

**The Best Interests of the Child Principle in the European Court of
Human Rights Case-Law about Adoption and Surrogacy**



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Executive Summary

The European Court of Human Rights (ECtHR) has proved to be a precious instrument to protect Human Rights both at an international and national level. Children's rights are not explicitly mentioned in the European Convention of Human Rights (ECHR), nonetheless, the Court interprets the Convention's provision in the light of the UN Convention of the Rights of the Child (CRC). In the last thirty years, the Court has referred numerous times to the BIC principle, especially in relation to Art 8 and the right to private and family life. However, due to the absence of any literal reference to the BIC principle in the ECHR, the principle's intrinsic high flexibility opens the way for contestable uses of the principle itself. This thesis investigates to what extent the ECtHR does effectively take into account and protect children's rights in Family Law disputes through the application of the BIC Principle.

Chapter 2 explores the concept of Best Interests of the Child (BIC). It provides a theoretical framework for the analysis of the BIC as a principle. The framework is built by referring primarily on the work of the CRC Committee in its General Comment n.14 together with relevant academic sources. In particular, this section tries to define the principle's scope, meaning and weight. In the light of these considerations, the chapter ends by illustrating a child's rights-based model for the application of the principle to be used in the context of judicial decisions directly about children. The model will provide the objective standard to be applied in answering the main research question of this thesis which, in fact, will be used to test the ECtHR use of the BIC principle and thus determine to what extent the ECtHR in the selected case-law.

Chapter 3 provides the background necessary to understand children's rights position within the European Human Rights system and the role of the BIC in the European Court of Human Rights jurisprudence on family law. In particular, it will display the relationship between the ECHR and the CRC and how the ECtHR has taken on the role of protection and implementation of children's rights. Then, it will focus on describing how the Court has made use of the BIC principle in its case-law under art 8 ECHR while also highlighting the problematic aspects emerging from it. Prior to apply the model and analyse the Court's practice in the following chapter, it's necessary to narrow down the context of the research due to the limited space of this thesis. For this reason, chapter 3 will also describe the characteristics of the selected case-law, which corresponds to the ECtHR case-law on family law disputes concerning the recognition of parenthood established through adoption and surrogacy.

Chapter 4 will first provide an overview of selected cases and then showcase the results of the analysis of the 13 selected cases. The judgments will be reviewed to test the Court's use of the principle against the model of a children's rights-based BID described in chapter two. To this extent, the findings will be displayed following the structure of the model of BID. Therefore, they will first focus on the BIC's assessment by highlighting the Court's practice regarding the three elements of this phase according to the model, which are: the child's views on the matter, the relevant rights of the child under the CRC, and the child's individual circumstances in connection with factual evidence. Then, they will focus on how the BIC is balanced against other interests by highlighting the Court's practice regarding the three elements of this phase according to the model, which are: the identification of the competing interests through other rights-based considerations and the transparent disclosure of the process in the final outcome.

Eventually chapter 5 provides a summary of the main findings of the research and presents recommendations on how the ECtHR could improve its approach toward a more coherent use of the principle which could ultimately promote the idea of children as fundamental rights holders.

Keywords:

Children's Rights - Best Interests of the Child - European Court of Human Rights - Right to Private and Family Life - Adoption - Surrogacy - Parenthood - Filiation

Overview of Main Findings

The BIC principle is a powerful instrument which shall be handled carefully. Its indeterminacy, as well as the vagueness of its formulation, are necessary to make the principle flexible and applicable “in all actions concerning children”. Yet, these very same characteristics make the principle an easy prey to contestable uses. To answer the main research question – to what extent the ECtHR does effectively take into account and protect children's rights in Family Law disputes through the application of the BIC Principle – this thesis has first created a model of a child's rights-based application of the BIC principle and then it has applied that model to test a selected group of ECtHR judgements.

To this extent, the thesis first reviewed GC n.14 and the most relevant academic sources to identify the principle's scope, meaning and weight. From this analysis, it emerges that a reasonable use of the principle is one that reflects the principle's scope, i.e. promoting the conception of children as rightsholders who can exercise those rights according to their evolving capacities. Applying the BIC principle on a case-by case basis, the relationship between the child's best interests and her rights should be clearly disclosed in every decision outcome. More precisely, the principle's scope should be reflected not only in its substantive but also in its procedural dimension which can be identified with the BID process. On this premise a model for a child's rights-based BID was built. The model's is structured as follows:

1. Phase one: BIC assessment; elements that shall be taken into account
 - a. The child's views on the matter
 - b. Relevant rights of the child under the CRC
 - c. The child's individual circumstances in connection with factual evidence
2. Phase two: Balancing of competing interests:
 - a. Identify the competing interests through other rights-based considerations
 - b. Transparent disclosure of the process in the final outcome

The model was then applied to a selected group of cases to test the ECtHR use of the principle. The selected case-law concerns disputes brought under art 8 ECHR about the recognition of parenthood through adoption or surrogacy. There the Court resorts to the BIC principle on regular basis but by mentioning it as a general principle of international law rather than a children's rights general principle.

By studying the Court's selected case-law it is noticeable how the Court's approach to the BIC principle's application is not fully in line with a child's rights-based model. Yet by highlighting its shortcoming it is possible to identify ways to change such approach toward a more coherent use of the principle which could ultimately promote the idea of children as fundamental rights holders, children's rights as fundamental rights and the credibility of the BIC principle as well.

In particular the Court should first change its BID by: integrating it with the relevant rights of the Child enshrined in the CRC, to determine with more accuracy the interests at stake while treating children as holders of individual and specific fundamental rights; integrating it with the child's views on the matter, to respect the child's right to be heard and promote the child's autonomy in the exercise of their fundamental rights; assessing the child's individual circumstances based on factual evidence even in cases where the Court would apply principles established in its previous case-law, to assure consistency of the assessment with the specificity of each child individual context. Lastly, the recommendation for what concerns the balancing of the BIC with other interests is for the Court to display together with the outcome of the process not only how it promotes the BIC but also how it affects the other interests at stake.

List of Abbreviations

| | |
|--------------|---|
| BIC | Best Interests of the Child |
| BID | Best Interests of the Child Determination |
| CRC | United Nations Convention on the Rights of the Child |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| GC | United Nations Committee on the Rights of the Child General Comment |

1. Introduction

The ECtHR has proved to be a precious instrument to protect Human Rights both at an international and national level. Children's rights are not explicitly mentioned in the ECHR, nonetheless, the Court has been able to interpret the Convention's provision in the light of the UN Convention of the Rights of the Child (CRC). In the last thirty years, the Court has referred numerous times to the BIC principle, especially in relation to Art 8 and the right to private and family life. However, due to the absence of any literal reference to the BIC principle in the ECHR, the principle's intrinsic high flexibility has proven to be a double-edged sword in those areas of family law where the child's interests are almost indistinguishable from those of the adults.

Contestable uses of the principle can lead to the protection of the adults, rather than the child, especially in the area of family law where the child's interests are strongly intertwined with those of the adults. In her dissenting opinion related to the *Mandet v. France* judgement, Judge Nussberger has expressed her concern about the Court's attitude of referring to the principle without a clear Best Interests Determination (BID) or without the exposition of the legal reasoning behind its application. For this reason, numerous questions arise. Can the BIC principle be balanced with other principles? Shall it have a primary or *the* primary consideration? In cases where a conflict between the Best Interests of the single child and the best interests of children as a group arises, how can it be solved?

The aim of the present work is to analyse the ECtHR use of the BIC principle in the specific area of family law disputes concerning the recognition of parenthood established through adoption and surrogacy. In such cases, the Court faces the challenge to find a balance in the triangular relationship that links the interests of the child, the parents and the State while operating in an area strongly affected by the margin of appreciation doctrine. To do so it will be first necessary to structure a child's rights-based model of application of the BIC principle based on the one hand, on the CRC Committee's guidance on the interpretation of art 3 CRC and, on the other, on the relevant academic debate. The model will be then used to test the Court's practice to highlight if it can be considered coherent with the CRC.

1.1. Research question

The main research question of this work is:

- to what extent the ECtHR does effectively take into account and protect children's rights in Family Law disputes through the application of the BIC principle?

To answer this research question, it will be necessary to address multiple sub-questions:

- facing the intrinsic indeterminacy of the BIC principle is it possible to curb its vagueness and thus reduce the space for manipulation and contestable uses of the principle?
- what are the characteristics of a child's rights-based model of application of the principle?
- does the ECtHR use of the principle present those characteristics?
- how can the Court's approach in the application of the principle be changed to better assure the protection of children's rights?

1.2. Scope and Limitation of the Research

The scope of the research is to test the compliance of the ECtHR approach in applying the BIC principle with the child's right-based model of application of the principle, built in line with the international children's rights framework. Furthermore, the research aim at provide recommendations on how to the ECtHR shall approach the BIC application to better promote and protect children's rights.

The research is limited to the area of family law and, more precisely, to the ECtHR case-law regarding claims under art 8 ECHR concerning the issue of recognition of parenthood established through adoption and surrogacy.

1.3. Methodology and research techniques

This work combines desk research of relevant academic literature, the CRC and the ECHR as hard law instruments and the CRC Committee's General Comments as soft law instruments, with the empirical analysis of the selected ECtHR's case law.

The ECtHR relevant case law was selected among the list of cases provided in the Claire Fenton-Glynn work "Children and the European Court of Human Rights"¹ and by searching in the HUDOC database by using the following keywords: ('adoption' OR 'surrogacy' AND/OR 'filiation') AND ("best interests of the child" OR "superior interest de l'enfant")

The selection aimed at identifying the cases presenting the following characteristics:

- Admissible cases that are decided in French or English by ECtHR Chambre or Grand Chambre
- Claims brought under art 8 alone or art 8 in conjunction with art 14
- Claims involving the establishment or recognition of parenthood through adoption or surrogacy of a specific child (or children); for the purpose of the research adoption was considered only as a family law institute comprehending strong adoption, simple adoption, international adoption, step-child adoption, second-parent adoption and excluding adoption as a measure of child protection
- In the merits section of the judgment the Court must have referred at least once to the "best interests of the child" or "interet superior de l'enfant"
- Time frame: cases filed from January 1990 to May 2022, thus allowing to cover a span of time from the ratification of the CRC up to the present days

The thirteen cases that fitted the requirements are analysed vis a vis two main questions:

- Which factors were considered to determine the Best Interests of the child or children involved?
- How does the Court operate the balancement between the BIC and the balancing the competing interests?

1.4. Structure

The first two chapters following the introduction are meant to provide the theoretical framework for the research. In chapter 2 the concept of BIC is investigated first by addressing its role in the context of the CRC referring primarily on the work of the CRC Committee in its General Comment n.14², and then by focusing on defining its characteristics, in particular its scope, meaning and weight as a principle. Lastly, drawing from this analysis a model for a children's rights-based application of the principle will be provided.

¹ C. Fenton-Glynn, *Children and the European Court of Human Rights*, Oxford University Press (2021)

² UN Committee on the Rights of the Child (2013), General Comment No. 14 (2013): On the right of the child to have his/her best interests taken as a primary consideration, CRC/C/GC/14

Meanwhile, in chapter 3 children's rights position within the European Human Rights system and the role of the BIC in the European Court of Human Rights jurisprudence on family law will be investigated.

The fourth chapter will provide an in-depth analysis of the ECtHR use of the BIC principle in a selected group of cases, namely those concerning the recognition of parenthood through adoption or surrogacy. The scope of this chapter is to test the Court's use of the principle against the model of a children's rights-based application of the principle described in chapter one.

The fifth and final chapter will display the analysis' main findings and then, in light of the identified problems, the second part of the chapter will provide recommendations for the Court on how it could better align its practice to the child's rights-based model.

2. The concept of the Best Interests of the Child: a theoretical framework

This chapter is meant to provide a theoretical framework for the analysis of the Best Interests of the Child (BIC) concept. It will first display the role of the BIC in the context of the UN Convention on the Rights of the Child (CRC) referring primarily on the work of the CRC Committee in its General Comment n.14.³ Then, in the second section, relying on relevant academic sources, the characteristics of the BIC as a general principle will be displayed. In particular, this section aims at better defining the object of the research, looking at the scope, the meaning and the weight that should be accorded to the principle. Lastly, in the light of these considerations the chapter's third section will be used to draft a child's rights-based model for the application of the BIC principle to be used in the context of judicial decisions directly about children.

The creation of this model is necessary to answer the main research question of this theses. In fact, the model will be used throughout this work as standard to test the ECtHR use of the BIC principle and thus determine to what extent the ECtHR does effectively take into account and protect children's rights in Family Law disputes through the application of the BIC principle.

2.1. The BIC in the CRC

The child's right to have her best interests taken into account as a primary consideration is enshrined in art 3(1) of the CRC. However, the BIC consists of a much broader concept in which "right" represents only one facet. References to this concept can be found in numerous other provisions of the Convention, testifying in favour of its pervasive role in the entire realm of children's rights.⁴ Moreover, in its General Comment n.5, the Committee has identified the BIC as one of the four CRC general principles together with non-discrimination (art. 2), right to life, survival and development (art. 6) and the right to be heard (art. 12).⁵ Art. 3 formulation has inspired other international and national documents and represents the vessel through which the BIC has been exported in many different jurisdictions.⁶ For this reason, it stems as the necessary starting point for any research on the BIC concept.

Art 3 is made of 3 paragraphs which enlist as many obligations for States Parties, however, only paragraph 1 contains the general obligation that shapes the BIC principle:

Art. 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The broad formulation mirrors the broad range of contexts in which the principle is meant to be applied, i.e. "in all actions concerning children". Together with the other CRC general principles, art

³ CRC/C/GC/14

⁴ N. Peleg, General Principles, in T. Liefwaard & U. Kikelly (eds), *International Human Rights of Children* (2018)

⁵ UN Committee on the Rights of the Child, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para 12

⁶ J. Eekelaar & J. Tobin, Art.3 The Best Interests of the Child, in Tobin, J. (ed.), *The UN Convention on the Rights of the Child: A Commentary* 74 (2019)

3(1) “underpins the Convention as a whole”⁷ and plays a key role in the implementation of every other CRC right. However, since the early days of the CRC’s entry into force two main interpretative issues emerged: the vagueness of the concept of BIC and, subsequently, the amount of priority to be accorded to them.⁸ Aiming to provide guidance on the subject and reduce the ambiguity around it, in 2013 the Committee drafted its General Comment n.14. The document not only depicts the Committee’s comprehensive analysis of art 3(1) but offers also directions in determining the elements and the procedures underlying the BIC determination.

