

<https://helda.helsinki.fi>

---

## Understanding the Best Interests of the Child as a Procedural Obligation : The Example of the European Court of Human Rights

Sormunen, Milka

2020-12

---

Sormunen , M 2020 , ' Understanding the Best Interests of the Child as a Procedural  
Obligation : The Example of the European Court of Human Rights ' , Human rights law  
review , vol. 20 , no. 4 , pp. 745-768 . <https://doi.org/10.1093/hrlr/ngaa034>

---

<http://hdl.handle.net/10138/351091>  
<https://doi.org/10.1093/hrlr/ngaa034>

---

unspecified  
acceptedVersion

---

*Downloaded from Helda, University of Helsinki institutional repository.*

*This is an electronic reprint of the original article.*

*This reprint may differ from the original in pagination and typographic detail.*

*Please cite the original version.*

Author's accepted manuscript. For final page numbers, please cite the publisher's version.

Citation: Milka Sormunen, Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights, *Human Rights Law Review*, Volume 20, Issue 4, December 2020, Pages 745–768, <https://doi.org/10.1093/hrlr/ngaa034>

## **Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights**

Milka Sormunen\*

### **ABSTRACT**

According to Article 3(1) of the United Nations Convention on the Rights of the Child, the best interests of the child have to be a primary consideration in all cases concerning children. The Committee on the Rights of the Child understands Article 3(1) as a ‘threefold concept’: a substantive right, an interpretive principle and a rule of procedure. This article argues that the provision is best understood as a procedural obligation. Understanding Article 3(1) as a procedural obligation remedies key problems that originate from interpreting the provision as a substantive right. A significant strength of the procedural approach is that it can be consistently applied in different case groups. This article illustrates the argument with the case law of the European Court of Human Rights related to children, in which the article detects three layers of a procedural approach to the best interests of the child.

**KEYWORDS:** procedural review, best interests of the child, children’s rights, European Court of Human Rights, European Convention on Human Rights, UN Convention on the Rights of the Child

---

\* Faculty of Law, University of Helsinki, [milka.sormunen@helsinki.fi](mailto:milka.sormunen@helsinki.fi).

## 1. INTRODUCTION

A ‘procedural turn’ has taken place in the protection of fundamental and human rights, as many scholars have recently shown. The procedural turn means that decision-making bodies turn increasingly to procedural arguments instead of or in addition to substantive arguments when justifying their decisions. Signs of a procedural turn can be detected in the decision-making of supranational bodies such as the European Court of Human Rights (ECtHR or ‘the Court’) and the Court of Justice of the European Union, as well as in decision-making in national administrative and legislative processes and procedures before national courts.<sup>1</sup>

This article discusses the procedural turn in the context of Article 3(1) of the United Nations Convention on the Rights of the Child (CRC),<sup>2</sup> according to which in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The United Nations Committee on the Rights of the Child (‘the Committee’ or ‘the CRC Committee’) has expressed that Article 3(1) is a ‘threefold concept’: a substantive right, an interpretive principle and a rule of procedure.<sup>3</sup> The substantive dimension has traditionally been prominent in case law.<sup>4</sup> Even though courts often pay attention to procedural elements, too, best interests are generally used as a standard to measure the outcome of a decision.<sup>5</sup> When talking about weighing interests and comparing outcomes regarding which option respects the best interests of the child, a substantive understanding is implicit.<sup>6</sup> While the importance of identifying elements

---

<sup>1</sup> E.g. Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017); Popelier and Van De Heyning, ‘Subsidiarity Post-Brighton: Procedural Rationality as Answer?’ (2017) 30 *Leiden Journal of International Law* 5; Nussberger, ‘Procedural Review by the ECHR: View from the Court’ in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 161 at 164-5; Kleinlein, ‘The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution’ (2019) 68 *International & Comparative Law Quarterly* 91; Spano, ‘The Future of the European Court of Human Rights - Subsidiarity, Process-Based Review and the Rule of Law’ (2018) 18 *Human Rights Law Review* 473.

<sup>2</sup> 1989, 1577 UNTS 3.

<sup>3</sup> Committee on the Rights of the Child, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013 at para 6.

<sup>4</sup> For descriptions of a substantive approach in national case law and legislation, see e.g. Langrognet, ‘The Best Interests of the Child in French Deportation Case Law’ (2018) 18 *Human Rights Law Review* 567; Willmott et al., ‘When Is It in a Child’s Best Interests to Withhold or Withdraw Life-Sustaining Treatment? An Evolving Australian Jurisprudence’ (2018) 25 *Journal of Law and Medicine* 944.

<sup>5</sup> For ECtHR case law, see *infra* n 13.

<sup>6</sup> See e.g. Sandberg, ‘The Role of National Courts in Promoting Children’s Rights’ (2014) 22 *International Journal of Children’s Rights* 1 at 9; Eekelaar, ‘The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children’ (2015) 23 *International Journal of Children’s Rights* 3 at 5. Weighing of interests is the approach suggested by the Committee, see Committee on the Rights of the Child, *supra* n 3 at paras 80-81.

relevant in a best interests assessment needs to be acknowledged, challenges arise too. The concept's vagueness provides a significant problem in understanding best interests as a substantive right: what do 'best interests' mean and how can they be defined in individual situations?<sup>7</sup> This vagueness originates not only from understanding best interests as a substantive right but also from the indeterminacy of the concept itself and its application to a broad range of situations. However, a substantive understanding is an important source of vagueness. Another problem concerns balancing rights; to what extent should decision-makers prioritise the interests of the child over the interests of the parents, other children or the State? Although some suggestions have been made to guide balancing,<sup>8</sup> no clear criteria exist for striking a rights-compliant balance. This risks leading to inconsistent case law.

This article argues that the potential of the best interests concept lies in relying on Article 3(1) as a procedural obligation. By 'potential', I mean that the interpretation helps remedy some key problems that originate from interpreting the provision as a substantive right, such as vagueness and the difficulty of applying the concept with predictable results. A close reading of the CRC and related documents supports such an interpretation. When understood as a predominantly procedural obligation, Article 3(1) aligns closely with the object and purpose of the CRC, which is to safeguard the human rights of children. In addition, a significant strength of the procedural approach is that it can be consistently applied in different case groups. To illustrate how a procedural approach to the best interests of the child may look in practice, this article suggests a three-layered categorisation of ECtHR case law where the ECtHR has taken a procedural approach to the best interests of the child.<sup>9</sup> This categorisation builds on a categorisation created by Brems.<sup>10</sup> In the first category, the ECtHR acknowledges that in cases concerning children, a best interests consideration is necessary in order to satisfy the requirements of the substantive European Convention on Human Rights (ECHR) article in question.<sup>11</sup> In the second category, the ECtHR pays attention to the quality of the best interests consideration. In the third category, which is the

---

<sup>7</sup> Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226 at 229.

<sup>8</sup> E.g. Eekelaar and Tobin, 'The Best Interests of the Child' in Tobin (ed), *The UN Convention on the Rights of the Child. A Commentary* (2019) 73 at 95-100.

<sup>9</sup> Cases reviewed for the article consist of jurisprudence where the Court has referred to the best interests of the child and used a procedural approach. The focus is on recent cases – years 2018 and 2019 – but older cases are occasionally discussed as well, when relevant. Case law has been followed until 31 December 2019.

<sup>10</sup> See below at section 2.

<sup>11</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 005.

most specific, the ECtHR reviews whether national authorities have considered certain factors with sufficient attention.

The ECtHR is used as an example in this article because it has arguably taken a procedural turn in the protection of human rights in general and, more specifically, in assessing the best interests of children.<sup>12</sup> The ECtHR plays a central role in interpreting human rights obligations in concrete cases, and recent developments in ECtHR jurisprudence demonstrate both the challenges of a substantive approach to best interests and the potential solutions offered by a procedural approach. The Court regularly refers to the best interests of the child in different contexts, both as a substantive right and a procedural obligation, and a vast body of case law allows for a reliable analysis of how the Court understands the best interests concept. However, despite the Court's frequent references to best interests, its use of the concept does not often lead to child-friendly outcomes. It has been demonstrated that a substantive approach to best interests frequently results in problematic differences between case groups and ECHR articles. Consequently, rights become very dependent on the context and individual circumstances in which they are claimed.<sup>13</sup> Previous research indicates that a procedural approach may provide a solution to these problems. Kilkelly has identified the development of procedural rights and the focus on positive obligations as the main techniques through which the ECtHR advances children's rights.<sup>14</sup> A procedural approach to the best interests of the child has arguably proven effective in safeguarding fundamental and human rights and more applicant-friendly than a substantive approach, especially in cases with a wide margin of appreciation.<sup>15</sup>

It is important to stress that this article does not claim that the procedural approach has replaced the substantive approach entirely in ECtHR cases concerning best interests. This is clearly

---

<sup>12</sup> Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 17 at 17; Kilkelly, 'Protecting children's rights under the ECHR: the role of positive obligations' (2010) 61 *Northern Ireland Legal Quarterly* 245.

