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The Convention on the Rights of the Child's Imprint on Judgments from the European Court of Human Rights: A Negligible Footprint?

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ABSTRACT

The European Court of Human Rights (ECtHR) is the sole interpreter of all matters on the European Convention on Human Rights (ECHR) and has no obligations toward any other international law and/or jurisprudence. In the realm of children's rights, the Convention on the Rights of the Child (CRC) is renowned as the most prominent source for all development of children's rights. Officially, there is no connection between the ECHR/ECtHR and the CRC. Nevertheless, the ECtHR has acknowledged a reciprocal, harmonious relationship between the two conventions. By analysing all judgments from the ECtHR referring to the CRC, using a combination of quantitative and qualitative document analyses, this article aims to examine the CRC's footing in the ECtHR. Leaning on concepts of legal mobilisation, lawfare, and availability heuristics, we argue that there has been a clear development in how the CRC is used in and by the ECtHR, indicating that the CRC has an increasingly stronger footing within the Court, especially in the past decade. Additionally, we argue that this development has strengthened children's rights and that the CRC, at least indirectly, has had and still has a vital role in developing children's rights within the ECtHR.

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European Court of Human Rights; ECtHR; European Convention on Human Rights; ECHR; Convention on the Rights of the Child; CRC; legal mobilisation; lawfare; availability heuristic

1. Introduction

The European Court of Human Rights (ECtHR, or the Court) is the sole interpreter of all matters on the European Convention on Human Rights (ECHR) and has no obligations towards any other international law and/or jurisprudence.[1] Nevertheless, the Court has stated that: 'The Convention [ECHR] cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.'[2]

Under article 8 of the ECHR, all Contracting States have both negative obligations to restrain from actions which would interfere with individuals' family life and positive

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[1]Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press 2011).

[2]*Harroudj v France* App No 43631/09 (ECtHR, 4 October 2012) para 42.

obligations to protect individuals who cannot protect themselves.[3] Additionally, the Convention on the Rights of the Child (CRC) aims to protect children against harm and give children fundamental rights.[4] Similarities are apparent between the Contracting States' positive obligations to protect children under the ECHR and CRC. However, while the ECHR focuses on *all* individuals (adults and children alike), the CRC revolves around only children's rights and thus has a more comprehensive approach to these rights. The ECtHR seems to acknowledge that the CRC is more comprehensive concerning children's rights and has emphasised that, concerning children, '… the positive obligations that Article 8 [ECHR] lays on the Contracting States … must be interpreted in the light of the Convention on the Rights of the Child'.[5]

Even though the ECtHR has no direct obligations towards the CRC or vice versa, the Court has stated that a reciprocal, harmonious relationship exists between the two.[6] In her work, Fenton-Glynn states that the ECtHR should be 'praised for its adoption of the [CRC]'[7] but that there are significant limitations to the use of the CRC as a legal argument in the ECtHR. Most noteworthy, Fenton-Glynn states that '… there is no guarantee that the [CRC] will be mentioned, let alone followed by the Court'[8] and argues that while it is understandable why the ECtHR does not always follow the CRC, the Court cannot ignore it.

This article examines how the relationship between the CRC and the ECHR/ECtHR comes into view in the judgments. More specifically, it explores the CRC's footing in the ECtHR through quantitative and qualitative document analyses on judgments from the Court.

2. Backdrop: The Research Question

Previous research has found that the CRC is not a primary source of information for the ECtHR.[9] The main link between the CRC and the ECtHR seems to be the argument of the child's best interests which, at least indirectly, derives from article 3 of the CRC.[10]

[3]Kath O'Donnell, 'Protection of Family Life: Positive Approaches and the ECHR' (1995) 17 Journal of Social Welfare and Family Law 261; Judith Masson and Jonathan Dickens, 'Protecting Unborn and Newborn Babies' (2015) 24 Child Abuse Review 107; ECtHR, 'Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life' (2020) <www.echr.coe.int/documents/guide_art_8_eng.pdf> accessed 11 April 2023. All online sources accessed 11 April 2023.

[4]Convention on the Rights of the Child 1989 [United Nations, Treaty Series, vol 1577, p 3].

[5]*Harroudj v France* (n 2) para 42.

[6]*X and others v Bulgaria* App No 22457/16 (ECtHR, 2 February 2021) [2 & 4].

[7]Claire Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford University Press 2020) 394; see also Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 1999).

[8]Fenton-Glynn (n 7) 394.

[9]Anette Faye Jacobsen, 'Children's Rights in the European Court of Human Rights: An Emerging Power Structure' (2016) The International Journal of Children's Rights <https://doi.org/10.1163/15718182-02403003>; Marit Skivenes and Karl Søvig, 'Judicial Discretion and the Child's Best Interest: The European Court of Human Rights on Child Protection Adoptions' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016) 341.

[10]See amongst others U 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(2) Human Rights Quarterly 308; John Eekelar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23(1) International Journal of Children's Rights 3 https://doi.org/10.1163/15718182-02301003; Ciara 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(1) European Journal of Migration and Law 70 https://doi.org/10.1163/15718166-12342072; Jonathan Collinson, 'Making the Best Interests of the Child a Substantive Human Right at the Centre of National Level Expulsion Decisions' (2020) 38(3) Netherlands Quarterly of Human Rights

Since the CRC came into force in the early 1990s the ECtHR has taken a more child-centric approach to its assessments,[11] although this appears unrelated to the CRC coming into force.[12] While research has shown a remarkably slow development in its adoption of a child-centric approach, the Court's use of the principle of the child's best interests will likely continue to grow in the future.[13]

In recent years cases pertaining to children have significantly increased in volume at the ECtHR.[14] Meanwhile the status of the child within the Court is changing, in that it increasingly recognises children as legal subjects with their own rights which it must address directly.[15] It is noteworthy that the Court's shift towards seeing children as legal subjects with their own rights seems to have coincided with the preamble of the CRC's Optional Protocol of 19 December 2011, on a communication procedure, which came into force on 14 April 2014 and reaffirmed '… the status of the child as a subject of rights'.

This article focuses on developments in the use of the CRC as a legal argument in the ECtHR by conducting both quantitative and qualitative analyses of Court judgments. More specifically, by examining all references to the CRC in all judgments from the Court, we examine if, and potentially how, the use of the CRC as a legal argument within the Court has changed over time. The quantitative analysis focuses on development over time in both numbers of references, types of reference, the location of references within a judgment, and whether there is a correlation between the use of the CRC and judgment outcomes. The qualitative analysis focuses on the CRC's footing within the ECtHR, specifically in terms of how each actor within the Court uses the CRC as a legal argument. Through this analysis, we examine whether the CRC, directly or indirectly, is connected to the outcome of the judgments.

3. Theoretical Framework: Legal Mobilisation, Lawfare, and Heuristics

To understand how the CRC, directly or indirectly, is connected to the ECtHR and the development of the use of the CRC as a legal argument in the Court, we find the concepts of legal mobilisation, lawfare, and heuristics helpful.

Legal mobilisation is historically linked to US civil rights movements against segregation in the second half of the twentieth century, and it has further developed through women's and minorities' rights movements.[16] To create changes in society,

169 https://doi.org/10.1177/0924051920940167; Milka Sormunen, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights' (2020) 20(4) Human Rights Law Review 745 https://doi.org/10.1093/hrlr/ngaa034.

