

United Nations Convention on the Rights of the Child

Article-by-Article Commentary

by

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PREFACE

This Commentary covers the UN Convention on the Rights of the Child (CRC) as well as its three Optional Protocols and provides a detailed analysis of each Article of the Convention. The work updates and expands my German-language *Kinderrechtskonvention mit Zusatzprotokollen. Handkommentar* (i.e. Commentary on the Convention on the Rights of the Child with Optional Protocols), published by Nomos as first edition in 2013 and as second edition in 2017. The present English-language version almost entirely omits references to domestic German law, as contained in the *Kinderrechtskonvention mit Zusatzprotokollen*, while references to international human rights law were extended.

Like almost any scholarly text, also this Commentary has unavoidable gaps and omissions. The Commentary does not deal with the First Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Second Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in form of a detailed and in-depth article-by-article analysis. Rather, their main stipulations and objectives are elucidated as part of the respective explanations of the relevant provisions of the CRC. However, the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure is analysed independently in an overview at the end of this book.

Furthermore, the Commentary does not cover all topics, nor could it. It mainly focuses on the work and recommendations of the UN Committee on the Rights of the Child (CRC Committee). Over the last three decades, the CRC Committee, the Convention's monitoring body, has taken a very active role in the understanding and interpretation of the CRC. It has passed, among others, 24 General Comments in roughly 20 years and nearly 900 Concluding Observations since the early 1990s. The Commentary considers all General Comments and a significant number of the Concluding Observations, as well as various versions of the CRC Committee's Reporting Guidelines. All these documents, albeit being legally non-binding, provide important interpretive guidance on the aims and for the implementation of the Convention.

The Commentary builds on the understanding that children's rights form part of the legal discipline of international human rights law. Irrespective of the considerable value of interdisciplinary studies on children's rights, the CRC is a legal treaty, which mainly has to be understood in legal terms. With all their specificities, international children's rights remain an area of international human rights law, which imposes obligations and responsibilities for those States that have ratified the relevant international instruments. Therefore, insights and findings from other disciplines are included on a limited basis and just to the extent that they have a bearing on the legal interpretation of a provision or its implementation.

The Commentary takes into account perspectives of other, universal and regional, human rights instruments. Such perspectives are not only examined as part of the introduction at the beginning of this book, but also in the context of each Article as well as in the final chapter of each Article where the provision is put in a wider human rights context. This legal comparison places special emphasis on the "International Bill of Rights", i.e. the International Covenants on Civil and Political Rights as well as on Economic, Social and Cultural Rights. Furthermore, a particular focus is laid on the rights and fundamental freedoms enshrined in the European Convention on Human Rights. Finally, to further contextualise the provisions of the CRC within the general human rights setting, the Commentary also takes into consideration reports and resolutions of UN Special Rapporteurs and the UN General Assembly, the case-law of

the law of last resort, should a person be unable to establish a nationality on any other basis.¹⁶⁷ In contrast, the ECHR does not confer a right to a nationality, or the right to acquire one, upon either adults or children. However, the 1997 European Convention on Nationality aims to redress this deficiency. It affirms the general position that each State shall determine who is a national under its domestic law, but adds the requirement that statelessness shall be avoided, and no one shall be arbitrarily deprived of his or her nationality. Thus, also in Europe there is evidence for a slow but gradual shift towards ensuring that children should not remain stateless.¹⁶⁸

Article 8

[States' Duty to Protect the Identity of the Child]

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

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I. Generalities

Article 8 para. 1 CRC is closely linked to the right in Article 7 CRC. Therefore, Article 8 CRC may appear, at first glance, to be an unnecessary and superfluous provision when compared to the more sophisticated rules laid down in Article 7 CRC. This is, however, not true. Because Article 8 para. 1 CRC does not provide an exclusive enumeration of the elements of identity, but is instead openly formulated in a non-exhaustive way, its rules and guarantees provide a more comprehensive protection than Article 7 CRC.¹ In addition, while Article 7 CRC guarantees the acquisition of the listed elements in a child's identity, Article 8 para. 1 CRC seeks to preserve those elements.² As such, arbitrary deprivation of a given nationality, even if it does not leave a child without a nationality, could, for instance, still be challenged on the grounds that the result is inconsistent with the preservation of the child's identity under Article 8 para. 1 CRC.³

The background of Article 8 para. 2 CRC is the prevention of a reoccurrence of the atrocities in the 1970s and 1980s under the military junta in Argentina when a large number of babies and children disappeared, some to be killed, others to be adopted by

¹⁶⁷ J. Tobin/F. Seow, Article 7, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 237, at 278.

¹⁶⁸ J. Chan, *The Right to Nationality as a Human Right: The Current Trend towards Recognition*, *Human Rights Journal* 12 (1991), p. 1, at 11.

¹ J. Tobin/J. Todres, Article 8, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 291 et seq.

² W. Vandenhoele/GE Türkelli/S. Lembrechts, *Children's Rights*, 2019, mn. 8.01.

³ J. Tobin/F. Seow, Article 7, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 237, at 257.

the Court holds that it is sufficient that there is the possibility of establishing legal parenthood by means of adoption, provided that this takes place sufficiently quickly.¹⁵⁶

The name of a person is also a part of private life and personal identity and thus falls under the protection of Article 8 ECHR.¹⁵⁷ In the refusal of State authorities to register double-family names for children, however, the ECHR sees no violation of Article 8 ECHR, as this serves to protect future generations from "growing name chains" and thus from impairing the identity-forming function of names.¹⁵⁸ With regard to the choice of given names, the Strasbourg Court also refers to the best interests of the child and the cultural importance of the name.¹⁵⁹ Dress and other features of personal appearances, such as a person's image, are also matters that concern private life.¹⁶⁰ By contrast, the ECHR does not contain the right to a nationality.¹⁶¹ To some extent, however, this right can be vindicated through Article 8 ECHR in cases that the citizenship scheme results in statelessness for an individual.¹⁶²

Under the ACRWC, its Article 6 only provides for the rights to birth registration, a name and nationality. No separate right to an identity of the child is provided. However, the African Committee of Experts on the Rights and Welfare of the Child holds the view that rights enshrined in Article 6 ACRWC together constitute the pillars of a person's identity.¹⁶³ This approach supports the view that there are other elements that form part of a person's identity.¹⁶⁴ With regard to nationality, the ACRWC is a rather progressive law instrument which is based on Article 1 of the 1961 Convention on the Reduction of Statelessness. Article 6 para. 4 ACRWC establishes State obligations with regard to the implementation of the right to a nationality, with particular focus on the prevention of statelessness. By doing so, the provision offers more explicit protection against statelessness for a child than Article 7 para. 1 CRC.¹⁶⁵ It forces the Contracting States to adopt the principle of *jus soli* if the child would otherwise be stateless.¹⁶⁶ Interestingly, also the American Convention on Human Rights, being a general human rights treaty, addresses the question of statelessness. Article 20 ACHR provides that every person has the right to the nationality of the State in whose territory he or she was born if he or she does not have the right to any other nationality. The provision establishes the *jus soli* principle as

¹⁵⁶ ECHR, Judgment of 16 July 2020, No. 11288/18, paras 58 et seq. - *D. v. France*. But see also the critical assessment by C. von Bar, *Anmerkung, Zeitschrift für das gesamte Familienrecht* 2020, p. 1475.

¹⁵⁷ See ECHR, Judgment of 22 February 1994, No. 16213/90, para. 24 - *Burghartz v. Switzerland*; Judgment of 24 October 1993, No. 22500/93, para. 21 - *Guillot v. France*; Judgment of 2 June 2005, No. 77785/01, para. 23 - *Znamenskaya v. Russia*; Judgment of 3 May 2011, No. 56759/08, para. 55 - *Negropontis-Giannitis v. Greece*. Similar assessment by CJEU, Judgment of 14 October 2008, Case C-353/06, *ECLI:EU:C:2008:559 - Grunkin and Paul*; Judgment of 8 June 2017, Case C-541/15, *ECLI:EU:C:2017:432*, paras 39 et seq. - *Preitlag*.

¹⁵⁸ ECHR, Judgment of 6 May 2008, No. 33572/02 - *v. Rehlingen and Others v. Germany*.

¹⁵⁹ See ECHR, Judgment of 24 October 1993, No. 22500/93, para. 27 - *Guillot v. France*; Judgment of 6 September 2007, No. 10163/02, paras 31 et seq. - *Johansson v. Finland*; Judgment of 21 October 2008, No. 37483/02, paras 55 et seq. - *Gizel Erdogöz v. Turkey*.

¹⁶⁰ ECHR, Judgment of 1 July 2014, No. 43835/11, para. 107 - *S.A.S. v. France*; Judgment of 15 January 2009, No. 1234/05, para. 40 - *Rekkos and Davouritis v. Greece*.

¹⁶¹ WA Schabas, *The European Convention on Human Rights*, A Commentary, 2015, Article 8, p. 358, at 378-379.

¹⁶² ECHR, Judgment of 26 June 2012, No. 26828/06, para. 337 - *Kutic and Others v. Slovenia*.

¹⁶³ ACERWC, General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/02, 2014, para 23.

¹⁶⁴ U. Assim, in: U. Kilkelly/T. Liefaard (eds.), *International Human Rights of Children*, 2019, p. 389, at 400.

¹⁶⁵ Similarly, W. Vandenhoele/GE Türkelli/S. Lembrechts, *Children's Rights*, 2019, mn. 7.12; DB Thronson, in: J. Todres/SM King (eds.), *The Oxford Handbook of Children's Rights Law*, 2020, p. 223, at 228.

