

Master of Law: Advanced Studies in International Children's Rights

The Rights of Siblings under International Children's Rights Law



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Supervisor: Professor Julia Sloth-Nielsen

Thesis submitted by
Marit Buddenbaum for the final
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Name: Marit Buddenbaum

Student ID Number: s1896342

Signature:

A handwritten signature in black ink, appearing to be 'Marit Buddenbaum'.

Table of Contents

Acknowledgments	v
Executive Summary	vi
Keywords	vii
Overview of Main Findings	vii
List of Abbreviations	x
1. Introduction	1
1.1. The Relevance of Sibling Rights	1
1.1.1. Three Examples of Sibling Separation	1
1.1.2. Siblings and Other Inter-child Relationships under the UNCRC	3
1.2. The Definition of Sibling	6
1.2.1. The Three Dimensions of Defining Sibling Relationships	6
1.2.2. The Biological Sibling	6
1.2.3. The Legal Sibling	7
1.2.4. The Social Sibling	8
1.2.5. The Sibling within the Scope of This Thesis	9
1.3. Research Question and Methodology	10
2. The Significance of Sibling Relationships for Children	12
2.1. Introduction	12
2.2. Benefits of a Positive Sibling Relationship	13
2.3. The Increased Value of an Intact Sibling Relationship in Stressful Circumstances	14
2.4. Negative Outcomes of Involuntary Separation of Siblings.....	15
3. Siblings in Civil Judicial Proceedings: Separation from One Parent	17
3.1. Introduction	17
3.2. The Complementary Roles of the Best Interests of the Child and the Right to be Heard	17
3.3. Child Participation in Civil Judicial Proceedings	19
3.4. Sibling Rights in the United States and under the UNCRC	19
3.4.1. The Best Interest of the Child in U.S. Family Law	19
3.4.2. The UNCRC, the Rights of Parents and the Notion of Family	21
3.5. Sibling Rights in Europe	24
3.5.1. A Sibling's Right to Contact.....	24
3.5.2. A Sibling's Right to Private and Family Life	25
3.6. Sibling Cases under the 1980 Child Abduction Convention of the HCCH	27
4. Siblings in Civil Judicial Proceedings: Alternative Care (incl. Adoption)	29
4.1. Introduction	29
4.2. Siblings in Alternative Care through a UNCRC perspective	30
4.2.1. Article 20(1) of the UNCRC	30
4.2.2. Siblings and the UN Guidelines on Alternative Care for Children	30
4.3. Adoption from a UNCRC perspective	31
4.3.1. Article 21 of the UNCRC	31
4.3.2. International Adoption in the case of the Ramírez Brothers.....	32
4.4. Child-headed households as a solution for non-separation of siblings	35
5. Conclusion	38

5.1. The International Children’s Rights of Siblings	38
5.2. Anchoring Sibling Relationships as a Factor in BITC Assessments	39
5.3. Recommendations for the Way Forward	39
5.4. Ideas for Future Research	40
Bibliography	41
Appendix 1: The Parent-State-Child Triangle and Its Variations with Multiple Children	47
Appendix 2: Estimates of Shared Genetic Information	48

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Executive Summary

This thesis considers if and to what extent there is an international right for siblings not to be separated or to know (of) each other. The UN Convention on the Rights of the Child (hereinafter **UNCRC**) mentions the roles of parents or caregivers and of States towards children explicitly and elaborately, but the roles and rights of siblings are not explicitly mentioned, nor is any legal position for siblings identified within the UNCRC. Different (civil judicial) cases have indicated that there is a need for siblings to be able to participate in decisions affecting them – and in order for their participation to be effective, a legal position for siblings might have to be acknowledged. In today's world, with so-called 'modern family' formations and assisted reproductive technological (hereinafter **ART**) advances, various different types of sibling relationships (biological, legal and social) can be identified, such as half-brothers, step-sisters, adopted siblings and so on. This makes it possibly a challenge to legally define 'sibling' and consequently recognize sibling rights through law. Additionally, the roles siblings (could) play in relation to one another are non-exhaustive. For instance, older siblings could be heads of the household and take a parental role towards their younger siblings. Younger siblings could be especially selected by parents to take on the role of tissue donor to their sick older siblings. Siblings could be each other's best friends. On the other hand, they can be a burden to each other, harm each other and dislike each other (also to extent where separation might be in the best interest of one or all of them). Due to early separation and/or anonymous donations in ART, it is also a possibility that siblings might not know (of) each other.

In Chapter 1 this thesis will seek a working definition of sibling, by looking more closely at the types of siblings that exist. It will hold that sharing one parent is the minimum requirement of being a sibling, but that other factors of the relationship, such as sharing genetic information or having a shared history together, add relevance to the individual circumstances of the sibling relationship, which might need to be assessed in order to establish the extent to which the relationship requires legal protection.

Chapter 2 will review the importance of the sibling relationship from mainly a developmental psychological perspective. These fields provide an understanding of the positive potential that siblings can have on each other's development, identity and social skills (such as sharing, coping, empathy and understanding, and negotiation). It will show that there is a justified need to protect the sibling relationship as one crucial to children's well-being, identity and psychological health. Because little is written about the sibling relationship from a children's rights perspective, this thesis will look at existing (case) law that impact(ed) sibling relationships in Chapters 3 and 4.

In Chapter 3, cases in which siblings were separated from each other as a result of divorce, the death of one parent or parental abduction will be analyzed. It is first and foremost found that children individually do not always have their best interests assessed, nor have the possibility to participate in civil judicial decisions affecting them. Consequently, having their sibling relationship assessed and weighed in judicial decisions is an even rarer event. The United States Supreme Court's and European interpretation of the best interest of the child (hereinafter **BITC**) principle will lead to an understanding of the extent in which sibling importance is recognized and protected in these national and regional jurisdictions. At the end of the chapter, three child abduction cases from the Hague Conference will be reviewed to understand importance attached to the sibling bond and siblings' BITC in private international law. Findings in this chapter will also lead to a greater understanding of the meaning of family and parental rights under the UNCRC.

Chapter 4 will argue that siblings in alternative care, as children deprived of both parents and their natural family environment, have an added argument not to be separated from their siblings, because their sibling(s) might be the only constant(s) in their life and identity. Within this chapter, the international, regional and domestic recognition of the importance of siblings will be looked at through the lens of alternative care including (international) adoption. At the end of the chapter, the legal

recognition of child-headed households (hereinafter **CHH**) as a solution for non-separation of siblings, will be discussed.

In the conclusion, following the findings in all previous chapters, an answer to the question whether there is a legal right for siblings not to be separated and to know (of) each other will be answered with a yes. Even though siblings are not explicitly mentioned in any of the provisions of the UNCRC, the sibling is recognized as part of the family, part of the child's (right to) identity, and a factor within a BITC assessment. This means that neglecting the sibling relationship in civil judicial proceedings will lead to the breaches of the rights under Articles 16, 8 and 3 of the UNCRC respectively. The need for legal recognition of siblings from a UNCRC perspective is submitted, in which the UNCRC Committee is encouraged to act on the recommendations that could mean a step forward in realizing the rights of siblings everywhere in the world. Since the UNCRC has been created (at least to some extent) to ensure that children will no longer be treated as property or as an extension of their parents, but as individuals with their own rights and responsibilities, siblings need to be able to participate in decisions affecting their relationships and have access to justice when adults (attempt to) separate them against their will.

Keywords

Siblings – Child – UN Convention on the Rights of the Child – Civil Judicial Proceedings – Sibling Separation – Best Interest of the Child – Right to Be Heard – (Right to) Identity – Contact – Family

Overview of Main Findings

This thesis aims to advocate for the legal recognition and protection of sibling relationships under international children's rights law. It presents a child-centered and rights-based approach to siblings, which is a novel research area. This thesis looks at the UNCRC primarily, and at principles such as the BITC and right to be heard, as well as the more specific rights to identity and family, which are central. This thesis offers three novel findings and contributions.

First, there is a legal basis for siblings within the UNCRC under Articles 3, 8 and 16 on the BITC, right to identity and right to family respectively. Siblings come in many forms, but the importance of the sibling relationship is well-established for many different types of siblings in the field of developmental psychology. Siblings have a positive potential on each other's development, identity and social skills (such as sharing, coping, empathy and understanding, and negotiation). When families find themselves in stressful circumstances, siblings in that family naturally click together and support each other to the extent that their mental health is significantly better than those of siblings who have been separated from each other in similar situations. However, if the siblings are separated as a result of the family circumstances, not only the potential benefits are lost but also additional negative effects of separation occur. Their identity, ability to cope with the situation and sense of self-worth are for instance negatively impacted. As such, there is a justified need to protect the sibling relationship as one crucial to children's well-being, identity and psychological health. Because brothers and sisters can shape each other's identity, be beneficial for the (social) development and well-being of the child, and are in general considered an important member of the child's family environment, sibling separation could be a breach of individual children's rights to family and identity, as well as countering individual children's BITC. All types of sibling relationships require protection if this is found to be in the individual children's best interest, as much as their separation would be justified if *that* is in their best interest. Because of the various types of siblings existing, it is important to assess each sibling tie individually. Assessing the importance of a sibling bond for individual children requires hearing the individual children's views or assessing the case from a child-centered approach in cases where the child is unable to participate. This thesis submits that taking into account sibling relationships is vital to all BITC assessments.

Second, even though 'siblings' are not explicitly mentioned anywhere in the UNCRC, the Committee on the Rights of the Child (hereinafter **UNCRC Committee**) does recognize siblings as an important family tie in multiple General Comments (hereinafter **GC**) and Concluding Observations. Also, the UN Guidelines on Alternative Care recognize the importance of sibling relationships, and advocate for their non-separation over otherwise prioritized forms of family-based care arrangements. As such, the sibling bond is recognized under international children's rights framework, but this is non-binding and the importance of the sibling relationship is not clearly recognized by States parties.

Third, there is a lack of data regarding siblings. Therefore, this thesis looked at existing (case) law regarding multi-child families, to see whether and how courts – international, regional and domestic – weigh the sibling relationship in their reasoning. Through the analysis of various civil judicial proceedings, it was found that not all courts attach the same importance to the sibling relationship when weighing a case. In fact, oftentimes the sibling bond is not weighed at all, leading to sibling separation as a collateral damage rather than a decision taken in their best interest. This thesis clearly establishes that separation of siblings can occur as a result of various issues, such as (international) parental abduction, divorce, death of one or both parent(s), placement in foster care and separate (international) adoption. In light of the lack of data concerning siblings and their separation, this thesis recommends the UNCRC Committee to deploy its multiple functions to strengthen the legal recognition and protection of siblings in international children's rights law. Herein, it could educate States parties and legal practitioners on *how* they could best assess and weigh the individual sibling relationships in cases involving children. Also, it could request States parties to collect data on siblings and encourage research on the topic of siblings and the law in order to ensure

their bond is recognized in cases that carry the possibility of affecting their identity, development and future.

List of Abbreviations

ACHR	American Convention on Human Rights
ACRWC	African Convention on the Rights and Welfare of the Child
ART	Assisted Reproductive Technology
BITC	Best Interest of the Child
CHH	Child-Headed Household
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GC	General Comment
HCCH	Hague Conference on Private International Law
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
UN Guidelines	United Nations Guidelines on Alternative Care for Children
UNCRC	United Nations Convention on the Rights of the Child
UNCRC Committee	United Nations Committee on the Rights of the Child
U.S.	United States of America

1. Introduction

1.1. The Relevance of Sibling Rights

1.1.1. Three Examples of Sibling Separation

This January the extraordinary true story of a triplet separation premiered at the Sundance Film Festival.¹ In this documentary, triplets Bobby Shafran, Eddy Galland, and David Kellman were separated at birth in the 1980's.² As subjects of a secret study – that was supposed to put an end to the nature v. nurture debate – they were adopted by three different families, that were not aware of the purpose of the study or the existence of any siblings.³ Only 19 years later, the boys would find out about each other, move in together, and even start a restaurant together, but when they found out about the study, the trio went from exhilaration to anger and eventually one of the brothers committed suicide.⁴ Peter Naubauer, the New York psychoanalyst who led the study, which included multiple sets of twins and triplets and was funded by the New York Institute of Health, might have been concerned about the moral and ethical issues, since he never published the study and even locked the data in a Yale archive until 2066.⁵ The study was secret and might be called immoral, but it was lawful.⁶ Today a study like this would not be permitted, because of the rules for informed consent by parents and the children, but after reading this story one might wonder if there should also be specific rules prohibiting the separation of siblings, unless it happens in their own best interest.

On 9 March 2018, a case against the State of Guatemala was decided by the Inter-American Court of Human Rights (hereinafter **IACtHR**), concerning the separation of two brothers in alternative care followed by their international adoption into two separate U.S. families.⁷ In January 1997, the oldest brother, Osmín Ricardo Tobar Ramírez, aged 7 at the time, and the youngest brother, J.R., aged 2, were removed from their home by agents from the Office of the Attorney General of Guatemala on the (disputed) allegation of abandonment by their mother.⁸ Attempts by the mother and extended family to (re)gain the custody over the boys failed.⁹ And instead of a foster home or placement together in Guatemala, the decision was made to place the brothers for international adoption into separate families. Fifteen years later, the oldest brother was able to trace his biological family, and decided to file a case against Guatemala, after his parents told him the details of his case. He felt the separation from his family, especially from his younger brother was an unjustified

¹ Sundance Institute, *Three Identical Strangers*, as retrieved from: <http://www.sundance.org/projects/three-identical-strangers/>, last visited 12 June 2018.

² T. Wardle (Director), “Three Identical Strangers”, *RAW*, 2018 [96 minutes].

³ G. Kardon “Research Ethics: Life in triplicate: A tale of triplets at birth raises red flags and questions about the role of nature and nurture” *Science*, 2018 (hereinafter **Kardon**), p. 1222.

⁴ S. Saul, “In The Name of Research: Identical brothers separated at birth were studied, but truth was hidden”, *Newsday*, 1997, p. A5.

⁵ Kardon, p. 1222.

⁶ *Ibid.*

⁷ Inter-American Court of Human Rights, *Ramírez Escobar and Others v. Guatemala*, 9 March 2018 (hereinafter **Ramírez v. Guatemala**).

⁸ Inter-American Commission on Human Rights (IACHR), *Ramírez Brothers and Family v. Guatemala*, Report No. 72/15, 28 October 2015 (hereinafter **IACHR, Merits**), para. 2.

⁹ IACHR, Merits, paras. 55-118.

disturbance of his right to family life and identity.¹⁰ The IACtHR ruled that Guatemala indeed was in violation of his rights to equal protection of the family, name and identity and humane treatment.¹¹ This case shows that the separation of minor siblings can be an international issue with long-lasting psychological effects, from which they might require protection.

