Migration, abduction and children's rights: the relevance of children’s rights and the European supranational system to child abduction cases with immigration components

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3 Children's Rights in The Aftermath of Parental Separation

3.1 Introduction

This Chapter builds on the previous one by conceptualising the rights of children in the aftermath of their parents' separation. It thus adds flesh to the bones of a child rights-based approach developed in the preceding Chapter. It brings insight into the approach under the CRC of three rights of children which are essential to any parental separation case: the best interests of the child, the right to have contact with both parents and the right to be heard.

As discussed in Chapter 2, both Tobin and the CRC Committee have stressed that in matters concerning children, all of the rights enshrined in the CRC should guide the analysis.[1] Clearly, depending on the specific context of a case, some rights may become more relevant than others. Moreover, flexibility is essential to achieving true child-oriented decision-making. In other words, a too rigid approach which impacts on the judge's flexibility to balance the rights in a given case may ultimately result in undermining the position of the child rather than enhancing it. This notwithstanding, this dissertation identifies three rights of children as *core* to cross-border separation cases. This is because judicial decision-making in all parental separation cases should take into account as a minimum, all of these three rights: (i) the child's best interests (hereinafter also abbreviated as "BIC"), (ii) the right to have contact with both parents; and (iii) the right to be heard. As will be discussed below, the child's best interests originates precisely in family law proceedings. The right to have contact with both parents has been first laid down in the CRC and since then, arguably supported by the CRC, has brought about a paradigm shift in the way children are positioned within their families. Last but not least, the right to be heard is essential to all cases involving children and it is the main venue through which children become agents and not merely objects of protection. Thus, it is difficult to conceive a rights-based approach in cross-border separation cases without an evaluation of (at least) these three rights.

One potentially relevant article of the CRC, which has ultimately not been included in the present analysis, is Article 11. As per this Article States Parties shall take measures to combat the illicit transfer and, non-return of children abroad and they shall promote the conclusion of international agreements or accession to existing agreements. As Tobin et al specify, to

1 See also Section 2.3.2.

date the CRC Committee has rarely relied on Article 11 CRC.[2] The same commentary confirms that the illicit transfer and non-return of children refers to parental child abduction in the same way as the Hague Abduction Convention.[3] Article 11 CRC is less relevant for the present dissertation as all Member States of the European Union have acceded to the Child Abduction Convention, rendering the second paragraph moot. Further, the obligation to take measures to combat the illicit transfer of children essentially overlaps with the scope of the Child Abduction Convention.[4] Also, as Tobin's et al commentary demonstrates, the assessment under this Article is an interpretation of the Child Abduction Convention which has been carried out in Chapter 4 of this dissertation.

The analysis below will be guided by the CRC, with a focus on the relevant General Comments of the CRC Committee and academic literature directly related to these General Comments. Each of the Sections 3.2, 3.3. and 3.4. address first the drafting works of the CRC followed by an analysis of the contemporary relevance of the best interests of the child, the right to have contact with both parents, and the right to be heard. Section 3.5 covers the relationship between these three rights. Balancing is one of the steps of a rights-based approach. Finally, Section 3.6 introduces the concept of parental alienation as a point of contention between women's rights advocates and father's rights advocates. This concept plays an important role in post separation parenting disputes, and it is closely linked to the child's right to have contact with both parents. In individual decision-making, judges need to distinguish between competing rights or policy interests, and parental alienation forms in many cases the backdrop against which the decision is being taken. Thus, for the purposes of a rights-based approach to children's rights parental alienation allegations should be distinguished from and balanced against other relevant rights to the decision.

3.2 The best interests of the child

The principle of the best interests of the child is now one of the four guiding principles of the CRC. The BIC was first laid out at international level in the 1959 Declaration which explicitly refers to it in two of its ten (10) principles. This principle predates the 1959 Declaration; its origins are in domestic custody decisions and legislation emanating from both common and civil law jurisdictions.[5]

2 Tobin et al 2019, p. 376.

3 Tobin et al 2019, pp. 374-375.

4 Tobin et al 2019, pp. 374-375. Chapter 4 of this dissertation is dedicated to analysing the Child Abduction Convention.

5 The United States: Zainaldin 1978, pp. 1052 -1053, Carbone 1995, p. 728; for the evolution of English custody laws, see among others, Wright 2002; Eekelaar 1986, pp. 167-168; for Canada, see Cliche, 1997, p. 54; France: Rubellin-Devichi 1994, p. 261; for Australia, see James 2006; for Switzerland, see: Zermatten 2003, p. 3; the Netherlands: de Boer 1984, p. 8.

The discussions surrounding the best interests of the child at both national and international levels reflect the paradoxes of rights of children which were described in the context of the family in the preceding chapter. Originally it was used to protect children from the power of the father (*patria potestas*); thus as a welfare consideration reflecting children's needs, rather than their agency.[6] More recently however, the CRC Committee and academic commentators have argued for a new conceptualisation of the best interests as a right, distinct from a purely welfare-oriented approach. The fact remains that it is both the most used concept in this area of law and the most criticised at the same time.

3.2.1 Best interests during the drafting process of the CRC

The current text of Article 3(1) CRC originates in Article II of the Polish draft, proposed in 1978. The original proposal read as follows:

> "The child shall enjoy special protection and shall be given opportunities and facilities, by law and by 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."[7]

During the first and second readings in the Working Group, Article II became Article 3. In 1979, paragraph 1 of Article 3 was revised as follows: "In all actions concerning children, whether undertaken by their parents, guardians, social or State institutions, and in particular by courts of law and administrative authorities, the best interests of the child shall be the paramount consideration."[8]

It is to be noted that in both Polish proposals, the best interest was to be seen as the *paramount* consideration. This was changed into a *primary* consideration, in 1981, at the proposal of the United States.[9] The reason was that some delegations felt that making best interests a paramount consideration was too broad and that sometimes other parties may have equal or superior interests.[10] Already at the drafting stage a discussion emerged on the vagueness of the concept and the risk that States could give this concept purely nationalist content and interpretation in cases of children of dual origins.[11] Concerns over the fact that best interests should not be interpreted

6 Vuolanto 2016, p. 494.
7 Report of the Commission on Human Rights (thirty-fourth session, document E/CN.4/1292), p. 124.
8 Commission on Human Rights, document E/CN.4/1349.
9 Commission on Human Rights, document E/CN.4/L1575, paras 19-38.
10 *Travaux préparatoires*, p. 339, paras 23-24.
11 This comment was made by the International Federation of Human Rights, International Federation of Women in Legal Careers, Pax Romana, document no E/CN.4/1984/WG.1/WP.6.

as imposing limitations on countries' immigration laws were also expressed by the United Kingdom and Germany.[12]

However, other than these considerations, it does not appear that the introduction of 'best interests' as a concept in the text of the CRC was ever subject to debates as such. The reason is most likely that -as shown in the historical overview undertaken in Section 2.1 above- by the time the text of the CRC was being discussed the best interests of the child existed in the legislation and practice of most countries.[13] The main focus of the discussions was whether the best interests of the child was *the* primary or *a* primary consideration. Ultimately, the Working Group adopted the latter version in view of the consensus achieved.[14]

3.2.2 Current relevance

It has rightly been observed that the 'best interests of the child' is one of the most amorphous legal concepts of all times.[15] Certainly, much of its vagueness could be traced back to the historical origins and to the fact that it was and continues to be used as both an empowering legal tool for children and one which factually relegates them to passive objects of protection[16]. While both criticisms and endorsements have their legal merit, it is not the aim of this dissertation to undertake a detailed evaluation of either position. Such an endeavour would largely be doomed to failure, especially considering the amount of academic and professional writing which has already been dedicated to the best interests of the child. Also, various fields of law may use different interpretations thereof and it may have different meanings in different cultural contexts.

For the purposes of the present chapter it is considered important to lay down the core features of the best interests as a 'rights concept' on the basis of the CRC Committee General Comment no 14.[17] Further, attention will be paid to some recent works which have as a starting point the aforementioned General Comment. The reason for this approach is that the CRC Committee through its General Comment has arguably attempted to depart from the 'welfarist' or paternalistic view over the best interests of the child and to position this concept in the context of a rights-based approach to children.[18]

12 Commission on Human Rights, document E/CN.4/1984/71, paras 9 and 11.
13 Several commentators have remarked this as well, see for eg, Alston 1994, p. 11.
14 Legislative history CRC 2007, para 125.
15 Smyth 2015, p. 71.
16 This tension is also recognized by the CRC Committee in 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), CRC/C/GC/14, 29 May 2013., para 83 (GC No. 14). The CRC Committee recommends that the age and maturity of the child guide the balancing act.
17 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), CRC/C/GC/14, 29 May 2013 (GC No. 14).
18 Kilkelly 2016, p. 55.