¹⁶⁶ ACERWC, General Comment No. 2 on the Right to a Name, Registration at Birth, and to Acquire a Nationality, ACERWC/GC/02, 2014, paras 83, 88.

childless couples linked to the official authoritarian regime at that time.⁴ Through Article 8 para. 2 CRC, Argentina sought recognition of the child's inalienable right to retain his or her genuine personal, legal and family identity.⁵ The provision ensures that children are not only identified and registered after birth but their right to preserve their identities is respected, and in case of illegal deprivation, speedily re-established.⁶

II. Protection of Identity (Article 8 para. 1 CRC)

3 Article 8 para. 1 CRC obliges States Parties to undertake to respect a child's right to preserve his or her identity. What is meant exactly by a child's identity is not defined in the Convention. Article 8 para. 1 CRC only contains an exemplary list of various elements contributing to the identity of the child, such as nationality, name and family relationships, thus making reference to Article 7 para. 1 CRC. The drafting history illustrates that Article 8 para. 1 CRC aims to guarantee comprehensive protection of the identity and legal status of the child⁷ and obliges States Parties to undertake any appropriate measures to respect and ensure the preservation of this status. This includes special assistance from the State authorities in re-establishing an identity which has been the subject of interference.⁸

4 Since Article 8 para. 1 CRC does not exhaustively list the elements which build the child's identity, its protection goes beyond the scope of Article 7 CRC. The CRC Committee has not yet given a definition of identity which is unsurprising given the complexity, the ambiguity and the fluidity of the term.⁹ Both the development and preservation of identity are matters concerning the individual rights-holder, and as such, Article 12 CRC demands that the view of the child be given due weight.¹⁰ In any case, particular weight must be given under Article 8 para. 1 CRC to the cultural, ethnic, sexual, social and religious identity of the child.¹¹ Likewise, the child's right to knowledge of his or her biological parentage in the case of artificial insemination, especially when performed through in-vitro fertilisation with third persons' gametes or in cases of gestational surrogacy agreements, can be subsumed under Article 8 CRC.¹² Because the right, in regards to family relationships, is only recognised within the domestic legal order, the Convention does not offer stronger protection than the one

⁴ See, e.g., F. Lessa, *Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina between 1976 and 2010*, *Journal of Human Rights Practice* 3 (2011), p. 25 et seq.

⁵ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 282.

⁶ J Fortin, *Children's Rights and the Developing Law*, 2003, p. 5 et seq. See also W Vandenhoele/GE Turkelli/S Lembrechts, *Children's Rights*, 2019, nn. 8-10.

⁷ See J Dock, in: A Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 10 et seq.; S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 1999, p. 162.

⁸ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 283.

⁹ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 292.

¹⁰ For a full discussion of this issue see J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 293 et seq.

¹¹ D Hodgson, *The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness*, *International Journal of Law and the Family* 7 (1993), p. 255, at 265.

¹² J Dock, in: A Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 11 et seq. See also → Article 7 mns. 21 et seq.

offered by States Parties.¹³ However, the CRC Committee regards the right to respect for one's own identity as crucial to the well-being of the child and even understands it as an absolute right.¹⁴ Given the rights of the biological or social parents and the rights of third parties, this view is by no means unproblematic.¹⁵ Also, under Article 8 para. 1 CRC, a child's right to preserve his or her identity is not absolute and can be subject to lawful interference and must be balanced against the rights and interests of other persons.

5 The phrase "undertake to respect" has been criticised as too vague and weakening States' obligations under Article 8 para. 1 CRC.¹⁶ However, it is clear from the drafting history that the obligation is mandatory and the presence of the word "undertake" does not absolve States Parties of their responsibility to ensure this right.¹⁷ Article 8 para. 1 CRC requires that States Parties refrain from actions which would violate a child's right to preserve his or her identity. It also requires positive measures to be taken in order to give full effect to the child's right to identity preservation.¹⁸ This means that States must take all reasonable measures to prevent non-State actors from unlawfully interfering with a child's right to preserve his or her identity and to ensure that a child is able to effectively enjoy this right. Although States Parties enjoy a margin of appreciation in determining which measures to implement in order to respect, protect and ensure the right under Article 8 para. 1 CRC, the CRC Committee rightly stresses the importance of an effective system of birth registration.¹⁹ It has also called on States Parties to provide homeless/street children²⁰ and children of ethnic minorities²¹ with identity documents, and to provide identity documents for internally displaced children.²² The CRC Committee further expresses concern at the overrepresentation of indigenous children in care and urges the States Parties to ensure full respect for the preservation of the cultural identity of children belonging to ethnic minorities.²³ Moreover, the CRC Committee underscores that children who are adopted or born through assisted reproduction or surrogacy have the right to access information about their origins as well as their medical history.²⁴ It is not entirely clear whether this approach is, in fact, a reasonable interpretation of Article 8 para. 1 CRC or whether it should not be better

¹³ S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 1999, p. 161. See also ECtHR, Judgment of 3 November 2011, No. 57813/00, para. 97 – *S.H. and others v. Austria*.

¹⁴ See CRC Committee, Concluding Observations: Germany, CRC/C/DEU/CO/3-4, 2014, para. 31.

¹⁵ See → Article 7 mn. 18.

¹⁶ See, e.g., G Van Bueren, *The International Law on the Rights of the Child*, 1995, p. 119.

¹⁷ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 286.

¹⁸ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 286 et seq.

¹⁹ See → Article 7 mn. 4.

²⁰ CRC Committee, Concluding Observations: Egypt, CRC/C/EGY/CO/3-4, 2011, para. 81. See also CRC Committee, General Comment No. 21, CRC/C/GC/21, 2017, para. 42.

²¹ CRC Committee, Concluding Observations: Cambodia, CRC/C/KHM/CO/2-3, 2011, para. 80; Costa Rica, CRC/C/CR/CO/4, 2011, para. 36.

²² CRC Committee, Concluding Observations: Afghanistan, CRC/C/AFG/CO/1, 2011, para. 63.

²³ CRC Committee, Concluding Observations: Canada, CRC/C/CAN/CO/3-4, 2012, para. 42; Australia, CRC/C/AUS/CO/4, 2012, paras 37 et seq.

²⁴ CRC Committee, Concluding Observations: China, CRC/C/CHN/CO/2, 2005, para. 53; Sierra Leone, CRC/C/SLE/CO/2, 2008, para. 46; Uzbekistan, CRC/C/UZB/CO/3-4, 2013, para. 7h; Israel, CRC/C/ISR/CO/2-4, 2013, para. 34.

placed under the rules of Article 7 para. 1 CRC, where, of course, this position also remains controversial.²⁵

6 Yet, a State Party clearly violates the identity rights of a person under Articles 7 and 8 CRC insofar it alters elements of his or her identity by attributing to him or her an age and a date of birth that do not match the information on the birth certificate or another official document that accredits the age, even after the individual has presented a copy of the certificate or the document to the competent authorities.²⁶ The CRC Committee considers that a child's age and date of birth form part of his or her identity and that States Parties have an obligation to respect the right of the child to preserve this identity without depriving him or her of any elements of that identity.²⁷ In the cases *A.L. v. Spain* (2019) and *R.K. v. Spain* (2019), the CRC Committee therefore noted that, although the author of the communication provided the authorities of the State Party with a copy of his birth certificate issued by his country of origin, which contained data pertaining to the child's identity, the State Party failed to respect the identity of the author by denying the birth certificate had any probative value, without having checked the data contained in the certificate with the authorities of the author's country of origin.²⁸ A similar decision was taken by the CRC Committee in the case *J.A.B. v. Spain* (2019) where the authorities did not analyse the validity of the documents provided by the author and did not check the data of said documents with the authorities of the author's country of origin.²⁹

7 Not only within the context of Article 7 CRC but also within the context of Article 8 para. 1 CRC, the CRC Committee remains aware of the threat posed to a child's identity by non-State actors. It therefore calls on States Parties to take reasonable measures to support children in the preservation of their identity and, in particular, to protect children against threats of sale and trafficking by private individuals.³⁰ This demand is consistent with Article 25 lit. b of the Convention on the Protection of All Persons from Enforced Disappearance (CED) which recognises that acts of falsification, concealment or destruction of documents attesting to a child's true identity shall be punishable as criminal offences under domestic law.³¹

III. Re-establishment of Identity (Article 8 para. 2 CRC)

8 The special content of Article 8 para. 2 CRC is revealed in its drafting history. The provision is based on a proposal from Argentina, which sought to react to the numerous forced disappearances and related crimes violating the identity of many babies and children during the military junta in the 1970s and 1980s.³² The introduction of Article 8 para. 2 CRC into the Convention text sought to create a legal basis to prevent such dis-

²⁵ See J Doek, in: A. Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 11 et seq. See also → Article 7 mns. 21 et seq.

²⁶ CRC Committee, *J.A.B. v. Spain*, Views adopted on 31 May 2019, CRC/C/81/D/22/2017, para. 13.10. ²⁷ CRC Committee, *A.L. v. Spain*, Views adopted on 31 May 2019, CRC/C/81/D/16/2017, paras 3.5 and 12.10; *J.A.B. v. Spain*, Views adopted on 31 May 2019, CRC/C/81/D/22/2017, para. 13.10.

²⁸ CRC Committee, *A.L. v. Spain*, Views adopted on 31 May 2019, CRC/C/81/D/16/2017, para. 12.10; *R.K. v. Spain*, Views adopted on 18 September 2019, CRC/C/81/D/27/2017, para. 9.10.

²⁹ CRC Committee, *J.A.B. v. Spain*, Views adopted on 31 May 2019, CRC/C/81/D/22/2017, para. 13.10. ³⁰ CRC Committee, *Concluding Observations: Ukraine*, CRC/C/15/Add.42, 1995, paras 11, 28.

