaving room for discretion to the decision-maker and ultimately leading to a lack of uniformity on domestic level and especially on international level. Furthermore, Article 3(1) of the CRC has been criticized from dangerously allowing State Parties to adopt an extreme culturally relativist position to defend their actions.[69]

However, this indeterminacy of the concept should not be over exaggerated as it would have not been possible or even practical to try to include an exhaustive list of factors which would be applicable in all situations. Even if some sort of list of factors would had been concluded, it would have not answered the questions relating to the balancing of other relevant interests or the relationship and balancing of the factors themselves. In addition, these criticisms do not consider the fact that many other international human rights instruments also leave open the question of how to balance one right against another in order to meet the demands of justice in a specific case.[70]

The wide scope of the concept is understandable in its the context of a provision, which was designed to be applicable in a wide range of situations, and it should be noted that a level of indeterminacy is a characteristic of human rights norms in general.[71] The CRC Committee has also emphasized the concept's dynamic nature and stated that the guidance given in relation to the assessment of the best interests of the child does not attempt to prescribe what is best for the child in any given situation but rather to provide a framework for assessing and determining them. The concept of the best interests of the child is a dynamic one and it "encompasses various issues which are continuously evolving". The CRC Committee has pointed out that the flexibility of the concept allows it to response to situations of different type of individuals and to evolve knowledge about child development.[72]

Furthermore, it has been noted to be one of the Convention's advantages, at least in contrast to most domestic statutes, that it provides a category of distinct rights, which in principle,

[69] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 45–47.
[70] Ibid.
[71] Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1.
[72] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, paras. 11 and 34.

are considered to be in the child's best interests.[73] The CRC Committee has stressed that there is no hierarchy between the rights conferred in the Convention and all the rights are primarily in the "child's best interests". The Committee has also explicitly stated that in the interpretation of Article 3(1) of the CRC, "the rights enshrined in the Convention and its Optional Protocols provide the framework" and that a judge, administrative, social or educational authority will make concrete use of Article 3(1) when it is interpreted and implemented in line with the other provisions.[74]

For the purposes of this thesis, I will describe the relevant parts of the preamble as well as the rights enshrined in Articles 3(2), 9, 18 and 20 which at least are all relevant in cases concerning alternative care of the child and right of access. According to the preamble of the CRC for the full and harmonious development of the child's personality, he or she should grow up in a family environment, in an atmosphere of happiness, love and understanding. The preamble also states that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.[75]

Albeit, family is recognized as the fundamental group of society and natural environment for the growth and well-being of children in the CRC, the Convention challenges the traditional approach of seeing family life as being in the best interests of the child regardless and the assumption that parents or legal guardians of the child would always be capable to decide what is in the best interests of the child in different circumstances.[76]

Article 3(2) prescribes States Parties obligation to ensure the child such protection and care as is necessary for his or her well-being while respecting the rights and duties of parents. According to Article 9, a child should not be separated from his or her parents against their will except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests

[73] See e.g. Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1.
[74] See General Comment No. 14 (2013), UN Doc CRC/C/GC/14, paras. 4, 6 and 32.
[75] For more about the recognition of the role of parents and State Parties' obligations relating to support and assistance, see Pia M. van den Boom, 'Advancing Children's Rights through Parent Support Services' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (eBook, Brill 2017).
[76] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), p. 46.

of the child. Article 9 continues to state that, for instance, abuse or neglect of the child by the parents is an example of a situation where such separation might be necessary. According to Article 9(3), the child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 18 emphasizes the importance of both parents to a child by stating that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child and the primary responsibility for the child's upbringing and development is on the parents or legal guardians with the best interests of the child as their basic concern. For the performance of their "child-rearing responsibilities", States Parties shall give appropriate assistance.[77] In addition to the preamble, Article 18 demonstrates that the CRC recognizes the importance of parents as caregivers and primary protectors of children. It should be acknowledged that the "CRC is not anti-family or conflicting with parents' rights" but rather sets international standards for children's rights with the realization that State Parties must provide assistance to families in complying with them.[78]

According to Article 20, a child who is deprived of his or her family environment either temporarily or permanently, 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 and the State shall ensure alternative care, such as foster placement, for such a child. None of the CoE Member States have reservations in force in relation to the aforementioned Articles either, as reservations made in respect of Article 9 have been withdrawn by Serbia (former Government of Yugoslavia) in 1997, Slovenia in 2004, Bosnia and Herzegovina in 2008, Iceland in 2009 and Germany withdrew its reservations in respect of Articles 9 and 18 in 2010.

All of these Articles and the preamble shed light to the best interests of the child for which reason I too find it important that the CRC is considered as a whole in a particular case and circumstances and further guidance in determining the best interests of the child in that specific case is searched from other rights enshrined in the CRC. The ECtHR has also referred to Article 9(1) of the CRC in relation to the best interests of the child. In *Strand*

[77] Article 18(2) of the CRC.
[78] For more, see van den Boom *op. cit.* footnote 74.

Lobben and Others v. Norway, the Court stated that "an important international consensus exists to the effect that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child" and cited Article 9(1) of the CRC.[79]

The CRC Committee has given guidance in relation to the concept of the best interests of the child in multiple General Comments and observations. According to the CRC Committee, Article 3(1) of the CRC expresses one of the fundamental values of the Convention and it is considered to be one of the Convention's four general principles for the interpretation and implementation of other Articles. It is a dynamic concept and it requires an assessment appropriate to each specific context. It is aimed at ensuring the full and effective enjoyment of the rights recognized in the CRC as well as the holistic development of the child. Furthermore, the CRC Committee has emphasized the concept's three-fold dimension and given guidance to it as a right, a principle and a rule of procedure.[80] The next chapters will address each of these dimensions and their additional value to the concept.

2.2.2 Best interests of the child as a substantive rule

During the drafting process of the CRC, some representatives expressed their view that Article 3(1) did not need to have a reference to specific obligations to State Parties in respect of the best interests of the child because paragraph 1 enunciated general principles while the specific obligations of States Parties would be listed in the following provisions.[81] Subsequently, Article 3(1) of the CRC has been envisaged only as a principle of interpretation not creating any rights or duties on its own.[82] However, in 2013 the CRC Committee emphasized that Article 3(1) of the CRC establishes a substantive right and creates an intrinsic obligation for State Parties. According to the CRC Committee the right is directly applicable, and it can be invoked before a court. The CRC Committee underlined

[79] Application no. 37283/13 (10 September 2019), para. 207. The ECtHR has demonstrated compliance in referring to more context-specific Articles, such as Article 9, in cases concerning children rather than referring to Article 12 for instance which is considered to be one of the CRC's four general principles. For more, see Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014) 193–209.

[80] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, paras. 1 and 4.

[81] UN Doc E/CN.4/L.1575, para. 24.

[82] See e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), p. 46 and Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1.

that in accordance with the concept, a child has the right to have his or her best interests assessed and taken as a primary consideration when different interests are being considered, in order to reach a decision. As soon as Article 3(1) of the CRC is regarded as a substantive right, there is a guarantee that this right is implemented when a decision is to be made concerning a child.[83]

The formulation "*shall be*" a primary consideration does not leave room for discretion as to whether the best interests of the child should be assessed in the first place but rather obliges to make that assessment and place proper weight on those considerations with adequate reasoning. The CRC Committee has also emphasized the meaning of "*primary consideration*" and recalled that it means that other considerations are not on the same level as those of the child's best interests due to children's incapability to fight and promote their interests on their own.[84]

According to the CRC Committee, there are three obligations inherent in Article 3(1) of the CRC. Firstly, State Parties are under an obligation to ensure that the child's best interests are "appropriately integrated and consistently applied" in every action taken by a public institution. The second obligation requires to ensure that all judicial and administrative action demonstrate that the child's best interests have been a primary consideration. This includes, *inter alia,* that in a judicial decision it is explicitly described how the best interests have been examined and assessed and what weight has been attached to them. Lastly, State Parties are under an obligation to ensure that the best interests principle is applied accordingly by the private sector. In order to comply with these obligations, State Parties shall undertake implementation measures in accordance, *inter alia,* with Article 4, which requires to take all appropriate legislative, administrative, and other measures for the implementation of the rights stipulated in the CRC.[85]

Article 3(1) of the CRC obliges to asses and choose to take the child's best interests as a primary consideration in individual decisions. It requires having children's best interests considered in general, as a group and as individuals. However, a child's interests must not be understood as being the same as those of children in general but rather they must be assessed individually.[86] It goes without saying that in cases concerning alternative care and

[83] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 6.
[84] Ibid, para. 37.
[85] Ibid, paras. 14–15.
[86] Ibid, para. 22–24.

contact with a child, the decision will have direct impact on the child in question. Thus, Article 3(1) obliges that the best interests of the child are taken as a primary consideration in the decision-making process. Taking the right duly into account the decision-maker should explicitly state how the best interests of the child have been identified, assessed and what weight is attached to them.

2.2.3 Best interests of the child as a principle of interpretation

As a principle of interpretation Article 3(1) has the advantage of being considered simultaneously and in relation to each of the rights in the CRC as well as in relation to *all* actions concerning children. In each individual case, the particular situation and circumstances will define the factors which are to be considered in order to decide what would be in the child's best interests. These include, *inter alia*, the opinions of the child, the child's sense of time, the need for continuity, the risk of harm and the child's needs. What is distinct about the concept as formulated in the CRC compared to its predecessors is that the child should always take part in the assessment of his or her best interests either by him- or herself or through a representative as derived from Article 12 of the CRC.[87]

The assessment and consequences of a conflict between another right of the CRC and the particular interpretation of the child's best interests in a given case were not considered during the drafting process. Although the Working Group drew its attention to the possibility of there being other interests at least of equal value than the best interests of the child in a given case, there is no guidance as to how these types of conflicts or situations should be dealt with in the reports.[88] This inevitable possibility of conflict between human rights should not, however, be over-exaggerated. Again, there are not many treaty provisions which explicitly provide tools for balancing conflicting interests or rights in a given set of circumstances.[89]

According to the CRC Committee, it is precisely the best interests principle which should be taken into account to resolve any conflicts among the rights enshrined in the CRC or other human rights treaties. To do so, the possible solutions which are in the child's best interests

[87] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 46–47. For more about Article 12 and the participation of the child, see chapter 2.2.4.

[88] See e.g. Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1 and Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 48–51.

[89] See e.g. Helen Keller and Reto Walther, 'Balancing Test: United Nations Human Rights Bodies', *Max Planck Encyclopedia of International Law* (last updated April 2018).

must be identified and clarified and this must be done on a case-by-case basis by carefully balancing the interests of all parties with the aim of finding a suitable compromise. Furthermore, the Committee has emphasized that where harmonization is not possible it must be borne in mind that the child's best interests have a high priority and they are not merely one of several considerations. Larger weight must be attached to a solution which is considered as the best for the child or children concerned.[90]

Placing emphasis on the formulation of Article 3(1) of the CRC with the State Parties' obligation under Article 4 to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the CRC, it seems that the concept of the best interests of the child requires that where there are multiple alternatives of outcome in a given case, the burden of proof to establish and demonstrate why, under those specific circumstances, another outcome than the one being in the child's best interests, should prevail is on the decision-maker.[91] The CRC Committee has emphasized that the decision-making process must include an evaluation of the possible impact of the decision on the child and the decision's reasoning must demonstrate that the right has been explicitly taken into account. This includes reasoning on what has been considered to be in the child's best interests, what criteria it is based on and how the child's interests have been weighed against other considerations.[92]

There will never be an accurate scientific measure to facilitate the determination of what is considered to be in the best interests of the child. This, however, should not be regarded as devaluing the importance of Article 3(1) of the CRC. Applying the principle together with other Articles of the Convention, especially with Article 5 of the CRC which takes into account the evolving capacities of the child, allows to understand the need for different degree of protection, provision, prevention and participation at different stages of

[90] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, paras. 33 and 39.
[91] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 50–51 and Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1.
[92] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 6.

childhood.[93] Effective protection of the child's rights requires that this evolving nature of childhood is taken into account when the child's best interests are considered.[94]

One criticism faced by the concept relates to the impossibility to predict a decision's long-term implications and different factors' long-term effects on the development of the child. This inability to predict family relations and interpersonal relationships in the future should be taken into account in decisions on every level – whether domestic or international. The potential negative implications of this deficit are, however, diminished by subjecting the decisions under review either from time to time or at least by way of more than a one court instance.[95] The ECtHR favours the approach to take decisions concerning public care and restrictions on contact under review by domestic authorities after a period of time has passed since the first decision was made[96] albeit, to guarantee that the natural parents' right to respect for family life is protected accordingly. However, as the natural family environment is considered to be the best environment for the child to develop and grow unless it is contrary to his or her best interests, reviewing the decisions can be seen as in the child's interests as well.

The first decisions to take a child into public care or restrictions on contact do not become final in the traditional sense of *res judicata* as such in the CoE Member States. These decisions become legally valid in accordance with domestic legislation, but if the family's circumstances later change there might no longer be relevant and sufficient reasons to keep the child in public care or to restrict contact between the natural family members and consequently, the matter can be subjected to a second set of proceedings.[97] Thus, in my opinion the criticism relating to the impossibility to predict future relationships should not be considered as an obstacle in relation to the full implementation and recognition of the principle at least in situations under research here. In theory, domestic authorities could assess the best interests of the child from time to time. Whether this leads to a situation,

[93] According to Article 5 of the CRC, "State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".

[94] See e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 50–51.

[95] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 47–48.

[96] For more, see chapter 4.4.3.

[97] This is due to obligations inherent in Article 8 of the ECHR. For detailed reasons, see chapter 3.

where the child is constantly under stress is again a situation which elimination is ultimately the responsibility of national authorities.

After almost thirty years since the CRC entered into force, it should be regarded as inadequate application of Article 3(1) if a decision-maker merely states that the best interests of the child have been considered or that the decision was based on the best interests of the child without giving further reasoning as to why and based on what grounds. Besides the judicial framework provided for the best interests principle, the assessment of the best interests of the child should not be made based on legal assumptions or exercised in isolation from the reality of the circumstances or child psychology and development. As will become evident in chapter 4.2.3, the Strasbourg Court takes into account how the national authority has assessed the reports and opinions issued by child institutions, child psychologists and other experts who have recommended some solution as in the child's best interests and what weight has been attached to them.[98]

2.2.4 Best interests of the child as a rule of procedure

The CRC Committee has recognized that all actions taken by domestic authorities inevitably affect children in one way or another and thus clarified that the full respect and recognition of Article 3(1) does not mean that every action taken must incorporate formal process of assessing and determining the best interests of the child but a greater level of protection and detailed procedures are appropriate where a decision will have a major impact on a child or children.[99] The Committee has listed cases concerning, *inter alia,* paternity, family reunification, accommodation, custody, residence or contact as examples of civil cases where the child might be defending his or her interests directly or through a representative and where the court must provide for the best interests of the child to be considered and demonstrate that they have effectively done so.[100]

As already briefly mentioned, Article 3(1) is one of the four general principles in the interpretation and implementation of the CRC as a whole. Another general principle is

[98] In relation to permitting contact between a biological father whose paternity has not been established and the child, the ECtHR has already stressed that the decision should not be made based on legal assumption but rather the authorities should consider in the specific circumstances whether permitting contact would be in the child's best interests. For more, see chapter 4.5.
[99] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 20.
[100] Ibid, para. 29.

established in Article 12 which enshrines the child's right to be heard.[101] According to Article 12, a child who is capable of forming his or her own views, has the right to express those views freely in all matters affecting him or her and the views of the child are to be given due weight in accordance with his or her age and maturity. For this purpose, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. The provision clarifies that it is the adult's duty to listen and respond to the child given that the child might struggle to be heard for a variety of reasons.[102]

The CRC Committee has emphasized that hearing the child as stipulated in Article 12 is a mandatory step. The best interests of the child are to be established in consultation with the child and this factor is of crucial importance. The Committee has highlighted the inseparability and interdependency of Articles 3(1) and 12 and it has explicitly stated that if the requirements of Article 12 are not met, the concept of best interests of the child is not correctly applied.[103] Furthermore, the Committee has emphasized that this right is not tied in with age and State Parties should not introduce age limits that would restrict this right.[104] The dominant approach in relation to Article 12 appears to be that there is no fixed procedure as to how the child should be heard but that it should rather be done flexibly and after receiving the child's views the weight attached to them should be considered in accordance with the child's age and maturity.[105]

What comes to the requirement of forming the views "freely", the CRC Committee has stated that the child should be able to express his or her views "without pressure" and "without undue influence" or manipulation.[106] The Committee acknowledges that the "hearing" of a

[101] The two remaining general principles are Article 2 (the child's right to non-discrimination) and Article 6 (child's right to life, survival and development). For more about each of the principles, see e.g. Committee on the Rights of the Child, General Comment No. 14 (2013), UN Doc CRC/C/GC/14, paras. 41–45 and General Comment No. 7 (2005) UN Doc CRC/C/GC/7/Rev.1, paras. 9–14.

[102] Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).

[103] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 43 and General Comment No. 12 (2009), UN Doc CRC/C/GC/12, paras. 70–74. See also the decision in Y.B. and N.S. v. Belgium, Communication no. 12/2017. For more detailed discussion of the case, see chapter 2.3.