As has been discussed in the preceding chapter, it is the CRC which has enshrined the best interests of the child as a free-standing legal provision.[19] The Convention does not include a hierarchy of rights, and other than a brief discussion during the drafting process on the *general nature* of some provisions, there is no indication that the drafters saw the best interests as a core principle of the Convention.[20] The BIC has become one of the four general principles of the CRC in 1991, when it was listed as such by the CRC Committee in its guidelines for State Parties initial reports. [21] It has been documented that the elevation of the four provisions to the status of general principles did not receive much discussion at the time; such qualification nevertheless has generated in time a large impact on the way the CRC has been approached.[22] The first General Comment to refer to the best interests as one of the general principles of the Convention is General Comment No 5 of 2003, on general measures of implementation.[23]

Further, it should be noted that there are several references within the text of the Convention to the best interests, however the *principle* of the best interests of the child is enshrined in Article 3(1) of the CRC. A closer look at the other provisions indicate that the 'best interests' is used in other contexts as a tool to allow for discretion on the part of the state authorities to deviate from a specific right.[24]

The principle enshrined in Article 3(1) CRC is subject to a detailed analysis by the CRC Committee in its General Comment No 14. Commentators have pointed out that through this General Comment the Committee has attempted to flash out a true rights-based approach to BIC.[25] Importantly, the Committee underlines that BIC is a threefold concept: a substantive right, a fundamental legal principle and a rule of procedure. As a substantive right, BIC "creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court."[26] While ambitious, the proclamation by the Committee of BIC as a self-standing right has been considered problematic, especially against the more general perception that the BIC is an umbrella provision to the Convention.[27] Kilkelly however argues, on the basis of the interpretative rules of the Vienna Convention on the Law of Treaties, that reading Article 3(1) in the context of the CRC as a whole supports the idea that the BIC is to be seen as a substantive right.[28] Indeed, several commentators have highlighted that the BIC has been instrumental for national courts and that many domestic

19 Kilkelly 2016.
20 Hanson/Lundy 2017, p. 288.
21 Hanson/Lundy 2017, p. 287.
22 Hanson/Lundy 2017, pp. 288 – 292.
23 General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5,27 November 2003, (GC No 5) para 65.
24 See for example Article 9(1) and 9(3); Article 37(c), Article 40(2)(iii) of the CRC.
25 Cantwell 2017, p.68; Kilkelly, 2016, p. 55.
26 GC no 14, para 6.
27 Kilkelly 2016, pp 56-58.
28 Kilkelly 2016, pp. 55-57.

courts are directly applying it, so that it has acquired self-executing force.[29] Nevertheless, other than the possibility of using the best interests directly in court, there are hardly any contexts where the best interests can be seen as a stand-alone provision. For example, Pobjoy has argued for the interpretation of the best interests as a separate ground for granting refugee status, yet such an approach does not appear to have (yet) gained much traction in domestic courts.[30]

It has been considered that central to the concept of a *right* is the recognition that the interest protected by the right is understood by the right holder as expressing an element of his or her wellbeing.[31] Tobin and Eekelaar argue that under this conceptualization of a right, the principle requires an evaluation of a child's well-being to be undertaken as far as possible from each child's views.[32]

While the proposition of the best interests principle as a stand-alone right may be subject to debate, it is herein argued that the two other propositions of the CRC Committee, those of incorporating the best interests principle as an *interpretative legal principle* or, more importantly as a *rule of procedure* are more capable of furthering the rights of children. According to the CRC Committee, the best interests of the child as a rule of procedure in particular requires that procedural guarantees are offered and that decisions show that the right has been explicitly taken into account.[33] Further,

> "States parties shall explain how the right has been respected in the decision, that is, 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, be they broad issues of policy or individual cases."[34]

Such an approach would help diminish the negative perceptions of the best interests principle as infused with subjective perceptions and focus on a process whereby the consequences of actions and decisions are more consistently taken into account and assessed by reference to their impact on children.[35] It is within the context of the BIC as a procedural rule that the determination of the child's best interests requires decision makers to hear children and both commentators and the CRC Committee agree that articles 12 and 3 should be used together to advance the rights of children.[36] Moreover, in General Comment no 14 the CRC Committee recommends that decision-makers draw up a non-exhaustive and non-hierarchical list of elements which should assist in drawing up the child's best interests.[37] Such elements include:

29 Liefaard/Doek 2015, Couzens 2019.
30 Pobjoy 2017, pp. 196-203.
31 Eekelaar/Tobin 2019, p. 91.
32 Eekelaar/Tobin 2019, p. 91.
33 GC No. 14, para 6(3).
34 GC No. 14, para 6(3).
35 Eekelaar/Tobin 2019.
36 Kilkelly 2016, p. 59.
37 GC No. 14, para 50.

> "age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc."[38]

On a closer inspection it has been submitted that the criteria included by the CRC Committee represent in fact the rights enshrined in the CRC.[39] The same is indicated by the Committee which expressly highlights that the balancing act should take place against the background and with the aim of ensuring the child's full and effective enjoyment of the rights set out in the CRC and its protocols.[40]

However, while the Committee highlights that guidance is important it also stresses the value of flexibility in such matters.[41] It has been submitted that such an approach, while commendable may not result in achieving the much-desired clarity in the interpretation of BIC in concrete cases, yet as has been discussed throughout this dissertation, judicial discretion is one key element present in the field of children's rights.[42]

Further, concerning the procedural safeguards, the CRC Committee recommends that states put in place formal processes, with strict procedural safeguards which are transparent and objective.[43]

One additional aspect touched upon in the General Comment is that of legal reasoning. This aspect is important as it reinforces the idea of how courts could take a rights-based approach to cases concerning children which was discussed previously in Chapter 2. The Committee also agrees that the reasoning of courts is essential and that motivations should state explicitly:

> "all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighed to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained."[44]

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38 GC No. 14, para 48.
39 Kilkelly 2016, p. 60.
40 GC No. 14, para 82.
41 GC No. 14, para 50.
42 Eekelaar/Tobin 2019, pp. 93-94.
43 GC No. 14, para 87.
44 GC No. 14, para 97.

All the aspects above are very significant for the purposes of the present dissertation as they indicate that the relevance of best interests lies less in the actual content of this right but more in the process used to achieve the result. This dissertation argues that it is principally through such a process, and through well-reasoned court decisions that children's rights could disentangle from other policy considerations which may play a role.

The final remark on the current use of the BIC concerns the wording which was ultimately adopted in the text of Article 3(1) CRC and which posits the best interests as *a* primary consideration, rather than *the* primary consideration. As has been stressed throughout this text, and is equally highlighted by the CRC Committee, such a distinction is an important one in practice in that the child's interests are not the only consideration for decision makers but nevertheless they have high priority and not just one of several considerations.[45] The idea of having children's interests as a primary consideration is rooted in their dependency and the ensuing risk that if their interests are not highlighted, they tend to be overlooked.[46]

3.3 The right of the child to have contact with both parents

The right of the child to have contact with both parents is intimately linked with the best interests principle. Article 9(3) of the CRC provides that "States Parties shall respect the right of the child who is separated from one or both parents 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." A similar provision is included in Article 10(2) of the CRC which provides that "a child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents." Other than the provisions of these two articles, the CRC makes numerous references to the child-parent (caretaker) relationship and to the way such a relationship is to be defined in relation to the state. For example, Article 5 the right to give guidance in accordance with the child's evolving capacities, Article 7(1) CRC provides for the child's right to know and be cared for by his parents. Article 8(1) CRC refers to the right of the child to preserve his or her family relations without undue state interference. Article 16(1) CRC mentions the right not to be subject to unlawful or arbitrary interferences with the family whereas Article 18 CRC mandates that States Parties use their best efforts to ensure that both parents have common responsibilities in the upbringing and development of the child. All these provisions refer to various aspects of the parent-child relationship and they are all relevant in cases concerning

45 GC No. 14, para 39.
46 GC No. 14, para 37.

parental separation. For cross-border relations, the provisions of Article 11 CRC are equally relevant.[47]

As has been discussed herein, there is agreement amongst commentators that the provisions of the CRC are to be interpreted holistically[48]. The same view is shared by the CRC Committee and this general position has been analysed in more detail in Chapter 1 of this dissertation. Notwithstanding the above, a closer look at the provisions of the Convention indicates that Articles 9 and 10 are the most specific ones detailing the rights of children to have contact with both parents in the event of parental separation. For this reason, and to avoid repetition, these two articles are analysed in more detail in the following paragraphs.