³¹ For more detail see J Tobin/J. Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 291.

³² S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 1999, p. 159; G. Van Bueren, *The International Law on the Rights of the Child*, 1995, p. 118 et seq.

appearances, to re-establish identity after unlawful interferences and to assist in the reunification of parents with their children.³³ Its main purpose is remedial.³⁴ In contrast, Article 8 para. 2 CRC does not extend its scope to international child abduction, as addressed in Article 11 CRC, nor to potential loss of identity rights as a consequence of legal adoption in the sense of Article 21 CRC. The separation from parents, which is not always accompanied by a loss of identity, is to be fundamentally assessed pursuant to Article 9 para. 1 CRC. Certain overlaps between these protections are, nevertheless, conceivable.³⁵ It is noteworthy, however, that Article 8 para. 2 CRC also extends its personal scope to unaccompanied and separated minors, in presupposing a mechanism for identifying the unaccompanied and separated child.³⁶ Although originally intended to apply to disappeared children only, the CRC Committee considers that Article 8 para. 2 CRC extends to a duty to identify separated or unaccompanied children at ports of entry or as soon as their presence becomes known to the State authorities.³⁷

9 According to Article 8 para. 2 CRC, in the case of an unlawful interference with the child's identity, States Parties have the duty to re-establish the identity of a child speedily. This obligation is unique within the system of human rights conventions.³⁸ States Parties must ensure compliance with this obligation without undue delay, because time is a crucial factor when interventions in children's rights are concerned. Where the separation of a child from his or her parents spans too long a time period, it may be contrary to the interests of the child to be returned to his or her parents because alienation may have occurred.³⁹ The CRC Committee has not yet clarified the meaning of the term "speedily". According to the ECtHR, however, speediness is to be determined in light of the facts of each individual case.⁴⁰ The onus is on the State to explain and justify any delay. Neither an excessive workload nor a vacation period is a valid reason for delay,⁴¹ and States Parties are obliged to organise their administrative and judicial systems effectively.

10 Taken together, Article 7 and Article 8 para. 2 CRC are critical for assisting displaced and forcibly disappeared children to re-establish contact with their parents and family as well as for those children in the care of State authorities or who have been adopted,

³³ See, in detail: OHCHR, *Legislative History of the Convention on the Rights of the Child*, 2007, p. 385-387. See also, with regard to the CED: IACtHR, Judgment of 24 February 2011, Series C No. 221, paras 121 et seq. – *Gelman v. Uruguay*; K. Theurer, *Durch Referendum bestätigte Amnestiegesetze in Färländern*, *Europäische Grundrechte Zeitschrift* 2012, p. 682, at 683 et seq.

³⁴ J. Tobin/J. Todres, Article 8, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 300.

³⁵ See J. Doek, in: A. Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 9 et seq.

³⁶ C. Smyth, in: U. Kilkelly/T. Liefhaard (eds.), *International Human Rights of Children*, 2019, p. 421, at 428.

³⁷ CRC Committee, General Comment No. 6, CRC/GC/2005/6, 2005, para. 31.

³⁸ J. Doek, in: A. Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 5.

³⁹ J. Doek, in: A. Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 8. See also ECtHR, Judgment of 27 June 2000, No. 32842/96, para. 110 – *Nuutinen v. Finland*; Judgment of 10 November 2005, No. 40324/98, para. 100 – *Süss v. Germany*, both cases concerning the lengths of custody disputes. See further ECtHR, Judgment of 15 January 2015, No. 62198/11, paras 102 et seq. – *Kuppinger v. Germany*, as regards the enforcement of access rights.

⁴⁰ ECtHR, Judgment of 21 October 1986, No. 9862/82, para. 55 – *Sánchez-Reisse v. Switzerland*. ⁴¹ See ECtHR, Judgment of 25 October 1989, No. 11400/85, para. 25 – *Bezzicheri v. Italy*. However, a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action, see ECtHR, Judgment of 25 June 1987, No. 10527/83, para. 18 – *Milasi v. Italy*.

to trace their roots at a later stage in life.⁴² Although the CRC Committee has yet to address the nature of the obligation to provide appropriate assistance and protection, it is reasonable to conclude that Article 8 para. 2 CRC requires States Parties to provide a legal mechanism for the re-establishment of the child's identity.⁴³ States authorities have to prevent falsification of a child's true identity and to search for and identify any child whose identity has been altered and to return children subjected to enforced disappearances to their families of origin, provided the return is in the best interests of the child.⁴⁴ Furthermore, the assistance provided must be accompanied by the necessary human, psychological, financial, logistic, scientific and other resources.⁴⁵ A further example is found in Article 25 para. 4 CED, which requires a review of adoptions with the possibility of annulment where there is an implication of forced disappearance. But, also here, the State has to carry out the process of re-establishing the child's identity in a way that prevents, or at least, minimises, any harm to the child's well-being.⁴⁶

11 Whereas Article 8 para. 1 CRC places the States Parties under a duty to respect and ensure the preservation of the child's identity, Article 8 para. 2 CRC protects against unlawful or arbitrary interference with a child's identity or with parts thereof (such as cultural identity).⁴⁷ Falling within the meaning of "unlawful interference" are third-party acts or omissions that violate the national law of a State, or which are contrary to international law.⁴⁸ Therefore, Article 8 para. 2 CRC must accommodate the possibility of a child's identity or elements thereof being deprived lawfully.⁴⁹ All lawful interferences in the identity of the child must, however, pursue a legitimate aim, the measures employed to achieve that aim must be proportionate and strictly required by the exigencies of the situation and be designed to support the welfare and the best interests of the child under Article 3 CRC. This means, for instance, that potential developments in the field of genetic engineering could find their limits in Article 8 CRC.⁵⁰

IV. Embedding of Article 8 CRC into the System of International Human Rights Protection

12 Prior to the adoption of the CRC, no other general human rights treaty had included a right to preservation of identity. Even the African Charter on the Rights and Welfare of the Child, which was adopted after the CRC in 1990, contains no provision equivalent to Article 8 CRC.⁵¹ It was not until the adoption of the Convention on the Protection of

⁴² U Assim, in: U Kilkelly/T Liefard (eds.), *International Human Rights of Children*, 2019, p. 389, at 400.

⁴³ JS Cerda, *The Draft Convention on the Rights of the Child: New Rights?*, *Human Rights Quarterly* 12 (1990), p. 115, at 116.

⁴⁴ R Hodgkin/P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn. 2007, p. 117.

⁴⁵ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 302.

⁴⁶ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 303.

⁴⁷ OHCHR, *Legislative History of the convention on the Rights of the Child*, 2007, p. 386.

⁴⁸ G Van Bueren, *The International Law on the Rights of the Child*, 1995, p. 119; see also recently IACHR, *Judgment of 24 February 2011, Series C No. 221, paras 121 et seq. - Gelman v. Uruguay*.

⁴⁹ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 301.

⁵⁰ S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 1999, p. 163.

⁵¹ J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 283.

All Persons from Enforced Disappearance in 2006 that included recognition of the right to preserve one's identity.⁵² Article 25 para. 4 CED echoes various provisions of the CRC such as Article 3 and Article 12 CRC.

13 Although other international human rights instruments do not incorporate a right to identity, the issue has arisen in fact under international law. The ECtHR has recognised various elements of individual and family identity as part of the right to private and family life under Article 8 ECHR.⁵³ It has also ruled on the "theft" of a child's identity on the Internet, by stating that the State's positive duty to protect the private life under Article 8 ECHR extends to the protection of a person's identity in online matters.⁵⁴ Various Articles of Geneva Convention IV and of the Additional Protocols to the Geneva Conventions as well as Article 11 lit. e of the International Convention on the Prevention and Punishment of the Crime of Genocide also indirectly deal with the concept of a child's identity. They aim to ensure proper identification of children, to facilitate reunification with parents and, in particular, recognise the harm of forcibly changing a child's identity.⁵⁵

Article 9 [Separation from Parents]

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

⁵² A/RES/61/177. Entered into force on 23 December 2010.

⁵³ ECtHR, *Judgment of 13 July 2006, No. 58757/00, para. 37 - Jäggi v. Switzerland*. See further → Article 7 mns. 27 et seq.

⁵⁴ ECtHR, *Judgment of 2 December 2008, No. 2872/02, paras 42 et seq. - K.U. v. Finland*.

⁵⁵ For a fuller account see J Tobin/J Todres, Article 8, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, 2019, p. 281, at 284-285.

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I. Generalities

According to Article 9 para. 1 and para. 2 CRC, the child shall not, in principle, be separated from his or her parents against their will. Thus, the Convention recognises the significant importance of the biological and emotional bonds between parents and their children, the destruction of which is generally to be avoided. The CRC clearly positions family cohesion as highly important, which is confirmed in Recitals 5 and 6 of the Preamble. Under international human rights law, the family is recognised as the natural and fundamental unity of society.¹ This recognition is also consolidated by several provisions in the Convention, for instance in Article 5, Article 7, Article 10 and Article 18 CRC. The interests of the child are usually best served when the child is raised by his or her parents and (extended) family. The CRC Committee notes that the family, as the fundamental group of society, is the natural environment for the survival, protection and development of the child.² Therefore, it is necessary to support and promote the viability of joint parenting.³ Article 9 para. 3 CRC protects the rights of the child to maintain personal relations and direct contact with both parents on a regular basis after a necessary separation and, in the case of separation, Article 9 para. 4 CRC safeguards the right to information of those concerned.