[104] General Comment No. 12 (2009), UN Doc CRC/C/GC/12, para. 21.

[105] Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).

[106] General Comment No. 12 (2009), UN Doc CRC/C/GC/12, para. 22.

child is difficult and can have traumatic impacts and thus the conditions and environment for the child to express his or her views must be safe and secure. Closely connected to the right to express his or her views is the requirement to provide the child with adequate information in order to form his or her views if the child so wishes to do. According to the Committee, it is not necessary that the child has comprehensive knowledge about all aspects of the matter, but he or she must have sufficient understanding in order to appropriately form his or her views on the matter.[107]

The other principle of interpretation in international law introduced by the CRC, namely the principle of the evolving capacities of the child as stipulated in Article 5, is closely related also to the procedural requirements of Article 3(1) of the CRC.[108] The CRC Committee has stressed that the more a child knows, has experienced and understands, the more the adults legally responsible for him or her have to "transfer direction and guidance into reminders and advice, and later on to an exchange on an equal footing".[109] However, whatever the age of a particular child, each and every child has the same rights to have their best interests assessed even if they cannot or will not express their views. It is for the States to ensure appropriate arrangements for the assessment of their best interests.[110]

It seems like the procedural aspects of Article 3(1) of the CRC have been recognized within the CoE, as on 8 September 1995 the Council of Europe adopted the European Convention on the Exercise of Children's rights (ECECR)[111] which entered into force on 1 July 2000. The object of the Convention is, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.[112] It is stated in the preamble of the Convention that "children should be provided with relevant information to enable such rights and best interests to be promoted and due weight should be given to the views of children". However, the recognition of these rights and the additional value of the

[107] Ibid, paras. 21 and 23–25.
[108] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), p. 15. For the content of Article 5 of the CRC, see *op. cit.* footnote 93.
[109] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 44 and General Comment No. 12 (2009), UN Doc CRC/C/GC/12, para. 84.
[110] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 44.
[111] ETS No. 160.
[112] Article 1(2) of the ECECR.

Convention were criticized already before its entry into force and up until today it has entered into force only in 20 Member States of the CoE.[113]

2.3 Implementation of Article 3(1) of the CRC

Although the reporting system established in the CRC can be identified as one of the methods of promoting and protecting human rights in international law and an attempt to strengthen the form of such an enforcement mechanism[114] the lack of individual petitioning system together with the ineffective remedies has been frequently argued to be one of the CRC's weaknesses. It has been argued that the CRC has provided theoretical protection for children, but the lack of meaningful enforcement mechanisms and remedies has been described as a gap between the Convention's obligations and the effective recognition of the rights of children.[115]

Thus, the OPCP which entered into force on 14 April 2014 can be seen as a call for action in relation to incomplete recognition of the rights enshrined in the CRC in practice.[116] By becoming a Party to the Protocol, the state recognizes the competence of the CRC Committee to, *inter alia*, examine individual communications submitted by or on behalf of an individual or group of individuals, claiming to be victim or victims of a violation of rights set forth in the CRC and give recommendations to the parties concerned.[117] While examining communications, the CRC Committee is guided by the principle of the best interests of the child and the Committee shall also have regard for the rights and views of the child, the

[113] The up to date status of the state parties can be verified from Council of Europe Treaty Office on https://coe.int/en/web/conventions/full-list/-/conventions/treaty/160. For more about the critique, see e.g. Caroline Sawyer, 'One Step Forward, Two Steps Back – The European Convention on the Exercise of Children's Rights' (1999) 11 Child & Fam L Q 151.

[114] See e.g. Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 378–379.

[115] See e.g. Marta Santos Pais, Special Representative of the Secretary-General on Violence against Children, 'Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure', (14 December 2009) UN Doc A/HRC/WG.7/1/CRP.7 and Peter Newell, 'Submission to Open-ended Working Group of the Human Rights Council, considering the possibility of elaborating an Optional Protocol to provide a communications procedure for the Convention on the Rights of the Child', (9 December 2009) UN Doc A/HRC/WG.7/1/CRP.2. Also, the CRC Committee has emphasized that "for rights to have meaning, effective remedies must be available to redress violations" in its General Comment No. 5 (2003) UN Doc CRC/GC/2003/5.

[116] See e.g. Dubravka Hrabar, 'Bringing the Non-Protection of Children's Rights through the Optional Protocol to the CRC on Communications Procedure and a Future European Court' (2017) 8 Croat Acad Legal Sci YB 13. In addition, an international campaign to draft such a Protocol had received great support after a communications procedure to the ICESCR was adopted in 2008. For more about the motives behind the Optional Protocol, see e.g. Sarah Spronk, 'Realizing Children's Right to Health; Additional Value of the Optional Protocol on a Communications Procedure for Chilren' (2014) 22:1 Intl J Child Rts 189.

[117] Articles 1, 5 and 10 of the Optional Protocol.

views of the child being given due weight in accordance with the age and maturity of the child.[118]

The OPCP recognizes that children's special and dependent status may create real difficulties for them in pursuing remedies for violations of their rights. In addition, State Parties recognize that the best interests of the child should be a primary consideration to be respected in pursuing remedies for violations of the rights of the child, and that such remedies should take into account the need for child-sensitive procedures at all levels.[119] Thus, State Parties are also encouraged to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level.[120]

The Protocol established two procedures of protection, a communication procedure under Article 5(1) and an inquiry procedure for grave or systematic violations under Article 13. According to Article 5(1), communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State Party, claiming to be victims of a violation of that State Party of any of the rights set forth in any of the following instruments to which that State is a party: (a) The Convention; (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; (c) the Optional Protocol to the Convention on the involvement of children in armed conflict. The established procedure was envisaged to be a child-friendly one, but whether or not it actually became one has been criticized. Nevertheless, the Optional Protocol provides an opportunity for children to become involved in the recognition of their rights.[121]

As of 31 January 2020, there are 52 signatories to the OPCP and 46 State Parties have ratified it.[122] Whether or not the procedure established by the Protocol is successful or providing further guidance as to the interpretation of the CRC and the concept of the best interests of the child is yet hard to say. At the time of writing the Committee has received 29 communications and ruled 13 of them as inadmissible and decided to discontinue 8 of them.

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[118] Article 2 of the Optional Protocol.
[119] The Preamble of the Optional Protocol.
[120] Ibid.
[121] See e.g. Sarah Spronk, 'Realizing Children's Right to Health; Additional Value of the Optional Protocol on a Communications Procedure for Chilren' (2014) 22:1 Intl J Child Rts 189 and Suzanne Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child; A Mini-Step Forward for Children' (2014) 22 Int'l J Child Rts 205.
[122] For up to date status of the State Parties, see the United Nations Treaty Collection, Status of Treaties on https://treaties.un.org.

Most of the considered cases – 7 out of 8 – are concerned with immigration situations where a child has entered another State with or without identification documents and/or residence permit.[123] 55 % of the communications submitted include Spain as the Respondent State and almost 21 % Denmark. Clearly the range of Respondent States is not yet a wide one either.[124]

The case of Y.B. and N.S. v. Belgium[125] concerned a child who was taken under a fostering arrangement from Morocco by a Belgian-Moroccan couple and the State Party had denied granting the child a humanitarian visa. The State Party and the couple had a different understanding about the relationship which the fostering arrangement established, as the couple correlated it with adoption while the State Party considered it to be similar than what was known in Belgian law as a 'special guardianship' which is revocable and ends when the child reaches adulthood.[126]

In relation to effective implementation of Article 3(1) of the Convention, the CRC Committee has established a twofold procedure to be followed when assessing and determining the best interests of the child in a specific situation. Firstly, within the specific factual context, the decision-maker must find out what are the relevant elements in the assessment, give them concrete content and assign a weight to each element in relation to one another. Secondly, in order to apply the first step, the decision-maker must follow a procedure which ensures legal guarantees and proper application of Article 3(1) of the CRC.[127]

Accordingly, in the aforementioned case, the Committee stated that "in all actions concerning children, the best interests of the child must be a primary consideration" and "the concept should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs". Additionally, in order to make an individual decision, the best interests of the child must be assessed and determined in light of the specific circumstances of the particular child.[128] The CRC Committee also made reference to Article 12 of the CRC and

[123] See e.g. N.B.F. v. Spain, Communication No. 11/2017 (27 September 2018) UN Doc CRC/C/79/D/11/2017 and I.A.M. v. Denmark, Communication No. 3/2016 (25 January 2018) UN Doc CRC/C/77/D/3/2016.
[124] For the jurisprudence of the CRC Committee, see https://juris.ohchr.org/en.
[125] Communication No. 12/2017 (27 September 2018) UN Doc CRC/C/79/D/12/2017. Although the case does not shed light particularly on public care and contact rights issues, I will shortly describe the CRC Committee's assessment in order to demonstrate the application of the concept by the Committee.
[126] See the decision text para. 4.2.
[127] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 46.
[128] See the decision text para. 8.3.

pointed out that "any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests".[129]

In this case, the Committee observed that the child was 5 years old when the authorities made the second decision concerning the denial of the humanitarian visa. The Committee stated that the child would have been "perfectly capable of forming views of her own regarding the possibility of living permanently with the authors". The Committee pointed out that the implications of the proceedings were directly tied to the child's chances of living with the couple as a member of their family. The Committee observed that the State Party did not specifically consider the best interest of the child when it assessed the application for a visa and did not allow her to be heard and hence, was in breach of Articles 3 and 12 of the CRC.[130]

What should be pointed out is that like the CRC Committee stated, it is for the national authorities to examine the facts and evidence of the case and to interpret and enforce domestic law. The Committee's task is to ensure that the national authorities' assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment.[131] Based on this brief review, the CRC Committee's assessment does not seem to be much different than that of the European Court of Human Rights under its own Convention. As will be explained in chapter 3.3, in cases concerning children the ECtHR's assessment has on some occasions been confined to guarantee that the procedural requirements under Article 8 have been secured and that the domestic authorities' decision-making process has not been arbitrary. Similarly, it seems that the CRC Committee emphasized in the aforementioned case that the duty to explicitly identify and clarify the best interests of the child and involve the child in the proceedings were met.

2.4 Concluding remarks

National authorities are under an obligation to identify and transparently explain what the best interests of the child are considered to be in particular circumstances. Furthermore, when a child is taken into public care or natural parents' right of access is restricted, the

[129] See the decision text para. 8.7.
[130] See the decision text paras. 8.8–8.9.
[131] See the decision text para. 8.4.

decision should transparently explain how the child's best interests have been identified, what they were considered to be and how they have been considered and balanced against the interests of the parents or other interests. These decisions have direct and crucial impacts on the child and the best interests of the child must be stated out loud in order for them to be reviewed.

Balancing the interests of the child and those of parents bores into and shakes the traditional ideology of family privacy and the freedoms of parents. There are multiple reasons argued in opposition of the recognition of the wide range of children's rights provided in the CRC, such as arguing that children do not have the capacity to have rights. Even though it is well evidenced nowadays that children can be "highly competent, technically, cognitively, socially and morally".[132] As mentioned, the CRC has also been regarded as "anti-family" despite the references made in the CRC to the effect of supporting the family and parents in their child-rearing responsibilities.

More transparent reasoning by courts and education about the CRC in general[133] would secure and provide better sense of legitimacy altogether. Transparent reasoning is the only way how the parties concerned can assess whether they accept the outcome or not. If the parties are suspicious about the application and interpretation of the law in their case, the reasoning must provide elements which persuade to understand the outcome. Thus, without any explanation why some option has been considered to be in the child's best interests, the decision might appear arbitrary and the adult in question might get a sense of being on the opposite side without having his or her rights fully acknowledged.[134]

Secondly, the child must be involved in identifying his or her best interests, either by him or herself or through a representative. The involvement of the child in proceedings concerning him or her should not be seen as an obstacle but rather as a way to recognize the child as an individual possessing the human rights designed especially for the child. It should be realized that the involvement does not mean the same as a ruler of the outcome but that the non-involvement can have severe and detrimental effects on the child and the child's

[132] For more about the different oppositions and counterarguments, see Michael Freeman, 'Why it remains important to take children's rights seriously' in Michael Freeman (ed), *Children's Rights: Progress and Perspectives: Essays From the International Journal of Children's Rights* (eBook, Brill 2011) 5–25.

[133] According to Article 42 of the CRC, State Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

[134] For more about the interconnectedness of reasoning and legitimacy, see e.g. Michael D Daneker, 'Moral Reasoning and the Quest for Legitimacy' (1993) 43 Am U L Rev 49.

development.[135] The adult is also responsible to respond to the views of the child for which reason the child's views must be given appropriate consideration in accordance with the age and maturity of the child. Thus, the decision should also be transparent on factors such as what the views of the child were, how they were acquired and what weight was attached to them.

Thirdly, it should always be considered whether parents or other adults responsible for the child actually can always represent the child. It has been noted on several occasions that the interests of the child and those of his or her parents might not always coincide, and the motives of the parent might not support the best interests of the child. The ECtHR has also acknowledged this in its case law.[136] Within the CoE, the adoption of the ECECR supports the view of recognizing the importance of impartial representation as according to Article 9(1), in proceedings affecting the child where the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child. Article 4 grants the child the right to apply for a special representative in cases where there is a conflict of interests between the holders of parental responsibilities and the child.

Lastly, as Article 3(1) of the CRC has such a multidimensional character, the vocabulary used when discussing about Article 3(1) of the CRC should, in my opinion, be standardized. It is somewhat diminishing to speak about Article 3(1) only as a principle because it takes the focus on the legal obligations it imposes away. Thus, I find it more coherent to speak about the concept of the best interests of the child when all the dimensions of Article 3(1) are meant and only about the principle when the role and impact as a tool for interpretation are meant. The fact that the CRC Committee uses the formulation "concept" in its decisions on submitted communications supports this view also.[137]

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[135] See e.g. Stacey Platt, 'Set Another Place at the Table: Child Participation in Family Separation Cases' (2016) 17 Cardozo J Conflict Resol 749 and Aisling Parkes, Caroline Shore, Conor O'Mahony and Kenneth Burns, 'The Right of the Child to Be Heard: Professional Experiences of Child Care Proceedings in the Irish District Court' (2015) 27 Child & Fam L Q 423 and Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014), p. 203.

[136] E.g. *Kopf and Liberda v. Austria* Application no. 1598/06 (17 January 2012). For the ECtHR considerations, see chapter 4.6.

[137] See e.g. the decision of Y.B. and N.S. v. Belgium, Communication No. 12/2017 (27 September 2018) UN Doc CRC/C/79/D/12/2017, para. 8.3.

3 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

3.1 Outline and interpretation of the Convention

The European Convention on Human Rights (ECHR) protects the family, as a unit and its individual members, like no other human rights convention in international law. The most apparent source for the protection is Article 8 of the Convention which already broad scope was and is interpreted dynamically by the European Commission on Human Rights and the European Court of Human Rights.[138] Furthermore, Article 12 of the Convention protects the right to marry and found a family and Article 2 of the First Protocol to the Convention[139] recognizes the parents' important role in the education of their children. In addition, Article 5 of the Seventh Protocol[140] guarantees equality between spouses in relation to their children during marriage and in the event of dissolution.

The cases examined in chapter 4 are concerned with alleged violations of the right to respect for private and family life due to national authorities' decision to take a child into public care or restrict or ban right of access. Thus, the focus is on the right as stipulated in Article 8 of the ECHR which reads as follows

> 1. *Everyone has the right to respect for his private and family life, his home and 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.*

[138] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 187. On 1 November 1998 the permanent European Court of Human Rights was set up in the context of Protocol No. 11 to the European Convention on Human Rights and the Court replaced the previous control system.

[139] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entry into force 18 May 1954) ETS No. 009.

[140] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entry into force 1 November 1988) ETS No. 117.

Both of these paragraphs originate from the UDHR adopted in 1948 although, during the Convention's drafting process, the wording of the provision was modified several times.[141] It has been well established in the Strasbourg Court's case law that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities.[142] States are under an obligation to "act in a manner calculated to allow those concerned to lead a normal family life". Nevertheless, this primarily negative obligation not to interfere arbitrarily in one's private and family life creates also positive obligations which are inherent in an effective "respect" for family life.[143] The protection under Article 8 has been expanding persistently and it has been described as "one of the richest areas of legal development" by the ECtHR.[144]

Article 8 covers four interests which contain various overlapping and inter-related areas. None of these interests is defined in the Convention and the right's content and scope is imprecise in general as well.[145] There is no clear-cut line between private and family life and consequently certain matters may be examined under both concepts.[146] The traditional approach of the Strasbourg organs has been to accept that close relationships which are short of "family life" will generally fall within the scope of "private life".[147] Thus, the Court has found that for instance in cases concerning the establishment or contestation of paternity, the determination of a man's legal relations with his legal or putative child might concern his "family" life but that the question can be left open because the matter undoubtedly concerns

[141] For a detailed overview about the drafting process, see e.g. William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 358–366.

[142] See e.g. *Hadzhieva v. Bulgaria*, Application no. 45285/12 (1 February 2018), para. 58, *Kopf and Liberda v. Austria*, Application no. 1598/06 (17 January 2012), para. 38, *Hokkanen v. Finland*, Application no. 19823/92 (23 September 1994), para. 55 and *X and Y v. The Netherlands*, Application no. 8978/80 (26 March 1985), para. 23.