3.3.1 The right to have contact with both parents during the drafting process of the CRC

The origin of both provisions is Article VI of the first Polish draft of 1978 which read as follows:

> "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, whenever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without means of support. Payment of state and other assistance towards the maintenance of children of large families is desirable."[49]

Almost immediately, several delegations objected to the use of the word 'mother' and proposed to replace it by 'parents' focusing on the important role of both the mother and the father in the upbringing of the child. In the discussions on this Article -which spanned from 1978 to its adoption

47 The comments to Article 11 CRC are less relevant at this stage. This is because essentially Article 11 of the CRC makes reference to the provisions of other multilateral treaties. Further, as Lowe and Tobin pointed out, outside of a few references in the Concluding Observations the CRC Committee has been reluctant in making concrete recommendations to states in relation to Article 11 CRC. However, in these few remarks it can be observed that the CRC Committee seemed to understand that there is no tension between the Hague Convention and the CRC, and that ratification of the Hague Convention is a necessary step in the promotion of the rights of children. Even so, as mentioned above, some tensions exist and they relate in part to the issue of how the child's best interests should be approached. See Lowe/Tobin 2019, pp. 370-397.

48 Last but not least, when discussing Article 9 CRC, Tobin and Cashmore suggest that this Article should be understood through the lens of the other articles as well, where the child is not to be seen as isolated from his family, but rather within that context and where states are to take positive steps to prevent separation and ensure continuation of personal relationships Tobin/Cashmore 2019, p. 341.

49 Legislative History of the CRC 2007, E/CN.4/1292, pp 124-125.

in 1989 -, the trend towards awarding joint parental responsibility to both parents rather than to seeing mothers as the principal caretakers was constantly reiterated. Several delegations, including for example New Zealand and Australia pointed out that in their countries in cases of disputes, both parents were entitled to custody and courts were to treat the welfare of the child as the first and paramount consideration.[50]

One other aspect which also emerged soon after the first Polish proposal was that related to securing the rights of children from *international families*. The French delegation proposed the addition of the following sentence:

"Children who belong to an international family that has split up shall, so far as possible, preserve their ties with both parents even if they are of different social origin, nationality or religion".[51] In the same vein, the Society for Comparative Legislation proposed that a duty be inserted for states to provide particular care to children belonging to a divided international family.[52] Following drafts of this Article, initiated by the United States, included the right of the child to be reunited with parents if they *lawfully* reside in another state and to have the child's preferred place of residence taken into account as a *primary consideration* on questions of residence.[53]

From this moment on, the discussions were split into the issue of the child's right to have contact with both parents in a *national setting* and that of the same right in an *international setting*. The 1981 proposal of the United States framed the right to have contact with both parents in light of legal residence: the wording proposed indicated that the child's right to family reunification only existed to the extent the parents lawfully resided in one State Party and the child resided in another State Party.[54] The discussions then delved into the issue of child abduction where several delegations had pointed to the frequency and the increasing scale of the problem.[55] The issue of children of separated parents of different nationalities was expressly raised by the French delegation at several points during the drafting process.[56] At the same time the delegations were aware of the Child Abduction Convention and the European Convention of Luxembourg which had already been drafted and wished to avoid repetition.

As it is apparent from the above, the right of children to have contact with parents in the context of international families received significant attention during the drafting process. An analysis of these drafts indicates that particularly contentious issues were precisely immigration-related considerations such as the legality of the parents' stay in a particular state. While no

50 Legislative History of the CRC 2007, E/CN.4/1324/Add.5.
51 Legislative History of the CRC 2007, E/CN.4/1324/Add.1.
52 Legislative History of the Convention on the Rights of the Child, United Nations, New York and Geneva, 2007, HR/PUB/07/1. E/CN.4/1324.
53 HR/(XXXVII)/WG.1/WP.12.
54 Legislative History of the CRC 2007, Report of the Working Group to the Commission on Human Rights (E/CN.4/L.1575), para 65.
55 Legislative History of the CRC 2007, For eg Minority Rights Group, France, the United States.
56 Legislative History of the CRC 2007, p. 398.

major disagreement existed on the right to have contact with both parents as such, several states expressly pointed out the fact that they wished to retain authority on the issue of immigration. Particularly strong objections in this regard were expressed by Japan and the Federal Republic of Germany who wished to introduce a new paragraph as follows: "Nothing in this Convention shall affect in any way the legal provisions of States Parties concerning the immigration and residence of foreign nationals".[57] This proposal was however met with strong objections from Portugal on the ground that it interfered with the right to liberty of movement as enshrined in other (binding) international documents.[58] Upon further discussion, Article 6 was broken down into two Articles, Article 6 and Article 6 *bis* (which in the CRC became Articles 9 and 10 respectively). It was proposed to restrict Article 6 to domestic situations and to specifically mention that Article 6 *bis* did not affect the right of states to regulate their respective immigration laws in accordance with their international obligations. Again, Portugal, supported by Sweden and Italy, emphasised that they understood 'international obligations' to apply to both treaties as well as principles recognized by the international community.[59]

Furthermore, the discussions on Article 6 *bis* (now Article 10 of the CRC), also connected the right of the child to choose his residence, the right to freedom of movement, issues of residence rights, and immigration law. Some delegations proposed to eliminate all restrictions to international movement of children and parents.[60] Others limited the right to family reunification to situations of lawful residence.[61] The reference to the 'lawfulness' of residence was eventually eliminated at the suggestion of the United Kingdom.[62]

Ultimately, when Article 10 was adopted, both Japan and the Federal Republic of Germany made declarations in the sense mentioned above. It is to be noted that Germany withdrew this declaration on 15 July 2010.[63] Japan, for its part, does maintain two reservations to both Article 9(1) and Article 10(1). Concerning Article 9(1), Japan expressly declared that it does not understand this Article to apply to deportation decisions taken following domestic immigration laws.

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57 Legislative History of the CRC 2007, E/CN.4/1989/WG.1.WP.20, p. 405.

58 Legislative History of the CRC 2007, para 194, page 406. The documents referred to where Article 12 of the ICCPR and several recommendations of the CoE. Article 12 of the ICCPR reads as follows: 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country."

59 Legislative History of the CRC 2007, paras 204-207, p. 407.

60 Legislative History of the CRC 2007, paras 11,12, p. 411.

61 Notably the United States, Legislative History of the CRC 2007, p. 412.

62 Legislative History of the CRC 2007, para 41, p. 414.

63 as per << https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#34>> ,10 June 2019.

It should be also pointed out that the discussions on Article 11, were carried out while the 1980 Child Abduction Convention had already been adopted. Thus, it was ultimately decided to defer to this Convention for the actual regulation of the issue.[64] It is interesting to note though, that from the discussions it appeared that the factual scenario envisaged at the time was that of a couple where the two partners held *different nationalities*. The regulation of parental authority/ responsibility at national level did not play an important role in the discussions. Only one delegation mentioned that at the time when a couple was separated parental authority was retained by the parent with whom the child *lived*.[65]

The paragraphs above show that already at the drafting stage of the CRC, the gendered role of parenthood and immigration were important points of discussion for States Parties. The distinction between the roles of mothers and fathers in child rearing was eliminated from the very beginning making way for a provision where both parents share an equal role in raising their children. This is in line with the developments at national law which were taking place in some countries at the time as described in Section 3.1. above.

On the immigration points, more disagreements emerged. As mentioned, while delegations agreed that children should have the right to maintain contact with both parents, they were less willing to accept such a right when they perceived that it may encroach upon their powers to regulate immigration. Despite these tensions, it is telling that ultimately references to nationality and/or legal residence were eliminated from the final drafts of the Convention. This may be perceived as an indication of states' willingness to facilitate the right to family unity, which was perceived as fundamental already at the drafting stage of the CRC.[66]

Further, at the moment only two countries, namely Japan and Switzerland have made reservations to Articles 9 and 10 of the CRC on account of their immigration laws (more precisely in relation to the fact that they do not understand these Articles to affect their immigration laws).[67]

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64 Legislative History of the CRC 2007, p. 435-437.

65 Legislative History of the CRC 2007, Yugoslavia (doc E/ CN.4/1983/32/Add.2.), p.433.

66 See also the note of the representative of the United States to the effect that family unity and family reunification are basic rights and should be included in the draft convention. Legislative History of the CRC 2007, para 10 p. 418.

67 The Swiss reservation to Article 10(1) reads as follows: Swiss legislation, which does not guarantee family reunification to certain categories of aliens, is unaffected.; The reservations of Japan read as follows: " 1. The Government of Japan declares that paragraph 1 of article 9 of the Convention on the Rights of the Child be interpreted not to apply to a case where a child is separated from his or her parents as a result of deportation in accordance with its immigration law. 2. The Government of Japan declares further that the obligation to deal with applications to enter or leave a State Party for the purpose of family reunification `in a positive, humane and expeditious manner' provided for in paragraph 1 of article 10 of the Convention on the Rights of the Child be interpreted not to affect the outcome of such applications.", available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#34>, last accessed on 15 July 2024.