2.1.1. CRC Committee and General Comment n.14

In General Comment n. 14 the Committee takes one step forward in the definition of a concept whose meaning has always been difficult to determine. While acknowledging that the BIC per se is not a “new” concept,⁹ the Committee certainly provides it with new meaning by framing it inside the CRC.

2.1.1.1. *A Threefold Concept*

The Committee presents the BIC as a threefold concept, namely, a substantive right, a rule of procedure and a principle of interpretation.¹⁰ Only when declined in these three forms, the BIC can reach its ultimate goal of “ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child”.¹¹ The Committee distinguishes these three forms of being of the BIC, providing for each a description. Thus, it’s noticeable how, as a substantive right, art. 3(1) gives origin to a “self-executing” obligation for the States which must implement it whenever a decision is made concerning a child or children.¹² Then, as an interpretative principle, it serves a different twofold purpose of, first, providing the framework of interpretation for every other provision of the CRC and its Protocols and, second, whenever a legal provision is open to multiple interpretations, directing the interpreter towards the one “which most effectively serves the child’s best interests”.¹³ Lastly, as a rule of procedure, it shapes the decision-making process by introducing a necessary evaluation of the decision’s impact on the child or children. This means that, not only the decision-maker has to carry on a BIC assessment and determination but that such operation must be reflected in the decision, which outcome must “explain how the right has been respected in the decision”.¹⁴

⁷ E. Sutherland, Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities, in E. Sutherland, & L-A. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being 23* (2016)

⁸ Id.

⁹ CRC/C/GC/14, para 2

¹⁰ CRC/C/GC/14, para 6

¹¹ CRC/C/GC/14, para 4

¹² CRC/C/GC/14, para 6(a)

¹³ CRC/C/GC/14, para 6(b)

¹⁴ CRC/C/GC/14, para 6(c)

2.1.1.2. A Dynamic and Complex Concept

These three forms - right, principle and rule of procedure - represent the BIC's different functions but, while they say something about how it operates, they don't define its meaning. Regarding this aspect, the Committee describes the BIC as both a dynamic and complex concept. Because it's not possible to define what is universally best for the child "in any given situation at any point in time",¹⁵ the concept needs to be dynamic. Therefore, the dynamicity of the concept makes it adaptable not only to different contexts of application but also to the continuous evolution of the issues that it encompasses.¹⁶ At the same time, the complexity of the concept relates to the wide range of factors that must be taken into account to determine its content. To this extent, the Committee highlights that the content of the BIC can be determined only on a "case-by-case basis [...] according to the specific situation of the child or children concerned".¹⁷

2.1.1.3 A Primary Consideration

Art 3(1) represents an answer to a long history of neglect that children's rights have suffered: "If the interests of children are not highlighted, they tend to be overlooked".¹⁸ To this extent, the expression "primary consideration" serves a very particular purpose. The Committee explains, in fact, that the special situation of children asks for special consideration, and "a primary" must be interpreted in the sense that BIC "may not be considered on the same level as all other considerations".¹⁹ However, interestingly enough, other provisions of the CRC assign a different weight to the child's interest, for instance, art. 20²⁰ which requires that in matters relating to adoption, the consideration accorded to the BIC is "the paramount".²¹

Anyway, it is important to bear in mind that the BIC refers not only to individual children but also to children as a group. Furthermore, the duty to take the BIC into account relates to "all decisions and actions that directly or indirectly affect" both the single child and children collectively. The Committee warns that in doing so conflict can arise between the interests of a single child and those of children as a group. However, there isn't a predetermined way to solve such conflict and, whenever it may arise, it shall be solved on a case-by-case basis "carefully balancing the interests of all parties and finding a suitable compromise".²²

¹⁵ *Id.*

¹⁶ CRC/C/GC/14, para 11

¹⁷ CRC/C/GC/14, para 32

¹⁸ CRC/C/GC/14, para 37

¹⁹ *Id.*

²⁰ Cfr. Eekelaar & Tobin *supra* note 6, at 99

²¹ CRC/C/GC/14, para 38

²² CRC/C/GC/14, para 39

2.1.1.4. Assessment and Determination

Facing the BIC's different functions together with its dynamicity and complexity, the flexibility of the concept is as essential as it is dangerous. On the one hand, it fosters the possibility to accommodate the specific social and cultural features of each case while leaving room for the evolving "knowledge about child development".²³ On the other, as recognised by the Committee, it also opens the door to manipulation.²⁴ Precisely for this reason the BIC implementation it's a delicate process and, therefore, the Committee sketches some guidelines for its assessment and determination. The two actions represent consecutive steps of one single process that starts from the "specific factual context of the case". From there the relevant elements for the assessment can be found and weighed against one another.²⁵ The Committee enlists these elements which are: the child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety; situations of vulnerability; right to health; right to education.²⁶ Even if there isn't a particular hierarchy among these elements, the child's views occupy a special position due to the relationship between articles 3 and 12. Has it emerges from Both General Comment n. 14 and n. 12,²⁷ while the former (art. 3) is "setting an objective", the latter (art. 12) is "providing the methodology for achieving" it.²⁸

2.2. In between indeterminacy and vagueness: the BIC as a general principle.

The Committee has provided precious guidance in the interpretation of the BIC as a concept, yet its status as a principle is still "controversial".²⁹ The gist of the problem has been identified by many authors in the BIC's indeterminacy³⁰ as a source of manipulation,³¹ paternalistic interpretations³² and even lack of fairness.³³ It's then necessary to look further into the relevant academic debate to understand if it's possible to curb such indeterminacy and thus reduce the space for manipulation and

²³ *Id.*

²⁴ CRC/C/GC/14, para 34

²⁵ CRC/C/GC/14, para 46

²⁶ CRC/C/GC/14, para 52-79

²⁷ UN Committee on the Rights of the Child, General Comment No. 12 (2009): The right of the child to be heard, 1 July 2009, CRC/C/GC/12

²⁸ W. Vandenhoe & E. Turkelli, *The Best Interests of the Child*, in J. Todres & S. M. King (eds.), *The Oxford Handbook of Children's Rights Law* 209 (2020)

²⁹ Cfr. Eekelaar & Tobin *supra* note 6, at 74

³⁰ *Id.*

³¹ See Vandenhoe & Turkelli *supra* note 28, at 208; see also Sutherland *supra* note 5, at 35

³² N. Cantwell, *Are Best Interests a Pillar or a Problem for Implementing the Human Rights of Children*, in J. Sloth-Nielsen & T. Liefgaard (eds), *25 Years of the Convention on the Rights of the Child* 62 (2015)

³³ R. H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, in 36(3) *Law Contemporary Problems* (1975)

contestable uses of the principle. In doing so it will be necessary to first try to define the scope of this principle and only afterwards focus on its meaning and the weight it should be accorded.

However, before doing so, a terminological premise is required. Although the Committee refers to the concept of BIC describing it as “complex”, “dynamic” and flexible” when the discussion is focused on the BIC as a principle another terminology is used in the academic debate. In particular, the principle has been described as indeterminate and vague. However, it’s necessary to draw a distinction between the terms indeterminacy and vagueness. From a general theory of law perspective, indeterminacy is a quality that pertains to every legal standard classifiable as a principle. Such standards state “a reason that argues in one direction, but does not necessitate a particular decision”.³⁴ It’s the principle’s indeterminacy the quality that makes it flexible and adaptable to such a wide range of different contexts and cases.

Meanwhile, vagueness is a quality which refers to the meaning of the propositions that the principle is made up of.³⁵ The BIC is a “concept with blurred edges”³⁶ but it doesn’t imply that it’s impossible to give it determinate meanings. On the contrary, the challenges around this principle come from the fact that for each case it applies to, the best interests can be easily identified with more than one single meaning. On this premise, it can be said that it’s the vagueness, rather than the indeterminacy, of the principle’s formulation that opens it up to subjective interpretations³⁷ based on contestable meanings. Addressing the two qualities individually permits to analyse separately the scope of the BIC as a principle and the meaning of the BIC as a concept. Once identified the scope, while narrowing the principle’s indeterminacy, it will be possible to use it as a parameter to separate *the wheat from the chaff* and distinguish which meanings are contestable and which are not.

2.2.1. Scope: Paternalistic tool or Gateway for children’s rights?

In discussing the scope of the BIC principle, the longstanding dispute between the two opposite conceptions of children as the object of protection, on the one hand, and children as the subject of rights, on the other, continues to dominate the debate.³⁸ In this perspective a question is bound to be asked, does the BIC principle point towards the paternalistic protection of children or the promotion of their rights? For Nigel Cantwell, the answer lays in the first option. As previously mentioned, the BIC concept predates the CRC and finds its origins in a time and space where children were denied the

³⁴ R. Dworkin, *Taking rights seriously* 47 (1977); cfr. J. Eekelaar, *Two Dimensions of the Best Interests Principle: Decisions About Children and Decisions Affecting Children*, in E. Sutherland & L. Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* 111 (2016)

³⁵ J. Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, in *California Law Review* 82(3), at 513 (1994)

³⁶ L. Wittgenstein, et al., *Philosophische Untersuchungen =: Philosophical Investigations*, Wiley-Blackwell (4th ed.) 71 (2009)

³⁷ See Eekelaar & Tobin *supra* note 6, at 74

³⁸ K. Hanson, *Schools of Thought in Children’s Rights*, Children’s Rights Unit, University Institute Kurt Bosch (2008)

status of rightsholders.³⁹ According to Cantwell, the BIC can't be separated from its paternalistic roots and instead of promoting children's rights as human rights, it's used to advocate the idea of "special rights". The author highlights how, in the name of its alleged paramountcy, the principle is often invoked "pointlessly instead of specific rights or principles that can better fit the situation".⁴⁰ However, while pointing out that the BIC might be - as it has been - used as a paternalistic tool, it is still important to distinguish between what pertains to the nature of the principle and what to the use that's made out of it.

The inclusion of the BIC in the CRC is not an insignificant event, quite the opposite. This new dimension of CRC general principle detaches - or better - *may detach* the BIC from its origins and transform it into a "gateway for children's rights".⁴¹ In fact, as Ursula Kilkelly emphasises, for the BIC to fully function as a catalyst for a child's rights-based approach in every action concerning children, the BIC must be accepted "as a children's rights principle".⁴² This means that it must operate inside the framework of the CRC, promoting the conception of children as rightsholders who can exercise those rights according to their evolving capacities.⁴³ Thus, a use of the BIC which does justice to its scope of fostering children's rights, is what Ciara Smyth defines as "a principled use", where the BIC is determined "through the lens of relevant rights of the child"⁴⁴ according to the CRC.

Eventually, while the BIC principle is applicable "in all actions concerning children", it's noticeable that the scope of the principle is slightly different if an action is "affecting children indirectly" or if it is "directly about children".⁴⁵ According to John Eekelaar, in fact, when it comes to actions or decision indirectly affecting children the scope of the principle is to shape the decision-maker's agenda to prevent children's interests from being neglected, as they historically have been.⁴⁶ By contrast, in those decisions directly about children, the scope of the principle is to put the children's interests "at the centre of the decision-making process".⁴⁷ As it will be shown in the next paragraphs, this distinction has a strong impact particularly when it comes to assessing and determining the weight to be accorded the child's interests.

³⁹ L. M. Kohm, Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence, in *Journal of Law and Family Studies* 10(2) (2008)

⁴⁰ See Cantwell *supra* note 32, at 66

⁴¹ U. Kilkelly, The Best Interests of the Child: A Gateway to Children's Rights?, in E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* 51 (2016)

⁴² *Id.* 63

⁴³ See art 5 CRC; *cfr* CRC/C/GC/14, para 16

⁴⁴ C. Smyth, The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?, in *European Journal of Migration and Law* 17, at 87 (2015)

⁴⁵ See Eekelaar *supra* note 34

⁴⁶ See Eekelaar & Tobin *supra* note 6, at 79

⁴⁷ *Id.*

2.2.2. Meaning: Two dimensions of the principle

As previously mentioned, the content of the BIC concept is vague and “must be determined on a case-by-case basis”.⁴⁸ It’s, in fact, impossible to determine once and for all what’s universally best for each child in every situation. Moreover, such openness to different meanings is functional to prevent the idea that “relationships involving children and children’s interests needed to constantly conform to community rules”.⁴⁹ Nonetheless, the concept’s vagueness - especially when added to the principle’s indeterminacy - has another, more problematic, side. Many influential authors have pointed out how the principle’s formulation lacks fairness and transparency.⁵⁰ Especially in those decisions “about” children, it may allow the decisionmaker to “import his personal values into the process and leaves considerable scope for class bias”.⁵¹ Moreover, it may be used to convey “untested assumptions about what is good for children”⁵² or it may even operate as a “proxy for the interests of others”.⁵³

The problem is then how to restrain the potentially harmful effects of the concept’s vagueness. A possible solution is to restrict the wide array of possible meanings to those that are acceptable. A similar operation doesn’t require reducing the size of the category of meanings which can be assigned to the concept but determining its borders.⁵⁴ In doing so the scope of the principle plays a central role. Paraphrasing the words of a distinguished Judge of the Italian Constitutional Court, a principle is like a block of ice that, when meeting the different circumstances of life, breaks into many fragments, but each one of them still bares inside the same substance of the original block.⁵⁵ The scope of the principle draws the border of such a category, becoming then the parameter to determine which meanings are acceptable and which are not. Stated that BIC’s scope is promoting the conception of children as rightsholders and fostering the other rights of the CRC, an acceptable meaning assigned to the concept reflects such scope. While applying the BIC principle on a case-by-case basis, whatever is identified with the best interests of the child should always be in line with the principle’s