[11] Loveday Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' (2012) 20(4) The International Journal of Children's Rights 501 https://doi.org/10.1163/157181812X634247; Katre Luhamaa and Jenny Krutzinna, 'Pedersen et al v Norway: Progress towards Child-Centrism at the European Court of Human Rights?' (*Strasbourg Observers*, 28 May 2020) <https://strasbourgobservers.com/2020/05/28/pedersen-et-al-v-norway-progress-towards-child-centrism-at-the-european-court-of-human-rights-2/>.

[12] cf Jacobsen (n 9); Skivenes and Søvig (n 9).

[13] Jacobsen (n 9) 568–69.

[14] Trond Helland, 'Care Order Cases in the European Court of Human Rights: Parents' vs Children's Rights' (MA thesis, University of Bergen 2019).

[15] Claire Breen and others, 'Family Life for Children in State Care: An Analysis of the European Court of Human Rights' Reasoning on Adoption Without Consent' (2020) 28(4) The International Journal of Children's Rights 715 https://doi.org/10.1163/15718182-28040001.

[16] Michael McCann, 'Litigation and Legal Mobilization' in *The Oxford Handbook of Law and Politics*, vol 1 (Oxford University Press 2008).

various social movement groups now use legal mobilisation, defined as '… when a desire or a want is translated into a demand as an assertion of one's rights'.[17] It has played an active role in developing the field of children's rights. In the second half of the twentieth century, for example, women's rights movements across Europe placed childcare on the political agenda as a public responsibility and a social right for both parents and children, rather than as a family responsibility.[18]

To some extent, lawfare conceptually overlaps with legal mobilisation. Both terms refer to actors from civil society using intentional[19] strategies to engage rights or legal institutions as part of a broader political struggle.[20] Not all legal mobilisation is lawfare, however. It becomes lawfare when it '… forms part of an ongoing, contentious struggle between organised social interests for (or against) social transformation, and … if litigation forms part of the repertoire'.[21] Litigation itself only constitutes lawfare if it is part of a broader strategy.[22] Research indicates that lawfare is a controversial term, often having strong ideological connotations,[23] but there is a broad consensus on its analytical core:

> Lawfare is understood as the strategic use of rights, law and litigation by actors of different breeds to advance contested political and social goals.[24]

While both individuals and groups use legal mobilisation, lawfare implies a more substantial conflictual and collective dimension.[25]

For social movement groups to mobilise law, they must have legal rights consciousness.[26] Groups must feel like their rights are being violated,[27] and acknowledge that bringing their case before a court can contribute to their wished-for solution. The keyword here is *feel*, for while the average layperson does not have in-depth knowledge of all laws and regulations, everyone in society has an understanding of what *feels* right or wrong.[28] If members of society agree with the law, they will follow it; if a law feels unjust, respect for it is less likely.[29] Members of civil society should thus be involved in shaping how a law is interpreted and phrased linguistically.[30] In the case of the concept of the

[17]Frances Kahn Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77(3) The American Political Science Review 690, 700, <www.jstor.org/stable/1957268>.
[18]B Halsaa, S Roseneil and Sevil Sümer, *Remaking Citizenship in Multicultural Europe: Women's Movements, Gender and Diversity* (Palgrave Macmillan 2012) ch 5.
[19]Intentional points to actors actively using these strategies, rather than legal mobilisation and lawfare being biproducts of other strategies or a coincidence.
[20]Siri Gloppen, 'Conceptualizing Lawfare: A Typology & Theoretical Framework' [2018] Centre on Law & Social Transformation (working paper) <www.academia.edu/35608212/Conceptualizing_Lawfare_A_Typology_and_Theoretical_Framwork>.
[21]Ibid 13.
[22]Ibid.
[23]Ibid.
[24]Ibid 6.
[25]Gloppen (n 20); McCann (n 16).
[26]Holly J McCammon and Allison R McGrath, 'Litigating Change? Social Movements and the Court System' (2015) 9(2) Sociology Compass 128 https://doi.org/10.1111/soc4.12243; Mónica Roa and Barbara Klugman, 'Seeking Social Change in the Courts: Tools for Strategic Advocacy' [2018] Women's Link Worldwide.
[27]Roa and Klugman (n 26).
[28]cf Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996).
[29]Lars Chr Blichner and Anders Molander, 'What Is Juridification?' (2005) 14 Arena <https://hdl.handle.net/20.500.12199/3098>.
[30]Daniel M Brinks, Varun Gauri and Kyle Shen, 'Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular' (2015) 11 Annual Review of Law and Social Science 289 https://doi.org/10.1146/annurev-lawsocsci-110413-030654.

child's best interests, which derives from the CRC, the phrase 'the child's best interests' is integral to communication about children's rights at every level of society, not only in the legal systems. As a legal argument, by all accounts, the focus on the child's best interests is a result of legal mobilisation for children's rights.[31]

Heuristics can contribute to understanding how legal mobilisation and lawfare influence policymakers and other decision processes. To get a better idea of how all parties in the ECtHR may use the CRC, this article leans on Tversky and Kahneman's work on heuristics and biases,[32] or more specifically, availability heuristics. Heuristics are cognitive shortcuts or rules of thumb used to aid decision-making.[33] Availability heuristics points to people tending to recall and thus rely on similar situations when making a decision.[34] If advocates of children's rights within the ECtHR frequently use elements from the CRC, for example, this suggests that the CRC is 'available' in the judges' recollection, thus potentially affecting the Court's decisions. Biases are a risk when relying on individuals' recollections of how many times a situation has occurred. The salience and vividness of an event may influence how prone individuals are to recall it,[35] which may lead to erroneous and biased decisions.[36]

While previous research has found that the CRC is not a primary source of information for the ECtHR, this article uses these three concepts to discuss developments in the CRC's use in ECtHR judges' deliberations and how this may impact the Court's decisions.

4. Creating a Foundation for Analysis and Discussion: Data Gathering and Mixed Methods

This article uses a mixed-method approach to examine the research question. The quantitative approach examines the development of the CRC as a legal argument in the ECtHR through a combination of descriptive statistics and correlation analysis, aiming to grasp if, and potentially how, the use of the CRC in the ECtHR has changed over time.[37] The qualitative analysis aims to create an understanding of the CRC's footing within the ECtHR by examining how actors within the Court use the CRC as a legal argument. Both methods are applied to the same dataset, with different delimitations. SPSS was used for the quantitative analyses, and NVivo for the qualitative. The following section presents how we approach the two methods.

For the quantitative analysis, we chose four angles of questioning to map the use of the CRC in judgments:

[31] Ibid.

[32] Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185(4157) Science 1124 <www.science.org/doi/10.1126/science.185.4157.1124>.

[33] Sefa Hayibor and David M Wasieleski, 'Effects of the Use of the Availability Heuristic on Ethical Decision-Making in Organizations' (2009) 84(1) Journal of Business Ethics 151 https://doi.org/10.1007/s10551-008-9690-7; Barbara Vis, 'Heuristics and Political Elites' Judgment and Decision-Making' (2019) 17(1) Political Studies Review 41 https://doi.org/10.1177/1478929917750311.

[34] Hayibor and Wasieleski (n 33).