The rules laid down in Article 9 para. 1 and para. 2 CRC apply only to interventions by State authorities which aim to separate the child from his or her parents and family environment in cases where the remaining of the child in the family environment would be contrary to his or her best interests. Separations that are caused, for example, by the execution of a custodial sentence of a parent or a child, or by the conscription of a parent or a child for military service do not fall within the scope of Article 9 para. 1 CRC.⁴ Such separations merely establish a right to information pursuant to Article 9 para. 4 CRC. Nevertheless, the CRC Committee is also dedicated to the specific needs of children of incarcerated parents and stresses that States Parties should endeavour to provide alternatives to detention and imprisonment and enable children the possibility of safe access to and suitable contact with their detained or incarcerated parents.⁵ These include, for example, regular and on-demand appointments to care for family contacts,

¹ See, e.g., Article 16 para. 3 UDHR, Article 23 para. 1 ICCPR and Article 10 para. 1 ICESCR.

² CRC Committee, Day of General Discussion: Children without Parental Care, 17 March 2006, CRC/C/153, 2006 para. 644.

³ R. Hodgkin/P. Newell, Implementation Handbook for the Convention on the Rights of the Child, 3rd edn. 2007, p. 236; O. Khazova, in: U. Kilkelly/T. Liefraad (eds.), International Human Rights of Children, 2019, p. 161, at 176.

⁴ Doeke, in: A. Alen et al. (eds.), A Commentary on the United Nations Convention on the Rights of the Child, Vol. 8, 2006, Articles 8-9, Article 9 nn. 8; G. Dorsch, Die Konvention der Vereinten Nationen über die Rechte des Kindes, 1994, p. 155.

⁵ CRC Committee, Report and Recommendations of the Day of General Discussion on Children of Incarcerated Parents, CRC/DG/D/Report, 30 September 2011, paras 11 et seq.

more intensive ways of contacting them by telephone or via Internet, the accommodation of the imprisoned parent together with the child in an open institution, or the accommodation of the detained parent in a detention centre that is close to the child's place of residence.⁶

II. Prerequisites for Separation (Article 9 para. 1, para. 2 CRC)

The physical separation of parents and children by public authorities is the most procedural hurdles to execute a separation under Article 9 para. 1 and para. 2 CRC are therefore correspondingly high. The requirements apply to all children within the meaning of Article 1 CRC, including children with disabilities⁷ and adolescents close to the age of majority.⁸ Although the closeness of the relationship between adolescents and their parents relaxes in the course of time, these relationships remain worthy of protection. It corresponds to the well-being of adolescents when they are in the care and responsibility of parents. It is not just children of tender age or pre-school children but all children who enjoy the right under Article 9 CRC.⁹ The CRC Committee routinely expresses concern about the separation of children, regardless of their age and status, from their parents and their family environment.¹⁰ Article 9 para. 1 CRC relates however only to separations that take place without any inter-country or transborder element.¹¹ Article 9 CRC applies exclusively to domestic situations in which parents and children are separated, but still live within the same country.¹² For safeguarding the family unit between children and parents who reside in different countries, it is Article 10 CRC that addresses situations with cross-border dimensions.¹³ Furthermore, the content of Article 9 CRC is preoccupied with the standards and procedures that regulate State removal of a child from his or her parents and does not extend to separation acts performed by non-State actors.¹⁴ These acts are regulated by Article 11 CRC on international parental abduction, or by Article 35 CRC on the abduction of children by persons other than their parents.

The inclusion of the phrase "against their will" gives rise to two remarks. First, it tends to imply that where there is consent to the separation of a child from his or her

⁶ See, e.g., CRC Committee, Concluding Observations: India, CRC/C/IND/CO/3-4, 2014, para. 60; Tonga, CRC/C/TON/CO/1, 2019, paras 43-44. For more detail see S. Schmahl, Auswirkungen der UN-Kinderrechtskonvention auf die deutsche Rechtsordnung, *Recht der Jugend und des Bildungswesens* 2014, p. 125, at 133. See also → Article 3 nn. 9.

⁷ See CRC Committee, General Comment No. 9, CRC/C/GC/9, 2006, para. 41. For more detail see → Article 23 nn. 12.

⁸ G. Van Bueren, *The International Law on the Rights of the Child*, 1995, p. 80.

⁹ J. Tobin/J. Cashmore, Article 9, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child*, A Commentary, 2019, p. 307, at 313.

¹⁰ See, e.g., CRC Committee, Concluding Observations: China, CRC/C/CHN/CO/3-4, 2013, para. 49; Timor-Leste, CRC/C/TLS/CO/1, 2008, para. 46; Russian Federation, CRC/C/RUS/CO/4-5, 2014, para. 3; Congo, CRC/C/COG/CO/2-4, 2014, para. 52.

¹¹ S. Detrick, A Commentary on the United Nations Convention on the Rights of the Child, 1999, p. 170.

¹² W. Vandenhoele/GE Turkelli/S. Lembrechts, *Children's Rights*, 2019, nn. 9.04.

¹³ See Commission on Human Rights, Report of the Working Group, E/CN.4/1989/48, 1989, para. 203; S. Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Trauma Preparations"*, 1992, p. 181. See also → Article 10 nn. 1.

¹⁴ J. Tobin/J. Cashmore, Article 9, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child*, A Commentary, 2019, p. 307, at 313.

parents, Article 9 para. 1 and para. 2 CRC will have no application.¹⁵ Second, the “will” refers to both the will of the parents and the child and does not depend on the will of parents nor on the will of the child only.¹⁶ The CRC Committee is clear in that the consent of the child is a relevant but, of course, is not the only decisive factor.¹⁷ The right of children to parental care is, in general, inevitably subject to the will of parents.¹⁸

1. Substantive Standards

The criteria, upon which State interventions in family life are to be assessed, must be considered in light of the effective exercise of the right of parents and children to maintain personal relationships, and in the light of the child's welfare and best interests.¹⁹ A disentanglement of children from their parents and family environment against their will is admissible only if it evidently serves the best interests of the child (see Article 3 CRC) and is absolutely necessary.²⁰ Given the gravity of the impact on the child of separation from his or her parents, the threshold is high.²¹ Article 9 para. 1, sentence 2 CRC cites that the abuse or neglect of the child by the parents are examples of special circumstances warranting a separation. In particular, physical neglect, that is the failure to protect a child from harm and to provide the child with basic necessities including adequate food, shelter, clothing and basic medical care, can give rise for a State intervention.²² Also, heavy emotional and psychological neglect, e.g., chronic inattention to the child or exposure to intimate partner violence, drug or alcohol abuse, can instigate a separation from the parents or other primary caregivers.²³ The list enshrined in Article 9 para. 1 CRC is illustrative and not exhaustive.²⁴ However, child's conduct disorders,²⁵ disabilities,²⁶ being born out of wedlock²⁷ and parental poverty or any other economic or social hardship that families have to face²⁸ are under no circumstances a permissible

¹⁵ J Tobin/J Cashmore, Article 9, in: J Tobin (ed.), *The UN Convention on the Rights of the Child. A Commentary*, 2019, p. 307, at 313.

¹⁶ J Doek, in: A Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 21-22; W Vandenhoele/GE Türkelli/S Lembrechts, *Children's Rights*, 2019, nn. 9-10.

¹⁷ CRC Committee, *Concluding Observations: Lebanon*, CRC/C/15/Add.169, 2002, paras 36 et seq. See also R Hodgkin/P Newell, *Implementation Handbook of the United Nations Convention on the Rights of the Child*, 3rd edn. 2007, p. 122.

¹⁸ J Tobin/J Cashmore, Article 9, in: J Tobin (ed.), *The UN Convention on the Rights of the Child. A Commentary*, 2019, p. 307, at 314.

¹⁹ Similarly: Human Rights Committee, *Tcholatch v. Canada*, Views adopted on 20 March 2007, CCPR/C/89/D/1052/2002, para. 8-3.

²⁰ CRC Committee, *Concluding Observations: Finland*, CRC/C/15/Add.132, 2000, para. 34; United Kingdom, CRC/C/GBR/CO/5, 2016, para. 53; Tunisia, CRC/C/TUN/CO/3, 2010, para. 46.

²¹ CRC Committee, *General Comment No. 14*, CRC/GC/14, 2013, para. 61.

²² CRC Committee, *General Comment No. 13*, CRC/GC/13, 2011, para. 20 a.

²³ CRC Committee, *General Comment No. 13*, CRC/GC/13, 2011, para. 20 b; *General Comment No. 14*, CRC/GC/14, 2013, para. 72.

²⁴ J Doek, in: A Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, Article 9 nn. 8.

²⁵ CRC Committee, *Concluding Observations: Spain*, CRC/C/ESP/CO/3-4, 2010, para. 41.

²⁶ CRC Committee, *Concluding Observations: Poland*, CRC/C/POL/CO/3-4, 2015, paras 32 et seq.; Canada, CRC/C/CAN/CO/3-4, 2012, para. 55.

²⁷ CRC Committee, *Concluding Observations: Tunisia*, CRC/C/TUN/CO/3, 2010, para. 45.