3.3.2 Current relevance

It is to be noted that commentaries to the aforementioned Articles of the CRC are scarce.[68] In particular in relation to Article 9, the CRC Committee routinely refers to the issue of non-separation of children from their parents, however, rarely does the Committee directly refer to Article 9 in the Concluding Observations[69]. Here, all relevant Articles (namely, Article 9, 10, 11 and 18) are grouped together under the heading Family Environment and Alternative Care.[70]

One other aspect worth highlighting is that, in line with the discussions during the drafting of the CRC, commentators point to the fact that Article 9 CRC is designed to ensure the child's right not to be separated from both parents in a national setting whereas Articles 10 and 11 are dedicated to the international setting.[71]

Under Article 9(3), the CRC favours *direct* and *regular* contact with both *parents* under the assumption that this type of contact is in the best interests of the child.[72] Doek stresses that the implicit assumption of the CRC is that contact with both parents is in the best interests of children, and the child's best interests is the sole ground for denying contact. The CRC Committee is of the opinion that the opposition to contact by one parent cannot be considered an exceptional circumstance justifying interruption of contact.[73] The CRC Committee has underlined in several Concluding Observations that states should ensure that the child has a right to maintain contact with both parents even after divorce.[74] Also, more recently in the General Comment no 14 concerning the best interests of the child, the CRC Committee has dedicated a section to the importance of the family environment and maintenance of relationships within such an environment.[75] In paragraph 70 of this General Comment the Committee highlights:

> "Preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well as friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places."

With specific reference to Article 9(3) CRC the Committee mentions:

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68 For example: Detrick 1999, Doek 2006, Tobin/Cashmore 2019, pp. 307-343.
69 Tobin/Cashmore 2019.
70 Tobin/Cashmore 2019, p. 310.
71 Tobin/Cashmore 2019, p. 310; Doek 2006; Detrick 1999, 181.
72 Doek 2006, p. 19.
73 Doek 2006, p. 13.
74 Khazova 2019, pp. 176-177, referring to CRC/C/ALB/CO/2–4 Albania 2012a.
75 GC No. 14, section c, paras 58 to 70.

> "The *quality of the relationships* and the need to retain them must be taken into consideration in decisions on the frequency and length of visits and other contact when a child is placed outside the family."[76]

Furthermore, the reference to 'direct' contact has been interpreted to include contact via means of electronic communication such as e-mailing, Skype, etc.[77]

One other important aspect to note is that the holder of the right to contact is the *child* and not the parents.[78] This is in contrast with earlier approaches where contact rights were attributed to the parents.[79] Discussions on the distinction between the child as the right holder of the right of contact/access as opposed to the parent had emerged already as of the late 1980s.[80] The significance of having the child at the forefront is that decisions concerning whether to permit access will be taken from the perspective of the child, rather than that of the parents.[81]

The right of the child to have contact with both parents as mentioned under Article 9(3) is directly linked to cases of parental voluntary separation (divorce) and derived from the text of this Article, authorities are to take positive steps to ensure contact between the child and both (separated) parents.[82] This right has equally been affirmed on the international arena already from 1989, through the Human Rights' Committee General Comment no 17.[83]

On the meaning of the terms *'regular'* contact, it was emphasised that absent indications to the contrary there is a presumption in favour of more rather than less contact between the child and the non-residential parent.[84]

Under Article 9, the exclusive basis on which separation between the child and his parents can be justified is the child's best interests.[85] The CRC Com-

76 GC No. 14, para. 65.
77 Tobin 2019, p. 333.
78 Tobin 2019, p. 330.
79 Tobin 2019, p. 330.
80 Kodilinye 1992, p. 41.
81 It should be noted that such an approach is far from a clear cut. For example in her article Kodilinye criticises as not in the best interests of the child approaches where courts granted natural fathers the right to contact their children on the basis of the blood time. See: Kodilinye 1992. This is to be contrasted with more recent views where courts (particularly in the countries of the Global North) are far more likely to permit such contact, motivated precisely on the basis of the best interest of the child (see for eg *Mandet v. France*, ECtHR 14 January 2016, appl. No. 30955/12, ECLI:CE:ECHR:2016:0114JUD003095512.; See also Ismaïli 2019, discussing the approach of Dutch Courts to contact.
82 Tobin 2019, p. 332.
83 ICCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989.
84 Tobin 2019, p. 334.
85 Pobjoy/Tobin 2019, p. 350.

mittee has considered that joint parental responsibility is generally in the best interests of the child; however it is important that domestic authorities retain discretion in deciding these cases on a case by case basis as any automatic allocation of parental responsibilities would defeat this purpose.[86]

Based on the discussions during the preparatory works of the CRC, it has been considered that it is Article 10 CRC which gives expression to the child's right to have contact with both parents in an international setting.[87]

Article 10 is divided into two paragraphs, with paragraph 1 covering the right to family reunification and paragraph 2 providing for similar rights to Article 9(3) but in an international setting.

Article 10(1) grants the child or to his parents the right to apply for family reunification and to have the application decided in a positive, humane and expeditious manner.[88] That means that either the parent has the right to *apply* to join the child or the other way around, the child has the right to *apply* to join the parent located in a different country.[89] Further, under Article 10(1) states are under the obligation to deal with applications for family reunification.[90] Compared to other international instruments, Article 10(1) affords the right to file an application for family reunification, thus any blanket prohibition on family reunification is contrary to Article 10(1) CRC.[91] It has been suggested that in principle, the rejection of applications for family reunification are only justifiable to the extent that reunification would be contrary to the best interests of the child.[92] In the same vein, pursuant to the Joint General Comment of the CRC Committee and the Committee on Migrant Workers, states have been urged to adopt measures for parents to reunify with their children and / or to regularise their status on the basis of their children's best interests.[93] Clearly, the aforementioned provisions focus on procedures rather than outcomes.[94] In other words, the right to family reunification is considered to be respected provided that either the child is entitled to apply to join the parent or the parent is entitled to apply to join the child. In their turn, authorities have to assess the merits of these applications.

Moreover, it has been pointed out that states are under an obligation to facilitate reunification between a child and his parents.[95] Where reunifica-

86 GC No. 14, para. 67.
87 Pobjoy/Tobin 2019, p. 345.
88 Pobjoy/Tobin 2019, p. 344.
89 Pobjoy/Tobin 2019, p. 350.
90 Pobjoy/Tobin 2019, p. 350.
91 Pobjoy/Tobin 2019, p. 351.
92 Abram 1995, p. 423.
93 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CRC/C/GC/22 – CMW/C/GC/3, 16 November 2017.
94 In this sense see also Pobjoy/Tobin 2019, p. 348.
95 Pobjoy/Tobin 2019, p. 351.

tion is refused, reasons for such refusal ought to be provided, including the possibilities to appeal[96].

Article 10(2) deals with the right of the child to maintain direct contact and personal relations with both parents, where the parents reside in different countries. As with Article 9(3), it has been submitted that under Article 10(2) states are obliged to take measures to promote contact between children and parents.[97]

Further, even if Article 10(2) provides in a similar way to Article 9(3) for the right of the child to maintain direct contact and personal relations with both parents, it has been considered that given the geographical distance between the child and the parent(s) in this case, 'direct' contact cannot be interpreted to mean physical contact, but only contact through means of communication.[98] As opposed to the child's right to maintain contact with both parents in a national setting, which can be restricted solely on account of the child's best interests, the same right in an international setting provides that restrictions of the right can only occur in exceptional circumstances. Such exceptional circumstances are slightly broader than the child's best interests, allowing for cases concerning the socio-economic context as well.[99]

Overall, more tensions are to be perceived in the way the child's right to have contact with both parents has been granted in this context. This is because, in situations with an international dimension, as stated already at the drafting stage, states wished to retain their right to control the entry and stay of aliens. It has been considered that Article 10 stops short of granting children the right to reunification, yet there is a push for states to deal with these applications in a positive, humane, and expeditious manner.[100]

One important aspect to note concerns the point in time which should be considered when distinguishing between Articles 9(3) CRC and 10(2) CRC. Commentators differentiate between these two paragraphs on the basis of the drafting works to the CRC, but there is no indication as to the timeline. Article 9(3) CRC proclaims the right of the child to have contact with both parents whereas Article 10(2) CRC affirms the same rights for the "child whose parents reside in different States". A textual analysis of these provisions indicates that Article 10(2) is only incident when the parents already reside in different countries whereas it is Article 9(3) who is applicable to children and parents, irrespective of their nationality and legal or illegal residence status who reside in one country at a given time. In other words, if there is a question about the expulsion of a parent and/or of a child from a particular state at a moment in time, the child's right to have contact with both parents should be analysed from the angle of Article 9(3) and not in light of Article 10(2) as at the time the parents do not reside in

96 Joint GC no. 4, para 36.
97 Whalen 2022, p. 141.
98 Whalen 2022, p. 141.
99 Pobjoy/Tobin 2019, p. 359.
100 Schmahl (Ed.) 2021, pp. 173-174.

different states, and it is only this latter situation which is envisaged under Article 10(2) CRC. If a situation concerns parents and children who already reside in different countries (and not because they have been forced to do so through state action, such as for example expulsion), the right to have contact with both parents should be analysed from the angle of Article 10(2). This is also supported by paragraph (1) of Article 10 of the Convention which covers the issue of family reunification. This distinction is important in practice as commentators, on the basis of the *travaux préparatoires* and the actual text of the provisions, do accept that the provisions of Article 9(3) CRC confer more extensive rights to children than those concerning Article 10(2) CRC. In any event, for the time being no authoritative interpretation, case law or other directions exist on the distinction between Articles 9(3) and 10(2). Such interpretation would be very much welcomed in light of the different impact on the lives of children that these provisions are having.

