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Prioritising the child's best interests: mixed messages in the international human rights arena

Elaine E. Sutherland

Introduction

All European jurisdictions accept that the state has a role in protecting children where their parents or other family members are unable or unwilling to do so. The optimum way for the state to fulfil that obligation is by means of prevention, something that can be attempted by providing universal services, coupled with effective and robust additional support for families that need it.

It is when the state steps beyond the voluntary and into mandatory intervention in a particular family that its role may become contentious. The issues are manifold. What constitutes child abuse and neglect? When is it legitimate for the state to intervene in responses to – often alleged or suspected – child abuse and neglect? Can the child's right to be cared for in his or her own family be reconciled with the right to protection? What of the rights of the child's parents and others, like siblings and substitute carers?

Individual jurisdictions take different approaches in their efforts to protect children, of course (Luhamaa et al, 2022), and there are numerous classifications of these efforts (Gilbert, 1997; Connolly and Katz, 2019; Berrick et al, 2023). Yet it remains the eternal dilemma of those charged with child protection that they will be 'damned if they do and damned if they don't'. On the one hand, they will be condemned for a failure to act timeously and appropriately, particularly where a child is injured or dies. On the other hand, they will be criticised for over-zealous intervention where their actions are perceived to be unwarranted or excessive.

One way to test the legitimacy of state action aimed at protecting children is to measure it against international human rights norms and there is no shortage of treaty provisions and further guidance available to the state. In Europe, the two main sources of these norms are the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC). All European states are parties to the CRC

and the same was true of the ECHR until the Russian Federation ceased to be a party in 2022 (Council of Europe Newsroom, 2022). Each instrument has evolved over time and has been subject to extensive interpretation and amplification. Decisions of the European Court of Human Rights (ECtHR) have added flesh to the bare bones of the ECHR. Similarly, the United Nations Committee on the Rights of the Child (CRC Committee) has amplified the basic provisions of that instrument through its General Comments (GCs), Concluding Observations on State party reports, the case law under the Complaints Procedure and its Days of General Discussion (DGDs).

A difficulty arises, however, if the treaty provisions themselves – or the way in which they are interpreted and amplified – are inconsistent, since states may be left unclear about what is required of them, and it may be impossible for them to comply with all of the norms simultaneously.

This chapter examines the priority accorded to the child's best interests in the child protection context when weighed against the rights and interests of others, particularly the child's parents. Focussing on the ECHR and the CRC, it will drill down into their interpretation and amplification by the ECtHR and CRC Committee, respectively, in order to evaluate whether states are, indeed, being sent mixed messages and, if so, how that might be addressed.

The best interests of the child

At the outset, it is worth remembering that the best interests test itself has long been criticised as vague and indeterminate, resulting in unpredictability or inconsistency when it is used by public authorities or courts in decision-making (Mnookin, 1975). This may give the decision-maker the opportunity to apply his or her preferred values (Reece, 1996; Kohm, 2008). There is the further danger that, by emphasising the child's 'interests', the test undermines the advances made in recognising children as rights-holders (Bainham, 2002; Fenton-Glynn, 2019). In the light of this persistent criticism of the best interests test, it is legitimate to ask why it continues to be used. One answer was provided many years ago by Robert Mnookin, the arch-critic of the test, when he said, 'While the indeterminate best interests standard may not be good, there is no available alternative that is plainly less detrimental' (Mnookin, 1975, p 282).

European Convention on Human Rights

Some familiar observations can be made about the ECHR. Drafted, as it was, in the aftermath of the Second World War and designed to protect individuals from authoritarian regimes, it is unsurprising, perhaps, that it is

adult-centric in nature, making scant reference to children.[1] That, however, does not make it inapplicable to children for the obvious reason that they are human beings, and the ECtHR has found violations of the rights of children, often in conjunction with finding violations of the rights of their parents (Marckx v Belgium, 1979; Johnston v Ireland, 1986; X v Austria, 2013).[2] Applications to the ECtHR relating to child protection are made by parents, with the child sometimes featuring as a co-applicant, something that has led commentators to observe that this focus on the parents' rights can result in the child's perspective being 'virtually invisible' (Breen et al, 2020, p 717).