[35] Cass R Sunstein, 'What's Available? Social Influences and Behavioral Economics' (2002) 97 Northwestern University Law Review <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12522&context=journal_articles>.

[36] Tversky and Kahneman (n 32); see also Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011).

[37] cf Julie Pallant, *SPSS Survival Manual: A Step by Step Guide to Data Analysis Using IBM SPSS* (2nd edn, Open University Press 2005); and Charles Wheelan, *Naked Statistics : Stripping the Dread from the Data* (WW Norton 2013).

1. Has there been a development in the number of references to the CRC in each judgment over time?
2. When references are made to the CRC, how is the CRC used?
3. Who uses the CRC as an argument? The ECtHR, applicants (used here to mean all those affiliated with applicants, such as lawyers and witnesses), governments (used to mean all those affiliated with a government, such as domestic courts, witnesses, and lawyers), judges (in separate opinions), third-party interveners, or others (e.g. the United Nations Human Rights Committee)?
4. Where are references to the CRC inside the judgments: in the fact section, the law section, a dissenting opinion, or a concurring opinion?

The dataset was created by finding all judgments referring to the CRC in the ECtHR database, HUDOC, by using 'Convention on the Rights of the Child' and 'English' as delimitations. A second search was conducted using the abbreviation 'CRC' to ensure the inclusion of all judgments. In the end, after a manual cleaning of the findings, the dataset consisted of 597 references from 228 judgments.

To examine the four quantitative angles of questioning, the data was coded into 10 categories: (1) name of judgment; (2) year of judgment; (3) the quantity of references to the CRC; (4) the chamber (chamber or grand chamber); (5) whether article 8 of the ECHR was involved; (6) whether the ECtHR found a violation of the ECHR (no, yes, partly); (7) whether there were separate opinions in the judgment; (8) where the reference to the CRC is located within the judgment; (9) who makes the reference(s) to the CRC; and (10) what was being referred to/area of referral. The quantitative findings are presented in section 5a.

The qualitative approach aims to reveal how the CRC is used as an argument by and in the ECtHR, and thus shed light on how the judges use the CRC in their deliberations. Some delimitations were applied in this analysis due to the magnitude of references and relevance to the research objectives. How the judges use the CRC in their reasoning is most relevant to the question of how the CRC may affect their deliberations. Thus, all references in the 'as to the fact' section of judgments were omitted, as were all references from parties other than the ECtHR and its judges. In the end, 204 references were analysed: 112 from 'as to the law', 49 from concurring opinions, and 43 from dissenting opinions.

Our qualitative analyses build on concepts of qualitative content analyses presented by Bratberg[38] and Grønmo.[39] We also uses elements from Braun and Clarke's thematic approach.[40] To address the article's research question, the 204 references were coded into five content categories:

(1) The first content category revolves around the child's best interests, e.g. 'Since 1980, the legal landscape has changed with the United Nations Convention on the Rights of the Child … which talks of the paramount interests of the child'[41] or 'where

[38]Øivind Bratberg, *Tekstanalyse for Samfunnsvitere* (Cappelen Damm akademisk 2017).
[39]Sigmund Grønmo, *Samfunnsvitenskapelige Metoder* (Fagbokforlaget 2016).
[40]Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77
[41]*YS and OS v Russia* App No 17665/17 (ECtHR, 15 June 2021) [14] concurring opinion.

children are involved, their best interests must be taken into account (see … Article 3 of the Convention on the rights of the child …)'.[42]

(2) The second content category focuses on statements in which the ECtHR emphasises that its assessments must take the CRC into account, e.g. '… the obligation imposed by Article 8 [ECHR] on the Contracting States must be interpreted in the light of the requirements of the … Convention on the Rights of the Child'[43] or '… the Court considers it relevant to take account of the standards set out in the international instruments in this area … it observes that the International Convention on the Rights of the Child recommends'.[44]

(3) The third content category relates to when the ECtHR references the CRC as means to underline its own reasoning. In other words, references where the Court use the CRC as an argument to support its views, e.g. 'In this context reference, may be made to the principle laid down in article 7 [of the CRC] … '[45], or 'A rights to adopt is likewise not provided for by domestic law or other international instruments such as the Convention on the Rights of the Child'.[46]

(4) The fourth content category relates to all references using the CRC as a direct source, e.g. 'Children and other vulnerable individuals … are entitled to State protection … (see … the United Nations Convention on the Rights of the Child, Articles 19 and 37)'.[47]

(5) The last content category, other, includes all the remaining references. There is a great variety of references in this category. References deemed relevant for this article will be presented in section 5b, alongside the rest of the qualitative findings.

5. Analyses and Findings

5a. Quantitative findings

Each of the 597 references was examined and coded in accordance with the 10 categories listed above and according to type of reference.[48] Additionally, we created an overview that includes all articles from the CRC referred to, the year(s) in which they were referred to, and how many judgments referring to each article each year to map how the use of the CRC in the ECtHR has developed over time. Lastly, we conducted a correlation analysis between each of the four approaches and whether the ECtHR have found a violation on the ECHR. However, there were no significant findings. There were no indications of a correlation between any of the four approaches and whether the ECtHR found a violation of the ECHR. The correlation analysis is therefore omitted from the presentation of findings.

[42] *NŠ v Croatia* App No 36908/13 (ECtHR, 10 September 2020) [97].
[43] *Frisancho Perea v Slovakia* App No 383/13 (ECtHR, 21 July 2015) [61].
[44] *Tanda-Muzinga v France* App No 2260/10 (ECtHR, 10 July 2014) [76].
[45] *Keegan v Ireland* App No 16969/90 (ECtHR, 26 May 1994) [50].
[46] *AH and others v Russia* App Nos 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13, 42403/13 (ECtHR, 17 January 2017) [378].
[47] *A v The United Kingdom* App Nos 100/1997/884/1096 (ECtHR, 23 September 1998) [22].
[48] General reference or reference to specific articles.

(i) Number of references to the CRC

Table 1 shows an overview of the number of judgments referring to the CRC each year and what percentage it constitutes of the total number.[49] The table demonstrates an increase in judgments referring to the CRC over the past decade, but the increase is not consistent. The years with the most judgments containing a referral to the CRC were 2015 and 2016, with 19 and 22 judgments respectively; nearly 18% of all judgments referring to the CRC are from these two years. There is no indication that the number of judgments referring to the CRC have increased in the past five years, but nearly 66% of all judgments referring to the CRC come from the last decade. Of the CRC-referring judgments, 35% stem from the period between 2012 and 2016, and close to 31% from 2017 to 2021. In other words, after 2012 the CRC has steadily gained more use as a legal argument in the ECtHR.

Table 2 shows an overview of the number of references to the CRC each year and how many times, on average, each judgment refers to the CRC. There is a slight increase in how often each judgment refers to the CRC in five out of the six past years, but there are years prior to 2016 where the average was both the same and higher than the averages after 2016. Nevertheless, it is evident that the total number of references have been higher in the past decade. The four judgments referring to the CRC the highest number of times are found within the last few years. Both 2016 and 2019 saw a judgment that referred to the CRC 16 times, and 2018 and 2021 each saw a judgement with 11 references.

Table 1. Overview of judgments referring to the CRC each year, and the percentage of the total number of references to the CRC by year.