[143] See e.g. *Popov v. France*, Application nos. 39472/07 and 39474/07 (19 January 2012), para. 133 and *Marckx v. Belgium,* Application no. 6833/74 (13 June 1979), para 31.

[144] William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 366.

[145] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), p. 501.

[146] William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), pp. 366–367.

[147] See e.g. *Lazoriva v. Ukraine*, Application no. 6878/14 (17 April 2018), paras. 61 and 66 and *Paradiso and Campanelli v. Italy*, Application no. 25358/12 (24 January 2017), para. 165.

that man's private life.[148] The same approach has been applied to an adopted child's right to know her personal history.[149]

As Article 8 is wide in scope and imprecise in its content, it allows taking into account legal and social change. The ECtHR, as a result of the Court's "living instrument" doctrine[150], has taken a broad approach what comes to defining the interests in question and as a result the scope of protection under Article 8 has become wide. Applying this approach in cases concerning children, the Court enhances the applicability of the ECHR to children as well. For instance, as it is becoming more widely accepted in the CoE Member States that a child has a right to know his or her birth parents, the right for private and family life could be interpreted as implicitly granting the child such a right.[151]

Most of the parental disputes concerning the care of children are resolved within the private sphere of family but situations where state interference is required do occur. Situations where a judicial or administrative authority has to settle a dispute between the parents always involve an interference with the family life of the other parent. By nature, the placement of a child into public care or restrictions concerning contact are always regarded as interferences within the meaning of Article 8.[152] The Convention allows individuals to submit applications of alleged violations to the ECtHR and primarily the Convention has been used to raise questions of particular violations of human rights in a Member State.[153] In cases arising from individual applications, the Court's task is to examine whether the

[148] See e.g. *Schneider v. Germany,* Application no. 17080/07 (15 September 2011), para. 82, *Shofman v. Russia,* Application no. 74826/01 (24 November 2005), para. 30 and *Rasmussen v. Denmark*, Application no. 8777/79 (28 November 1984), para. 33.

[149] *Odièvre v. France*, Application no. 42326/98 (13 February 2003), para. 28.

[150] See e.g. *Tyrer v. The United Kingdom*, Application no. 5856/72 (25 April 1978), para. 31.

[151] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), p. 501 and Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 13–14.

[152] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), p. 510 and Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 199 and 239. See also e.g. *K. and T. v. Finland* (2001) para. 173. In more ambiguous cases, the burden of proof to establish that the state has interfered with a Convention right is on the applicant.

[153] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), pp. 3–4.

manner in which domestic legislation was applied in particular circumstances was compatible with the Convention rights.[154]

As a general rule, in its application of Article 8 the Court will first decide whether an interference with the applicant's right has occurred and in cases of affirmative answer, continue to consider whether that interference was justified within the meaning of Article 8(2).[155] In order to justify any interference in private and family life, the Government must demonstrate that the measures in question were in accordance with the law, pursued a legitimate aim and were necessary in a democratic society. I will look into each of these conditions in the next chapter but first, I will shortly explain the general principles of interpretation applied by the Court when assessing the domestic decisions and their compatibility with the Convention.

The doctrine of margin of appreciation, developed by the Court in 1976, is widely related with Article 8 due to the right's wide scope and possibility to limitations. The doctrine has been described as "an obligation to respect, within certain bounds, the cultural and ideological variety, and also the legal variety, which are characteristic of Europe".[156] The doctrine allows certain amount of discretion to the Member States which varies based on circumstances and issues in question. Generally, the Court is not eager to deviate from practice common to Member States and in relation to issues where a common ground, at least to some extent, can be found, the margin of appreciation will be narrower than in cases where there is no consensus between the states.[157] Furthermore, the margin of appreciation will be narrower in cases where there is a "particularly important facet of an individual's existence or identity" at stake.[158]

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[154] See e.g. William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 367. For case law, see e.g. *Anayo v. Germany*, Application no. 20578/07 (21 December 2010), para. 69.

[155] See e.g. William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 367.

[156] The quote has been made by the ECtHR's former judge Franz Matscher. For more, see Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 6–7.

[157] Ibid. E.g. in *Marckx v. Belgium* Application no. 6833/74 (13 June 1979), para. 41 the Court relied upon the law of the "great majority" CoE Member States in relation to the status of children born out of wedlock. For more, see D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), pp. 8–10.

[158] See e.g. William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 368.

A second principle of interpretation is the principle of proportionality according to which an interference with the Convention right can be justified if the measure was proportionate to the aim which it sought to achieve.[159] In order for the Court to be convinced that the measure in question was necessary in a democratic society, the domestic authorities must have succeeded to "strike a fair balance between the competing interests of the individual and of society as a whole".[160] Thus, when a child is taken into public care, the Court examines whether the domestic decision-making process and the implementation of the decision have achieved a fair and appropriate balance between the interference in family life and the rights and interests of the child. The principle of proportionality recognizes that the right to respect for family life is not absolute.[161]

Furthermore, the Court has on multiple occasions stated that the Convention cannot be interpreted in a vacuum, but in accordance with Article 31(3)(c) of the VCLT. Hence, any relevant rules of international law applicable to the Contracting Parties must be taken into account.[162] Accordingly, in cases concerning children, the CRC and the rights it confers to the child must be taken into account. The advantage of this approach is that the child-specific provisions of the CRC could be combined with the ECHR's effective petition system and subsequently it would maximize the potential of both of these instruments in promoting and protecting children's rights.[163]

In the next two chapters, I will explain the scope of Article 8 more precisely. I will first explain the concept of "family life" and then turn on to the specific obligations owed to those families by domestic authorities in order to effectively comply with the Article's obligations. What makes an interference justified is also discussed in general in the chapter concerned with the obligations. The final part of this chapter considers specifically the child's rights under Article 8. I have decided to consider them in their own section since the obligations

[159] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 9.
[160] See e.g. *Nazarenko v. Russia*, Application no. 39438/13 (16 July 2015), para. 63, *Shofman v. Russia,* Application no. 74826/01 (24 November 2005), para. 34, *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 194, *Kroon and Others v. The Netherlands,* Application no. 18535/91 (27 October 1994), para. 31, *Hokkanen v. Finland*, Application no. 19823/92 (23 September 1994), para. 58 and *Keegan v. Ireland*, Application no. 16969/90 (26 May 1994), para. 49.
[161] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 9.
[162] See e.g. *Šneersone and Kampanella v. Italy*, Application no. 14737/09 (12 July 2011), para. 85 (i).
[163] Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).

are traditionally considered from the point of a view of parents and, as shortly mentioned in the introduction, the rights of the child are usually protected only indirectly and thus, I want to draw the attention to rights owed to children in theory under the ECHR already before entering chapter 4.

3.2 Parents and other adult members of the family

3.2.1 Overview of the scope of protected individuals

The notion of "family life" has extended from the traditional way it was adopted in 1950 as the Commission and Court have interpreted the concept flexibly, taking into account the diversity of modern family arrangements.[164] It has been well established in the Court's case law that family life under Article 8 is not confined only to marriage-based relationships and it may cover other *de facto* family ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that family unit from the moment, and by the very fact, of the birth.[165] Despite the fact that later, in chapter 4, I will only examine cases where "family life" is found to be existing, I will shortly describe some of the different circumstances and relationships relevant for my purposes where Article 8 is applicable and the interests of the relevant adult member of the family on the one hand and the child on the other might come into clash and the authorities in question are required to balance them.

For instance, in *Marckx v. Belgium*[166] the Court stated that a single mother and her child constituted a family and subsequently the same approach has been applied to a single father and his adopted son.[167] In addition, family life has been adequately found to exist between siblings[168] and between grandparents and grandchildren.[169] The Court determines the existence of family life on a case by case basis and makes the decision based on facts

[164] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), p. 505 and Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 188.

[165] See e.g. *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), para. 79, *Anayo v. Germany*, Application no. 20578/07 (21 December 2010), para. 55 and *Kopf and Liberda v. Austria*, Application no. 1598/06 (17 January 2012), para. 35.

[166] Application no. 6833/74 (13 June 1979), para 31.

[167] *Negrepontis-Giannisis v. Greece*, Application no. 56759/08 (3 May 2011), para. 55.

[168] *Mustafa and Armağan Akin v. Turkey*, Application no. 4694/03 (6 April 2010), para 19, *Moustaquim v. Belgium*, Application no. 12313/86 (18 February 1991), para. 36 and *Olsson v. Sweden (No. 1),* Application no. 10465/83 (24 March 1988).

[169] *Bronda v. Italy*, Application no. 22430/93 (9 June 1998), para. 51.

depending upon the existence of close family ties in practice.[170] The Court takes into account, *inter alia*, whether a couple lives together, the length of their relationship and whether they have demonstrated their commitment to each other by having children or by other means.[171]

A biological kinship does not guarantee the applicability of Article 8 since "family life" requires further legal or factual elements indicating the existence of a close personal relationship. Generally, cohabitation is required for a relationship to be regarded as amounting to family life. However, exceptionally other factors may demonstrate that a relationship has sufficient consistency to create *de facto* family ties.[172] Where family life has not yet fully been established is not attributable to the applicant, the Court has considered that also intended family life could fall under the protection of Article 8. This applies particularly to the potential relationship between a child born out of wedlock and the natural father. The nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child before and after birth are factors to be considered in order to determine whether there exists a close personal tie in practice.[173]

The relationship between foster parents and a child who has been reunited with his or her natural family, was unexamined by the Court for quite a while, although the Court's approach to find family life to exist in cases of legal tie favoured the assumption to find family life to exist between members of a foster family as well.[174] In recent case law, the Court has considered a relationship between foster parents and a child as falling within the notion of family life where the child had lived with the foster parents from the age of one month for a period of 19 months because there had been a close inter-personal bond between the foster parents and the child and the foster parents had behaved in every respect like the child's parents.[175]

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[170] See e.g. *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 150.
[171] See e.g. *Van der Heijden v. the Netherlands*, Application no. 42857/05 (3 April 2012), para. 50.
[172] See e.g. *Kopf and Liberda v. Austria*, Application no. 1598/06 (17 January 2012), para. 35 and *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), para. 80.
[173] See e.g. *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), para. 81 and *Anayo v. Germany*, Application no. 20578/07 (21 December 2010), paras. 56–57. See also D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), p. 506. For more cases, see the CoE, ECtHR: Guide on Article 8 of the Convention – Right to respect for private and family life (last update 31.8.2019), p. 56.
[174] See e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 212.
[175] See *Moretti and Bendetti v. Italy*, Application no. 16318/07 (27 April 2010), paras. 49–50.

Furthermore, in *K. and T. v. Finland* the Court found that both of the applicants, the biological mother of two children and the biological father of one of them, enjoyed "family life" within the meaning of Article 8 with both children even though there was no biological or legal tie between the second applicant and the older child. The Court observed that even though there was no biological link between them, they had all lived together until the child was voluntarily placed in a children's home and later taken into public care. The Court stated that prior to the birth of the applicants' mutual child, the applicants and the older child had formed a family with a clear intention of continuing their life together and the same intention existed regarding the new-born baby.[176]

Once family life has been established, it does not cease to exist upon divorce or when the parties no longer live with each other. Existing family life does not come to an end when a child is taken into public care either.[177] Thus, the legally recognized tie between natural family members is strong, and the Court has expressly stated that only exceptional circumstances, even in case of adoption, might break it.[178] Nevertheless, the existence of family life only determines that Article 8 is applicable in a given case and it is yet to be determined whether the interference in question was justified within the meaning of Article 8(2). In the next chapters I will explain the scope of effective respect owed to families and requirements for justified interference by national authorities in general.

3.2.2 Negative and positive obligations

As mentioned, the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities and States are under the obligation to "act in a manner calculated to allow those concerned to lead a normal family life". In cases concerning alternative care and contact rights with a child, the ECtHR has well established that one of the fundamental elements of "family life" within the meaning of Article 8 is the mutual enjoyment by a parent and a child of each other's company and any domestic measures hindering the mutual enjoyment, such as taking the child into care, amounts to an

[176] Application no. 25702/94 (12 July 2001), para. 150.
[177] See e.g. *Rieme v. Sweden,* Application no. 12366/86 (22 April 1992), para. 54 and *Eriksson v. Sweden*, Application no. 11373/85 (22 June 1989), para. 58.
[178] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 188–189.

interference with the right protected by Article 8 of the ECHR.[179]

The Court has stressed that splitting up a family is a very serious interference and there must be "sufficiently sound and weighty considerations in the interests of the child" supporting the decision to do so.[180] The fact that a child could be placed in a "more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal" and there must exist other circumstances pointing to the "necessity" for such an interference.[181] Nevertheless, the Court has acknowledged that the best interests of the child are a paramount factor and depending upon their nature and seriousness, they may prevail over those of the parents.[182] However, even if the original decision to take a child into public care would be based on reasons justifiable under Article 8(2), difficulties may arise due the fact that the family relationship is not terminated by that decision.[183]

Once a child has been taken into public care, the national authorities might have positive obligations in order to comply with the obligation to effectively respect family life. The identification of conditions where positive obligations exists is not, however, easy. The Court has, *inter alia*, recognized that the varying circumstances in Member States affect what is required to ensure effective respect for family life.[184] Nevertheless, positive obligations may involve the adoption of measures designed to secure respect for family life, including the implementation of specific steps where appropriate. These positive obligations may also involve the adoption of measures in the sphere of the relations of individuals between themselves. In both, negative and positive contexts of obligations, regard must be

[179] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 202, *R.M.S. v. Spain*, Application no. 28775/12 (18 June 2013), para. 68, *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), para. 58, *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 151 and *Johansen v. Norway*, Application no. 17383/90 (7 August 1996), para. 52, *Rieme v. Sweden,* Application no. 12366/86 (22 April 1992), para. 54 and *Eriksson v. Sweden*, Application no. 11373/85 (22 June 1989), para. 58.

[180] See e.g. *R.M.S. v. Spain*, Application no. 28775/12 (18 June 2013), para. 71 and *Olsson v. Sweden (No. 1),* Application no. 10465/83 (24 March 1988), para. 72.

[181] See e.g. *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), para. 69, *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 173 and *Olsson v. Sweden (No. 1),* Application no. 10465/83 (24 March 1988), para. 72.

[182] William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 392–393.

[183] Ibid, p. 392.

[184] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 198.

had to the fair balance which has to be struck between the competing interests and the State's margin of appreciation.[185]

Positive obligations inherent in effective respect for family life include an obligation for the national authorities to take measures with a view to reuniting parent with their children when they have been separated.[186] The national authorities are under an obligation to take "all necessary steps" that can reasonably be demanded in the specific circumstances of each case.[187] Accordingly, the positive obligations are not confined to ensure that children can re-join their parents or have contact with them, but also extend to "all preparatory steps to be taken".[188] In *Glaser v. The United Kingdom* the Court reiterated that Article 8 includes a right for a parent to have measures taken with a view to his or her being reunited with the child and an obligation for the national authorities to take such measures. This obligation applies to cases dealing with the compulsory taking of children into public care and the implementation of care measures and cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family.[189]

Furthermore, national authorities are under an obligation to take measures in order to *facilitate* reunions between a parent and a child and *support* contact between them.[190] However, the Court has stated that the in relation to contact between a non-custodial parent and a child, the obligation to facilitate contact is not absolute and rather one of means than of result. The Court has recognized that the establishment of contact may not be able to take place immediately and it may require preparatory or phased measures.[191] However, the Court has also emphasized that the danger of restricting access and contact is that the family relations will be curtailed altogether and thus these restrictions are placed under a strict

[185] See e.g. *R.M.S. v. Spain*, Application no. 28775/12 (18 June 2013), para. 69, *Kopf and Liberda v. Austria*, Application no. 1598/06 (17 January 2012), para. 38, *Shofman v. Russia,* Application no. 74826/01 (24 November 2005), para. 33 and *Glaser v. The United Kingdom,* Application no. 32346/96 (19 September 2000), para. 63.

[186] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 205, *Nazarenko v. Russia*, Application no. 39438/13 (16 July 2015), para. 62, *R.M.S. v. Spain*, Application no. 28775/12 (18 June 2013), para 71, *Olsson v. Sweden (No. 2)*, Application no. 13441/87 (27 November 1992), para. 90 and *Eriksson v. Sweden*, Application no. 11373/85 (22 June 1989), para. 71.

[187] See e.g. *Ribić v. Croatia*, Application no. 27148/12 (2 April 2015), para. 93 and *Hokkanen v. Finland*, Application no. 19823/92 (23 September 1994), para. 58.

[188] See e.g. *R.M.S. v. Spain*, Application no. 28775/12 (18 June 2013), para. 71.

[189] *Glaser v. The United Kingdom,* Application no. 32346/96 (19 September 2000), para. 65. See also *Shvets v. Ukraine,* Application no. 22208/17 (23 July 2019), para. 35.

[190] See e.g. *Stand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 208.