The majority of child protection cases that come before the ECtHR found on Article 8 (right to respect for private and family life) of the ECHR, with Articles 5 (right to liberty and security), 6 (right to a fair trial), 9 (right to freedom of thought, conscience and religion) and 13 (right to an effective remedy) sometimes being founded upon as well (Fenton-Glynn, 2021, p 304).

In order to withstand a challenge under Article 8, the action of the state party designed to protect a child must be lawful, in pursuit of a legitimate aim and necessary. The lawfulness of state action is rarely challenged, since the state will usually be acting in accordance with domestic law, and child protection is regarded as a legitimate aim under Article 8(2). Thus, it is the necessity of the state's intervention that is usually at issue: that is, whether its response was proportionate.

The evolution of European Court thinking on child protection

Early ECtHR decisions on cases involving children reflected the adult-centric nature of the ECHR itself, something demonstrated by the now-notorious decision in Nielsen v Denmark in 1988, when the Court found no violation of the child's Article 5 rights in his mother's decision to authorise his detention in a mental health facility. Happily, its thinking has evolved (Fortin, 2009, p 555; Fenton-Glynn, 2021, p 305: Taylor, 2024, pp 364–365). In the child protection context, the Court initially emphasised parental rights, noting, in L v Sweden (1984), that interference with these rights 'cannot be justified simply on the basis that it would be better for the child to be taken care of by certain foster parents' (para 151) and opining, in Olsson v Sweden (No. 1), that interference could only be justified 'if it is clearly shown that the parents' exercise their rights 'in a manner contrary to the child's interests' (Olsson v Sweden, 1988, para 149).

Towards the end of the last century, with the heightened appreciation of children's rights occasioned by the adoption by the UNCRC, the Court shifted its focus to emphasising the need to strike a 'fair balance' between parental rights and the interests of the child (Olsson v Sweden (2), 1992,

para 90; Hokkanen v Finland, 1994, para 146; Abdi Ibrahim v Norway, 2021, para 151). The possibility that applying this balancing test might result in the child's interests prevailing was acknowledged by the Court in Johansen v Norway (1996) when it said: 'a fair balance must be struck in the interests of the child and those of the parent and, in striking such a balance, particular importance must be attached to the welfare of the child which, depending on their nature and seriousness, *may override those of the parent*' (para 78; emphasis added).

The drafters of the CRC expended considerable energy debating whether the child's best interests should be the paramount or a primary consideration in decision-making, eventually settling on the latter, save in adoption cases where the former governs (Sutherland, 2016, p 27). Thus, it was less surprising than it might have been that, in R. and H. v United Kingdom, where the child had been adopted in the face of parental opposition, the ECtHR opined that, 'in all decisions concerning children, their best interests must be paramount' (R. and H. v the United Kingdom, 2011, para 73). It drew support for that position from the then-recent Grand Chamber judgment in Neulinger and Shuruk v Switzerland (2010, para 135), a case addressing the wrongful removal of a child and application of the relevant Hague Convention which, in its preamble, accords 'paramount importance' to the interests of children in custody matters (Hague Convention on the Civil Aspects of International Child Abduction, 1980, H.C. No. 25). There, the Court had noted 'that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount'. While these decisions must be understood in the context of international instruments that accorded paramountcy to the child's best interests in the particular context, for a brief period, they raised the tantalising prospect that there might be further elevation of the child's best interests across the board in decisions of the ECtHR (Simmonds, 2012). That period was brought to an end by the judgment of the Grand Chamber in Strand Lobben v Norway (2019).

Strand Lobben and its progeny

Discussions of Strand Lobben permeate this volume so the myriad facts and domestic court proceeding will not be explored again here (see, particularly, Emberland, Chapter 2; Archard and Skivenes, Chapter 13). In brief, Ms Strand Lobben's infant son, X, had been removed from her care and placed in foster care under an emergency care order due to serious concerns over her ability to look after him. Ultimately – and following numerous domestic court proceedings – her parental authority was removed and the foster parents, who had cared for X since he was three weeks old, were permitted to adopt him.

Ms Strand Lobben turned to the ECtHR for assistance, founding on Article 8 of the Convention. Noting the extensive enquiry undertaken by the child welfare authorities and the domestic courts which highlighted X's psychological vulnerability and his mother's continuing inability to care for him, the Chamber concluded, by four votes to three, that the decision-making process had been fair, that it had been motivated by an overriding concern for the child's best interests and that there were exceptional circumstances that warranted the termination of his mother's parental responsibilities and X's adoption by his foster parents. Thus, that there had been no violation of Article 8 (Strand Lobben and Others v Norway, 2017).