⁴⁸ CRC/C/GC/14, para par 32

⁴⁹ See Eekelaar *supra* note 34, at 111

⁵⁰ J. Eekelaar, Beyond the welfare principle, in *Child and Family Law Quarterly* 14(3) (2002); see also R. H. Mnookin *supra* note 33; cfr. N. Cantwell, Are Children’s Rights still Human?, in A. Invernizzi & J. Williams (eds), *The Human Rights of Children: From Visions to Implementation* (2001)

⁵¹ R. H. Mnookin, Foster Care-in Whose Best Interest?, in *Harv. Educ. Rev.* 43, at 592 (1973). The author warns about the risk that “courts may sometimes be enforcing middle-class norms of cleanliness where both economic and cultural circumstances make it both unfair and in appropriate”. Such a risk is extremely high for all minorities and marginalized groups and it’s typical of all judicial standards, see G. Calabresi, *Ideals, Beliefs, Attitudes and the Law: Private Law Perspectives On A Public Law Problem* (1985)

⁵² See Eekelaar *supra* note 50, at 237; cfr. Cantwell *supra* note 50

⁵³ See Eekelaar & Tobin *supra* note 6, at 83

⁵⁴ See Waldron, *supra* note 35, at 522

⁵⁵ G. Zagrebelsky, Valori e diritti nei conflitti della politica [Values and Rights in conflicts of politics], 22 March 2008, *La Repubblica* <https://eddyburg.it/eddy/valori-e-principi-secondo-zagrebelsky/>. All translations in brackets [] are mine

scope and reflect such scope. To this extent, the procedural dimension of the principle becomes the key for decision-makers “to identify a child’s best interests under a rights-based conception of this principle”.⁵⁶

The BIC principle has two dimensions, not only a substantive but also a procedural one.⁵⁷ The former describes how the outcome of a certain decision reflects the best interests of the child, whereas the latter refers to the procedure used to reach that outcome. This second dimension contains what the Committee refers to as the best interest’s determination (BID) process. Once again there’s no universal formula for this process, however, following GC n. 14.⁵⁸ it’s possible to find guidance on which elements must be considered⁵⁹ and which procedural safeguards must be enabled during such a process. This process entails “a delicate, sometimes fraught balancing act between dependency and autonomy”⁶⁰ and the child’s views are the tip of that balancing act. For this reason, involving the child in the process by making them express such views is “an important safeguard against paternalism”,⁶¹ as it requires the recognition of the child’s agency in the exercise of their rights.⁶² Furthermore, the process itself must be disclosed in the very same outcome of the decision as it must be clear how such an outcome benefits the child’s interests and most importantly the child’s human rights.⁶³ If such a process is disclosed with transparency alongside its outcome, it will “enhance objectivity and shield against discretion and bias”.⁶⁴

2.2.3. Weight: the consideration dilemma

One last problematic aspect of the BIC principle relates to the weight that must be accorded to the child’s interests in a decision, and most precisely how to interpret art 3(1) proposition, “shall be a primary consideration”. The problem lays in determining if the principle allows for the BIC to be

⁵⁶ See Eekelaar & Tobin *supra* note 6, at 96

⁵⁷ See Eekelaar *supra* note 50; see also R. H. Mnookin *supra* note 33

⁵⁸ See Vandenhole & Turkelli *supra* note 28, at 208

⁵⁹ Cfr. Eekelaar & Tobin *supra* note 6, at 96 “More specifically, this process must involve as a minimum a consideration of: a) the views of a child; b) the relevance of any other rights under the Convention or other international treaties; c) the views of parents or other persons involved in the child’s care; d) the individual circumstances of the child, including his or her developmental needs and any relevant social, religious or cultural practices; and e) any available empirical evidence of relevance”

⁶⁰ See Vandenhole & Turkelli *supra* note 28, at 209

⁶¹ *Id.* 216

⁶² Cfr. J. Eekelaar, The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism, in *International Journal of Law and the Family* 8 (1994). Here Eekelaar theorized how the only way to take a decision in the best interest of a child and at the same time recognise their position as rightsholder is to make them participate in the decision - *self-determinism* - and also give the possibility to review such decision in the course of time - *dynamic*.

⁶³ See Eekelaar *supra* note 50; see also Smyth *supra* note 44, at 99

⁶⁴ See Vandenhole & Turkelli *supra* note 28, at 216

balanced with other interests or not. Even the Committee's guidance on this paramountcy issue has been criticised for being contradictory, whereas it suggests "that these interests are to be both prioritized and subject to compromise".⁶⁵ However, it is arguable that prioritizing the BIC doesn't necessarily conflict with searching for a compromise with other interests. On the contrary, it can be said that following the approach proposed by Eekelaar, thus distinguishing between decisions "directly about" children and "indirectly affecting" them can provide a feasible solution to reconcile the two interpretations.

As previously mentioned, in decisions indirectly affecting children, the BIC's primary consideration is translated into the policymaker's duty to assess the impact of that decision on the children's interests. Being the issue only indirectly about children their interests should be "taken into account alongside other relevant matters"⁶⁶ but they may be overridden by other considerations. The principle's aim, in this case, is to assure that the children's interests and rights are not overlooked. On the other hand, whenever the decision's focus is directly about children, among the possible outcomes, the one that's best for the child should be selected. In this case, the BIC are the determinative consideration. Yet, even being the primary consideration both "chronologically"⁶⁷ and hierarchically, the BIC position is not absolute and other competing interests should be considered as well.⁶⁸ However, as Eekelaar warns, "it would be hard to contemplate any decision that would inflict harm on the child's interests".⁶⁹ Finally, in both kinds of decisions, it's important that how the BIC was balanced with other interests is displayed by the decision-maker in the outcome. The procedural dimension of the principle requires that despite the result, any decision concerning the child shows "that the child's best interests were [treated] as a primary consideration".⁷⁰

2.3. A child's rights-based model for the BID

This brief review of CRC Committee's GC n.14 and of the relevant academic debate on the BIC has helped to better define the characteristics of the BIC as a principle. In the light of these considerations, it's possible to answer the question asked earlier in this chapter, and in particular, try to understand if and how the BIC's vagueness can be curbed to reduce the space for manipulation and contestable uses of the principle.

As stated before, the principle's scope, as a children's rights principle, is promoting the conception of children as rightsholders who can exercise those rights according to their evolving capacities. Such scope must be reflected in the principle's application. Thus, while applying the BIC principle on a case-by-case basis, whatever is identified with the best interests of the child should always be in line with the principle's scope and reflect it. Yet, if one looks only at the substantive dimension of the principle, it's possible to establish if the principle was applied reasonably only *ex post*. If instead, one looks at

⁶⁵ See Eekelaar & Tobin *supra* note 6, at 96

⁶⁶ See Eekelar *supra* note 34 at 99

⁶⁷ See Smyth *supra* note 44

⁶⁸ D. Archard, Children's rights, in Stanford Encyclopedia of Philosophy 34 (2008)

⁶⁹ See Eekelar *supra* note 34, at 100

⁷⁰ See Eekelaar & Tobin *supra* note 6, at 96

the procedural dimension of the principle, it's possible to identify the elements that characterise a reasonable use of the principle *ex ante*. It's then by sketching a child's rights-based model of application of the principle that it becomes possible not only to reduce the space for manipulation but also to guide towards reasonable uses of the principle. Therefore, the principle's vagueness can be reduced, and the key to do it is the BID.

On this premise, this thesis argues that it's possible to build a model for a child's rights-based BID. The model can be used not only to guide *ex ante* the process of applying the BIC principle, but also *ex post* to evaluate how it was applied. Thus, it's then possible to point out the elements of the child's rights-based model for the BID, which will represent the main tool for the analysis conducted in the next chapters. However, facing the intrinsic indeterminacy of the principle and the wide array of contexts in which it can be applied, it's necessary to acknowledge the limits of this sort of model which can work only in arrowing down the context of its application. For the purpose of this work, in fact, the model is designed for the context of judicial decisions directly about children.

That said, referring to the terminology used by the Committee, the BID can be distinguished in into phases the BIC assessment and the balancing process that determines the final outcome of the decision. Thus, the structure of the child's rights based model for BID appears as follows:

1. BIC assessment phase: elements that shall be taken into account
 - a. The child's views on the matter
 - b. Relevant rights of the child under the CRC
 - c. The child's individual circumstances in connection with factual evidence
2. Balancing of competing interests phase:
 - a. Identify the competing interests through other rights-based considerations
 - b. Transparent disclose of the process in the final outcome

The assessment phase is aimed at identifying which outcome represents the child's best interests for that specific case. Three different elements should be taken into account for this purpose. The first element that should contribute to the BIC's identification are the child's views and wishes, which, in light with art. 12 should be "being given due weight in accordance with the age and maturity of the child".⁷¹ As pointed out by John Tobin, in opposition to welfare model who considers a child a passive object of protection, a child's right-based approach makes the child an active participant in the BID process.⁷² The second element to be addressed should be the relevant rights of the child under the CRC. In doing so, the matter of the decision will be necessarily framed in the context of the CRC, requiring the judge to acknowledge the strong and inextricable interconnection that links the different rights of the child. Then, the third and last element to be considered should be the individual circumstances of the child which would allow the judge to tailor the decision on a case-by-case basis. More precisely, the individual circumstances' assessment should be linked to factual evidence. An evidence-based assessment is – in the words of Tobin - essential "to mitigate the potential for judges to substitute their own subjective or speculative preferences as to what amounts to a child's best interest".⁷³

⁷¹ Art 12(1) CRC

⁷² J. Tobin, Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?, in *MelbULawRw* 33(2), at 591 (2009); cfr. Vandenhole & Turkelli *supra* note 28, at 216

⁷³ See Tobin *supra* note 72, at 592

Once the BIC have been assessed the following phase of the BID coincides with balancing the competing interests. The BIC should be a primary consideration, but to ascertain that they've been given more weight than the other considerations, the process should be characterized by two main features. First, the BIC should be weighed against other rights-based considerations and, second, the entire process should be disclosed with transparency together with its outcome. The need for balancing the BIC with other rights-based considerations has been expressed in the context of migration by both the CRC Committee⁷⁴ and the UNHCR in the "Guidelines on determining the best interests of the child". More precisely, the Guidelines point out how "the Convention does not, however, exclude balancing other considerations, which, if they are rights-based, may in certain rare circumstances, override the best interests considerations"⁷⁵. This thesis argues that conducting the balancing process among rights-based considerations is beneficial in every area and shouldn't be limited to migration. Moreover, by pointing out which and whose rights are at stake, the entire BID results to be more transparent and the risk of (ab)using the BIC as a trump card for interests other than the child's is reduced.

2.4. Conclusions

This chapter provided a broad description of the BIC as a concept as well as a principle in the framework of the CRC, by reviewing the Committee's GC. n.14, and the relevant academic literature. From GC n.14, the BIC principle, enshrined in art 3(1), emerges as an integrant part of the CRC that must be interpreted in the light of the Convention as a whole. The Committee's comprehensive analysis of art 3(1) offers precious directions in determining the elements and the procedures underlying the BIC determination, but it's not sufficient to reduce the principles' indeterminacy to the point of excluding possible misuse and paternalistic interpretations of the principle itself.

Thus, by looking further into the relevant academic debate the second section has defined the principle's scope as well as the BIC's meaning, and weight aiming to curb such indeterminacy and thus reduce the space for manipulation and contestable uses. From this analysis, it emerges that reasonable use of the principle is one that reflects the principle's scope, i.e. promoting the conception of children as rightsholders who can exercise those rights according to their evolving capacities. In particular, when applying the BIC principle in every decision-making process, the relationship between the child's best interests and her rights should be clearly disclosed in the decision's outcome. More precisely, the principle's scope should be reflected not only in its substantive but also in its procedural dimension which can be identified with the BID process.

On this premise, in the last section, a model for a child's rights-based BID is built. The model's is structured as follows:

3. Phase one: BIC assessment; elements that shall be taken into account
 - a. The child's views on the matter
 - b. Relevant rights of the child under the CRC
 - c. The child's individual circumstances in connection with factual evidence
4. Phase two: Balancing of competing interests:
 - a. Identify the competing interests through other rights-based considerations

⁷⁴ General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc CRC/GC/2005/6, para 86

⁷⁵ UNHCR Guidelines on Determining the Best Interests of the Child, 2008, at 76

b. Transparent disclose of the process in the final outcome

This model - which will represent the main tool for the analysis conducted in the next chapters - can be used not only to guide *ex ante* the process of applying the BIC principle, but also *ex post* to evaluate how it was applied.

3. The European Court of Human Rights and Children's Rights

To answer the main research question of this thesis - to what extent the ECtHR does effectively take into account and protect children's rights in Family Law disputes through the application of the BIC Principle – it will be necessary to analyse the ECtHR case law in the light of the model for a child's rights-based BID displayed in the previous chapter.

Prior to do so in, this chapter will provide the background necessary to understand children's rights position within the European Human Rights system and the role of the BIC in the European Court of Human Rights jurisprudence on family law. In particular, the first section will display the relationship between the ECHR and the CRC and how the ECtHR has taken on the role of protection and implementation of children's rights. Then, section two will focus on describing how the Court has made use of the BIC principle in its case-law under art 8 ECHR while also highlighting the problematic aspects emerging from it.

Due to the limited space of this thesis, it's necessary to narrow down the context of the research, which, in this case, corresponds to the ECtHR case-law on family law disputes concerning the recognition of parenthood established through adoption and surrogacy. Therefore, section three will display the reasons behind this choice as well as the characteristic of the selected case-law, which will be analysed in the following chapter.

3.1. The ECHR as a “living instrument” and its relationship with the CRC

The European Convention on Human Rights (ECHR) is the cornerstone of the European Human Rights system. The ECHR doesn't contain any provisions specifically focusing on children and yet, more than 60 years after its first signature the European Convention plays a key role in the implementation of children's rights.⁷⁶ The secret of its success, according to Claire Fenton-Glynn “lies not in its provisions [...] but in its enforcement through the European Court of Human Rights”,⁷⁷ which, since 1989, has interpreted those provisions in light of the CRC. In the next sections, the Court's main achievements and shortcomings in the protection of children's fundamental rights identified in literature will be pointed out aiming at better understanding the relationship between the ECHR and the CRC.