<sup>13</sup> See e.g. Smyth, 'The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) 17 *European Journal of Migration and Law* 70; Bracken, 'Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?' (2017) 39 *Journal of Social Welfare and Family Law* 368; Fenton-Glynn, 'International surrogacy before the European Court of Human Rights' (2017) 13 *Journal of Private International Law* 546; Sormunen, 'A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?' (2019) 31 *Child and Family Law Quarterly* 248.

<sup>14</sup> Kilkelly, 'The CRC in Litigation under the ECHR' in Liefwaard and Doek (eds), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 193 at 195-6.

<sup>15</sup> Leloup, 'Some Reflections on the Principle of the Best Interests of the Child in European Expulsion Case Law' in Benedek et al. (eds), *European Yearbook on Human Rights*, vol. 10 (2018) 395 at 415; see also Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 176 at 197-200.

not the case. In several recent judgments, the Court's reasoning builds on substantive arguments only.<sup>16</sup> At times, the ECtHR has flirted with the procedural approach and then refrained from using it.<sup>17</sup> The Court has even expressly refused the procedural approach.<sup>18</sup> It seems that several, partly contrasting developments, including the procedural turn, are taking place at once. The ECtHR does not apply the same logic in every case. Despite this, the Court relies on the procedural approach increasingly often.

This article first introduces procedural review of fundamental and human rights in general and then in the context of the ECtHR. After that, it analyses the nature of the best interests provision. Based on both an interpretation of Article 3(1) as a provision in an international treaty and an analysis of the views of the CRC Committee, the article suggests that the provision should be understood predominantly as a procedural obligation. The article then discusses what a procedural approach to the best interests of the child currently looks like in the case law of the ECtHR.

## 2. PROCEDURAL REVIEW OF FUNDAMENTAL AND HUMAN RIGHTS

The term 'procedural approach' (also 'procedural review' or 'process-based review') refers to different approaches for including procedural elements in a fundamental rights review. The different types of procedural review share a focus on how the decision was reached. The procedural approach can be 'pure' in that it only reviews the procedure and remains silent about substantive concerns. Alternatively, the procedural approach can be 'semiprocedural', combining elements of procedural and substantive review,<sup>19</sup> which shows that emphasising procedural review does not necessarily mean abandoning substantive review; rather, the two are complementary. Proceduralisation can also be understood more widely as reflecting the structural relationship of different decision-making bodies in the European system for the protection of human rights.<sup>20</sup> Additionally, the label 'procedural' may be understood to describe either the nature of the right or a court's conceptualisation of the right. A human right may itself be a procedural right, such as the

<sup>16</sup> See e.g. *SS v Slovenia* App no 40938/16, Merits and Just Satisfaction, 30 October 2018; *Pojatina v Croatia* Application No 18568/12, Merits and Just Satisfaction, 4 October 2018.

<sup>17</sup> E.g. *Ejimson v Germany* Application No 58681/12, Merits and Just Satisfaction, 1 March 2018 at paras 49, 60-65.

<sup>18</sup> *Assem Hassan Ali v Denmark* Application No 25593/14, Merits and Just Satisfaction, 23 October 2018 at paras 60-61.

<sup>19</sup> Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

<sup>20</sup> Arnardóttir, 'Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation' (2015) 5 *European Society of International Law Conference Paper Series* 1.

right to a fair trial. Some rights, typically worded in general terms, are understood by courts as procedural obligations in certain circumstances.<sup>21</sup>

Procedural review has benefits regarding legitimacy and subsidiarity. Studies on procedural justice have shown that the acceptance of decisions depends to a great extent on the procedures used to reach those decisions.<sup>22</sup> Procedural justice is especially important for the legitimacy of a body deciding controversial or divisive issues, such as disputes over fundamental and human rights.<sup>23</sup> Procedural review is often linked to subsidiarity, especially in the case of supranational bodies.<sup>24</sup>

A drawback of the procedural approach is that its outcome can be difficult to predict, which is why it can lack the certainty of other methods.<sup>25</sup> Another concern is the review's breadth: if procedural review is too narrow, relying on it may produce unpredictable conclusions. The review's quality is thus essential. The neutrality of procedural review can also be questioned. Huijbers has argued in the context of the ECtHR that procedural review is not necessarily more neutral than substantive review. There are different types of procedural standards, not all of which are neutral in that they would not limit the political choices of States. The more detailed and concrete the procedural standards, the more the ECtHR imposes its standards on States. In addition, procedural obligations may shape future substantive conclusions.<sup>26</sup>

When assessing procedural review's legitimacy, it is important to consider whether the review consists of drawing positive or negative inferences from the quality of the process. Brems has argued that while drawing a negative inference – finding a violation based on the discovery that procedural obligations were not followed – is acceptable, drawing a positive inference – arriving at a non-violation based on a mere discovery that procedural obligations were followed – is more problematic.<sup>27</sup> In the context of the ECtHR, Gerards has found that negative inferences are drawn more directly and cases with a positive type of procedural review usually include more substantive arguments in addition to procedural arguments. The lack of procedural

---

<sup>21</sup> Sathanapally, 'The Modest Promise of "Procedural Review" in Fundamental Rights Cases' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 40 at 45.

<sup>22</sup> Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 26.

<sup>23</sup> Brems and Lavrysen, *supra* n 15.

<sup>24</sup> Brems, *supra* n 12 at 22-6; Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 177 at 179-80.

<sup>25</sup> Kilkelly, *supra* n 14 at 195-6.

<sup>26</sup> Huijbers, 'Procedural-Type Review: A More Neutral Approach to Human Rights Protection by the European Court of Human Rights?' (2017) 9 *European Society of International Law Conference Paper Series*.

<sup>27</sup> Brems, *supra* n 12 at 39.

care is often used as an important or decisive reason for finding a violation, whereas demonstrated procedural care is usually one argument considered alongside more substantive considerations. Thus, procedural review by the ECtHR is rarely purely positive.<sup>28</sup> It has been argued that while procedural (or semi-procedural) review can contribute to the ECtHR's legitimacy as a subsidiary body that complements national systems, this is not necessarily true when the Court draws a negative inference from the quality of the procedure by concluding that the national procedure did not fulfil the ECHR requirements.<sup>29</sup>

In previous research, different categorisations of procedural review have been proposed according to the scope of the review, type of obligation (positive or negative) and the stage where procedural arguments appear in the reasoning. In the context of the ECtHR, Popelier and Van De Heyning have distinguished between 'procedural rationality review', in which the decision-making procedure's quality is a decisive factor in assessing whether an interference in human rights was proportional, and 'pure procedural review', in which formal compliance with procedural requirements is the only focus.<sup>30</sup> Gerards has suggested a broad distinction between two types of procedural review. In the first type, the Court sets positive obligations of a procedural nature under an ECHR right. In the second, the Court relies on the quality of national decision-making when reviewing whether States have acted in conformity with ECHR provisions.<sup>31</sup> Brems and Lavrysen have identified two procedural approaches of the ECtHR: context-specific assessment focused on the case at hand and a more comprehensive approach in which general obligations related to procedural fairness are read into substantive human rights provisions.<sup>32</sup> Based on Gerards' and Brems and Lavrysen's categorisations, Arnardóttir has determined that the procedural turn in the ECtHR takes two forms. In the first form, the 'procedural rights approach', explicit procedural requirements are interpreted into different ECHR provisions and 'become part of the protective scope of the right in question alongside issues relating to the substance of the relevant right'. In the second form, the 'procedural review in the strict sense', procedural elements are included in 'the balance of reasons when the Court pronounces on the substantive merits and assesses the proportionality or reasonableness of a measure'.<sup>33</sup>

---

<sup>28</sup> Gerards, 'Procedural Review by the ECtHR: A Typology' in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 127 at 150-5.

<sup>29</sup> Popelier and Van De Heyning, *supra* n 1 at 20; Nussberger, *supra* n 1 at 163.

<sup>30</sup> Popelier and Van De Heyning, *supra* n 1 at 9-10.

<sup>31</sup> Gerards, *supra* n 8 at 129.

<sup>32</sup> Brems and Lavrysen, *supra* n 5 at 196.