On 16 February 2016, the European Court on Human Rights (hereinafter **ECtHR**) concluded that in Portugal also the right to family life was seriously violated in the case of *Soares de Melo v. Portugal*.¹² In this case, social services interfered in the family of an unemployed immigrant mother of ten children, whose husband, the father of all ten children, was hardly around.¹³ The family's status of severe financial instability led to allegations of neglect by the Portuguese social services and eventually protection measures were imposed on the children, that led to the separation of six of the children from their mother and each other.¹⁴ Because one of the children was not at home at the time, 5 (of the 6 intended) children were removed from the home and were placed in three separate institutions, without the possibility to visit their mother or their siblings. Also, all 5 children that were removed from the home were placed with a view to adoption.¹⁵ Throughout the proceedings, there was no possibility for the siblings to have their voices heard, nor was any independent best interest of the child (hereinafter **BITC**) assessment carried out for the siblings that pointed to a reason for their separation from each other.¹⁶ In the end, when the mother appealed to the European Court of Human Rights, the Court adopted the interim measure for the mother to visit her children throughout the proceedings.¹⁷ Even though the Court stated that the separation of the siblings broke the sibling relationship and family relationship, which is contrary to the children's best interests, the children were not actively involved in the proceedings nor did they participate in a best interests assessment.¹⁸ Even though the mother won the case, it is hard to tell whether all siblings safely returned home, or whether some were in the end adopted into other families.¹⁹ According to the UNCRC children have a right to be heard in *all* cases affecting them²⁰, but it is the question whether this is also true in cases in which sibling separation is the collateral damage in a case of a parent versus state. This case also

¹⁰ IACHR, Merits, paras. 123-161.

¹¹ *Ramírez v. Guatemala*.

¹² European Court of Human Rights, *Soares de Melo v. Portugal*, Application No. 72850/14, 16 February 2016 (hereinafter **Soares**).

¹³ V. David, "ECtHR condemns the punishment of women living in poverty and the 'rescuing' of their children", *Strasbourg Observers*, 17 March 2016, as retrieved from: <https://strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/#more-3185>.

¹⁴ *Soares*, paras. 33 & 56.

¹⁵ *Soares*, paras. 34 & 56.

¹⁶ *Soares*, paras. 80 & 115.

¹⁷ *Soares*, para. 54.

¹⁸ *Soares*, para. 114.

¹⁹ S. Phillimore, "Adoption of Portuguese children found to be in breach of Article 8", *St John's Chambers*, 2016, as retrieved from: <http://www.stjohnschambers.co.uk/2016/04/adoption-of-portuguese-children-found-to-be-in-breach-of-article-8/>.

²⁰ Art. 12(1) of the UN General Assembly, *Convention on the Rights of the Child* (1989) (hereinafter **UNCRC**).

illustrates that the number of siblings (ten in this case) adds to the complexity of balancing the rights of all individuals concerned.²¹

These three examples show that sibling separation of minors can be problematic and occurs around the globe without children's consent. Each example falls within a different legal context, but together they raise the question whether the sibling relationship is sufficiently protected under human rights law, and more specifically international children's rights law, or whether sibling separation occurs in an unjustifiable way with respect to the children. The United Nations Convention on the Rights of the Child (hereinafter **UNCRC**) is herein the most important legal document, for it is ratified by all but one country in the world²² and for it was implemented with the specific purpose of acknowledging children as rights holders rather than passive recipients of protection.²³ In fact, the UNCRC is the first-ever international legally binding document that enforces the aim of empowering children through participation rights in line with the age, maturity and evolving capacities of the children.²⁴ In 2014, Professor Ton Liefaard noted that "[r]egional human rights courts, such as the European Court of Human Rights and Inter-American Court of Human Rights, increasingly refer to the CRC and related children's rights standards as the relevant legal framework in cases where the interests of children are at stake."²⁵ For the latter two examples, it is possible to review the court decisions that regard sibling relationships and research whether the rights and principles under the UNCRC were respected. Therefore, regional court cases will be analyzed more thoroughly in Chapters 3 and 4 of this thesis.

1.1.2. Siblings and Other Inter-child Relationships under the UNCRC

Not anywhere in the UNCRC siblings are mentioned, nor can an explicit right be found for siblings not to be separated, to be able to stay in touch with each other or even to know of each other – even though their strong emotional connection is widely recognized and their separation can cause long-lasting psychological issues.²⁶ However, through the adoption of General Comments, United Nations Committee on the Rights of the Child (hereinafter **UNCRC Committee**), the monitoring body of the UNCRC, can extend the *corpus juris* of international children's rights for purposes of interpretation of the UNCRC.²⁷ These General Comments are not legally binding, but provide authoritative guidance to States parties on the implementation of the UNCRC. Eight General Comments (hereinafter **GC**)

²¹ See Appendix 1, specifically panel C.

²² United Nations Office of the High Commissioner on Human Rights (hereinafter **OHCHR**), "Ratification of the Convention on the Rights of the Child", as retrieved from: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>, last visited 16 June 2018.

²³ See for instance A. Nolan, *Children's Socio-Economic Rights, Democracy and the Courts: Children's Socio-Economic Rights, Democracy and the Courts*, London, Bloomsbury Publishing PLC (2011), p. 10.

²⁴ General Comment No. 12 (2009) on the right of the child to be heard, (hereinafter **GC 12**), para 1.

²⁵ T. Liefaard & J.E. Doek, "Litigating the Rights of the Child: Taking Stock after 25 Years of the CRC" in T. Liefaard & J.E. Doek (eds.), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*. Springer: Dordrecht (2014) (hereinafter **Liefaard & Doek**), p. 2.

²⁶ See Chapter 2 for the significance of the sibling relationship from a developmental psychological point of view.

²⁷ OHCHR, "Committee on the Rights of the Child", as retrieved from: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>, last visited 13 June 2018.

mention siblings explicitly (*which are*, General Comments 3²⁸, 6²⁹, 7³⁰, 14³¹, 16³², 17³³, 21³⁴ and 23³⁵) in the contexts of children's family environment. One paragraph in the latest General Comment, no. 23, does not only mention sibling, but also provides explicit guidance to States on the interpretation of siblings as a part of the family, when it writes that: "in compliance with international legal obligations in terms of maintaining family unity, which includes siblings, States should prevent separation in accordance with the Guidelines on Alternative Care of Children."³⁶ It should be understood that this particular phrase was written in the specific context of migration. Furthermore, this GC was jointly written together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and it is to be questioned whether that Committee's definition of family happens to include siblings, or whether the UNCRC Committee actively chose to include siblings in this context too. Still, the UNCRC Committee agreed on the wording of this paragraph, otherwise it would have been rewritten. Therefore, this is an extremely important finding for the way sibling relationships need to be viewed in international children's rights law: as part of the family environment. Another crucial finding stems from a second function of the UNCRC Committee, which is monitoring the implementation of the UNCRC at the national level through periodic State reports. In previous reports, the Committee expressed concern to multiple Muslim countries who "award custody of young children to mothers and older children to fathers."³⁷ In their State report to Pakistan, the UNCRC Committee expressed concern "that the State Party's legislation uses age limits, instead of the best interests of the child, as criteria in determining custody in cases of divorce. Such permission, in addition to **implying that siblings can be separated**, discriminates between the sexes and fails to acknowledge the child's right to express her/his views and have them taken into account."³⁸ By literally expressing their concern for systematic sibling separation, the UNCRC Committee shows that sibling separation for other reasons than it being in the BITC of the children concerned, should be discouraged.

²⁸ General Comment No. 3 (2003) on HIV/AIDS and the rights of the child (hereinafter **GC 3**), paras. 34 and 36.

²⁹ General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, paras. 31(ii) and 40.

³⁰ General Comment No. 7 (2005) on implementing child rights in early childhood (hereinafter **GC 7**), paras. 19, 20(c) and 36(e).

³¹ 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) (hereinafter **GC 14**), Chapter V.A.1(c)

³² General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, chapter IIIC.

³³ General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), chapter VII.

³⁴ General Comment No. 21 (2017) on children in street situations, para. 4.

³⁵ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on the human rights of children in the context of international migration in countries of origin, transit, destination and return (hereinafter **GC 23**), paras. 27, 32, 37, 38.

³⁶ GC 23, para. 27.

³⁷ R. Hodgkin & P. Newell, "Implementation Handbook for the Convention on the Rights of the Child", *UNICEF*, 2007 (hereinafter **Hodgkin & Newell**), p. 128.

³⁸ *Ibid* [emphasis added].

Within the UNCRC, there is not only disregard for sibling relationships but, in fact, there is also not any regard for inter-child relationships, despite common knowledge that children interact with each other at schools, playgrounds, (team) sports, kindergarten, et cetera. The importance of legal recognition of inter-child relationships was highlighted by a former child protection case worker from Egypt, who could not process BITC assessment forms for children who feel or fell victim of another child's actions, because the forms were specifically intended to deal with adult-child problems and abuses.³⁹ According to the case worker, the lack of inter-child relationship recognition in her organization was a consequence of the wording of the UNCRC. The assessment form's section on 'violence against children' followed the specific wording of Article 19 of the UNCRC, and thus included protection from "all forms of physical or mental violence, injury, abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."⁴⁰ This meant that, despite the many types of violence explicitly included, the assessment form was only directed to cases in which the legal caregiver or the parents could be held accountable, and the case worker could never trace or raise the point of peer violence. In Egypt, however, school violence was one of the concerns of the UNCRC Committee in review of the country in 2011.⁴¹ In the explicit reading of Article 19 of the UNCRC, peer violence was not mentioned as one of the forms of violence. However, in General Comment 13, the UNCRC Committee did elaborate, for purposes of interpretation of Article 19, that "violence by other children" is to be included in the definition of violence.⁴² The case worker stated that this was noted by her organization, but for the purposes of intervention, the Committee's lack of guidance on *how* States could or should intervene, was a key issue that hampered inclusion of peer violence in the BITC assessment forms. This goes to show that in the wider context, children under the UNCRC may fall victim of the individual focus of the treaty, even with recognition of inter-child relationships and siblings by the UNCRC Committee in their General Comments or State reports.

Even though the importance of the sibling relationship for children is recognized by the UNCRC Committee, disregard for siblings in the legally binding UNCRC, and the lack of clear guidance on the implementation of the UNCRC Committee's mentions of sibling in the extended (non-binding) *corpus juris*, threatens the protection of siblings, even when such protection would be in the BITC. The next paragraph will seek a definition of 'sibling' in order to develop an understanding of the legal safeguards to protect the sibling relationship that are or should be in place.

³⁹ The person I am referring to and the organization she worked for would like to stay anonymous. For the purposes of the argument, I would like to include her voice.

⁴⁰ Art. 19(1) of the UNCRC.

⁴¹ UNCRC Committee, *Concluding Observations: Egypt* (2011), paras. 74(b) and 75(c).

⁴² General Comment No. 13 (2011) *on the right of the child to freedom from all forms of violence*, cf. paras. 22(b), 25(a) and 27.

1.2. The Definition of Sibling

1.2.1. The Three Dimensions of Defining Sibling Relationships

The Oxford English Dictionary elegantly defines sibling as “[e]ach of two or more children or offspring having one or both parents in common; a brother or sister.”⁴³ Taking into account that siblings can both be children and adults and that they can share one or both parents, this definition already illustrates the heterogeneity of the group, but it does not answer all arbitrary cases of siblinghood. Are children from the same gamete donor siblings in this definition? And what about two adults who live together (unmarried), but both have children from a previous relationship? Would their children be siblings? At the beginning of this thesis – that aims to study the protection of the sibling relationship from a children’s rights perspective – it is important to develop a working definition for ‘sibling’. Three perspectives on a sibling definition will be discussed, namely the biological or shared genetic aspect, the legal aspect, and the social aspect.

1.2.2. The Biological Sibling

At birth, a baby carries 50% of the DNA from each of the two parents. This way biological siblings share approximately 50% of their DNA (see Appendix 2, panel A).⁴⁴ That is in full siblings, since half siblings only share half of the DNA of one parent resulting in roughly 25% shared genetic information between the siblings (see Appendix 2, panel B). The only way to prove a true biological sibling bond is to test the DNA of both siblings and the parents. If the parents are unavailable, testing only the siblings leads to the percentage of shared DNA, which can only be used to predict the likelihood of being biological siblings. 50% overlap in genetic information is no proof of sibling ties, because it could also indicate a parent-child relation (if sufficient age gap is present to make this possible) or theoretically the children could be conceived by two identical twin fathers and two identical twin mothers (see Appendix 2, panel C). The ‘blood tie’ of siblings is thus hard to test and verify, and therefore siblings cannot be defined merely by looking at the DNA.

In light of recent advances in the field of artificial reproductive technology (hereinafter **ART**), especially, the verification of sibling ties has become a challenge. Between 2004 and 2013 in the United States (hereinafter **U.S.**), around 20% of all children born through in vitro fertilization⁴⁵, were born through donor gametes - some of which were from the same donor but used in different families.⁴⁶ Technically, these children are (at least) half siblings biologically, sharing roughly 25% of their DNA. Even with relatively new laws prohibiting the use of anonymous donor gametes, it will be a question whether siblings born through donor gametes will know about each other’s existence, or

⁴³ Oxford Dictionaries, “Definition of *sibling* in English”, *Oxford University Press*, as retrieved from: <https://en.oxforddictionaries.com/definition/sibling>, last visited 10 June 2018.

⁴⁴ Professor Dr. Manfred Kayser, a genetic identification expert was so kind to explain the genetic dimension of siblinghood.

⁴⁵ In vitro fertilization is a specific form of ART.

⁴⁶ V.A. Kushnir, S.K. Darmon, A.J. Shapiro, D.F. Albertini, D.H. Barad and N. Gleicher, “Utilization of Third-party In Vitro Fertilization in the United States” *American Journal of Obstetrics & Gynecology*, 2017, p. 266.

whether their right to know their family history is limited to knowing the donor(s).⁴⁷ Taking into account these new techniques, a definition of sibling would need to weigh what creates a familial link: is it “on the basis of gestation, or genetics, or intent”?⁴⁸ With these techniques it is now for instance possible to have five parents if one donated the egg (genetic link), the second donated the sperm (genetic link), the third carried the child and gave birth to it (*de facto* parenthood) and the remaining two adults are the ones who initiated everything and plan (hence, have the intent) to raise the child as its parents.⁴⁹ An example of multiple parents in an ART-derived pregnancy leading to sibling separation was the international surrogacy case (decided in 2016) of the two twins, baby Gammy and his sister Pipah.⁵⁰ Where initially the surrogate and the intended parents agreed via a commercial surrogacy agent to a contract for one child, it turned out that the surrogate was carrying twins: one completely healthy girl and one baby boy with Down’s Syndrome. When the Australian initiating couple took only the girl home and left the boy behind with the Thai surrogate, international media expressed outrage and the surrogate filed for a court decision that the girl should be returned to her.⁵¹ Both parties’ conflicting stories⁵² in the media and court pleadings on their intentions to keep the siblings together, were resolved by an Australian court decision that both babies had established family life to the extent that separation from the parent(s) they lived with would be more detrimental than their continuing separation from their twin.⁵³ In the case ruling there is no specific provision that ensures the children will know about each other or be provided any type of visitation rights or knowledge of each other’s whereabouts. The baby Gammy case illustrates two things relevant for this thesis: first, that biological sibling separation is sometimes maintained, prioritizing bonds that came into existence through legal contracts, and second, that recognition of siblings’ biological tie does not safeguard any rights to visit or even know about each other.