The stage was set for the case to go to the Grand Chamber and the controversy in Europe over the issue of child protection is reflected in the level of third-party involvement, with seven states and a number of organisations being granted leave to intervene in the case (see Cichowski and Crun, Chapter 11). Signalling the importance they attached to their decision and the division among them, no fewer than 11 of the 17 judges wrote (often joint) separate opinions, six concurring with the majority and five dissenting (see Emberland, Chapter 2).

The majority began by recognising that 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life' and the familiar test that any interference with it will violate Article 8 unless it is in accordance with law, in pursuit of a legitimate aim and proportionate (Strand Lobben and Others v Norway, 2019, paras 202, 207). Signalling what was to prove central to its decision, it noted that, in assessing proportionality, regard must be had to the extent to which a 'fair balance' had been struck between 'the relevant competing interests' (Strand Lobben and Others v Norway, 2019, para 203).

More specifically, the Court set out the following basic principles to be applied in child protection cases: a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit; the authorities are under a positive obligation to take measures to facilitate family reunification as soon as reasonably feasible; and, in the meantime, everything must be done to preserve personal relations (Strand Lobben and Others v Norway, 2019, paras 205–208). More far-reaching measures, like the termination of parental responsibilities or adoption, 'should only be applied in exceptional circumstances' and only where they can be justified by 'an overriding requirement pertaining to the child's best interests' (Strand Lobben and Others v Norway, 2019, para 209). In all of this, the Court was conscious of the danger that the 'effluxion of time' due to procedural or other delays could 'result in the de facto determination of the issue submitted to the court before it has held its hearing' (Strand Lobben and Others v Norway, 2019, para 212).

When it applied these principles to the instant case, it found a number of shortcomings in the decision-making process. In particular, it noted the limited opportunities for contact between the mother and the child, the failure to seek updated expert reports, the limited assessment of how the mother's situation had changed and the lack of detailed and up-to-date assessment of the child's continuing vulnerability (Strand Lobben and Others v Norway, 2019, paras 220–225). In concluding that there had been a violation of Article 8, it found that

> [T]he domestic authorities did not attempt to perform a genuine balancing exercise between the interests of the child and his biological family, but focused on the child's interests instead of trying to combine both sets of interests, and moreover did not seriously contemplate any possibility of the child's reunification with his biological family. (Strand Lobben and Others v Norway, 2019, para 220)

Decisions of the ECtHR have been criticised for a lack of clarity and consistency (Fenton-Glynn, 2019; O'Mahony, 2019) and the Court's approach to the importance to be attached to the child's best interests provides another example of that problem. It referred to the 'broad consensus, including in international law' that in all decisions concerning children the best interests of the child are 'of paramount importance' and 'must come before all other considerations' (Strand Lobben and Others v Norway, 2019, para 204). With respect, that is not entirely accurate. As we have seen, while the Hague Convention on Child Abduction, for example, accords paramountcy to these interests, the CRC treats the child's best interests as a primary consideration, save in adoption cases where paramountcy is the order of the day.

In any event, the Court departed from its position on paramountcy. Having emphasised that 'regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Art.8' (Strand Lobben and Others v Norway, 2019, para 205), it concluded that 'where the respective interests of a child and those of the parents come into conflict, art.8 requires that the domestic authorities should *strike a fair balance* between those interests', albeit, it conceded that 'in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents' (Strand Lobben and Others v Norway, 2019, para 206; emphasis added).

In their dissenting opinion, Judges Kjølbro, Poláčková, Koskelo and Nordén criticised the approach of their fellows in the majority as being 'riddled not only with some inevitable ambiguities but also with some undeniable tensions and outright contradictions, "internally" as well as

in relation to the relevant specialised legal instruments, particularly the International Convention on the Rights of the Child' (Strand Lobben and Others v Norway, 2019, OIII-5). As they noted, the difficulty stems from 'how to reconcile the "sanctity" of the biological family with the best interests of the child' (Strand Lobben and Others v Norway, 2019, OIII-6) and, where reconciliation it not possible, to determine which takes precedence (Strand Lobben and Others v Norway, 2019, OIII-9). As they rightly pointed out, the ECHR and the CRC may give very different answers.