3.1.1. The ECtHR and the protection of children's rights: achievements ...

The ECtHR, especially through its case law, has managed to advance children's rights in State Parties by imposing procedural standards as well as substantive obligations in many different fields.⁷⁸ For instance, in the area of child protection, the Court has sketched a complex system of State obligations which scope goes beyond State actions and covers also those of private individuals.⁷⁹ In doing so, the

⁷⁶ J. Doek, *The Human Rights of Children: an Introduction*, in T. Liefwaard & U. Kikelly (eds), *International Human Rights of Children* 17 (2018)

⁷⁷ See Fenton-Glynn *supra* note 1, at 3

⁷⁸ *Id.* at 6

⁷⁹ For example, cases where the Court has found violations due to the State's failure to adequately respond to violence perpetrated on children by identified individuals like ECtHR, *Kontrová v. Slovakia*, Appl. no. 7510/04, May 2007 and ECtHR, *Eremia v. Moldova*, Appl. No. 3564/11, May 2013. See also C. O'Mahony, *Child Protection and*

Court has directly referred to the CRC multiple times. An example of this practice is the case CAS and CS v. Romania.⁸⁰ The case was about the investigation on allegation of violence and sexual abuse on a seven-year-old child. There, the Court, in identifying the State's procedural obligations under art 3 ECHR, has directly referred to the CRC, stating that it requires that "a series of measures must be put in place so as to protect children from all forms of violence which includes prevention, redress and reparation".⁸¹ The Court supported this conclusion by explicitly referring to CRC articles 19, 34 and 39 and to CRC Committee's GC. n.13 on the right of the child to freedom from all forms of violence⁸². It's important to clarify that the ECtHR cannot rule on violations of the CRC, and that, instead, it can interpret the articles of the ECHR in light of the CRC. Yet, it's arguable that by doing so, the Court has reinforced the CRC influence on State Parties.⁸³

The reason behind these positive results can be found in the ECtHR's use of two interpretative tools: the living instrument principle and the positive obligations doctrine. Following the first principle, the ECtHR dynamically interpreted the ECHR provisions reading them "in light of present-day conditions enforced" and "in line with newly adopted international standards".⁸⁴ In this way, accordingly to Fenton-Glynn, over time the ECtHR had been able to accommodate the ECHR framework to the new conception of children as holders of individual rights, leaving behind the "patriarchal understanding of their place in the family and society".⁸⁵ Hence, regardless of the lack of child specificity of its provisions,⁸⁶ the ECHR has become a medium to protect children's individual fundamental rights.

At the same time, the doctrine of positive obligations has allowed to Court to make the qualitative leap from mere recognition to actual enforcement of these rights. Under this doctrine, States must not only refrain from violating human rights but also have to take positive actions towards ensuring their enjoyment. Moreover, the Court has expanded the scale of this doctrine to the point that States are also responsible for protecting individuals "from infringement on the part of private actors".⁸⁷ This

the ECHR: Making Sense of Positive and Procedural Obligations, in *International Journal of Children's Rights* 7, at 662 (2019).

⁸⁰ ECtHR, CS v. Romania, Appl. No. 26692/05, March 2012

⁸¹ *Id.* para72

⁸² *Id.* para 52-53

⁸³ E. Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, in *New York Journal of International Law and Politics* 31 (1999);

⁸⁴ See Fenton-Glynn *supra* note 1, at 6

⁸⁵ *Id.*

⁸⁶ The absence of children in the ECHR is not necessarily a sign of their exclusion from the entitlement of fundamental rights. While the in the anglo- american tradition "children are the paradigmatic group excluded from traditional liberal rights" (M. Minow, Making all the difference. Inclusion, Exclusion and American Law 283, 1990) the European continental tradition on the contrary considers children as holders of human fundamental rights on par with all other human beings, see E. Lamarque, *Prima i bambini. Il principio dei best interests of the child nella prospettiva costituzionale* 34 (2016)

⁸⁷ See Fenton-Glynn *supra* note 1, at 5

special horizontal *Drittwirkung*⁸⁸ of the ECHR's provisions is extremely relevant for both children and their rights. In fact, children depend on others for most of their "day-to-day life"⁸⁹ but, through positive obligations, even if they are in the care of private actors, States are still responsible for the enjoyment of their rights.

3.1.2. ... and shortcomings

In contrast with what was previously said, the Court's approach toward children's rights has some noticeable shortcomings, both at substantive and systemic levels.⁹⁰ The main substantive issue can be described as a lack of consistency in the use of the CRC.⁹¹ First, the Court is not persistent in mentioning or following the CRC.⁹² Second, if it refers to the CRC, the Court will only recall some specific articles which can be linked to other ECHR provisions.⁹³ As a consequence of this almost tokenistic use of the CRC, the Court's approach lacks a coherent children's rights framework. Alongside this first issue, a second emerges from the fact that cases are presented to the Court through what Fenton-Glynn describes as an "adult-focused prism".⁹⁴ Even in light of the evolutive interpretation proposed by the ECtHR, the ECHR's main focus is still "the protection, and balancing, of the rights of everyone within a State's jurisdiction" instead of "strengthening and protecting children as holders of distinct individual rights".⁹⁵

Meanwhile, other issues stand out for having a negative impact also at a systemic level. First of all, the ECtHR is bound by the principle of subsidiarity to accept the determination of the facts of a case made by domestic authorities. Especially in cases where domestic proceedings don't respect the right of the child to be heard, it creates a huge obstacle to child participation and impairs children's possibility to express their views.⁹⁶ Second, as a corollary of the subsidiarity principle, the margin of appreciation doctrine represents another limit to the Court's range of action. Following this doctrine, the ECtHR recognizes a certain degree of discretion for domestic authorities in implementing the Convention. Usually, though, as highlighted by Eyal Benvenisti, "the less the court is able to identify a European-

⁸⁸ Italian Constitutional Court Judge and academic Emanuela Nvarretta, defines it as "improper horizontal *Drittwirkung*" due to the fact that individuals cannot challenge other private actors in front of the ECtHR but they can challenge the State in relation to those actions see E. Navarretta, *Costituzione, Europa e diritto privato. Effettività e «drittwirkung» ripensando la complessità giuridica* 149 (2017)

⁸⁹ See Fenton-Glynn *supra* note 1, at 5

⁹⁰ See Fenton-Glynn *supra* note 1, at 394

⁹¹ See O'Mahony *supra* note 79, at 661

⁹² *Id.* 662

⁹³ See Vandenhole & Turkelli *supra* note 28, at 209

⁹⁴ See Fenton-Glynn *supra* note 1, at 395

⁹⁵ ECtHR, *Strand Lobben v Norway*, Appl. No. 37283/13, September 2019, dissenting opinion, para 9

⁹⁶ This problem is aggravated by the fact that children cannot make an application in front of the Court, and a parent needs to apply on their behalf, see C. Fenton-Glynn, *Children, Parents and the European Court of Human Rights*, *European Human Rights Law Review* 6 (2019)

wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions".⁹⁷ This doctrine is often invoked in matters concerning family and children, an area where national values and legal traditions tend to be more diversified. Nevertheless, the effect of the doctrine's application in such areas can hold back "the progressive interpretation of children's rights"⁹⁸ and have a particularly detrimental effect on children from minorities, whose values are "hardly reflected in national policies".⁹⁹

3.2. The BIC in ECtHR family law jurisprudence

While engaging with children's rights, the ECtHR resorts to the BIC principle in many different areas. From juvenile justice to migration from property to family law,¹⁰⁰ the Court has assessed the interests of children in different ways, has weighed them against different interests and has given them a different level of consideration.¹⁰¹ Hence, the BIC should be examined in relation to a specific area because, as highlighted by the very same Court, it "cannot be understood in an identical manner irrespective of" the context of the case.¹⁰² Thus, for this work, the selected context is that of family law, and, more precisely, those situations that fall under art 8 ECHR and concern the right to private and family life, where the Court has done extensive use of the principle.

3.2.1. Art 8 ECHR and the BIC

It was actually about a claim brought under art 8 and 14 ECHR, that in 1979 the ECtHR explicitly refers for the first time to a child as a holder of Fundamental rights.¹⁰³ Since that pivotal case, the Court's jurisprudence on art 8 has expanded and so did the range of States obligations the Court found originating from that provision. Notwithstanding the specific matter – being it child protection, custody, access rights etc. –, references to the BIC principle can be found in the entire ECtHR case law on art 8 claims.

More precisely, art 8(1) recognizes the right to respect for private and family life, while art 8(2) set the threshold for the State to legitimately interfere with that right. Therefore, from art 8 comes primarily a negative obligation. In this case, when the alleged violation refers precisely to the right to family life, the Court will have to first establish the existence of family life, and only if that family life exists, it will evaluate if the State acted in accordance with the law, pursuing a legitimate aim and if the action was proportionate. Furthermore, as mentioned in the previous section, the Court has also identified positive obligations aimed at "the adoption of measures designed to secure respect for private life

⁹⁷ See Benvenisti *supra* note 83, at 851

⁹⁸ See Fenton-Glynn *supra* note 3, at 394

⁹⁹ See Benvenisti *supra* note 83, at 851

¹⁰⁰ See Vandenhole & Turkelli *supra* note 28, at 210

¹⁰¹ N. Ismaïli, Who cares for the child? Regulating custody and access in family and migration law in the Netherlands, the European Union and the Council of Europe 87 (2019)

¹⁰² ECtHR, X. v. Latvia, Appl. No. 27853/09, November 2011 para 100

¹⁰³ ECtHR, Marckx v. Belgium, Appl. No. 6833/74, June 1979, para 48

even in the sphere of the relations of individuals between themselves”.¹⁰⁴ In this second case the Court, once identified which are the interests at stake, will determine if the interests of the State and those of the individuals have been fairly balanced.¹⁰⁵

This distinction between obligations is reflected in the Court’s use of the BIC. According to *Vandenhole and Turkelli*, the Court “has identified two limbs to the best interests of the child [the] first is that ties with the family must be maintained” while “the second limb is to ensure that the child develops in a sound environment”.¹⁰⁶ However, each of these two interpretations has been used in both the context of negative and positive obligations. More precisely, concerning negative obligations, the Court refers to the BIC as a legitimate aim to justify the State interference in the right to family life.¹⁰⁷ Here the BIC is often used in opposition to parents’ rights, as, for instance, in child protection cases, where the BIC may justify domestic authorities’ interventions into the parent’s right to family life.¹⁰⁸ On the other hand, when it comes to positive obligations, the BIC is used by the Court in support of the child’s rights to family life and to private life.¹⁰⁹

3.2.2. BIC as protection of de facto family life

As mentioned in the previous section the first “limb” of the BIC accordingly to the ECtHR is maintaining family ties. However, it’s necessary to look into the Court’s definition of family to fully understand the meaning of the Court’s interpretation of BIC. As already said, the first step toward the evaluation of a claim related to the violation of the right to family life is to assess the existence of family life. Since *Marckx v Belgium* the Court has worked on defining the notion of “family life”.¹¹⁰ The area of family is one where European legal traditions diverge the most and the Court had “to strike a delicate balance between jurisdictions”.¹¹¹ So, while it couldn’t rely on a specific definition in the ECHR text or on the different classifications of domestic law, the Court developed an autonomous concept of family life.

To this extent, the Court has identified the “essential ingredient of family life” in the right to live together which promotes the harmonious flourishing of family relationships between family members who mutually enjoy each other company.¹¹² In doing so the Court adopted a functional approach: it

¹⁰⁴ Council of Europe: European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, para 8

¹⁰⁵ *Id.*; see also *Ismaili supra* note 101, at 24

¹⁰⁶ See *Vandenhole & Turkelli supra* note 28

¹⁰⁷ See *Lamarque supra* note 86, at 94

¹⁰⁸ See for instance cases concerning emergency measures in the field of child protection, *Fenton-Glynn supra* note 3, at 308 - 310

¹⁰⁹ See for instance ECtHR, *Gnavoré v. France*, Appl. No. 40031/98, September 2000, at para 59, concerning the applicants contact rights with his son; cfr. *Lamarque supra* note 86, at 95.

¹¹⁰ See *Marckx v. Belgium supra* note 26

¹¹¹ D. Lima, *The Concept of Parenthood in the Case Law of the European Court of Human Rights*, in K. Boele-Woelki & D. Martiny (Eds.), *Plurality and Diversity of Family Relations in Europe*, 102 (2019)

¹¹² See *Guide on Article 8 supra* note 104, para 292

reduced the question of the existence or non-existence of “family life” to a “question of fact, depending upon the existence of close personal ties”.¹¹³ Therefore, in the Court’s judgments, the emphasis is on the States obligation to preserve family ties, sometimes even before the full development of family relationships.¹¹⁴

The Court’s choice of looking for a *de facto* family life can be seen as the result of a compromise between the “living instrument” interpretation of the ECHR and the margin of appreciation doctrine. This factual notion can accommodate the dynamicity of societal changes, to which the area of family law is extremely sensitive.¹¹⁵ However, the fact that the Court defines the existence of family life based on “individual circumstances”¹¹⁶ instead of *de iure* requirements of domestic law may be perceived as an interference with the State’s sovereignty. Yet, the Court counterbalances its interference into the State’s policy by leaving to domestic authorities the choice on how to protect that *de facto* family life.¹¹⁷

3.2.3. Problematic aspects

Even if the Court seems to have been constant in interpreting the BIC as described in the previous paragraph, it’s noticeable how many authors and commentators have highlighted some problematic issues in relation to the Court’s use of the principle. Among those, two emerge more frequently. The first attains to what as been described in the previous chapter as the substantive dimension of the principle. This issue stems from the fact that the BIC is mentioned more as a general principle of international law rather than as a children’s rights general principle.¹¹⁸

As the Grande Chambre stated, “there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount”.¹¹⁹ And yet, if, on the one hand, the fact that the BIC has a life beyond the CRC proves its pervasive power, on the other, it generates some concerns about its capacity to pursue its scope. In particular, the risk is that the Court’s reasoning will focus on children’s interests instead of children’s rights. Thus, as Claire Fenton Glynn points out: “in contrast to the autonomy and individualism of rights-based claims, the language of ‘interests’ invokes paternalism and protectionism”,¹²⁰ especially when used in the context of an “adult-rights” convention.

