

Principles and Prospects for a European System of Child Protection

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*Abstract**

In the process of restating the principles of European family law currently underway, it should be asked to what extent a common European system of child protection exists and what principles and values it comprises. In our view this system is multi-polar and has to be built from the principles of the United Nations Convention on the Rights of the Child (1989), the instruments emanating from the Council of Europe, and especially from European Court of Human Rights case law. The article sets out and discusses the procedural and substantive principles derived from this case law. Although the UN Convention and ECtHR case law – applying the Rome Convention – approach child protection from opposing perspectives (in one case the affirming of children’s rights, and in the other, the right to respect for family autonomy) a trend towards convergence and interaction between Conventions and their monitoring bodies can be discerned in recent ECtHR decisions. The final part of the article assesses this trend and the perspectives for the future.

En el proceso de formulación de principios del derecho de familia europeo actualmente en curso, cabe preguntarse hasta qué punto existe un sistema europeo común de protección de menores y, en su caso, qué principios y valores lo integran. Sostenemos que el marco europeo de protección de menores es multipolar y se configura a partir de los principios de la Convención de Naciones Unidas sobre los derechos del niño (1989), de los instrumentos emanados del Consejo de Europa y muy especialmente de la jurisprudencia del TEDH. Este trabajo expone y discute los principios procedimentales y sustantivos que pueden extraerse de esta jurisprudencia. Si bien la Convención de NU y la jurisprudencia del TEDH –aplicando el Convenio de Roma– parten de perspectivas antagónicas (en un caso, la afirmación de los derechos del menor, y en el otro, el derecho al respeto de la autonomía familiar), se percibe, por parte del Tribunal de Estrasburgo, una creciente voluntad de aproximación e interacción entre ambas Convenciones y sus organismos de supervisión. La parte final del trabajo valora esta tendencia y las perspectivas de futuro.

Palabras clave: protección de menores; derechos del niño; guarda o custodia alternativa; entidades de protección de menores; autonomía familiar

Keywords: child protection; children’s rights; alternative care; child welfare agencies; family autonomy

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1. Introduction: a European system of child protection?

The protection of children and the recognition of children's rights have become a fundamental principle of social and legal policy in Europe. The European Union has emphatically undertaken to make the protection of children's rights against all forms of abuse a priority in its strategic objectives¹. In the same vein, the European Charter of Fundamental Rights recognizes the right of children to such protection and care as is necessary for their well-being (Art. 24-1)². A significant number of Council of Europe treaties, resolutions and recommendations also assert children's rights and define standards for child protection in many different settings³.

However, beyond this consensus and these achievements, the nature, extent and practical effectiveness of measures to advance such rights and provide due protection in national legal systems remain highly variable. European countries have made significant progress towards reducing the number of children in residential care and replacing large-scale institutions with family-type residential homes, but this development has been uneven. Statistics show that high numbers of children – rates vary between 5 and 20 children per 1000 – are still placed in alternative care in central and eastern Europe (including countries outside the EU), most of whom live in residential facilities⁴. Non-governmental

¹ As regards EU children's policy see generally RUXTON (2005, pp.19-30). Among the recent policy developments on children's rights within the EU see:

(i) the *Communication on Strategic Objectives 2005-2009* [COM(2005) 12, 26.1.2005], in which the Commission identifies children's rights as a particular priority of EU action;

(ii) the *Communication from the Commission "Towards an EU Strategy on the Rights of the Child"* [COM(2006) 367, 4.7.2006], which marks the Commission's launch of a long-term strategy, structured around specific objectives, each supported by a series of actions;

(iii) the *EU Guidelines for the Promotion and Protection of the Rights of the Child* (available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/16031.07.pdf>) adopted by the Council on 10.12.2007, which spell out the basic principles and objectives of the EU's external policy towards children, including an Implementation Strategy that selects the area of "All Forms of Violence against Children" as a first priority area, and

(iv) the *Communication from the Commission "A Special Place for Children in EU External Action"* [COM (2008) 55 final, 5.2.2008].

² *Charter of Fundamental Rights of the European Union* (OJ C 364, 18.12.2000), available at: http://europa.eu.int/comm/justice_home/unit/charte/index_en.html.

³ See *Council of Europe achievements in the field of law – Family law and the protection of children*, version August 2008 [CJ-FA (2008) 2].

⁴ GUDBRANDSSON Report (2006, pp. 36-40). See also general data on child poverty, social exclusion and violence against children within the EU in RUXTON (2005, pp. 41-60) with further information.

organizations in many countries have expressed concern about the insufficient assistance given to vulnerable families, the too-frequent resorting to institutionalization policies and the persistence of cases of negligent care or, even worse, of outright mistreatment of children placed in institutions⁵.

This variability in the development of national child protection systems has many causes. The key factors contributing to the persistence of differences are not the heterogeneity of national legal systems, though certainly noteworthy, nor the dissimilarities in the design of rules and legal procedures, but the variety of the complex structures through which child protection is provided (including levels of social services and family support provision), the weight of professional ideologies and the different cultures or social philosophies of the States or communities in which child welfare decisions are taken⁶.

For this reason, in spite of public opinion's habitual demands for legal changes when worrying reports or statistics are released or when serious incidents in the performance of state agencies come to light, legal reform is probably not one of the most important steps to be taken in the first instance. The improvement of European child protection systems requires efforts in many directions, but not primarily in the legal field. Passing laws has become an easy way to avoid coming to terms with problems which require much more complex action. The legal foundations upon which child protection and children's rights rest in Europe are sound and have been shown to be flexible enough to adjust to societal changes. Aspiring to build a fully-fledged European child protection system with common substantive rules, standards and procedures is at the present time neither politically realistic nor, perhaps, desirable⁷. As the European Court of Human Rights (hereinafter ECtHR) has repeatedly pointed out:

"Perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one state to another, depending on such factors as traditions relating to the

⁵ A good example of these shortcomings can be seen in the Spanish Ombudsman's report "Centros de protección de menores con trastornos de conducta y en situación de dificultad social" (2009) ("Care centres for children with behavioural disorders and in situations of social difficulty") [available at: <http://www.defensordelpueblo.es/index.asp?destino=informes2.asp>]. The report, which shocked Spanish public opinion, describes the living conditions of teenagers with behavioural disorders who had been placed in institutional care, and denounces situations involving the denial of rights, poorly resourced premises, forced medication, physical restraints and humiliating punishments.

⁶ Concerning the relevance and interaction of these three factors (structures, professional ideology and culture), particularly when comparing different child protection systems, see HETHERINGTON (2007, pp. 33-45).

⁷ The EU lacks general competence in the area of children's rights, but has to take these rights into account in the development of its policies and may even take positive action on them under various specific competences. As regards the instruments or methods for intervention, the Commission suggests resorting not only to legislative action, but also to soft law, financial assistance or political dialogue (see Communication "Towards an EU Strategy" par. I.3, cited in n. 1).

role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area”⁸.

At present, the most practicable policy is striving for approximation among legal cultures by emphasising shared principles, putting differences into perspective rather than denying them, and creating a progressive European consciousness⁹. Agreement on common values has already allowed the formulation of common European legal principles which have been enshrined in many treaties, conventions and other international instruments. As principles continue to be shaped in international texts, equivalent legal standards, though not necessarily identical rules, are gradually emerging. On an academic level, normative convergence is being assisted by the work done by the Commission on European Family Law (CEFL). Drawing from the common core of family law in many European countries and resorting to a “better law approach” whenever there is substantial divergence among legal systems, the CEFL is currently drafting sets of Principles which are deemed to be suitable for the harmonising of family law¹⁰. Although no specific child protection principles have been drafted to date, the CEFL has published a set of Principles Regarding Parental Responsibilities which are relevant to the position of child carers (including public institutions), given the broad concept of parental responsibility embraced by the drafters¹¹.