The decision in Strand Lobben had been followed in numerous Chamber judgments on child protection (see Emberland, Chapter 2) when the Grand Chamber returned to the matter of child protection, in 2021, in Abdi Ibrahim v Norway (2021). There, the authorities had authorised the adoption of the son of a young, Muslim, Somali woman by a Christian couple in the face of her opposition. The fascinating cultural and religious dimensions of that case are a matter for discussion another day. For our present purpose, two points should be noted. First, the Grand Chamber quoted in full – and endorsed – 'the general principles relevant to child welfare measures' that it had set out in Strand Lobben (2019, para 145). Second, it found that there had been violation of the mother's Article 8 rights and the Court repeated the criticism that the domestic authorities had not attempted 'to perform a genuine balancing exercise between the interests of the child and those of his biological family, but focused on the child's interests instead of trying to combine both sets of interests' (Abdi Ibrahim v Norway, 2021, para 151). It is clear, then, that the European Court now takes the view in child protection cases that, while the child's best interests are important, they must be balanced against respect for the rights of the child's parents.

United Nations Convention on the Rights of the Child

It is familiar territory that the CRC, adopted by the UN General Assembly in 1989, came into force more quickly than any other human rights treaty, becoming the most widely ratified international human rights instrument (Lopatka, 2007, p xli; Tobin, 2019, p 1). While the CRC is much younger than the ECHR, it has now featured in the human rights firmament for well over 30 years and there has been ample opportunity for it to be founded upon in domestic and international courts (Liefaard and Doek, 2015) and explored extensively in the academic literature.

In contrast to the ECHR, the CRC is unambiguously focused on children's rights. As is made clear in the preamble to the CRC, however, these rights are premised on a view of the family as 'the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children' and the centrality of the family is reinforced throughout the CRC. So, for example, there is the Article 9

injunction against separation of a child from his or her parents save where that is necessary in the child's best interests, while Article 16(1), protects against arbitrary or unlawful interference in the child's family.

Alongside this emphasis on the importance of the family, the CRC recognises that families alone may not always be relied upon to provide all children with adequate protection and, indeed, that family members may be the source of potential or actual harm (Sandberg, 2018). Thus, for example, Article 3(2) places an obligation on states parties 'to ensure the child such protection and care as is necessary for his or her well-being', while Article 19 addresses the state obligation to protect the child from abuse and neglect.

The focus here is on the priority accorded to the child's best interests in the child protection context when weighed against the rights and interest of others. Since Article 3(1) of the CRC provides that the child's best interests are 'a primary consideration in all actins concerning the child', these interests start from a strong position, something reinforced by the fact that Article 3(1) itself has long been regarded as one of the four general principles of the convention (UN, 2022, para 12).

The CRC Committee plays a crucial role in amplifying the content of the rights and obligations under the CRC. In the following sections, its contributions through Concluding Observations on state party reports and decisions under the Communications Procedure will be explored first since they are of limited assistance in addressing our concern. We then turn to the Committee's GCs, which do more to clarify the priority to be accorded to best interests, and the DGDs, which, arguably, point to a way forward.

Concluding Observations

The CRC requires each state party to submit an initial report to the CRC Committee on its progress in implementing the convention within two years of it entering into force in the country and periodic reports every five years thereafter (Article 44(1)). In 2022 – and in line with other treaty bodies – the CRC Committee extended the reporting cycle to eight years (UN, 2022, para 58). After a process of dialogue with the state party and deliberation, the CRC Committee publishes its Concluding Observations – essentially, a report card on the state party's performance – acknowledging progress made, highlighting matters that are cause for concern and making recommendations for action. Concluding Observations are important in assessing and recording the performance of the state under review, but they also serve a valuable function as an interpretative tool in respect of the CRC itself (O'Flaherty, 2006, p 51).

This opportunity for the CRC Committee to monitor the state party's compliance with its convention obligations and to amplify what CRC obligations entail is constrained, however, by the Committee's very part-time

status. In 2014, the General Assembly introduced a further limitation when, as part of its efforts aimed at operating more efficiently, it encouraged treaty bodies to adopt a simplified reporting procedure, 'short, focused and concrete concluding observations' and to limit them to 10,700 words (UNGA, 2014).