1.2.3. The Legal Sibling

A blood relationship or genetic link is not necessary to establish a familial relationship or sibling bond.⁵⁴ In Europe and the U.S., the traditional nuclear family with married heterosexual parents and biologically-related children has become a minority.⁵⁵ New sibling relationships can be recognized in

⁴⁷ A. Bainham, “Birthrights? The Rights and Obligations Associated with the Birth of a Child” in J.R. Spencer & A. Bu Bois-Pedain (eds.), *Freedom and Responsibility in Reproductive Choice*, Hart Publishing: Oxford (2006), p. 168.

⁴⁸ F. Banda, J. Eekelaar and FBA, “International conceptions of the family”, *International and Comparative Law Quarterly*, 2017 (hereinafter **Banda, Eekelaar & FBA**), p. 12.

⁴⁹ S. Golombok, *Modern Families: Parents and Children in New Family Forms*, Cambridge University Press: Cambridge (2015) (hereinafter **Golombok**), p. 2.

⁵⁰ Family Court Of Western Australia, *Farnell & Anor and Chanbua FCWA 17*, Application No. PTW 3718, 14 April 2016, as retrieved from: <https://www.jade.io/article/462048> (hereinafter **Farnell**).

⁵¹ J. Campbell, “The “Baby Gammy” case dealing with commercial surrogacy: What happened to baby Pipah? – Farnell & Anor and Chanbua (2016) FLC 93-700” *Wolter Kluwer Central Legal*, 3 November 2018, as retrieved from: <http://www.wolterskluwercentral.com.au/legal/family-law/baby-gammy-case-dealing-commercial-surrogacy-happened-baby-pipah-farnell-anor-chanbua-2016-flc-93-700/>.

⁵² Ibid.

⁵³ Farnell.

⁵⁴ Banda, Eekelaar & FBA, p. 12.

⁵⁵ Golombok, p. 1.

new family formations. An obvious example is the replacement of blood relations by legal family relations in the case of adoption.⁵⁶ Adopted children can have two types of legal siblings. The first would be where the adopted child shares his or her legal parent(s) with another adopted child. Another possibility is that his or her parent(s) have a biological child. The children would then share the same parent(s) for as long as the contract between the adopted child(ren) and the legal parents is in force. Because a termination of that contract would lead to a termination of a tie as siblings, both types of siblings will be referred to as legal siblings. The same would hold for step-siblings, whose biological parent married their step-parent that had children. All children, as a result of the legally recognized marriage, share the same set of parents. Finding a clear definition for legal siblings is challenging, however, because the laws on this topic are complex and differ from one jurisdiction to another.⁵⁷

1.2.4. The Social Sibling

In addition to biological and legal definitions for siblings, the sibling tie could also be defined from a social perspective. The word sibling came into use as a word with a positive meaning, since it is derived from the Old English word *sibb*, that expressed “brotherly love, familial affection”.⁵⁸ The current sense of the word sibling – brothers and sisters – provokes the same positive association as becomes apparent by its use among ‘non-siblings’, like religious groups or fraternities and sororities who call each other brothers and sisters in an affectionate way.⁵⁹ This thesis aims to find a definition of sibling that is not too wide, to enable the study of sibling rights. There is another sibling relationship, other than biological or legal siblings, that needs to be addressed to allow a full understanding of the concept and allow for an analysis in the coming chapters.

The first ‘social’ sibling relationship that cannot be identified through shared genetics or a legal contract, is the one between a foster child and the biological child of the foster parent. Their shared “parent(s)” and shared household or family environment – however short – might have an impact on the way these children see each other and love each other in another way than regular children (cf. peers) would. The same could be true for step-siblings whose parents are not married and thus not officially tied legally. The relationship of these children could potentially be as strong, or even stronger, than the relationship between children who share a biological or legal tie.

In Mexico, the children of the indigenous Zapatista group provide for a second example. Within this group, children are considered everyone’s children and family in the community.⁶⁰ This way all

⁵⁶ Banda, Eekelaar & FBA, p. 12.

⁵⁷ Ibid.

⁵⁸ D. Harper, “Sibling (n.)”, *Online Etymology Dictionary*, as retrieved from: <https://www.etymonline.com/classic/search?q=sibling>, last visited 10 June 2018.

⁵⁹ See for an example of the use of the words ‘brother’ and ‘sister’ in fraternities and sororities C.L. Torbenson and G.S. Parks, *Brothers and Sisters*, Fairleigh Dickinson University Press: Vancouver (2009) and for the use of the word brothers in Catholic theology J.J. Pasquini, *Catholic: A Scriptural, Historical, and Catechetical Study of Catholic Christianity*, Iuniverse: Bloomington (2002), p. 35.

⁶⁰ Author’s personal notes: In 2014, I spent three weeks living with the Zapatista community in Mexico as part of a sociology course from University College Roosevelt, Middelburg, The Netherlands, where I obtained my Bachelor of Arts degree cum laude.

children are considered to be siblings and consider each other as full brothers and sisters, without the necessity of either a biological connection or a legal contract to confirm such a relationship. It is, however, the question whether the separation of two children in this group from each other, would necessarily have the same harmful effect as sibling separation would for children who spent their childhood together with only one other or a few other children.

1.2.5. The Sibling within the Scope of This Thesis

There are some extraordinary sibling relationships worth mentioning in a discussion regarding the definition of sibling from a child-centered perspective. One example would be the implications of the Saudi Arabian male guardianship system, in which sometimes (younger) brothers are the guardian of their sister(s).⁶¹ Another remarkable sibling relationship is that of a critically ill child who has a 'savior sibling'. A savior sibling is a medically coined term for a "child who is conceived and selected as an embryo by his or her parent(s), specifically to be an organ or tissue donor for a sick sibling".⁶² Even though both of these constructions do not impact the biological relationship of the siblings or the constellation of the (nuclear) family, they both have consequences in light of the identity of all children involved and the emotional weight they attach to their relationship(s). Whereas the risks for savior siblings' psychological health and well-being are more speculative than any of the physical risks associated with ART and the embryo biopsy process of creating a savior sibling⁶³, there is a "theoretical risk of psychological or social harm associated with being conceived in order to save the life of another" and a possible "negative impact of the savior sibling's sense of self-worth, identity [...] sense of unconditional parental love [...] guilt if treatment fails or if he/she is reluctant at a later stage to undergo further donation procedures".⁶⁴ It is not in the thesis' scope to reason whether or not these relationships are in themselves violating children's rights, it is rather the concern that only children themselves could express what possible separation from their siblings would mean to them.

The various ways in which sibling relationships can be formed and defined results in having to make a choice how to legally define a sibling relationship for the purposes of this thesis. For every type of sibling described above – biological, legal, social – a scenario could be imagined in which granting a specific right to them would be problematic. For instance, in the biological sibling relationship, based on shared genetic information, granting the right to non-separation, visitation or knowledge about each other's existence would make sense for the majority of full biological siblings, but for donor-conceived children who might never have had the *potential* to spend their childhood together, it might become a practically impossible right to grant. Therefore, the following flexible and

⁶¹ Human Rights Watch, "Boxed In: Women and Saudi Arabia's Male Guardianship System" 16 July 2016, as retrieved from: <https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system>, last visited 10 June 2018.

⁶² E. Du Plessis, A. Givindjee and G. Van der Walt, "A Legal Analysis of "Saviour Siblings" and "Benefactor Children" in South Africa", *Obiter*, 2014, p. 230.

⁶³ M. Taylor-Sands, *Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Production*, Routledge: London (2013) (hereinafter **Taylor-Sands**), p. 56.

⁶⁴ Taylor-Sands, pp. 57-58. Note: There is currently no empirical evidence on the longer-term psychological impact on saviour siblings, due to the relative newness of the procedure that enables the creation of saviour siblings.

future-proof definition is provided, in which the core component of sharing or, in the case of deceased parents, having shared at least one parent is a minimal requirement:

A sibling shares or has shared at least one parent and:

- a) Is biologically related (or shares genetic information), and/or;*
- b) Has another relationship that can be proven to be of significant importance to the individual child.*

Whether there is a legal basis in the UNCRC for siblings, however, still needs to be researched. Falling within the above definition of sibling, therefore might not grant any status to prevent separation or grant visitation rights or even knowledge about each other's existence and whereabouts.

1.3. Research Question and Methodology

This thesis considers if and to what extent there is an international right for siblings not to be separated or to know (of) each other. The legal framework for a child and his or her sibling(s) from a UNCRC perspective is difficult to comprehend prior to this research, especially in the knowledge that a (legal) position for the sibling relationship or any other inter-child relationship is not explicitly mentioned in the UNCRC. Finding a working definition of sibling has been attempted in this chapter, leading to the certainty that siblings come in many forms. For all types of siblings, therefore, it might be important to assess the individual circumstances of their relationship and possible impact of separation, visitation or right to know. Therefore, a BITC assessment should include regard for their specific relationship, which would indicate whether or not separation from each other would be detrimental to the individual children in that relationship, and if separation is allowed, whether there is a right to know (of) each other.

Maria Herczog, former member of the UNCRC Committee, noted that there is a lack of data regarding the characteristics of sibling relationships, "other than official data on the number, gender, age and social status of siblings in families".⁶⁵ Therefore, this thesis also aims to gain a deeper understanding of the sibling relationship from a psychological perspective in chapter 2. On the basis of these findings, and because little is written about the sibling relationship from a children's rights perspective, this thesis will analyze civil judicial proceedings in the familial sphere that include siblings. Civil judicial proceedings include three areas of special interest, identified by the UNCRC Committee as:

1. Divorce and separation of the child from one parent;⁶⁶
2. Alternative care and separation of the child from both parents;⁶⁷

⁶⁵ H. Kutin, "Because we are sisters and brothers: siblings in alternative care" *SOS Children's Villages International*, October 2012 (hereinafter **Kutin**), pp. 4-5.

⁶⁶ GC 12, paras. 51-52.

⁶⁷ GC 12, paras. 53-54.

3. Adoption and *kafalah* of Islamic law.⁶⁸

All types of civil judicial proceedings that concern families with multiple children are likely to impact the sibling relationship of the children. This makes civil judicial proceedings an excellent starting point to see whether siblings are granted, or protected through, any (children's) rights around the globe, and how legal practitioners weigh cases within the familial sphere that potentially impact the sibling relationship of the children involved. If there is not an explicit recognition of siblings in the UNCRC, is there any through international, regional or national jurisprudence? Do siblings have the right to know (of) each other, for instance as part of their right to identity? Should it be (un)lawful to separate two (or more) siblings against their will? In chapter 3, the focus will be on civil judicial proceedings regarding divorce and separation from one parent. Chapter 4 will deal with the other two identified areas, namely alternative care and adoption. The phenomenon of child-headed households will also be part of chapter 4. In this thesis, cases will be analyzed in which the relationship between the children is recognized by all parties as a sibling relationship.

⁶⁸ GC 12, paras. 55-56.

2. The Significance of Sibling Relationships for Children

2.1. Introduction

At the end of his career in ca. 1665 Rembrandt painted the *Family Portrait* (see figure 1), that is famous for the exceptional “warmth you sense between the subjects of the family”.⁶⁹ This seventeenth century painting closely resembles what nowadays would be considered the nuclear family. Intra-familial relationships (including between siblings) are portrayed in a positive manner. It should be understood that for the 17th century, it was truly rare and exceptional that such a warm family life was observed: with child mortality rates being one in two children and children being sent to work or apprenticeships already at the age of seven, there was little time for siblings to bond.⁷⁰ Over the last centuries, however, a lot has changed in family life, with decreased child mortality having the most extensive effect on intra-familial relationships.⁷¹ During the Enlightenment, with increasing life expectancy, gradually childhood became longer and schooling was introduced, changes that allowed minor siblings more than ever to live together and share real experiences.⁷² Since then, children have had the possibility to develop sibling relationships throughout their childhood. This chapter will provide an overview of the significance, risks and valuable aspects of sibling relationships from a mostly psychological point of view.



Figure 1: *The Family Portrait* – Rembrandt – ca. 1665.

⁶⁹ KPN & Rijksmuseum Amsterdam, *The Family Portrait*, as retrieved from: <http://kprijksmuseum.com/familieportret>, last visited 7 June 2018.

⁷⁰ Kutin, p. 8.

⁷¹ J.P. Sommerville, “The early modern family”, *Faculty of history of the University of Wisconsin Madison*, as retrieved from: <https://faculty.history.wisc.edu/sommerville/367/367-033.htm>, last visited 7 June 2018.

⁷² Kutin, p. 8.

2.2. Benefits of a Positive Sibling Relationship

“Every sibling group is unique, differing from any other by the gender, number and age of children that make it up, the particular history of each individual, their common history, and the nature of the filial and sibling alliances and loyalties that structure and drive them.”⁷³ Sibling relationships are important because the interaction between siblings influences the social and emotional context in which the children grow up.⁷⁴ Siblings contribute to the development of each other’s cognitive and language skills.⁷⁵ The younger sibling will learn from the older one, but it was shown that helping a younger sibling also increases the language skill of an older (adolescent) sibling.⁷⁶ This way siblings fulfill an important role in each other’s life, as teachers and caregivers, but also as companions.⁷⁷ Furthermore, growing up with a sibling helps the development of psychological skills (e.g. effective coping strategies or empathy) in a child.⁷⁸ Siblings can be a valuable source of emotional support and a positive sibling relationship is associated with a lower risk of poor peer relationships and other adverse life events.⁷⁹

The relationship between a newborn and its older sibling will, over the years, transform from hierarchical to egalitarian.⁸⁰ This unique feature of the sibling relationship is not observed, to the same extent, in the parent-child relationship; in fact from middle childhood children spend, on average, more time with their siblings than with their parents.⁸¹ The unique nature of the sibling relationship offers potential for both positive and negative relational qualities (such as affection on the one hand and conflict on the other).⁸² It was reported in 2015 that up to 40% of siblings in U.S. and U.K. are exposed to sibling bullying every week.⁸³ The same study, however, attributed this high number of negative sibling relationships to poor “parenting quality and behaviour” which were identified as the strongest intra-familial risk factors.⁸⁴

⁷³ R. Scelles, “Accueil des fratries: analyse de l’expérience de professionnels travaillant dans le cadre de l’association SOS Villages d’Enfants” (2006) in Kutin, p. 9.

⁷⁴ G.H. Brody, “Sibling Relationship Quality: Its Causes and Consequences”, *Annual Review of Psychology*, 1998 (hereinafter **Brody**), p. 19.

⁷⁵ M. Azmitia and J. Hesser, “Why siblings are important agents of cognitive development: A comparison of siblings and peers”, *Child Development*, 1993, p. 442.

⁷⁶ T.E. Smith, “Growth in Academic Achievement and Teaching Younger Siblings”, *Social Psychology Quarterly*, 1993, p. 83.

⁷⁷ J. Dunn and S. McGuire, “Sibling and peer relationships in childhood”, *Journal of Child Psychology and Psychiatry*, 1992, p. 71.

⁷⁸ Brody, p. 19.

⁷⁹ D. Wolke, N. Tippett, and S. Dantchev, “Bullying in the family: siblings bullying”, *Lancet Psychiatry*, 2015 (hereinafter **Wolke et al.**), p. 917.