<sup>33</sup> Arnardóttir, 'The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance' (2017) 15 *International Journal of Constitutional Law* 9 at 13-14.



Brems has argued that based on process efficacy and subsidiarity considerations, the optimal type of procedural review assesses the quality of the domestic human rights scrutiny. This type of review is not strictly procedural but rather is ‘mixed’ or ‘substance-flavoured’, concentrating primarily on the procedure but also incorporating some substantive elements.<sup>34</sup> Brems has identified three types of substance-flavoured procedural review in the ECtHR, ranging from a broad-brush approach to the imposition of more specific requirements. For the purposes of this article, Brems’ categorisation is particularly interesting. The first type is a broad approach in which the Court considers whether national authorities have conducted a proportionality analysis or weighing of interests but does not provide further guidance as to more specific requirements. The second is a broad approach with a specific substantive focus as authorities must show that they have explicitly taken into account certain relevant elements, for example, the special vulnerability of affected persons. The third is the most specific approach where the ECtHR reviews the human rights scrutiny of domestic courts by drawing concrete checklists of criteria to guide proportionality analysis, such as the *Üner* criteria concerning the expulsion of foreigners.<sup>35</sup>

Before showing how Brems’ three approaches can be used to classify ECtHR case law concerning the best interests of the child, it is necessary to discuss the nature of the best interests provision. The next section analyses Article 3(1) CRC and suggests that the best interests concept should be understood predominantly as a procedural obligation.

### **3. BEST INTERESTS OF THE CHILD AS A PROCEDURAL OBLIGATION**

#### **A. A Threefold Concept?**

The obligation to take the best interests of the child into account in actions concerning children, enshrined in Article 3(1) CRC, has an important status in the context of children’s rights.<sup>36</sup> The CRC Committee elevated Article 3 as one of the ‘general principles’ of the CRC when drafting the guidelines for State reports in 1991.<sup>37</sup> The general principles have particular importance for interpreting the whole convention.<sup>38</sup> Yet article 3(1) has also raised criticism. It is different from other CRC provisions in its unusual formulation of not containing the word ‘right’.<sup>39</sup> The provision

---

<sup>34</sup> Brems, *supra* n 12 at 34-5.

<sup>35</sup> *Ibid.* at 35-7.

<sup>36</sup> See e.g. Freeman, 'Article 3. The Best Interests of the Child' in André et al. (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 1 at 1.

<sup>37</sup> UN Doc CRC/C/1991/SR.1 at para 58.

<sup>38</sup> Other general principles are Articles 2, 6 and 12.

<sup>39</sup> Kilkelly, 'The Best Interests of the Child: a Gateway to Children's Rights?' in Sutherland and Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child. Best Interests, Welfare and Well-being* (2016) 51 at 57.

does not define best interests, nor does it outline any particular duties or precise rules.<sup>40</sup> It is, therefore, unclear what ‘best interests’ are and how they differ from rights. Furthermore, the meaning of taking best interests as a primary consideration is uncertain. These questions are only some of those that contribute to the confusion around how Article 3(1) CRC should be interpreted. It is debatable whether the provision expresses an obligation different from or complementary to the rights protected by other provisions in the CRC; that is, does relying on the rights of the child produce the same – or a better – outcome than a best interests assessment?<sup>41</sup>

When interpreting Article 3(1) CRC, it is useful to examine the CRC Committee’s views. Pursuant to Article 43 CRC, the Committee is established ‘[f]or the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention’. The Committee has taken an active role in interpreting CRC articles and other relevant themes.<sup>42</sup> In 2013, the Committee issued a General Comment clarifying the interpretation of Article 3(1). The General Comment explains the best interests of the child as ‘a threefold concept’ comprising 1) a substantive right, 2) a fundamental, interpretative legal principle and 3) a rule of procedure.<sup>43</sup> The following analysis focuses on whether conceptualising the provision as a threefold concept is helpful.

The different dimensions of Article 3(1) are characterised in the General Comment. The function as a substantive right refers to the ‘right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake’. The substantive right dimension also refers to ‘the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general’. Furthermore, Article 3(1) is characterised as directly applicable. The second function identified by the Committee is that the provision is a ‘fundamental, interpretative legal principle’, which means that if a provision can be interpreted in several ways, ‘the interpretation which most effectively serves the child’s best

---

<sup>40</sup> Zermatten, ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18 *International Journal of Children’s Rights* 483 at 485.

<sup>41</sup> Cantwell, ‘Are “Best Interests” a Pillar or a Problem for Implementing the Human Rights of Children?’ in Liefgaard and Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child* (2017) 61 at 65-6; Kilkelly, *supra* n 39 at 60-61.

<sup>42</sup> See also Gras, *Monitoring the Convention on the Rights of the Child*, Research Reports 8/2001, The Erik Castrén Institute of International Law and Human Rights (2001) at 53-6.

<sup>43</sup> Committee on the Rights of the Child, *supra* n 3; the characterisation of best interests as a threefold concept is similar to the characterisation presented by the former chair of the Committee Jean Zermatten in 2010 before the General Comment was issued, see Zermatten, *supra* n 40.

interests should be chosen'. The CRC rights set the framework for interpretation. The third function of the concept is a 'rule of procedure', which refers to the obligation to include an evaluation in decision-making processes of the decision's possible impact on a specific child, an identified group of children or children in general. The function as a rule of procedure also refers to the procedural guarantees required to assess and determine the best interests of the child, as well as to the obligation to explain how best interests have been defined in a specific case, what criteria the assessment is based on and how the child's interests have been weighed against other considerations. According to the Committee, a decision's justification must show that the right protected by Article 3(1) CRC has been explicitly taken into account.<sup>44</sup>

The Committee's identification of best interests as a substantive right suggests that best interests can be equated with children's rights. In addition to expressly characterising best interests as a substantive right, the Committee stresses that '[t]he concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all rights recognized in the Convention and the holistic development of the child'.<sup>45</sup> A rights-based understanding – assessing and determining best interests in light of the whole CRC – is logical. The Committee also expresses an outcome-focused understanding of best interests; a significant part of the General Comment consists of describing which 'elements' are important in assessing the best interests of the child.<sup>46</sup> The General Comment also addresses the balancing of best interests, implying that best interests can be weighed against other rights and interests in a similar way to fundamental rights.<sup>47</sup>

The function of the concept as a substantive right has been criticised in earlier research. Based on a textual analysis of Article 3(1), Kilkelly has questioned whether the best interests provision contains a right at all; instead, the provision's value is practical and lies in persuading decision-makers about the importance of a rights-based approach to children's issues in contexts where the language of human rights is not possible. The language of 'best interests' may represent a soft approach and, therefore, be a strategic way of advancing children's issues, especially in politically sensitive contexts.<sup>48</sup> Cantwell has criticised use of 'best interests' as a 'trump card', arguing that a provision focused on children's interests should not exist in a convention that otherwise guarantees rights. Cantwell does not, however, see the best interests

---

<sup>44</sup> Committee on the Rights of the Child, *supra* n 3 at paras 6a-6c.

<sup>45</sup> *Ibid.* at para 4.

<sup>46</sup> *Ibid.* at paras 46-79.

<sup>47</sup> *Ibid.* at paras 80-84.

<sup>48</sup> Kilkelly, *supra* n 39 at 64-6.

provision as entirely unnecessary. According to him, the provision can be useful in certain circumstances, though not as widely as often advocated; it can be helpful, for example, when the decision-maker has to choose between two good options that are both in accordance with the rights of the child. Of these two options, the one that best fulfils the child's best interests must be chosen.<sup>49</sup>

The second dimension identified by the Committee, best interests as an interpretive principle, seems similar to the function Cantwell attributes to the concept: when more than one interpretation exists, the one that best respects the best interests of the child should be chosen. Formulated as the Committee puts it, the interpretive function seems to require a substantive best interests determination. This raises the question about the relationship between the interpretive and substantive functions – and, ultimately, about what the interpretive status actually entails. Kilkelly has noted that the Committee ‘says very little’ about the concept as an interpretive tool.<sup>50</sup>

It is important to note, however, that the interpretive function can have potential too for aligning best interests with the rights of the child. The interpretive function becomes important in situations where the child's rights can be maximised or when two rights or interests of the same child compete against each other, for example, in cases of adoption in which best interests must be a paramount consideration, according to Article 21 CRC. It can also help interpret other international obligations in a child rights compliant manner, as Pobjoy has argued regarding the Refugee Convention.<sup>51</sup> In the ECtHR jurisprudence, the interpretive function can be understood to mean construing ECHR obligations so that if several options are available, the one that best respects the best interests of the child should be chosen.<sup>52</sup> It is, however, difficult to see how the best interests concept could function as an interpretive principle when child's interests conflict with other rights and interests. In other words, the function as an interpretive principle does not seem useful in

---

<sup>49</sup> Cantwell, 'Are Children's Rights Still Human?' in Intervenizzi and Williams (eds), *The Human Rights of Children. From Visions to Implementation* (2011) at 37; Cantwell, supra n 41 at 69-70.