The CRC Committee responded the following year, issuing new reporting guidelines (UN Committee on the Rights of the Child, 2015). States parties are directed to structure their reports using the model provided which groups cognate articles in the convention together in 'clusters' (para 17). There are 11 clusters in all, most having further sub-divisions, but of particular relevance for our present purpose are those dealing with general principles (taking in Article 3), violence against children, family environment and alternative care, and special protection measures.

Concluding Observations mirror the clusters in the guidelines, often addressing the various sub-divisions specifically. Unsurprisingly, there is always a discussion of the state party's progress in implementing Article 3(1), with the Committee emphasising its importance and reminding states parties of the need to apply it comprehensively and to train the relevant professionals in its application. Similarly, Concluding Observations address child protection, often making detailed recommendations in respect of the state party.

What is absent, however, is in-depth exploration of the priority to be accorded to the child's best interests when weighed against parental rights in the child protection context. Given that Concluding Observations deal with a wide range of topics and are subject to a word limit, that is no criticism of the Committee. It does suggest, however, that it might take the opportunity to address that matter in greater depth elsewhere.

Communications Procedure

The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) provides the CRC Committee with another opportunity to amplify the convention (UNGA, 2011). Since OPIC came into force in 2014, the Committee has been empowered to receive 'individual communications' – essentially, complaints – from, or on behalf of, a particular child or group of children that a state party has violated rights set out in the CRC or the First or Second Optional Protocols thereto and to make determinations on them (Article 5). Communications may only be received in respect of a state party that has ratified OPIC and, where the complaint concerns the First or Second Optional Protocols, the relevant instrument (Article 1) and a range of fairly standard admissibility criteria impose further limitations (Article 7). Echoing the CRC itself, the Committee is directed that, in dealing with communications, it 'shall be guided by the principle of the best interests of the child', having regard to

the rights and views of the child (Article 2), and this approach is repeated in the Committee's own Rules of Procedure (2021).

The promise of the Committee's determinations under OPIC is that, unlike GCs and Concluding Observations, they will provide insights into its thinking in a case-specific context that more closely parallels judgments of the ECtHR. For our present purpose, that promise has yet to be fulfilled since the Committee's decisions on the merits to date have largely addressed migration-related issues (age determination, deportation and asylum), with a small number of cases dealing with access to education and intra-family disputes. In its only decision on the merits to date that dealt squarely with child protection, B.J. and P.J. v Czech Republic (2023), the Committee found such clear violation of the rights of two siblings, aged 13 and 15, under Articles 3(1), 9, 12 and 37(b) that it did not discuss the matter of balancing parental rights with those of the young people.[3]

Why OPIC has been used so rarely in respect of child protection is a matter for speculation. One explanation is that relatively few states – only 52 at the time of writing – have ratified it and some countries whose child protection procedures have given rise to cases before the ECtHR, including Norway and the United Kingdom, are not among them. It may simply be due to the fact that OPIC has only been in force for a relatively short time and using it is still feeding into litigators' thinking, an explanation made all the more persuasive by the fact that a number of cases raising child protection issues are pending. The Committee's determinations in these cases may provide a wealth of material for future analysis providing insights into the priority to be accorded to the child's best interests when weighed against the rights of others.

General Comments

In its Rules of Procedure, the CRC Committee describes the GCs it publishes periodically as being designed to promote the 'further implementation' of the Convention and to 'assist States parties in fulfilling their reporting obligations' (UN Committee on the Rights of the Child, 2019, r. 77). That modest statement underplays the immense importance of the GCs in fleshing out CRC obligations, in amplifying their application in particular contexts and the reliance placed on them by states parties, courts and commentators.

Numerous GCs address the obligation to protect children and young people in the many situations where their rights may be compromised (see UNCRC, 2005a, 2006, 2009, 2016, 2017), but of particular relevance for our present purpose is GC No. 13: The right of the child to freedom from all forms of violence (UNCRC, 2011). There, the Committee makes clear that, while 'in common parlance the term violence is often understood to mean only physical harm and/or intentional harm', Article 19 is designed

to protect children from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse' (UNCRC, 2011).[4] Thus, the protection afforded by the Convention addresses the totality of the child's situation.