In absence of such guidance, a closer look at the Committee's Views given in the context of the OPIC procedure seems to indicate that not much distinction between the two provisions is currently being made. To date,[101] the Committee had only one occasion[102] to issue a View on the merits of a complaint that covered both Articles 9(3) and 10(2) of the CRC. *C.R. v. Paraguay*, concerned a cross-border situation where a father complained that Paraguay had breached Articles 3(1), 9(3) and 10(2) in respect of his daughter in that he had not been able to have contact with her over a prolonged period of time. He had obtained final domestic judgments against his former partner granting him the right to either see the daughter in person or have Skype contact with her; however the judgments remained largely unenforced and no coercive measures had been imposed against his former partner so as to remove the obstacles to contact.

The Committee analysed these complaints together under Articles 3(1), 9(3) and 10(2) of the CRC. Importantly, it did not distinguish between the scope of Articles 9 and 10. In its reasoning, the Committee read in positive and procedural obligations on the part of the state: (i) to take active measures to secure rapid enforcement of judgments and (ii) to proceed expeditiously. This View has been so far subject to one commentary which, while commending the position of the CRC Committee highlighted as problematic the use of terminology alluding to the non-scientific concept of 'parental alienation' and the failure by the Committee to ascertain the views of the child.[103]

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101 The cutoff date for the purposes of the present dissertation is 15 June 2024.

102 Two other complaints which covered the same issue were declared inadmissible by the Committee. *K.A.B. v. Germany*, Communication No. 35/2017, View of 11 July 2018 was discontinued; *L.H.L. and A.H.L. v. Spain,* communication No. 13/2017, View of 15 May 2019 was declared inadmissible as manifestly ill-founded as the assessment of the domestic decisions was not found to be clearly arbitrary or a denial of justice.

103 Yaksic, Case note 2018/2, Communication 30/2017 *N.R. v. Paraguay*, Right to maintain personal relations and direct contact with the father, available at <<https://www.childrensrightsobservatory.org>>.

By way of conclusion, it could be ascertained that the right of the child to have contact with both parents was a topic being discussed already before the drafting stage of the CRC in the context of emerging changes in some national custody laws from sole custody to joint custody which had occurred amid debates on the respective roles of mothers and fathers in raising and educating children. There is no dedicated General Comment on this right, but its importance is highlighted in the Committee's specific provisions to the right to maintain relationships with both parents in the General Comment concerning best interests. Also, in the one view rendered on the substance on the topic, the Committee stressed the importance of the rights and the consequent positive and procedural obligations on the part of the state. However, the relationship between the two paragraphs (3) and (2) respectively of Articles 9 and 10 remains ambiguous. The need for further clarification is necessary especially since these two paragraphs connect children with an immigration background to children who do not have such a background. Immigration is an important -potential- modifier of rights and the tensions that such considerations pose have been evident already from the drafting stage of the Convention.

3.4 The right of the child to be heard

As already touched upon elsewhere in this dissertation, the right of the child to be heard is generally considered to have brought the rights of children closer to the rights of adults by offering them something close to 'due process' which is an uncontested human right for adults.[104] The right to be heard was meant to counterbalance other rights in the Convention such as the best interests which historically was perceived as a vehicle meant to secure the protection of children. The ultimate insertion of Article 12 brought about more criticism to the CRC as a whole as it was generally feared that the voice of children could be used by the state against parents and families.[105]

Similarly to the other two rights discussed herein, this section will start by looking into the discussions carried out at the time of the *travaux préparatoires* of the CRC, followed by a focus on the relevance of the right to be heard to contemporary discussions.

3.4.1 The right to be heard during the drafting process of the CRC

Neither the first draft nor the commentaries to the initial Polish draft included provisions on the child's right to be heard. [106]Article 7 titled "The

104 Clooney/Webb 2021; Zhang 2009.
105 In this sense, see also Chapter 2 of this dissertation and the references therein.
106 Legislative History of the CRC 2007, Document E/CN.4/1324 and Corr 1 and Add.1-5.

child's right to express opinions" was introduced for the first time in the revised Polish draft in 1979 and it read as follows:

> "The States parties to the present Convention shall enable the child who is capable of forming his own views the right to express his opinion in matters concerning his own person, and, in particular, marriage, choice of occupation, medical treatment, education and recreation."[107]

Subsequently, the discussions on what was to become Article 12 were closely interlinked with the discussions on Article 3(2). In 1981, in the context of the negotiations on Article 3, the United States proposed the following text as paragraph 2 of this Article:

> "In all judicial and administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided, and those views shall be taken into consideration by the competent authorities."[108]

The United States then proposed a similar text, slightly amended in the context of discussions concerning Article 7.[109] The slightly revised text introduced the idea of a child capable of forming his own views instead of 'a child that has reached the age of reason'. Further, the possibility of hearing children directly or indirectly was also added.

The ensuing discussions focused in the first place on whether the text should be a subparagraph of Article 3 or an Article on its own. Also, the idea of a child as an independent party to the proceedings was discarded in favour of the more neutral language: "in a manner consistent with the procedures followed in the State Party for the application of its legislation."[110] Some of the proposals also indicated the areas where a child could express his opinions.[111] These areas were ultimately deleted as it was felt that it was not appropriate to limit such a right.[112] Proposals to include the word "effectively" as a means to ensure that the child could *effectively* express his opinion were equally deleted.[113] Other than these discussions which took place in 1981, no other significant developments occurred until the moment of the second reading of 1988-1989. The final text as it now stands resulted

107 Legislative History of the CRC 2007, Commission on Human Rights document E/CN.4/1349.
108 Legislative History of the CRC 2007, Commission on Human Rights E/CN.4/1475.
109 Legislative History of the CRC 2007 document HR / (XXXVII)/WG.1/WP.3.
110 Legislative History of the CRC 2007, para 30.
111 Legislative History of the CRC 2007, para 76 They included education, religion, marriage, choice of occupation.
112 Legislative History of the CRC 2007, para 78.
113 Legislative History of the CRC 2007, para 77.

mainly from a proposal of Finland made at the second reading on behalf of a drafting group.[114]

The discussions carried out during the drafting process are indicative of some of the tensions surrounding the conceptualization of the right. One such tension concerned the types of proceedings for which children should be heard. Initially, several proceedings such as 'marriage, choice of occupation, medical treatment, education and recreation' were expressly included.[115] While such limitation was ultimately deleted it is indicative of the concern States had on the potential breadth the right to be heard might have. Second, the manner of expressing the views was subject to concern. The proposals for a provision mandating independent child representation and the expression of views directly were ultimately removed in favour of a more neutral language giving priority to national laws and procedures. Finally, the interlink between the best interests concept and the right to be heard is evident as the right to be heard was originally seen as a guarantee for securing the best interests of the child.

3.4.2 Current relevance

The right to be heard is one of the four fundamental principles of the CRC.[116] It is also a provision which has been extensively discussed in academic literature, and which, it has been argued, plays an important role in ensuring that children are rights holders and not mere beneficiaries of protection.[117]

In 2009, the CRC Committee published the General Comment No. 12 on the right of the child to be heard (hereinafter "GC 12").[118] Here the Committee recognizes that Article 12 is a unique provision of the Convention situated at the juncture between autonomy and protection.[119] One important point that comes out is that no age limits should be imposed for children so as to allow them to participate in the proceedings.[120] This point had also been made earlier in General Comment No 7 dedicated to children's rights in early childhood when the Committee argued that the views and feelings of young children (under the age of 8 as per the aforementioned General Comment) are frequently overlooked and rejected as inappropriate on the

114 Legislative History of the CRC 2007, Document E/CN.4/1989/WG.1/WP.35.
115 Legislative History of the CRC 2007, Commission on Human Rights document E/CN.4/1349.
116 General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 27 November 2003, para 12.
117 See among many other authorities: Freeman 1998; Parkes 2013; Daly 2018; Lundy 2007.
118 General Comment No. 12 (2009): The right of the child to be heard CRC/C/GC/12, 20 July 2009 (GC No. 12).
119 GC No. 12, para 1.
120 GC No. 12 para 21.

grounds of their age.[121] The Committee affirms that babies and infants are also able to express their opinion, albeit in a different manner.[122] More recently, the same point was made in the context of a communication procedure. In the case of *C.E. v. Belgium*, the CRC Committee found that Belgium infringed Article 12 CRC as it did not hear a 5 year old child.[123] The Committee stressed that Article 12 does not set an age limit for allowing children to express their views and that moreover, the low age or the vulnerability of the child (including his immigration status) should not be used as justifications for depriving children of their right to express their views.[124]

In its legal analysis of the right embedded in Article 12, the Committee underscored that states have no discretion in ensuring its full implementation.[125] In the same vein, Lundy has argued that Article 12 embodies positive obligations for states to take all the necessary measures to ensure that children have the opportunity to express their views.[126] The Committee further highlighted that the States' obligations under Article 12 are underpinned by two elements: the first one is to put in place mechanisms for obtaining the views of children and the second one is to ensure that these views are given due weight.