<sup>50</sup> Kilkelly, supra n 39 at 61-2; cf Wandenhole who considers the interpretive function as potentially powerful, see 'Distinctive characteristics of children's human rights law' in Brems, Desmet and Wandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?* (2017) 21 at 26.

<sup>51</sup> Pobjoy, *The Child in International Refugee Law* (2017) at 80-1, 124; Convention relating to the Status of Refugees 1951, 189 UNTS 137.

<sup>52</sup> See e.g. *A and B v Croatia* Application No 7144/15, Merits and Just Satisfaction, 20 June 2019, joint dissenting opinion of Judges Sicilianos, Turkovic and Pejchal, at para 34, where the dissenting judges suggest that when deciding whether the Court should depart from a principle established in a previous judgment, it 'should be guided by the principle of the best interests of the child, in all of its three aspects, as a substantive right, as an interpretative principle and as a rule of procedure'.

situations where the child's human rights must be limited. This excludes a significant number of situations as court cases often concern limiting rights.<sup>53</sup>

Given that two of the three dimensions outlined by the CRC Committee do not sufficiently clarify the nature of best interests, the threefold-concept understanding of the concept does not seem particularly helpful. The substantive right dimension of the best interests provision shifts focus to the rights of the child, which accords with the object and purpose of the CRC. However, if considering best interests means considering relevant rights, it is difficult to see why the best interests provision is needed in the first place. At the same time, understanding the provision as an interpretive principle also does not seem to add value when rights conflict. In these situations, the problem from the perspective of children's rights is often not identifying which alternative is best for the child in question; instead, the problem tends to be that other rights or interests, such as the State's interest in controlling immigration, are seen to weigh more heavily than the rights of the child. Conceptualising the situation from the perspective of what is best for the child does not offer practical tools to the decision-maker. However, the third dimension of the best interests concept is more promising.

### **B. Or (Mainly) a Procedural Obligation?**

Perceiving best interests as a procedural rule is the third function identified by the Committee. I argue that the most reasonable interpretation of best interests is to understand Article 3(1) as imposing a procedural obligation to consider the best interests of the child in any decision-making process concerning children. This interpretation is in line with Article 31(1) of the Vienna Convention on the Law of Treaties,<sup>54</sup> which postulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. If Article 3(1) CRC is examined carefully, its main content is the obligation to consider the best interests of the child in all cases concerning children, which implies a procedural obligation. Interpreting the best interests provision as a procedural obligation also receives support from the title of the General Comment concerning best interests, which is 'the right of the child to have his or her best interests taken as a primary consideration'. The obligations of States parties identified in the General Comment to ensure that best interests are consistently applied in every action taken by a public or private institution and to ensure that

---

<sup>53</sup> On the ECtHR system of limiting rights, see e.g. Letsas, 'The scope and balancing of rights. Diagnostic or constitutive?' in Brems and Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) 38.

<sup>54</sup> 1969, 1155 UNTS 331.

decisions, policies and legislation demonstrate that best interests have been a primary consideration are also best understood as procedural in nature.<sup>55</sup>

In practice, a procedural approach means that when a court conducts a best interests assessment, it does not substantively assess which outcome is in the best interests of the child in question but instead reviews the procedure that led to the outcome. Understanding the best interests provision as a procedural obligation means shifting the focus on whether best interests have been considered in the decision-making process. According to this interpretation, not giving adequate consideration to the child's interests could, consequently, be grounds for challenging the decision in front of a court. When perceived as a procedural obligation, the obligation to consider best interests in all actions concerning children becomes central. The debate about what it means to take best interests as a 'primary' or 'paramount' consideration<sup>56</sup> – which was also one of the most discussed issues during the drafting of Article 3<sup>57</sup> – becomes less meaningful as the substantive assessment focusing on the relevant rights of the child is distinguished from the weight of best interests. Taking a procedural approach to best interests does not mean that substantive considerations are set aside but rather that the substantive assessment should be articulated in terms of the rights of the child whereas the best interests assessment should focus on procedural factors.

The understanding of best interests as a procedural obligation has gained some support in previous research. Abramson has examined the drafting process of the CRC and argued that no careful analysis was conducted during the process regarding whether the provisions declared as 'general principles' in fact contained a principle. Abramson claims that Article 3(1) does not contain a principle but a procedural rule prescribing a step in the decision-making process.<sup>58</sup> Kilkelly is sceptical of the added value of Article 3(1) but argues that if it contains a right, that right is procedural.<sup>59</sup> Leloup has proposed that in expulsion cases of the ECtHR where the deportee is the parent, relying on a procedural approach would allow the Court to safeguard sufficiently those interests while also retaining consistency. Leloup claims that the inconsistency in the current expulsion case law stems from the Court's practice of conducting substantive best interests

---

<sup>55</sup> Committee on the Rights of the Child, *supra* n 3 at para 14.

<sup>56</sup> E.g. Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Sutherland and Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (2016) 21 at 33.

<sup>57</sup> E.g. Considerations 1981 Working Group, E/CN.4/L.1575 at para 22.

<sup>58</sup> Abramson, 'Article 2. The Right of Non-Discrimination' in André et al. (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2008) 1 at 65-6.

<sup>59</sup> Kilkelly, *supra* n 39 at 59-66.

assessments based on the child's age, country ties and family bonds.<sup>60</sup> Concerning argumentation at the national level, Langrognet asserts that French administrative judges could interpret Article 3(1) as a procedural rule in addition to seeing it as a substantive right. This would lead the judges to examine if Article 3(1) has been violated regardless of whether the parties have relied on the provision. This would significantly broaden the protection of children's rights.<sup>61</sup> Furthermore, Popelier and Van De Heyning have analysed judicial and administrative decisions and found that in cases concerning the interests of a child in particular, the ECtHR has accentuated the importance of procedural guarantees.<sup>62</sup>

The following sections discuss the procedural approach to the best interests of the child in ECtHR case law to illustrate how the best interests concept may be understood as a procedural obligation in concrete cases. Three different layers are identified according to the intensity of the ECtHR's scrutiny. These layers are drawn from Brems' categorisation concerning the three types of substance-flavoured procedural review.<sup>63</sup> The first, and least intense, approach covers situations in which the ECtHR acknowledges that in cases concerning children, a best interests assessment is required to satisfy the requirements of the relevant substantive ECHR Article. The second approach requires not only that a best interests assessment is conducted but also that the assessment is of good quality. Requirements as to what constitutes sufficient quality are not specified in detail. In the third approach, the requirements of a substantive ECHR Article are met when the best interests of the child have been considered, the consideration is of good quality and specific elements identified by the Court have been taken into account by national authorities.

#### **4. LAYERS OF A PROCEDURAL APPROACH TO THE BEST INTERESTS OF THE CHILD IN THE EUROPEAN COURT OF HUMAN RIGHTS**

##### **A. Best Interests Consideration as a Procedural Obligation**

In the first approach related to the best interests of the child as a procedural obligation, the ECtHR acknowledges that in cases concerning children, a best interests consideration is required in to satisfy the requirements of the ECHR Article in question. In other words, not considering the best interests of the child in a case concerning children could constitute a violation of the substantive

---

<sup>60</sup> Leloup, *supra* n 5 at 413-415; Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency' (2019) 37 *Netherlands Quarterly of Human Rights* 50 at 62-6; see also Smyth, *supra* n 13.

<sup>61</sup> Langrognet, *supra* n 4 at 574.

<sup>62</sup> Popelier and Van De Heyning, *supra* n 1 at 13.

<sup>63</sup> See above at section 2; Brems, *supra* n 12 at 35-7.