¹¹³ *Paradiso and Campanelli v. Italy*, Appl. No. 25358/12, 24.01.2017, para 140

¹¹⁴ See *Ismaili supra* note 101, at 87

¹¹⁵ See *Lima supra* note 111, at 103; cfr. *Ismaili supra* note 101, at 40

¹¹⁶ see also *Ismaili supra* note 101, at 29; cfr *Lima supra* note 111, at 116

¹¹⁷ The width of such leeway is directly proportional to the width of the margin of appreciation, which left varies depending on the matter discussed. See *Guide on Article 8 supra* note 104, para 303

¹¹⁸ See C. Smyth, *supra* note 44, at 87

¹¹⁹ ECtHR, *Neulinger and Shuruk v. Switzerland*, Appl. no. 41615/07, June 2010, para 134

¹²⁰ See *Fenton-Glynn supra* note 96, at 7

The second issue pointed out by different authors, instead, pertains to the procedural dimension of the principle.¹²¹ As highlighted by Vandenhole and Turkelli, so far, the ECtHR has been inconsistent on multiple fronts when it comes to the BID: on which elements it takes into account in determining the BIC, on how much weight is given to the BIC¹²² and on providing “clarification or justification” for its application of the principle.¹²³ The Court fails to disclose the elements of its best interest determination and how they were weighted against each other. This lack of transparency in the use of the BIC was noticed even by Judge Nussberger, who blame the Court for using the principle as a “formule stéréotypée pour défendre d’autres intérêts”.¹²⁴ In the context of family, then, where many rights have a relational dimension, the non-rigorous use of the principle can easily bring to the promotion of adult’s rather than children’s rights.

3.3. Art 8 and the establishment of parenthood through adoption and surrogacy

In the light of these problematic aspects, the purpose of this work is then to understand to what extent does the ECtHR effectively take into account and protect children’s rights in Family Law disputes through the application of the BIC principle. Yet, due to the limited space of this work to test the Court’s use of the principle it’s necessary to identify a more circumscribed area of research inside the broader context of art 8 case-law. To this extent, the specific area of family law disputes concerning the recognition of parenthood established through adoption and surrogacy has been selected.

Among the vast ECtHR case law on article 8 and the right to private and family life the cases concerning adoption and surrogacy stand out for two main reasons. The first is the fact that these controversies while focusing on the recognition of parenthood impact directly on the child’s *status filiationis*. From the point of view of the adults involved, the recognition of parenthood falls under their right to family life. From the child’s perspective, the same issue has repercussions on both her right to private as well as to family life. The child’s *status*, in fact, is an essential element of both those rights. As the ECtHR has pointed out, the legal recognition of the child-parent relationship is part of her identity¹²⁵ and, as such, a core feature of her private life. Whereas from the perspective of her right to family life, the establishment of a certain *status* may either foster a potential family life or provide legal recognition of a pre-existing one.¹²⁶ Therefore, filiation inevitably intertwines the rights of the child with those of the parent(s) and it becomes difficult to determine where the former end and the latter begin.

¹²¹ Id.; see also M. Freeman, Commentary on the United Nations Convention on the Rights of the Child. Article 3 The Best Interests of the Child, Brill 12 (2007); see also M. Skivenes, and K. Søvig, Judicial Discretion and the Child’s Best Interests: The European Court of Human Rights on Adoptions in Child Protection Cases. In E. Sutherland & L. Barnes Macfarlane (Eds.), Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being, Cambridge 345 (2016)

¹²² The Court refers to the BIC weight with a wide variety of term, from, for instance, “must prevail” to “may override”. For the detailed analysis see Lamarque *supra* note 86, at 102,

¹²³ See Vandenhole & Turkelli *supra* note 28, at 215

¹²⁴ European Court of Human Rights (ECtHR), Mandet v. France, Appl. No. 30955/12, January 2016, dissenting opinion, para 7

¹²⁵ See Guide on Article 8 *supra* note 104

¹²⁶ See Fenton-Glynn, *supra* note 1, at 229

Meanwhile, the second reason why these cases stand out is that they require for the Court to assess how the State has balanced at least three different competing interests: those of the adults, those of the child and those of children in general. This is because, when it comes to adoption and surrogacy, the establishment of filiation is determined by rules made to protect not only the rights of the single child but also and primarily the rights and interests of children as a group.¹²⁷ Therefore, in these cases, whenever the ECtHR validates the existence of a family contrary to the State opinion, it ends up reshaping that triangular relationship of interests that exists between children, parents and the State.¹²⁸

3.4. Conclusions

This chapter briefly described the position of children's rights in the context of the ECHR. What emerges from the first section of this chapter is that the ECtHR has been able to succeed in the protection of children's rights by abiding by its own principles of interpretation and by using the CRC as a source of interpretation for the ECHR provisions. However, looking more closely at the area of family law, it's noticeable how those very same principles of interpretation represent a limit to its influence on domestic jurisdiction. Meanwhile, the second section looked at the Court's use of the BIC principle in the context of family law disputes under art 8 ECHR. From that, it appears that the Court refers to the principle both in the context of negative as well as positive obligations as a way to include children's rights in the balancing act under art. 8 to determine whether the children's or the parents' rights have been violated. Yet, some problematic issues in relation to the Court's use of the principle emerge according to the relevant academic debate on the matter.

Therefore, to further investigate the Court's use of the BIC principle and understand to what extent is the Court able to take into account and protect children's rights, a selected group of cases will be analysed through the lenses of the child's rights-based model for the BID described in the previous chapter. Using the model as a frame of reference will allow understanding not only what are the shortcomings in the Court's approach, but also to suggest how can the Court's approach be improved. Prior to do so in the next chapter, the last section of this chapter has been used to circumscribe the area of research inside the broader context of art 8 case-law. To this extent, the specific area of family law disputes concerning the recognition of parenthood established through adoption and surrogacy has been selected. In these cases, the Court faces the challenge to find a balance in the triangular relationship that links the interests of the child, the parents and the State while operating inside the boundaries of the margin of appreciation doctrine.

¹²⁷ N. Cantwell, *The Best Interests of the Child in Intercountry Adoption*, Innocenti Insight, Florence: UNICEF Office of Research 49 (2014)

¹²⁸ See Doek *supra* note 1

4. Establishing parenthood through adoption and surrogacy and the ECtHR: a test case for the Court's use of the BIC principle

This chapter provides an in-depth analysis of the ECtHR use of the BIC principle in a selected group of cases. The scope of this chapter is to test the Court's use of the principle against the model of a children's rights-based BID described in chapter two. To this extent, the chapter opens with an overview of the selected cases and then move to the analysis of the Court's BID. The findings are displayed following the structure of the model.

In particular, a first section focuses on the BID's phase one, i.e. the BIC's assessment. In doing so, the Court's practice regarding the following elements is described:

- a. The child's views on the matter
- b. Relevant rights of the child under the CRC
- c. The child's individual circumstances in connection with factual evidence

Then, a second section focuses on the BID's phase two, i.e. how the BIC is balanced against other interests. To this aim, it describes the Court's practice regarding the following elements:

- d. Identify the competing interests through other rights-based considerations
- e. Transparent disclose of the process in the final outcome

4.1. Overview of selected cases

To evaluate the ECtHR use of the BIC principle and test its compliance with a child's rights-based approach consistent with the CRC, thirteen cases have been selected. In these cases, the Court applies the BIC principle in addressing controversies surrounding the establishment of filiation as a result of intercountry adoption,¹²⁹ second-parent adoption,¹³⁰ kafala¹³¹ and international¹³² and domestic surrogacy.¹³³ While originating from very different factual matrixes, what's common to all these cases is the fact that they are all about the formation of legal family ties.

Moreover, a second common element to the selected cases is that in deciding them the Court deals with the interests of a child as an individual. Thus, they may all be described as "directly about a child", as opposed to cases "affecting children indirectly", like, for instance, cases dealing with the prohibition

¹²⁹ ECtHR, *Wagner and JMWL v Luxembourg*, No. 76240/ 01, June 2007

¹³⁰ ECtHR, *Chepelev v. Russia*, Appl. No. 58077/00, July 2007; ECtHR, *Elski v Austria*, No. 21949/03, January 2007; ECtHR, *Gas and Dubois v. France*, No. 25951/07, March 152012; ECtHR, *X and Others v Austria*, No. 19010/07, February 2013

¹³¹ ECtHR, *Chbihi Loudoudi and others v Belgium*, No. 52265/10, December 2014; ECtHR, *Harroudj v France*, No. 43631/ 09, October 2012

¹³² ECtHR, *A.M. v. Norway*, No. 30254/18, March 2022; ECtHR, *D v. France*, No. 11288/18, July 2020; ECtHR, *Foulon and Bouvet v. France*, Nos. 9063/14 and 10410/14, July 2016; ECtHR, *Menesson and Labassee v France*, Nos. 65192/11, 65941/ 11, June 2014; ECtHR, *Paradiso and Campanelli v. Italy*, Appl. No. 25358/12, January 2017

¹³³ ECtHR, *A.L. v. France*, No. 13344/20, April 2022

of single parent adoption¹³⁴ or the limitation of access to artificial reproduction for certain groups of people¹³⁵. Therefore, the selected cases, offer the possibility to see how the Court balances the interest of an individual child with the interests of children in general. In fact, the interests of children as a group are at the core of national policies on both adoption and surrogacy, and the laws regulating the establishment of the child's legal status reflect those interests.

Before proceeding with the cases' analysis, it's important to notice that in these cases the Court's assessment of the existence of family life plays a pivotal role in determining the interaction between the interests and also the rights involved. As pointed out in the previous chapter of this thesis, many authors have highlighted how the main task of the Court under art 8 is to protect family life from the interferences of the State and how, in so doing, the Court tends to refer to the *family* almost as it was a different subject from the individuals that the family is composed of.¹³⁶ Hence, while looking at the Court's application of the cases it will be necessary to understand also if and how the recognition of the existence of a family life impacts the Court's ability to single out the child's interests and balance them against the others. To this extent it will be important to notice also if and how the Court's perspective changes when the child is also an applicant of the case.

4.2. Cases analysis: The Court's BID

This section aims to examine the ECtHR practice of BID. To do so the thirteen cases were analysed by applying the model for a rights-based approach exposed in the first chapter of this work. In the following pages the results of this analysis are displayed by focusing first on the BIC assessment phase and then on the balancing process that determines the final outcome of the decision.

Before doing that, two preliminary considerations are necessary. First, it's important to highlight that the Court doesn't substitute itself for the domestic authorities, and instead it "reviews under the Convention the decisions taken by those authorities in the exercise of their power of appreciation".¹³⁷ So, the Court doesn't carry on the BID *ex novo*, but rather it assesses how it was conducted by the lower courts. Still, whenever the Court considers the domestic authorities BID to be inadequate it doesn't limit itself to acknowledge that, but it also indicates which would have been the outcome of a proper BID for that specific case. Second, in the group of selected cases, the BID is carried on sometimes in the context of positive obligations and sometimes in the context of negative obligations. Yet, the following analysis will not address them separately. In fact, the Court itself doesn't distinguish between the two for what concerns the balancing act, as "whether the question is approached from the aspect of a positive obligation of the State [...] the principles to be applied are quite similar".¹³⁸

¹³⁴ See for instance ECtHR, *Schwizgebel v. Switzerland* Appl. No. 25762/07, June .2010, or ECtHR, *E.B. v. France*, Appl. No. 43546/02, January 2008, or ECtHR, *Fretté V. France*, Appl. No. 36515/97, February 2002 To check

¹³⁵ See, for instance, prisoners' access to IVF in *Dickson v the United Kingdom*, Appl. No. 44362/ 04, April 2007 or same-sex couple's access to IVF in *SH and others v Austria*, Appl. No. 57813/ 00, November.2011

¹³⁶ See Lima *supra* note 111, at 106; Ismaili *supra* note 101, at 45; cfr. L. Lenti, «Best interests of the child» o «best interests of children»? , in *Nuova Giurisprudenza Civile Commentata* 3, at 161 (2010).

¹³⁷ *Harroudj v France*, *supra* note 131, para 45

¹³⁸ *Id.* para 43

4.2.1. Phase one: BIC assessment

To study how the Court conducted the assessment of the BIC, each judgment was reviewed to find if the Court referred to those elements that should be considered in identifying the child's best interests, i.e., the views of the child, the relevant rights of the child, and the individual circumstances of the child - possibly linked to any available factual evidence.

In general, while comparing all the thirteen cases, it's noticeable that only in one judgment out of thirteen all the three elements of the child's right-based model contribute to the Court's BID. In the majority of cases (8 out of 13) the Court determined the BIC of the child in connection with only two of the three elements, namely the child's relevant rights and the child's individual circumstances. While in the remaining four cases, it only referred to one of the three. The judgment where the ECtHR displayed the most comprehensive BID is *Elski v. Austria*¹³⁹ The following sections will separately display the findings related to each one of these elements. Prior to do that, it's useful to briefly describe the BID was conducted in that judgement.

In *Elski v. Austria* the Court had to establish if the Austrian authority's decision to allow the applicant's daughter to be adopted by the mother's new partner without his consent amounted to a violation of the applicant's rights under art 8. Without going into the merits of the decision, it's noticeable how the Court assessed the child's BIC. First, the Court, looking at both the Austrian Civil Code and the European Convention on the Adoption of Children,¹⁴⁰ identified two conflicting rights of the child, the "right to her biological father"¹⁴¹ as opposed to her "legal interest in consolidating and formalising de facto family ties with her adoptive father".¹⁴² Then it assessed the child's individual circumstances, namely the reality of her relationship with both the biological and the adoptive father.¹⁴³ The Court referred also to the child's opinion, namely that she saw the adoptive father as a parent and that she wanted to live with him.¹⁴⁴ Eventually, then, the Court held that the Austrian authority's adoption decision had been made in the child's best interest. *Elski v Austria* represents a good example of how the Court can conduct child-rights-based BID, yet it seems to be an exception rather than the rule.