[191] *Ribić v. Croatia*, Application no. 27148/12 (2 April 2015), para. 94 and *Glaser v. The United Kingdom,* Application no. 32346/96 (19 September 2000), para. 66.

scrutiny by the Court.[192] Positive obligations include also a duty to exercise exceptional diligence in children related proceedings since delays in the proceedings can ultimately determine the case.[193]

Article 8 imposes also procedural requirements for the protection of individuals at the domestic level. The inherent procedural requirements were formulated by the Court in 1987 to form an implicit part of Article 8. In particular, the involvement of parents in the decision-making process concerning their children has been found to form a part of the obligations under Article 8. This requirement seeks to guarantee that the parents are provided to a sufficient degree with requisite protection of their interests. The Court has not yet extended the requirement to involve children in the proceedings.[194] However, the Court could interpret Article 8 more child-friendly by taking into account in its judgements whether the child's interests are promoted by a distinct representation.[195]

3.2.3 Requirements for justified interference

According to Article 8(2) of the ECHR, interference in family life is justified if it is demonstrated to be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society. All of these conditions must be met. It seems that generally the measures amounting to interference, such as taking the child into care or restricting right of access, have basis in national legislation and that the aim of the interference has been to protect "the health and morals" or "the rights and freedoms of others", namely those of the child. Thus, what more often requires further assessment and consideration is whether the interference was "necessary in a democratic society".

Although, for instance in *Eriksson v. Sweden*, the applicant alleged that the Swedish law's quality did not satisfy the requirements of the phrase "in accordance with the law" within the meaning of Article 8. In that case, the Court reiterated the requirements for the phrase: the law must be sufficiently precise, there must be a measure of protection against arbitrary interferences by the public authorities and if the law confers discretion, its scope and manner of exercise must be indicated with sufficient clarity to afford such protection. The Court also

[192] See e.g. *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), para. 94.
[193] For more discussion concerning the obligation to exercise exceptional diligence, see chapter 4.8.
[194] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 10 and 206–208 where there is also more about the procedural requirements implicit in Article 8 in family proceedings compared to Article 6 of the ECHR.
[195] Ibid, pp. 212–213.

pointed out the legislator's incapability to take into account in advance all circumstances in which for instance the removal of a child will come into question and thus the general terms and a wide measure of discretion was justified, taken together with the preparatory work of the legislation giving adequate guidance to the interpretation and the competence of the administrative courts to review at several levels the decisions made pursuant to the legislation in question.[196]

In relation to the legitimate aims pursued with the interference in relation to children, the Court has recognized that the best interests of the child might determine whether the interference has been consistent with Article 8(2) of the ECHR. However, traditionally the Court's considerations of the concept have reflected the traditional form which is more associated with welfarism rather than the CRC's formulation which also requires to take into account the child's evolving capacities and the child's right to be heard, as was explained in chapter 2. The Court has been criticized from the lack of clearly highlighting which factors are to be taken into account when applying the concept or how decisive each factor is.[197]

In order to determine whether the interference was "necessary in a democratic society", the Court will assess whether the interference corresponds to a pressing social need and, in particular, whether the measure was proportionate to the legitimate aim pursued. These considerations include examination on whether, in the light of the case as a whole, the reasons adduced to justify the interference were relevant and sufficient and whether the decision-making process was fair and afforded due respect to the applicant's rights under Article 8.[198] The notion of proportionality implies that where the interference is more far

[196] *Eriksson v. Sweden*, Application no. 11373/85 (22 June 1989), paras. 59–63. For another example, see e.g. *Mifsud v. Malta*, Application no. 62257/15 (29 January 2019).

[197] See e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 201–202. The emphasis on the approach concerned with the welfarism of the child is illustrated the report of the Commission in *Wim Hendriks against the Netherlands*, Application no. 8427/78 (8 March 1982), para. 121, where it is stated that "[- -] this purpose is achieved by keeping the child away from a situation which could be detrimental to his mental development owing to the existence of loyalty conflict vis-á-vis one or both of the parents and the inevitable parental pressure put on him causing feelings of insecurity and distress". See also Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995), pp. 45–46. For more about the detrimental effects of torn loyalties, see e.g. Sietske Dijkstra, 'Listening to Children and Parents: Seven Dimensions to Untangle High-Conflict Divorce', in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017).

[198] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 203, *Y.C. v. The United Kingdom*, Application no. 4547/10 (13 March 2012), para. 133, *Kopf and Liberda v. Austria*, Application no. 1598/06 (17 January 2012), para. 39, *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), para. 93, *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), paras. 60 and 65, *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 154 and *Eriksson v. Sweden*, Application no. 11373/85 (22 June 1989), paras. 68–72.

reaching and severe, the stronger the reasons must be in order to justify it. Thus, reasons for prohibiting contact with a child altogether must be stronger than reasons for restricting contact.[199] While considering the necessity of the measure in question, the Court has stated that consideration of what lies in the best interests of the child concerned is of paramount and crucial importance and depending on their nature and seriousness, the child's best interests may override those of the parents.[200]

3.3 Children's rights under Article 8

According to Article 1 of the ECHR, states are to secure rights and freedoms conferred in the Convention to *everyone* within their jurisdiction.[201] Thus, Article 8 equally protects the right to respect for private and family life of children and it has a significant potential to advance the rights of children. In *Maslov v. Austria*, the Court reaffirmed the child's right to respect for family life.[202] The Court's approach to develop the procedural requirements inherent in Article 8 and its focus on the positive obligations have especially been regarded as strengthening the Convention's potential to protect children and it has been already envisaged that the procedural requirements of Article 8 could lead to a finding by the Court that consultation with the child in question is essential part for effective protection of their rights.[203]

Under Article 8 of the ECHR, the child's right to respect for family life includes, *inter alia*, the right to be cared by his or her parents, the right to maintain contact with both

[199] See e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 203.

[200] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 206, *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), para. 93, *Anayo v. Germany*, Application no. 20578/07 (21 December 2010), para. 65, *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 154 and *Glaser v. The United Kingdom,* Application no. 32346/96 (19 September 2000), para. 64.

[201] For more about the principle of equal entitlement, see e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 3–4.

[202] Application no. 1638/03 (23 June 2008), paras. 61–62.

[203] Article 8 could be interpreted as requiring a higher degree of "effective" protection in relation to children and other vulnerable individuals. See e.g. Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014) and Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 10. For case law, see e.g. *X and Y v. The Netherlands*, Application no. 8978/80 (26 March 1985), paras. 23–34 and the CoE, ECtHR: Guide on Article 8 of the Convention – Right to respect for private and family life (last update 31.8.2019), p. 9.

parents[204], the right not to be separated from parents except where it is in the child's best interests and the right to family reunification. Even though the best interests principle is not expressly stipulated in the ECHR, the principle is well incorporated in the ECtHR's case law.[205] Furthermore, it has been envisaged that the dynamic interpretation of Article 8 will expand the scope of protection to the need for independent representation for children in terms of providing the child means to express his or her opinions and views as well as to safeguard the child's individual interests.[206]

Indirectly, by rejecting parents' claims concerning alleged violations of their right, Article 8 protects the child also by finding a removal of the child to be justified where it is found to be necessary in order to protect the child's rights and interests. The ECtHR has generally found this to be the case in situations where domestic decisions have been based on suspected or confirmed abuse or neglect. Obviously, the Court has found the removal of a child as justified in cases where the relevant parent has been convicted of abuse by the domestic courts or where evidence of ill-treatment is provided. Positive obligations to effectively protect a child's right to respect for family life may also include preventive measures taken by public authorities in order to protect the child from abuse.[207]

In cases where there is no physical danger or abuse inflicted on the child in question, but rather other type of neglect have proven to be more difficult in relation to justifying the placement of a child in alternative care. The European Commission on Human Rights has

[204] The child's right to maintain contact with both parents is also recognized in the European Convention on Contact concerning Children adopted by the Council of Europe on 15 May 2003. According to Article 4, a child and his or her parents shall have the right to obtain and maintain regular contact with each other and such contact may be restricted or excluded only where necessary in the best interests of the child. Where it is not in the best interests of a child to maintain unsupervised contact with one of his or her parents the possibility of supervised personal contact or other forms of contact with this parent shall be considered. The Convention recognizes the right of the child to have contact also with another adult member of the child's "family unit" and according to which Article 5(1), subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child.

[205] See e.g. European Union Agency for Fundamental Rights, the Council of Europe and Registry of the European Court of Human Rights, Handbook on European law relating to the rights of the child (Luxembourg 2015), pp. 75–91 and Council of Europe, Parliamentary Assembly Resolution 2232 (2018) adopted by the Assembly on 28 June 2018, para. 1.

[206] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 212–213.

[207] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 170–172 and 174–178. Cases concerning physical punishment of children are closely connected to assessment under Article 3 of the ECHR which provides that "no one shall be subjected to torture or inhuman or degrading treatment or punishment". However, e.g. in *M. and M. v. Croatia*, Application no. 10161/13 (3 September 2015), the majority of the ECtHR found that there was no obligation to prevent ill-treatment by removing the child from her father's custody even if the Court found that there was a procedural obligation to prosecute the father. For more, see the joint partly dissenting opinion of judges Berro and Møse.

considered that severe conditions of neglect, an inability to take care of child's medical and welfare needs and in certain situations unsanitary and impoverished living conditions may justify an interference with the family. However, in these situations positive obligations inherent in Article 8 oblige a State to take pro-active measures to give guidance and support to the family in question before the removal of the child.[208] In *R.M.S. v. Spain* the Court noted that unsatisfactory living conditions or material deprivation never amount to relevant and sufficient reasons on their own but other factors such as psychological state of parents or inability to provide their child with emotional and educational support have been affecting the decision as well.[209]

The Court has acknowledged that depending upon the nature and seriousness of the best interests of the child, his or her interests may prevail over the interests of parents. The Court has stated that primarily, the child's best interests are considered to be firstly, to have the child's ties with his or her family maintained, unless it is proved that such ties are undesirable and secondly, to be allowed to develop in a sound environment.[210] The Court has stated that it is in the child's best interests to maintain ties with his or her family unless the family has proved particularly unfit and it is in the child's best interests to ensure his or her development in a safe and secure environment.[211] Furthermore, the Court has stated that such matters as the child's age and level of maturity, the wishes of the child, the presence or absence of parents and the environment and experiences are factors involved in the assessment of what the child's best interests are.[212]

The Court has deviated from its general approach to make a difference between actions which are attributable to a State and which are not in cases concerning children. The reason for this deviation has been suggested to be the "overwhelming importance" incorporated into the principle of the best interests of the child.[213] This interpretation would comply with the

[208] Ibid, pp. 173–174.
[209] Application no. 28775/12 (18 June 2013), para. 84.
[210] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 207, *Šneersone and Kampanella v. Italy*, Application no. 14737/09 (12 July 2011), para. 85 (v) and *Y.C. v. The United Kingdom*, Application no. 4547/10 (13 March 2012), para. 134.
[211] *Y.C. v. The United Kingdom*, Application no. 4547/10 (13 March 2012), para. 134.
[212] Ibid, para. 135 and *Šneersone and Kampanella v. Italy*, Application no. 14737/09 (12 July 2011), para. 85 (v). Albeit, these principles were at first identified in a case concerning international child abduction, they were later acknowledged in the case of *Y.C. v. the United Kingdom* concerned with the taking a child into care.
[213] William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 393. Questions concerning attribution are important as they determine when a State Party to a treaty is responsible for the conduct and action of its organs. For more general overview, see e.g. Lucius Caflisch, 'Attribution, Responsibility and Jurisdiction in International Human Rights Law' (2017) 10 ACDI 161.

CRC's requirement that in all actions the best interests of the child are to be of primary consideration and the States are obliged to guarantee this, *inter alia*, by legislation in accordance with Article 4 of the CRC.

In relation to the right to respect for private life the ECtHR has stated that Article 8 intends to ensure the development of the personality of each individual in his relations with other human beings. Inherent to private life is the notion of personal autonomy which provides for example the right to establish details of one's identity as a human being.[214] This observation acknowledges that individuals have "a vital interest in establishing the biological truth about an important aspect of their private and family life and having it recognized by law"[215] which in turn involves, *inter alia*, the determination of paternity.[216] Article 8 grants the right for a child to know his or her origins as the failure to receive the information may imply mental and psychological suffering.[217]

The Court has stated on several occasions that in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations[218] and that the best interests of the child are of paramount importance.[219] Nevertheless, what level of importance should be attached to the principle in domestic decisions in order to protect the child's right but also ensure compatibility with Article 8 is somewhat unsure. The next chapter addresses this dilemma and looks into the application of the best interests of the child in the ECtHR case law in cases concerning the alternative care of the child and restrictions on the right of access.

[214] William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 375.
[215] See e.g. *Krušković v. Croatia*, Application no. 46185/08 (21 June 2011), para 34.
[216] See ibid, para 18 and *Rasmussen v. Denmark*, Application no. 8777/79 (28 November 1984), para 33.
[217] See e.g. William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 368. For case law, see *Godelli v. Italy*, Application no. 33783/09 (25 September 2012), para 56. These observations could be regarded important in determining whether the child should be allowed to have contact with his or her biological father if the best interests of the child as a whole would support to allow it. For case law, see chapter 4.5.
[218] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 204, *Jovanovic v. Sweden*, Application no. 10592/12 (22 October 2015), para. 77 and *Gnahoré v. France*, Application no. 40031/98 (19 September 2000), para. 59.
[219] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 204.

4 CASE LAW – THE BEST INTERESTS OF THE CHILD AND THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

4.1 Procedure of the ECtHR

In cases arising from individual applications, the Court has to confine itself, as far as possible, to an examination of the concrete case before it in order to determine whether the manner in which the legal provisions were applied to or affected the individuals concerned gave rise to a violation of the ECHR.[220] While making this assessment, the Court takes into account the margin of appreciation accorded to national authorities in the specific circumstances.[221] The margin of appreciation will vary in the light of the nature of the issues and the seriousness of the interests at stake. Two competing interests could be for instance the importance of protecting a child in a situation threatening his or her health or development and on the other hand the aim to reunite the family as soon as circumstances permit.[222]

While making the assessment concerning the compatibility of an intervention with Article 8(2) of the ECHR, the Court will have regard to the fact that perceptions as to the appropriateness of intervention in the care of children vary from one Contracting State to another. These perceptions depend on, *inter alia*, traditions relating to the role of the family, traditions relating to State intervention in family affairs and the availability of resources for public measures in the care of children. Albeit, "consideration of what is in the best interests of the child is in every case of crucial importance".[223]

It should be recalled that the ECtHR is not bound by its previous interpretations of the Convention.[224] The Court stated in *Cossey v. The United Kingdom* that it is free to depart from an earlier judgement if there are "cogent reasons" for doing so. According to the Court, reasons for a departure could be warranted to ensure that the ECHR reflects societal changes and remains in line with present-day conditions. However, the Court "usually follows and

[220] See e.g. *Eriksson v. Sweden*, Application no. 11373/85 (22 June 1989), para. 54.
[221] See e.g. *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 154 and *Glaser v. The United Kingdom,* Application no. 32346/96 (19 September 2000), para. 64.
[222] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 211, *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), para. 67 and *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 155.
[223] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 210 and *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), para. 66.
[224] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), p. 23.

applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law".[225]

The Court has rarely interfered with domestic decisions where a child has been removed from the family based on suspected or confirmed abuse or neglect if the reasons given by the domestic authorities for the removal have been "relevant and sufficient".[226] The Court has on several occasions noted that the national authorities have the benefit of direct contact with all the persons concerned partly for which reason it is not for the Court to substitute itself for the domestic authorities in the exercise of their responsibilities and the domestic courts are to decide whether the measures in question have been in the child's best interests.[227] Thus, the Court has traditionally accepted the national authorities' assessments concerning the necessity of a care order in situations concerning the taking of children into public care[228] and the Court has determined in relation to the procedural requirements "whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person".[229]

However, the restraint from the assessment of the necessity of measures might be changing. In *K. and T. v. Finland* judge Palm and judge Gaukur Jörundsson pointed out in their partly dissenting opinion that the judgement was the first of a kind where the Court rejected the national authorities' understanding and assessment whether it was necessary or not to take the child into public care by finding a violation of Article 8 in relation to a decision to take a new-born baby into emergency care.[230] Furthermore, in *Strand Lobben and Others v. Norway,* the Court pointed out that it can attach weight to the factor whether national authorities attempted to assist and support the family with other less intrusive measures

[225] *Cossey v. The United Kingdom,* Application no. 10843/84 (27 September 1990), para 35.
[226] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 170.
[227] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 210, *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), paras. 94 and 99, *Anayo v. Germany*, Application no. 20578/07 (21 December 2010), para. 66 and *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 154.
[228] See e.g. the partly dissenting opinion of judge Palm, joined by judge Gaukur Jörundsson in *K. and T. v. Finland,* Application no. 25702/94 (12 July 2001).
[229] See e.g. *Petrov and X v. Russia*, Application no. 23608/16 (23 October 2018), para. 98 and *mutatis mutandis* cases of *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07 (6 July 2010), para. 139 and *Karrer v. Romania*, Application no. 16965/10 (21 February 2012), para. 40.
[230] *Op. cit.* footnote 229.

before the care order, and this demonstrates that the wide margin of appreciation traditionally enjoyed by national authorities in assessing the necessity to take a child into care is not to unfettered.[231]

While making the assessment of the necessity of the impugned measures, the Court considers whether the reasons for the measures were relevant and sufficient within the meaning of Article 8(2) of the ECHR. This assessment leads to a situation where the reasoning of the national authorities is found to be relevant and sufficient, relevant but not sufficient or neither relevant nor sufficient on some grounds identified by the Court. Where the reasons given by the national authorities have heavily relied upon what has been considered to be in the child's best interests, the Court inevitably considers and rules something about these reasons. If no violation of Article 8 is found, the Court can either state that the reasons were relevant and sufficient without explaining why in detail or identify why the reasons for the measure considered to be in the child's best interests were relevant and sufficient. Thus, the Court has a considerable role and impact in interpreting the concept.