Article (negative inference);<sup>64</sup> and, conversely, a thorough assessment could lead to finding a non-violation (positive inference).<sup>65</sup>

Conceptualising best interests assessment as a procedural obligation is already quite far-reaching, not least because the ECHR does not contain an obligation to consider the best interests of the child. The ECtHR, however, has developed a vast body of case law related to the best interests of the child and emphasised in several case groups the importance of considering the best interests of the child and the need to interpret the ECHR in accordance with the CRC.<sup>66</sup> It can be argued that the norm already has an established status in the case law. As illustrated in the following sections, a lack of consideration of best interests has led to a violation in many ECtHR cases decided under Article 8. Furthermore, all the contracting States to the ECHR have ratified the CRC, which can be considered to demonstrate the existence of a European consensus on the obligation to assess best interests in all cases concerning children.<sup>67</sup>

The ECtHR usually refers to the best interests of the child in Article 8 cases. In some case groups decided under Article 8, such as child protection and adoption cases, the ECtHR has identified Article 8 as having a procedural limb. The procedural limb requires the decision-making process in administrative and judicial proceedings to be fair and respect the interests protected by Article 8.<sup>68</sup> The identification of a procedural limb is remarkable because the text of Article 8 does not refer to any procedural guarantees. Attaching procedural guarantees to Article 8 essentially accords new rights to applicants in cases that do not fall under Article 6, which protects the right to a fair trial. Traditionally, the focus of the procedural limb of Article 8 has been on parents' rights to be involved in the decision-making process to a degree sufficient to provide them with a requisite protection of their interests,<sup>69</sup> and it is still not self-evident whether children have procedural rights

---

<sup>64</sup> Naturally, this does not always need to be the case; children's rights and interests may be outweighed by other interests and rights even when adequately identified.

<sup>65</sup> E.g. *Leonov v Russia* Application No 77180/11, Merits and Just Satisfaction, 10 April 2018 concerning the residence of the applicant's child.

<sup>66</sup> E.g. *Harroudj v France* Application No 43631/09, Merits and Just Satisfaction, 4 October 2012 at para 42; *KT v Norway* Application No 26664/03, Merits, 25 September 2008 at para 43; *X v Latvia* Application No 27853/09, Merits and Just Satisfaction, 26 November 2013 at para 96.

<sup>67</sup> Ratification of a treaty can be considered a constituent of the consensus. See e.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015).

<sup>68</sup> *Elita Magomadova v Russia* Application No 77546/14, Merits and Just Satisfaction, 10 April 2018 at para 57.

<sup>69</sup> *W v the UK*, Application No 9749/82, Merits, 8 July 1987 at para 64.



under Article 8.<sup>70</sup> It seems, however, that the focus has recently shifted from protecting the interests of the parents to protecting the procedural rights of the children concerned too.<sup>71</sup>

An early case where the finding of an Article 8 violation was essentially based on the procedure is *W v the UK*, in which the child had been placed in long-term care with a view to adoption. The applicant father complained about the procedures applied to reach the decisions to restrict and then terminate his access to his son, as well as about the remedies available. The State did not accept that such procedural matters were relevant to Article 8, but the ECtHR held that while Article 8 contains no explicit procedural requirements, the decision-making process ‘clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary’. The Court explicitly held that factors such as length of proceedings and availability of remedies could be significant. In the reasoning, the emphasis was on the interests of parents to be involved in the decision-making process.<sup>72</sup>

In more recent child protection cases, the procedural limb of Article 8 is evident, and the consideration of the child’s best interests is somewhat established as an element belonging to the procedural limb. In cases concerning taking children into care, the Court considers that the procedural limb requires that decision-making procedures be fair and all parties be given a possibility to be heard or otherwise sufficiently involved. In *RMS v Spain*, which concerned the removal of the applicant’s daughter with a view to her adoption, the Court expressed that its role is to ensure whether domestic authorities have, in applying and interpreting the applicable legal provisions, secured the guarantees set forth in Article 8, fulfilled their positive obligations and taken account of the child’s best interests.<sup>73</sup> In *Lazoriva v Ukraine*, an adoption case where the applicant’s nephew had been adopted by a couple not related to the family, the ECtHR found that domestic courts had failed to clarify why the adoption better served the child’s interests than the tutelage that the applicant intended to establish. This failure was crucial; the comparison of adoption and tutelage was arguably relevant to an assessment of what constituted the child’s best interests, which was the

---

<sup>70</sup> Kilkelly argued in 2015 that procedural rights for children have not yet been developed. Kilkelly, *supra* n 14.

<sup>71</sup> E.g. *Lazoriva v Ukraine* Application No 6878/14, Merits and Just Satisfaction, 17 April 2018.

<sup>72</sup> *W v the UK*, *supra* n 69 at paras 59-70. See also *McMichael v the UK* Application No 16424/90, Merits and Just Satisfaction, 24 February 1995 where the non-involvement of parents in the proceedings led to a violation.

<sup>73</sup> Application No 28775/12, Merits and Just Satisfaction, 18 June 2013 at para 72.

principal question in the adoption proceedings. Consequently, ‘the interference with the applicant’s private life was not in compliance with the procedural requirements implicit in Article 8’.<sup>74</sup>

In addition to child protection and adoption cases, examples of integrating best interests into assessments of whether procedural obligations have been followed can be found in other case groups as well, such as immigration cases. In *MPEV and others v Switzerland*, where the father of a family faced the risk of expulsion, the Court identified best interests as ‘a primary consideration for the public authorities in the assessment of the proportionality for the purposes of the Convention’. A violation of Article 8 was found essentially for procedural reasons; the Court was not convinced that sufficient weight had been attached to the child’s best interests as no reference to them had been made on the national level. The national court had held that the relationship between the father and child did not fall under the protection of family life within the meaning of Article 8 and consequently had seen no need to refer to the child’s best interests. In fact, an assessment of the child’s situation had been made, which found that sending her back to Ecuador would amount to an ‘uprooting of excessive rigidity’, given her integration into Swiss society, lack of knowledge about her country of origin, where she had never returned after the age of two, and very limited Spanish. However, the Court, referring to Article 3 CRC, was nevertheless not convinced that sufficient weight had been attached to her best interests.<sup>75</sup>

In another expulsion case, *Guliyev and Sheina v Russia*, the Court unanimously found a violation of Article 8 because domestic courts had not carefully balanced the interests involved, including the best interests of the children. Nor had they made a thorough analysis of the proportionality of the expulsion of the father of the family and the impact of the expulsion on his family life. The applicant father had three children, but because he had not been officially registered as their father before the decision to remove him had been taken, domestic courts had refused to consider the case from the perspective of family life. When listing general considerations and relevant principles in expulsion cases, the Court expressly mentioned that the best interests of the child must be assessed in the context of the removal of a non-national parent ‘in order to give effective protection and sufficient weight to the best interests of the children directly affected by it’.<sup>76</sup> The case clearly indicates that failure to consider children may lead to a violation of Article 8.

---

<sup>74</sup> *Lazoriva v Ukraine*, supra n 71 at paras 69-70. The case was unanimous, but Judges De Gaetano and Yudkivska underlined in their concurring opinions that regardless of the procedural violation, the outcome of the case was substantively in the child’s best interests.

<sup>75</sup> Application No 3910/13, Merits and Just Satisfaction, 8 July 2014 at paras 52, 57-59.

<sup>76</sup> Application No 29790/14, Merits and Just Satisfaction, 17 April 2018 at paras 50-60.

On the other hand, the procedural failure in this case was so blatant that the case does not provide tools for assessing the quality of the procedure in other circumstances, other than that domestic courts must take into account the considerations and principles elaborated by the Court.

In child abduction cases, the Court does not usually view the lack of a best interests assessment as indicating a violation. In *Andersena v Latvia*, for example, the ECtHR underlined the need to take the Hague Convention into account when assessing best interests in cases concerning the child's return.<sup>77</sup> It held that 'the domestic courts' dismissing certain information and evidence as irrelevant to the particular proceedings cannot be taken to imply that the best interests of the child were disregarded'.<sup>78</sup> However, in *Royer v Hungary*, the ECtHR considered it positive that domestic courts had adequately considered the best interests of the child when deciding that a young child well integrated into his new environment should not be returned.<sup>79</sup> The case law is not entirely consistent, but the ECtHR seems to value the Hague Convention's rebuttable presumption of a speedy return of the child. This approach is procedural, too, because it suggests that following a certain procedure – returning the child – respects the child's interests.<sup>80</sup>

The procedural limb of Article 8 is different from the requirement expressly to consider the best interests of the child, but, as discussed above, the ECtHR often views the best interests consideration as an element of the procedural limb of Article 8. So far, this approach has covered some Article 8 cases only, but there are no barriers to broadening the approach to other ECHR Articles as well. As Leloup has argued, a procedural approach to considering the best interests of the child – instead of applying the concept as a substantive right – would allow the Court to apply the principle in all cases irrespective of the right at issue. If the Court only has to verify whether due consideration was afforded to the interests of the child in a given case, no balancing is required and making a comparable assessment between different ECHR provisions becomes easier.<sup>81</sup>

---

<sup>77</sup> Hague Conference on Private International Law, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

<sup>78</sup> Application No 79441/17, Merits and Just Satisfaction, 19 September 2019 at para 119.