Year	Frequency	Percent	Year	Frequency	Percent	Year	Frequency	Percent
1992	1	0.4	2002	1	0.4	2012	16	7.0
1993	2	0.9	2003	5	2.2	2013	11	4.8
1994	3	1.3	2004	4	1.8	2014	12	5.3
1995	0	0	2005	2	0.9	2015	19	8.3
1996	2	0.9	2005	7	3.1	2016	22	9.6
1997	1	0.4	2007	6	2.6	2017	17	7.5
1998	1	0.4	2008	13	5.7	2018	11	4.8
1999	3	1.3	2009	4	1.8	2019	12	5.3
2000	5	2.2	2010	11	4.8	2020	13	5.7
2001	1	0.4	2011	6	2.6	2021	17	7.5

Table 2. Overview of the number of references to the CRC each year and how many times, on average, each judgment referred to the CRC.

Year	Total	Average	Year	Total	Average	Year	Total	Average
1992	2	2.0	2002	1	1.0	2012	41	2.6
1993	3	1.5	2003	14	2.8	2013	28	2.3
1994	3	1.0	2004	6	1.5	2014	28	2.0
1995	0	0	2005	5	2.5	2015	42	2.1
1996	2	1.0	2006	19	2.7	2016	62	2.8
1997	1	1.0	2007	22	3.7	2017	57	3.2
1998	1	1.0	2008	35	2.7	2018	34	3.1
1999	13	4.3	2009	8	1.6	2019	45	3.8
2000	11	1.8	2010	21	1.9	2020	21	1.6
2001	2	2.0	2011	17	2.8	2021	54	3.2

[49]Percentages are rounded to the nearest tenth.

(ii) What is being referred to?

Table 3 shows the total number of references to both specific articles in the CRC and the CRC in general. There are more than twice as many references to specific articles than to the CRC as a whole.

Table 4 shows the ratio between references to the CRC, categorised as references to specific articles or general references, and *who* is making those references. All parties make more references to specific articles than to the CRC in general. Both the ECtHR and governments have a ratio of +/– 2.50. This means that when they refer to the CRC, they are two and a half times more likely to be referring to specific articles than to the CRC in general. In their separate opinions, judges have the lowest ratio, with 1.33 in favour of specific articles.

(iii) Who refers to the CRC and where?

Table 5 shows an overview of who refers to the CRC and in what part of the judgment the reference is found. The ECtHR refers to the CRC the most (268 times), followed by governments (131 times), and judges (91 times). The ECtHR has made more than double as many references to the CRC as governments. Regarding where within judgments references are found, most are in the 'as to the fact' section. More than half of the ECtHR's references are found in the 'as to the fact' section, most referring to the CRC as relevant international law. For governments, two-thirds of the references are in the 'as to the fact' section, where governments present their case. Applicants' references are fairly equally divided among the 'as to the fact' and 'as to the law' sections. The same applies to judges, whose references to the CRC are divided between dissenting and concurring opinions.

Table 3. Overview of references to the CRC.

Specific articles in the CRC	The CRC in general
404 references	193 references

Table 4. Overview of the ratio between references to specific articles and to the CRC in general, and of who refers to the CRC.

	ECtHR	Applicant	Government	Judge	Third-party	Other
Ratio articles/general	2.48	1.94	2.54	1.33	1.40	1.77
Specific articles	191	31	94	52	14	23
In general	77	16	37	39	10	13
Total	268	47	131	91	24	36

Table 5. Overview of who refers to the CRC and where in the judgment the reference is found.

	ECtHR	Applicant	Government	Judge	Third-party	Other
As to the fact	151	21	101	0	0	35
As to the law	116	26	30	0	24	0
Dissenting opinion	1	0	0	42	0	1
Concurring opinion	0	0	0	49	0	0
Total	268	47	131	91	24	36

Concerning how the references have developed over time, the development is similar to the overview shown in Table 1. The ECtHR and government have increasingly focused on the CRC in the past decade. The same increase is not seen among the other parties. For both applicants and judges, however, references to the CRC increased between 2012 and 2016. With the exception of that five-year period, the references remain stably low. There is no indication of third-party interveners using the CRC as a legal argument to front their case.

5b. Qualitative findings

The following section is limited to the ECtHR and its judges' opinions and divided into three subsections, following where in the judgment the references are found. Each subsection starts with a general overview before presenting key references from each of the five categories presented in section 4.

(i) 'As to the law'

Table 6 shows how the 112 references to the CRC found in the 'as to the law' section were coded. Most references underline the ECtHR's reasoning, with 34 references from 27 judgments. References stating that the Court's assessments should be seen in the light of the CRC is the second largest category, with 32 references from 30 judgments. The third largest category consists of references using the CRC as a direct source, with 26 references from 23 judgments. There is a significant drop to the fourth content category, the child's best interests, with 10 references from 10 judgments. Ten references exist at the outset of the content categories, seven of which refer to the CRC as international law and/or a standard.

To start with the child's best interests, on several occasions the ECtHR has emphasised the CRC's role in developing the concept. In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*,[50] the ECtHR states that: 'Other measures could have been taken that would have been more conducive to the higher interest of the child guaranteed by Article 3 of the [CRC].' In *Maumousseau and Washington v France*,[51] the ECtHR states that 'The Court notes that since the adoption of the [CRC], "the best interests of the child" in all matters concerning it … have been paramount in child protection issues', thus acknowledging that the concept of the child's best interests both derives from the CRC and plays an essential role in the how the ECtHR sees children's rights.

Viewing how the ECtHR considers the CRC in its assessments, there are some cases – and corresponding articles from the ECHR – in which the CRC seems more prominent. In international child abduction cases, the ECtHR repeatedly emphasises that '… the obligations imposed by Article 8 [of the ECHR] on the Contracting States must be interpreted in the light of the requirements … of the [CRC]'.[52] It is not only in child abduction cases that the ECtHR has made this emphasis. In *Emonet and others v Switzerland*,[53] the ECtHR stated that the positive

[50] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App No 13178/03 (ECtHR, 12 October 2006) para 83.
[51] *Maumousseau and Washington v France* App No 39388/05 (ECtHR, 6 December 2007) para 66.
[52] see amongst other *Voica v Romania* App No 9256/19 (ECtHR, 7 July 2020) para 51.
[53] *Emonet and others v Switzerland* App No 39051/03 (ECtHR, 13 December 2007) para 65.

Table 6. Overview of references found in the 'as to the law' section of the judgments.

Child's best interests	Seen in light of/take into account	Underline ECtHR's reasoning	Source	Other
10 ref.	32 ref.	34 ref.	26 ref.	10 ref.

obligations under article 8 in respect of adoption '… must be interpreted in light of the [CRC]', and in *Maumousseau and Washington* (para 60) it declared that the same must be done with the positive obligation under article 8 to reunite parents with their children.

The largest content category in the law section consists of references used to underline the ECtHR's reasoning. In *A, B and C v Latvia*,[54] for example, the ECtHR asserted that 'This obligation stems also from other international instruments, such as, inter alia, Articles 19 and 34 of the [CRC]', indicating use of the CRC to legitimise its decision. Similarly, in *Blohkin v Russia*,[55] after finding that the applicant would require special treatment and protection, the ECtHR states that '… it is clear from a variety of international sources … that any measures against him should have been based on his best interests' in reference to article 40 of the CRC. Both *A, B and C v Latvia* and *Blohkin* are typical examples of how the ECtHR refers to the CRC to make it clear that Court assessments are in line with international law.