⁸⁰ N. Campione-Barr, “The Changing Nature of Power, Control, and Influence in Sibling Relationships”, *New Directions for Child and Adolescent Development*, 2017 (hereinafter **Campione-Barr**), p. 7.

⁸¹ Wolke et al., p. 917.

⁸² Campione-Barr, p. 12.

⁸³ Wolke et al., p. 927.

⁸⁴ Wolke et al., pp. 921-922.

It is important to note that the striking positive or negative impact that the sibling relationship can have on a child remains visible even if the effects of other family relations are taken into account.⁸⁵ A good example of such a study was published by Judith S. Brook and her colleagues, where sibling influence is assessed taking also into account the influence of parents and peers.⁸⁶ It was observed that drug use by an older brother correlated with drug use by the younger sibling, regardless of whether or not the parents or their peers used drugs. This study, albeit in the negative context of drug use, clearly shows the important role-model function an older sibling fulfills. The abovementioned positive effects of siblings on each other's development were tested in the same way, taking into account possible confounders and objectifying the important role siblings play in each other's lives.

Although sibling relationships can be negative or even harmful as a result of other problems in the familial sphere, the positive influence of a positive sibling relationship on the development of the child is widely acknowledged in academic literature. The development of sibling relationships in childhood should be perceived as investments for the future of the child.⁸⁷ This is illustrated by many elderly people, who report to feel closer to their siblings than to any other member of the family except for maybe their own children.⁸⁸

2.3. The Increased Value of an Intact Sibling Relationship in Stressful Circumstances

When their family environment becomes unstable, children value their sibling relationships higher. U.S. attorney and *Guardian ad Litem*⁸⁹ Jenny R. Stevens describes the increasing significance of the sibling relationship in a stressful divorce scenario: "many time siblings become each other's best, and maybe only, friends".⁹⁰ When other family relationships are crumbling the sibling relationship becomes especially important, because it provides "solace, nurturing, caretaking and secure emotional attachments."⁹¹ In alternative care settings, sibling relationships are often "the only constants" and therefore become extra valuable to the child.⁹² Siblings growing closer together when their relationship with one or both parents is threatened is not a surprising phenomenon, because siblings

⁸⁵ S.M. McHale, K.A. Updegraff, and S.D. Whiteman, "Sibling Relationships and Influences in Childhood and Adolescence", *Journal of Marriage and Family*, 2012, p. 924.

⁸⁶ J.S. Brook, M. Whiteman, A.S. Gordon and D.W. Brook, "The Role of Older Brothers in Younger Brothers' Drug Use Viewed in the Context of Parent and Peer Influences", *Journal of Genetic Psychology*, 1990, pp. 62-65.

⁸⁷ M. Kosonen, "Sibling relationships for children in the care system", *Adoption and Fostering*, 1994 (hereinafter **Kosonen**), p. 23.

⁸⁸ J.E. Hasday, *Family Law Reimagined*. Harvard University Press: Boston (2014) (hereinafter **Hasday 2014**), p. 167.

⁸⁹ A 'guardian ad litem' (GAL) is a person the court appoints to investigate what solutions would be in the "best interests of a child." Here, we are talking about a GAL in a divorce or parental rights and responsibilities case.

⁹⁰ J.R. Stevens, "The Importance of Sibling Relationships for Children of Divorce" *SC Family Law*, as retrieved from: <https://www.scfamilylaw.com/importance-sibling-relationships-children-of-divorce>, last visited 10 June 2018.

⁹¹ Hasday, p. 166.

⁹² Kutin, p. 32.

naturally seek each other's help "in the process of gaining autonomy and defining their identity."⁹³ Given the described significance of the sibling relationships – that only increase when they are in an unstable family environment – adults (parents as well as States) should not think lightly about these ties. As such, sibling separation as a result of social workers' intent to save children from unstable family environments (cf. through their separate placement, like in the case of the *Ramírez Brothers* and the siblings in *Soares de Melo v. Portugal*) could be harmful and their relationship and the impact of separation should therefore be assessed prior to the decision that leads to sibling separation.

2.4. Negative Outcomes of Involuntary Separation of Siblings

U.S. social workers accept the importance of sibling relationships for children's short-term and long-term welfare, but still a large portion of children in alternative care live separated from one or more siblings.⁹⁴ "Because of the significant relationships that children may have with their parents and siblings before being removed from their home, children who enter the child welfare system may [feel unwanted or unloved and] experience anxiety, trauma, grief, guilt and loss of identity."⁹⁵ Also separated children in migration express the importance of their sibling relationships in conversations with mental health workers of the NHS in the United Kingdom. During the "Lost in Migration II: from European priorities to local realities" conference, Dr. Ana Draper provided all participants of her workshop with some of her daily encounters as a mental health psychiatrist for unaccompanied and separated children. She noted that some of these children express their fear that something bad will happen to their siblings if they have to go through the same, horrible, journey the child in session went through before arrival. Anxiety, sleep deprivation and anger issues among children in migration are not uncommon when the life, survival and health of their sibling(s) is uncertain.

Herrick & Piccus explored that maintaining sibling relationships through placement together – as long as the safety of all siblings allows for placement together – can have "ameliorating effects" on the negative impact that placement in alternative care can have on a child.⁹⁶ In alternative care settings, siblings take on the role of "mutual supporters" to compensate to some extent their loss of parents.⁹⁷ Also, they can provide each other with stability, love and permanence.⁹⁸ When siblings live apart from each other, they cannot positively influence each other's development, in the ways that were described above. In other words, the potential of the sibling relationship is (partly) wasted in such a situation. In addition to this loss of potential, involuntary separation of siblings results in loneliness negatively affecting the child.⁹⁹ Separating children from their sibling(s) (on top of separating them

⁹³ S.J.T. Branje, C.F.M. van Lieshout, M.A.G. van Aken, and G.J.T. Haselager, "Perceived support in sibling relationships and adolescent adjustment", *Journal of Child Psychology and Psychiatry*, 2008, p.1395.

⁹⁴ Kosonen, p. 845.

⁹⁵ M.A. Herrick, W. Piccus, "Sibling connections: The importance of nurturing sibling bonds in the foster care system", *Children and Youth Services Review*, 2005 (hereinafter **Herrick & Piccus**), p. 849.

⁹⁶ Herrick & Piccus, p. 858.

⁹⁷ Kutin, p. 32.

⁹⁸ Herrick & Piccus, p. 858.

⁹⁹ Herrick & Piccus, p. 849.

from their parents) whilst they wish to remain together intensifies children's weakened psychological well-being upon entering the welfare system.

3. Siblings in Civil Judicial Proceedings: Separation from One Parent

3.1. Introduction

In the previous chapter the sibling relationship was found to be unique among family relationships and to harbor the potential of positively impacting the child in multiple ways. At the same time, the negative effects of involuntary sibling separation in stressful family circumstances, highlighted that the sibling relationship needs consideration prior to any decision that affects their relationship. Cases that impact the sibling relationship will undoubtedly have an impact on the individual children in that relationship. Whenever a decision is to be made that affects an individual child directly or indirectly, the UNCRC stipulates that “an evaluation of the possible impact (positive or negative)” of that decision on the child is mandatory for States parties to the UNCRC.¹⁰⁰ The UNCRC Committee identified the child’s right to be heard in civil judicial proceedings as a specific obligation of States parties.¹⁰¹ The UNCRC Committee stressed that in all civil judicial proceedings, the best interests of the child (BITC) is of paramount importance, as are children’s participatory rights. After establishing the link between the BITC and participation in relation to siblings, (case) law from the U.S. and Europe will be examined to obtain examples of the current practice in civil judicial cases affecting siblings.

3.2. The Complementary Roles of the Best Interests of the Child and the Right to be Heard

The BITC is the “general guiding principle for interpreting and implementing *all* the provisions of the Convention on the Rights of the child.”¹⁰² The UNCRC is the first international children’s rights document strongly emphasizing the importance of a “universal, holistic and comprehensive application” of the BITC in all matters concerning children.¹⁰³ The UNCRC is also the first instrument in which children’s participation rights are made explicit.¹⁰⁴ Children’s participatory rights serve the purpose of acknowledging “the growing autonomy of children” and granting them “the opportunity to participate in decisions that immediately affect their lives.”¹⁰⁵ Article 12 of the UNCRC encompasses the right to be heard and express one’s views freely in all matters that affecting the child, and to have these views given due weight in accordance with the age and maturity of the child.¹⁰⁶ Rap and

¹⁰⁰ GC 14, para. 6(c).

¹⁰¹ GC 12, paras. 50-56.

¹⁰² GC 5, para. 12 & GC 14, para. 1 [emphasis added].

¹⁰³ O.C. Jančić, *The Rights of the Child in a Changing World: 25 Years after the UN Convention on the Rights of the Child*, New York: Springer (2016), pp. 7-8.

¹⁰⁴ N. Cantwell, “The origins, development and significance of the United Nations Convention on the Rights of the Child”, as cited in S. Rap, “The Voice of the Child in Juvenile Justice Procedures” in T. Liefwaard & J. Sloth-Nielsen (eds.) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead*, Brill | Nijhoff: Leiden (2017) (hereinafter **Rap**), p. 296.

¹⁰⁵ G. Van Bueren, *The International Law on the Rights of the Child* (1995) as cited in Rap, p. 296.

¹⁰⁶ Art. 12(1) of the UNCRC.

Abramson stress that “one of the most valuable developments stemming from the UNCRC is that the participation of children at all levels of society is promoted by its provisions.”¹⁰⁷

States parties to the UNCRC have a legally binding obligation towards every child. The Committee stresses in its fifth General Comment on the implementation of the Convention that the correct implementation should not be seen as “bestowing favors on children.”¹⁰⁸ This means that the BITC principle¹⁰⁹ and the right to participation¹¹⁰ are *obligations* throughout “government, parliament and judiciary” and not *favors*.¹¹¹ If a case could impact a child’s sibling relationship (for instance through their separation), it would undoubtedly fall under “all matters affecting the child.” An evaluation of this impact is then needed through child participation in their BITC assessments.¹¹²

In the UNCRC, the BITC and the right to participation have complementary roles.¹¹³ The UNCRC Committee expressed that:

*“There is no tension between articles 3 and 12 (...) In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.”*¹¹⁴

The UNCRC Committee encourages decision-makers to draw up a “non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment.”¹¹⁵ The term non-exhaustive is used to imply that *all* factors relevant in the specific circumstances of a child should be considered and balanced in light of the situation. As such, a best interests assessment also comprises decisions involving issues “*not covered by existing rights*”, and provides a guarantee that children will no longer bear unacceptable outcomes or become collateral damage of any (adult) decisions that affect them.¹¹⁶ In order to understand individual children’s specific relationship with their siblings, their views on the relation with their siblings should be taken into consideration and given due weight in making the (judicial) decision.

An alternative approach to the legal question of whether sibling rights are protected in international children’s rights would be to look at the siblings as group of children. In General Comment 14 the Committee states that the BITC assessment is not only mandatory in the case of a

¹⁰⁷ B. Abramson, “Juvenile Justice: the ‘unwanted child’. Why the potential of the Convention on the Rights of the Child is not being realized and what we can do about it”, as cited in Rap, p. 296.

¹⁰⁸ GC 5, para. 11.

¹⁰⁹ Art. 3 of the UNCRC.

¹¹⁰ Art. 12 of the UNCRC.

¹¹¹ GC 5, para. 12. See also J. Zermatten “Foreword” in Liefwaard & Doek.

¹¹² GC 14, para. 6(c).

¹¹³ GC 12, para. 74.

¹¹⁴ Ibid.

¹¹⁵ GC 14, para. 50.

¹¹⁶ N. Cantwell, “Are ‘Best Interests’ a Pillar or a Problem?” in T. Liefwaard & J. Sloth-Nielsen (eds.) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead*, Brill | Nijhoff: Leiden (2017), p. 70 [emphasis added].

specific child, but also for children of an identified group, or even children in general.¹¹⁷ Although Chapter 1 described some challenges in finding one exact definition for the sibling, the various definitions together are sufficient to speak of siblings as an identified group. This means that just like the individual child who has a right to participate in a BITC assessment, when matters concern his or her sibling relationship, “States have the obligation to assess and take as a primary consideration the best interest of children” including the right to be heard of all children involved.¹¹⁸ In this sense, sibling rights (although not mentioned explicitly) are part of the total package of children’s rights under the UNCRC.

3.3. Child Participation in Civil Judicial Proceedings

Generally speaking, children around the world cannot yet rely on States to ensure that their right to participate in all cases affecting them is effectively implemented.¹¹⁹ A global research project in 2016 revealed that only 55 out of the 197 UNCRC States parties enshrine a right to be heard – which is a necessary step of participation – for all children in *all* matters that affect them.¹²⁰ Of the remaining 142 states, 58 have no provision for this right at all in their national laws.¹²¹ Child participation, however, is essential to assess how sibling relationships, if existing, are valued by a child. The child’s views on such relationships is important input to determine the child’s best interests. Giving due regard to sibling relationships might be hampered by the global phenomenon of unsatisfactory application of the right to participation in courts and other state institutions. However, compared to juvenile justice cases, where the interests of the State and the child often conflict, in civil judicial proceedings there is likely more room for children to participate and influence decisions, because in these cases the state’s and the child’s best interest tend to overlap.¹²² This is a relevant observation for this thesis, since these civil judicial proceedings might have the most extensive impact on existing sibling relationships when they, for instance, pose the risk of sibling separation.

3.4. Sibling Rights in the United States and under the UNCRC

3.4.1. The Best Interest of the Child in U.S. Family Law

Although the U.S. is not a State party to the UNCRC, U.S. family law is the field where the BITC principle was originally developed.¹²³ It has been a guiding principle in U.S. law for over 125 years

¹¹⁷ GC 14, para. 6(c).

¹¹⁸ GC 14, para. 23 [emphasis added].

¹¹⁹ S. Rap & A. Daly “Children’s Participation in Youth Justice and Civil Court Proceedings” to be published in U. Kilkelly & T. Liefaard (eds.), *International Human Rights of Children*, Springer: Singapore (2018) (hereinafter **Rap & Daly**), p. 3.

¹²⁰ Child Rights International Network (CRIN), “Rights remedies and representation: global report on access to justice for children”, *Child Rights International Network London*, 2016.

¹²¹ Ibid.

¹²² Rap & Daly, p. 11.

¹²³ S. Starr & L. Brillmayer “Family Separation as a Violation of International Law” *Berkeley Journal of International Law*, 2003, (hereinafter **Starr & Brillmayer**), p. 225.

and state court decisions are overflowing with “best interest of the child” references.¹²⁴ As a result, the body of research from the U.S. into this principle and the comparison between U.S. (case) law and the provisions of the UNCRC will reveal some necessary nuances and details of sibling rights in civil judicial proceedings.