<sup>79</sup> Application No 9114/16, Merits and Just Satisfaction, 6 March 2018 at paras 60-63.

<sup>80</sup> See also Keller and Heri, 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights' (2015) 84 *Nordic Journal of International Law* 270.

<sup>81</sup> Leloup, *supra* n 5 at 415-416; the observation is made in the context of cases where the parent of the child has been expelled, as the ECtHR assesses some of the cases under Article 3 and some under Article 8 ECHR.

## B. Quality of Best Interests Consideration

The approach described in the previous section, which requires national authorities to consider best interests in cases concerning children, is already progressive. In some cases, however, the ECtHR has gone even further. In addition to requiring a best interests consideration to satisfy the requirements of the substantive ECHR Article in question, the Court has on several occasions postulated that a mere consideration of best interests is not enough; the consideration also needs to be of good quality.

An example of this approach can be found in the child protection case *ML v Norway*, where the ECtHR concentrated on the national authorities' reasoning about why they had not seen the applicant mother's parents as suitable foster parents for her son. Authorities had 'conducted an in-depth examination of the entire family situation and the factors relevant to the case'. The Court was 'therefore satisfied that the domestic court carried out a balanced and reasonable assessment of the respective interests of each person, while exercising constant care to determine what would be the best solution' for the child concerned. Consequently, no violation was found.<sup>82</sup> In *Petrov and X v Russia*, where the issue was the child's residence, the Court referred to the same principles and held that a failure to make a sufficiently thorough examination would amount to a violation of Article 8.<sup>83</sup> In *Petrov*, the child had not been duly heard, an expert assessment had not been conducted and domestic courts had not sufficiently explained why they had arrived at the conclusion that they reached in the case. In addition, domestic courts had refused to take into account evidence advanced by the applicant. The Court concluded that because the examination had not been sufficiently thorough, 'the decision-making process was deficient and did not therefore allow the best interests of the child to be established'. A violation of Article 8 was found. According to the minority, the proceedings' deficiencies were insufficient to result in a violation.<sup>84</sup>

Another example of a quality-focused procedural approach to assessing best interests is the dissenting opinion of *Ndidi v the UK*. In *Ndidi*, the applicant had had a child after a deportation decision, issued because of crimes, some committed as a minor. The majority of the ECtHR relied on the assessment by the national courts and found no violation of Article 8.<sup>85</sup> The dissenting opinion disagreed that national courts had properly assessed the best interests of the

<sup>82</sup> Application No 43701/14, Merits and Just Satisfaction, 7 September 2017 at para 58.

<sup>83</sup> See also *Elita Magomadova v Russia*, supra n 68 at para 63.

<sup>84</sup> Application No 23608/16, Merits and Just Satisfaction, 23 October 2018 at paras 103-114, vote 4-3; dissenting opinion of Judges Dedov, Lubarda and Poláčková.

<sup>85</sup> Application No 41215/14, Merits and Just Satisfaction, 14 September 2017.

child. Even though a reference to best interests had been made, the national court ‘failed to explain what was considered to be in the child’s best interests, what criteria this was based on and how the child’s interests were weighed against other considerations’. The dissenting judge specified that the requirement of according primary importance to the child’s interests does not necessarily mean that a proportionality test – including a best interests assessment – would have led to a different conclusion from the one reached by national courts. The dissenting opinion suggests that the domestic courts’ failure to assess best interests adequately should alone constitute a procedural violation of Article 8.<sup>86</sup> The dissenting opinion demonstrates that the ECtHR judges do not always share the same views and the Court could have followed a different path. In this case, the majority relied on national decision-making whereas the minority called for a more thorough examination.<sup>87</sup>

The ECtHR has sometimes emphasised the need to interpret the best interests of the child in accordance with the CRC, which can be considered as an indication of the assessment quality. In the family reunification case *Senigo Longue and others v France*, the ECtHR paid attention to national authorities’ obligation to take the child’s best interests into account when assessing the proportionality of a measure. The Court also noted that international conventions, notably the CRC, have to be taken into account in the balancing. In *Senigo Longue*, these considerations led the Court to conclude that the respondent State should have followed a procedure that would have taken the interests of the children, who were also applicants before the Court, into account.<sup>88</sup> In *El Ghatet v Switzerland*, another family reunification case, the authorities had examined the son’s best interests, but they had done so ‘in a brief manner and put forward a rather summary reasoning in that regard’ without focusing sufficiently on his interests in their balancing exercise and reasoning. This was contrary to the requirements under the ECHR and other international treaties, such as the CRC in particular.<sup>89</sup> Therefore, a brief best interests consideration with a summary reasoning was not sufficient to satisfy the requirements of Article 8; the assessment needed to fulfil certain quality criteria.

Assessing the quality of decision-making is essentially based on how well reasoned a decision or judgment is. The CRC Committee has emphasised the importance of reasoned decisions

---

<sup>86</sup> Ibid., dissenting opinion of Judge Turković.

<sup>87</sup> On the ‘undercurrents’ of case law and the significance of dissenting opinions, see Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015) at 17-20.

<sup>88</sup> Application No 19113/09, Merits and Just Satisfaction, 10 July 2014 at paras 62-75.

<sup>89</sup> Application No 56971/10, Merits and Just Satisfaction, 8 November 2016 at paras 51-54.

in the context of best interests assessment and determination. It has stated that the understanding of best interests as a procedural rule presupposes that

the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.<sup>90</sup>

To be able to assess the quality of best interests considerations, ECtHR judges must possess enough information on how the judgment in question has been produced, as well as on the reasons behind it. A thorough reasoning is essential in this respect.

### C. The Checklist Approach

In addition to observing that best interests have been considered and generally requiring that the consideration is of good quality, the ECtHR has, in some cases, expected that specific elements or 'checklists' are visible in the assessment. This means that the Court reviews whether national authorities have considered certain factors and done so with sufficient quality. The checklist approach may focus on different elements depending on the context. The Court has, for example, used last resort argumentation, paid attention to linking best interests consideration to relevant rights of the child and considered the content and weight of the child's views. In the following, these three forms of the checklist approach are presented.

The last resort argumentation, also called the less restrictive means test, is an example of a more specific requirement. In the context of child protection and alternative care, the Court expects national authorities to demonstrate that they have considered less restrictive measures before resorting to an option that limits the child's rights, such as taking the child into care, access restrictions or even involuntary adoption. All these interferences need to be in the best interests of the child to be justified. In established case law, an essential criterion according to Article 8 is that taking a child into care is a last resort measure.<sup>91</sup> In *Akinnibosun v Italy*, lack of considering other, less restrictive measures was decisive for finding a violation of Article 8. The applicant father was a Nigerian national who had received a residence permit in Italy for humanitarian reasons. The

---

<sup>90</sup> Committee on the Rights of the Child, *supra* n 3 at para 6(c).

<sup>91</sup> *K and T v Finland* Application No 25702/94, Merits and Just Satisfaction, 12 July 2001 at para 168; Brems and Lavrysen, "Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 139 at 156-7.

daughter had been taken into care at the age of two as she seemed traumatised (which was not surprising given her history, which included arriving in Italy by boat with the father).<sup>92</sup> Similarly, in *Zhou v Italy*, the focus was on whether national authorities had taken all the necessary measures to allow the child to live with his mother before proceeding to adoption.<sup>93</sup> In *Wunderlich v Germany*, which concerned homeschooling, the domestic courts had given detailed reasons why measures less severe than taking the children into care were not available in a situation where the parents had failed to comply with compulsory school attendance. The decisions to withdraw parts of the parents' authority and to take the children into care were, therefore, proportionate.<sup>94</sup>

Another context in which the ECtHR regularly uses last resort argumentation is the detention of children. In *DL v Bulgaria*, where the applicant child had been held in an education centre, the Court found that an essential criterion in assessing the proportionality of the detention was whether the detention was a last resort measure, chosen in the best interests of the child.<sup>95</sup> Last resort arguments are often presented under Articles 5 and 8 ECHR when assessing the permissibility of immigration detention of children.<sup>96</sup> In *Bistieva and others v Poland*, where a mother and her three children had been detained pending their removal, the Court found a violation of Article 8 because the authorities had failed to provide sufficient reasons to justify the detention. This failure had two components: failure to give due consideration to possible alternative measures and 'serious doubts as to whether the authorities had given sufficient consideration to the best interests of the first applicant's three children, in compliance with obligations stemming from international law'.<sup>97</sup> In the first ECtHR case on immigration detention of children, *Rahimi v Greece*, the Court criticised the fact that when deciding up on the detention of an unaccompanied 15-year-old child, national authorities had not addressed the question of the boy's best interests at all. In addition, they had not researched whether placing him in detention was a last resort measure and whether less radical measures were available. Consequently, a violation of Article 5(1) was found.<sup>98</sup> *Rahimi* and the subsequent immigration detention cases form an exception to the rule that the

---

<sup>92</sup> Application No 9056/14, Merits and Just Satisfaction, 16 July 2015 at para 76.