Furthermore, as per the GC 12, the reference in Article 12 to children capable of expressing their views should not be construed as a limitation but rather as a presumption in favour of capacity.[127] In other words it is for the state authorities to prove that a child is incapable of expressing his views and not the other way around, i.e. for the child to prove that he is capable. Commentators have noted that there is some confusion in practice between the *capacity* of children and their *maturity*.[128] It has been submitted that there is no correlation between children's capacity to express a view and their ability to form a mature view.[129] Thus, all children, mature or not, should be able to express their views with *maturity* playing a role only at the second stage of the analysis: that of giving such views 'due weight'.

One important point to be made is that the right of the child to be heard encompasses the possibility for children to refuse expressing their opinion, even if the matter is affecting them; in other words it is entirely up to the child if he or she chooses to express the views.[130] After a child is heard, the second step in complying with the obligation under Article 12 is to give the

121 GC No. 12 para 14.
122 GC No 7, para 16.
123 *C.E. v. Belgium*, Communication no. 12/2017, 24 October 2018.
124 *C.E. v. Belgium*, para 8.7.
125 GC No. 12 para 19.
126 Lundy 2007, p. 933-934.
127 GC No. 12, para 20.
128 Lundy 2007, p. 935; Daly 2018, p. 440.
129 Lundy 2007, p. 935.
130 GC No. 12, paras 16 and 22.

views "due weight in accordance with the age and maturity of the child."[131] Here again, the Committee stresses that "age alone cannot determine the significance of a child's views" and that the assessment should be made on a case by case basis. [132] Crucially, the Committee does not detail on how the maturity of a child should be assessed; this should be done by states on a case by case basis.

Giving the voice of children 'due weight' has been identified as one of the most problematic and complex parts of Article 12 CRC.[133] This is because due weight is on the one hand linked to the age and maturity of the child and also because it is dependent on the adults' perception of children's maturity.[134] Even if the Committee does not elaborate much on how authorities should give due weight to the voice of children, it highlights that children should be capable of influencing the outcome of cases which concern their rights.[135] This capacity of children to influence outcomes and the fact that authorities can shield away from giving children an actual right to be heard by using more paternalistic and entrenched approaches such as best interests is a key point of criticism for some commentators.[136] This point shall be further elaborated upon in the following section which discusses the balancing of the three core rights of children as identified in this chapter.

Further, the Committee expresses a preference for directly hearing children wherever possible.[137] Direct participation refers to situations where the child meets and communicates directly with the decision maker whereas indirect participation refers to situations where the child is expressing himself through a representative or appropriate body.[138] The GC 12 does not indicate that there is an obligation derived from Article 12 for children to benefit from independent representation by a lawyer or other professional, such as a guardian *ad litem.*[139] It does stress however that where there is a risk of a conflict of interests, "it is of utmost importance that the child's views are transmitted correctly to the decision maker".[140] More recently however, in the General Comment no 14 concerning the best interests of the child the need for separate representation for children in cases of conflicts of interests was made clearer. Here, States are urged to establish a procedure to allow the child to approach an authority to establish separate representation

131 GC No. 12, para 28.
132 GC No. 12, para 29.
133 Parks 2013, p 35, Alderson 2007, p. 2275; Daly 2020, p. 482.
134 Lundy 2007, p. 937.
135 GC No. 12, Para 44.
136 Eekelaar 1994, p. 48., Daly 2018, p. 385, Archard/Uniacke 2021, pp.534-535.
137 GC No. 12, para 35.
138 Parks 2013, pp. 37-38.
139 Similarly Freeman has highlighted the shortcomings of Article 12 on account of a lack of provision for separate representation for children. Freeman 2000, p. 288.
140 GC No. 12, para 36.

if necessary.[141] Also, it is recommended that codes of conduct are drafted for child representatives.[142] Further the practice of allowing children to choose between different forms of representation has been considered in line with Article 12 CRC.[143]

One further interesting aspect is the Committee's interpretation of the phrase "in a manner consistent with the procedural rules of national law" included at the end of the second paragraph of Article 12. Here the Committee specifies that such provision should not be interpreted as encouraging a limitation to the right to be heard but rather as an 'encouragement' for states to comply with the basic rules of fair proceedings, such as the right to defence and the right to access to one's own files.[144]

The Committee also outlines four important steps in appropriately discharging with states' obligations to hear children: (i) the preparation of the child before the hearing; (ii) the hearing of the child, including who hears the child and where, (iii) the follow up of the hearing and finally (iv) how the voice of the child is taken into account in the final judgement.[145] Lundy has used a different frame to express essentially the idea that giving children a true voice in proceedings that affect them requires a delicate balance between certain aspects which are interrelated.[146] Her position, similar to that of the Committee, is based on the fact that children are different from adults but that these differences should not result in ignoring their voices. For children to express themselves effectively it is important to create a safe space where children are not afraid of reprisals or rebuke.[147] Second, giving children a voice implies access to child friendly information and proceedings as well as time to understand the issues.[148] Third, adults should actually listen to children, a notion which is implicit in the idea of 'due weight', and which also recognizes that children do not always express themselves in the same way as adults do.[149] Last but not least, children should be capable of influencing the outcomes of the proceedings they are involved in.[150] It has been recognized that if implemented inadequately, the right of the child to be heard may have negative consequences for children.[151]

The Committee is arguing for child participation in all contexts, provided that child sensitive proceedings are in place.[152]

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141 GC no. 14, para 90.
142 Parks 2013, p. 38.
143 Mol 2019, p. 97.
144 GC No. 12, para 38.
145 GC No. 12, paras 41- 47.
146 Lundy 2007.
147 Lundy 2007, p. 934.
148 Bennett Woodhouse 2003, Lundy 2007, p 935.
149 Lundy 2007, p. 936.
150 Daly 2018, p. 385, plus Lundy 2007, p. 937
151 Parkes 2013, p. 33.
152 GC No. 12, paras 90-132.

To conclude, it can be observed that Article 12 CRC embodies a procedural right for children. The obligations of states under Article 12 are complex and the Committee has shown that children should not only be heard by such right needs to be effective. As a minimum, the Committee emphasises that all children should have the right to express their views. While preference is given for direct contact with the decision maker, indirect contact is also a viable alternative. Second, even if not initially set out, more recent General Comments highlight that children should have the right to independent representation in cases of conflict of interests. This is an important element, as cross border separation cases are by their very nature susceptible to conflicts of interests between parents and children. Third, giving the voice of children 'due weight', means that the more 'mature' a child is the more weight should the voice carry and that in any event children should be able to influence the outcomes in their particular cases. Here, there is an obvious link between Article 12 and Article 5 of the Convention.[153] There is no requirement for a child's opinion to be decisive, however it should have an impact on the decision. Fourth, children have the right to be heard in all decisions concerning them. At the same time, the right embodied under Article 12 CRC stops short of offering children independent standing in legal proceedings or entitling them to challenge decisions in courts of law.

3.5 The relationship between the child's best interests, the right to have contact with both parents and the right to be heard

The CRC offers a holistic vision of children's rights, meaning that the rights enshrined in the Convention are equally important, indivisible and interrelated.[154] Thus, even if the rights identified as 'core' for parental separation cases have been analysed separately, in practice considerations concerning all three of them may and will overlap and decision-makers, courts in particular, will have to analyse them together. The wording of Article 9 clearly illustrates this relationship as it mentions the three rights together. The first paragraph only allowed for the child's separation from parents if due process was followed and subject to a determination of the child's best interests. The second paragraph provides that all interested parties (thus the child as well) shall be given the right to participate in the proceedings and make their views known.