Being a family tie, the sibling relationship would be expected to fall within the scope of family law. However, since the formation of the United States republic, U.S. family law focuses on marriage (husband and wife) and parenthood (parent and child) relationships, with little attention for other family relationships.¹²⁵ Traditionally, the field of U.S. family law, therefore, protects marital and parent-child relationships, even to the extent that it is generally accepted by courts that it is in the best interest of a child to see his or her non-custodial parent.¹²⁶ There is, however, no direct legal protection of other family ties such as the ties between siblings, even though they are often “crucial to family life”.¹²⁷ In line with family law’s “narrowness”¹²⁸, U.S. legal decision-makers tend to overlook sibling ties, even when these ties are vulnerable to disruption.¹²⁹ Since the Supreme Court case of *Stanley v. Illinois* in 1971, the U.S. Constitution prohibits courts to conduct a BITC assessment, “unless the court first finds a parent unfit”.¹³⁰ In *Troxel v. Granville* in 2000, regarding the visitation rights of grandparents, the Supreme Court reiterated, “so long as a parent adequately cares for his or her children [...] there will normally be no reason for the State to inject itself into the private realm of the family.”¹³¹ U.S. courts presume that ‘fit parents’ act in the best interest of their children and thus their decisions, as a rule, should not be interfered with. This is troubling, since not only legal decision-makers, but also parents have a tendency of disregarding sibling ties, as was observed by Judge Anne Kass already in 1998: “Hardly a week goes by that I am not presented with a parent’s plan to separate siblings.”¹³²

In 2002, the *Troxel v. Granville* court decision was applied in a Californian court case regarding two half-siblings, an adult sister (Jeana Herbst) and minor brother (Jake Herbst), whose shared parent – the father – had died.¹³³ Jake’s mother did not want any contact between Jeana and Jake, thus Jeana Herbst turned to court to file for visitation rights. It should be noted that California Legislature:

1. “places a high significance on the sibling bond”;
2. “favors the maintenance of sibling contact”;

¹²⁴ M.R. Gardner and A.P. Dupre, “Parents Rights in the CRC”, *Georgetown University Law School*, 2006, as retrieved from: childrightscampaign.org/images/documents/concept%20of%20family%20draft%208-8%20final.pdf, last visited 10 June 2018 (hereinafter **Gardner & Dupre**), p. 18.

¹²⁵ Hasday 2014, p. 162.

¹²⁶ In *re Marriage of Matthews* in A. Ferraris, “Sibling Visitation as a Fundamental Right in *Herbst v. Swan*” 39 *New England Law Review*, 2004 (hereinafter **Ferraris**), p. 746.

¹²⁷ J.E. Hasday, “Siblings in Law” *Vanderbilt Law Review*, 65(3), 2012 (hereinafter **Hasday 2012**), p. 898.

¹²⁸ Hasday 2012, p. 899.

¹²⁹ Hasday 2014, p. 167.

¹³⁰ Gardner & Dupre, p. 18.

¹³¹ *Troxel v. Granville* (2000) paras. 61 and 69, in Gardner & Dupre, pp. 18-19.

¹³² A. Kass (1998) *Splitting Siblings upon Divorce* in Hasday 2014, p. 161.

¹³³ *Herbst v. Swan* (2002) in Ferraris, pp. 715-754.

3. “finds the sibling bond is so important [in the lives of children] that it can act as a bar to the termination of parental rights”.¹³⁴

In *Herbst v. Swan*, however, the rights of the “fit parent” superseded the rights of the sibling. Ferraris noted that the *Troxel v. Granville* case was wrongly applied in the *Herbst v. Swan* decision, because the context of *sibling* separation and visitation was not the scope of *Troxel*. However, as a result of Jake’s mother’s competence, the best interests of Jake were not inquired into, but assumed to be protected by the mother, and the California court did not order sibling visitation for Jeana and Jake Herbst. In the commentary of this case, it is concluded that in cases where the fundamental rights of two parties collide, the court should apply a balancing test, and the appropriate test in sibling visitation cases “which involve children” is the BITC assessment.¹³⁵ Ferraris sees the repetition of such a ruling likely for as long as the U.S. Supreme Court does not formally recognize the fundamental rights of siblings.¹³⁶ When it does, the recognition would not only have implications for the visitation rights of half-siblings, but also for “children adopted into different homes or otherwise separated due to custody or social services issues”.¹³⁷

It is a question whether under the UNCRC a similar presumption of parental fitness would lead to neglecting the BITC assessment in sibling visitation cases. In the next section, therefore, the rights of parents as well as the meaning of family under the UNCRC will be the focus.

3.4.2. The UNCRC, the Rights of Parents and the Notion of Family

Looking at the law solely from a parent-child relationship, the fear is that there is an imbalance in how to weigh a case involving siblings: in the absence of rights of siblings, individual children cannot claim their non-separation in any legal way (but indirectly via other rights), whereas parents only have to execute their parental power in order to make the separation happen. Whereas in the U.S. parents are deemed to be fit “unless proven otherwise”, it looks like under the UNCRC interpretation of parental rights and duties, States have an obligation to first examine whether a parent is fit in light of the best interest of the child, before deciding a case that impacts a child or group of siblings. This view is sustained by Hodgkin & Newell in the implementation handbook of the UNCRC: “The Convention challenges concepts that parents have absolute rights over their children, which the Committee has noted are traditional in many societies but already changing to some degree in most. The rights and the duties that parents have derive from their responsibility to act in the best interests of the child.”¹³⁸ Acting in the BITC is so to speak a requirement for parents (or legal caregivers).¹³⁹ Still, the UNCRC underscores that parent(s) have the *primary* responsibility for the upbringing and development of the child¹⁴⁰ and that their rights and duties encompass providing “appropriate direction and guidance” to children in their “exercise of the rights recognized in the present

¹³⁴ Ferraris, p. 751.

¹³⁵ Ferraris, p. 753.

¹³⁶ Ferraris, p. 754.

¹³⁷ Ferraris, p. 715.

¹³⁸ Hodgkin & Newell, p. 76.

¹³⁹ GC 7, para. 16.

¹⁴⁰ Art. 18(1) of the UNCRC.

Convention”.¹⁴¹ In light of Article 5 of the UNCRC, and the evolving capacities of children, it can be argued that the rights of parents decrease when the abilities of children to voice their views and opinions increase. In GC 20, the UNCRC Committee “highlights the importance of a human rights-based approach that includes recognition and respect for the dignity and agency of adolescents; their empowerment, citizenship and active participation in their own lives”.¹⁴² At the same time, discrimination based on age is a particular risk for children in early childhood who depend on others for the realization of rights – which the Committee stresses States should not to allow.¹⁴³ This means that if courts place importance on sibling relationships in civil judicial cases involving adolescents, who can voice a significant weight they attach to their sibling relationship, it should not be excluded in the weighing of cases which involve younger siblings – particularly babies who cannot yet express themselves. The UNCRC Committee notes that achieving the right to participation for young children, “requires adults to adopt a child-centered attitude, listening to young children and respecting their dignity and their individual points of view.”¹⁴⁴

Even though parents do not possess absolute rights over their children, the UNCRC specifically mandates non-separation from a child with his or her parents under Article 9(1) of the UNCRC. This right is not directed to any other members of family, such as siblings. Even though the emphasis on the parent-child relationship could be interpreted as finding this relationship more important than other family relationships, the UNCRC also implemented article 16 on the child’s right to privacy and family life, which includes “the child’s wider family, such as siblings or grandparents, *who may be as important to the child*”.¹⁴⁵ Article 9(1) of the UNCRC allows States parties to remove children from the care of their parents to protect them from abuse or neglect.¹⁴⁶ Starr & Brilmayer noted that this possibility of removal “imposes a procedural requirement of judicial review” on States parties.¹⁴⁷ The absence of an Article 9 for other family members automatically results in an absence of the procedural requirement of judicial review in cases of separation from relationships “*who may be as important to the child*” as the relationship with their parent(s).¹⁴⁸

Even though the UNCRC opens with the conviction that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”, a clear or full definition of the concept of family is not provided by the UNCRC or UNCRC Committee.¹⁴⁹ In a book regarding the rights of children under international law, three children’s rights experts write that “[t]he reason for this lies in the fact that family is a

¹⁴¹ Art. 5 of the UNCRC.

¹⁴² GC 20, para. 4.

¹⁴³ GC 7, paras. 11 & 16.

¹⁴⁴ GC 7, para. 14.

¹⁴⁵ Hodgkin & Newell, p. 210 [emphasis added].

¹⁴⁶ Starr & Brilmayer, p. 223.

¹⁴⁷ Ibid.

¹⁴⁸ Hodgkin & Newell, p. 210 [emphasis added].

¹⁴⁹ UNCRC, Preamble, para. 5.

changing concept, which depends on historical, sociological, economic, moral and legal factors.”¹⁵⁰ However, as noted in chapter one of this thesis, that does not lead to a total neglect of the importance of the sibling relationship by the UNCRC Committee. In fact, GC 23 specifically notes that siblings are members of the family in the context of migration, and in their General Comments regarding the rights of children in early childhood and of children with disabilities – both categories of children that do not have the same abilities to participate as older, healthy children do – siblings are mentioned as essential part of the children’s family environment. No specific rights are granted automatically to these family relationships, which is the case with parents. However, the implication that siblings are part of the family environment opens the possibility to analyze the articles of the UNCRC that mention ‘family environment’ in light of their implications for siblings. This might mean that a close reading of the *corpus juris* of the UNCRC does protect the sibling in certain cases. Following this idea, articles 5 and 16 might be of particular importance to siblings, and would ensure that “[a]ny arrangements permitting interference with a child’s family must be set out in the law and must not be arbitrary, must be compatible with the other principles and provisions of the Convention, and must be reasonable in the particular circumstances.”¹⁵¹

Following the findings of Branje et al. and Herrick & Piccus, siblings shape each other’s (sense of) identity too.¹⁵² Depending on the type of sibling, the sibling is a part of the children’s biological identity and/or of the child’s family identity.¹⁵³ One’s (sense of) identity, Page explains, is both fixed and dynamic, meaning that certain aspects are continuous, and others can fluctuate over time.¹⁵⁴ Herein, it is clear that biological siblings will always be part of each other’s fixed biological identity, but children who become step-siblings later in life, could for instance start identifying as step-sibling, making their new relationship part of their identity. As such, failing to protect the sibling relationship could lead to a violation of the right to identity under Article 8 of the UNCRC, meaning that the protection of or information about sibling relationships is indirectly safeguarded in the child’s right to the preservation of identity.¹⁵⁵ Not only are States parties warned not to interfere (arbitrarily) with family relations, States parties are obliged to speedily re-establish the child’s identity (and thus family relations).¹⁵⁶ To see how these findings are dealt with in legal practice with existing laws besides the UNCRC, (case) law from Europe will be reviewed next.

¹⁵⁰ N. Vučković Šahović, J.E. Doek & J. Zermatten (eds.) *The Rights of the Child in International Law - Rights of the Child in a Nutshell and in Context: all about Children’s Rights*, Stämpfli Publishers: Berne (2012) (hereinafter **Vučković Šahović, Doek & Zermatten**), p. 157.

¹⁵¹ Hodgkin & Newell, p. 210.

¹⁵² See 2.3. The Increased Value of an Intact Sibling Relationship in Stressful Circumstances (footnote 92) and 2.4. Negative Outcomes of Involuntary Separation of Siblings (footnote 94) respectively.

¹⁵³ C. Page, *Artificial Womb Technology and the Safeguarding of Children’s Rights Through an Analysis of the Right to Identity*, Leiden University Faculty of Law (2017), p. 7.

¹⁵⁴ Ibid.

¹⁵⁵ Art. 8(1) of the UNCRC.

¹⁵⁶ Arts. 8(1) & 8(2) of the UNCRC.

3.5. Sibling Rights in Europe

3.5.1. A Sibling's Right to Contact

Roagna explained that the Council of Europe includes siblings, regardless of their age, in their definition of family.¹⁵⁷ This finding has implications for the interpretation of the right to family life under the European Convention on Human Rights and Fundamental Freedoms (hereinafter **ECHR**) as well as other European conventions that address rights of children and their family, such as the Council of Europe Convention on Contact concerning Children of 2003.¹⁵⁸ Herein the concepts of “contact” and “family ties” were defined as follows:

<p>“<i>contact</i>” means:</p> <p>the child staying for a limited period of time with or meeting a person mentioned in Articles 4 or 5 with whom he or she is not usually living;</p> <p>any form of communication between the child and such person;</p> <p>the provision of information to such a person about the child or to the child about such a person.</p>	<p>“<i>family ties</i>” means:</p> <p>a close relationship such as between a child and his or her grandparents or siblings, based on law or on a <i>de facto</i> family relationship;</p>
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Table 1: The Concepts of contact and family ties under the Council of Europe Convention on Contact Concerning Children in Article 2.¹⁵⁹

It is welcome that Article 5 of the Convention on Contact Concerning Children explicitly supports contact between a child and persons other than his or her parents who have family tie with the child.¹⁶⁰ This possibility of contact for persons other than parents is, however, subject to the child’s BITC.¹⁶¹ Article 5 continues that “States Parties are free to extend this provision to persons other than those mentioned in paragraph 1, and where so extended, States may freely decide what aspects of contact, as defined in Article 2 letter a shall apply.”¹⁶² In a way, this makes a family tie as important as any other relationship tie that can be proved to be in the BITC of the child to maintain. In contrast, parents *automatically* hold the right to “obtain or maintain regular contact” with his or her child, without

¹⁵⁷ I. Roagna, *Protecting the right to respect for private and family life under the European Convention on Human Rights*, Council of Europe Human Rights Handbooks, 2012 (hereinafter **Roagna**), p. 28. This recognition derived from case law in which siblings were recognized as important relationships for children within the scope of the family (see specifically *Mustafa and Armağan Akin; Olsson v. Sweden & Boughanemi v. France*).

¹⁵⁸ See Council of Europe, *European Convention on Human Rights and Fundamental Freedoms*, 1950 & Council of Europe, *Convention on Contact concerning Children*, 2003 (hereinafter **CoE Convention**).

¹⁵⁹ CoE Convention, Article 2.

¹⁶⁰ CoE Convention, Article 5(1).

¹⁶¹ *Ibid.*

¹⁶² CoE Convention, Article 5(2).

the requirement to prove that it is in the child's BITC.¹⁶³ In fact, Article 4(2) expresses that this right shall only be "restricted or excluded" when restriction or exclusion is proven in the BITC. Even when Article 4(2) is the case, still Article 4(3) of the Convention explicitly provides for "the possibility of supervised personal contact or other forms of contact with [the] parent" where it is not in the child's BITC to maintain unsupervised contact with this parent. Regardless of the higher importance placed on the parent-child relationship, there is a legal possibility for siblings under this Convention to seek contact with one another, which could be granted in three forms: the first being meeting the sibling in person and staying over for a limited period of time, the second being any form of communication between the siblings and the third being the provision of information about their sibling.¹⁶⁴ As such, this European Convention provides a legal basis for siblings to know (of) each other, without the need to link it to the children's right to identity, but through the determination that such contact is in their BITC.

3.5.2. A Sibling's Right to Private and Family Life

In light of the right to non-separation of siblings under European law, the ECtHR will be reviewed. As highlighted in Chapter 1, regional human rights courts increasingly refer to the principles of the UNCRC as the appropriate legal framework for cases concerning children¹⁶⁵, for which looking at the European Court might offer some insight into the relevant principles of the UNCRC regarding sibling's non-separation. In Chapter 1, however, the ECtHR case *Soares de Melo v. Portugal* was used as an example to show that in cases concerning siblings, the children's rights standards in the UNCRC might not offer sufficient protection to siblings, especially in cases that concern the rights of parents *primarily* and merely affect the sibling relationship only concurrently. Knowing that siblings, regardless of their age, fall within the scope of family life under European law, opened the possibility to research how the ECtHR addresses sibling separation in cases that directly deal with sibling separation as the subject.