Blohkin para. 219 further emphasises the influence of international laws and standards:

> The Court would point out that this does not mean, however, that children should be exposed to a fully-fledged criminal trial; their rights should be secured in an adapted and age-appropriate setting in line with international standards, in particular the [CRC].

In other words, it acknowledges that there are international standards to which it should comply.

The references coded in the source category vary significantly more than the other categories. They include direct references to an article in the CRC, the content of an article, or the CRC in general. There are also different nuances in how the Court uses the CRC as a source. In *KT v Norway*,[56] when discussing the range of the domestic authorities' margin of appreciation regarding effectiveness in decision-making, the ECtHR states that 'In this connection, the Court cannot but note the emphasis placed on effectiveness in Article 19 of the [CRC …]. Therefore, the Court finds nothing to indicate that the authorities' assessments … went beyond the wide margin of appreciation.' The keyword here is 'therefore', which is also present in *Nunez v Norway*,[57] where the ECtHR states that

> Reference is made in this context also to Article 3 of the [CRC], according to which the child's best interests shall be a primary consideration. The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation.

By using the word 'therefore', the ECtHR seems to directly state that the CRC has influenced its decision. Furthermore, the Court has used the CRC as a general

[54] *A, B and C v Latvia* App No 30808/11 (ECtHR, 31 March 2016) para 148.
[55] *Blokhin v Russia* App No 47152/06 (ECtHR, 23 March 2016) para 138.
[56] *KT v Norway* App No 26664/03 (ECtHR, 25 September 2008) paras 67 and 68.
[57] *Nunez v Norway* App No 55597/09 (ECtHR, 28 June 2011) para 84.

example of international law affecting all: 'Article 37(a) of the [CRC] demonstrates an international consensus against the imposition of life imprisonment without parole on a young defendant who is under the age of eighteen.' The articles within the CRC are referred to as an 'international consensus' here due to the number of states that have ratified the CRC. Not all references are similarly direct, however. In *Gülcü v Turkey*,[58] the Court explains that 'In assessing the proportionality of the interference … the Court has also had regard to the fact that the applicant was a minor at the relevant time. In this context, the Court notes Article 37 of the [CRC].' The keyword here is 'notes', which indicates that the Court has the CRC in mind when assessing cases about children. The ECtHR also addresses children's role in cases involving them. In *M and M v Croatia*,[59] the Court insists that even though children '… lack the full autonomy of adults, [they] are, nevertheless, subjects of rights', referring to the Optional Protocol to the CRC on a communication procedure coming into force in 2014. It is noteworthy that the ECtHR stated that children are subjects of their own rights one year after the preamble to the Optional Protocol to the CRC reaffirmed '… the status of the child as a subject of rights'.

(ii) Concurring opinion

Table 7 shows how the 49 references to the CRC found in concurring opinions were coded. The largest category consists of references using the CRC as a direct source, with 19 references originating from ten judgments. The second and third largest categories are references underlining the judges' reasoning and references focusing on the child's best interests, with 10 references from nine judgments and eight references from eight judgments respectively. No references directly state that the ECtHR should take the CRC into account, but a few references indirectly state the same; these will be presented later in the section. In total, 12 references originating from 10 judgments are coded as other.

ECtHR judges have repeatedly acknowledged the role the CRC plays in developing the field of children's rights. In the concurring opinion of Judge Ziemelein *O'Keeffe v Ireland* (2014), the judge said that '… the field of the rights of the child' is regulated by the CRC when discussing time factors in tackling child abuse.[60] In *YS and OS v Russia*, Judge Schembri Orland states that '… the legal landscape has changed with the [CRC]'.[61] Both references imply that the CRC has had a profound impact on the entire field of children's rights. In a joint concurring opinion in *Frette v France*,[62] however, the judges said that the CRC is not binding to the ECtHR but '… may provide it with guidance', indicating that international treaties may influence judges' deliberations. This point is further emphasised in the concurring opinion of Judge Jebens in *Nunez*: 'The protection of the children … has become clearer in recent years, and may have increased, as a result of the Court's reliance on other international legal instruments, in particular the [CRC]',[63] highlighting that the CRC has impacted the ECtHR's decisions and that the Court

[58] *Gülcü v Turkey* App No 17526/10 (ECtHR, 19 January 2016) para 115.
[59] *M and M v Croatia* App No 55597/09 (ECtHR, 3 September 2015) para 171.
[60] *O'Keeffe v Ireland* App No 3581009 (ECtHR, 28 January 2014) 55.
[61] *YS and OS v Russia* App No 1766517 (ECtHR, 15 June 2021) 37.
[62] *Frette v France* App No 36515/97 (ECtHR. 26 February 2002) 27.
[63] *Nunez v Norway* (n 57) 31.

Table 7. Overview of references found in concurring opinions.

Child's best interest	Underline EctHR's reasoning	Source	Other
8	10	19	12

relies on other international legal instruments in its deliberations. Furthermore, in the concurring opinion of Judge Pinto De Albuquerque in *X v Latvia*,[64] the judge emphasises both the 'paramountcy of the child's interests' and that ' … every child should be viewed as a subject of rights and not merely as an object of rights,' which is in line with the aforementioned Optional Protocol to CRC. While the Optional Protocol came into force in 2014, however, *X v Latvia* was finalised in 2013.

Even though no references focus on the ECtHR directly using the CRC in its assessments, some revolve around the relationship between the ECtHR and the CRC. In the concurring opinion of Judge Pettiti in *X, Y and Z v The UK*,[65] the judge criticised the ECtHR for *not* referring to the direct effect of the CRC when discussing the child's interests. Similarly, in a joint concurring opinion in *Paradiso and Campanelli v Italy*,[66] the judges state that the CRC is 'relevant' and that they 'regret' that an Optional Protocol from the CRC is omitted from the relevant international instruments to which the judgment refers. Furthermore, in *X and others v Bulgaria*,[67] in a partly concurring opinion, Judge Serghides states:

> The purpose of this partly concurring opinion is to clarify and elaborate on the harmonious relationship between the interpretation and application of the Convention [ECHR] and … other international law treaties, such as the [CRC …]. The present case is an example of the reciprocal relationship between the Convention and … the [CRC].

Here the judge acknowledges a reciprocal, harmonious relationship between the ECHR and the CRC.

(iii) Dissenting opinion

Table 8 shows how the 44 references to the CRC found in dissenting opinions were coded. References underlining the judges' own reasoning are the largest category by far, with 21 references originating from 15 judgments. Using the CRC as a direct source and references to the child's best interests follow suit, with nine references from six judgments and six references from six judgments respectively. No references directly state that the ECHR should be interpreted in the light of the CRC. There are eight references in the 'other' category, three of which are judges commenting on the ECtHR's lack of reference to the CRC in the judgments.