²⁸ CRC Committee, *Concluding Observations: Suriname*, CRC/C/SUR/CO/3-4, 2016, para. 24; Brazil, CRC/C/BRA/CO/2-4, 2015, para. 46; Sierra Leone, CRC/C/SLE/CO/3-5, 2016, para. 25; Armenia, CRC/C/ARM/CO/3-4, 2013, para. 3. This is also true for children in street situations living with their families, see CRC Committee, *General Comment No. 21*, CRC/GC/21, 2017, para. 46.

separation ground.²⁹ It is also an insufficient cause to argue that a child possibly has better or more beneficial development opportunities elsewhere.³⁰ Article 9 para. 1 CRC is not concerned with the provision of optimal or even average life and family conditions for the child, but merely with the prevention of serious threats to the development of the child.³¹ Therefore, the CRC Committee calls on the States Parties to ensure appropriate assistance to parents in particular situations of poverty or socioeconomic hardship, especially financial support and accessible early childhood education and care for young children, in order to facilitate and support family-based care for children wherever possible.³²

Before State authorities may take immediate measures to separate children from their parents, the direct threat to, the neglect or abuse of the child's well-being must be evidenced by facts.³³ The parental misconduct must be of such seriousness that the child's physical, mental and/or intellectual well-being would be seriously jeopardised if he or she remained in the family. The authorities must strictly adhere to the principle of proportionality and of last resort.³⁴ Because a separation is an *ultima ratio* solution, priority is given to an examination of whether the family situation could be improved through intensified advice and assistance by the competent State authority.³⁵ The CRC Committee is very clear in stating that, given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a measure of last resort, as when the child is in danger of experiencing imminent harm or when otherwise necessary.³⁶ Thus, the CRC Committee is seriously concerned about deprivation of parental rights that could be applied as a measure to punish parents.³⁷ The State Party must rather guarantee that the situation of the child and his or her family has been appropriately assessed on an evidence-based approach, where possible, by a multidisciplinary team of well-trained professionals, ensuring that no other option can fulfil the child's best interests.³⁸ Fundamentally, the separation should only be of a

²⁹ See also G. Van Bueren, *The International Law on the Rights of the Child*, 1995, p. 80 et seq.; O Khazova, in: U Kilkelly/T Liefraad (eds.), *International Human Rights of Children*, 2019, p. 161, at 181; J Tobin/J Cashmore, Article 9, in: J Tobin (ed.), *The UN Convention on the Rights of the Child. A Commentary*, 2019, p. 307, at 323.

³⁰ CRC Committee, *Concluding Observations: Sweden*, CRC/C/SWE/CO/5, 2015, para. 1; United Kingdom, CRC/C/GBR/CO/5, 2016, paras 52 et seq. See also ECtHR, *Judgment of 26 February 2002*, No. 46544/99, para. 69 – *Kutzner v. Germany*; *Judgment of 26 May 2009*, No. 4023/04, para. 86 – *Amanadachioi v. Romania*; *Judgment of 22 March 2018*, Nos. 68125/14, 72204/14, para. 69 – *Wetjen and Others v. Germany*; *Judgment of 10 January 2019*, No. 18925/15, para. 48 – *Wunderlich v. Germany*.

³¹ S Graf Kielmansegg, *Jenseits von Karlsruhe: Das deutsche Familienrecht in der Straßburger Rechtsprechung*, *Archiv des Völkerrechts* 46 (2008), p. 273, at 277.

³² See CRC Committee, *Concluding Observations: Bosnia and Herzegovina*, CRC/C/BIH/CO/2-4, 2012, para. 49; Portugal, CRC/C/PT/CO/3-4, 2014, para. 40; Serbia, CRC/C/SRB/CO/2-3, 2017, para. 52. See also CRC Committee, *General Comment No. 14*, CRC/GC/14, 2013, para. 63; *General Comment No. 21*, CRC/GC/21, 2017, para. 46.

³³ See also ECtHR, *Judgment of 8 April 2004*, No. 11057/02, para. 99 – *Haase v. Germany*.

³⁴ CRC Committee, *Concluding Observations: Belarus*, CRC/C/BLR/CO/5-6, 2020, paras 25-26. See also ECtHR, *Judgment of 26 February 2002*, No. 46544/99, paras 75 et seq. – *Kutzner v. Germany*; *Judgment of 8 April 2004*, No. 11057/02, paras 101 et seq. – *Haase v. Germany*.

³⁵ M Parzelle/R Dettmeyer/H Bratzke/B Flaig/B Zedler, *Schutz von Kindern vor Gewalt*, *Rechtsmedizin* 2010, p. 147, at 152.

³⁶ CRC Committee, *General Comment No. 14*, CRC/GC/14, 2013, para. 61.

³⁷ CRC Committee, *Concluding Observations: Belarus*, CRC/C/BLR/CO/5-6, 2020, para. 25.

³⁸ CRC Committee, *General Comment No. 14*, CRC/GC/14, 2013, para. 64.

transitory nature.³⁹ It should therefore either be limited to the shortest possible period,⁴⁰ or intended that the measure be subject to regular, short-interval examinations to test their necessity.⁴¹ A State must undertake all reasonable measures to ultimately secure family reunion, as soon as the circumstances permit.⁴² On the other hand, it must not be ruled out from the outset that the separation in extreme cases, such as incurable drug addiction of parents with ensuing neglect of the care of the child, may be permanently affected in view of the best interests of the child.⁴³ In any case, however, the States Parties are called upon to intensify their efforts to render appropriate assistance to parents, **including counselling in child-rearing, service for the treatment of alcohol or drug-related problems, before resorting to separation.**⁴⁴

Article 9 para. 1 CRC does not distinguish between marital and non-marital children. The rights enshrined in the Convention apply equally to all children regardless of their status pursuant to the non-discrimination principle in Article 2 para. 1 CRC.⁴⁵ It is for this reason that the CRC Committee has also expressed its concern at the wide over-representation of indigenous children in care and the abandonment of children with disabilities.⁴⁶ On the other hand, Article 9 para. 1, sentence 2 CRC accounts for the fact that some factual situations require a separation. The provision explicitly assumes that in the case of parents who are living separately, a decision upon the place of residence of the child and therefore separation from one parent may be necessary. Consequently, the principle highlighted in Article 18 para. 1, sentence 1 CRC that both parents have common and joint responsibilities for the upbringing and development of the child, cannot apply unabated or in an absolute manner if the family is not intact but consists of separated parents.⁴⁷

2. Conditions of Procedural Law

Pursuant to Article 9 para. 1, sentence 1 CRC, a separation must be implemented by the decision of a competent authority under the applicable laws and procedures which are subject to judicial review. The CRC Committee grants States Parties discretion on whether the executive or judiciary shall be responsible for the decision. Yet, if the decision is attributed to an administrative body in the first place, the parties must then have the right to bring the case to court.⁴⁸ The ability to apply for review and a court

³⁹ J Doek, in: A Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, Article 9 mn. 10. See also UN Guidelines for the Alternative Care of Children, A/RES/64/142, 20 December 2009, para. 14.

⁴⁰ CRC Committee, *Concluding Observations: Finland*, CRC/C/15/Add.132, 2000, para. 36.

⁴¹ See → Article 25 mn. 3. For more detail see S Graf Kiedmannsgg, *Jenseits von Karlsruhe: Das deutsche Familienrecht in der Straßburger Rechtsprechung*, *Archiv des Völkerrechts* 46 (2008), p. 273, at 280.

⁴² CRC Committee, *Concluding Observations: Haiti*, CRC/C/HTI/CO/2-3, 2016, para. 43; Guyana, CRC/C/GUY/CO/2-4, 2013, para. 42 d.

⁴³ J Doek, in: A Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, Article 9 mn. 8.

⁴⁴ CRC Committee, *Concluding Observations: New Zealand*, CRC/C/NZL/CO/5, 2016, para. 26; Canada, CRC/C/CAN/CO/3-4, 2012, para. 56; India, CRC/C/IND/CO/3-4, 2014, para. 56; China, CRC/C/CHN/CO/3-4, 2013, para. 49; Armenia, CRC/C/ARM/CO/3-4, 2013, para. 32.

⁴⁵ See → Article 2 mns. 21, 32.

⁴⁶ CRC Committee, *Concluding Observations: Australia*, CRC/C/AUS/CO/4, 2012, para. 52; New Zealand, CRC/C/NZL/CO/5, 2016, para. 27; China, CRC/C/CHN/CO/3-4, 2013, para. 52.

⁴⁷ C Kirchhof, *Die UN-Konvention über die Rechte des Kindes*, 2001, p. 233. See also → Article 18 mn. 4.

⁴⁸ CRC Committee, *Concluding Observations: Madagascar*, CRC/C/MDG/CO/3-4, 2012, para. 41; Serbia, CRC/C/SRB/CO/1, 2008, para. 40. See also K Sandberg, in: U Kilkelly/T Liefeld (eds.), *International Human Rights of Children*, 2019, p. 187, at 199.

decision with respect to that review should be expeditious. This high standard, which means a matter of days rather than weeks, is necessary given the serious consequences associated with separating a child from his or her parents.⁴⁹ The ECtHR also emphasises the need for comprehensive procedural safeguards to a judicial body particularly in the area of alternative care and child protection.⁵⁰ The phrase "in accordance with applicable law and procedures" refers to the whole range of applicable domestic law but also means the quality of law requiring it to be compatible with the rule of law.⁵¹

Insofar as the wording of Article 9 para. 1 CRC uses the terminology "competent authorities", the term "authority" has not merely a procedural character, but is also meant in a substantive sense. The prerequisite is that the decision-makers have the necessary skills and expertise, are suitably trained, act child-sensitive and are not only legally but also psychologically qualified to make such serious decisions.⁵² Furthermore, States Parties have to ensure adequate safeguards, including the rights to be heard, to a fair trial and judicial review, as well as clear criteria, based on the needs and welfare of the child.⁵³ Where possible, a multidisciplinary team of well-trained professionals is recommended because the situation of the child is complex and so are the caregiving abilities of the parents. Issues of neglect and/or abuse often do not only have psychological components but sociocultural ones as well.⁵⁴ To New Zealand, the CRC Committee expressed its concern about enduring inadequate cultural capability of the State care system leading to indigenous children being separated from parents and overrepresented in public care institutions.⁵⁵

According to Article 9 para. 2 CRC, a proceeding undertaken on the basis of Article 9 para. 1 CRC shall give all interested parties the opportunity to participate in the proceedings and to make their views known. Interested parties in this sense are always the parents and the child, who has an individual right to participation, depending on his or her age and maturity.⁵⁶ Additional interested parties may be the grandparents, the siblings, the extended family under Article 5 CRC or, in the case of court proceedings, the authority responsible for the protection of the child, e.g., the guardian *ad litem*.⁵⁷ As regards the participation rights of the child, these rights are detailed in Article 12 CRC. According to the CRC Committee, assessment of the best interests of the child when making a decision on the child's place of residence, parental responsibilities, or custody or visitation can hardly be complete if the child is not given an opportunity to express his or her opinion.⁵⁸ In this context, States Parties are called upon to adopt greater

⁴⁹ J Tobin/J Cashmore, Article 9, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, A Commentary, 2019, p. 307, at 317.