An authoritative restatement of the principles constituting the backbone of child protection law in Europe would certainly be of great value for the sake of certainty and clarity. However, this would not significantly change the law in action: most of these principles have already been laid down in international instruments and ECtHR case law, and have consequently permeated national legal systems. Remaining differences among these systems – relevant as they are – have mainly to do with different family and social policies, policies which in turn are conditioned by highly different levels of public provision of resources to attend to social welfare needs.

⁸ ECtHR *Johansen v. Norway* (No. 17383/90), 7 August 1996 (paragraph 64).

⁹ PINTENS (2003, pp. 28-29).

¹⁰ The CEFL is an independent body of European academics, established in 2001, whose main objective is the creation of Principles of European Family Law. The Principles are primarily aimed at national, European and international legislators who are considering modernising relevant areas of family law (BOELE-WOELKI *et al.*, 2007, pp. 1-6). As to the working method of the Commission, see also BOELE-WOELKI (2005, pp. 15-38).

¹¹ See BOELE-WOELKI *et al.* (2007). Regarding the concept of parental responsibilities and the holders of such responsibilities, see Principles 3:1 and 3:2, and the accompanying legal references, comparative overview and comments (*ibid.*, 25-33).

The tenets of the European system of child protection in its present form can be retrieved from three different settings¹²:

- They derive, firstly, from the United Nations human rights instruments and especially from the United Nations Convention on the Rights of the Child (UNCRC)¹³. The Convention (adopted in 1989, in force from 1990) is of paramount importance as regards children's rights and child protection. It is a worldwide instrument which sets out children's human rights and the standards towards which States must strive in implementing these rights. It also enshrines child protection duties, sets out some basic conditions for interference in family life and details a number of measures that States have a duty to adopt to protect children. It has been developed and interpreted by means of guidelines as well as recommendations aimed at States Parties by the Committee on the Rights of the Child (hereinafter CRC). Although this is not a specifically European instrument, it has had an obvious incidence on treaties and conventions of European scope and in domestic jurisdictions, insofar as it binds all European States by international law.

- Secondly, reference has to be made to the instruments produced and adopted under the aegis of the Council of Europe. The specific European dimension of children's rights and child protection lies mainly with several Council conventions, especially the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) (1950)¹⁴, the European Social Charter (revised) (1996)¹⁵, the European Convention on the Exercise of Children's Rights (1996)¹⁶, the Convention on Contact Concerning Children (2003)¹⁷, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)¹⁸, and the revised European Convention on the Adoption of Children (2008)¹⁹. In matters of child protection in a strict sense (i.e. state intervention in family life and interference with parental autonomy with the aim of protecting abused or neglected children), the focus must be primarily on the ECHR, whose system of monitoring and enforcement has allowed an extensive body of case law to develop. In some specific areas, the recommendations and resolutions passed by the Parliamentary Assembly and the

¹² For summarized information about European legal developments in the field of child protection, see FERRER RIBA (2009, pp. 973-977) and DUTTA (2009, pp. 977-981).

¹³ United Nations, *Treaty Series*, vol. 1577, No. 27531.

¹⁴ European Treaty Series (ETS) No 5.

¹⁵ ETS No 163.

¹⁶ ETS No 160.

¹⁷ ETS No 192.

¹⁸ ETS No 201.

¹⁹ ETS No 202.

Committee of Ministers of the Council of Europe dealing with child protection and institutional care should not be ignored either²⁰.

- A third pillar of the European system of child protection, of great practical importance with respect to children in danger in cross-border situations, consists of the treaties and regulations in the field of private international law. Two instruments are particularly relevant. The first, whose application extends beyond Europe, is the Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (1996, in force from 2002)²¹. The second is Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility (also called “revised Brussels II Regulation”)²². Both instruments aim to establish rules on jurisdiction (i.e. determining the competent authority) and on the recognition and enforcement in another country of judgements, decrees, orders and decisions pronounced by public authorities in a Member State. In addition, the Hague Convention also contains rules setting out the applicable law. The concept of parental responsibility in these instruments is very broad: it extends to the designation of any person or body having charge of a child’s person or property, or representing or assisting a child, and also to the placement of a child in a foster family or in institutional care, among other situations (Art. 3 (d) (e) of the Hague Convention; Art. 1.2 (c) and (d) of Regulation 2201/2003).

The European Court of Justice (ECJ) was called upon to decide whether an order issued by a Swedish Social Welfare Board to take two children into care could be enforced in Finland²³. After the order had been issued the mother took up residence in Finland, accompanied by her two children, who she placed with their grandmother. The European Court disregarded the fact that decisions concerning the taking of children into care and their placement are governed by public law in Finland and decided that both decisions fell within the scope of the “civil matters” listed in Art. 2 of the European Regulation. Thus, the Regulation was applicable and the decision issued by the Swedish authorities could be enforced in Finland. The ECJ ruling in this case

²⁰ See the Recommendations from the Parliamentary Assembly of the Council of Europe No 1071 (1988) on child welfare – Providing institutional care for infants and children; No 1371 (1998) on abuse and neglect of children; No 1601 (2003) on improving the lot of abandoned children in institutions; No 1698 (2005) on the rights of children in institutions [follow up to Recommendation 1601 (2003)], and No 1778 (2007) on child victims: stamping out all forms of violence, exploitation and abuse, as well as Resolution No 1530 (2007) on the same subject. See also the Recommendations of the Committee of Ministers No R(79) 17 concerning the protection of children against ill-treatment; No R(87)6 on foster families; Rec(2005)5 on the rights of children living in residential institutions, and R(2006) 19 on policy to support positive parenting.

²¹ See text, status table and bibliography at:

http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70.

²² Official Journal 2003 L 338/1.

²³ Case C-435/06, judgement ECJ (Grand Chamber), of 27 November 2007.

regarding the inclusion of public measures of child protection within the scope of the term “civil matters” was reaffirmed in a later judgement²⁴.

The broad interpretation of the Hague Convention and the European Regulation’s scope of application to matters of child protection, which the C. case exemplifies, greatly fosters international cooperation between social welfare boards or courts of justice in cross-border settings. While the prospects for a (substantive) European system of child protection are certainly debatable, it is important to recall the existence of a common (conflictual) system made up of rules which facilitate mutual cooperation by recognizing and enforcing decisions taken by any EU Member State’s internal authorities in all other Community countries or in third countries which have ratified the Hague Convention.

2. Child protection in the UN Convention on the Rights of the Child

The UNCRC was the first legally binding international instrument to recognize the full range of children’s fundamental rights, including civil and political as well as economic, social and cultural rights. It sets out human rights already addressed by other instruments, but does this from a child-centred perspective. A significant number of its provisions are central to the social and legal policies developed by States in the field of child protection²⁵.

The Convention emphasizes the primary responsibility of parents or legal guardians for the upbringing and development of the child and imposes on States a duty to render appropriate assistance to parents and legal guardians in the performance of these responsibilities, including a duty to ensure the development of institutions, facilities and services for the care of children (Art. 18.2). The failure of parents or other legal guardians to fulfil their duties may lead to the taking of public measures for child protection. According to Arts. 3.2 and 19.1 UNCRC, States undertake to ensure child protection and specifically to take all appropriate measures to protect children from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents or other persons with responsibility for child care. The Convention provides a detailed list of the protective measures which States should undertake as appropriate: these measures should include effective procedures for establishing social programmes to provide support for children and their carers; other forms of prevention; procedures for identification, reporting, referral, investigation, treatment, and following up of instances of ill-treatment and judicial involvement (Art. 19.2). States also have to ensure that institutions, services and facilities responsible for the care or protection of children conform to adequate standards (Art. 3.3).

²⁴ Case C-523/07, judgement ECJ (Third Chamber), of 2 April 2009.

²⁵ On the incidence of the UNCRC on child protection policies see DOEK (2006, pp. 21-31) and CANTWELL AND HOLZSCHEITER (2008).