The concept of the child's best interests is a recurring subject in dissenting opinions. In a joint dissenting opinion in *Antwi and others v Norway* (2012), the judges state that the concept of the child's best interests is of 'particular significance' in that it provides a ' … general standard to be applied "in all actions concerning children"'.[68] However, the judges also emphasise that there are other relevant provisions on the child's best interests

[64] *X v Latvia* App No 27853/09 (ECtHR, 26 November 2013) 41.
[65] *X, Y and Z v The United Kingdom* App No 21830/93 (ECtHR, 22 April 1997).
[66] *Paradiso and Campanelli v Italy* App No 25358/12 (ECtHR, 24 January 2017) paras 6 and 7, 57–60.
[67] *X and others v Bulgaria* (n 6) paras 2 and 4, 86–87.
[68] *Antwi and others v Norway* App No 2694010 (ECtHR, 14 February 2012).

Table 8. Overview of references found in dissenting opinions.

Child's best interest	Underline EctHR's reasoning	Source	Other
6	21	9	8

besides the CRC which surpass the CRC formulation, stating that the child's best interests should not only be a primary consideration but *the* paramount consideration.

In the Grand Chamber judgment *Strand Lobben and others v Norway*,[69] in a joint dissenting opinion, four judges point out that the CRC '… established the position of a child as a subject of distinct individual rights'. In another joint dissenting opinion in *Strand Lobben and others*, when discussing biological parents' rights to represent their child, the judges state:

> It is high time for the Court to reconsider its approach and practices regarding the issue of permitting a natural parent to act on behalf of his or her child even where the circumstances of the case indicate an actual or potential conflict of interests between them. If the Court is genuinely to embrace, in line with the Convention on the Rights of the Child, the idea of children as subjects of distinct individual rights and the need to regard the best interests of the child as a primary consideration, it appears necessary to make changes also in the procedural practices.[70]

The statement from *Strand Lobben and others* indicates dissensus within the ECtHR regarding the direction judges believe the Court should take in the field of children's rights.

Viewing the references in the category in which the judges refer to the CRC to underline their reasoning, it is evident that judges use CRC provisions as an instrument to provide ground for their statements. In *Bayev and others v Russia*,[71] for example, Judge Dedov states that '… the element of privacy was not seriously taken into consideration by the Court. The Court did not make use of the [CRC]', thus claiming that the majority of judges not taking the CRC into account constitutes an inferior assessment.

Two of the three references focusing on the ECtHR's lack of reference to the CRC originate from a joint dissenting opinion in *Olsson v Sweden (No 2)*.[72] Here, the judges regret that references were not made to the [CRC] and that it is '… paradoxical that in the year of the implementation of the [CRC], which stresses the importance of parent–child relations, there should have been such a failure in the application of Article 8'. These judges were clearly aware of the CRC and its impact immediately after the CRC came into force.

6. Discussion

This article aims to examine the development of the CRC as a legal argument in the ECtHR and whether the CRC's footing within the Court has changed over time. In the following section, applying the concepts of legal mobilisation, lawfare, and heuristics, we discuss how the development of the use of the CRC as a legal argument in the ECtHR can be understood and what it may signify for the Court's decisions.

[69] *Strand Lobben and others v Norway* App No 37283/13 (ECtHR, 10 September 2019) 88.
[70] Ibid. para 17, p 98.
[71] *Bayev and others v Russia*, App No 67667/09 (ECtHR, 20 June 2017) 39.
[72] *Olsson v Sweden (No 2)* App No13441/87 (ECtHR, 24 April and 30 October 1992).

First, there are no indications of a correlation between using the CRC as a legal argument, regardless of who presents the argument, and how the ECtHR rules in a case. These findings align with previous findings by, among others, Jacobsen[73] and Skivenes and Søvig.[74] The CRC does not appear to have significant direct impact on decisions made by the ECtHR. If the CRC had a substantial impact on ECtHR decisions, it would most likely be more prominent as a legal argument. Even though the quantitative analysis revealed no signs of the CRC directly influencing ECtHR decisions, however, this does not mean that there has been no development in how the CRC is used *by* and *in* the ECtHR.

In reviewing the number of references to the CRC in judgments, we see an increase in references over the past decade (see Table 1). This increase may indicate that the CRC has achieved a stronger footing in the ECtHR during these 10 years, but it may also be a consequence of the implementation of Protocol No 14 in 2010, which aimed to streamline how the Court handled cases.[75] The implementation of Protocol No 14 prompted a significant increase in cases processed by the Court.[76] However, a high number of processed cases does not automatically entail a high number of judgments delivered; cases which are not in an area of well-established law are still being handled by chambers. This suggests that the increased focus on the CRC in the ECtHR is due to an actual change of focus area rather than a by-product of the increased number of cases processed.

Jacobsen[77] and Skivenes and Søvig[78] have found that the ECtHR has turned towards a child-centred approach in its assessments. Jacobsen emphasises, however, that the findings '… show a remarkably slow development in the Court's [ECtHR] application of the child-centred perspective', which only really gained momentum around 2010.[79] The turn towards a child-centred approach may also explain the increase in references to the CRC. Breen and others emphasise that the ECtHR increasingly views the child as a subject of its own rights.[80] As shown in Table 2, the average number of references to the CRC in the judgments increased in 2016. In four of the past five years, the average number of references to the CRC is higher than in the first five years of the decade. The increase in references to the CRC may indicate a change in how the ECtHR uses the CRC as a legal argument.

It is established in ECtHR case law that the child's best interests is an overriding requirement in cases concerning children.[81] However, it is evident that the weighting of the argument of the child's best interests has changed over time. In *Olsson v Sweden (No1)*,[82] the ECtHR states that decisions '… must be supported by sufficiently sound and weighty considerations in the interests of the child', while in *Johansen v Norway*[83] the Court states that '… consideration of what is in the best interests of the child is in any event of crucial importance'. There is thus a clear development in the

[73] Jacobsen (n 9).
[74] Skivenes and Søvig (n 9).
[75] See e.g. ECHR, art 28(1).
[76] Helland (n 14).
[77] Jacobsen (n 9).
[78] Skivenes and Søvig (n 9).
[79] Jacobsen (n 9) 568.
[80] Breen and others (n 15).
[81] See e.g. *Johansen v Norway* App No 17383/90 (ECtHR, 26 January and 27 June 1996) para 78.
[82] *Olsson v Sweden (No 1)* App No 10465/83 (ECtHR, 24 March 1988) para 72.
[83] *Johansen v Norway* (n 81) para 78.

phrasing used by the ECtHR on decisions made in the interests of the child over eight years, from 'sound and weighty' to 'of crucial importance'. Fifteen years later, in *R and H v the UK*,[84] the ECtHR states that '… in all decisions concerning children, their best interests must be paramount'. By using the word 'paramount', the ECtHR took another step toward a child-centred focus, but also chose a more forceful phrasing than in the CRC. The focus on the child's best interests as the primary argument in all cases pertaining to children continued until *Strand Lobben v Norway*,[85] where the ECtHR criticised domestic authorities for not attempting to '… perform a genuine balancing exercise between the interests of the child and his biological family … but focused on the child's interest instead'. It is crucial to keep in mind that the child's best interests is a concept deriving from article 3 of the CRC,[86] and a well-known argument that decision-makers constantly use on all levels and in every state.[87]