4.2 General principles in cases concerning public care and contact rights

The Strasbourg Court has recognized that national authorities enjoy a wide margin of appreciation in assessing the necessity to take a child into care but, a stricter scrutiny is applied in relation to any further limitations, such as restrictions placed on parental rights of access and any legal safeguards securing the right of parents and children to respect for their family life.[232] Stricter scrutiny is called for because any further limitations "entail the danger that the family relations between a young child and a parent will be effectively curtailed".[233] Thus, even if it was deemed to be necessary for the child to stay in alternative care for a long period of time, the object to eventually lift the care order must guide all the arrangements made during that period.[234]

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[231] Application no. 37283/13 (10 September 2019), para. 211. For more discussion, see chapter 4.3.1.

[232] See e.g. *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 155 and *Elsholz v. Germany*, Application no. 25735/94 (13 July 2000), para. 64. See also D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), pp. 548–549.

[233] See e.g. *Kopf and Liberda v. Austria*, Application no. 1598/06 (17 January 2012), para. 41, *Schneider v. Germany*, Application no. 17080/07 (15 September 2011), para. 94 and *Anayo v. Germany*, Application no. 20578/07 (21 December 2010), para. 66, *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), para. 67 and *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 155.

[234] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 271.

Care orders in situations where the child has been sexually abused, physically injured either directly or indirectly by a failure to protect the child from physical injuries, where the child is living in circumstances of neglect – such as deplorable conditions, without light or heat – or where the child suffers neglect or ill-treatment as a result of a parent's alcohol or drug addiction, have been regularly found to be compatible with Article 8.[235] Nevertheless, it is for the State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child as well as of the possible alternatives to taking the child into public care, was carried out prior to the implementation of such a measure.[236]

The Court has well established that a guiding principle in relation to care orders is that they ought to be regarded as temporary measures, to be discontinued as soon as circumstances permit and the implementation of the measures should be consistent with the ultimate aim of reuniting the natural parents and the child.[237] National authorities "must do their utmost to facilitate reunion of the family" but any obligation to apply coercion in this area must be limited since the best interests of the child must be taken into account.[238] According to the ECtHR, the minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family's situation.[239] The duty to take measures to facilitate the reunification will have progressively more weight from the commencement of the period of care, however, always being subjected to considerations of what is in the best interests of the child.[240]

As was mentioned in chapter 3.3, the Court has identified some factors to be in the best interests of the child. Firstly, the child's best interests are that his or her ties with the natural family are maintained unless this is not desirable. The Court has clarified the content of "desirable" by stating that "unless the family is unfit". Second of all, it is in the child's best

[235] Ibid, pp. 263–265.
[236] *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 166 in relation to emergency care orders. The CRC entered into force in Finland on 20 June 1991 and the emergency care orders were made in 1993.
[237] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 208, *Jovanovic v. Sweden*, Application no. 10592/12 (22 October 2015), para. 77, *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 178, *Johansen v. Norway*, Application no. 17383/90 (7 August 1996), para. 78 and *Olsson v. Sweden (No. 1)*, Application no. 10465/83 (24 March 1988), para. 81.
[238] See e.g. *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), paras. 178 and 194.
[239] See e.g. *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 179. For the implementation of the care orders, see chapter 4.4.3.
[240] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 208, *R.M.S. v. Spain*, Application no. 28775/12 (18 June 2013), para. 71, *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), para. 76 and *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 178.

interests to be allowed to develop in a sound environment. The Court has clarified this factor as well by qualifying the term sound environment as "safe and secure".[241] Furthermore, the Court has acknowledged that the child's age and maturity, the wishes of the child, the presence or absence of parents and the environment and experiences are all factors to be considered when the best interests of the child are determined.[242]

In relation to right of access between the natural family members, the Court has generally accepted as justified to restrict or prohibit access when the need for providing stability in the child's upbringing so requires, when the parent is on observation and the child must not be influenced by that, when the child needs to be kept away from a situation which could be detrimental for the child's mental development due to a loyalty conflict *vis-á-vis* one or both parents or the foster parents and where a conflict in relation to the care of the child exists.[243]

According to the Court, the question whether the deprivation of access is justified must be assessed in the light of the circumstances obtaining at the time when the decisions were taken and not with the benefit of hindsight.[244] The ECtHR has also stated that when assessing whether specific restrictions such as prohibiting contact by mail or telephone are justified the broader context of the restrictions and access as a whole should be taken into account.[245] However, a parent cannot be entitled to have any measures taken that would harm the child's health and development.[246] Nevertheless, particularly harsh restrictions on the right to maintain contact between the natural family members can be imposed only in exceptional circumstances when the overriding importance of the best interests of the child so requires.[247]

The next chapters will look in detail to the judgements of the ECtHR and describe how the Court actually balances the interests of the parties concerned and especially the best interests of the child first in relation to care orders and secondly in relation to the implementation of

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[241] *Op. cit.* footnotes 211–212.
[242] *Op. cit.* footnote 213.
[243] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 278–279.
[244] See e.g. *B.B. and F.B. v. Germany*, Application no. 18734/09 (14 March 2013), para. 48 and *Johansen v. Norway*, Application no. 17383/90 (7 August 1996), para. 79. See also [244] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 276–277. This "requirement" helps to guarantee that the process in the Strasbourg Court is fair.
[245] *Margareta and Roger Andersson v. Sweden*, Application no. 12963/87 (25 February 1992), para. 95.
[246] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 207, *Jovanovic v. Sweden*, Application no. 10592/12 (22 October 2015), para. 83, *Elsholz v. Germany*, Application no. 25735/94 (13 July 2000), para. 50, *ulo-Zenide v. Romania*, Application no. 31679/96 (25 January 2000), para. 94 and *Johansen v. Norway*, Application no. 17383/90 (7 August 1996), para. 78.
[247] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 276.

the care orders. In relation to care orders, the Court takes into account many factors in determining whether the reasons for the decision have been "relevant and sufficient" within the meaning of Article 8(2) of the ECHR. Based on the survey of case law in relation to more ambiguous cases than the ones mentioned above, I have decided to look into more detail in the following recurring factors – whether preventive and less intrusive measures were adopted before the care order was issued and whether the amount and quality of expert and professional reports provided adequate grounds to assess what was in the best interests of the children.

Chapter 4.4 addresses the questions concerning contact between a biological father and his child in a situation where the child has another man recognized as his or her legal father and chapter 4.5 discusses contact issues between the child and other members of the child's recognized "family". In the final chapters I will consider matters relating to the child's participation and the severe consequences of prolonged proceedings.

The examined cases have been chosen based on the date of judgement and the year of the domestic proceedings in question in order to make sure that the CRC has entered into force in the Member State in question at the time of relevant decisions made by national authorities. However, as the proceedings in the ECtHR take years and proceedings as a whole in domestic instances might take years as well there are some exceptions to this general rule and some of the cases might concern national decisions made prior to the entry into force of the CRC in that particular State Party. These exceptions are highlighted in the text alongside reasons for explaining them regardless.[248]

4.3 Alternative care of the child – separating the natural family members

4.3.1 Consideration of preventive and/or less intrusive measures

Already in 1988, prior to the entry into force of the CRC, the Court took into account in its assessment of care order's compatibility with Article 8 whether any alternative measures

[248] The fact that a State Party to the CRC might have signed the CRC at the time of the relevant domestic decision but the Convention has not yet entered into force through ratification, acceptance, accession or succession diminishes this difficulty a bit, since according to Article 18 of the VCLT, a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed a treaty. Furthermore, as the principle of the best interests of the child was recognized also in the 1959 Declaration, domestic decisions made prior to the entry into force of the CRC might have reasoning as to the best interests of the child. Nevertheless, I will not make any claims and arguments as to the content of the concept based on assessments and considerations prior the entry into force of the CRC and thus, as a general rule, ECtHR judgements concerned with domestic decisions made at the time when Article 3(1) of the CRC has not yet been applicable have been ruled out.

had been taken with a view to assisting the family before the children were taken into alternative care. The Court found that providing social care and special education to mentally retarded children, home-therapy and a psychiatric team to the whole family and in addition holding five case conferences with the natural parents and social authorities before taking the children into public were enough to satisfy this requirement.[249] However, the Court concluded that the Swedish authorities were reasonably entitled to think that it was necessary to take the children into care, "*especially* since the preventive measures had proved unsuccessful" and hence whether there was a "requirement" to consider them in those circumstances is not self-evident.

In *K. and T. v. Finland* two children were taken into emergency care mainly due to their mother's mental illnesses.[250] Afterwards also normal care orders were issued and the parents' rights of access were heavily restricted.[251] Here, the ECtHR found a violation of Article 8 in relation to the decision to take a new-born baby into emergency care but not in relation to the emergency care order of the 5 year-old child or in relation to the normal care orders. The Court stated that keeping in mind that the authorities' primary task was to safeguard the interests of the children, there was no reason to doubt that the placement in public care was called for rather than continuation of the open-care measures or even introduction of new open-care measures. The less intrusive measures already taken in relation to the older child was the initial placement of the child in a children's home for a period of three months with the idea of that placement being regarded as a short-term support measure and which the applicants did not contest.[252]

In relation to the new-born baby, the father had stayed with her in the children's ward at the hospital and subsequently moved to a family centre with her and later agreed to leave the baby there with the intention that by progressive contacts between them she would eventually move in with him. The social welfare authorities paid his travel expenses to the centre and after his paternity was established, he was granted joint custody with the child's mother.[253]

[249] See *Olsson v. Sweden (No. 1)*, Application no. 10465/83 (24 March 1988), paras. 9–11 and 72–74.
[250] Application no. 25702/94 (12 July 2001).
[251] For discussion and observations relating to the right of access, see chapter 4.4.
[252] See paras. 18–19.
[253] See paras. 35–40.

In *Kutzner v. Germany* the ECtHR considered the circumstances surrounding the care orders and their implementation as a whole and found a violation of Article 8 relating to the care orders themselves and, "above all", to the manner in which they were implemented. Here, two children, 4 and 6 years old, placed in alternative care never had the opportunity to reunite with their natural family as their placement was from time to time continued and the national authorities imposed strict restrictions on contact between the natural family members.[254] In relation to the less intrusive measures, the Court noted that although the educational-support measures taken initially subsequently proved to be inadequate, it was questionable whether the domestic administrative and judicial authorities gave sufficient consideration to additional measures of support as an alternative to what is by far the most extreme measure, namely separating the children from their parents. The Court also pointed out that two of the psychologists retained as expert witnesses and the family doctors had recommended that the children should be given additional educational support.[255]

Prior to the care orders, the children received educational assistance and attended a day-nursery school for children with special needs due to their late physical and mental development. The children had undergone a series of medical examinations and a social worker visited the family at home officially for ten hours a week, although this was contested by the natural parents.[256] In its decision to remove the children from their natural parents, the domestic court stated that the parents lacked the necessary awareness to answer their children's needs and that they opposed to receiving any support from social services. According to the domestic court, the children's development was so retarded that any less radical measures would be inadequate and only a foster home could help.[257] It is important to observe that as the ECtHR pointed out, "unlike the position in other cases of the same type that have come before the Court, there have been no allegations that the children have been neglected or ill-treated by the applicants".[258]

Thus, the positive obligations requiring providing assistance to the parents in order for them to provide an adequate environment for their children can be considered to be wider in scope than in cases where a child is subject to other type of neglect. Although the ECtHR did not

[254] Application no. 46544/99 (26 February 2002), paras. 70 and 81–82. The implementation of the care orders is considered in chapter 4.4.1.
[255] Paras. 73 and 75.
[256] Paras. 12–13.
[257] Paras. 20 and 53.
[258] Para. 74.

explicitly say so but nevertheless, by referring to the duty to consider the best interests of the child[259], the case demonstrates that it cannot be argued to be in the child's best interests to immediately separate the child from his or her family merely due to the parents' intellectual shortcomings or emotional deficiencies.[260] Since the family is regarded in the CRC as the natural environment for the child's development as well and states are under an obligation to provide to a sufficient degree assistance to the families in order for them to comply with the CRC, the interpretation of the ECtHR in relation to the positive obligations under Article 8 can be seen as consistent with the CRC.

In *R.M.S. v. Spain* the Court explicitly stated that the national authorities should have considered other less drastic measures than taking the child into care. The Court pointed out that role of the social welfare authorities is "precisely to help persons in difficulty" and in this case the authorities had not taken any other measures before they decided to take the child into care.[261] Here the applicant had sought assistance from authorities due to difficult financial circumstances which in turn led the authorities to find that the applicant's daughter had been "legally abandoned" and she was placed in a children's home and later without the applicant's knowledge transferred to another children's home.[262] The Court observed that the child had not been subjected to violence, physical or psychological ill-treatment or to sexual abuse nor had the national courts noted anything about lack of emotional development, worrying health problems on the part of the child or psychological instability on the part of the parents.[263] Since the Court explicitly made reference to these factors and cited case law relating to these issues, the Court presumably finds arguments stating that it was in the best interests of the child to be taken into public care in circumstances where at least one of these factors is present.

Recently, in the case of *Strand Lobben and Others v. Norway*, the Court cited both of the last-mentioned cases as examples where the Court has attached weight to whether the authorities first attempted to take less drastic measures, such as supportive or preventive ones, and whether these had proved unsuccessful and explicitly stated that the margin of

[259] Para. 76.
[260] See e.g. para. 54.
[261] Application no. 28775/12 (18 June 2013), para. 86.
[262] Para. 73.
[263] Para. 84.

appreciation of Member States in relation to the necessity to take children into public care is not unfettered.[264]

Based on these decisions, the Court's approach can be interpreted to evolve to a direction where the positive obligations of Article 8 are widened in scope and consequently, the national authorities' margin of appreciation in assessing the necessity to take a child into care is becoming smaller. Hence, Article 8 can be interpreted as requiring that at least some less intrusive measures are considered and attempted and only after the attempt has proved to be unsuccessful the reasons for public care might exist, however, with the exception that if the best interests of the child require an immediate decision, the national authorities must be allowed to make it. Consequently, in these situations it would be enough to provide relevant and sufficient reasons why the best interests of the child require that no less intrusive measures were considered first.

It is clear from the CRC Committee's General Comments and general discussions as well that the State Parties are obliged to provide assistance for parents and families in parents "performance of their child-rearing responsibilities" as stated in Article 18(2) of the CRC. During general discussions the importance in helping parents to cope with economic and psychological stress and other risk factors have been emphasized and the need for "parent education and support rather than punishment" has been highlighted.[265] The Committee has reaffirmed the State Parties duty to assist parents in providing such living conditions which are necessary to the child's development and to ensure that they receive protection and care.[266] Unfortunately, Governments have been criticized to "forget this part" by prioritizing children without considering the role of parents.[267] Within the CoE Member States, the above-described interpretation of Article 8 could thus promote and protect the rights of the child more effectively.

4.3.2 Expert reports and opinions

Where there is no imminent danger on the child's physical well-being it seems that the Court considers more critically the quality, date, impartiality and amount of expert opinions and

[264] *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 211.
[265] Committee on the Rights of the Child, Report on the twenty-eight session (28 November 2001) UN Doc CRC/C/111, para. 694.
[266] General Comment No. 7 (2005) UN Doc CRC/C/GC/7/Rev.1, paras. 20–21.
[267] Pia M. van den Boom, 'Adnvacing Children's Rights through Parent Support Services' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017).

recommendations in order to assess whether the domestic court's decision was based on relevant and sufficient reasons. Expert reports and opinions for my purposes include reports by social workers, child psychiatrists, psychologists and doctors as well as other professionals from similar fields.

In *K. and T. v. Finland*[268], where two children were first taken into emergency care and subsequently into normal public care mostly due to their mother's schizophrenia and psychoses, the ECtHR found that the normal care orders were not in violation of Article 8. The ECtHR explicitly stated that "in a situation in which, as detailed in the medical and social reports, the mother of the children was seriously mentally ill, there were social problems in the family and the prospects for the healthy development of the children in foster care appeared far more positive than the expected development in the care of their biological parents, the authorities could reasonably base the contested decisions on the assessment that was made of what was in the best interests of the children".[269]

In this case the Government demonstrated the mother's mental illness and incapability to take care of the children and the necessity to take and keep the children in public care by multiple social welfare authorities' reports, psychologist report on the older child, report by two doctors concerning the mother, statement by the children's home, medical files and records of the mother and a psychiatrist report concerning the mother.[270] All these reports were consistent in finding that at the relevant time the mother was incapable of taking care of the children but her mental state would not necessarily permanently prevent her from caring for them. The mother's mental health was examined from time to time when she was hospitalized, and the reports also seem to provide an impartial overall view with notes such as "the mother's behaviour was later found to be somewhat restless but not completely disorderly".[271] In addition to being up to date, the reports also describe the situation as a whole in detail.