Separating a child from his or her parents against their will is exceptional: it is only admitted when the competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the child's best interests, as it is in cases of abuse or neglect (Art. 9.1). In the proceedings which may lead to the child's separation from his or her parents all interested parties should have an opportunity to participate and make their views known. The separation must not deprive the child of his or her right to maintain personal relationships and direct contact with both parents on a regular basis, except if this is contrary to the child's best interests. Children who are temporarily or permanently deprived of their family environment are entitled to special protection or assistance (Art. 20.1). States must ensure alternative care in particular for these children (Art. 20.2). The Convention does not establish criteria for choosing the most suitable type of placement: care can include foster placement, *kafalah*, adoption, or, "if necessary", placement in suitable institutions (Art. 20.3). It seems clear from the provision's wording that family-based alternative care is preferable to institutional care. In any event, periodic reviews of child care placements have to be carried out (Art. 25).

Because of the nature of many of the rights set out in its text, compliance with the Convention is being achieved only progressively. States commit themselves to taking all measures appropriate for implementing the rights set out in the Convention, and doing so –when it comes to economic, social and cultural rights– to the greatest extent their available resources allow (Art. 4). The Convention, however, lacks an enforcement mechanism to allow for the adjudication and redress of individual violations of rights. Monitoring the fulfilment of the rights and obligations assumed under the Convention is entrusted to the Committee on the Rights of the Child (CRC), composed of ten international experts to whom reports are periodically submitted by the States Parties (Art. 44). The CRC then issues concluding observations, which are statements derived from its consideration of these reports. The progressive and effective realization of the Convention's rights and obligations depends in practice on its persuasive moral force, and on national authorities' willingness to heed domestic and international criticisms and pressures on the basis of the recommendations made by the CRC in its concluding observations. The Committee's approach to the protection of children's rights is therefore advisory and non-adversarial and relies on diplomacy rather than on legal sanction²⁶.

The effectiveness of the rights and achieving of the standards set out by the UNCRC is also fostered by the work of many international bodies, national governments and non-governmental organizations. An important step towards improving the implementation of the UN Convention in the field of child protection has been the drawing up and publication of the "*Guidelines for the Alternative Care of Children*" (2009)²⁷.

²⁶ KILKELLY (2001b, p. 309).

²⁷ See the text of the Guidelines in the Annex of the Resolution A/RES/64/142 adopted by the UN General Assembly on 18 December 2009 (65th plenary meeting).

The document originated from a research and advocacy programme launched in 2004 by UNICEF and International Social Services (ISS) with the aim of developing international standards for improving the protection of children deprived of parental care. The initiative was reinforced by the CRC in 2005. During its 2005 “Day of General Discussion” the Committee recommended the preparation of a set of international standards for the protection and alternative care of children without parental care for the UN General Assembly to consider and adopt²⁸. Following this recommendation, a draft was prepared in consultation with international organizations, NGOs active in the field and other participants, including young adults who had experienced alternative care. A revised version of the draft, which took into account comments made by the CRC and other experts, was presented to the CRC by the Brazilian Government, with a view to taking it forward for adoption by the UN General Assembly. In its 63rd session (2008), the Assembly invited States to dedicate all their efforts to taking action on the draft within the Human Rights Council. Finally, on the occasion of the 20th anniversary of the adoption of the UNCRC, the Third Committee of the UN General Assembly approved a draft resolution, which was later adopted as a Resolution by the Plenary of the General Assembly. According to this Resolution, the Assembly “welcomed” (but did not formally adopt) the Guidelines “as a set of orientations to help to inform policy and practice” and encouraged States “to take them into account and to bring them to the attention of the relevant executive, legislative and judiciary bodies of government, human rights defenders and lawyers, the media and the public in general”.²⁹

The Guidelines – an extensive set of proposals divided into 9 parts and 166 paragraphs – tackle all major questions posed by alternative care, including the promotion of parental care, the adoption of specific measures for the prevention of family separation and for family reintegration, the general care provision framework, the determination of the most appropriate form of care, and the provision of alternative care in general, for children outside their habitual country of residence, and in emergency situations. The main thrusts of the Guidelines are:

- Furthering parental care, with government policies directed at the prevention of child abandonment and family separation, and at the promotion of family reintegration (paragraphs 31-51).
- Prioritising family and community-based care solutions over institutional arrangements (par. 22) and regularly monitoring and reviewing entities and individuals engaged in the provision of alternative care (par. 127-129).
- Decision-making on alternative care based on rigorous assessment, planning and reviewing, stating the placement goals on a case-by-case basis and with full consultation with the child and his or her parents or legal guardians (par. 56, 63-66).

²⁸ CRC/C/153 17 March 2006.

²⁹ See A/RES/64/142. See also the observations made by some country representatives (the United Kingdom, the United States, Australia, Canada) at the meeting of the Third Committee (Social, Humanitarian and Cultural) of the UN General Assembly held on 20 November 2009 (GA/SHC/3968), in which the non-binding nature of the Guidelines are emphasized and certain discrepancies between the text and the respective national laws are highlighted.

- Planning aimed at establishing permanent arrangements without undue delay, through reintegration in the family or, if this is not possible, in an alternative stable family setting (par. 57-61).

- Clear policies and procedures regarding the transition from care to after-care and follow-up (par. 130-135).

The Guidelines themselves will not have a significant effect on the principles of European child protection law, but they may do in their implementation. Their main function, in effect, is to serve as orientation for policy and practice. They could be of great value for welfare authorities and professionals, and provide inspiration for legal reforms – such as those which are needed in Eastern Europe – aimed at introducing higher standards of protection and social services provision.

3. Child protection in the European Court of Human Rights

3.1. Children and the European Convention

The legal dimension of children's rights and child protection in Europe – leaving aside the revised Brussels II Regulation – lies mainly in the international instruments adopted under the Council of Europe's auspices. For child protection purposes, the European Convention for the Protection of Human Rights and Fundamental Freedoms is the most prominent among these instruments. It is also the most powerful, insofar as it is equipped with individual rights of complaint before the ECtHR and with supervision and enforcement mechanisms. The ECHR is well-known not to be a child-centred instrument. Children's rights and interests are absent from its text. Nonetheless, most of the rights enshrined in the Convention can be held and exercised by children or by parents or other legal representatives on behalf of children³⁰. In interpreting and applying the Convention the ECtHR has built up a detailed body of case law on the scope, contents and limits of these rights, which represents a legal standard that Council of Europe Member States must respect. Parents, other family members and children bring complaints against states on a regular basis, claiming that their rights have been violated by decisions taken by administrative or judicial authorities in the exercise of child protective functions.

The Court has been called to scrutinize under the ECHR all types of decisions: decisions of welfare service authorities to conduct investigations; the removal of children from their homes and their placement in alternative care; the implementation of the placement and other measures taken; the impingement on parental rights; the modification and review of the measures, and the decision to continue or discontinue them. The Court has also been asked to assess the relevance under the Convention of omissions and failure to take action

³⁰ KILKELLY (1999, pp. 1-17).

by public authorities³¹. Rights which are typically affected in all these cases are the right to a fair trial (Art. 6) and the right to respect for privacy and family life (Art. 8), although occasionally complaints may have had a bearing on the prohibition of being subjected to inhuman or degrading treatment (Art. 3) and the right to have an effective remedy before a national authority (Art. 13).

The wealth of jurisprudential principles and standards crafted by the Court in dealing with these complaints for more than two decades has been and still is of enormous importance for national legislative bodies – which have sometimes been urged to amend internal law –, for lawyers and judges who litigate or are required to decide cases in national courts, for public officials and professionals involved in child protection in the performance of their duties, and last but not least, for children and their families.

3.2. Pursuing effectiveness in child protection: the human rights liability of child protection authorities

Throughout its history, the Court has showed a commitment to ensuring that the rights and freedoms set forth by the Convention are effective. Aiming to guarantee effectiveness has led the Court to find that States and their authorities have in some cases positive obligations to act. Violation of rights may not only derive from State encroachment on areas of private freedom, but also from failure to comply with the duty to take action.