⁵⁰ U Kilkelly, in: T Liefeld/JE Doek (eds.), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, 2015, p. 193-209.

⁵¹ See Commission on Human Rights, *Report of the Working Group*, E/CN.4/1982/36/Add.1, 1982, para. 22. See also J Tobin/J Cashmore, Article 9, in: J Tobin (ed.), *The UN Convention on the Rights of the Child*, A Commentary, 2019, p. 307, at 317 et seq.

⁵² CRC Committee, General Comment No. 14, CRC/C/GC/14, 2013, para. 94; J Doek, in: A Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, Article 9 mn. 9.

⁵³ CRC Committee, *Concluding Observations: Suriname*, CRC/C/SUR/CO/3-4, 2016, para. 24 b.

⁵⁴ K Sandberg, in: U Kilkelly/T Liefeld (eds.), *International Human Rights of Children*, 2019, p. 187, at 202.

⁵⁵ CRC Committee, *Concluding Observations: New Zealand*, CRC/C/NZL/CO/5, 2016, paras 27-28.

⁵⁶ K Sandberg, in: U Kilkelly/T Liefeld (eds.), *International Human Rights of Children*, 2019, p. 187, at 200 et seq.

⁵⁷ UN Guidelines for the Alternative Care of Children, A/RES/64/142, 20 December 2009, para. 47.

⁵⁸ CRC Committee, General Comment No. 14, CRC/C/GC/14, 2013, para. 43; *Concluding Observations: Sweden*, CRC/C/SWE/CO/5, 2015, para. 39; Hungary, CRC/C/HUN/CO/3-5, 2014, para. 23; China, CRC/C/CHN/CO/3-4, 2013, para. 55.

efforts to include children with disabilities in separation procedures.⁵⁹ The effective exercise of participation rights requires, of course, that the interested parties are afforded **adequate access to information relevant to the decision. The right to information is inextricably linked to the rights to participation and expression of all parties, including the child.**⁶⁰ In proceedings relating to the withdrawal of parental custody, there applies an additional requirement for rapid action due to the severity of separation procedures.⁶¹

III. Right to Contact and Maintenance of Personal Relations (Article 9 para. 3 CRC)

11 Article 9 para. 3 CRC ensures the maintenance of family contact in case of separation. The States Parties must respect the rights of a child separated from one or both parents to maintain regular personal relations and direct contact with them or with the non-resident parent, except if this is contrary to the child's best interests. In the context of parental responsibilities and parental equality, the CRC Committee, in 2012, expressed concerns that in the northern areas of Albania, mothers were not allowed to maintain contact with their children when they lived on their own or went back to their original families following divorce or upon the death of their spouse. The CRC Committee recommended that the Albanian Government set up a system to facilitate relations between the child and both parents after divorce and ensure the responsibilities of both parents.⁶² The child's right to maintain personal relations and direct contact with both parents on a regular basis under Article 9 para. 3 CRC also extends, according to the CRC Committee, to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has strong relationships.⁶³ Furthermore, the CRC Committee stresses that the quality of the relationships and the need to retain them must be taken into consideration in decisions on the frequency and length of visits and other contacts when a child is placed outside the family.⁶⁴

12 Article 9 para. 3 CRC guarantees the child's right of maintaining personal relations and direct contact with the parent who is separated from him or her, but says nothing about the model of the regime or contact system to be offered by the Contracting States. In any case, an **obligation** to establish a parity caregiver model (so-called "exchange model", "*Wechselmodell*") in favour of the parents cannot be deducted from this rule.⁶⁵ It is the right of the child and not of both parents to maintain contact and family relations that constitutes the focus of Article 9 para. 3 CRC. This approach contrasts fundamentally with the historical approach whereby access or contact was considered to be a basic right of parents.⁶⁶ Only in serious and exceptional cases can the contact between the child and parents be denied. Where there are no such exceptional circumstances, it cannot be regarded as in the child's best interests to completely interrupt

⁵⁹ CRC Committee, General Comment No. 9, CRC/C/GC/9, 2007, para. 48.

⁶⁰ J. Doek, in: A. Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, Article 9 nn. 11. See also → Article 12 nn. 7.

⁶¹ Human Rights Committee, *Tcholatsh v. Canada*, Views adopted on 20 March 2007, CCPR/C/89/D/1052/2002, para. 8.9; *E. B. v. New Zealand*, Views adopted on 16 March 2007, CCPR/C/89/D/1368/2005, para. 9.3.

⁶² CRC Committee, Concluding Observations: Albania, CRC/C/ALB/CO/2-4, 2012, para. 53.

⁶³ CRC Committee, General Comment No. 14, CRC/C/GC/14, 2013, para. 60.

⁶⁴ CRC Committee, General Comment No. 14, CRC/C/GC/14, 2013, para. 65.

⁶⁵ See (German) Federal Constitutional Court, Decision of 24 June 2015, 1 BvR 486/14, para. 18. See also → Article 18 nn. 5.

⁶⁶ J. Tobin/J. Cashmore, Article 9, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child. A Commentary*, 2019, p. 307, at 330.

the direct contact with their parents.⁶⁷ Where one custodial parent denies contact and **personal relations** rights to the other potentially authorised parent without proving **serious reasons**, a contact ban is contrary to the rights of the child.⁶⁸ The child's right to maintain personal relations and direct contact with both parents is not dependent on the consent of the other parent. On the contrary, the States Parties must ensure that the rights of the holder of parental responsibility can be **enforced** even against the wishes of the custodial parent.⁶⁹ Since Article 9 CRC does not distinguish between marital and non-marital children, it also follows from Article 9 para. 3 CRC that children born out of wedlock have a right to regular personal relations with their biological father.⁷⁰ The biological father, under particular circumstances, has also the right to personal relations and direct contact with his **child even when he is not the legal father**.⁷¹ This right even applies in cases where it is **not (yet) firmly established that the applicant is actually the biological father of the child**.⁷² In any case, **the best interests of the child, who lives with his or her legal father, but who (potentially) has a different biological father, in view of the realities of family life in the 21st century cannot be determined by a general legal presumption as was the case in former German civil law**.⁷³ However, according to the ECtHR, the right of the (presumed) biological father to have direct contact with the child does not imply an obligation to allow the presumed biological father to challenge the position of the legal father.⁷⁴

13 Article 9 para. 3 CRC speaks of the obligation of States Parties to "respect the right of the child" and therefore only suggests *prima facie* the existence of a defensive right against unlawful State interference. **However**, in light of Article 4 CRC, the provision must be considered as forming also a **positive** obligation of the States Parties to take all necessary measures to ensure the child's right to maintain personal relations and direct contact with both parents.⁷⁵ According to the Human Rights Committee, this includes ensuring that the competent authorities in proceedings relating to contact rights, e.g., upon the conclusion of a **divorce**, decide **expeditiously** and **expediently**.⁷⁶ Long-term proceedings, especially in young children, lead to a child's alienation from his or her parents (or a parent). A process that took three years, for instance, violated the right of the parents and children to a fair trial.⁷⁷ The CRC Committee underscores this view.

⁶⁷ Human Rights Committee, *Tcholatsh v. Canada*, Views adopted on 20 March 2007, CCPR/C/89/D/1052/2007, para. 8.7.

⁶⁸ See Human Rights Committee, *Henricks v. The Netherlands*, Views adopted on 27 July 1988, CCPR/C/33/D/2011/1985, para. 10.4.

⁶⁹ Human Rights Committee, *Azeasi Martinez v. Paraguay*, Views adopted on 27 March 2009, CCPR/C/95/D/1407/2005, para. 9.

⁷⁰ J. Baer, *Verabschiedung des UN-Übereinkommens über die Rechte des Kindes im November 1989 in New York*, Familie und Recht 1990, p. 192, at 194. See also ECtHR, Judgment of 26 February 2004, No. 74969/01, para. 48 - *Görgülü v. Germany*.

⁷¹ ECtHR, Judgment of 21 December 2010, No. 20578/07, paras 62, 67 et seq. - *Anayo v. Germany*; Judgment of 22 March 2012, No. 45071/09, paras 74 et seq. - *Ahrens v. Germany*. On the other hand, see also ECtHR, Judgment of 22 March 2012, No. 23338/09, paras 72, 76 - *Kautzor v. Germany*; Decision of 2 December 2014, No. 546/10, paras 21 et seq. - *Adebowale v. Germany*.

⁷² ECtHR, Judgment of 15 September 2011, No. 17080/07, paras 97 et seq. - *Schneider v. Germany*.

⁷³ ECtHR, Judgment of 15 September 2011, No. 17080/07, para. 100 - *Schneider v. Germany*.

⁷⁴ See ECtHR, Decision of 5 November 2013, No. 26610/09 - *Hilsmann v. Germany*; Decision of 2 December 2014, No. 546/10, paras 21 et seq. - *Adebowale v. Germany*.

⁷⁵ See J. Tobin/J. Cashmore, Article 9, in: J. Tobin (ed.), *The UN Convention on the Rights of the Child. A Commentary*, 2019, p. 307, at 329.