Noteworthy, however, is that reasons for finding the other applicant, the father of the new-born baby, incapable of taking care of his child are not as detailed and as well understandable as in relation to the mother. The father's paternity had been established on 13 July 1993, less than a month later than the child was placed in emergency care and two days prior the normal

[268] Application no. 25702/94 (12 July 2001).
[269] Para. 173.
[270] See paras. 14, 16–17, 19–21, 34, 36–38, 49, 64 and 70.
[271] Para. 23.

care order. On 4 August 1993 the father was granted a joint custody of the baby with the mother. The social workers had stated that the father had taken good care of the baby at the hospital and later at the family centre were the baby was placed after the emergency care order. In addition, the family centre's records provided that the father had succeeded in creating a relationship with the baby and learned to take good care of her. Nevertheless, when the domestic court decided to confirm the public care order of the new-born child in September 1993, it referred to conflicts between the applicants, the mother's illness as a reason why neither of the applicants could take care of the child and unsuccessful results of care support as reasoning in its judgement. The father did not, however, appeal against this decision, only the mother did.[272]

In 1995, pursuant to the applicants' request for discontinue the public care of both children, the Social Board rejected the request and stated in relation to the father that according to a statement given by the children's clinic, although he was capable of interaction with both children, he was considered to find it difficult to respond to the children's emotional needs. In addition, the Board stated that both of the applicants' abilities to act as educators taking care of the children's needs were inadequate.[273] However, altogether the assessment in relation to the father's capabilities is not nearly as comprehensive as the mother's. Nevertheless, the ECtHR accepted as "reasonable, in the light of the evidence before the national authorities, their assessment that the father was not capable of coping with the mother's mental illness, the expected baby of their own and the mother's second child on his own".[274]

However, in relation to the matter discussed in the previous chapter, namely authorities' obligation to consider supportive and preventive measures before splitting up family ties, it is a bit questionable why the father was considered as incapable of taking care of his first biological child with help from the authorities by the domestic court before any such measures actually had even been implemented. Especially, since prior to the care order made by the domestic court, the Social Welfare Board had already started to investigate whether the father could be entrusted with the responsibility for the child with the help of support measures taken by the Board based on the good relationship that had already developed

[272] See paras. 38–46.
[273] See paras. 62–67.
[274] See para. 167.

between them.[275] The ECtHR did not however consider this issue separately but went on to say that the authorities could consider placement in public care was called for rather than continuation of the open-care measures or even introduction of new open-care measures.

The relationship between the applicants' which never ceased to continue and the national authorities' perception of this relationship as a threat to the well-being and development of the child can be read between the lines from the facts of the case. At one point the father had told that he left the applicants' mutual home after the social welfare authorities had told him that he had to "break off his relationship" with the mother "if he wanted to keep" the child.[276] Nevertheless, the ECtHR did not take a stand in relation to these issues while considering whether the national authorities had overstepped their margin of appreciation when deciding to take the children into public care. However, as part of the Court's consideration relating to the alleged failure to take proper steps to reunite the family, the Court found that the national authorities had hindered the possibilities of reunification and on that regard the Court stated that it was striking how "exceptionally firm negative attitude" the authorities had.[277] This case demonstrates well how the Court considers the circumstances of the case as a whole and why it is difficult to say precisely how much weight the ECtHR has attached to each of the factors it mentions.

In *R.M.S. v. Spain*, where the Court unanimously found a violation of Article 8, a social worker A.L.N. had given a report proposing that the visits of the mother should be suspended, and the child should be moved to a different children's home. The report stated that the mother had an inappropriate, disrespectful, "violent" and aggressive attitude, she had attempted to harm herself and she had to be taken to hospital when her daughter was taken from her. Furthermore, according to the report, during three supervised visits the mother had encouraged her daughter to continue crying and shouting, she had accused the professionals of not providing her daughter with appropriate assistance and she had spoken with her daughter in a compulsive and incoherent manner. [278]

Subsequently, the same social worker had sent an e-mail almost two years later to the Red Cross, asking them to trace the applicant and check the situation with her fourth child who had been recently born. The social worker stated in the e-mail that the applicant's two older

[275] See para. 41.
[276] See para. 32.
[277] This is discussed in chapter 4.4.
[278] Application no. 28775/12 (18 June 2013), paras. 16, 26, 75 and 89.

children where in foster care and the child concerned with the proceedings in the ECtHR had "been adopted" by a family who were also prepared to adopt the applicant's baby.

The ECtHR observed that the initial decision to place the approximately 4-year-old child in the children's home was made based on the report by the social worker A.L.N. The subsequent decisions to withdraw the applicants contact rights and transfer the child to another home were made based on the same report. The Court observed that it is understandable that the social worker may have decided to take the child into care based on the urgency of the situation and the best interests of the child. However, the Court noted that following that decision, there should had been swiftly taken measures to examine in depth the child's situation and her relationship with her parents. Furthermore, the Court was of the view that the authorities simply reproduced the successive decisions without making any new findings or assessing how the circumstances might have changed on the basis of tangible evidence. The Court pointed out that the judge had simply referred to "technical reports", without giving any details as to their content, and found that it had not been proven that the mother was "once again competent to raise the child" although there were nothing to suggest that the applicant had ill-treated her daughter. Hence, it can be read indirectly from the judgement, that the expert reports relied upon by the domestic courts were not considered appropriate, relevant and up to date by the ECtHR.

In *Kutzner v. Germany*, where the Court unanimously found a violation of Article 8, the Court took into account that the domestic courts had failed to consider the expert reports as a whole. There had been no allegations that the children would have been neglected or ill-treated by their parents. The Court pointed out that the reports given by two psychologists and which the domestic authorities relied upon were contradictory. One of the psychologists had referred to the parents' lack of intellectual capacity and the other had stated that the emotional underdevelopment of the parents made them incapable of contributing to the development of the children's personalities. In addition, the Court observed that the domestic courts had disregarded the opinions given by two other psychologists according to whom the children's welfare was not in jeopardy and the parents were entirely fit to bring up their children, both emotionally and intellectually. They had also recommended as a less intrusive measure that the children should be given additional educational support.[279]

[279] Application no. 46544/99 (26 February 2002), paras. 72–73.

As was discussed in chapter 2, the CRC Committee has emphasized that when a decision concerning an individual child is made, the decision must be clear on how the best interests of the child were obtained. It would seem understandable that when a professional has been examined the situation and recommended some solution as in the best interests of the child, it would be more persuasive and convincing to consider that opinion to be in accordance with the child's best interests.

However, in *Strand Lobben and Others v. Norway* and *Sommerfeld v. Germany* the Court observed that it would be going too far to say that domestic courts always required to involve a psychological expert on the issue of awarding contact, but that this depends on the circumstances of the case, having due regard to the age and maturity of the child concerned.[280] Nevertheless, in *Strand Lobben and Others v. Norway*, the ECtHR found that while generally it would be for the national authorities to decide whether expert reports were needed, in the instant case, the lack of fresh expert examination substantially limited the factual assessment of the mother's new situation and her caring skills. Accordingly, this was partly the reason why the ECtHR found that the decision-making process was not conducted in a way to ensure that all views and interests were duly taken into account.[281]

4.3.3 Procedural requirements

The relevance of procedural requirements is well established especially in childcare proceedings and they become relevant in the assessment of the proportionality of the imposed measure and the application of the margin of appreciation. As a general rule, the decision-making process must be demonstrated to have included safeguards which are necessary to ensure the applicants' participation and the adequate consideration of all relevant issues.[282] According to the ECtHR, the Court must determine whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, the parents have been involved in the process "to a degree sufficient" to provide

[280] *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019, para. 213 and *Sommerfeld v. Germany*, Application no. Application no. 31871/96 (8 July 2003), para. 71.

[281] See paras. 222–225. However, the Court was not unanimous at this point and some of the judges questioned whether any expert opinions could have overruled the child's best interests in staying with the foster parents. For more, see e.g. the concurring opinion of judge Ranzioni, joined by judges Yudkivska, Kūris, Harutyunyan, Paczolay and Chanturia.

[282] D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), p. 514 and and Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014), p. 195.

them with the requisite protection of their interests.[283] However, it seems that the Court has not yet developed procedural rights specifically for children[284], although it has on some occasions pointed out the lack of the child's involvement in the proceedings as will be discussed in chapter 4.7.

In relation to the procedural requirements inherent in Article 8, I will only shortly point as an example the case of *K. and T. v. Finland*, where the Court considered that the national authorities did not violate Article 8 by not involving the parents in the decision-making process concerning emergency care orders. There the ECtHR has accepted that, when an emergency care order has to be made, it may not always be possible to associate in the decision-making process those who have custody of the child. Even if technically it would be possible, the Court recognized that it might not be desirable, if those having custody of the child are seen as the source of an immediate threat to the child. In this type of scenario, the prior warning could deprive the measure of its effectiveness. However, where no prior contact or consultation exists, the national authorities must demonstrate that they were entitled to consider that there existed circumstances justifying the abrupt removal.[285]

The majority of the Court found that if the mother had been forewarned of the measure, it could most likely have had dangerous consequences for herself and for the children and that it was not a realistic option for the authorities to associate the second applicant either in the process due to the applicants' close relationship and the likelihood of their sharing information.[286] However, judge Mr G. Ress, joined by five other judges, disagreed that the emergency care order of the 12-year-old child was made in accordance with Article 8. In his view, there was nothing to imply that a normal decision-making process, which would had included the applicants, could not be have been possible in relation to him. He pointed out that the child was earlier placed voluntarily in the children's home by the applicants and no drastic change had occurred which could have justified the emergency care order. According to him, a procedure by which the normal care order was prepared would have been reasonable and fully satisfactory one.

[283] See e.g. *W. v. The United Kingdom*, Application no. 9749/82 (8 July 1987), para. 64.
[284] Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).
[285] *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 166.
[286] Para. 167.

The next chapter's focus is on the Court's assessment in relation to the implementation of the care orders. These assessments include considerations relating to the amount and quality of contact between the natural family members once the children have been placed in public care.

4.4 Implementation of care orders

4.4.1 Right of access and contact between natural family members

Although the case of *Olsson v. Sweden (No. 1)* was decided in 1988 and thus prior to the entry into force of the CRC, it demonstrates well the difficulties arising out of the implementation of care orders. In that case the Court accepted that the national authorities had acted in good faith in relation to the implementation of the decisions but by placing the three children with foster families in a great distance from their parents and from each other, the longest distance being 900 kilometres between the siblings, lead to a situation of impeding regular access and the implementation of the orders violated Article 8.[287]

The case of *Johansen v. Norway*[288] involved a child who had been taken into public care at the age of two weeks and her mother as the applicant. The applicant had already had her first child when she was 17 years old and due to cohabiting with a man who had mistreated her and the child, she was assisted by social welfare authorities in the upbringing of that child. In 1989, approximately two weeks before the child concerned was born, the mother's first child was taken into public care at the age of 12 years old based on danger on his health and development.[289] Subsequently, her daughter was also taken into public care a week after she was born and the applicant was allowed to see her twice a week at a Child Welfare Centre.[290] At the time of the initial order for public care, the social welfare authorities had recommended the relevant authority to refuse the applicant from having contact with her daughter and that the child's new address should be kept as a secret. Ultimately, a care order was given according to which the child was taken into care, the mother was deprived of her parental responsibilities, the child was placed in a foster home with a view to adoption and

[287] *Olsson v. Sweden (No. 1)*, Application no. 10465/83 (24 March 1988), paras. 17–20 and 81.
[288] Application no. 17383/90 (7 August 1996). The ultimate decision to continue the child's placement and uphold the access restrictions was made on 16 April 1991 and the Supreme Court refused leave to appeal in May 1991. The CRC entered into force in Norway on 8 January 1991.
[289] See paras. 9–10.
[290] See para. 12.

the applicant was refused access from the moment of the child's placement in the foster home and the latter's address was kept secret.[291]

Two contradicting expert opinions were obtained before making the order. The psychologist, whose report was obtained by the relevant authority, concluded that the applicant was not capable of taking care of the child. The mother had requested a second expert which the child welfare authorities had refused to obtain. Hence, the mother herself engaged a psychologist who concluded that neither of the applicant's children should be taken away, but the authorities should rather provide assistance and support.[292] Nevertheless, the national authority concluded that it was in the interests of the child to be placed in a foster home with a view to adoption. The appellate instance subsequently decided not to give the mother's appeal suspensive effect on the ground that it would be in the girl's best interests if the decision to terminate access was implemented as from the moment when she was placed in foster home. As of the time when the ECtHR gave its judgement, the applicant's daughter was still living with her foster family, but she had not yet been adopted.[293]

The Government argued that the deprivation of access was in the child's best interests because it was necessary to place the child in the foster home permanently. The Government stated that there was strong scientific evidence indicating that a placement was more likely to succeed if the child was adopted by the foster parents. According to the Government, reuniting the applicant with her daughter would had required extensive preparation presupposing good operation between all the parties involved and as the mother had shown extremely hostile attitude towards the child welfare authorities, there was a danger that she might disturb the daughter's development in the foster home and try to abduct her if given access.[294]

The ECtHR observed that the deprivation of the mother's access to her child had a permanent character and it could only be considered "necessary" if supported by particularly strong reasons. The Court pointed out that the Government's argument according to which the mother might disturb the calm and stable foster-home environment could not be decisive as the access arrangements could have been implemented outside the foster home. In addition, as the mother's situation had improved from the situation she had with her first child and the

[291] See para. 17.
[292] See paras. 14–15.
[293] See paras. 16–22.
[294] See para. 77.

deprivation of access had irreversible effects, the measures could not be said to be justified albeit, the ECtHR stated that it had attached particular importance to the best interests of the child. Nevertheless, these particularly far-reaching measures should only be applied in exceptional circumstances if motivated by an overriding requirement to the child's best interests.[295]

The Court did consider relevant that "it was in the child's interest to ensure that the process of establishing bonds with her foster parents was not disrupted". The Court took into account that the girl who had already spent half a year with temporary carers before being placed in a long-term foster home, was at a stage of her development when it was crucial that she live under secure and emotionally stable conditions. In its consideration whether the reasons adduced by the Government were relevant, the Court also took into account that the mother was not "particularly motivated to accept treatment" and the authorities even feared that she might take her daughter away as on one occasion she had tried to disappear with her first child. According to the ECtHR, all these reasons were relevant but not sufficient.[296]

The Court also took into account that the mother was granted access to the child twice a week when her daughter was living in the Child Welfare Centre and there was nothing to suggest that this had been detrimental to the child. Furthermore, the concerns of the Government were not of such a nature and degree that the national authorities could have been dispensed altogether from the obligation to take measures with a view to reuniting the natural family members. Furthermore, the Government had not shown that the measures corresponded to any overriding requirement in the child's best interests.[297]

This case illustrates well that the right to maintain contact between natural family members is strong and there must be particularly weighty reasons in relation to the best interests of the child to ban right of access altogether. It is noteworthy that the Court observed that there could have been other options available to provide access between the mother and the child than the foster home. Thus, the positive obligations under Article 8 in relation to contact rights might as well require providing meetings with the parties organized and secured by the national authorities and if measures of lesser degree still seem to be against the best interests of the child, the banning of access could be justified.

[295] See paras. 74–79.
[296] See paras. 80–84.
[297] See paras. 81–84.

In *K. and T. v. Finland* two children were placed in a same foster home when the younger child was approximately seven months and the older five years old. The Social Welfare Board drew up a plan concerning the implementation of the public care according to which the father of the younger child was permitted to see his child once a month. The applicants requested an alternative plan, but neither they nor their representative attended the meeting organized by the authorities. Later on, the Social Director restricted both applicants' access to the children to one monthly supervised visit at the foster home and subsequently on the premises of a school at the presence of one of the foster parents to last three hours for each visit. The County Administrative Court upheld the restriction after it took evidence, *inter alia,* from two psychiatrists who had interviewed the mother and from a child psychiatrist. According to the domestic court, allowing access once a month would ensure that the children retained knowledge about their biological parents and if later grounds for public care ceased to exist, a reunification of the family would be possible.[298]

The applicants argued that the meetings with the children under strict supervision were so unnatural that they were never given a real opportunity to form normal family ties or have a normal family life. The Government had admitted during the Chamber proceedings that no measures aimed at reunification had been carried out but argued in the Grand Chamber that steps in order to terminate public care were taken.[299] The ECtHR found that in relation to the obligation to take steps to reunite the natural family the national authorities violated Article 8 but that as regards to the situation at the time of the judgement the access restrictions were not in violation of Article 8.[300]

In relation to the failure to take steps in order to reunite the family, the ECtHR stated that the attempts to guarantee that the applicants were able to bond with the children did not amount to a serious or sustained effort directed towards facilitating family reunification such as could reasonably be expected for the purposes of Article 8(2). This was especially due to the fact that these attempts constituted the sole effort on the authorities' part to that effect during the seven years the children were in public care.[301] With these attempts the Court

[298] Application no. 25702/94 (12 July 2001), paras. 52–60.
[299] See paras. 175–176. Admissibility decisions are taken by Chambers of seven judges and decisions on merits are taken by Chambers or the Grand Chamber of 17 judges. The initiation of proceedings before the Grand Chamber takes the form of referral or relinquishment. For an overview about the Court's structure, see e.g. D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edition, OUP 2018), pp. 107–142.
[300] This was due to the length of the proceedings and the fact that the children had lived in the foster home for such a long period of time. For more about this issue, see chapter 4.8.
[301] See para. 179.

presumably referred to the obtained psychiatrists' reports in 1995 which stated that neither of the applicants was able to understand and answer the needs of the children and especially the mother who suffered from mental illnesses was incapable of seeing the children as objects independent from her. The reports did not recommend anything about contact between the natural family members.[302]

The ECtHR stated that the national authorities should had at least examined the situation anew from time to time to see whether there was any improvement in the family's situation. The Court observed that the restrictions and prohibitions imposed on the applicants' access to their children had rather contributed to hindering the possible reunification than preparing it. The Court further stated that what was striking in the case was the exceptionally negative attitude of the authorities.[303] Here again the positive obligations to support the natural family with meetings in order to form and maintain close personal ties were regarded as to require more than what the national authorities had conducted. Although in this case the reports obtained by the national authorities stated that the open care measures and other support measures would not be enough in order for the applicants "to be responsible" for the children, it appears that the national authorities should had provided the family with more assistance in relation to bond with each other. Even though, the Government did admit that *nothing* was done in order to reunite the family it is noteworthy to point out that a mental illness of a parent *as such* might not be adequate to justify a lesser degree of measures taken in relation to the general positive obligations owed to the natural family by national authorities.