In family relationships, for instance, the Court has stressed that respect for family life involves States acting in a manner calculated to enable family ties to develop normally and allow the parties concerned – usually parents and children – to lead a normal family life³². In cases where children are separated from their families this also involves a positive duty to take measures with a view to reuniting them, subject to their being in line with the child's best interests³³. On the other hand, bearing in mind the fact that young children cannot pursue their rights on their own, the effectiveness of children's rights may depend on vigorous State intervention – especially when these rights conflict with actions taken or positions held by other family members.

The ECtHR's most conspicuous move towards enhancing the effectiveness of child protection has been to assert that States have a duty "*to take reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge*". When neglect or abuse is sufficiently serious to reach the threshold of inhuman and degrading treatment, the child protection system's failure to protect the victims may constitute a violation of Art. 3 ECHR.

³¹ KILKELLY (1999, pp. 160-186, pp. 263-294); VAN BUEREN (2007, pp. 134-143).

³² ECtHR *Marckx v. Belgium*, No. 6833/74, 13 June 1979.

³³ ECtHR *Eriksson v. Sweden*, No. 11373/85, 22 June 1989.

This doctrine was first formulated with respect to children in the judgement on the case of *Z. and others v. the UK*³⁴. The case involved a local authority's failure to intervene at the appropriate time in circumstances of known severe neglect. When the children were finally placed in foster care, five years after the family was referred to the social services for the first time, an abundance of evidence showed that they had endured horrific experiences. Proceedings were commenced against the local authority claiming damages for negligence and breach of statutory duty. The application was struck out by the domestic courts as revealing no cause of action. The House of Lords rejected the appeal, considering that child protection agencies face very difficult decisions when trying to strike the right balance between protecting the child from immediate feared harm and disrupting its family relationships³⁵. The ECtHR reacted to the English courts' decisions and found a breach not only of Art. 3, but also of Art. 13 ECHR on account of the unavailability to the applicants of appropriate means of obtaining a determination of their allegations and the impossibility of obtaining an enforceable compensation award for the damage suffered.

In *Z. and others* the Court acknowledged the difficult and sensitive dilemma facing the social services, which had to decide between possibly taking action too soon and not taking it soon enough. However, it considered that the case left no doubt as to the system's failure to protect the children from serious, long-term neglect and abuse and found a violation of Art. 3 of the Convention. It is important to realize that, according to the *Z and others* doctrine, this dilemma becomes legally relevant for the purposes of finding an infringement of the ECHR only on the condition that the mistreatment reaches the level of inhuman or degrading treatment, which is a very serious degree of abuse, and that the authorities had been in a position to prevent the harm³⁶.

In a later case, *D.P. & J.C. v. the UK*³⁷, dealing with sexual abuse which had gone unnoticed for many years by the social services involved with the family, the Court admitted that the professionals involved could not be criticised for failing to instigate an investigation into the possibility of additional underlying problems because of the culture of absolute silence on the issue among family members.

In any event, the duty to take positive action both to protect the right of children not to suffer inhuman treatment within the family home and also to respect and preserve the family life of parents and children necessarily creates potential for conflict. In the end, as two authors have recently said, the core of the problem lies in the definition of boundaries,

³⁴ ECtHR No. 29392/95, 10 May 2001. The European Court had previously rejected the blanket immunity rule established by the English courts, on the grounds of public policy requirements, with regard to actions in negligence against the police in the investigation and suppression of crime (ECtHR *Osman v. The United Kingdom*, No. 23452/94, 28 October 1998).

³⁵ See *X and Others v. Bedfordshire County Council* [1995] 3 *All England Law Reports* 353. A summary of the British courts' position in this type of case can be found in the ECtHR's decision which reexamined this case (above n. 34), par. 45-46 and 57-65. See also HOYANO AND KEENAN (2007, pp. 329-339).

³⁶ HOYANO AND KEENAN (2007, pp. 387-396).

³⁷ ECtHR No. 38719/97, 10 October 2002.

i.e., in defining the point at which compulsory State intervention in a child's life is better for him or her than offering family services, or simply not being involved at all³⁸.

3.3. The setting out of boundaries to interference in family life

Action taken by the ECtHR in child protection cases normally consists of reviewing decisions taken by social welfare authorities or national courts which purportedly interfere with the right to respect for family life or violate the due process requirements of Art. 6 ECHR. State authorities' incursions into family life violate the European Convention if they are not in accordance with the law, if they lack a legitimate aim, and if they are unnecessary or disproportionate (Art. 8.2 ECHR)³⁹. In most cases the final decision hinges upon the necessity or proportionality of the interference. Ascertaining such necessity or proportionality requires the setting out of thresholds or standards for different types of intervention.

However, the nature of this exercise is not equivalent to what the national authorities usually do in the first instance. The European Court takes the difficulty of the task performed by social welfare agencies and courts into account and acknowledges that they have the benefit of direct contact with all persons concerned. Because of this, and because the European Court is not a fact-finding court, national authorities are allowed a significant measure of discretion. This applies across the board: a) it applies to the accuracy required from legislation⁴⁰; b) it extends to the procedural requirements leading to the making of a decision⁴¹, and c) it applies to the very assessment of the necessity for interference, to which effect the authorities are granted a generous margin of appreciation.

The review process carried out by the ECtHR does not obviously lead to the formulation of clear-cut rules. Its case law defines neither the standards which justify interference in family life nor the scope of such interference, let alone the most effective strategies for preventing out-of-home placements, the most adequate means to support positive parenting, or the practices to be followed in the transition from care to the after-care period. Depending on their nature, these are matters for legislation, regulations, guidelines or best-practices codes. The ECtHR's main achievement is the development of principles, which are usually formulated as limitations or restrictions to the right to remain together as a family, free from external intervention. Principles defined by the ECtHR have become a

³⁸ HOYANO AND KEENAN (2007, pp. 22-23).

³⁹ On these stages of the Art. 8 test, see for instance KILKELLY (2000a, pp. 23-33).

⁴⁰ ECtHR *Olsson v. Sweden (1)*, No. 10465/83, 24 March 1988: "the circumstances in which it may be necessary to take a child into public care and in which a care decision may fail to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality" (par. 62).

⁴¹ ECtHR *W. v. the UK*, No. 9749/82, 8 July 1987: "to require them [the local authorities] to follow on each occasion an inflexible procedure would only add to their problems. There must therefore be allowed a measure of discretion in this respect" (par. 62).

paramount contribution to the creation of a European system of child protection. They relate to procedural issues, to the decisions to take children into public care or place them for adoption; to the implementation of protective measures, and to the refusal to terminate care or the upholding of other restrictions.

a) Procedural principles

Procedures bear significant influence on the substance of decisions taken by administrative bodies and courts. Everyone is entitled to a fair trial in the determination of his or her civil rights (Art. 6 ECHR). The vast array of guarantees encompassed by the right to a fair trial frequently play a crucial role in child protection cases. They include, among others, the right to have decisions restricting or terminating access to children reviewed by a court⁴²; the right to have access to information or evidence which has been relied upon by the authorities in taking protection measures⁴³ or in reviewing a court's decision on appeal⁴⁴; the right to legal assistance in proceedings leading to the issuance of care orders or orders freeing a child for adoption⁴⁵; the right to a hearing, unless there are exceptional circumstances that justify dispensing with one, and even the right to request that the hearing be public, unless there are reasons for excluding the case from public scrutiny⁴⁶. All these are defence rights, derived from the principle of equality of arms, i.e. the requirement that each party be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the opponent.

Interestingly, Art. 8 ECHR contains further procedural requirements. In addition to the guarantees included in the right to a fair trial, the Court has come to define a more general right "to a sufficient involvement": the parties whose rights and interests are affected by public authority decisions have the right "(to be) involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests"⁴⁷. The principle of sufficient involvement has become one of the pillars upon which European child protection systems are based. Although there is inevitably some overlap between the two sets of procedural rights (those explicitly derived from Art. 6 and those implied in Art. 8), the principle of involvement in the decision-making process goes further than the right to a fair trial and has different goals. It conveys several purposes at once: it is meant to

⁴² ECtHR *W. v. the UK*, cited above n. 41; *Eriksson v. Sweden*, cited above n. 33.