The Committee in its General Comments frequently refers to the interaction between the rights of the CRC. For example, in General Comment No. 12 the Committee identifies the best interests as a procedural right entailing that states introduce steps into the action process, and among these steps,

153 For a discussion on this link see also Chapter II, Section 2.3.2 of this dissertation.

154 CRC Committee, *General Guidelines for Periodic Reports*, UN Doc CRC/C/58, 20 November 1996, para 9.

states have the obligation to hear children.[155] It is further clarified that no tension exists between Articles 3 and 12, but rather that Article 3 provides the objective and Article 12 deals with the methodology. In short, the best interests of the child cannot be realised without giving their voice due weight. The same point has been reiterated more recently in General Comment No. 14.[156] There is also a link between Articles 3, 12 and 5 in that with maturity children's views should weigh heavier in the assessment of their best interests.[157] The Committee envisages thus that children should have the possibility to determine their best interests, and for this to be accomplished Article 12 plays a crucial role. It is here that most tensions have been perceived between Articles 12 and 3 as the latter has emerged as a paternalistic principle with adults determining what is best for children whereas the former embodies children's agency. On the face of it they are irreconcilable. Yet if it is accepted that children should be able to determine their own best interests, their voice carrying a bigger weight the more mature they become, then a more balanced approach between best interests and agency emerges. Nevertheless, it has been highlighted that considerations about best interests (seen from an adult perspective) tend to prevail over the voice of children.[158] Adults often substitute their own beliefs for those of children to the effect that especially in family cases children's voices are given 'due weight' in the sense of being able to influence outcomes only to the extent that they accord with the judges' / decision – makers perception about what is in the best interests of children.[159]

It remains to assess how the right to have contact with both parents fits in relation to best interests and right to be heard. Not much has been written about this right in and of its own, yet, Articles 9 and 18 in particular have arguably provided the justification for modern custody laws laying down the principles of joint parental responsibility of parents even after divorce or separation.[160] Furthermore, the text of Article 9 has been interpreted to mean that it is in the best interests of children to maintain personal relationships with both parents even after separation. This means that this right brings substance to the otherwise vague concept of best interests. At the same time, it could be perceived as an element of the best interests concept, and it has been indeed listed as one especially in family law jurisdictions using checklists for determining the best interests of a child in a particular dispute.[161] The relationship between Article 9(3) and 10(2) in particular has also not been explored in detail in literature in particular in so far as it concerns issues of immigration and residence. As it has been discussed

155 GC No. 12, para 70.
156 GC No. 14, para 43.
157 GC No. 14, para 44.
158 Daly 2018; Archard/Skivenes 2007.
159 Daly 2018; Archard/Skivenes 2007.
160 Mavrogordatos 1996, p. 10.
161 For example Section 1 Children's Act for the United Kingdom; Section 60 of Family Law Act 1975; For the US, Caulley 2018; Elrod 2016.

above, neither the *travaux préparatoires* to the CRC nor the recent case law of the CRC Committee support the interpretation that states are entitled under Article 10 to deport a parent, thus breaking up an existing relationship between a child and a parent. Article 10(2) seems to apply to situations where parents already live in different states. Nevertheless, to date there is no official interpretation on these provisions, and as has been shown above, immigration was one of the salient points during the drafting of the CRC.

3.6 Manifestations of the three rights in post-separation parenting disputes: the parental alienation syndrome

The best interests of the child, the right to have contact with both parents and the right to be heard have gained substantial importance in post parenting separation disputes across liberal democracies. Parental child abduction is also one such dispute, and these rights are important as well, albeit in a more limited fashion.[162] At the same time, discourses around children's rights have developed alongside wider debates in family law between feminist groups and groups representing father's rights movements. These tensions form the backdrop of many current-day family proceedings as well as parliamentary debates on changing legislation. The different positions are briefly discussed below, with the explicit disclaimer that the present dissertation focuses on the rights of the child, while also acknowledging the close link between the child and their parents.[163]

The BIC is now universally accepted as the guiding principle in post separation parenting disputes across the Global North.[164] Legislation in all European Union countries, Australia, Canada, New Zealand, United States and United Kingdom mandate that the best interests of the child shall guide decisions after parental separation. At the same time it is widely accepted that the best interests is one of the most amorphous legal concepts of all times.[165] As discussed in the preceding sections, its vagueness has prompted some commentators to disregard it as a valid legal standard.[166] Nevertheless, the BIC remains the key determinant around which parental separations are organised.

While the BIC has been enshrined in family law since the 1800s, the right to maintain contact with both parents has had a much shorter existence. Sociologists have shown that the introduction of no-fault divorce in the late 1970s resulted in a reconfiguration of the previously accepted legal position of the child in relation to their parents after separation.[167] The *logic*

162 See Chapter 4.
163 See also Chapter 4.
164 Daly 2018; Boele-Woelki 2008; Van Krieken 2005.
165 Smyth 2015, p. 71.
166 Mnookin/Maccoby 2002; Guggenheim 2005, supra Section 3.3.
167 Thery 1986; Van Krieken 2005.

of substitution which existed until that time, had focused on the mother as the centre of the child's emotional development assuming that both parents will re-partner and that children will gain a step parent to substitute for the departing parent. [168] It was subsequently replaced by the *logic of durability* which focused on continuing contact between the child and both parents even after their separation.[169] Divorce became a way of redefining relationships over a long period of time rather than ending them.[170] "The best interests standard was reconceptualised to include a 'right' to contact with both parents after separation, leading to arguments either for joint custody arrangements or some alternatives to the concept of custody itself."[171]

These transformations in family law resulted in an increased focus on the right of the child to maintain contact with both parents, manifested through presumptions in favour of contact, shared parenting laws or joint physical custody.[172]

Amid these legislative changes, the debates over child custody became increasingly gendered. Mothers' rights groups have argued that modern post separation parenting arrangements (including shared care provisions, alternative dispute resolution, presumptions for contact, etc) do not adequately take into consideration the realities of domestic violence and may result in harming children.[173] Their arguments focused on the vulnerability of victims of domestic violence,[174] the failure of the courts to take into account the harm inflicted on children by exposure to domestic violence or the harm on children of the rigid application of the presumption of contact.[175]

On the other hand, supporters of the fathers' rights movements have insisted on the positive impact of children to maintain a relationship with their fathers and the gatekeeping roles which mothers have played in denying this contact.[176] Fathers' rights groups focused on the benefit for children of the presumption of shared parenting and increased father involvement in the upbringing of children after divorce.[177]

In 1992 Gardner published a study introducing the term 'parental alienation syndrome' to distinguish between substantiated and unsubstantiated allegations of sexual abuse towards children in high conflict custody litigation.[178] He defined parental alienation syndrome (the "PAS") as:

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168 Thery 1986 has coined the two terms: logic of substitution and logic of continuity; Van Krieken 2005, p. 26
169 Thery 1986, Van Krieken 2005, p. 26.
170 Schepard 1999, p. 396.
171 Van Krieken, p. 34
172 DiFonzo 2014; Kaganas 2018; Treloar/Boyd 2014.
173 Scott/Emery 2014, p. 69.
174 Schuller and Vidmar 1992; Chesler 1991.
175 Bailey-Harris/Barron/Pearce 1999; Cohen/Gershbain 2001, p. 121.
176 Kruk 2010.
177 Pruett/Cowan/Cowan/Diamond 2012.
178 Gardner 1992.

"a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a good, loving parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present the child's animosity may be justified, and so the parental alienation syndrome diagnosis is not applicable."[179]

Gardner further qualified PAS as mild, moderate and severe and listed several symptomatic manifestations.[180] The use of PAS rapidly expanded beyond allegations of sexual abuse of children and it forms now an important consideration for courts and legislators across the world.[181] It is also being argued that the severe form of parental alienation, resulting in prolonged lack of contact between a child and the target parent amounts to emotional child abuse.[182] In this view, parental alienation represents a significant form of harm to the child's well-being and the abuser is the alienating parent.[183] Contrary to Gardner's original proposal, it has also been suggested that the only reason a child may refuse contact with a parent is because of alienation as otherwise "it is counter-instinctual for a child to reject a parent, even an abusive parent."[184]

The scientific value of PAS continues to be contested and there is a wealth of literature from various disciplines engaging with its usage in family courts.[185] The WHO International Classification of Diseases clarifies that there are no evidence-based health care interventions for parental alienation.[186] It is beyond the scope of this dissertation to undertake a detailed exploration of contemporary usages of PAS. It is however important to note that it is now widely understood that PAS applies to questions of contact and judges are inclined to consider whether the refusal of a child of contact

179 Gardner 2002, p. 192.

180 According to Gardner these manifestations are 1. A campaign of denigration 2. Weak, absurd, or frivolous rationalisations for the deprecation 3. Lack of ambivalence 4. The "independent-thinker" phenomenon 5. Reflexive support of the alienating parent in the parental conflict 6. Absence of guilt over cruelty to and/or exploitation of the alienated parent 7. The presence of borrowed scenarios 8. Spread of the animosity to the friends and/or extended family of the alienated parent. See Gardner 2002, p. 193.

181 Johnston and Sullivan 2020; Rathus 2020.

182 Kruk 2018.

183 Kruk 2018, p. 145.

184 Kruk 2018, p. 144, he also refers to research in the child protection field, Gottlieb, L. J. 2012.

185 For example the Center for Knowledge Management at Vanderbilt University hosts a database with more than more than 1,000 books, book chapters, and articles published in mental health or legal (see https://ckm.vumc.org/pasg/), last accessed on 18 October 2023. On the other hand in their study, Saini and others cite 45 research papers and 13 doctoral dissertations on the topic Saini, Johnston/Fidler/Bala 2016.