The CRC Committee had long signalled the importance of according to primacy to the best interests of the child in all actions concerning children, designating it one of the general principles of the CRC, when it turned its attentions to Article 3(1) again, in GC No. 14 (UNCRC, 2013). There, it provided the iconic description of the child's best interests as 'a threefold concept', being 'a substantive right … a fundamental interpretive principle and … a rule of procedure' (para 6).

Conscious of the criticism levelled at the concept of the child's best interests – that it is vague and indeterminate (see the discussion of 'The best interests of the child' earlier) – the Committee sought to clarify what was involved in making what it described as a 'best interests assessment and determination' using 'a non-exhaustive and non-hierarchical list of elements' that would provide decision-makers with 'concrete guidance, yet flexibility' (para 50). It emphasised that assessment should be undertaken by 'balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children' (para 48). The elements it identified are as follows: the child's views; the child's identity; preservation of family environment and maintaining relations; care, protection and safety; situations of vulnerability; the child's right to health; and the child's right to education (paras 52–79).

These elements echo the CRC itself. So, for example, 'preservation of family environment and maintaining relations' has its roots in the Convention's preambular reference to the importance of the family as the fundamental group in society and to the numerous articles that acknowledge its importance. Similarly, by highlighting 'care, protection and safety' as a facet of best interests, the Committee was reiterating the state party's obligations to ensure protection for children. Addressing the situation where protecting the child might indicate intervention in the family, GC 14 drew on the UN Guidelines for the Alternative Care of Children (UNGA, 2010), emphasising that states parties should provide support to parents to enable them to fulfil their responsibilities; that separation of a child from his or her family should be a measure of last resort; that it should be accompanied by assessment, preferably by a multidisciplinary team of well-trained professionals with appropriate judicial involvement; and that the child should maintain links with the parents and family unless that is not in the child's best interests (paras 61–65).

Thus far, the approach of the CRC Committee has much in common with that of the ECtHR. It is when we turn to the priority to be accorded to the child's best interests that divergence emerges. Acknowledging that a particular

child's rights might conflict with those of other people, whether children or adults, the Committee recommended balancing the interests of all concerned and seeking to find a compromise. However, it recognised that will not always be possible and, where conflicting rights cannot be harmonised, it was quite clear that the child's best interests 'have high priority', that they are 'not just one of several considerations' and, consequently, that 'a larger weight must be attached to what serves the child best' (para 39). That is a long way from the simple balancing test advocated by the ECtHR.

Days of General Discussion

In order to enhance a deeper understanding of the content and implications of the Convention, the CRC Committee devotes one or more meetings of its regular sessions to a general discussion of a specific topic or article of the Convention (2019).[5] These DGDs bring together a wide range of government representatives, organisations and individuals, including children and young people, and, following in-depth discussion, make recommendations for action by states and stakeholders.

That DGDs can have considerable impact is illustrated by the fact it was the recommendations from the Day of General Discussion in September 2005 on Children without Parental Care (UNCRC, 2005b, para 688) that led, ultimately, to the United Nations adopting the highly influential Guidelines for the Alternative Care of Children (UNGA, 2010).

In September 2021, the topic was Children's Rights and Alternative Care and the resulting Outcome Report (2022) set out comprehensive recommendations that were endorsed by the CRC Committee. Constraints of space do not permit in-depth exploration of the many excellent recommendations, but they repeat familiar themes, often echoing the Guidelines for the Alternative Care of Children and the General Assembly resolution of 2019. For our present purpose, the following recommendation is of particular interest:

> The Committee should, through its monitoring role, provide explicit guidance to States parties on practical steps to be taken to implement international human rights frameworks and commitments, including measures to strengthen prevention of family separation, building integrated systems for child protection and strategies for deinstitutionalization with specific time frames and adequate budgets. (UNGA, 2019, p 36)

It might be a stretch to interpret that recommendation as a call for the CRC Committee to issue a GC on child protection since it refers expressly to the Committee's 'monitoring role', something that was probably a reference to Concluding Observations directed to individual states parties. Yet it will

be recalled that the Committee's own Rules of Procedure view promoting further implementation of the CRC as one of the goals of GCs (r. 77) and there is recent precedent for a GC to follow on from a DGD.[6]

Conclusion

The goal of this chapter was to explore whether the ECtHR, interpreting the ECHR, and the CRC Committee, amplifying the CRC, were sending states parties different messages about what is required of them in the priority to be accorded to the child's best interests when weighed against the rights and interests of other family members, particularly their parents.