⁴³ ECtHR *Mc Michael v. the UK*, No. 16424/90, 24 February 1995.

⁴⁴ ECtHR *Buchberger v. Austria*, No. 32899/96, 20 December 2001.

⁴⁵ ECtHR *P., C. and S. v. the UK*, No. 56547/00, 16 July 2002.

⁴⁶ ECtHR *Moser v. Austria*, No. 12643/02, 21 September 2006.

⁴⁷ ECtHR *W. v. the UK*, cited above n. 41.

foster cooperation, by including parents' views and interests among the relevant considerations in reaching decisions on child protection; to allow parents to dispel concerns expressed about them (e.g. by health care professionals) or to put forward data in their favour, and even to enable them to understand and to come to terms with traumatic events affecting the family as a whole.

This idea was first stated in *T.P. and K.M. v. the UK*⁴⁸, a case of sexual abuse where the mother was not permitted to watch a video of the interview in which her daughter disclosed the information that she had been abused. The lack of access to this material prevented the mother from realizing that the authorities had wrongly identified the abuser. Certainly, the right to have access to all case material can be restricted if careful consideration leads to the conclusion that such disclosure could place the child at risk: in *K.A. v. Finland*⁴⁹, a case where incest was strongly suspected, for instance, the decision not to inform the parent of the identities of the persons from whom the suspicion had originated was considered understandable.

b) Principles related to decisions about taking children into care

With regard to decisions to take children into care, the law in Europe is rooted in the principle of exceptionality, in clear correspondence with Art. 9 UNCRC. Measures separating children from their families are exceptional and can only be justified by relevant and sufficient reasons. Family law's approach to child protection – it has recently been concluded – revolves around two types of models. It is “*polarized between a model premised on the central role of the child's biological family, supported by the state in the protection of the child in the future, and a model of permanency which advocates swift court-mandated intervention to remove children from abusive environments and place them with new adoptive families*”⁵⁰. ECtHR case law has developed from complaints raised by parents and family members against administrative or judicial orders which intruded on the family's autonomy. The fact that the Court's decisions revolve around this type of conflict has given its case law a noticeably garantiste hallmark, very much in tune with the first model mentioned above. Unless there is a shift in its principles – which is not expected for the time being – the Court may play a significant role in holding back political support for more proactive systems which favour attaching the children of deeply dysfunctional parents to new families.

Turning to more specific findings in European case law, the principle of exceptionality translates into different standards of discretion in taking decisions about care, depending on the degree to which they restrict contact between parents and children. As a matter of principle, the European Court admits that the authorities have a wide margin of appreciation in assessing the need to take a child into care: cases have to be analyzed as a whole and with regard to all their circumstances. However, the degree of latitude in taking

⁴⁸ ECtHR No. 28945/95, 10 May 2001.

⁴⁹ ECtHR No. 27751/95, 14 January 2003.

⁵⁰ HOYANO AND KEENAN (2007, p. 23).

a decision has to correlate with the gravity of its consequences: administrative or judicial orders restricting or depriving parents of their rights or limiting access between children and parents or other family members are subjected to stricter scrutiny because they entail the danger of child alienation or the curtailment of family relationships⁵¹.

In order to assess whether interference is legitimate the Court requires the reasons adduced by the authorities for intervention to be explicit, relevant and sufficient. The reasoning has to reflect the careful examination which the competent organs can be expected to carry out in matters of such magnitude by weighing the evidence militating in favour and against the care measure: vague descriptions or references to “documentation on file” are not sufficient⁵². With regard to the requirement of relevance, the Court has observed many times that “it is not enough that the child would be better off if placed in care”⁵³. The child must have suffered harm or be in danger of suffering harm. In the case of danger, this has to be actually established⁵⁴. The evidentiary basis for deciding to take a child into care may vary according to the seriousness of the harm: in cases of sexual abuse or infliction of physical ill-treatment, national authorities are entitled to take action on the basis of strong suspicion, even if they do not possess actual evidence of the facts⁵⁵. The requirement for the reasons for interference to be sufficient calls for assessing their proportionality to the measures adopted, and this normally implies evaluating the alternatives. In fact, failing to carry out a thorough assessment of possible alternatives may lead to a violation of the Convention. In cases where there were no allegations of neglect or ill-treatment, the Court has been particularly assertive in demanding the consideration of additional support measures as an alternative to what is by far the most extreme measure, namely the removal of children from their parents⁵⁶. As stated in the case *Moser v. Austria*⁵⁷, material shortcomings such as inadequate housing or lack of financial means, or unclear residence status which made it difficult for a mother to care for a very young child, all require careful examination of the possible alternatives to taking a child into foster care. The Court particularly blamed the Austrian authorities in *Moser* for not taking any positive action to explore possibilities

⁵¹ ECtHR *Johansen v. Norway*, cited above n. 8.

⁵² ECtHR *K.A. v. Finland*, cited above 49.

⁵³ ECtHR *Olsson v. Sweden (1)*, cited above n. 40 (par. 72).

⁵⁴ ECtHR *Saviny v. Ukraine*, No. 39948/06, 18 December 2008.

⁵⁵ ECtHR *Gnahoré v. France*, No. 40031/98, 19 September 2000. In this case, a care order had been issued because the applicant was suspected of ill-treating the child with intent; he had been charged on that count but was subsequently exonerated. Nevertheless, the national authorities renewed the care order, referring to the father’s inability to tend to the child’s material needs and the child’s wish to stay in his foster home. The European Court considered that these were valid reasons for keeping the child in care.

⁵⁶ ECtHR *Kutzner v. Germany*, No. 46544/99, 26 February 2002.

⁵⁷ Cited above n. 46.

which would have allowed the mother and child to remain together, for instance by placing them in a mother-child centre.

With respect to the assessment of the alleged reasons for intervention, a further distinction has to be made between emergency orders and normal care orders. By their very nature, decisions to adopt emergency care measures are taken on a highly provisional basis and on an assessment of the risk to the child carried out on the basis of information available at the time, which may be incomplete. On the other hand, involving parents in the decision-making process may not always be possible or, if it is possible, may not be desirable: if parents are viewed as the source of an immediate threat to the child, giving them prior warning could deprive the measure of its effectiveness. These restrictions are counterbalanced by the duty imposed on the authorities to carry out a careful assessment of the proposed measure's impact as well as of possible alternatives prior to its implementation⁵⁸.

Emergency measures are in any event subject to the "sufficiency test": in particular, the Court has been quite scrupulous in policing the reasons for taking new-born babies into public care at the moment of birth. Removing babies from their mothers is an extremely harsh step which can only be justified by the existence of extraordinarily compelling reasons. If the situation leading to the need for protection is foreseeable, the authorities have to examine less intrusive options⁵⁹. If there is no suspicion of life-threatening conduct, supervised contact, for instance, is a more proportionate measure than removing the child.

This principle was upheld in the case of *P., C. and S. v. the UK*⁶⁰, where the mother was affected by a medical condition involving seeking attention by fabricating or inducing illness in her children, with significant physical and psychological damage to them. When she gave birth to her third child, the English authorities removed the baby immediately in the light of her previous conviction for harming one of her other children. The Court did not consider the draconian step of removing the child from her mother after birth to be supported by relevant and sufficient reasons, as it was not apparent why the mother and child could not at least spend some time together under supervision in hospital.

c) Principles related to the implementation of care decisions

When care decisions have been taken with the aim of attaining subsequent family reunification, the ECtHR has placed considerable importance on the question of whether the measures implemented were consistent with the aim being pursued. As is the case with care decisions, care implementation measures have to be supported by necessary and sufficient reasons. There are no sufficient reasons to justify the measures if they impose

⁵⁸ ECtHR *K. and T. v. Finland*, No. 25702/94, 12 July 2001.

⁵⁹ ECtHR *K. and T.*, cited above n. 58; *Haase v. Germany*, No. 11057/02, 8 April 2004.