In *Kutzner v. Germany*, the Court noted that the children, four and six years old, had been placed in separate, unidentified foster homes and all contact with their parents was severed for the first six months. Furthermore, the evidence showed that the natural parents were granted visiting rights only after making an application to the national court and visits were in practice systematically obstructed. The contacts were initially restricted to one hour a month in the presence of eight people who were not members of the family and afterwards increased to two hours a month with the grandparents being authorized to visit once every two months. The Court stated that taking into account that the children were very young, severing contact in that way and imposing such restrictions could only lead to the children's

[302] See para. 67.
[303] See para. 179.

increased alienation from their parents and from each other. In this case the Court found that especially the way in which the care orders were implemented was unsatisfactory and violated Article 8.[304]

4.4.2 Facilitating co-operation between parties concerned

In some cases, the respondent Government seeks to justify the lack of measures taken in the view of reunification, restrictions on contacts or extraordinary implementation measures by hostile attitudes of the adult parties concerned or some other reasons the Government seeks to attribute to the parties concerned.

The case of *Hokkanen v. Finland* provides a comprehensive example in special circumstances of the Court's assessment concerning the difficulties in cooperation between the parties concerned.[305] In this case, the applicant's daughter was placed to live with her maternal grandparents by a private agreement after the child's mother had passed away. When the child was two years old the grandparents informed the applicant that they did not intend to return the child back to him. National authorities attempted to achieve reconciliation between the applicant and grandparents but to no avail. In September 1991 the grandparents were granted custody of the child on the grounds that it was in the child's interests as she had already been living with them for six years. Prior to this decision the national authorities had ordered the grandparents to return the child to her father, most recently on 8 May 1991, but the grandparents had not obeyed they orders.[306]

The right of access was stipulated by the same decision in September 1991. The applicant and his daughter were to meet for four hours one Saturday each month during the first three months at a place chosen by the national authorities and every other weekend between Saturday noon and Sunday noon. The child was also to spend two weeks of the following summer with the applicant and subsequently the holidays were supposed to be alternated between the applicant and the grandparents. However, the grandparents refused to bring the child to these meetings. The applicant sought to have his right of access enforced by the national authorities but to no avail and on 21 October 1993 the national appellate court

[304] Application no. 46544/99 (26 February 2002), paras. 70 and 77–79.
[305] *Hokkanen v. Finland*, Application no. 19823/92 (23 September 1994). The CRC entered into force in Finland on 20 June 1991. Although the original decisions were made prior this date, the latest decisions at the domestic level were taken after that date and the domestic courts refer to the best interests of the child in their reasoning. As the ECHR entered into force in Finland on 10 May 1990, the ECtHR took events prior to that date into account only as background information. See para. 53.
[306] Paras. 8–31.

upheld the grandparents appeal and decided that in view of the child's maturity, access could not be enforced against her wishes. The decision was based on a medical report according to which the child was physically and mentally healthy and a psychological test had shown that she was clearly of above average intelligence for a twelve-year-old. The report concluded that the child should not be forced to meet the applicant but rather to be allowed to decide for herself.[307]

The ECtHR found a violation of Article 8 in relation to the period of time from the moment on when the ECHR entered into force in Finland until 21 October 1993 when the child was considered to be mature enough to decide about the access on herself. After that date, the Court found no violation.[308] The Court observed that the difficulties in arranging access were in large due to the hostility between the grandparents and the applicant but that the Court "does not accept that responsibility for the failure of the relevant decisions or measures in actually bringing contacts can be attributed to the applicant". The Court pointed out that the national authorities had observed the need for arranging meetings on a neutral ground. Accordingly, the Court concluded that the national authorities did not make reasonable efforts to facilitate reunion.[309]

In relation to contact between a non-custodial parent and a child after divorce, the Court has recognized that the establishment of contact may require preparatory and phased measures where cooperation and understanding between all parties concerned is important.[310] However, the Court stated in *Ribić v. Croatia* that lack of cooperation between separated parents does not exempt national authorities from their positive obligations under Article 8 but rather imposes an obligation to take measures to reconcile the conflicting interests of the parties, keeping in mind the best interests of the child as primary consideration.[311] Here the contacts between the applicant and his son were due to the mother's lack of cooperation.[312]

For example, in *Glaser v. The UK* the Court emphasized that even though national authorities must do "their utmost" to assist such cooperation, any coercion in this area is limited since the best interests of the child and his or her rights under Article 8 of the ECHR must be taken

[307] Paras. 27 and 33–38.
[308] For the reasoning, see chapter 4.7.
[309] Paras. 60–61.
[310] *Ribić v. Croatia*, Application no. 27148/12 (2 April 2015), para. 94 and *Glaser v. The United Kingdom,* Application no. 32346/96 (19 September 2000), para. 66.
[311] Application no. 27148/12 (2 April 2015), paras. 94–95.
[312] See e.g. para. 65.

into account.[313] However, in the more recent judgement of *Ribić v. Croatia*, the Court pointed out that even though coercive measures against children are not desirable, the use of sanctions is not to be ruled out if the parent with whom the children live behaves in an unlawful manner.[314]

Thus, although Article 8 does not explicitly oblige national authorities to facilitate cooperation with the parties concerned[315] it seems clear that the authorities are not exempted from their responsibilities in relation to facilitating the natural family's reunification by having difficulties in arranging contact and taking steps with the view to reunification due to hostile attitudes of the parties concerned. Whether this is to be interpreted as widening the scope of the positive obligations inherent in Article 8 to the extent that national authorities should take steps in order to improve the relationship between the parties concerned is not self-evident but nevertheless the authorities cannot justify failure to facilitate reunification based on the aforementioned reasons. However, since it has been regarded to never be in the child's best interests if he or she is faced with torn loyalties[316], all steps taken in relation to facilitating contact between the parties arguably are in the child's best interests and would promote the rights of the child as well more efficiently.

4.4.3 Changed circumstances

The Court's observations concerning whether national authorities have given due weight in relation to improved circumstances has been addressed to some extent in the previous chapters. The Commission noted already in 1984 that after a care order has been made, an updated assessment of the applicant's abilities must be made at some stage, particularly when the order has not resulted from physical maltreatment but rather of psychological behaviour.[317]

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[313] Application no. 32346/96 (19 September 2000), para. 66.
[314] Application no. 27148/12 (2 April 2015), para. 95.
[315] The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (concluded 19 October 1996, entry into force 1 January 2002) explicitly obliges Contracting States to take appropriate steps to facilitate, by meditation, conciliation or similar means, agreed solutions for the protection of the person of the child in situations to which the Convention applies (Article 31(b) of the Convention) such as rights of access (Article 3(b) of the Convention).
[316] For more, see e.g. Sietske Dijkstra, 'Listening to Children and Parents: Seven Dimensions to Untangle High-Conflict Divorce', in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill 2017).
[317] *L. v. Sweden*, Application no. 10141/82 (3 October 1984), p. 152.

In *Johansen v. Norway*, where the applicant's daughter was taken into public care at the age of two weeks, the ECtHR stated somewhat "additionally" after already finding a violation of Article 8, that it should be noted that the national court had found already after less than a year had passed since the care order and decision concerning contact were made that the applicant's "material conditions had improved to the point where she would have been able to provide her daughter with a satisfactory upbringing" but due to lack of contact between the applicant and her daughter, the Court could not terminate the care.[318]

In *K. and T. v. Finland*, the Court emphasized, in relation to the national authorities' failure to take proper steps to reunite the family, that the minimum to be expected of the authorities is to examine from time to time whether there are any improvements in the family's situation.[319] Also in *R.M.S. v. Spain*, the Court was of the view that the domestic authorities had not taken into account any subsequent events or changes in the mother's circumstances when considering subsequent decisions relating to the alternative care of the child and they had made their decisions based on the initial report made by a social worker. The Court was unanimously of the opinion that the national authorities had not complied with their obligations under Article 8.[320]

Based on the discussion above, Article 8 can be interpreted as requiring that national authorities review the care orders and contact restrictions from time to time and at least when one of the parties concerned initiate proceedings to that end. When reviewing the decisions, it understandable requires genuine assessment based on updated and relevant information and a similar balancing procedure which is required in the first place. The next chapters will discuss right of access concerning other relevant adults of the child's family.

4.5 Contact rights between a natural father and a child living with other legal parents

In cases of *Schneider v. Germany*[321] and *Anayo v. Germany*[322], the Court has considered the right to respect for private and family life of a biological father whose child is living with the child's mother and legal father. In *Schneider* the paternity of the child was not yet established by a DNA test but in *Anayo* it was known for a fact that the applicant was the

[318] Application no. 17383/90 (7 August 1996), para. 84.
[319] Application no. 25702/94 (12 July 2001), para. 179.
[320] Application no. 28775/12 (18 June 2013), para. 85.
[321] Application no. 17080/07 (15 September 2011).
[322] Application no. 20578/07 (21 December 2010).

biological father of the twins. In both cases the applicants requested to have contact with their children who they never had cohabited with, but the legal parents refused it. Under domestic law, neither of the applicants had a right to have contact with their children in such a situation. What is significant about the reasoning of the ECtHR in relation to both of these cases is that it is heavily based on the domestic authorities' failure to consider what would had been in the best interests of the children in question. The Court stated in both cases that consideration of what lies in the best interests of the child concerned is of paramount importance in every case of this kind and depending on their nature and seriousness, the child's best interests may override those of the parents.[323]

The unanimous finding of a violation of Article 8 in *Schneider v. Germany* was highly reasoned with the failure to give any consideration to the question, whether in the particular circumstances of the case, contact between the child and the applicant and information provided for the applicant concerning the development of the child would be in the child's best interest. The Court stated not to be convinced that the best interests of the child can be determined by a general legal assumption and the actual fair balancing of the rights of all persons involved requires performing an examination of the particular circumstances of the case.[324] The domestic courts failed to provide sufficient reasons to justify the interference in the applicant's right under Article 8.

In *Anayo* the Court similarly pointed out that the approach and interpretation of legal provisions by the domestic court led to a situation where the applicant was denied any contact with his children, irrespective whether such contact was beneficial for the children's well-being. The Court further expressed the concern that "the legal parents' motives for refusing contact did not necessarily have to be based on considerations relating to the children's best interests". The Court again unanimously found a violation of Article 8 based on the failure to adequately balance the interests of everyone concerned. This can be seen as a step forward to the right to have contact between both parents since traditionally the position of the unmarried father has been unfavourable in relation to his children based on allegedly protecting the child by refusing contact.[325]

[323] *Schneider v. Germany*, para. 93 and *Anayo v. Germany*, para.65.
[324] *Schneider v. Germany*, para. 100.
[325] See e.g. Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), pp. 189–190.

However, as was pointed out in chapter 3, the biological link between the father and the child does not in itself lead to a situation where domestic authorities have positive obligations in relation to protect the father's right to respect for private and family life. The Court took into account in both of the aforementioned cases the interest in and commitment by the father to the children concerned and whether it was demonstrated that the father had genuine interest in his offspring, which the father had succeeded to do in both of the cases. However, if the child's right to contact with both parents is to be regarded as a general rule unless it is contrary to the child's best interests and in a specific case the biological father is demonstrating his interest in the child at the latest by asking to have contact with him or her it could be argued that the child's right to have contact with his or her biological parent should override the legal parents' negative attitudes towards the biological father and the national authorities should at least examine whether granting contact would be in the child's best interests.[326]

Subsequently in similar circumstances the ECtHR found in *Fröhlich v. Germany* that the domestic had made the decision "in the child's best interests" and it was satisfied that reasons for refusing to grant contact rights and provide the applicant with information about his child were relevant and sufficient.[327] Here the domestic court had made a thorough analysis of the child's integration in the family where she felt protected and secure. In addition, the domestic court demonstrated to be aware of the importance the question of paternity might have for the child in the future, when she would start to ask about her origin, but that in eny event at the time being, it was not in the best interest of the six-year-old child to be confronted with the paternity issue.[328]

4.6 Contact rights with another adult family member and the child

In *Nazarenko v. Russia*[329] the applicant alleged, *inter alia*, that the termination of his parental status had deprived him of the right to have contact with his daughter or to lodge civil actions in defence of her rights. At the age of 4 years old, the child was ordered to live with her mother after her parents got divorced. Two years later, a DNA paternity test established that the applicant was not the child's biological father and subsequently the domestic court

[326] Here again it would become important that the child participated in the assessment of what would be in his or her best interests either through a representative or by him or herself. For more about participation and the child's best interests, see chapter 2.
[327] Application no. 16112/15 (26 July 2018), para. 66.
[328] See paras. 63–64.
[329] Application no. 39438/13 (16 July 2015).

decided to, *inter alia,* terminate his parental status. The ECtHR found unanimously a violation of Article 8 based on the domestic authorities' failure to provide a possibility for the family ties between the applicant and the child to be maintained. Particularly, the Court found a failure to respect the applicant's family life based on the denial of contact rights without giving proper consideration to the child's best interests.

Here again, the Court reiterated that it was not convinced that the best interests of children in the sphere of contact rights can be truly determined by a general legal presumption. The Court stated that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of each case and accordingly, Article 8 of the ECHR can be interpreted as "imposing on Member States an obligation to examine on a case-by-case basis whether it is in the child's best interests to maintain contact with a person, whether biologically related or not, who has taken care of him or her for a sufficiently long period of time".[330] In this case, four years of cohabiting with the child amounted to a sufficiently long period of time.

In the circumstances of the case in question, the Government had failed to comply with the aforementioned obligation by denying the applicant the right to maintain contact with the child without any examination of the question whether such contact would be in the child's best interests. Furthermore, the Court pointed out that there was nothing suggesting that contact between the applicant and the child would had been detrimental to the child, rather the opposite. The facts of the case included reports by the childcare authority and expert psychologists stating that there existed a strong mutual attachment between them and the applicant had been taking good care of her.[331] Whether the Court would had found a violation of Article 8 if the Government had demonstrated that it was not in the child's best interests to maintain contact with the applicant even though not explicitly considering them in the decision-making process is of relevance. Since the Court takes this literally into account by stating "furthermore" it can be argued that the lack of the explicit consideration of the child's best interests amounted to a violation in itself. This interpretation would be in line with the obligations imposed by the CRC in relation to the national authorities' duties to transparently find out what the best interests of the child are considered to be and on what grounds.

[330] Para. 66.
[331] Para. 67.

In *Kopf and Liberda v. Austria*[332], a two-year-old child was placed in a foster family for approximately three years and ten months. In December 2001 the child was returned to his biological mother and the foster parents, the applicants in the ECtHR, requested contact rights without any delay. After approximately three years since the foster parents had requested contact rights, the domestic court refused the applicants from having contact with the child as it would not be in the child's best interests and would put him in a situation of divided loyalties. The decision was based on, *inter alia*, two expert opinions stating that not granting visiting rights would not endanger the child's well-being.[333]

The ECtHR found that the domestic authorities succeeded to strike a fair balance between the competing interests in question. The Court pointed out that it was apparent from the domestic court's decision that they examined whether contact between the foster parents and the child would be in the child's best interests. Evidence presented to the domestic court had demonstrated that the child opposed meeting the foster parents and he had developed a close and positive relationship with his mother. The national court had acknowledged that the foster parents had a genuine concern for the child's well-being, but their interests did not coincide with the child's best interests. Since the child had not been in contact with the foster parents for three years, the court stated that it would follow the expert opinions recommending that the contact rights should not be granted. The domestic court observed that immediately after the child was taken away from the foster family granting visiting rights could have been useful. However, at the time of the judgement, that was no longer the case and would had not served the best interests of the child.