4.2.1.1. Findings: The child's views on the matter

As previously mentioned, in the majority of judgments the Court determines the BIC referring only to the child's relevant rights and her individual circumstances. The aspect in which the Court is most lacking is the assessment of the child's views on the matter. Still, this shortcoming is not completely imputable to the Court's approach toward children's rights.¹⁴⁵

¹³⁹ *Elski v. Austria*, *supra* note 130

¹⁴⁰ *Id.* para 37

¹⁴¹ *Id.* para 30

¹⁴² *Id.* para 32

¹⁴³ *Id.* para 39

¹⁴⁴ *Id.* para 40

¹⁴⁵ See Smyth, *supra* note 44, at 91; Cfr. Ismaili *supra* note 101, at 26

As different authors have pointed out the reasons may be numerous. On the one hand, the child's views are not always included in the domestic proceeding that gives origin to the case. On the other, the child may be too young to express them. Another reason may be that the child may not be an applicant of the case, thus making it difficult for the Court to consider evidence coming from a non-party.¹⁴⁶ By contrast, the reason may be that the child is actually an applicant, as one of the parents has applied on her behalf. In this case, according to Fenton-Glynn, the risk is that when a parent stands also on behalf of her child, the views of the first overshadow those of the second.¹⁴⁷

However, it's not possible to reach some comprehensive conclusions drawing from the present cases' analysis because the Court took into account the child's views only in one out of thirteen cases, *Elski v. Austria*. Yet, it's interesting to point out that, in another three cases,¹⁴⁸ the Court referred to psychological reports which were used by national authorities to better understand the position of children in the matter. The common element of all these cases is that the child wasn't an applicant and her interests were conflicting with those of the parent who was the case applicant. Lastly, it's noticeable how the child's age doesn't seem to play a role in the absence of consideration of her views. In the majority of the cases, in fact, the child was between 12 and 17 years old and thus presumably capable of express her views.

4.2.1.2. Findings: Relevant rights of the child

For what concerns the child's rights, the Court mostly referred to the child's rights arising from art 8 ECHR, in line with the fact that the complaints are brought under that provision. Only in two of the 13 analysed cases the Court referred only to the child's interests without openly identifying which rights are at stake¹⁴⁹.

The Court practice fluctuates from generically recalling to the right to private and family life¹⁵⁰ to identifying more precisely the components of that right. On the one hand, in dealing with the right to family life it may distinguish the right to a *de facto* family life from the right to family life based on biological ties.¹⁵¹ On the other, when the child's right to private life is at stake the Court frames it in the perspective of the right to identity. In this case, the Court sometimes distinguishes the right to identity's substantive dimension from its procedural. While, for instance, in the *Menesson v France* judgment the Court pointed out the different substantive components of identity – biological ties, nationality, succession rights –,¹⁵² in *D v. France* the right to identity comprehended also the right to a quick and effective procedure for the recognition of the child-parent relationship.¹⁵³

¹⁴⁶ See Smyth, *supra* note 44, at 91

¹⁴⁷ See Fenton-Glynn, *supra* note 1 at 395

¹⁴⁸ *Chepelev v. Russia*, *supra* note 130; *Paradiso and Campanelli v. Italy* and *A.L. v France*, *supra* note 132

¹⁴⁹ See *Wagner and JMWL v Luxembourg* *supra* note 129 and *A.M. v Norway* *supra* note 132

¹⁵⁰ *A.L. v France*, *supra* note 132, par 56; *A.M. v Norway*, *supra* note 132, para 119

¹⁵¹ See *X and Others v Austria*, *supra* note 130, para 146; *Chepelev v. Russia*, *supra* note 130, para 26; cfr. *Paradiso and Campanelli v. Italy*, *supra* note 132, para 207

¹⁵² *Menesson and Labassee v France*, *supra* note 132, para 95, 97 and 98

¹⁵³ *Id.* para 62

4.2.1.2.1. *The CRC*

Even if it's often listed among the relevant sources of international law, the CRC rarely appeared as a part of the Court reasoning. As previously said the Court cannot rule on violations of the CRC but can still use it as an interpretative tool. However, among the selected cases, there is at least one example where the CRC provisions were integrated into the Court's reasoning.

The case is *Harroudij v. France*, where the Court was called to evaluate the refusal of permission for a French national *kafhil* to adopt the Moroccan child entrusted to her through judicial *kafala*. The reason behind the State's decision was the prohibition of adoption in the child's country of birth. The Court had to determine if the refusal amounted to a violation of the applicant's right to family life under art 8. In doing so, the ECtHR first stated that "the positive obligations that Article 8 lays on the Contracting States in this matter, they must be interpreted in the light of the Convention on the Rights of the Child". Then, it assessed if the child's status derived from the recognition of *kafala* from the French authorities¹⁵⁴ was actually allowing the child to enjoy her family life with the applicant¹⁵⁵ and her rights under art. 20 and 21 of the CRC.¹⁵⁶ The Court noticed that the recognition of *kafala* didn't create filial ties, nor conferred inheritance rights and or entitled the child to acquire the nationality or the surname of the guardian.¹⁵⁷ Yet the Court pointed out that the State provides alternative legal means to acquire those rights and the child was already benefitting from some of them. Eventually, the Court decided that the refusal was legitimately grounded on the child's best interests because the State recognition of *kafala* allowed the integration of the child without cutting her off the rules of her country of origin,¹⁵⁸ in line with art 20 CRC.

4.2.1.3. *Findings: Individual Circumstances*

Overall, it's noticeable how the Court is very consistent in stressing the need for domestic authorities to carry on a case-by-case determination of the BIC.¹⁵⁹ Such an approach requires for more than the mere repetition of what is considered to be the best interests of children in general and asks for an analysis of the individual circumstances based on available evidence. The Court's investigates the child's individual circumstances in 9 out of 13 cases.

A lack of any reference to the child's individual circumstances is noticeable in at least two different cases: *Gas and Dubois v. France* and *Chbihi Loudoudi et autres c. Belgique*.¹⁶⁰ There, the Court limited itself to acknowledge that the national court has taken into consideration the child's BIC without assessing if it was actually linked to factual evidence. As noticed by the dissenting Judges of *Chbihi*

¹⁵⁴ *Harroudj v France*, *supra* note 131, para 48

¹⁵⁵ *Id.* para 46

¹⁵⁶ *Id.* para 42

¹⁵⁷ *Id.* para 51

¹⁵⁸ *Id.* para 52

¹⁵⁹ *X and Others v Austria*, *supra* note 130, para 146; *Paradiso and Campanelli v. Italy*, *supra* note 132, para 210; *Gas and Dubois v. France*, *supra* note 130, para 62

¹⁶⁰ *Gas and Dubois v. France supra* note 130 and *Chbihi Loudoudi et autres c. Belgique supra* note 131

Loudoudi, the Court accepted the national authorities reasoning based on general assumptions without a proper “appréciation in concreto de l’intérêt supérieur de l’enfant”.¹⁶¹ without assessing if the general assumptions are applicable also to the circumstances of the case - Judge Villiger pointed out in his dissenting opinion of *Gas and Dobois* - “the judgment focuses on the adults, but not on the children”.¹⁶² This kind of BID seems to reflect more of a “welfare model”¹⁶³ approach rather than a child’s rights-based approach. In fact, not only the child was deprived of any active role in the determination of her own interests, but she wasn’t even considered as an individual subject.

On the contrary in the majority of cases the Court paid attention to the child’s individual circumstances of the child. In doing so it’s visible how different factors are considered when determining more or less explicitly the individual child’s best interests. A similar approach seems in line with the one proposed by the CRC Committee in GC n.14.¹⁶⁴ However, the Court’s assessment varies in terms of different levels of depth and precision. Comparing the cases where the Court’s assessment was more superficial with those in which it was more thorough, two different factors seem to influence the Court’s assessment: the nature of the child’s right at stake and the Court’s own jurisprudence.

4.2.1.3.1. *The nature of the child’s rights*

The first factor seems to be individual or relational nature of the right at stake. On the one hand, when the Court’s had to evaluate a potential breach of the right to family life the Court’s assessment rotates mainly around determining if a *de facto* family life exists vis a vis the presence of other relevant relationships (legal or biological). In these cases, though, whenever the child was an applicant her right to family life becomes indistinguishable from those of the other applicants who “enjoy family life together”.¹⁶⁵ The Court had to evaluate the alleged breach of a child’s right, and yet, because that right was interconnected with the right of the other family members, the Court’s judgment reduced the level of attention reserved to the child individual circumstances. By contrast, a more child-specific analysis was conducted when the right to family life of the applicant is weighed against the child’s right to family life.¹⁶⁶ There the child’s interests were addressed individually and so were her rights.

The same level of specificity is noticeable also when the child’s right to private life is the Court’s main concern.¹⁶⁷ This is particularly evident in cases about surrogacy. There the parent-child relationship cannot be recognised on the basis of an existing *de facto* family life because that would amount to legitimate an unlawful practice. For this reason, the Court approached the issue from the child’s private life perspective. In so doing, the Court didn’t simply assess the presence of biological ties with the parent, but rather looked further into the various elements which constitutes the child’s right to identity.

¹⁶¹ Chbihi Loudoudi and others v Belgium, *supra* note 131, Common Dissenting Opinion of Judges Karakaş, Vučinić et Keller, para 9

¹⁶² Gas and Dubois v. France, *supra* note 130, Judge Villiger Dissenting Opinion

¹⁶³ See Tobin *supra* note 71, at 590

¹⁶⁴ GC 14, para 61

¹⁶⁵ X and Others v Austria, *supra* note 130, para 146

¹⁶⁶ Cfr. Elski v Austria, *supra* note 130 and Paradiso and Campanelli v. Italy, *supra* note 132,

¹⁶⁷ Cfr. Mennesson and Labassee v France and Paradiso and Campanelli v Italy, *supra* note 132, for two examples of equally in depth analysis in a case where children are also applicant and one where the child is not

4.2.1.3.2. *The influence of the Court's own jurisprudence*

Finally, a third element which may influence the degree of specificity of the Court's assessment of individual circumstances it's the Court's own jurisprudence. It is, in fact, noticeable in at least three different groups of cases which share the same factual matrix¹⁶⁸ that, even if the ECtHR is not bound to follow her own precedents, it tends to do it. While this allows for the Court case law to maintain a certain coherence, it may reduce the accuracy of the Court's evaluation of the individual case. This is visible, for instance, in cases about the Sates' refusal to permit the adoption of the child by her *kafhil*. In the first of the two cases on the matter, *Harroudj*, the Court displayed a thorough evaluation of the child's individual circumstances based on factual evidence.¹⁶⁹ Meanwhile, in *Chbihi Loudoudi* the Court repeated the same conclusions of the *Harroudj*, without acknowledging the specificities of the individual context of the child, like, for instance, the difference in the effects of the recognition of kafala in the two States, France and Belgium.¹⁷⁰

A similar pattern is noticeable also in surrogacy cases where the Court, while relying on the *Mennesson* jurisprudence, have been carrying on a less and less accurate inquiry into the child's individual circumstances.¹⁷¹ In this line of judgments, it clearly emerges that what the Court determined to be the best interests of a child is now held to be in the best interests of *children in general*. Lastly, it's also noticeable that in this area the Court has provided her first Advisory Opinion, which gave it the possibility to explicitly assess and determine the best interests of children born via surrogacy in relation to the recognition of their relationship with the parents.¹⁷²

4.2.2. Phase two: Balancing the competing interests

Once the first phase of BID is complete and the BIC has been assessed, the child's interests must be balanced with the other interests involved in the decision. In matters concerning art 8 ECHR the ECtHR has to establish if the domestic authorities have struck a fair balance "between the competing interests of the individual and of the community as a whole".¹⁷³ To study how the Court conducted this second phase, each judgment was reviewed to find if the Court's approach reflects the two key

¹⁶⁸ See international surrogacy such *Mennesson and Labassee v France*, *Foulon and Bouvet v. France*, *Laborie C. France* *supra* note 125; see also cases about second parent adoption without consent of the biological father *Elski v Austria* and *Chepelev v. Russia*, *supra* note 130; and cases about the State's refusal of adoption for children in *kafala* care *Harroudj v France* and *Chbihi Loudoudi*, *supra* note 131

¹⁶⁹ *Harroudj* *supra* note 131, para 51

¹⁷⁰ *Chbihi Loudoudi and others v Belgium*, *supra* note 131, Common Dissenting Opinion of Judges Karakaş, Vučinić et Keller

¹⁷¹ Cfr. *Mennesson and Labassee v France*, para 81-101 and *Foulon and Bouvet v. France*, para 55-58, *supra* note 132; see also *Laborie C. France*, No. 44024/13, January 2017, decided by the Fifth section of the ECtHR Committee

¹⁷² European Court of Human Rights (ECtHR), Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Request No. P16-2018-001, April 2019

¹⁷³ *Harroudj v France*, *supra* note 131, para 42

features of a child rights-based BID. In particular, if the BIC has been weighed against other rights-based considerations and if such balancing process has been disclosed with transparency together with its outcome.

The findings related to this second aspect of the BID will be displayed as follows: a first section will be focused on the Court's identification of other rights-based considerations; then two different sections will focus on the way through which the Court displays the balancing process distinguishing between the cases where the Court displayed a clear balancing process from those where the Court lacked transparency and clarity.

4.2.2.1. Findings: Right-based considerations

The selected cases are distinguished by the presence of two different groups of interests, other than those of the child: private and public interests. Overall, it's noticeable that the Court was able to translate the private interests at stake into right-based considerations. Being the applicants' interests, in fact, they are usually identified with the allegedly violated rights. By contrast when it comes to public interests, the Court kept referring as the States had framed them. Thus, instead of rights-based considerations, the State's interests are identified, for instance, as the protection of "children against illicit practices"¹⁷⁴, or as the protection of "health and morals" and "rights and freedoms" children,¹⁷⁵ or the principle of "indisponibilité de l'état de personnes".¹⁷⁶

Yet, it's interesting to notice that in only one case of the selected cases, the Court had contested the State's definition of public interests. The case is *X and others v. Austria* and it concerned the Austrian courts' refusal to grant the adoption of a child to the same-sex partner of the child's mother. In particular, the applicants complained that they had been discriminated compared with unmarried different-sex couples and their right to family life was violated. The State justified the difference in treatment with the protection of family "in the traditional sense"¹⁷⁷ based on the assumption that it was in the BIC to grow in a traditional family. The Court established that "protecting the family in the traditional sense is rather abstract"¹⁷⁸ and because of that it wasn't enough to justify the differentiated treatment.