⁶⁰ Cited above n. 45.

unwarranted restrictions on access or communication among family members and parents are thus denied the opportunity to meet their children to an extent and in circumstances which are likely to promote the aim of reuniting them⁶¹.

Similarly, placing siblings at a great distance from both their parents and each other was considered to be in breach of the right to respect for family life, because it adversely affected the possibility of contact and weakened the prospects of a successful reunification⁶². The underlying rationale for conducting a strict scrutiny of all measures restricting access and contact is that when children remain in the care of social welfare authorities or in foster families for a protracted period, the possibility of reuniting them with their parents diminishes progressively and can eventually be destroyed.

In addition to the principle of consistency with the ultimate aim of family reunification, the European Court has also stressed the duty to conduct a thorough review of measures adopted from time to time to assess whether there has been any improvement in the family's situation, and also to ensure that implementing the measures – when this is entrusted to the social services or to private non-profit-making organizations – does not alter the practical effects of judicial decisions.

The importance of conducting periodic supervisions was evident in the case of *Scozzari and Giunta v. Italy*⁶³. The children in the case had been placed in a community organized as an agricultural cooperative where twenty years earlier two employees, who still worked there, had been found guilty of the sexual abuse and ill-treatment of some handicapped people staying in the community at that time. While not expressing an opinion on the community as such, the Court considered that the institution and staff's background and circumstances should have prompted the authorities to increase the level of supervision.

d) Principles related to the termination of care

The Strasbourg court has also been called upon to evaluate the legitimacy of decisions to refuse to terminate public care, foster care or even placement for adoption in the light of the ECHR. The most common impediments found in cases decided by the Court are the lack of improvement in the parents' situation, the parents' failure to cooperate with the authorities, and children's becoming strongly attached to their foster carers. With regard to the first impediment, the Court has justified the decision not to terminate the care unless there is reasonable certainty that any improvement appears to be stable. Being restored to his or her parents, only to be taken away again shortly afterwards, would be contrary to the

⁶¹ ECtHR *Eriksson v. Sweden*, cited above n. 33; *Margareta and Roger Andersson v. Sweden*, No. 12963/87, 25 February 1992.

⁶² ECtHR *Olsson v. Sweden (1)*, cited above n. 40.

⁶³ ECtHR No. 39221/98; 41963/98, 13 July 2000.

child's interests⁶⁴. On the other hand, parents' failure to cooperate should not constitute an absolute decisive factor: their rights are not infringed if the authorities make genuine efforts to act in the child's best interests and the failure of measures implemented to this end is due solely to the parents' behaviour⁶⁵. Finally, with regard to children who are reluctant to return to their natural families because of the strong emotional bonds created with their foster parents, the Court has admitted that the possibility of applying coercion is limited, since the child's interests must be taken into account as well as his or her rights⁶⁶. In the case of older children who have persistently indicated that they do not want to leave their foster homes, their interests override the natural parents' wish to regain custody⁶⁷.

4. The increasing interplay between Conventions and their monitoring bodies: the incidence of the UN Convention on European Court of Human Rights child protection case law

The UNCRC's legal relevance as a vehicle for child protection in Europe has been overshadowed by the large and authoritative body of case law emanating from the ECtHR over the past twenty years. The assiduous application of the Rome Convention to individual complaints brought by parents, children or other family members against State authorities all over Europe clearly shows an international commitment to providing effective protection, in spite of the Court's delays, the limited or symbolic compensation awards and the difficulties sometimes encountered in enforcing judgements. On the other hand, however, the UNCRC's paramount position in the international legal order in terms of child empowerment, the comprehensiveness of its catalogue of rights and the loftiness of its standards cannot be denied. The European Court itself has acknowledged that the standards to which all governments must aspire in asserting and defending children's rights are those set out in the 1989 Convention⁶⁸.

Bearing in mind that all Council of Europe Member States are also party to the UNCRC, the question arises of how both Conventions and their respective monitoring systems can interrelate and benefit from their complementary strengths. A particularly critical issue is whether, and to what extent, the ECtHR and its enforcement mechanisms can draw upon UNCRC provisions in ways that advance children's rights and further the development of more progressive child protection frameworks. This approach has already raised significant academic interest⁶⁹.

⁶⁴ ECtHR *Olsson v. Sweden (1)*, cited above n. 40.

⁶⁵ ECtHR *Gnahoré v. France*, cited above n. 55.

⁶⁶ ECtHR *Olsson v. Sweden (2)*, No. 13441/87, 27 November 1992.

⁶⁷ ECtHR *Bronda v. Italy*, No. 22430/1993, 9 June 1998.

⁶⁸ E.g. ECtHR *Sahin v. Germany*, No. 30943/96, 8 July 2003.

⁶⁹ See for instance KILLKELY (2000 and 2001b); VAN BUEREN (2007, pp. 18-23); VERHEYDE (2007).

Even though the ECHR cannot be construed as limiting or derogating from any of the children's human rights enshrined in the UNCRC (Art. 53 ECHR), applications are admitted by the Strasbourg Court only from persons who claim to be victims of violations of the rights set out in the European Convention (Art. 34 ECHR) and not of rights enshrined in other Conventions or international treaties. According to Art. 32 ECHR, the Court's jurisdiction extends exclusively to interpreting and applying the European Convention. Nevertheless, in doing this in a dynamic manner – as it has done for decades – the Court may resort to principles, standards or values laid down in other human rights instruments, including the UNCRC. The Court has in fact followed this approach in its case law regarding the physical punishment of children, juvenile justice and child protection. On most occasions this has been done implicitly, without any mention of the sources of its inspiration, but in some cases the Court has explicitly referred to the UNCRC or to CRC recommendations, using them, as one author has put it, as an additional instrumental layer of legitimacy and guidance⁷⁰.

Some recent examples may help to illustrate this. In *K. T. v. Norway*⁷¹, a Norwegian national, the father of two children and separated from his wife, was subject to several investigations carried out by child welfare services. These investigations, which were quite intrusive, were ordered as a result of concerns, expressed by his wife and confirmed by anonymous reports, that he was abusing intoxicating substances and that the children were at risk of violence. The father, who also suffered from a psychiatric disorder, sought to obtain a judgement declaring that there was no legal basis for conducting these investigations. By way of a preliminary observation, the ECtHR noted that the investigation fell within the range of measures envisaged in Article 19 UNCRC to be taken in order to prevent the abuse and neglect of children (*“Such protective measures should, as appropriate, include effective procedures ... for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore ...”*). This was an important consideration to be borne in mind in assessing the necessity to interfere in the private and family life of the person being investigated.

Another relevant case, which also alludes to Art. 19 UNCRC (whose second section requires that protective measures should include effective procedures for the identification, reporting and referral of instances of child maltreatment), is *Juppala v. Finland*⁷². In *Juppala* the Court discussed whether a criminal conviction imposed on a grandmother for defamation without better knowledge, after she told a doctor in good faith of her suspicion that her three-year-old grandson had been assaulted by his father, was in conformity with

⁷⁰ VAN BUEREN (2007, p. 19).

⁷¹ ECtHR No. 26664/03, 25 September 2008.

⁷² ECtHR No. 18620/03, 2 December 2008.

the ECHR. The child himself appeared to have said that his father had hit him, and repeated this version to the doctor, but the suspicion could not be confirmed. The Court held that any individual should have the possibility of voicing a suspicion of child abuse, formed in good faith, in the context of an appropriate reporting procedure, without the potential “chilling effect” of a criminal conviction. This judgement not only takes the aforementioned Art. 19 UNCRC into consideration but also the CRC’s concluding observations in its third report on Finland⁷³ as relevant international materials. Among other suggestions, the CRC had recommended that Finland strengthen measures to encourage the reporting of instances of child abuse, bearing in mind that violence against children is one of the most serious obstacles to the full implementation of children’s rights in Finland.