186 The Index uses the term 'parental estrangement', see << https://www.who.int/standards/classifications/frequently-asked-questions/parental-alienation>>.

with a parent is genuine or whether it is due to PAS. Johnston and Sullivan indicate that courts tend to identify a binary problem: a situation is either abuse or it is PAS.[187] In their view the question is more complex and courts generally fail to identify whether a child's refusal of contact with a parent is the result of other factors such as inadequate parenting, an over-anxious protective parent or ill-fitted access schedule.[188] They also caution against assuming a singular motivation and towards an identification of whether the allegations are rooted in actual events or trauma and abuse and the extent to which a parent's motivation -even if misguided- is motivated by an attempt to cope and protect the child rather than to spite the other parent.[189]

From the perspective of children's rights, it has been proposed that, while contact with both parents is indeed important for children, an excessive focus on contact which negates children's agency is contrary to their rights.[190] Based on her research in 11 liberal democracies, Daly identified that children have little influence in decisions concerning their interests and that there is no methodology for ascribing due weight to children's views.[191] She also found that even when children are heard, their voice is hardly ever capable of influencing the outcome of the proceedings; her findings indicate that this usually only happens when there is a convergence between the child's voice and the outcome to which a judge agrees.[192] The failure of courts to give children's voices due weight in proceedings has been echoed in other research focused on child participation.[193] It has also been highlighted that among professionals working with children in disputed contact cases there is a very real concern that children have been coached by the resident parent to refuse contact with the non-resident parent or that hearing children places excessive responsibilities on their shoulders.[194] From the perspective of children's rights this also brings to the fore the careful balance which must be drawn between protection and participation as an overemphasis on protection of children results in a corresponding devaluation of children's participatory rights.

Daly has proposed that children's wishes are prioritised in best interests proceedings (which include parental separation proceedings) and she has used arguments on the basis of children's autonomy in support of this claim.[195] In her view, children's wishes should be capable of influencing the

187 Johnston/Sullivan 2020, p. 275.
188 Johnston/Sullivan 2020, p. 272.
189 Johnston/Sullivan 2020, p. 272.
190 Daly 2018.
191 Daly 2017.
192 Daly 2018, p. 63.
193 Taylor 2012, Birnbaum/Bala/Boyd 2016; Holt 2018.
194 Tisdall/Morrison/Warburton 2021, p.18; Höjer/Röbäck 2009; Rap/Smets 2021 note that in high conflict cases professionals' worries about the child's safety take over the involving children in the decision-making process, Rap/Smets 2021, p. 57.
195 Daly 2018, p. 86.

outcome of the proceedings provided that no significant harm to the child arises from following their wishes. Daly's proposal is that children should also choose if they wish how they are involved in the proceedings.[196] This proposal stems from her criticism to domestic courts' current processes whereby, she argues, children are exposed to higher standards of rationality than adults and where not much reasoning is usually provided by decision makers as to why the child's voice had not been considered or how it had been accorded due weight in a specific best interests determination.

Finally, from the perspective of children's rights it is important to note that the CRC Committee has not expressed any position on the PAS or on the issue of undue influence of one parent in relation to the right of the child to maintain relations with the other parent. The CRC Committee has however considered that joint parental responsibilities is in the best interests of children and has ruled that states have a positive obligation to enforce contact with children.[197] However, at the same time, when looking at the right of the child to be heard, both the CRC Committee and scholars have proposed that giving due weight implies the acceptance that children's voices must have some impact on the outcome of proceedings. As shown above, the CRC Committee has been criticised for its vagueness on the application of the due weight criterion. Nevertheless, the Committee appears to accept that the child's voice should be an important if not the most important factor in assessing the child's best interests. From a children's rights perspective thus the child's voice should guide the assessment of the contact with both parents, rather than the opposite. The nuances of weighing children's voices have been assessed in the relevant section.

3.7 Conclusions

Cases involving parental separation entail changes in how the relationship between the child and each of the parents unfolds. If parents do not share the same household, decisions on where the child will live and how they will spend time with both parents are inevitable. Each case of this nature, be it national or with cross-border elements, involves as a minimum the assessment of three rights: the best interests of the child, the right to have contact with both parents and the right of the child to be heard. For this reason, this dissertation identifies these three rights as 'core rights of the child'. This chapter analysed these three rights primarily from the perspective of the CRC. Sections 3.2, 3.3 and 3.4 analysed the three rights starting with the *travaux préparatoires* of the CRC and then focusing on CRC based interpretations. The *travaux préparatoires* revealed that there was not much disagreement on the inclusion of any of these rights in the Convention. This is hardly surprising especially since, as shown in the historical overview, all

196 Daly 2018, p. 83.
197 G.C. no. 14, para 67. See also Section 3.3.2 above.

three core rights were known to national jurisdictions well before the drafting of the Convention. When disagreements arose, they revolved around immigration issues. States showed clear reluctance to having an international instrument encroaching on their power to regulate immigration. Further, disagreements arose in relation to the right to be heard. This is because it was believed that children would receive an independent litigation position via Article 12. Put differently, states agreed whenever they saw the Convention as a mere extension of existing concepts of national family laws. They disagreed whenever the rights of children and their families arguably extended to new areas. These new areas changed children's position from passive recipients of protection to active agents in their own name. These tensions are yet a new exposition of a recurrent theme: children's rights are largely agreed upon if the core element is *protection* and significantly less so when protection should give way to *agency*, or when protection means changing existing approaches (as in the case of migration).

Further, the analysis of the current interpretation of these three rights focused on the existing CRC Committee General Comments and academic commentaries around these General Comments. The choice was explicit as scholarly works on each of the three rights is abundant and it would be largely impossible to cover the material within a single study. Second, the aim was to ascertain what the CRC has changed or is aiming to change regarding these specific rights. For each of the three rights it could be concluded that the CRC as interpreted by the CRC Committee encourages individual decision-making in a way that is suitable for children. The best interests of the child and the right of the child to have contact with both parents are two interrelated principles, in that it is generally agreed that it is in the best interests of the child to have contact with both parents. Further, the CRC Committee so far did not distinguish between national situations and situations with cross border elements. This dissertation thus posits that the right to have contact with both parents can be seen as an element adding substance to the otherwise vague best interests principle. Further, as has been shown in Section 3.3.2 it is generally through reasoning and procedures that the best interests could gain significance and depart from being a paternalistic principle to becoming a true right of the child. In the specific context of judgments, judges are encouraged to articulate the considerations which led them to find that a particular course of action is or is not in the best interests of the child. The right to be heard acts as a balancing factor, meaning that the Committee encourages the decision makers to attach more weight to the views of children (in light of their evolving capacities) and explain why the voices of children have not been taken into account, should that have been the case. This would result in children increasingly being able to influence outcomes in cases concerning them. It can hardly be argued that the child's best interests were upheld if the child was not heard in a particular matter. In General Comment no 12, the CRC Committee proposes that children of all ages are heard. The more mature the child,

the heavier their voice should weigh. There is a clear link between the right to be heard and the procedural side of the best interests principle. A child rights-based approach obliges judges to explain *how* the voice of children has been given due weight in particular cases. Children should be able to influence judicial outcomes in cases concerning them.

The discussion concerning children and their (alleged) impossibility to influence the outcome of proceedings has been briefly contextualised in Section 3.6 with reference to contemporary debates between different interest groups. These discussions, and underpinning policy considerations form the backdrop of contemporary family proceedings, and they inform policy making, legislation and judicial decision-making. From the perspective of post-separation parenting, it is important to acknowledge the influence of parental alienation syndrome. It is equally important to distinguish it from a child rights-based approach.

To sum up, it could be seen that the best interests of the child, the right to have contact with both parents and the right to be heard were well-known principles in family law procedures across liberal democracies well before the drafting of the CRC. Their inclusion in the Convention was not so problematic from the perspective of family law, but states were significantly less ready to agree to apply them to immigration proceedings or to give children's voices an independent status in litigation. Through its General Comments and more recently through the views expressed in the context of the communication procedure, the CRC Committee is encouraging states to move further towards a child rights-based approach. In the context of individual decision-making this means that judges should explain what they mean when they argue that a particular decision is in the best interests of the child. That equals to giving substance to the concept. Further, neither the Convention nor the CRC Committee appear to distinguish between the right of the child to have contact with both parents depending on their immigration status. Last, the right to be heard is increasingly being interpreted as mandating that children are being granted independent representation in proceedings if there is a conflict of interests between the parties and that children should have the capacity -in certain conditions- to influence cases concerning them. All these factors should contribute to bringing about childrights-oriented judgments.