Starr & Brilmayer noted that the right to family integrity and unity is an "aspect of the right to privacy, which is protected by a number of international conventions" such as in Article 12 of the Universal Declaration of Human Rights in 1948, Article 17 of the International Covenant on Civil and Political Rights, and Article 16 of the UNCRC. In all these articles, the family may not be interfered with arbitrarily, whereas the article on family integrity of the ECHR (*hence*, Article 8 on the right to private and family life) "spells out the conditions under which the state may interfere with family life."¹⁶⁶ States have a positive obligation to preserve family life, which "also encompasses the duty to facilitate contacts with siblings who have been separated by judicial decision" – especially when it was

¹⁶³ CoE Convention, Article 4(1).

¹⁶⁴ CoE Convention, Article 5(1) in conjunction with Article 2.

¹⁶⁵ See 1.1.1. Three Examples of Sibling Separation.

¹⁶⁶ Starr & Brilmayer, pp. 219-220. These conditions spelt out on p. 220 as in accordance with the law and necessary in a democratic society (i), in the interests of national security, public safety or the economic well-being of the country (ii), for the prevention of disorder or crime (iii), for the protection of health or morals (iv) or for the protection of the rights and freedoms of others (v).

a domestic court who initiated the separation.¹⁶⁷ In *Mustafa and Armağan Akin v. Turkey*¹⁶⁸, the ECtHR dealt with a case in which two separated parents, both living in the same city, were each given full custody over one of their two children in a domestic custody proceeding. The father was consequently given his son, whilst the daughter was under the care of the siblings' mother.¹⁶⁹ While the father did not want their children to be separated from one another, the mother's behaviour presented "clear indications of obstructive behaviour".¹⁷⁰

*"Court observed that **maintaining the ties between the children was too important an objective to be left to the parents' discretion** ... Eventually, the lack of reasoning by the domestic courts (including the Court of Cassation) as to why the siblings had been separated and as to why the contact arrangements requested by the applicants had been dismissed, together with the inability of the judges seized of the case to find alternative suitable agreements to ensure that the siblings would see each other on a regular basis led the Court to find a violation of Article 8. In deciding the case **the Court emphasised not only that the best interest of the child is to be given paramount importance in custody proceedings, but also that the voice of children must be heard.**"¹⁷¹*

As such, the ECtHR used the UNCRC principles under Articles 3 and 12 (*hence*, the BITC and the right to be heard) in conjunction with the right to family life (*hence*, Article 8 of the ECHR, but Article 16 of the UNCRC) to ensure that siblings would not be separated arbitrarily or as a result of parental choice in civil judicial proceedings.

While visiting each other is not obstructed while siblings live in the same city, but is a practical result of the illicit transfer of one or some of the children abroad, we speak of international child abduction, in which case the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children 1980, as well as the Hague Convention on the Civil Aspects of International Child Abduction 1980 can be acted upon.¹⁷² Whereas the European Convention places the right to initiate legal proceedings on the custody holder (the parent), because most often children are not in the position to start such a proceeding, the Hague Conference on Private International Law (hereinafter **HCCH**) does not "automatically discount" the possibility of a child-initiated Hague Convention case.¹⁷³ (International) parental abduction cases can affect sibling relationships, for instance when not all siblings are taken by the abducting parent, or

¹⁶⁷ Roagna, p. 71.

¹⁶⁸ ECtHR, *Mustafa and Armağan Akin v. Turkey*, Application No. 4694/03, 6 April 2010.

¹⁶⁹ S.O. Chaid, "Mustafa and Armağan Akin v. Turkey: Not above children's heads!" *Strasbourg Observers*, 29 April 2010, as retrieved from: <https://strasbourgobservers.com/2010/04/29/mustafa-and-armagan-akin-v-turkey-not-above-children's-heads/>.

¹⁷⁰ Roagna, p. 71.

¹⁷¹ *Ibid* [emphasis added].

¹⁷² G. van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers: Leiden (1995) (hereinafter **Van Bueren**) p. 90.

¹⁷³ Van Bueren, pp. 90-91.

when not all of them are returned. In the next paragraph, therefore, two cases involving siblings will be reviewed to see the extent of weight that is placed by the HCCH on the sibling relationship.

3.6. Sibling Cases under the 1980 Child Abduction Convention of the HCCH

“One of the unforeseen consequences of the increase in marriage and divorce between couples with different nationalities, and the accessibility of international transport, is the ease with which one parent can take a child to another country and then either refuse to return that child, or refuse the other parent access.”¹⁷⁴

The case of *Re T.* in 2000, regarded an appeal against a return order for the children G., who was 11 at the time of the proceedings, and T., who was at the time 6 and a half years old.¹⁷⁵ Their parents were both British and had joint custody over their two children. After the birth of their youngest child, they had moved to Spain, which was recognized as the habitual residence of both children. Pending a custody decision in Spain after the parents had separated, the father abducted the two children on 3 January 2000 to the United Kingdom.¹⁷⁶ The mother immediately approached the court and on 3 March 2000 that court ordered the return of G. and T. to undo their wrongful removal, which under the 1980 Abduction Convention “makes return inevitable under Article 12 if it is sought reasonably promptly.”¹⁷⁷ However, the father appealed this decision, in order for the court to assess the children’s interests and wishes. Article 13 creates this exception ‘in the child’s own interests’ “if, among other things, the child opposes return and is old and mature enough to have his or her views taken into account. Even then, the child’s views are not determinative: the final decision as to return must be the court’s own.”¹⁷⁸ In the appeal proceedings, the daughter, who was old enough to “articulate an objection to return” was assessed by a doctor on request of the father.¹⁷⁹ The doctor had ascertained that the G. loved her mother, but did not want to return to her “because of fears expressed for herself and for her younger sibling”.¹⁸⁰ During the proceedings, the Court decided that T. was too young and immature for his views to be taken into account and that “a defence under art 13(b) must be established with regard to him.”¹⁸¹ Without a defence, he must be returned, and his return would be a factor in balancing whether or not, despite G’s objections, she should also go back. Ultimately, Court decided that G.’s objections were decisive and created an exception to the return ordered under Article 12. The two siblings were both ordered to stay with their father.

¹⁷⁴ Van Bueren, p. 90.

¹⁷⁵ INCADAT, *Re T. (Abduction: Child’s Objections to Return)*, 2 FLR 192As, 18 April 2000, as retrieved from: <https://www.incadat.com/en/case/270> (hereinafter *Re T.*).

¹⁷⁶ *Re T.*

¹⁷⁷ Royal Courts of Justice (Court of Appeal) *Re T. (Abduction: Child’s Objections to Return)*, 2 FCR 159, 18 April 2000, as retrieved from: <https://assets.hcch.net/incadat/fullcase/0270.htm>.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

The fact that in this case, keeping the siblings together was a factor in deciding the case – either to return them both or grant them both the exception to return – is in this thesis considered a good thing. One case, however, is not enough proof to argue that sibling non-separation is a priority or factor in every case regarding an HCCH Convention application. Two conflicting cases do indicate that a lack of explicit legal recognition of sibling's importance to one another can result in arbitrary outcomes regarding siblings, and as a consequence, a call for legal recognition might be needed to overcome this arbitrariness. In the cases *Re LC* (2014)¹⁸² and *A v A* (2013)¹⁸³ the decisions were struck that sibling separation was permitted due to the different habitual residences of the individual children. Even though in the case of *Re T*, both children were allowed by judicial decision to stay with their father in a country other than their habitual residence, these two cases were both decided otherwise by the court.

¹⁸² INCADAT, *Re LC (Children) (International Abduction: Child's Objections to Return)*, 2 WLR 124, 15 January 2014, as retrieved from: <https://www.incadat.com/en/case/1256>. In this case, three oldest children in a sibling group of four British children were allowed to appeal the return order after wrongful removal by their father to Spain. This led to a possibility of returning the youngest child's to England whilst withdrawing the return of the oldest three children. Whereas the return was ordered in light of all children's habitual residence (Art. 3 of the Child Abduction Convention) the right to appeal this order under Article 13(2) of the Convention was not granted to all children in this case.

¹⁸³ INCADAT, *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, 3 WLR 761, 9 September 2013, as retrieved from: <https://www.incadat.com/en/case/1233>. In this case concerning the wrongful removal of British children by their father to Pakistan, again the three oldest children in a sibling group of four children were able to remain together, due to their shared habitual residence (England). It was the youngest child whose habitual residence had changed to Pakistan as a consequence of the wrongful removal by his parent.

4. Siblings in Civil Judicial Proceedings: Alternative Care (including Adoption)

4.1. Introduction

The difference between civil judicial proceedings for divorce cases and separation from one parent (including parental abduction) and civil judicial proceedings for children's placement in alternative care is that in the latter proceedings, children are a ward of the State, and States as such carry the full responsibility for the child. When it needs to be considered where the child shall be placed, the biological parents are no longer the legal caregivers whose opinion weighs heavily in a decision – in fact, in the case of adoption the legal care over a child will eventually be fully transferred to another (set of) parent(s). The UNCRC recognized “with special reference to foster placement and adoption nationally and internationally, that in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.”¹⁸⁴ Children in foster families, institutions or with a history of adoption or *kafalah* under Islamic law share the fact that they are deprived of their natural family unit, and the UNCRC, through articles 20 and 21, ensures special consideration for these children. Part of the *corpus juris* for children in alternative care and adoption are also the General Comments of the UNCRC Committee as well as the UN Guidelines for the Alternative Care of Children of 2010.¹⁸⁵

As explained in chapter 2, sibling relationships are seen as vital for the child's identity and family conception, and the mental health of siblings is under attack when the family is in crisis.¹⁸⁶ Especially in these times, siblings need each other, to spar, trust and have a part of their stable home with them. When focusing on alternative care cases and adoption cases, it becomes apparent that sibling separation occurs frequently. The example of *Soares de Melo v. Portugal*¹⁸⁷ even highlights that minor siblings can become passive recipients of court orders with separation without visitation rights as a result. Separation of siblings as a result of alternative care measures, therefore, needs to be addressed in order to understand if and why siblings are separated, and whether international children's rights law provides any legal basis to prevent and resolve it.

In this chapter, first the meaning and implications of article 20 on the rights of children deprived of a family environment will be analyzed. Secondly, two phenomena within the domain of alternative care will be reviewed in light of their impact and possible rights violations for siblings: the field of adoption, and phenomenon of child-headed households (hereinafter **CHH**). The latter gained legal recognition in South African law and might offer a solution for sibling non-separation. At the same time, CHH provide an example for how recognition of the interest of non-separation could lead to services that conflict or breach (other) children's rights.

¹⁸⁴ UNCRC, Preamble, para. 10.

¹⁸⁵ Note that the year of publication, 2010, is important in light of some of the cases that will be dealt with in this chapter and predate the UN Guidelines.

¹⁸⁶ See 2.4. Negative Outcomes of Involuntary Separation of Siblings.

¹⁸⁷ See 1.1.1. Three Examples of Sibling Separation.

4.2. Siblings in Alternative Care through a UNCRC perspective

4.2.1. Article 20(1) of the UNCRC

Article 20 of the UNCRC deals with the rights of children deprived of a family environment.¹⁸⁸ From the specific wording of this Article, one could see the importance of the wider family in cases where a child is unable to be cared for by his or her parents. “Unlike Article 9 of the UNCRC on separation of parents, [article 20] refers to family. It is an important distinction, which reaffirms the belief that solutions should always be sought first within the wider family. It goes without saying that in this particular context the principle of best interests of the child is crucial to find the most suitable solution for the child.”¹⁸⁹ As such, the BITC and child participation might be of paramount importance in civil judicial proceedings regarding children in alternative and adoption. How could States otherwise ensure that they are acting in these children’s best interest?

4.2.2. Siblings and the UN Guidelines on Alternative Care for Children

The UN Guidelines on Alternative Care for Children (hereinafter **UN Guidelines**) are intentionally developed to “enhance the implementation of the UNCRC and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so.”¹⁹⁰ Two main conditions regarding the placement of children in alternative care arrangements are stipulated with the aim to ensure the necessity and quality of care for children deprived of a family environment. These are called the necessity principle and suitability principle, which respectively concern that firstly, “children do not find themselves in out-of-home care unnecessarily” and, secondly, “that the type and quality of out-of-home care provided is appropriate to the rights and specific needs of the child concerned”.¹⁹¹

The UN Guidelines specifically mentions siblings and the importance of the sibling tie for individual children with one or multiple brother(s) and/or sister(s). Paragraph 17, for instance, stipulates that “siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child”.¹⁹² Also, paragraph 22 mentions that prevention of sibling separation is prioritized over placement in family-based care.¹⁹³ This means that keeping siblings together in an institution is more in line with the implementation of the UNCRC and relevant provisions regarding the rights of children deprived of a family environment, than separate placement in two different families – despite the consensus that family-based care is generally the best possible out-of-home care solution. Lastly, the UN Guidelines allow the phenomenon of child-headed households, “if the needs and interests and

¹⁸⁸ Art. 20 of the UNCRC.

¹⁸⁹ Vučković Šahović, Doek & Zermatten, p. 174.

¹⁹⁰ Save the Children, “United Nations Guidelines on Alternative Care for Children” as retrieved from: <https://resourcecentre.savethechildren.net/library/united-nations-guidelines-alternative-care-children>.

¹⁹¹ Ibid.

¹⁹² UN General Assembly, *Guidelines for the Alternative Care of Children*, UN Doc. A/RES/64/142 (2010), para. 17.

¹⁹³ UN Guidelines, para. 22.

capabilities of the children allow for this”.¹⁹⁴ This means that keeping siblings together is, in cases that ensure the safety of all children involved, again more important than their separate placement in the best out-of-home care arrangements. The UN Guidelines furthered the UNCRC Committee’s recommendation to States that child-headed households require support, “financially and otherwise”, by explicitly explaining the types of support States should offer.¹⁹⁵ Even though these are all important findings that interpret and explain the States duties and priorities for siblings deprived of both of their parents, it should be noted that the UN Guidelines are not legally binding, but like a GC provide the interpretative guidance for States parties to the UNCRC.