4.2.2.2. Findings: Clear balancing process

In the majority of cases - 9 out of 13 - the Court disclosed with transparency all the steps of the balancing process. To make easier the exposition of the findings, in the following subsections, the Court practice will be discussed distinguishing the cases where children are applicants together with their parents - 4 out of 9 - from those cases where the adults are the only applicants -5 out of 9.

The reason for this distinction lays on the fact that in these two groups the interaction among the interests of children and those of their parents is structured differently. Under art 34 of the Convention

¹⁷⁴ *Paradiso and Campanelli v. Italy*, supra note 132, para 202

¹⁷⁵ *Wagner and JMWL v Luxembourg*, supra note 129, para 126

¹⁷⁶ *Mennesson and Labassee v France*, supra note 132, para 82

¹⁷⁷ *X and Others v Austria*, supra note 130, para 19

¹⁷⁸ *Id.* 139

individuals can file complaints against States, thus in controversies discussed in front of the ECtHR the applicant's private interests are held against the State's public interests. However, in cases about the recognition of parenthood the interests of the child may be either aligned with the ones or with the others. When the adults are the only applicants, their interests are usually considered in opposition to those of the child. While, when children and adults together figure as applicants their interests are on the same side, opposed to those of the State.

4.2.2.2.1. *Adult applicants*

In 5 of the cases where the Court displayed a clear balancing act, the claims are brought by adults who, because of biological or *de facto* ties with the child, are or aspire to be recognized as the child's parents. Here, the Court evaluates the potential breach of the adults' rights against the State interests. However, the State's interests are on the same side of those of the child as both are in opposition to the parents. Moreover, it's possible to say that the State interests coincide with both those of children as a group and those of the individual child. On the one hand, because children's interests represent the *ratio* behind rules on recognizing parenthood. On the other, because the domestic authorities are supposed to have applied that general rule having assessed that it was in the child's best interests.

In these cases, the process of balancing the competing interests is clearly visible through the Court's reasoning. The various steps of the process are disclosed transparently, and, looking more closely, it's noticeable how the Court followed a similar pattern in each judgment. First, it identified the public interests by highlighting how the domestic law or policy serves the interests of children as a group.¹⁷⁹ Second, it pointed out which are the private interests at stake, which usually are "those of the child on the one hand and those of the applicants on the other".¹⁸⁰ The Court then assessed which interests were given more weight and if, in the balance, "particular importance"¹⁸¹ was attached to the child's best interests.

A clear example of this line of reasoning is offered by *Paradiso and Campanelli v. Italy*, where the Court not only clearly disclosed every passage of the balancing process, but it also pointed out the weight of each interest. The case concerned the non-recognition of parenthood of a child born in Russia following a surrogacy agreement, entered into by an Italian couple. The Italian State refused to recognize their parenthood, as established by the Russian authorities, and, due to the lack of any biological ties between them and the child, the State placed the child in the care of social services. The applicants claimed that both these measures violated their rights under art 8 ECHR.

In the balancing process of *Paradiso and Campanelli*, the Court first focused on identifying the public interests pursued by domestic authorities. It found that the State acted in the interests of children as a group, or more precisely, to "protect children against illicit practices, some of which may amount to human trafficking".¹⁸² Then, it stated that even if family life did not exist between the applicants and the child, however, the applicants', as well as the child's, right to private life was at stake. The Court

¹⁷⁹ *Elski v Austria*, *supra* note 130, para 32; *Harroudj v France*, *supra* note 131, para 49; *A.L. v. France* *supra* note 133 para 49;

¹⁸⁰ *Paradiso and Campanelli v. Italy*, *supra* note 132, 205; *Harroudj v France*, *supra* note 131, para 37; *Elski v Austria*, *supra* note 130, para 42; *A.L. v. France* *supra* note 133 para 56 and 58

¹⁸¹ *Elski v Austria*, *supra* note 130, para 35; *Chepelev v. Russia*, *supra* note 130, para 27

¹⁸² *Paradiso and Campanelli v. Italy*, *supra* note 132, para 202

acknowledged that the child wasn't an applicant but that, being the decision about him, his BIC should nonetheless be the primary consideration, as required by art 3 CRC.¹⁸³ To this extent, the ECtHR pointed out that the domestic court "assessed the impact which the separation from the applicants would have"¹⁸⁴ before determining that it wasn't in the child's best interests to continue his relationship with the couple. Instead, according to the domestic court, the child's BIC aligned with those of the children in general. For this reason, it decided to not legalise "the unlawful situation created [...] as a *fait accompli*" and instead take "measures with a view to providing the child with a family in accordance with the legislation on adoption".¹⁸⁵ Eventually, the ECtHR endorsed the Italian authorities' balancing of interests by noticing how "the public interests at stake weigh heavily [...] while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child".¹⁸⁶

4.2.2.2.2. *Child and adult applicants*

Four of the selected cases arise from complaints brought by children together with those adults who are or aspire to be recognized as their parents. In these cases when the claims are related to the breach of the right to family life, the interests of parents and children are aligned against those of States. Meanwhile, if the child's right to private life is at stake her interests are directly opposed to those of the State, which conversely represents those of children in general.

In these cases, the Court's process of balancing the competing interests is clearly visible throughout the Court's reasoning. As for the previous group of cases, it's possible to notice that the Court follows a similar pattern in each judgment. First, it identifies the public interests by highlighting how the domestic law or policy serves the interests of children in general. Second, it identifies the private interests at stake but, differently from the previous group, it distinguishes the interests of the family from the interests of the child as an individual¹⁸⁷. Last, the Court assesses separately how each of the two kind of interests were weighed against the public ones.

This line of reasoning is visible, for instance, in the *Mennesson and Labassee v. France* judgment. In this pivotal case the applicants were two couples of French nationals and their children born in the US via surrogacy. France refused to grant legal recognition to parent-child relationships legally established in the US between the children and the couples. Therefore, the applicants claimed the State action amounted to a violation of their rights under art 8 ECHR. In the balancing process, the Court first identified the public interest pursued by domestic authorities. These interests coincided with the principle of "indisponibilité del'état des personnes de leur faire produire effet au regard de la filiation".¹⁸⁸ Then it conducted two separate balancing acts. First, it balanced the public interests against those of the applicants in relation to the right to family life which they all enjoy.¹⁸⁹ Then it

¹⁸³ Id. para 208

¹⁸⁴ Id.

¹⁸⁵ Id. para 209

¹⁸⁶ Id. para 215

¹⁸⁷ *Mennesson and Labassee v France*, *supra* note 132, para 86

¹⁸⁸ Id. para 82

¹⁸⁹ Id. para 87

balanced the public interests against those of the child applicants, in particular those related to their right to identity.¹⁹⁰ As a result, the Court stated that while in the first case public interests could legitimately prevail over the family's, they couldn't take precedence over those of the child which must be the primary consideration.¹⁹¹

4.2.2.3. Findings: Unclear balancing process

As previously mentioned, in four of the studied cases the Court's approach doesn't follow a particular the pattern and the balancing process seems to lose coherence. It's then useful to briefly report the problematic aspects of the Court reasoning.

In two cases *Wagner and JMWL v Luxembourg* and *Chbihi Loudoudi et autres c. Belgique*, the Court doesn't clearly distinguish the child's interests from the other involved. On the one hand, in *Wagner* the child's interests are not addressed separately from those of her mother. On the other, in *Chbihi Loudoudi*, the child's interests are not distinguished from those of children in general. In particular, in *Wagner and JMWL* the Court established that the State's refusal to enforce a full adoption order by a Peruvian court in favour of a single woman amounted to a violation of the applicants' – the woman and the adopted child – right to family life, as it stands against the BIC¹⁹². However, in the BID the Court didn't link the child's interests to her relevant rights. Therefore, the Court ended up assigning the same "paramount"¹⁹³ consideration to both the child and the mother's interest.

Meanwhile, in *Chbihi Loudoudi*, the Court confirmed the State decision to not grant the adoption of a child placed in *kafala* care. The Court found that the BIC were "la principale considération des juridictions belges dans l'évaluation des intérêts concurrents en présence"¹⁹⁴. Yet, it's noticeable that, as mentioned in the previous section, the Court's BID didn't consider the child's individual circumstances. While merely assuming that the child's BIC coincided with those of children as a group, the Court seems to make the latter surreptitiously prevail over the former.

A different problem emerges from analysing the Court's reasoning in *A.M. v. Norway*. In this case the applicant complained that the State violated her rights under art 8 by refusing to acknowledge her legal parenthood established in the USA over the child born via surrogacy. At first the Court pointed out that the only private interests at stake are those of the applicant as the case did "not relate to any rights of the child, X, under Article 8 of the Convention".¹⁹⁵ The reasoning, then, focused solely on the adult applicant. However, in the final passage of the Court's balancing of the conflicting interests, the BIC appears to be the decisive consideration. In fact, the Court endorsed the domestic decision because it "concluded that X's best interests did not require that the applicant's claims should be granted".¹⁹⁶

¹⁹⁰ Id. para 96-99

¹⁹¹ Id. para 82 and 101

¹⁹² *Wagner and JMWL v Luxembourg*, *supra* note 129, para 146

¹⁹³ Id. para 133

¹⁹⁴ *Chbihi Loudoudi et autres c. Belgique*, *supra* note 131, para 97

¹⁹⁵ *A.M. v. Norway*, *supra* note 132, para 127

¹⁹⁶ Id. para 134

In the light of these findings, it's noticeable one common element, overall, to the cases where the Court's balancing process lacked clarity. In all of them the Court didn't carry out a proper BIC assessment. This group of cases, in fact, corresponds to those where the Court determined the child's best interests in relation to only one of the three elements required by the model of child's rights-based BID. The correlation between the two phases of the procedural dimension of the BIC principle becomes then evident, especially when looking at how an inaccurate assessment is reflected in an inaccurate balancing of the interests involved. This balancing phase requires the BIC to be properly identified and isolated from the others, otherwise, the primary consideration that is reserved to them will be inevitably given to either those of the parents or those of the State.

4.3. Conclusions

This chapter provided an analysis of the ECtHR application of the BIC principle in 13 selected cases concerning the recognition of parenthood through adoption and surrogacy. the Court's use of the principle against the child's rights-based model of BID described in chapter two.

In doing so, each judgment was first reviewed to find if the ECtHR has referred to those elements that characterise the first phase of the BID and that should be considered in the BIC's assessment: the views of the child, the relevant rights of the child, and the individual circumstances of the child - possibly linked to any available factual evidence. Overall, it emerges that only one judgment out of thirteen is in line with the model, as, there, all the three elements are present. Instead, in the majority of cases (8 out of 13) the Court assesses the BIC in connection with only two of the three elements. These are the child's relevant rights and the child's individual circumstances, while the child's views on the matter stems as the less represented element. By contrast, in the remaining four cases, almost a third of the total, the Court's assessment is based on only one of the three elements that should be present in a child-rights based BID.

Then, to study how the Court conducted the second phase of BID, each judgment was reviewed to find if the key features of the model's phase two - the balancing of competing interests - were present. In particular, the analysis aimed at understanding if the BIC was weighed against other rights-based considerations and if such balancing process was disclosed with transparency. Overall, it appears in the Court's identification of the competing interests, only the private ones are framed into rights-based considerations. Then for what concerns the clarity of the balancing process, in two thirds of the total cases the Court displays with transparency its various steps, which changes according to the presence or not of the child among the case applicants. While in a third of the total cases, the Court's reasoning lacks clarity and transparency.

In the light of the reported findings, it is arguable that although all the elements of the child rights-based model can be found throughout Court's case-law, it's use of the BIC is not completely in line with the model. In particular, the lack of consideration of the child's views has a negative impact on the position of the child which tends to be perceived as a passive object of the proceeding instead of an active subject. Moreover, the inconsistent use of factual evidence in the evaluation of the child's individual circumstances makes the Court assessment more generalised and less individualised. Finally, it's noticeable how an improper assessment of the child's best interests has the direct consequence of flawing the BID's second phase, which is the balancing of interests. In the next chapter, first the main problems emerging from the Court's approach towards the BID will be identified. Then, recommendations will be given on how the Court could overcome them while aligning its practice to the child's rights-based model of BID.

5. Conclusion, Main Findings and Recommendations

The starting point of this work is that the BIC principle is a powerful instrument which should be handled carefully, especially in the hands of an international human right body as the ECtHR. Its indeterminacy, as well as the vagueness of its formulation, are necessary to make the principle flexible and applicable “in all actions concerning children”. Yet, these very same characterises make the principle an easy prey to contestable uses. Thus, this work aimed to what extent the ECtHR does effectively take into account and protect children’s rights in Family Law disputes through the application of the BIC principle.

To this aim, chapter two provided a broad description of the BIC as a concept as well as a principle in the framework of the CRC. It’s possible to conclude that the CRC Committee has provided precious guidance on art 3(1) and how to harmoniously interpret the BIC principle in the context of the CRC and. However, since the principle has obtained the status of general principle of international law, the Committee words are not enough to avoid misuses of the principle. Nonetheless, paired with the relevant academic debate on the BIC they can be used as basis to sketch a child’s rights-based model for the principle’s application.

In the light of what emerges from chapter one, it’s arguable the BIC principle’s scope is to promote children as rightholders and children’s rights as fundamental human rights. Therefore, a reasonable use of the principle is one that reflect that same scope, not only in it’s substantive but also in its procedural dimension. More precisely, in the first chapter is argued that the procedural dimension of the principle coincides with what the Committee define as BID. On this premises, a model for a child’s rights-based BID is built. The model can be used not only to guide ex ante the process of applying the BIC principle, but also ex post to evaluate how it was applied. This thesis makes use of it in its second meaning, or else as a standard to test the ECtHR approach to the BID.