<sup>93</sup> Application No 33773/11, Merits and Just Satisfaction, 21 January 2014 at para 49.

<sup>94</sup> Application No 18925/15, Merits and Just Satisfaction, 10 January 2019 at para 54.

<sup>95</sup> Application No 7472/14, Merits and Just Satisfaction, 19 May 2016 at para 74.

<sup>96</sup> Although, as Smyth has argued, examining the arbitrariness of immigration detention in the light of CRC rights could be a better path than relying on last resort argumentation. See Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 *Human Rights Law Review* 1.

<sup>97</sup> Application No 75157/14, Merits and Just Satisfaction, 10 April 2018 at paras 69-88.

<sup>98</sup> Application No 8687/08, Merits and Just Satisfaction, 5 April 2011 at paras 108-110.

procedural approach is currently used in the context of Article 8 only.<sup>99</sup> Best interests and the less restrictive means test are sometimes presented as two separate grounds that count in the evaluation of the procedure, but they are often intertwined to the extent that consideration of less restrictive means is a component of the best interests assessment. In *GB and others v Turkey*, the Court used the latter approach when noting that protecting the child's best interests involves considering alternatives so that the detention of minors is a measure of last resort.<sup>100</sup>

In addition to last resort argumentation, the ECtHR has presented the link between the best interests and specific rights of the child as demonstrating the quality of decision-making. The extent to which the ECtHR interprets ECHR obligations by focusing on the rights of the child has been strongly influenced by the CRC and the CRC Committee's rights-based approach.<sup>101</sup> This influence is reflected in references to other CRC Articles and the Committee's views, often General Comments. In *Maslov v Austria*, a landmark case concerning the expulsion of juvenile offenders, both last resort argumentation and linking best interests to rights were used. In *Maslov*, the Grand Chamber found that the obligation to take the best interests of the child into account included an obligation to facilitate reintegration. In the reasoning, reintegration, as an aim of the juvenile justice system, was linked to Article 40 CRC. The Court held that reintegration 'will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort'. Expulsion of the applicant, who was a settled immigrant and had committed mostly non-violent crimes as a minor, did not fulfil these requirements and, therefore, breached Article 8.<sup>102</sup> In addition to reintegration, the Court has linked best interests to other rights, such as the child's right not to be separated from parents and maintain contact with them in child protection cases and immigration detention cases.<sup>103</sup>

A third element demonstrating the quality of a best interests assessment is the views of the children, as well as the weight attributed to those views. Guaranteeing children an opportunity

---

<sup>99</sup> See e.g. *HA and others v Greece* Application No 19951/16, Merits and Just Satisfaction, 28 February 2019 at paras 204-208 concerning immigration detention of nine unaccompanied minors. The violation of 5(1) was based on the finding that national authorities had not sufficiently explained their actions. Reference is made to *Rahimi v Greece*, supra n 98, as well as to Article 3 CRC.

<sup>100</sup> Application No 4633/15, Merits and Just Satisfaction, 17 October 2019 at para 186; similarly, see *ShD and others v Greece and others*, Application No 14165/16, Merits and Just Satisfaction, 13 June 2019 at para 69.

<sup>101</sup> E.g. *AV v Slovenia*, Application No 878/13, 9 April 2019 at para 49 where the ECHR refers to General Comment No 14; see also Kilkelly, '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' (2001) 23 *Human Rights Quarterly* 308.

<sup>102</sup> Application No 1638/03, Merits and Just Satisfaction, 23 June 2008 at paras 77-101.

<sup>103</sup> E.g. *NP v the Republic of Moldova*, Application No 58455/13, Merits and Just Satisfaction, 6 October 2015 at para 42; *GB and others v Turkey*, supra n 100 at paras 168 and 186.



to express their views and giving those views due weight is especially important in the current human rights framework because according to the Committee, Article 3(1) CRC cannot be correctly applied if the requirements of Article 12 CRC on participation are not met. In other words, an outcome cannot be considered to be in a child's best interests if the child has not been provided with an opportunity to be heard or otherwise express her views. In the General Comment on Article 12, the Committee expressed that best interests 'is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration'. Hearing the child is one of these steps.<sup>104</sup> The Committee's view reinforces the link between Articles 3 and 12 and supports the understanding of Article 3 as a procedural obligation. Eekelaar and Tobin have suggested a general obligation of decision-makers to take all reasonable measures in light of available resources to obtain the child's views when determining best interests; if the views are not obtained, the decision-maker bears a heavy burden to justify why not.<sup>105</sup>

The ECtHR has recently placed emphasis on the child's wishes especially in child protection and custody cases. In *Zelikha Magomadova v Russia* where the applicant had been deprived of her parental authority, the fact that domestic courts had heard none of the four children concerned contributed to the finding that the 'decision-making process was deficient and therefore did not allow the best interests of the children to be established'. Regarding the two younger children, the ECtHR also expressed that no expert opinion had been sought regarding whether they could be interviewed in court (assisted by a child psychologist, if necessary).<sup>106</sup> In *M and M v Croatia*, the applicants, mother and daughter, alleged that national authorities had failed to meet their positive obligations as they had not adequately prosecuted the father for the violence perpetrated against the daughter. In finding a violation of Article 8 on account of the child's non-involvement in the custody proceedings, the Court noted that the child had not been heard and her wish to live with her mother had not been taken into account. A violation of Article 3 ECHR was also found because domestic authorities had breached their procedural obligation to investigate allegations of ill-treatment towards the child's father effectively. The Court extensively analysed the relationship between Articles 3 and 12 CRC and referred to the General Comment on the right of the child to be heard and other CRC sources. As a general view, the Court expressed that 'in such cases it cannot be said that the children capable of forming their own views were sufficiently

---

<sup>104</sup> Committee on the Rights of the Child, General Comment No 12 (2009): The right of the child to be heard, 20 July 2009 at paras 70-74; see also Committee on the Rights of the Child, *supra* n 3 at paras 43-45.

<sup>105</sup> Eekelaar and Tobin, *supra* n 8 at 86.

<sup>106</sup> Application No 58724/14, *Merits and Just Satisfaction*, 8 October 2019 at paras 114-119.

involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views'.<sup>107</sup>

It is important to note that whether the body being assessed is a national court or non-judicial decision-maker, such as administrative body, may have implications for the checklist approach. Administrative authorities cannot be expected to reason similarly to courts, which is why the criteria for their decision-making need to be less detailed than human rights scrutiny checklists for courts.<sup>108</sup> Moreover, a perfunctory application of a checklist can lead to substantively unfair outcomes, and, because of this, checklists should be open to changes through further case law.<sup>109</sup> Consequently, there may be other elements indicating that a profound best interests assessment has taken place in addition to last resort argumentation, a link between best interests and rights, and the views of the child. The use of expert evidence, for instance, has been underlined by the ECtHR.<sup>110</sup> Eekelaar and Tobin assert that taking certain elements into account reduces the indeterminacy of best interests. Such elements include considering the child's views, other rights under the CRC and international law, the views of parents and other relevant persons involved in the child's care, the child's individual circumstances, including developmental needs and social, religious and cultural practices, and relevant evidence.<sup>111</sup> These elements resemble those identified by the ECtHR and could be relevant for future development of the checklist approach.

## **5. CHALLENGES OF A PROCEDURAL APPROACH TO BEST INTERESTS IN THE EUROPEAN COURT OF HUMAN RIGHTS**

Even though the ECtHR case law on the best interests of the child contains several examples in which the Court has relied on a procedural approach, the procedural approach is not without challenges. The main concerns and their possible answers are addressed in the following.

One might claim that the procedural approach is indeed the best approach in the ECtHR – yet not because of the nature of the best interests provision but because of the nature of the ECHR as a supranational court. It can be claimed that a substantive best interests assessment has to be conducted in cases concerning children by national authorities rather than the ECtHR. The ECtHR's review is different from that at the domestic level; the ECtHR is an international court premised on the principle of subsidiarity, and, hence, it differs from national authorities, especially

<sup>107</sup> Application No 10161/13, *Merits and Just Satisfaction*, 3 September 2015 at paras 96-97, 176-187.