The child-centred focus in the ECtHR is in line with developments in civil society.[88] The child's best interests argument has increasingly gained footing within the Court, to the extent that it is now the primary argument in cases concerning children. Research has shown that the CRC is the universal reference in developing children's rights for protection.[89] The implementation of the CRC gave social rights movement groups advocating for children's rights a substantial argument for their mobilisation.[90] Changes to children's rights at a national level affect the ECtHR, which is bound to take domestic legislation into account in its decisions. As an example of domestic legislation – which very well may be a result of legal mobilisation and lawfare – that may influence the ECtHR directly, we look to Norway. In 2014, after a lengthy process starting in 2009, Norway implemented the concept of the child's best interests in article 104 of its Constitution. The background for the change was '… strengthening the position of human rights in national law by giving central human rights the constitutional rank'.[91] Brinks, Gauri and Shen's research has revealed that the increase of social rights language in constitutions is due to legal mobilisation.[92] Organisations and groups use existing constitutional laws and adapt the language of rights to support their demands, and thus begin the process of vernacularisation. Advocates for children's rights use existing laws and adapt the laws' language to front their cases.[93] In Norway, for example, the interest organisation Forum for the CRC [Forum for barnekonvensjonen] played an active role in the process leading toward the CRC being incorporated into Norwegian law.[94] The

[84] *R and H v The United Kingdom* App No 35348/06 (ECtHR, 31 Mary 2011) para 73.
[85] *Strand Lobben and others v Norway* (n 69) para 220.
[86] Marit Skivenes and Tarja Pösö, 'Best Interest of the Child' in *The SAGE Encyclopedia of Abnormal and Clinical Psychology* (Sage 2017).
[87] cf Marit Skivenes and Line Marie Sørsdal, 'The Child's Best Interest Principle across Child Protection Jurisdictions' in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in Child Protection: Implications for Professional Practice and Policy* (Springer International 2018).
[88] cf ibid.
[89] Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in Child Protection: Implications for Professional Practice and Policy* (Palgrave Macmillan 2018).
[90] cf Julieta Lemaitre and Kristin Bergtora Sandvik, 'Shifting Frames, Vanishing Resources, and Dangerous Political Opportunities: Legal Mobilization among Displaced Women in Colombia' (2015) 49(1) Law & Society Review 5 https://doi.org/10.1111/lasr.12119.
[91] Document 16, 'Dokument 16 (2011–2012) Rapport Til Stortingets Presidentskap Fra Menneskerettighetsutvalget Om Menneskerettigheter i Grunnloven' (2011) s 1.1. Translated from Norwegian by authors.
[92] Brinks, Gauri and Shen (n 30).
[93] cf McCammon and McGrath (n 26); Roa and Klugman (n 26).
[94] See forumforbarnekonvensjonen.no for more information

child's best interests has been through the vernacularisation process[95] to become integral to everyday speech,[96] but it is essential to remember that the concept derives from the CRC. Thus, when the ECtHR increases its focus on the child's best interests, as demanded by civil society, the CRC is indirectly influencing the direction of children's rights in the ECtHR. In other words, legal mobilisation and lawfare based on concepts and articles from the CRC may play an essential role in developing children's rights in the ECtHR, both directly and, as seen in the example from Norway, by proxy.

There are clear indications that the EctHR increasingly sees the child as a subject of its own rights.[97] The development of children as subjects of rights in the EctHR has coincided with an optional protocol to the CRC reaffirming '… the status of the child as a subject of rights and as a human being with dignity and with evolving capacities'. The CRC's optional protocol was referred to by the ECtHR in *M and M v Croatia* to underline children's status as subjects of rights, but that was not the first time the Court made this emphasis. In *X v Latvia*,[98] the concurring opinion of Judge Pinto De Albuquerque states that children are 'subjects of rights' and not 'objects of rights'. It is noteworthy that this came one year before the CRC's optional protocol came into force, which raises the question of whether it is a coincidence that the ECtHR's focus on children as subjects of rights coincides with the optional protocol, whether judges keep themselves updated on the development of the CRC and thus acknowledge its role in developing children's rights within the ECtHR, or, lastly, whether the change in focus is a result of legal mobilisation and lawfare which may influence the CRC and ECtHR simultaneously. It could very well be a combination of the three, but besides pointing to the change of focus, the data cannot give a conclusive answer.

ECtHR judges, one from each of the Contracting States, represent the Court as private persons, not as representatives from their home state,[99] but they are inevitably influenced by their native cultures.[100] In *Bayev and others*, for example, Judge Dedov wrote a dissenting opinion on the ECtHR's ruling against the Russian anti-gay propaganda law, which revealed a fundamentally different worldview than the rest of the Court.[101] It would be naïve to assume that Judge Dedov's dissenting opinion was an isolated event. Any judge may face situations challenging their worldviews, making decisions profoundly more difficult.[102] While children's rights are an area in which there are significant differences between states,[103] the CRC is a common denominator in all member states of the ECtHR: all member states have ratified the CRC and are thus committed to follow the Convention. Any amendment of the CRC should point to potential changes to children's rights in member states. Since the ECtHR consists of judges

[95]cf Brinks, Gauri and Shen (n 30).
[96]Ragnhild Hollekim, Norman Anderssen and Agnes Andenæs, 'Images of Children in Views on Same-Sex Adoption Rights' (2015) 11(3) Journal of GLBT Family Studies 229 <https://doi.org/10.1080/1550428X.2014.947462>.
[97]Breen and others (n 15).
[98]*X v Latvia* (n 64) 41.
[99]ECHR art 23(3).
[100]Geert Hofstede, Gert Jan Hofstede and Michael Minkov, *Cultures and Organizations, Software of the Mind: Intercultural Cooperation and Its Importance for Survival* (McGraw-Hill Education–Europe 2010).
[101]Gabriel Armas-Cardona, 'The Dissent in Bayev and Others v Russia: A Window into an Illiberal World View' (*EJIL: Talk!*, 7 July 2017) <www.ejiltalk.org/the-dissent-in-bayev-and-others-v-russia-a-window-into-an-illiberal-world-view/>.
[102]cf Charles Taylor, *Human Agency and Language* (Cambridge University Press 1985).
[103]cf Trond Helland (ed), 'A Comparative Analysis of the Child Protection Systems in the Czech Republic, Lithuania, Norway, Poland, Romania and Russia' Bergen: Centre for Research on Discretion and Paternalism, University of Bergen https://bora.uib.no/handle/1956/21640.

from all member states, it could be judicious to conclude that changes in the CRC may influence how the ECtHR assesses children's rights. In our quantitative findings, however, there are no indications that the CRC directly influences ECtHR deliberations.

Even though there are no indications of the CRC directly influencing ECtHR decisions, there are clear indications that it is frequently – and actively – used by the judges of the Court. It is evident that the ECtHR acknowledges the CRC as international law that it should consider. It repeatedly states in child abduction cases, for example, that it should assess the case in light of the CRC. These findings are in line with previous research. Both Fenton-Glynn[104] and Kilkelly[105] demonstrate clear evidence of the ECtHR drawing on the CRC as an international instrument of law in cases regarding, inter alia, juvenile justice, detention, and prohibition of torture.

The CRC's increased footing in the Court is also visible when looking at judges' separate opinions: in *Frette*, the judges assert that the CRC is not binding to the ECtHR but may provide guidance; in *Nunez*, they refer to the CRC as an international legal instrument on which the ECtHR should rely; and in *Blohkin*, they posit the CRC as an international standard with which ECtHR assessments should be in line. With Tversky and Kahneman's theory of heuristics in mind,[106] we can see that the CRC is an 'available' argument for the judges, which may point to the CRC directly influencing how each judge argues and, consequently, the deliberations within the Court.