In three other recent cases the European Court has shown itself to be highly attentive to the observations made by the CRC in response to reports submitted by two States (the Czech Republic in two cases, and Ukraine) in compliance with Art. 44 UNCRC. At stake in all three cases (*Wallová and Walla v. the Czech Republic*⁷⁴; *Havelka and others v. the Czech Republic*⁷⁵, and *Saviny v. Ukraine*⁷⁶) were national authority decisions to place children in public care, mainly on the grounds that their parents faced serious material difficulties in providing suitable housing for them. In the *Wallová* and *Havelka* cases, the parents’ lack of effort to overcome their financial difficulties (plus evidence of alcohol consumption and uncooperative behaviour in *Havelka*) seem to have led the authorities to conclude that the children’s health and personal development were at risk. In the *Saviny* case, the authorities found that the parents – who were blind – were unable to provide their children with proper nutrition, clothing, a sanitary environment and health care, and to ensure their social and educational upbringing, by virtue of insufficient financial means and personal qualities. However, in none of the three cases were there any signs of relevant affective or educational deficiencies. The Court’s judgements found a violation of Art. 8 ECHR, holding that the decisions to put the children into care were disproportionate to the aim being pursued. Particularly pertinent here is the reference – among other relevant legal sources – to Art. 9 UNCRC and to the CRC’s observations upon consideration of the national reports submitted by the Czech Republic and Ukraine. These observations pointed to the insufficiency of financial resources for assisting families, the inadequacy of family therapy because of the lack of social workers, and serious concerns about the use of institutional placement as a solution to social problems and critical situations within families.

The Court did not draw explicitly on these observations to support its finding of Convention violations. However, the bulk of the argumentation was clearly in tune with

⁷³ CRC/C/15/Add. 272.

⁷⁴ ECtHR No. 23848/04, 26 October 2006.

⁷⁵ ECtHR No. 23499/06, 21 June 2007.

⁷⁶ ECtHR No. 39948/06, 18 December 2008.

concerns raised by the Committee. The Court pointed out the need to actually prove the existence of danger to the children and to assess whether inadequacies in the children's upbringings were attributable to the parents' irremediable incapacity to provide care, as opposed to their financial difficulties. To this end, it emphasized the importance of gathering specific information on the volume and sufficiency of social assistance provided to these families, the specific recommendations they could have received by way of counselling, and the reasons why these recommendations might have failed. With such information missing, no evaluation could be conducted as to whether the authorities had discharged their obligation to promote family unity or whether they had sufficiently explored the effectiveness of less far-reaching alternatives before splitting up the families. This line of reasoning is clearly in tune with Art. 9 UNCRC, the Recommendation of the Committee of Ministers of the Council of Europe on policy to support positive parenting⁷⁷ and the Guidelines for the Alternative Care of Children⁷⁸ (Part IV: Preventing the need for alternative care).

The ECtHR's reliance on UNCRC provisions and CRC recommendations and standards to provide support for its own findings is a promising development for children's rights. However, full recognition of these rights is still some way off. It should not be forgotten that the Court and the UN Committee have taken divergent approaches to children's issues in the past, such as in the areas of physical punishment and the child's right to know his or her parents as part of the right to identity⁷⁹. The CRC has shown a principled position against all forms of physical punishment and violence against children and has raised concerns regarding the legal admissibility of anonymous birth-giving and States Parties' policies in relation to artificial insemination (keeping donors' identities secret) because this prevents children from obtaining information which is essential to their right to identity⁸⁰. On the other hand, the ECtHR has taken a more pragmatic position in both fields. It has tolerated some forms of physical punishment, arguing that whether a punishment reaches the minimum threshold of severity required to infringe Art. 3 ECHR depends on the circumstances of each case⁸¹. It has also condoned the practice of anonymous birth-giving⁸², and has not objected to preserving the anonymity of gamete donors for the purposes of assisted reproduction because of the lack of consensus among Council of Europe Member States on this question⁸³.

⁷⁷ Cited above n. 20.

⁷⁸ Cited above n. 27.

⁷⁹ VAN BUEREN (2007, pp. 20-22).

⁸⁰ NEWELL (2000, 117-120); O'DONOVAN (2000, pp. 77-81).

⁸¹ ECtHR *Costello-Roberts v. the UK*, No. 13134/87, 25 March 1993.

⁸² ECtHR *Odievre v. France*, No. 42326/98, 13 February 2003.

⁸³ ECtHR *X., Y. and Z. v. the UK*, No. 21830/93, 22 April 1997.

More intense interaction between Conventions could also perhaps contribute to overcoming the well-founded criticism that the European Court does not promote children's independent claims as opposed to those of their parents⁸⁴. Applicants to the ECtHR in child protection cases are usually parents fighting for their rights, not children. The core issue under discussion in ECtHR cases is whether public authorities have illegitimately interfered with the right to lead an undisturbed family life. This right belongs to parents as well as children: as the Court has repeatedly stated, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life which is protected under the Convention. However, in the cases decided by the Court, the personal interests of parents and children which underlie their respective rights are not always aligned. They may even conflict. When public authorities have felt compelled to intervene in family life by using coercive measures, the assumption that parents' and children's interests coincide turns out to be significantly weakened. Children, in particular, may have countervailing interests of their own in not being forced to endure a state of uncertainty as to whether they will ultimately have to live with their original families or with foster or adoptive parents. These are distinct children's interests which sometimes go unnoticed or are not given due weight in the proceedings.

According to ECtHR case law, when a conflict brings parents and the authorities who have placed their child or children into public custody into opposition, the parents' standing suffices to afford them the necessary power to apply to the Court on behalf of the children too in order to protect their interests, even if they do not hold parental responsibility for them⁸⁵. This jurisprudential doctrine is highly controversial: although children have the same right as their parents to enjoy a family life free from state intervention, in certain circumstances they may have no interest in asserting this right, or they may have but in different conditions to those sought by their parents. In practice the Court's doctrine presupposes that the vindication of any autonomous child's right or interest which diverges from their parents' interest remains in the hands of the defendant State, which nevertheless may be primarily concerned with defending decisions taken by the internal authorities rather than with the defence of the child's rights. As a matter of fact, there is no provision in the ECHR which directs States to take children's best interests into account when deciding matters affecting them⁸⁶.

The fact that children's views are all too often absent or appear much-diluted in the proceedings says a great deal about the nature of the relevant considerations in Strasbourg cases. Although children are normally heard in national courts, this does not always happen, and even if it does, it may be several years before the case reaches the ECtHR.

⁸⁴ FORTIN (1999, 237-241; 2005, pp. 54-56).

⁸⁵ ECtHR *Scozzari and Giunta v. Italy*, cited above n. 63, and *Moser v. Austria*, cited above n. 46.

⁸⁶ FORTIN (2005, pp. 56-60).

Since the European Court does not act as a fact-finding court, children are not heard here either. This is not to say that the European Court systematically ignores or underplays children's rights and interests. Several of its judgements point out the need to strike the right balance between the child's interest (e.g., in remaining with the foster parents) and the natural family's interest (typically, in obtaining the child's return to the family home). The Court admits that the possibility of applying coercion to enforce parents' rights is limited since the child's interests and rights under Art. 8 must also be taken into account in achieving this balance⁸⁷. The Court has even attached overriding weight to the steadfast wishes of two children aged eight and fourteen to keep their father's access rights restricted⁸⁸ and those of a fourteen-year-old girl to remain with her foster family⁸⁹. All in all, the overall impression is that the appreciation of the child's best interests does not operate systematically, nor does it always necessarily carry the paramountcy assigned to it by the UNCRC, as it has to be reconciled with the respect owed to parental rights. Furthermore, this approach of focusing on the appreciation of the child's welfare fails to articulate the concept of the child as an independent player, with rights of his or her own⁹⁰, including the right – not so far recognised by the ECtHR as a general right – to be heard and have his or her view taken into account⁹¹. This is a shortcoming which is also present in EU law dealing with children: children's rights are too often instrumental to other major policy goals, are made dependent on the exercise of their parents' rights or are simply played down under a welfarist approach which prioritises parental entitlements⁹².