<sup>108</sup> Brems, *supra* n 12 at 37; Sathanapally, *supra* n 21 at 72-3.

<sup>109</sup> Brems, *supra* n 12 at 37.

<sup>110</sup> E.g. *AV v Slovenia*, *supra* n 101 at para 85.

<sup>111</sup> Eekelaar and Tobin, *supra* n 8 at 85-95.

from those who are the first to make a best interests assessment in a specific case. In addition, the ECtHR operates with a margin of appreciation based on the idea that because national authorities are closer to the case, they are better placed to make fact-based assessments and to give an opinion on the exact content of the requirements, as well as on the necessity of restrictions.<sup>112</sup> To preserve its legitimacy, the ECtHR must find ways to respect national decisions while safeguarding fundamental and human rights.<sup>113</sup> Procedural arguments might be more readily accepted at the national level. As the focus on the procedure is an inevitable characteristic of the ECtHR system, this article's examination of ECtHR case law may give too optimistic a view of how a procedural approach to best interests operates in practice.

However, it is equally possible to argue – as this article does – that Article 3 CRC is best understood as a procedural obligation. From this follows that national courts should also focus on the procedural obligation to conduct a best interests assessment, review whether such an assessment has taken place and examine its quality through indications of quality, such as whether the child has had an opportunity to express her views and whether those views have been accorded due weight. In a case where a parent has received an expulsion order, for example, it is the immigration service or other similar authority who has to assess substantively the impact of the measure on the child(ren) concerned. Instead of referring to best interests, the immigration service could articulate the substantive assessment with reference to the child's rights.

In addition to the implications of the position of the ECtHR as an international court, another concern of an entirely procedural review is that substantive argumentation related to the rights of the child risks becoming weaker. If the ECtHR focuses on procedural review in the strict sense, without paying any attention to the quality of the assessment, this may produce superficial argumentation by national authorities who might refer to best interests without really considering them and conduct a shallow assessment to satisfy the Court. Todres has criticised a procedural interpretation of best interests as weakening Article 3(1).<sup>114</sup> Furthermore, it has been argued that a procedural approach contributes to a diluted protection of vulnerable groups in the ECtHR.<sup>115</sup> To prevent human rights protection from weakening, it is crucial that procedural review does not

---

<sup>112</sup> *Handyside v UK* Application no 5493/72, Merits, 7 December 1976 at para 48.

<sup>113</sup> Sathanapally, *supra* n 21 at 62.

<sup>114</sup> Todres, 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law' (1998) 30 *Columbia Human Rights Law Review* 160 at 176.

<sup>115</sup> Cumper and Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights' (2019) 68 *International and Comparative Law Quarterly* 611; Nieminen, 'Eroding the protection against discrimination: The procedural and de-contextualized approach to *S.A.S. v France*' (2019) 19 *International Journal of Discrimination and the Law* 69.

become a formality in which a reference to the best interests of the child suffices without the Court examining whether the best interests assessment is genuine.<sup>116</sup> From this perspective, the Court's focus on the quality of best interests assessment and the checklist approach seem more reliable as they combine elements of procedural and substantive protection.

Another, more subtle problem related to the use of procedural review is the difficulty of distinguishing between procedural and substantive reviews. Though the two are conceptually different, in practice it may prove difficult to draw the line between them, given that quality of the review is important. In the ECtHR, guaranteeing the quality of the procedural review requires assessing whether the factors national authorities have linked to the best interests assessment, such as the child's age, are acceptable. This shifts focus away from a purely procedural review, raising the question of whether a purely procedural review is even possible. This question is not only theoretical; in the context of the ill-treatment of children, O'Mahony has argued that distinguishing between procedural and substantive violations is crucial to characterising the failure of the State and, consequently, to understanding what the execution of the judgment requires.<sup>117</sup>

Furthermore, it is important to note that the ways the ECtHR currently utilises the procedural approach – or the categorisation presented in this article – are not the only possible form of procedural review. The ECtHR could, for example, increasingly give attention to the requirements that legislation or national legislative processes have to fulfil, which is an approach it has applied in some other areas but also concerning the best interests of the child. As an illustration, automatically depriving a mother of her parental rights as a consequence of a criminal conviction without assessing the interests of justice and those of her children was considered problematic.<sup>118</sup> The previously discussed suggestions by Eekelaar and Tobin regarding the elements reducing indeterminacy can be useful in defining future requirements.

## 6. CONCLUSION

This article has claimed that Article 3(1) CRC should be understood as a predominantly procedural obligation, compelling decision-makers to consider the best interests of the child in all cases concerning children. This claim concerns the ECtHR in particular, but the article has argued that understanding Article 3(1) as a procedural obligation is beneficial in general, as a procedural

<sup>116</sup> Similarly, see Leloup, *supra* n 60 at 65-6.

<sup>117</sup> O'Mahony, 'Child Protection and the ECHR. Making Sense of Positive and Procedural Obligations' (2019) 27 *International Journal of Children's Rights* 660 at 677.

<sup>118</sup> *MD and others v Malta* Application No 64791/10, Merits and Just Satisfaction, 17 July 2012 at paras 77-80; see also Gerards, *supra* n 8 at 131-6.

approach allows the circumvention of several problems that originate from interpreting the provision as a substantive right. The wording of Article 3(1) supports such an interpretation, which is also in accordance with the object and purpose of the CRC. In decision-making, a procedural approach to best interests allows for a consistent application of the concept in different case groups. Instead of conducting a substantive best interests assessment, decision-makers could focus on the rights of the child.

To illustrate how a procedural approach to best interests may look in practice, the article presented a categorisation of three layers of the procedural approach to the best interests of the child in the ECtHR, building on Brems' categorisation. The intensity of the procedural review varies at the ECtHR. In the first approach, the Court requires a best interests consideration to satisfy the requirements of the substantive ECHR Article. In the second, the Court pays attention to the quality of the best interests assessment. In the third, and most specific, approach, the checklist approach, the Court requires national authorities to show that they have considered less restrictive measures, linked best interests to the child's rights or taken the child's views into account when assessing best interests. This categorisation shows that in some cases, the ECtHR has created far-reaching obligations for States to show that they have considered the best interests of the child. It is, however, important to underline that the growing use of the procedural approach is not the full picture; the Court still relies on the substantive approach too.

At present, there are significant differences between case groups in how accentuated procedural obligations are in ECtHR cases concerning the best interests of the child. Even though the procedural approach is promising, the Court is not fully consistent with its approach on best interests as a procedural obligation, either.<sup>119</sup> In some case groups, such as child protection cases, the ECtHR recognises the existence of a procedural limb to Article 8. In others, such as immigration cases, the Court has thus far refrained from expressly articulating the existence of the procedural limb of Article 8, even though a lack of consideration of best interests can lead to a violation in immigration cases too. In *W*, the early child protection case discussed earlier, a particularly interesting aspect of the reasoning is how the ECtHR justified the decision to recognise procedural aspects under Article 8. The Court noted that because the topic is so sensitive, the task of local authorities is already extremely difficult and to require them to follow inflexible procedures would complicate the matter. Therefore, a measure of discretion must be allowed. On the other hand, the Court noted that 'predominant in any consideration of this aspect of the present case must be the

---

<sup>119</sup> See also Gerards, *supra* n 28 at 158-60.

fact that the decisions may well prove to be irreversible'. In *W*, the irreversibility resulted from the fact that the child had been taken away from his parents and placed with alternative carers.<sup>120</sup> Child protection cases are, however, not the only group of cases in which the decisions are often irreversible. Overall, cases concerning children are particularly irreversible regardless of their context, which speaks for the importance of procedural approach in all case groups.

For an applicant before the ECtHR, arguing that the best interests of the child have not been taken into account in the decision-making process may be a more compelling argument than arguing that the outcome of the case is against the best interests of the child. As the Court already applies a procedural scrutiny on a rather regular basis, it could easily rely on its previous case law and tighten its already existing scrutiny by requiring national authorities to make a proper best interests assessment. Relying on procedural review more systematically when assessing the best interests of the child would improve the consistency of ECtHR case law and further a more consistent understanding of the best interests concept. It is, however, critical to pay attention to the quality of the assessment to safeguard the rights of children.

#### ACKNOWLEDGEMENTS

I would like to thank Professor Tuomas Ojanen, Dr Visa AJ Kurki and Dr Virve-Maria Toivonen for their thoughtful comments on earlier versions of the article. I am also thankful for the anonymous referee comments that helped me improve the article. Errors and omissions remain my own.

---

<sup>120</sup> *W v the UK*, supra n 69 at para 62.