In Chapter 1, two international adoption cases were touched upon in which the separation of siblings was a collateral consequence of the individual circumstances that led to the adoptions. Adoption is the de facto changing of legal family ties. Since the child is (or children are) no longer part of their natural family unit, this thesis will align adoption under the umbrella of alternative care. As such, the importance attached to keeping siblings together should also be extended to siblings in adoption. Even though it is generally accepted that adoption can be one means of achieving that children deprived of a stable family environment can grow up in a loving and permanent home, the practice of adoption can also “deny children their rights if the proper regulations are not in place and their interests are not at the forefront of decision making” (*hence*, once it is done arbitrarily, illegally or in an unsupervised fashion).¹⁹⁶

4.3. Adoption from a UNCRC perspective

4.3.1. Article 21 of the UNCRC

Article 21 of the UNCRC stipulates the rights of children and the duties of States in adoption arrangements. It should be noted that the “original draft of article 21 merely required States to ‘facilitate’ adoption.”¹⁹⁷ However, with the emergence of illegal and unethical conduct around children’s adoption at the time of drafting the UNCRC, the discussion around article 21 ultimately concluded in a consensus that the final article should set minimum standards for the adoption procedures.¹⁹⁸

It is evident from the *Ramírez Brothers* case as well as the *Baby Gammy* case, (international) adoption can impact biological siblings. There are two types of sibling separation that can be distinguished: One is active separation, like in the case of the brothers and of Baby Gammy and his twin sister, where, however short lived this was, the siblings were part of the same family unit until they were adopted in separate families. Second is passive separation, in which the first child is adopted, but his biological parents conceived another child after his or her adoption - which means the siblings never lived in the same household or family unit, but are undoubtedly biological siblings. This distinction between active and passive separation is not limited to adoption cases, but also

¹⁹⁴ UN Guidelines, para. 37.

¹⁹⁵ GC 3, para. 34 & UN Guidelines, para. 37 respectively.

¹⁹⁶ Child Rights International Network (CRIN), “Article 21: Adoption”, as retrieved from: <https://www.crin.org/en/home/rights/convention/articles/article-21-adoption>, last visited 17 June 2018.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

occurs in foster care arrangements or other types of alternative care and can even occur in divorce cases, if a child is permanently deprived of one of his or her parents, and this parent conceives another child. The difference in active and inactive separation of siblings calls for a different evaluation of possible children's rights violations, especially because the amount of time siblings spent together matters in the specific circumstances of this relationship.

During the drafting period of the UNCRC, the Working Group from Latin America noted at the time of the second reading in the period 1988-1989, that regarding adoption of children "[i]n the case of siblings, the States parties shall guarantee compulsory joint adoption. Should this not be possible, they shall look for a substitute family that shall receive all brothers and sisters in order to preserve the family bonds."¹⁹⁹ As stated above, in the UN Guidelines on Alternative Care of 2010, roughly 20 years later, the idea of sibling separation was tackled too as one that should be prevented.²⁰⁰ However, in the final version of the UNCRC this proposed text was not inserted, and even though most Latin American countries have kept strict rules regarding the adoption of children at a national level, this is not the case in all countries in the world. This is a problem regarding the lawfulness of sibling separation in adoption, especially in those countries where siblings are systematically separated in adoption cases. For instance, the State of Nepal, which is a State party to the UNCRC, has no policy to keep siblings together, but actually has a rule to split up same sex siblings in adoption cases.²⁰¹

4.3.2. International Adoption in the case of the Ramírez Brothers

In light of the practice of inter-country adoption, Miller et al. noted that the decline of international adoptions as a result of factors including the ratification of the Hague Convention on Inter-country Adoption, concurred with a dramatic rise in the proportions of international adoptions for children with defined special needs, one of which is being part of a sibling group.²⁰² For these children, a high prevalence of behavioral and emotional problems is observed, "that often justifies the need for psychological and child psychiatric guidance."²⁰³ Also the separate international adoption of the Ramírez brothers in 1998 – occurring in the period between 1990 and 2014 when more than 700.000 children were adopted internationally²⁰⁴ – led to psychological effects for the oldest brother, causing him filing a lawsuit against the State of Guatemala; his sense of identity was seriously impaired as a consequence of sibling- and family separation. Richards, who studied the narratives of belonging of children who were adopted from China into English families in 2012, noted that the extent to which the children and adolescents participating in her study knew the stories of their biological roots,

¹⁹⁹ OHCHR, *Legislative History of the Convention on the Rights of the Child Vol. 2*, United Nations: New York and Geneva (2007), para. E1(e)(f), p. 548.

²⁰⁰ UN Guidelines on Alternative Care 2010, para. 22.

²⁰¹ U.S. Department of State – Bureau of Consular Affairs, "Nepal: Who can be adopted?" as retrieved from: <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Nepal.html>, last visited 17 June 2018.

²⁰² L.C. Miller, M.O. Pérouse de Montclos & F. Sorge, "Special Needs Adoption in France and USA 2016: How can we best prepare and support families?" *Neuropsychiatrie de l'enfance et de l'adolescence*, 2016, p. 308.

²⁰³ Ibid.

²⁰⁴ Ibid.

determined the participants' sense of a stable identity.²⁰⁵ The more information they had, the more they felt their adopting parents provided stability.²⁰⁶

Ramírez Brothers and Family v. Guatemala was also described in Chapter 1.²⁰⁷ In the following paragraph, additional factual details of the case as well as a more in-depth discussion on the merits report by the IACHR in 2016 will reveal some nuance regarding the proceedings between 1997 and 1998 that led to the separation of the brothers. Furthermore, the legal reasoning by the IACtHR regarding the nature and extent of violations by the State of Guatemala will be closely examined and could illustrate the current consensus in international children's rights law about the paramount importance of the BITC and right to be heard of children in civil judicial proceedings. Subsequently, the findings will be aligned to the meaning of sibling relationships in international human rights law.

First with regards to some additional case facts, it should be noted that the neighbor of the boys and their mother, who was supposed to watch the children while the mother was away at work, had, at some instance before Office of the Attorney General of Guatemala intervened and removed the children from the home, mentioned "on more than one occasion" that the children could be "given up for adoption to a family that would give [the mother] good money" and the neighbor herself would also receive part of that money.²⁰⁸ When the brothers were removed from the family home, they were placed in the same institution, but the oldest brother stated during the proceedings that shortly after their arrival in the institution, he was separated from his sibling and they lost contact with each other.²⁰⁹ The mother was also not allowed to see her sons in that institution. The mother of the boys, and the father of the oldest brother, tried to appeal the removal and every decision taken by the Office. During the proceedings, however, the Office argued that "all of the steps—both administrative and judicial—taken by the children's mother and the father of one of them to try to get them back were unsuccessful."²¹⁰ Even then, the extended family of the brothers offered their homes as an alternative living situation, as the maternal grandmother of the boys, as well as two aunts, requested custody over the children, but the grandmother's lesbian sexuality as well as the entire families' situation of financial instability were reason to rule that the boys would not be well off in a placement within their family.²¹¹ In a preliminary report on the merits of the case, the Inter-American Commission on Human Rights (hereinafter **IACHR**) recognized that the arbitrariness was to be found in issues regarding the legal framework around adoption in Guatemala²¹², the impossibility for the parents to appeal and the

²⁰⁵ S. Richards, "What the map cuts up the story cuts across": Narratives of Belonging in Inter-country Adoption" *Adoption and Fostering*, 2012, p. 110.

²⁰⁶ *Ibid.*

²⁰⁷ See 1.1.1. Three Examples of Sibling Separation.

²⁰⁸ IACHR, Merits, para. 76.

²⁰⁹ IACHR, Merits, para. 75. Note that the youngest sibling, who was two years old at the time of his adoption, did not want to be part of the proceedings of the IAC(t)HR. The *Ramírez Brothers*-case was filed in the name of the oldest brother.

²¹⁰ IACHR, Merits, para. 2.

²¹¹ IACHR, Merits, paras. 60-61 & 65.

²¹² IACHR, Merits, para. 38.

court's failure to review,²¹³ as well as a prejudiced interpretation of what would be best for these boys.²¹⁴

The Court's legal reasoning proceeded in much the same as the way the Commission had legally reasoned the case in the merits report. It was thus concluded that State of Guatemala had violated the rights to a hearing, family life free of arbitrary interference and protection of the family as set forth in the American Convention on Human Rights (hereinafter **ACHR**). Also, with respect to the two brothers, the IACTHR concluded that the State also breached the right to identity, because family, a name and knowing the history of their origin are all "constituent elements" of this right. The boys had not been protected from the name changes and the arbitrary interference with their family, which "impaired their right to identity, and to know the history of their origin."²¹⁵

In 2001, three years after the boys' adoption, the IACHR stated in review of the legislative framework of Guatemala that there was a clear lack of adequate legislation on adoption.²¹⁶ In fact, adoption was identified as a "profitable business venture", which clearly shows the interest of the State in placing children for adoption at the time.²¹⁷ Therefore, the Commission urged the State of Guatemala to develop their legal framework and shift their focus towards the BITC, instead of financial gain, when it comes to adoption.²¹⁸ In the merits report of 2016, the current Guatemalan improvements in the legal framework around adoption are referred to, and especially that adoptions would now be conducted in accordance with the UNCRC standards for adoption and with priority given to the BITC.²¹⁹ Even though the State of Guatemala submitted that the adoption of these two boys had been done in their best interest, the IACHR and IACTHR both agreed that they had not acted in accordance with the BITC principle, as they could not justify that placement in an institution, disallowing the mother from visiting them and facilitating their adoption abroad were in the BITC of the brothers.²²⁰ With respect to the brothers' right to be heard, a violation was also found. The IACHR in accordance with the UNCRC found that the boys had the right to be heard in these (alternative care) proceedings "for the purposes of deciding upon the most suitable measure of protection, its review, modification or termination, as well as any other decision about this measure."²²¹ However, this right was violated as neither they themselves, nor any specialized agency that could protect their right, were part of the proceedings.²²² All in all, this case shows that the principles of the UNCRC might protect the sibling relationship if the Court deciding the case places the right interpretation and importance on the relevant UNRC rights and principles, such as the right to be heard (Article 12), the BITC (Article 3), the right to family life (Article 16) and even the right to identity (Article 8).

²¹³ IACHR, Merits, para. 200. See cf. the comment regarding the domestic court's inaction to verify neighbors' statements that allegedly lacked credibility, at para. 184.

²¹⁴ IACHR, Merits, para. 15 in conjunction with para. 223.

²¹⁵ IACHR, Merits, para. 218.

²¹⁶ IACHR, Merits, para. 38.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ IACHR, Merits, para. 26.

²²⁰ IACHR, Merits, para. 170.

²²¹ IACHR, Merits, para. 132.

²²² IACHR, Merits, para. 211.

4.4. Child-headed households as a solution for non-separation of siblings

Even though keeping siblings together is not a legally binding principle at the international level, three countries on the African continent have explicit articles in their jurisdictions that regard the maintenance of sibling ties. These countries are South Africa, Botswana and Lesotho, whose Children's Acts of 2005, 2009 and 2011 respectively stipulate that courts should include the importance of the sibling relationship in any BITC assessment, should desire to keep siblings together and should provide contact rights and information regarding the whereabouts of siblings in case their separation is inevitable.²²³ These explicit stipulations for courts leads to a necessary explanation to the children when sibling separation is decided upon. It also provides a possibility for applicants to appeal and/or request judicial review of any decisions taken by a court. While the legal recognition of siblings in two of the three countries predate the UN Guidelines, the question was raised whether the regional children's rights treaty includes special regard for siblings. Frankly, the African Charter on the Rights and Welfare of the Child (hereinafter **ACRWC**) does not include an explicit mention of siblings, even though as under the ECHR, it does include siblings in its definition of the family.²²⁴

South Africa is one of the countries in Africa in which the State deals with high numbers of orphans as a result of the HIV/Aids epidemic, and in which many families face problems in protecting and caring for their children.²²⁵ South Africa's progressive laws relating to siblings are in light of this thesis considered a big achievement, and the fact that high numbers of orphaned children must weigh heavily on the State's obligation to protect these ties amplifies the argument that maintaining family relationships is a choice, a priority. Because the high numbers of orphaned children include orphaned sibling groups, it is interesting to have a look at the phenomenon of child-headed households in the context of South Africa's jurisdiction.

When a child assumes the role of *de facto* head of the household, by providing and caring for the other members of the household, we speak of a CHH.²²⁶ Especially in South Africa this has become a frequent phenomenon due to the HIV/AIDS epidemic.²²⁷ It is possible that an adult who is legally the head of the household is still present in such a household, but no longer able to provide and care for the children.²²⁸ This is for example the case with terminally ill parents that are not yet passed away,

²²³ South Africa's Children's Act 38, 2005, Article 1 in conjunction article 7(1)(b)ii (see also para. 185(1)a); Botswana Children's Act, 2009, Part 1 in conjunction with all rights that grant rights to "relatives"; Lesotho's Children's Protection and Welfare Act, 2011, paras. 60(4) and 200(4)d.

²²⁴ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child* (1990). This implies that siblings fall within the scope of Articles 10 and 18 which protect the right to privacy and family respectively.

²²⁵ UNICEF South Africa, "Overview: Child Protection" as retrieved from: https://www.unicef.org/southafrica/protection_347.htm (hereinafter **UNICEF**).

²²⁶ H.Y. Lim, "Legally recognising child-headed households through a rights-based approach: The case of South Africa" *LLD Thesis, University of Pretoria* (2009) (hereinafter **Lim**), p. 198.

²²⁷ Lim, p. iii.

²²⁸ Lim, p. 198.

or grandparents that were head of the household but can no longer fulfill this role because of old age.²²⁹ In South Africa child headed households can be legally recognized if four criteria are met:

1. "There is no *de facto* head of the household who is an adult;
2. There is no suitable family member available to provide the care to the children in the household;²³⁰
3. Age restriction, meaning that only a person above 16 years of age can be recognized as head of the household;
4. BITC, meaning that a child headed household can only be recognized if it is deemed to be in the BITC.^{231,232}

Whereas the possibility of legally recognizing CHH (when they meet the conditions) respects *de facto* the maintenance of sibling relationships, CHH also provide an example of how recognition of the interest of non-separation could lead to services that conflict or breach (other) children's rights. In review of South Africa's high number of CHH, UNICEF reported that "childhoods are stolen."²³³ Phillips, with special reference to South Africa, is of the opinion that the actual meaning of BITC is much debated, and thus, as a condition to be met, does not provide sufficient safeguards to ensure that all siblings in the (prospective or unrecognized) CHH, especially the child above 16, are protected from being in a situation that is dangerous to their wellbeing and development.²³⁴ She also notes, that the UN Guidelines on Alternative Care allows maintenance of the sibling group in cases where the oldest child is both willing and deemed capable to be the head of the household, even though determining whether a child is "truly willing" is perhaps impossible if the alternative of not forming a CHH is sibling separation.²³⁵ It is submitted that Phillips makes good points regarding the possible challenges in realizing legal recognition for those groups who do meet the BITC requirement within the intended meaning of the principle. However, the point regarding the willingness of forming a CHH disregards the fact that there are more alternative care possibilities than separation into different families or forming a CHH. In fact, institutionalization and staying together has higher priority than separate family-based care. Also, if an adolescent child receives proper guidance by the State and professionals, and fully-informed of the possibilities (which include the visitation possibilities and adoption possibilities upon reaching legal adulthood) expresses the wish to form a CHH, the adolescent child's willingness can certainly be verified. It should lastly be noted that Phillips

²²⁹ Lim, p. 172.

²³⁰ Note that 'suitable' is also subjective, because the care of a family member could be rejected by the children (J. Sloth-Nielsen as cited in Lim, p. 225).

²³¹ The South African Constitution stipulates that the BITC is "of paramount importance in every matter concerning the child," See *The Constitution of the Republic of South Africa* (1996) chapter 2, para 28(2) on p. 12.