Examination of the Court's judgments and the work of the CRC Committee reveals much common ground between the two in the child protection context. Each recognises the importance of the family to its individual members – be they children or adults – and to society as a whole. Accordingly, both emphasise the desirability of supporting families to enable parents to care for their children, while recognising that there may be circumstances in which protecting the child will involve removing him or her from parental care. Both require that the decision to take a child into care should be based on clear criteria and that separation should be for as short a period as possible. Provided it is consistent with the child's best interest, both support child–parent contact being maintained during any period of separation and the goal of family reunification.

Both the ECtHR and the CRC Committee recognise that the child's best interests are important when decisions that affect children are being taken. Where the two part company is on the issue of the priority to be accorded to these interests when they conflict with the rights and interests of others, particularly those of the child's parents. As demonstrated by its recent decisions, the Grand Chamber of the ECtHR requires the application of a balancing test: that is, that the decision-maker should 'perform a genuine balancing exercise between the interests of the child and his [or her] biological family' (Strand Lobben v Norway, 2019) It is in the nature of balancing competing interests that one or other might prevail in a given case.

In contrast, in GC 14 (UNCRC, 2013), the CRC Committee makes clear that, where a conflict arises between the child's best interest and the rights of another person, the child's best interests are 'not just one of several considerations' and that 'a larger weight must be attached to what serves the child best' (para 39). Thus, for the Committee, this is not a competition between two equal factors. As we have seen, the limitations placed on Concluding Observations curtails the scope for the CRC Committee to develop this theme further there. Similarly, the dearth of child protection cases coming before it under OPIC to date has denied it the opportunity to apply its approach to prioritising the child's best interests in specific cases. That, however, is likely

to be a temporary deficit since a number of such cases are pending and it may be that the Committee will reiterate what it said in GC 14 in them.

In any event, for the time being, states parties are being sent conflicting messages about the priority to be accorded to the child's best interests where they conflict with parental rights and interests. As a theoretical proposition, a lack of coherence in the human rights arena is undesirable, but there are also practical consequences that place jurisdictions that seek to comply with their human rights obligations in an unenviable position. Should states parties draft laws and apply them in line with the approach of the ECtHR or should they seek to comply with that of the CRC Committee? How their actions are judged might well depend on whether any challenge to them is taken to the ECtHR or under OPIC.

How might this difficulty be resolved? It will be recalled that two decades ago, the Grand Chamber famously declared: 'The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child' (Sommerfeld v Germany, 2003).

Recent research confirms that the ECtHR continues to set great store by the CRC (Helland and Hollekim, 2023). Given this favourable climate, one avenue that might be worth pursuing would be for the CRC Committee to draft a new GC, dedicated to child protection, in which it takes the opportunity to explore all aspects of the subject, including the priority to be accorded to the child's best interests where they conflict with parental rights and interests.[7] Were it to adhere to the position it took in GC 14 – that is to say, that greater weight should be attached to the child's best interests – it might cause the ECtHR to revisit the matter and revise its own position.

Notes

[1] There is reference to minors in Article 5 and to juveniles in Article 6, with children being mentioned in Protocol 7, Article 5.

[2] Marckx v Belgium, no. 6833/74; (inheritance rights of child born outside of marriage); Johnston v Ireland no. 9697/82; (impact on child of father's inability to divorce); and X v Austria no. 19010/07; (impact on child of parent's same-sex partner being prevented from adopting the child).

[3] An earlier case, K.S.G. v Spain (2020), fell at the admissibility hurdle; CRC/C/85/D/92/2019 (inadmissible under OPIC, Article 7(f); communication manifestly ill-founded or not sufficiently substantiated).

[4] CRC/C/GC/13 (2011), para 4. It had already condemned corporal punishment and other abusive treatment in General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, CRC/C/GC/8 (2006).

[5] Rules of procedure: CRC/C/4/Rev.5 (2019), r.79. Since 2012, these have been scheduled biennially.

[6] General Comment No. 26 on children's rights and the environment with a special focus on climate change, CRC/C/GC/26 (2023), has its origins in the 2016 DGD on Children's Rights and the Environment.

[7] Instead, the Committee might elect to issue a Statement, as it did in respect of Article 5: Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child, 11 October 2023.

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