Given the European Court's institutional function and historical determining factors, it will not be easy to overcome the current situation, in which child protection cases brought before the Court are analyzed and decided as a contest between parents and child protection authorities while the child's individual position remains in the background. Greater sensitivity towards children's rights, and in particular their participation rights, as enshrined by Art. 12 UNCRC (and also by the 1996 European Convention on the Exercise of Children's Rights), should lead to the welfare principle (Art. 3.1 UNCRC) being applied in a more consistent and generalized way in judging both the legitimacy of public interferences with family life and the enforceability of parents' rights. In the same way, there should be a clear recognition of children's autonomous legal standing in the proceedings, and of the need to appoint a special representative on their behalf (a guardian

⁸⁷ ECtHR *Olsson v. Sweden* (2), cited above n 66.

⁸⁸ ECtHR No. 25651/94, *L. v. Finland*, 27 April 2000.

⁸⁹ ECtHR *Bronda v. Italy*, cited above n. 67.

⁹⁰ FORTIN (2005, p. 59).

⁹¹ VERHEYDE (2007, p. 117).

⁹² MCGLYNN (2006, pp. 42-77, pp. 169-171).

ad litem or other appropriate body) whenever there is a risk of a conflict of interests with other Court applicants (parents, grandparents, legal guardians)⁹³.

5. Conclusion

The process of convergence of family law in Europe is advancing at a speed which was hardly foreseeable two decades ago. Child protection law is keeping pace with this dynamic. The application of the European Convention has harmonized national authorities' legal practice patterns, has set limits to their discretionality and has imposed positive duties of protection on them. Although the European Court has primarily been prompted to intervene with the aim of preserving parents' freedom, it has also acted – albeit unsystematically – to defend children rights and has tried to ensure the precedence of the child's best interests in the event of conflict. The progressive incorporation of the principles laid down by the ECtHR into national legal systems has implicitly facilitated the creation of a common system of international private law within the EU.

Perhaps now is the time to take a step further and set out the substantive principles of child protection law in a formal text, as has already been done in other areas of family law, with the aim of facilitating its spreading and better cognisance. This project should revolve around the consideration of the child as a subject entitled to legal protection and to live in a secure and stable family environment which guarantees, as far as possible, his or her full personal development. To this effect, European principles should be nourished not only by the international instruments drawn up by the Council of Europe and ECtHR case law, but also, and chiefly, by the UNCRC. Beyond the drafting of a set of principles, the prospects for a future European unification of child protection law remain largely uncertain. Such a task should be preceded by a gradual approximation of cultural contexts, professional values, operating legal procedures, institutional frameworks in family law, and, in particular, national family and welfare policies.

⁹³ KILKELLY (2000, p. 99).

6. Table of Cases

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<i>Section and Date</i>	<i>Case</i>	<i>Parties</i>
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Third Chamber, 2.4.2009	C-523/07	<i>A v. Finland</i>

7. References

Katharina BOELE-WOELKI (2005), "The Working Method of the Commission on European Family Law", in Katharina BOELE-WOELKI (editor), *Common Core and Better Law in European Family Law*, Intersentia, Antwerp - Oxford, pp. 15-38.

Katharina BOELE-WOELKI / Frédérique FERRAND / Cristina GONZÁLEZ BEILFUSS / Maarit JÄNTERÄ-JAREBORG / Nigel LOWE / Dieter MARTINY / Walter PINTENS (2007), *Principles of European Family Law Regarding Parental Responsibilities*, Intersentia, Antwerpen / Oxford.

Nigel CANTWELL and Anna HOLZSCHEITER (2008), *Article 20 - Children Deprived of Their Environment* [André ALEN, Johan VANDE LANOTTE *et alii* (editors), A Commentary on the United Nations Convention on the Rights of the Child], Martinus Nijhoff Publishers, Leiden / Boston.

DEFENSOR DEL PUEBLO (2009), *Centros de protección de menores con trastornos de conducta y en situación de dificultad social*, Informes, Estudios y Documentos, Centro de documentación sobre el Defensor del Pueblo (Ombudsman) y los derechos humanos (Informes monográficos) (www.defensordelpueblo.es)

Jaap DOEK (2006), *Article 8 – The Right to Preservation of Identity, Article 9 – The Right Not to Be Separated from His or Her Parents* [André ALEN, Johan VANDE LANOTTE *et alii* (editors), A Commentary on the United Nations Convention on the Rights of the Child], Martinus Nijhoff Publishers, Leiden / Boston.

Anatol DUTTA (2009), “Kindschaftsrecht, internationales”, in Jürgen BASEDOW, Klaus J. HOPT and Reinhard ZIMMERMANN (editors), *Handwörterbuch des Europäischen Privatrechts*, Band II, Mohr Siebeck, Tübingen, pp. 977-981 (English edition by OUP forthcoming, 2010)

Josep FERRER RIBA (2009), “Kinderschutz”, in Jürgen BASEDOW, Klaus J. HOPT and Reinhard ZIMMERMANN (editors), *Handwörterbuch des Europäischen Privatrechts*, Band II, Mohr Siebeck, Tübingen, pp. 973-977 (English edition by OUP forthcoming, 2010)

Jane FORTIN (1999), “The HRA’s impact on litigation involving children and their families”, *Child and Family Law Quarterly*, 11 (3), pp. 237-255

Jane FORTIN (2005), *Children’s Rights and the Developing Law*, Cambridge University Press, Cambridge.

Bragi GUDBRANDSSON (2006), “Children in institutions: prevention and alternative care – Report”, in *Rights of children at risk and in care*, Council of Europe Publishing, Strasbourg, pp. 33-66.

Rachael HETHERINGTON (2006), “Learning from Difference: Comparing Child Welfare Systems”, in Nancy FREYMOND and Gary CAMERON (ed.), *Towards Positive Systems of Child and Family Welfare: International Comparisons of Child Protection, Family Service, and Community Caring Systems*, University of Toronto Press, Toronto, pp. 27-50.

Laura HOYANO and Caroline KEENAN (2007), *Child Abuse (Law and Policy Across Boundaries)*, Oxford University Press, Oxford.

Ursula KILKELLY (1999), *The Child and the European Convention on Human Rights*, Ashgate, Dartmouth.

Ursula KILKELLY (2000), “The impact of the Convention on the case-law of the European Court of Human Rights”, in Deirdre FOTRELL (ed.), *Revisiting Children’s Rights (10 Years of the UN Convention on the Rights of the Child)*, Kluwer Law International, The Hague, pp. 87-100.

Ursula KILKELLY (2001a), *The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights* [Human Rights handbooks series – Handbook No. 1], Council of Europe, Strasbourg

Ursula KILKELLY (2001b), "The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child", *Human Rights Quarterly*, 23, pp. 308-326.

Clare MCGLYNN (2006), *Families and the European Union (Law, Politics and Pluralism)*, Cambridge University Press, Cambridge

Peter NEWELL (2000), "Ending corporal punishment of children", in Deirdre FOTTRELL (ed.), *Revisiting Children's Rights (10 Years of the UN Convention on the Rights of the Child)*, Kluwer Law International, The Hague, pp. 115-126.

Katherine O'DONOVAN (2000), "Interpretations of children's identity rights", in Deirdre FOTTRELL (ed.), *Revisiting Children's Rights (10 Years of the UN Convention on the Rights of the Child)*, Kluwer Law International, The Hague, pp. 73-85.

Walter PINTENS (2003), "Europeanisation of Family Law", in Katharina BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Antwerp / Oxford / New York, pp. 3-33.

Sandy RUXTON (2005), *What about us? Children's Rights in the European Union - Next steps*, The European Children's Network (EURONET).

Geraldine VAN BUEREN (2007), *Child rights in Europe (Convergence and Divergence in judicial protection)*, Council of Europe Publishing, Strasbourg.

Mieke VERHEYDE (2007), "The protection of children's rights by the European Court of Human Rights", in A. ALEN, H. BOSLY, M. DE BIE *et alii* (ed.), *The UN Children's Rights Convention: theory meets practice*, Intersentia, Antwerpen / Oxford, pp. 107-119.