²³² Lim, p. 224.

²³³ UNICEF, supra note 221.

²³⁴ C. Phillips, *Child-headed Households: a feasible way forward or an infringement of children's rights to alternative care?* Hermens: Eindhoven (2011) (hereinafter **Phillips**), pp. 256-257.

²³⁵ Phillips, p. 256.

recognizes the importance of the sibling relationship, and as such her critiques do not disregard the fact that sibling non-separation should be a priority; she merely suggests that ensuring children's rights might become impossible if a State legally allows for CHH. The UN Guidelines and Children's Act of South Africa (and Botswana and Lesotho) do not contradict that CHH can be in conflict with children's rights. The UN Guidelines therefore stipulate that "special attention should be given to ensuring that the head of such a household retains all rights inherent to his/her child status, including access to education and leisure, in addition to his/her rights as a household head."²³⁶ If the phenomenon of CHH is monitored by NGO's such as UNICEF and monitoring bodies such as the UNCRC Committee, it must be possible to ensure CHH as a child-centered solution for non-separation of siblings, rather than as an infringement of their right to alternative care.

It is submitted that the legal recognition of siblings and CHH in national jurisdictions provides cast-iron proof that once an interest is legally recognized, the sibling relationship weighs more in the balancing of each case than indirect laws (such as UNCRC Article 3 in conjunction with Article 16) or non-binding guidance (such as General Comments or UN Guidelines).

²³⁶ UN Guidelines, para. 37.

5. Conclusion

5.1. The International Children's Rights of Siblings

The previous chapters have indicated that the sibling relationship is important in the lives of children and beyond. As part of the family and the child's identity, siblings play an important role in the development of children, and sibling separation carries the risk of negatively affecting the individual children at stake. From an analysis of cases and jurisdictions that regarded brothers and sisters, this thesis submits that the rights to identity, to private and family life as well as the general principle to have one's best interest taken as a primary consideration, are at risk of being breached if siblings are separated against their will. As such, there is an international right for siblings not to be separated or to know (of) each other under UNCRC Articles 16, 8 and 3 respectively. There is an international consensus that siblings should be separated if this is in the best interest of one or both of them. However, in cases that cannot justify that separation is in their BITC, siblings are sometimes separated without their consent anyway, and without any possibility to appeal or review the separation. The extent to which sibling relationships are protected in civil judicial proceedings, as such, is subject to the importance a regional or national jurisdiction or even a single court attaches to the sibling relationship. From an international children's rights perspective, however, protecting the sibling relationship should not be arbitrary, but justified when sibling separation is decided upon.

Even though siblings are not explicitly mentioned in the UNCRC, the UNCRC Committee did establish that they are part of the family environment, and that sibling separation is cause for concern when it occurs outside the scope of the children's best interest. Also, studies in the field of developmental psychology revealed that siblings are part of children's identity, and that siblings have a positive potential on children's development, mental health and social skills (such as sharing, empathy and understanding, coping and negotiating). In fact, when families find themselves in stressful circumstances (such as divorce or the death of one or more family members) siblings pull together and are better able to cope with the situation than siblings who are separated during these circumstances. Also, placement in foster care and separate (international) adoption arrangements carry the risk of seriously impairing children's right to identity, family and even mental health. As such, it is not strange that the (non-binding) UN Guidelines advocate for the maintenance of sibling ties over prioritized forms of family-based alternative care arrangements, and even express approval of child-headed households when the children are willing and able to opt for this over separate placement in alternative care. Even scholars and organizations who are against the legal recognition of CHH, such as Charlotte Phillips and UNICEF, do not contest the importance of the sibling relationship in any way. Their focus is on ensuring the realization of all children's rights (which may be impossible if children assume the role of caregiver) and ensuring the protection of all children's BITC. It is submitted in this thesis, that the sibling relationship should be included in the BITC assessments, in order to ensure a fair balancing of the interests of the children involved, without sibling separation being a matter of collateral damage, as the sibling bond was not factored in in any BITC assessment.

Without these findings being widely shared and recognized by States parties to the UNCRC, legal practitioners and parents, however, the non-binding expressions that siblings share an important

relationship which needs to be maintained, has been and will be overlooked. Because articles 3, 8, and 16 of the UNCRC provide for a legal framework that harbors the potential of protecting sibling bonds, it will not be concluded that the UNCRC is in need of an additional article or provision. There is however a need for awareness of the importance of the sibling bond and for guidance on how States parties should implement the rights of siblings in cases affecting them.²³⁷

5.2. Anchoring Sibling Relationships as a Factor in BITC Assessments

Chapters 3 and 4 indicated that the BITC is widely assessed in cases concerning children. However, the extent to which siblings are a factor in these assessments has been hard to measure, due to a lack of data. It has been established that laws and guidelines with respect to siblings vary widely across jurisdictions, with many countries having no specific legal framework for the protection of relationships of children other than with their parents. This lack of legal recognition of this important family tie explains why many courts, low and high, domestic and regional, have failed to put siblings in the balancing act when cases concern siblings directly²³⁸ and (especially) indirectly²³⁹. Given the importance of sibling relationships, there is a need for legal practitioners to include siblings as an important factor of the BITC – also if the sibling relationship concerned occurs in a non-classical family form, such as half siblings and donor-conceived siblings. Herein, the definition of sibling as provided in paragraph 1.2.5. of this thesis, might be a helpful tool to determine if the relationship at hand is a sibling relationship. Still, a very important way to find out whether the sibling relationship is important for the children at hand, is by asking the individual children. A BITC assessment normally requires children's participation and, especially for young and disabled children who cannot (yet) participate, a child-centered approach. Thus, enquiring about the sibling relationship too during the assessment should not be an obstacle generally. By anchoring siblings in individual children's BITC assessments, Article 3 of the UNCRC could offer a direct legal protection for sibling's rights to non-separation and contact, especially when read in conjunction with their right to identity and right to family under the UNCRC. This thesis does not submit that siblings should have priority over their parents (or the State's) needs, but it advocates for a legal recognition of the sibling, in order to ensure a fair balancing of rights, needs and interests at stake.

5.3. Recommendations for the Way Forward

While there is a lack of protection of sibling relationships, the UNCRC Committee would be able to overcome this clear gap through deploying its functions. Firstly, the Committee could dedicate a Day of General Discussion on the topic of siblings and other inter-child relationships, where it could offer its views on the importance of the sibling bond and discuss *how* States parties could best assess and weigh the individual sibling relationships in cases where the rights and wishes of the children involved as well as the rights and wishes of other parties involved need to be appropriately balanced.

²³⁷ See 5.3. Recommendations for the Way Forward for recommendations in this regard.

²³⁸ Cf. *Ramírez v. Guatemala & A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*.

²³⁹ Cf. *Soares de Melo v. Portugal*.

Secondly, it could use their functions of publishing General Comments and Concluding Observations to further protect siblings from being separated against their will. Furthermore, the UNCRC Committee could recommend States parties to gather data on siblings and their rights under their various jurisdictions across the globe. Herein it is important to note that States cannot be held responsible for cases of sibling separation caused by parents outside the context of State proceedings or oversight. However, States parties could be encouraged to support research and awareness-campaigns on the harmful effects of sibling separation, as well as providing training to legal practitioners on how to weigh the sibling bond in cases that do reach court.²⁴⁰ This combination of deploying its functions and endorsing research and awareness-campaigns on the effect of sibling separation by the UNCRC Committee, would have an educational and child-empowering effect in civil judicial proceedings and beyond the law. Siblings everywhere need to be able to access justice. Educating the world about their rights could ensure that children will be better protected through the children's rights framework and would know that the UNCRC Committee supports the maintenance of their ties as long as they are in their best interest.

5.4. Ideas for Future Research

At the early stages of this research, mental health workers from the NHS explained that in the field of migration, siblings experience mental health problems as a result of their separation.²⁴¹ Although it was not within the scope of this thesis to focus on the challenges for siblings in the context of migration, it would be an urgent topic for further research, now that this thesis has established there is a need for legal recognition and (better) protection of sibling relationships in general. Aside from exploring different fields of law in which siblings might require recognition and protection, it would also be needed to further look into the wider issue of non-recognition of inter-child relationships. During this research, examples from States entities and NGO's not knowing how to intervene when children harm each other highlights this need for further research.²⁴² In this thesis, one relatively new function of the UNCRC Committee has not been dealt with, namely their function of deciding on communications filed by or on behalf of children. In cases of sibling separation, the third Optional Protocol of the UNCRC on a communications procedure might provide an avenue for siblings to request recognition of their children's rights violations resulting from that separation. The analysis of these communications by siblings and decisions by the UNCRC Committee would add a new angle to study the views of the UNCRC Committee on siblings and sibling rights from a children's rights perspective. However, so far communications relevant to this study have not been decided, making it a topic to bear in mind for future research.

²⁴⁰ The UNCRC Committee recommended States parties to take similar measures in the case of the effects of separation from one parent on children as a result of divorce, see Hodgkin & Newell, p. 122.

²⁴¹ See 2.4. Negative Outcomes of Involuntary Sibling Separation.

²⁴² See 1.1.2. Siblings and Other Inter-child Relationships under the UNCRC.

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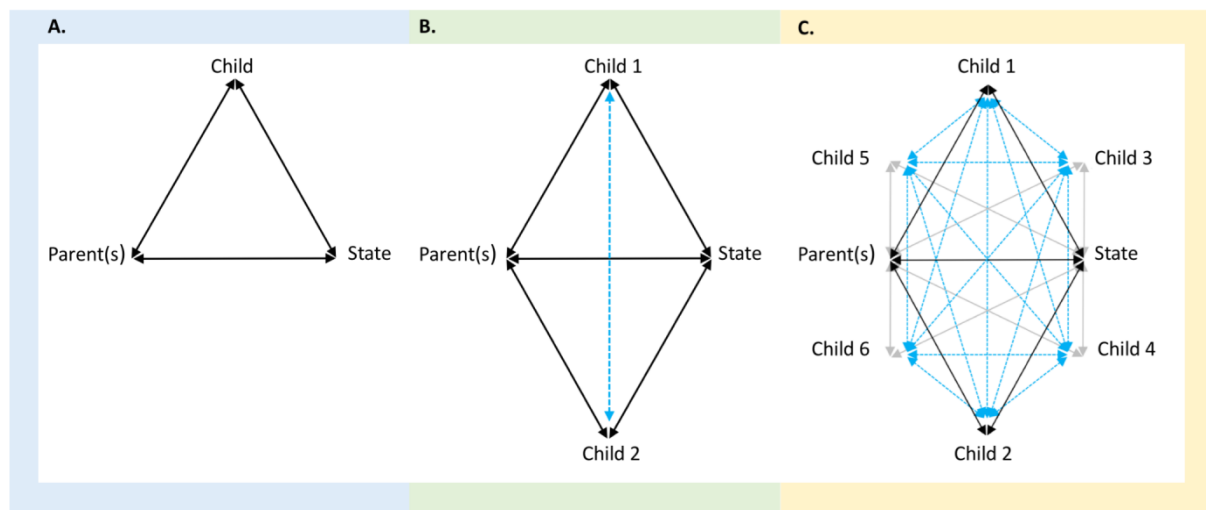
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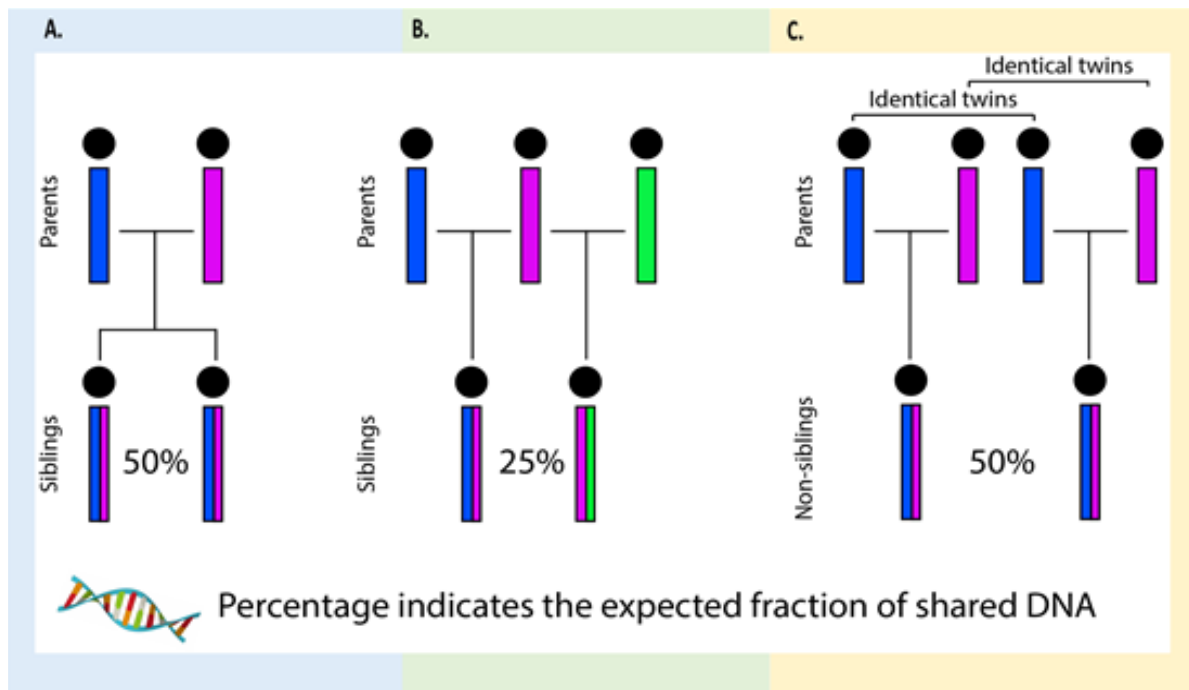
Appendix 1: The Parent-State-Child Triangle and Its Variations with Multiple Children



- displays the classic child-parent(s)-state triangle, which is more commonly embraced under U.S. law;²⁴³
- displays the triangle when a case concerns two children, such as two siblings for instance. They both have their individual rights within the UNCRC, and parents and States both have obligations towards these individual children. But, added to this is also their relationship (the blue line);
- displays that the more children there are, the more complicated any balancing act would become.

²⁴³ "Family Law in the U.S. has long embraced the image of a triangle to describe the allocation of legal authority over child-rearing. Parents, children and the State stand at the three points of the triangle" (L.A. Rosenbury, "Between Home and School" *University of Pennsylvania Law Review*, 2007, p. 1.). Rosenbury highlights also other American authors that use the same triangle to visualize the triangular relationship between children, parents and the State. In the UNCRC, the triangle is also sometimes referred to, even though during the drafting process of the treaty already Finland noted that this relationship between the three is bound to change (OHCHR, *Legislative History of the Convention on the Rights of the Child Vol. 2*, United Nations: New York and Geneva (2007), para. 211 on p. 869).

Appendix 2: Estimates of Shared Genetic Information



- displays full siblings, which share approximately 50% of their DNA;
- displays half siblings, who have only one shared parent and share approximately 25% of their DNA;
- displays that it is theoretically possible for non-siblings to share as much DNA as full siblings, if both fathers and both mothers are identical twins.