The model’s is structured as follows:

1. Phase one: BIC assessment; elements that shall be taken into account
 - a. The child’s views on the matter
 - b. Relevant rights of the child under the CRC
 - c. The child’s individual circumstances in connection with factual evidence
2. Phase two: Balancing of competing interests:
 - a. Identify the competing interests through other rights-based considerations
 - b. Transparent disclose of the process in the final outcome

Prior to the application of the model, chapter three offered the necessary background to understand the position of children’s rights and the role of the CRC in the context of the ECHR. It appears that in the European Human Rights framework the ECtHR has been able to promote children’s rights not only in its own case-law but also in State Parties. In particular the Court has been able to succeed in the protection of children’s rights by abiding by its own principles of interpretation and by using the CRC as an interpretative tool. Yet, when it comes to the Court’s use of the BIC it’s possible to conclude that the Court resorts to it on regular basis but by mentioning it as a general principle of international law rather than a children’s rights general principle. Once decontextualised the risk is that the BIC will not fulfil its scope of promotion of children as fundamental rights holders and will relegate children and their rights in a subordinate position instead. This risk is particularly tangible in the context of family law disputes under art 8 ECHR where the children’s interests are strictly intertwined with those of the other member of the family.

Therefore, to test the capacity of the ECtHR to protect children's rights through the use of the BIC principle, in chapter three a specific area of family law was chosen to test the Court's BID. The chosen area is that of the disputes concerning the recognition of parenthood established through adoption and surrogacy has been selected. In these cases, the Court deals with both the protection of the child's family life and the establishment of those very same family ties. In doing so it faces the challenge to find a balance between the interests of the child, the parents and the State, which represents the interest of children in general.

Once selected the cases, chapter four displayed the analysis conducted through the application of the BID model proposed in chapter two. By studying the Court's case-law it's noticeable how the Court's approach to the BIC principle's application is not fully in line with a child's rights-based model. It's possible to conclude that while all the elements of the model are present at least once throughout the analysed case-law, the Court is not consistent in their use. Yet by highlighting its shortcoming it is possible to identify ways to change such approach toward a more coherent use of the principle which could ultimately promote the idea of children as fundamental rights holders.

4.1 Problematic aspects of Court's use of the BIC principle

In the light of the conclusions exposed at the beginning of this chapter it's possible to better identify the main problematic aspects of the Court's approach. In reviewing the ECtHR's use of the BIC principle, one overarching issue that affects almost all judgments is clearly noticeable: the lack of reference to children's rights enshrined in the CRC. While the Court mentions the CRC as a source of interpretation for the ECHR provisions, it does not interpret art 8 ECHR in the light of the child's specific rights provided by the CRC. Yet, comparing the various judgments, it appears that the Court while referring to the child's right to family life, it's implicitly assigning different meanings to that right.

However, Different concepts of family life, not only *de facto* family life but also family life based on biological ties, originate different rights which may be conflicting with one another. For instance, the child's right to family life as right to maintain ties with biological parents may conflict with the child's right to family life as right to legal recognition of ties with social parents. However, to draw a distinction between the two is left to the reader, as the Court doesn't always point out which exact variations of the right to family life are at stake. Rarely the Court gives an account of how this possible conflict of rights impacts on the BID, and instead most of the time it refers only to the broad umbrella term of right to family life.

A second issue, that emerges from the analysis of the Court's approach toward the BIC is that the child almost never figures as an active participant in the proceeding. In the Court's assessment of the child's individual circumstances, the child's views are mostly absent. If, on the one hand, it's necessary to acknowledge that the Court has limited capacity in hearing the child, on the other, it's noticeable how the Court never question the lack of participation of the child to the domestic proceedings. The passive role of the child in the Court's determination of her best interest is then visible from both a substantive and a procedural dimension.

These two issues that affect the Court's BID have negative repercussions on the balancing and weighing phase of the application of the principle. A vague definition of the child's rights at stake brings to a vague definition of what corresponds to the child BIC. Especially when the Court determines the child's BIC only in relation to the broad child's right to private or family life, without clearly addressing the specific meaning pertaining to that case, due to the relational nature of the rights at stake, the child's interests cannot be distinguished from those of the parents. Moreover, because the BID does

not take into account the child's views and opinions the Court tends to reach the conclusion that they are in line with those of children as a group which are protected by the States' policies. The lack of a proper child's right-based BID compromises the outcome of the balancing process which is flawed by the fact that whatever weight is the Court's assigning to the BIC is also covertly assigning to either the parents or the State's interest.

4.2. Recommendations

Based on the child's right-based model of application of the BIC principle is possible to identify four main recommendations for improving the ECtHR's use of the BIC principle.

- Integrating the BID with the relevant rights of the Child enshrined in the CRC
- Integrating the BID with express reference to the child's views
- Assessing the child's individual circumstances possibly based on factual evidence
- Displaying in the outcome of the balancing of interests process not only how it promotes the BIC but also how it affects the other interests at stake

Each of them will be described in the following subsections

4.2.1 Integrating the BID with the relevant rights of the Child enshrined in the CRC

The first recommendation is for the Court to integrate the BID by interpreting art 8 in the light of the with the relevant rights of the Child enshrined in the CRC. The CRC, in fact, display a whole set of rights which may be used to frame the different variations of the right to private and family life under art 8 ECHR. In particular, it's noticeable that while the hole UN Convention "attaches great value to the protection of family unity"¹⁹⁷ at least two different articles come into play to address the child's right to family life: art 9 and art 16. The latter can be described as the children's rights translation of art 8 ECHR¹⁹⁸ as it guarantees the protection from the "arbitrary and unlawful State interference" with the child's "privacy, family, home or correspondence".¹⁹⁹ Whereas the former addresses more specifically the child's right to maintain "personal relations and direct contact with both parents".²⁰⁰ In the meantime, the CRC protects also the child-parent relationship in the perspective of the right to identity. More precisely, while art 7 contains the child's right to *acquire* her identity, art 8 refers to the right to *preserve* that same identity.²⁰¹ Furthermore, both articles highlight the elements of identity which include nationality, name and family relations.

¹⁹⁷ W. Vandenhoe, 'Article 9: Separation from parents,' in *Children's Rights: A Commentary on the CRC and its Protocols*, edited by Wouter Vandenhoe, Gamze Erdem Türkelli and Sara Lembrechts, Edward Elgar, 113 (2019)

¹⁹⁸ W. Vandenhoe, 'Article 16: The right to privacy,' in *Children's Rights: A Commentary on the CRC and its Protocols*, edited by Wouter Vandenhoe, Gamze Erdem Türkelli and Sara Lembrechts, Edward Elgar, 185 (2019)

¹⁹⁹ Art 10(1) CRC

²⁰⁰ Art 9(1) CRC

²⁰¹ W. Vandenhoe, 'Article 8: Preservation of identity,' in *Children's Rights: A Commentary on the CRC and its Protocols*, edited by Wouter Vandenhoe, Gamze Erdem Türkelli and Sara Lembrechts, Edward Elgar, 108 (2019)

That said, the ECtHR should use these children's rights as "signposts for identifying what is in the best interests"²⁰² in the context of art 8 ECHR. A consistent use of the CRC provisions may have the positive twofold effect of determining with more accuracy the interests at stake while treating children as holders of individual and specific fundamental rights. Moreover, it's noticeable how the Court is already familiar with this practice not only in other contexts - such as child protection and children in the justice system -²⁰³ but also in the analysed cases. In the two cases concerning *kafalah*, in fact, the child's rights are framed through art 20 and 21 of the CRC.²⁰⁴

4.2.2. Integrating the BID with express reference to the child's views

In line with a holistic interpretation of children's rights contained in the CRC, the Court should recognize the child's right to be heard (art 12 CRC) in the context of art 8 ECHR. Once acknowledged the already mentioned procedural limitations that restrict Court's power, it's still possible to identify two different ways in which the Court could implement this right in the context of the application of the BIC principle. First, whenever the Court has knowledge of the child's views either through the child's participation to domestic proceedings or through the applicants' submissions, it should always take them into account in the BID. Moreover, the Court should explicitly mention how the BID's outcome is in line with the child's opinions or why it detaches from them.

Second, while evaluating the domestic proceedings the Court should directly assess if the child's views were or not considered. In this second hypothesis, the Court could even frame the lack of child participation as a violation of art 8. In its recent case-law the Court has, in fact, held States responsible for the violation of art 8 ECHR in relation to what can be described as a procedural dimension of the right to private and family life. Two examples can be found also in the Court's case-law object of this research. More precisely, in *D v France*²⁰⁵ the Court examined the possible violation of the child's right to private and family life in relation to the effectiveness and rapidity of the means provided by the State to recognize the parent-child relationship. Whereas, in *AL v. France*²⁰⁶ the violation of art 8 was attributable to the State's failure to honour its duty to exceptional diligence required by the case's circumstances.

That said, if the Court put more emphasis on the child's right to be heard, it would not only carry on a BID more coherent with the child-rights-based approach, but it would also promote the child's autonomy in the exercise of their fundamental rights.

4.2.3. Assessing the child's individual circumstances possibly based on factual evidence

A third recommendation is for the Court to not rely on its own jurisprudence at the expense of the assessment of the child's individual circumstances. The Court should always determine the child's BIC while addressing her specific context even when it has already provided judgments on similar cases.

²⁰² See Smyth, *supra* note 44, at 86

²⁰³ See Fenton-Glynn, *supra* note 1, and O'Mahony *supra* note 79

²⁰⁴ Chbihi Loudoudi and others v Belgium and Harroudj v France *supra* note 130

²⁰⁵ D v. France, *supra* note 132

²⁰⁶ AL v. France, *supra* note 133

The BIC should be always determined on case-by-case basis, otherwise the BID will be based on stereotyped and generalized considerations.

4.2.4. Displaying in the outcome of the balancing of interests process not only how it promotes the BIC but also how it affects the other interests at stake

Lastly, for what concerns the balancing process of the BIC with other considerations, the ECtHR should not only accord significant weight to the BIC but also give justifications for the decision's outcome. In particular, as previously mentioned, in disputes concerning article 8 the interests of the child must be balanced with two other interests, those of the parents and those of the State. Moreover, the adversarial structure of the proceedings in front of the ECtHR requires that private interests are held against public interests. For this reason, in the outcome of the decision, the Court should explicate not only how it promotes the child's interest but also how those interests align with the private or the public ones. By clearly stating how the child's interests are connected with the others, the Court will be prevented from using the BIC as a "trump card" for other interests.

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European Court of Human Rights (ECtHR), Dickson v the United Kingdom, Appl. No. 44362/ 04, April 2007

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II. Appendix: Table of selected cases

| CASE | FACTS | APPLICANTS | CLAIMS and DECISION |
|--|------------------------|---|--|
| Wagner and JMWL v Luxembourg, Appl. No. 76240/ 01, June 2007 | Intercountry adoption | Adoptive mother on her own and on the adopted child behalf | Article 8 Mother living with her adopted daughter since the date of the foreign adoption order; Refusal to enforce a full adoption order by a foreign court in favour of a single woman: <i>violation</i> Article 14 Refusal to recognise as valid in domestic law a full adoption order by a foreign court: <i>violation</i> Article 6 Failure by a court of appeal to examine one of the applicants' main grounds of appeal and one based on an alleged violation of the Convention: <i>violation</i> |
| Harroudj v France, Application No. 43631/09, October 2012 | kafala | Woman entrusted with the child (<i>Kafhil</i>) | Art 8 Refusal of permission to adopt owing to prohibition of adoption in child's country of birth: no violation |
| Chbihi Loudoudi et autres c. Belgique, Appl. No 52265/10, December 2014 | Kafala | Couple entrusted with the child on theirs and on the child's behalf | Art 8 Refusal to grant adoption of child placed in <i>kafala</i> care by her biological parents: no violation |
| Gas and Dubois v. France, Appl. No. 25951/07, March 2012 | Second-parent adoption | Same sex partners | Article 14 (in conjunction with 8) Refusal of simple adoption order in favour of homosexual partner of biological mother: no violation |
| X and others v Austria Appl. No. 19010/07, February 2013 | Second-parent adoption | Same sex partners and biological child of one of them | Article 14 (in conjunction with 8) Refusal of second parent adoption in favour of the homosexual partner of the child' biological mother: violation |
| Elski v Austria, Appl. No. 21949/03, January 2007 | Second-parent adoption | Biological father | Article 8 decision to allow his daughter to be adopted by the mother's new partner without his consent: no violation |
| Chepelev v. Russia, Appl. No. 58077/00, July 2007 | Second-parent adoption | Biological father | Article 8 decision to allow his daughter to be adopted by the mother's new partner without his consent: no violation |

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|--|--|-------------------------------|--|
| Mennesson and Labassee v France, Appl. Nos. 65192/11, 65941/11, June 2014 | International surrogacy | Intended parents and children | Article 8 Refusal to grant legal recognition in France to parent-child relationships established in the US between children born as a result of surrogacy arrangement and the couples of intended parents: Right to Family life of the applicants: no violation Right to Private life of child applicants violation |
| Foulon and Bouvet v. France Appl. Nos. 9063/14 and 10410/14, July 2016 | International surrogacy | Intended parents and children | Article 8 Refusal to grant legal recognition in France to parent-child relationships established in the US between children born as a result of surrogacy arrangement and the couples of intended parents: Right to Family life of the applicants: no violation Right to Private life of child applicants violation |
| Paradiso and Campanelli v. Italy, Appl. No. 25358/12, January 2017 | International Surrogacy/ intercountry adoption | Intended parents | Article 8 Respect for private life Non recognition parent-child relationship established in russia and removal of a child born there as result of a surrogacy arrangement entered into by a couple later found to have no biological link with the child: no violation |
| D v. France, Appl. No. 11288/18, July 2020 | International surrogacy | Intended parents and children | Art. 8 Obligation for children born under surrogacy arrangement to be adopted in order to ensure recognition of legal mother-child relationship: no violation Article 14 Obligation for children born under surrogacy arrangement to be adopted in order to ensure recognition of legal mother-child relationship: no violation |
| A.M. v. Norway, Appl. No. 30254/18, March 2022 | International surrogacy | Intended mother | Article 8 (in conjunction with art. 14) Refusal grant legal recognition parent-child relationship established in the US between a child born as a result of surrogacy and the intended mother: no violation |
| A. L. v. France, Appl. No. 13344/20, April .2022 | Domestic surrogacy | Biological father | Article 8 Refusal to establish the applicant's biological paternity: no violation Domestic court failure to attend their duty of |

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| | | | exceptional diligence as regards the length of proceedings: violation |
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