However, although the Strasbourg Court found that the balancing exercise was performed adequately, the Court found a violation of Article 8 due to non-compliance with the duty to deal the request for visiting rights diligently and thus, the procedural requirements implicit in Article 8 were not complied with. This will be discussed more in chapter 4.8.

4.7 Participation, views and opinions of the child

The participation rights of the child stipulated in the CRC have been considered to be a whole "new" category of children's rights introduced by the CRC.[334] It was established in

[332] Application no. 1598/06 (17 January 2012).
[333] Paras. 21–22 and 42. According to domestic legislation, a court had to take necessary measures if failure to provide for personal contact between the child and a third person would endanger his or her well-being. Third persons had no legal right to be granted contact rights.
[334] See e.g. John Wall, 'Human Rights in Light of Childhood' (2008) 16 Int'l J Child Rts 523.

chapter 2.2.4 that the concept of the best interests of the child require that Article 12 of the CRC, which enshrines the child's right to be hear, is implemented and applied adequately. The Convention on Contact concerning Children also recognizes the child's participation rights and according to Article 6, a child who is considered by internal law as having sufficient understanding shall have the right, unless this would be manifestly contrary to his or her best interests, to receive all relevant information, to be consulted and to express his or her views. Due weight shall be given to those views and to the ascertainable wishes and feelings of the child.

As was briefly mentioned in the introduction, the ECtHR usually examines the application from the parents' perspective, and it is rare that a child would be a party to the proceedings as an applicant. Thus, the ECtHR was for a while never been in a situation where it needed to assess whether the child must be heard in the proceedings at national level in order to satisfy the procedural requirements inherent in Article 8 of the ECHR.[335] In 2015 however, the Court found a violation of the child's right under Article 8 due to national authorities' failure to have her views heard. This case is discussed later in this chapter, but I will first discuss the previous case law of the Court in relation to this matter.

In *Hokkanen v. Finland* the Court observed that the national authorities had not attached weight on the child's own wishes not to see her father until in 1993. The reasons for not attaching weight to the views of the child were stated to be the low age of the child at that time (eight years old) and the fact that she had not been in a position to form her views independently. The domestic court observed that the grandparents had totally refused to co-operate in the attempts to arrange meetings between the applicant and his daughter and the grandparents had a strong influence over the child.[336] On the other hand, the domestic court had considered in October 1993 that the child was mature enough in order for her views to be taken into account and that access could not be enforced against her wishes. The ECtHR stated not to find any reason to call this finding into question.[337]

In judicial literature, the judgment in *Sahin v. Germany* has been regarded as complying with the requirements set out in Article 12 of the CRC and that the assessment of the child's best

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[335] Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).
[336] Application no. 19823/92 (23 September 1994), paras. 29 and 35.
[337] Para. 61.

interests was made properly.[338] There the Strasbourg Court observed that the child who was three years old at the time when the proceedings concerning the father's right of access begun had been spoken to by a psychological expert whose opinion about the child's best interests was ultimately regarded decisive by the domestic court in denying access.[339] The ECtHR found no violation of Article 8 and stated that it would be going too far to say that domestic courts are always required to hear a child in court "on the issue of access to a parent not having custody" but that it depends on the specific circumstances of the case and the age and maturity of the child must be taken into account.[340] This case demonstrates well that the parents', who had serious tensions between them[341], had very different ideas about the child's best interests and sought to achieve an outcome most suitable for themselves.

In *Sommerfeld v. Germany* the ECtHR again found no violation in relation to a father's right to respect for family life in a situation where the domestic court had refused the applicant's right of access to his child based on the 13-year-old child's clear wish not see his father. The child had made her opinion clear for several years and directly to the court.[342] The domestic court had stated that forcing the girl to see her father would seriously disturb her emotional and psychological balance and thus it would not be in her best interests. The ECtHR found that the domestic decisions "can be taken to have been made in the interests of the child".[343] However, the Court was not unanimous at this point in relation to whether the child had form her views "freely" as required by Article 12 of the CRC. The majority of the Court stated that the domestic courts cannot be held as obliged to always involve a psychological expert on the issue of access to a parent not having custody, yet again depending on the circumstances and the age and maturity of the child.[344] In his partly dissenting opinion, joined by judges Pastor Ridruejo and Türmen, judge Ress disagreed and was of the opinion that the domestic court should assess the child's best interest on the basis of a reasoned and up-to-date psychological report and the child should be heard by both the psychological expert and the court in order to guarantee that the procedural requirements of Article 8 are secured.

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[338] Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).
[339] *Sahin v. Germany*, Application no. 30943/96 (8 July 2003), paras. 18, 22–23, 72 and 74–75.
[340] Para. 73.
[341] See e.g. para. 67.
[342] *Sommerfeld v. Germany*, Application no. 31871/96 (8 July 2003), paras. 23 – 24 and 65.
[343] Para. 88.
[344] Para. 71.

Contrary to these decisions, in *C. v. Finland* the Court found that the father's right was violated mainly based on the domestic court's failure to consider interests and factors other than those of the child in the decision-making process. This case has been envisaged as the case demonstrating that the ECtHR considers that hearing the views of the child is essential part of the process.[345] The Court noted that "it is generally accepted that that courts must take into account the wishes of children in such proceedings"[346] and that at some stage it may become "pointless, if not counter-productive and harmful, to attempt to force a child to conform to a situation" which the child resists.[347] Nevertheless, in the instant case, the domestic court had failed to hold an oral hearing and to take any steps to "clarify, through further evidence or expert opinion, any divergent interpretation of the evidence" or whether greater harm would be caused to the children by a decision in favour of the applicant. The Court noted that the domestic court had given the children "an unconditional veto power".[348]

In *M. and M. v. Croatia* the ECtHR decided to consider whether the domestic authorities had violated Article 8 of the ECHR by virtue of the *jura novit curia* principle.[349] This case concerned highly dangerous deficiencies concerning the rights of the child in question and not public care and contact rights as such but I will draw attention to it since the reason why the Court decided to consider Article 8 was due to the authorities' failure to take into account the views of the child. The Court stated to be "especially struck" by the fact that after four years and three months the child had not been heard in the proceedings and thus not given a chance to express her views on which parent she wanted to live with.[350] The Court observed that forensic experts in psychology and psychiatry established that the child had expressed a strong wish to live with her mother. In addition, the Court took into account that ordering the child to live with her mother would not have meant that the child would had had to change school or otherwise be removed from her habitual social environment. Here the

[345] Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (eBook, Springer 2014), p. 203.

[346] The proceedings were concerned with custody of the children and contact rights during and after the proceedings. The domestic court's decision was based on national legislation according to which after the child had turned 12 years old and was against arrangements relating to custody and contact any enforcement in those fields was prohibited.

[347] Application no. 18249/02 (9 May 2006), para. 57.

[348] Para. 58.

[349] This principle allows the ECtHR to consider of its own motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the Court has declared the complaint to be inadmissible while declaring it admissible under a different one. For more, see e.g. *M. and M. v. Croatia*, Application no. 10161/13 (3 September 2015), para. 167.

[350] Application no. 10161/13 (3 September 2015), para. 184.

ECtHR concluded that the child, who was an A-grade pupil and whom the experts viewed as being of good and even above-average intellectual capacities, was nine and a half years old at the start of the proceedings and over thirteen at the time of the judgement of the ECtHR and thus, it would be difficult to argue that, given her age and maturity, she would have not been capable of forming her own views and expressing them freely.[351] Even if it was established that the child was traumatized by her parents through manipulation and emotional abuse.[352]

In the aforementioned case the ECtHR found that the domestic authorities had violated the child's right under Article 8 due to the fact that her wishes were not heard. This case again demonstrates the enormous opportunity of the ECtHR under Article 8 to guide the Member States' interpretation and application of the concept of the best interest of the child in a way which more effective promotes and protects the rights of children. Article 8 could be interpreted in cases concerning children to requiring that the child's views are heard in the proceedings by him or herself or through a representative.

In addition, based on the review of the previous cases explained, it seems that in relation to the child's views the Court is again more convinced about the domestic courts' reasons, at least relating to the weight attached to the views, if there is an expert opinion supporting the reasons or some other "professional" has been involved in the case. Furthermore, it is clear from the case law that the domestic courts cannot rely merely on the opinions and views of the child without considering the interests of others and outcomes of other possible decisions as well.

4.8 Issue of elapsed time

The ECtHR has recognized that in proceedings concerning children, an important factor is that time takes on a particular significance since there is always a danger that any procedural delay will result in the *de facto* determination of the issue before the court.[353] Due to the undisputed fact that children grow and evolve physically and emotionally, the decisions concerning their custody and contact rights are to be made quickly.[354] The Court has emphasized that there is a duty to exercise exceptional diligence in view of the

[351] See para. 186.
[352] See paras. 9, 20, 69, 116, 139, 140, 168 and 183.
[353] See e.g. *Glaser v. The United Kingdom,* Application no. 32346/96 (19 September 2000), para. 66.
[354] William Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, OUP 2015), p. 393.

aforementioned risk. The Court has pointed out that this duty is decisive in assessing whether a case concerning access to children was heard within a reasonable time as required by Article 6 of the ECHR but that this requirement also forms part of the procedural requirements implicit in Article 8.[355]

The length of family proceedings may be considered as part of the assessment of the proceedings as a whole under Article 8 but also under Article 6, according to which everyone is entitled to a fair trial and public hearing within a reasonable time. In its assessment, the Court takes into account, *inter alia*, the complexity of the proceedings as well as the conduct of the applicant and the relevant administrative and judicial authorities. The preparation of expert reports and other in-depth investigations along with involvement of several levels of jurisdiction might speak in favour of more lengthy proceedings. Where delays in the proceedings are attributable to the conduct of the applicant, the State won't be held liable for the delays.[356]

The CRC Committee has also pointed out that as children evolve, delays in or prolonged decision-making have particularly undesirable effects on children. A fundamental difference is that the passage of time is perceived differently by children compared to adults.[357] In the OPCP, discussed in chapter 2, the duty to consider the issues speedily has been taken into account in Articles 8(2), 10, 11, 13 and 14. According to Article 10(1), the Committee shall consider communications "as quickly as possible".

The case of *Kopf and Liberda v. Austria* serves as an unfortunately good example of the effect of the passage of time. The foster parents who had lived with the child for approximately three years and ten months requested visiting and contact rights after the child was placed back with his biological mother. The domestic court made its first decision concerning the foster parents' request after almost three years had passed since the request was initiated. The ECtHR found unanimously that the procedural requirements implicit in Article 8 were not complied with. The ECtHR noted to be true that the case was of some complexity and the applications filed by the foster parents during the proceedings might had contributed to the length, but that this was not sufficient to explain the total length of the

[355] See e.g. *Ribić v. Croatia*, Application no. 27148/12 (2 April 2015), para. 92 and *Kopf and Liberda v. Austria*, Application no. 1598/06 (17 January 2012), para. 39 .
[356] Ursula Kilkelly, *The Child and the European Convention on Human Rights* (1st edition, Dartmouth Publishing Company Ltd 1999), p. 209.
[357] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 93.

domestic proceedings during which time the foster parents had no contact with the child. The Court stated that the passage of time had a direct and adverse impact on the foster parents' position since it was apparent from the domestic court's decision that the elapsed time was crucial for it when deciding not to give contact rights to the foster parents.[358]

Secondly, the issue of time might come into consideration when reuniting the natural family members. The ECtHR has acknowledged that when a "considerable period of time" has passed since the child was originally taken into public care the interest of the child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited.[359] Obviously in this type of situation the elapsed time renders the family's right to reunification impossible altogether. In *Ribić v. Croatia* the Court pointed out that the applicant had seen his son only three times during the child's entire childhood partially due to the delays in custody and contact proceedings and that such a lengthy period is *a priori* in breach of the State's obligations under Article 8 of the ECHR. The Court emphasized that the relations between a parent and a child are to be determined solely in the light of all relevant considerations and not by the passage of time.[360]

Furthermore, in cases concerning right of access by a parent not living with the child, the Court has stated that the adequacy of the measures taken by domestic authorities are to be judged by the swiftness of their implementation due to the fact that time can have "irremediable consequences" for the relationship between the child and the parent concerned.[361] In *Shvets v. Ukraine*, the Court found that the applicant's, who was the paternal grandfather of the child, right to respect for family life was violated mostly based on the failure by the domestic authorities to enforce the applicant's legally granted right to maintain contact with the child and the failure to show requisite diligence in treating the applicant's case. The proceedings had lasted almost three years.[362]

[358] Application no. 1598/06 (17 January 2012), paras. 46–49.
[359] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 208, *Kutzner v. Germany*, Application no. 46544/99 (26 February 2002), para. 67 and *K. and T. v. Finland*, Application no. 25702/94 (12 July 2001), para. 155.
[360] *Ribić v. Croatia*, Application no. 27148/12 (2 April 2015), paras. 90–92.
[361] See e.g. *Strand Lobben and Others v. Norway*, Application no. 37283/13 (10 September 2019), para. 208, *Vyshnyakov v. Ukraine*, Application no. 25612/12 (24 July 2018), para. 37 and *Ribić v. Croatia*, Application no. 27148/12 (2 April 2015), para. 93.
[362] Application no. 22208/17 (23 July 2019).

5 FINAL REMARKS

The research demonstrated that the European Court of Human Rights has taken the concept of the best interests of the child into account in every case that was under more detailed examination. Thus, the concept is already firmly interpreted as forming part of the child's right under Article 8 of the ECHR. However, during the research I found it confusing how the Court actually formulates the concept of the best interests of the child somewhat irregularly. In some instances, the Court emphasizes that the best interests of the child are of paramount importance and on other that the best interests of the child are of crucial importance. There is a difference between saying that the best interests of the child are a primary consideration than to say that they are of paramount importance since the latter seems to be going further than Article 3(1) of the CRC.[363]

For instance, in the discussed case of *R.M.S. v. Spain*, the Court explicitly noted that the interests of the child and those of the mother are often difficult to reconcile and in the pursuit of a balance between these different interests, the child's best interests must always be a *paramount* consideration.[364] It can be argued to be more difficult to draw any general principles and guidance when the "obligation" relating to the balancing of different interests might vary from case to case. Hence, the use of different formulations of the concept of the best interests of the child, especially when the Court has explicitly referred to Article 3(1) of the CRC in its list of relevant sources of international law, might be one of the causes surrounding difficulties in knowing how much weight is to be attached to the interests of the child and to other interests.

In relation to the criticism the ECtHR has faced concerning the failure to give clear guidance as to how much weight is to be attached to each factor considered in the balancing process, I consider that it might be practically impossible to provide exact guidance to that end. The CRC Committee has also emphasized that the concept of the best interests of the child is a dynamic one and it should be applied in each specific case in a way which guarantees that the individual's interests are assessed adequately. The fact that the CRC does not impose

[363] For the concept of "paramount importance", see e.g. Ursula Kilkelly, 'The CRC in Litigation Under the ECHR' in Ton Liefaard and Jaap E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2014).
[364] Application no. 28775/12 (18 June 2013), para. 74.

any fixed factors supports the approach to consider the circumstances as a whole, taking into account all factors which might affect what is to be considered in the child's best interests. The ECtHR has emphasized this approach of considering the case as a whole in the examined cases.

Nevertheless, it can be argued in relation to the balancing process that the national authorities should at least explicitly consider the best interests of the child as well as other members of the family. This is evident in the cases of *Schneider v. Germany* and *Anayo v. Germany* but analogically also from the Court's statements pointing out that the national authorities must "conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and make a balanced and reasonable assessment of the respective interests of each person".

Furthermore, it would seem that if there are up-to-date expert reports from professionals who have familiarized with the family's situation and examined the child's best interests, and which transparently and with reasoning suggest or recommend some solution to be in the child's best interests or otherwise provide detailed description about the family's situation, the Court is more convinced to find that the balancing process was made adequately. In more ambiguous cases, the Court also considers in more detail how much weight national authorities have attached to the opinions and recommendations. This in turn could lead to a finding of a violation in cases where some less intrusive measures have been suggested to be adequate enough by a professional but where none have been attempted by the national authorities.

Also in general, the positive obligations of Article 8 might be interpreted to require that the national authorities must at least consider some less intrusive measures and accordingly at least attempt to assist the family before they make a care order or restrictions on contact rights where they cannot provide relevant and sufficient reasons in the interests of the child for making such decisions immediately. If not yet interpreted as an obligation, the Court clearly seems to attach weight to this factor in deciding whether States have overstepped their margin of appreciation.

Finally, I will also point out the Court's considerations relating to the questions concerning child's participation. The adequate balancing process might require in the future that the child is involved in the proceedings affecting him or her which would be in accordance with

the CRC. This could happen either by hearing the child directly or by appointing a special representative of the child to make sure that the child's voice and interests are not overlooked in the proceedings which ultimately has direct impacts on the child. During the proceedings where the adult parties concerned have their own ideas of the child's best interest and whose relations can be severely strained the child easily ends up in the middle of fighting adults without anyone genially interested in his or her best interests. The CRC Committee has accordingly emphasized that "if the interests of children are not highlighted, they tend to be overlooked".[365] The ECtHR has a great potential in the realization of this right and based on the discussion in chapter 4.7, the interpretation of Article 8 might be evolving to this direction.

[365] General Comment No. 14 (2013), UN Doc CRC/C/GC/14, para. 37.