In *Strand Lobben and others*, the dissenting judges further emphasise the influence of the CRC, stating that

> … the general principles as set out by the Court are 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 [CRC].[107]

This quotation from the dissenting judges underlines the complexity of assessing child rights cases, as well as acknowledging the CRC as a specialised legal instrument focused on children's rights.

When referring to the CRC, every party in the ECtHR refers more to specific articles than to the CRC in general (see Table 3). It is evident that parties primarily use the CRC as an argument to strengthen their cases, especially if the argument is found in the law section of the judgment. It is interesting that there are more references to the CRC in the fact section than in the law section, however. Nearly 80% of all government references to the CRC are found in the fact section, which summarises domestic court proceedings. If domestic courts have referred to the CRC, it is coded as 'government'. The overwhelming number of references in the fact section compared to the law section from governments may indicate that the CRC has a significantly higher impact in domestic courts than in the ECtHR. When assessing cases, the ECtHR also considers domestic law; accordingly, the Court is bound to take the CRC into consideration if it is an integral part of domestic law. When the ECtHR is making the reference in the fact section of a judgment, it mainly refers to the CRC as a relevant international law, material, and/or instrument. Its references primarily focus on specific CRC articles pertinent to the

[104]Fenton-Glynn (n 7).
[105]Kilkelly, *The Child* (n 7).
[106]Tversky and Kahneman (n 32).
[107]Strand Lobben and others v Norway (n 69) para 5, p 87.

case in question.[108] The ECtHR's area of focus is another indication that the CRC, at least to an extent, is an 'available' argument and/or resource the judges keep in mind in their deliberations.

Regarding development over time in connection to *where* within judgments the references are found, all references in the 'as to the fact', 'as to the law', 'dissenting opinion', and 'concurring opinion' follow the same trend: they have increased in number over time, especially the past decade. However, the even distribution of the increase between each of the sections indicates that neither where in the judgment each party refers to the CRC nor how the parties use the CRC has changed over time. This may be explained by the fact that the premises for using the CRC as a legal argument in the ECtHR have remained the same: the ECtHR is neither bound by nor has any obligations towards the CRC.

Regarding development in terms of *who* refers to the CRC, the ECtHR, applicants, government, and judges all follow the same trend as seen above, with an increase in references over time, especially in the past 10 years. However, while the increase in references from applicants, governments, and judges all have been stable over the past decade, references made by the ECtHR have seen an additional increase in the past five years. Third-party interveners and others have only referred to the CRC in the past decade, except for one reference by a third-party intervener in 2004. Interestingly, references to the CRC by third-party interveners have decreased in the past five years; 15 references were made in the first five years of the decade and only eight in the past five years. However, the average number of references to the CRC per judgment by third-party interveners has increased from 1.88 references per judgment to 2.0. One question that arises here is whether third-party interveners' role has changed in the past five years. In children's rights cases, the increase in third-party interveners advocating for children's rights may result from legal mobilisation.[109] Additionally, the overall rise in third-party interveners may point to the ECtHR being more susceptible to impulses from outside its sphere, which in turn may point to legal mobilisation and lawfare playing increasingly important roles in developing the field of children's rights as well as human rights in general. But the data does not give a conclusive answer to the question, nor does it reveal what influence the CRC has on the ECtHR. Regardless, there has been a clear development the past five years in how the ECtHR refers to the CRC.

The increase of third-party intervenes may also indicate an increased focus on lawfare in the ECtHR. The concept of lawfare acknowledges the use of law as a tool and strategy to advance political goals by, inter alia, advocacy groups, NGOs, states, and political actors.[110] In the ECtHR, advocacy groups, NGOs, and states are active as third-party intervenes. In what is arguably the most notable judgment on children's rights in recent years, *Strand Lobben and others*, 11 third-party interveners commented on the case, including seven states. Not all 11 third-party interveners were in opposition to Norway. Some states intervened on Norway's behalf. In *Strand Lobben and others*, two opposing groups (those advocating for and those advocating against Norway) used the ECtHR as a battleground to gain social change for children. The active use of the

[108]See amongst others *AM and others v Russia* App No 47220/19 (ECtHR, 6 July 2021) paras 33–34.
[109]cf McCann (n 16).
[110]Gloppen (n 20).

Court as a site for fight for social change indicates that third-party interveners have made a conscious strategic choice to fight for their beliefs in the Court, thus indicating that lawfare is very much at play in the ECtHR.[111]

All deliberations within the ECtHR are exempt from public disclosure. However, by analysing statements from individual judges in separate opinions, it is possible to get an insight into certain disagreements within the Court. In concurring opinions, judges mainly use the CRC as a direct source, and appear to do so in a way similar to the reference of sources in academic writing. In dissenting opinions the CRC is used differently: as a foundation to underline and legitimise the judges' arguments. It is not surprising that judges aim to legitimise their arguments when disagreeing with the majority. Overall, it is clear that in both concurring and separate opinions judges use the CRC *actively*. Judges' active use of the CRC as a legal argument reaffirms that the CRC is an 'available' argument[112] and thus that the CRC is an active instrument in developing children's rights in the ECtHR.

7. Conclusion

Our quantitative findings reveal no statistical indications that the CRC profoundly impacts ECtHR decisions. There are no correlations between using the CRC as a legal argument and the outcome of the judgments. However, our qualitative analysis gives clear indications that the CRC is used actively in deliberations within the Court. We therefore argue that the CRC has an active role in developing the field of children's rights within the ECtHR.

When discussing the development of children's rights in the ECtHR, it is vital to keep in mind that differing positions appear to exist within the ECtHR regarding the direction judges believe the Court should move in the field of children's rights (see e.g. section 5b (iii)). There are also differences in the extent of the use of the CRC as an argument from case to case, from party to party, and from judge to judge. It is therefore to be expected that the CRC will have a more significant impact in some cases than in others. Regardless, as underlined by the dissenting judges in *Strand Lobben and others* (para 17, 98), an understanding seems to exist among judges that the CRC is an essential instrument in developing children's rights in the ECtHR:

> If the Court is genuinely to embrace, in line with the Convention on the Rights of the Child, the idea of children as subjects of distinct individual rights and the need to regard the best interests of the child as a primary consideration, it appears necessary to make changes also in the procedural practices.

The primary purpose of this article was to examine the development of the CRC as a legal argument in the ECtHR and whether the CRC's footing within the Court has changed over time. There has been a visible change in the number of references to the CRC. Our findings point to a strengthening of children's rights in the ECtHR over the past decade, with increased strengthening in the past five years. While there is no indication

[111]Varun Gauri and Daniel M Brinks, *Courting Social Justice : Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008); Gloppen (n 20); see also Shawn Rosenberg, 'The Empirical Study of Deliberative Democracy: Setting a Research Agenda' (2005) 40 Acta Politica https://doi.org/10.1057/palgrave.ap.5500105.

[112]Tversky and Kahneman (n 32).

that the use of the CRC directly influences the outcome of a case, the findings show that the CRC has had and still has an essential role in developing children's rights in the ECtHR, if not directly, then at least indirectly.

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