⁷⁶ Human Rights Committee, *Tcholatsh v. Canada*, Views adopted on 20 March 2007, CCPR/C/89/D/1052/2007, para. 8.9; *E. B. v. New Zealand*, Views adopted on 16 March 2007, CCPR/C/89/D/1368/2005, para. 9.3.

⁷⁷ Human Rights Committee, *Tcholatsh v. Canada*, Views adopted on 20 March 2007, CCPR/C/89/D/1052/2007, para. 8.11.

In the case *N.R. v. Paraguay* (2020), it considers that court procedures establishing visitation rights between a child and a parent from whom he or she is separated must be expeditiously processed, since the passage of time may have irreparable consequences for the relationship between them. This includes the rapid enforcement of decisions resulting from those procedures.⁷⁸ Also, the ECtHR has repeatedly emphasised the risk of alienation and the fact that a lapse of the time is already able of representing a factual decision on the merits. Therefore, cases where personal relations and direct contact between children and their parents are at stake, the administration of justice must be rapid and expedient.⁷⁹

If State authorities order the separation of parents and child pursuant to Article 9 para. 1 and para. 2 CRC, they must additionally seek to limit the geographical distance between the child and his or her parents as much as possible to ensure that the right to personal relations in Article 9 para. 3 CRC can be implemented effectively. In view of this “closeness principle”, the CRC Committee has indicated that placing a child in an institution or foster care that is distant from the residence of the parents, or is otherwise inaccessible to them, is unacceptable.⁸⁰ In case of the separation of several children from one family, the State authorities must further attempt to accommodate all siblings together in the same place.⁸¹ In particular, it is of importance that the siblings continue to be able to enjoy contact with both parents and with each other, at the same time. If this is not the case, the ECtHR, in the case *Mustafa and Arman Akin v. Turkey* (2010) deemed it appropriate to examine whether the State authorities complied with their positive obligation emanating from Article 8 ECHR and whether they acted with a view to maintaining and developing the family ties in the best interests of the children.⁸²

However, the positive obligation flowing from Article 9 para. 3 CRC does not extend to allow the State authorities to force a parent to exercise their access or contact rights. An access against the will of the rights-holder would result in more harm than good to the child.⁸³ The reasoned refusal of a child to maintain contact with a parent must also be taken into account by the authorities. The view of the child may, insofar as the child has reached a sufficient level of maturity and development, even be decisive in answering the question of direct contact between the child and his or her parent(s).⁸⁴

⁷⁸ CRC Committee, *N.R. v. Paraguay*, Views adopted on 3 February 2020, CRC/C/83/D/30/2017, para. 8.7.

⁷⁹ ECtHR, Decision of 27 June 2000, No. 32842/96, para. 110 – *Nuutinen v. Finland*; Judgment of 13 July 2000, No. 25735/94, paras 48 et seq. – *Elsholz v. Germany*; Judgment of 10 November 2005, No. 40324/98, para. 100 – *Siss v. Germany*; Judgment of 10 January 2008, No. 25706/03, paras 80 et seq. – *Glesmann v. Germany*; Judgment of 15 January 2015, No. 62198/11, paras 101 et seq. – *Kuppinger v. Germany*.

⁸⁰ CRC Committee, Concluding Observations: Sweden, CRC/C/SWE/CO/5, 2015, para. 35; United Kingdom, CRC/C/GBR/CO/5, 2016, para. 54.

⁸¹ J Doek, in: A Alen et al. (eds.), A Commentary on the United Nations Convention on the Rights of the Child, Vol. 8, 2006, Articles 8-9, Article 9 nn. 12.

⁸² ECtHR, Judgment of 6 April 2010, No. 4694/03, paras 21 et seq. – *Mustafa and Arman Akin v. Turkey*. See also O Khazova, in: U Kilkelly/T Liefard (eds.), International Human Rights of Children, 2019, p. 161, at 177.

⁸³ C Kirchhof, Die UN-Konvention über die Rechte des Kindes, 2001, p. 236.

⁸⁴ J Doek, in: A Alen et al. (eds.), A Commentary on the United Nations Convention on the Rights of the Child, Vol. 8, 2006, Articles 8-9, Article 9 nn. 13.

IV. Information Requirements of the State Regarding the Whereabouts of Absent Family Members (Article 9 para. 4 CRC)

16

Article 9 para. 4 CRC obliges the States Parties to provide information on the whereabouts of absent family members if their separation from the family is a consequence of another previous State action, such as detention, imprisonment, exile, deportation or death. Here, the focus is upon cases in which the separation of children and parents (or one parent) is not the intended aim for protective reasons but rather a side effect of the execution of a non-protective State action.⁸⁵ The examples of separation initiated by States authorities in Article 9 para. 4 CRC provide only an illustrative list. The provision extends beyond such measures to cover any action initiated by the State, which includes clandestine actions of any kind.⁸⁶ The right to obtain information on the whereabouts of an absent family member is not confined to the child or the parents but extends to a vast number of beneficiaries of the right, that is any member of the (extended) family.⁸⁷ On the other hand, the obligation to provide information is only invoked where a request is made to provide such an information. The rationale for such a requirement is not clear, since Article 19 para. 4 ACRWC does not make the information of the State Party dependent on a request.⁸⁸ In any case, at the submission of a request, States Parties must, under Article 9 para. 4, sentence 2 CRC, ensure that such a submission shall of itself entail no adverse or negative consequences for any of the persons concerned. Article 9 para. 4, sentence 2 CRC is a response to the problem of enforced disappearances, i.e. the illegal abduction and murder of persons, including children, which was prevalent in some Latin-American States at the time when the Convention entered into force. The Latin American totalitarian regimes, from the 1960s to 1990s, had launched an unprecedented attack against sections of their own societies and committed gross human rights violations under the euphemistic cover of “subversive threat”.⁸⁹ Against this background, Article 9 para. 4, sentence 2 CRC stands obviously in close connection to the requirements established in Article 8 CRC.⁹⁰ The positive impact of Article 9 para. 4, sentence 2 CRC could have been further enhanced by stipulating a minimum content of the essential information and an express element of promptness.⁹¹ In the meantime, the Convention for the Protection of All Persons from Enforced Disappearance (CED) entered into force in 2009 and makes detailed provisions in this regard,⁹² which are also applicable to children. In the case *Gelman v. Uruguay*, the Inter-American Court of Human Rights classified the practice of violent abduction and disappearance, especially of children, during military dictatorships in South America as blatant violations of human

⁸⁵ C Kirchhof, Die UN-Konvention über die Rechte des Kindes, 2001, p. 240.

⁸⁶ J Tobin/J Cashmore, Article 9, in: J Tobin (ed.), The UN Convention on the Rights of the Child. A Commentary, 2019, p. 307, at 337.

⁸⁷ See Article 5 CRC, further see J Doek, in: A Alen et al. (eds.), A Commentary on the United Nations Convention on the Rights of the Child, Vol. 8, 2006, Articles 8-9, Article 9 nn. 30.

⁸⁸ J Tobin/J Cashmore, Article 9, in: J Tobin (ed.), The UN Convention on the Rights of the Child. A Commentary, 2019, p. 307, at 338.

⁸⁹ See JP McSherry, Predatory States. Operation Condor and Covert War in Latin America, 2005, passim.

⁹⁰ See → Article 8 nns. 2, 8, 10.

⁹¹ Critical assessment also by G Dorsch, Die Konvention der Vereinten Nationen über die Rechte des Kindes, 1994, p. 262.

⁹² See D Diehl, in: A Pollmann/G Lohmann (eds.), Menschenrechte. Ein interdisziplinäres Handbuch, 2012, p. 326 et seq.; N Kyriakou, The International Convention for the Protection of all Persons from Enforced Disappearance and its Contributions to International Human Rights Law, With Specific Reference to Extraordinary Rendition, Melbourne Journal of International Law 13 (2012), p. 1, at 27 et seq.

rights.⁹³ The ECtHR further recognises a violation of Article 8 ECHR if the information on the whereabouts of a newborn shortly after birth is not given.⁹⁴

V. Embedding of Article 9 CRC into the System of International Human Rights Protection

17 The right of a child not to be separated from his or her parents and the associated procedural and information rights cannot be found with such explicitness as in Article 9 CRC in any other human rights conventions.⁹⁵ The only exception is Article 19 ACRWC which mimics but does not mirror Article 9 CRC, since it does not provide that separation has to be a necessity.⁹⁶ The features of Article 9 CRC rather represent a substantial expansion in the rights and protections accorded to children, their parents, and other interested parties relative to other international instruments that offer protection for the family unit, such as Article 8 ECHR and Article 23 para. 1 ICCPR. However, in view of Article 24 para. 1 ICCPR, the Human Rights Committee has stressed that it is admissible to remove a child from his or her family when this is necessary to protect the child's welfare and best interests.⁹⁷ Also, pursuant to Article 24 para. 3 of the EU Charter of Fundamental Rights, every child has a right to regular personal relations and direct contact with his or her parents; the norm is obviously inspired by Article 9 CRC.⁹⁸ Yet, since all of these subjective rights are not absolute in character, a separation of children and parents may be admissible under certain conditions provided these are proportional and a measure of last resort.⁹⁹

18 At the European level, the ECtHR has aptly highlighted the difficult situation in which the public authorities regularly find themselves when faced with a case of parental endangerment of the child's welfare.¹⁰⁰ If they remain inactive there is a risk that the child will be harmed and the authorities will be held accountable for their failure to act. On the other hand, where positive actions are taken, the State authorities are often accused of an unacceptable and hastily interference of the right to respect for family life. Therefore, a fair balance must be struck between the conflicting interests of the individual parties concerned and public interests, with the State authorities enjoying a certain

⁹³ IACHR, Judgment of 24 February 2011, Series C No. 221, paras 310 et seq. – *Gelman v. Uruguay*. For a fuller account see K Theurer, *Durch Referendum bestätigte Amnestiegesetze in Fällen gewaltsamen Verschwindens unvereinbar mit der Amerikanischen Menschenrechtskonvention*, Europäische Grundrechte Zeitschrift 2012, p. 682 et seq. See also → Article 8 nn. 8.

⁹⁴ ECtHR, Judgment of 26 March 2013, No. 21794/08, para. 74 – *Zorica Jovanovic v. Serbia*.

⁹⁵ S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 1999, p. 173.

⁹⁶ For a fuller account see J. Doek, in: A. Alen et al. (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Vol. 8, 2006, Articles 8-9, p. 17-18. See also W. Vandenhole/GE. Türkelli/S. Lembrechts, *Children's Rights*, 2019, nn. 9-10.

⁹⁷ Human Rights Committee, General Comment No. 17: Article 24, HRI/GEN/Rev.7, 1989, para. 6. See also Human Rights Committee, *Buckle v. New Zealand*, No. 858/1999, paras 9.1 and 9.2.

⁹⁸ See A.-M. Böhringer, *Schutz des Kindes und Jugendlicher*, in: S. Heselhaus/C. Nowak (eds.), *Handbuch der Europäischen Grundrechte*, 2nd edn. 2020, § 45 nn. 12. For more detail see S. Höltscheidt, in: J. Meyer (ed.), *Charta der Grundrechte der EU*, Kommentar, 5th edn. 2019, Article 24 mns. 33 et seq.

⁹⁹ See Article 8 para. 2 ECHR as well as C. Grabenwarter/K. Pabel, *Europäische Menschenrechtskonvention*, 6th edn. 2016, § 22 nn. 46.

¹⁰⁰ ECtHR, Judgment of 8 April 2004, No. 11057/02, paras 84 et seq. – *Haase v. Germany*; Judgment of 30 September 2008, No. 38000/05, paras 30 et seq. – *R.K. and A.K. v. The United Kingdom*; Judgment of 10 January 2019, No. 18925/15, para. 52 – *Wunderlich v. Germany*.

margin of discretion.¹⁰¹ Given the importance of family life, however, a strong interest of the child must be relevant in order to justify separation from his or her parents.¹⁰² In all decisions concerning children, their best interests must be paramount.¹⁰³ Indeed, the Court has emphasised that in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations. The child's interest comprises of two limbs. On the one hand, it is clearly in the child's interest to ensure his or her development in a sound environment, and a parent cannot be entitled under Article 8 ECHR to have such measures taken that would harm the child's health and development.¹⁰⁴ On the other hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots.¹⁰⁵ It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family.¹⁰⁶ Thus, the State authorities are obliged to seek alternatives to a separation, if this is in the best interests of the child.¹⁰⁷ For instance, a separation of the child from his or her biological single mother may only be considered as a last resort; socio-economic reasons alone do not justify a separation.¹⁰⁸ Financial and material poverty, or conditions attributable to such poverty, should never be the sole justification for removing a child from parental care. The ECtHR is very clear on that point. Thus, in the cases of *Wallová and Walla v. Czech Republic* (2006) and *Saviny v. Ukraine* (2008), the Court ruled that national authorities, instead of helping the parents cope with their social and economic difficulties, took the children into care, which amounted to a violation of Article 8 ECHR.¹⁰⁹ The ECtHR re-underlines this argument in the case of *Soares de Melo v. Portugal* (2016), making explicit reference to the statements and recommendations of the CRC Committee.¹¹⁰

In addition, neither archaic cultural practices nor an irrational view of the world nor the ongoing missionary effort to influence the religious orientation of the child can preclude the parenting ability of a parent unless the child is exposed to dangerous practices

¹⁰¹ ECtHR, Judgment of 13 July 2000, No. 25735/94, para. 49 – *Elsholz v. Germany*; Judgment of 8 April 2004, No. 11057/02, para. 85 – *Haase v. Germany*; Judgment of 12 July 2001, No. 25702/94, paras 154 et seq. – *K. and T. v. Finland*; Judgment of 14 March 2013, Nos. 18734/09, 9424/11, para. 48 – *B.B. and F.B. v. Germany*.

¹⁰² ECtHR, Judgment of 26 February 2002, No. 46544/99, paras 69 et seq. – *Kutzner v. Germany*; Judgment of 16 February 2016, No. 72850/14, para. 89 – *Soares de Melo v. Portugal*; Judgment of 30 October 2018, No. 40938/16, paras 82 et seq. – *S.S. v. Slovenia*. See also M. Palm-Risse, *Der völkerrechtliche Schutz von Ehe und Familie*, 1990, p. 347.

¹⁰³ ECtHR, Judgment of 6 September 2018, No. 2822/16, para. 91 – *Jansen v. Norway*, with further references.

¹⁰⁴ ECtHR, Judgment of 8 July 2003, No. 30943/96, paras 65 et seq. – *Sahin v. Germany*; Judgment of 16 February 2016, No. 72850/14, para. 93 – *Soares de Melo v. Portugal*.

¹⁰⁵ ECtHR, Judgment of 13 March 2012, No. 45471/10, para. 134 – *Y.C. v. The United Kingdom*; Judgment of 16 February 2016, No. 72850/14, para. 91 – *Soares de Melo v. Portugal*; Judgment of 10 September 2019, No. 37283/13, paras 204 et seq., 208 – *Strand Lobben and Others v. Norway*, with further references.

¹⁰⁶ ECtHR, Judgment of 19 September 2000, No. 40031/98, para. 59 – *Gnahoré v. France*; Judgment of 6 July 2010, No. 41615/07, paras 136 et seq. – *Neudinger and Shuruk v. Switzerland*; Judgment of 10 April 2012, No. 19554/09, para. 85 – *Pontes v. Portugal*. See also ECtHR, Judgment of 10 September 2019, No. 37283/13, para. 209 et seq. – *Strand Lobben and Others v. Norway*.

¹⁰⁷ UN Guidelines for the Alternative Care of Children, A/RES/64/142, 20 December 2009, paras 14 et seq. See also ECtHR, Judgment of 21 September 2006, No. 12643/02, paras 68 et seq. – *Moser v. Austria*.

¹⁰⁸ ECtHR, Judgment of 18 June 2013, No. 28775/12, paras 86 et seq. – *R.M.S. v. Spain*.

¹⁰⁹ ECtHR, Judgment of 26 October 2006, No. 23848/04, paras 71 et seq. – *Wallová and Walla v. Czech Republic*; Judgment of 18 December 2008, No. 39948/06, paras 57 et seq. – *Saviny v. Ukraine*.

¹¹⁰ ECtHR, Judgment of 16 February 2016, No. 72850/14, paras 98 et seq. – *Soares de Melo v. Portugal*.

contrary to his or her best interests.¹¹¹ The State does not have the task of providing the best possible support for the child's abilities or advocating an improvement in education.¹¹² Deficits in the parents' ability to educate the child cannot justify a separation of the child from the parents, insofar as the well-being of the child is not seriously endangered. Even with the risk of female genital mutilation, there is a need for certain signs of a present or at least imminent risk to the well-being of the child. Therefore, the ECtHR rightly notes a violation of Article 3 ECHR only if a girl is deported to a State in which she is demonstrably threatened with genital mutilation without authorities protecting her.¹¹³ On the other hand, parents may rightfully be deprived of their parental rights if there is a well-founded suspicion that they constantly beat and ill-treat their children, even for religious reasons.¹¹⁴ Also, the persistent refusal of parents to send their children to school in order to keep the children in a "symbiotic" family system is a relevant and sufficient reason under Article 8 ECHR for the withdrawal of some parts of the parents' authority and the temporary removal of the children from their family home.¹¹⁵ In any case, however, the seriousness of measures which separate parent and child requires that they should not last any longer than necessary for the pursuit of the child's rights and that the State should take measures to rehabilitate the child and parent, wherever possible.¹¹⁶

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Similar to the requirements established in Article 9 para. 2 CRC, in the case of State ordered separation, the ECtHR calls for participation of the parents and the child at all stages of the proceedings.¹¹⁷ This includes a consultation of all interested parties as well as the submission of an expert appraisal.¹¹⁸ Only where the participation of the parents would lead to a serious endangerment of the child's well-being, can this element be relinquished. If this is the case, the child shall be assigned a legal guardian acting on behalf of the child's best interests (guardian *ad litem*).¹¹⁹ If wrong judgments were issued at the domestic level due to incomplete hearings, Article 8 ECHR is not violated by that alone. However, it is necessary for the courts to determine the facts in a sustainable manner if circumstances justify doubts about the correctness of the child's allegations that he or she has been severely physically abused by (one of) the parents.¹²⁰ If it is possible to consult the child's parents and to discuss with them the need for separation, there is no justification for urgent measures of the State. Accordingly, only upon the presentation of extraordinarily compelling reasons can an infant be immediately, and

¹¹¹ ECtHR, Judgment of 12 February 2013, No. 29617/07, paras 38 et seq. – *Vojnity v. Hungary*.

¹¹² ECtHR, Judgment of 26 February 2002, No. 46544/99, para. 69 – *Kützner v. Germany*; Judgment of 12 July 2001, No. 25702/94, para. 173 – *K. and T. v. Finland*; Judgment of 10 January 2019, No. 18925/15, para. 48 – *Wunderlich v. Germany*.

¹¹³ See ECtHR, Judgment of 19 January 2016, No. 27081/13, paras 62 et seq. – *Sow v. Belgium*.

¹¹⁴ ECtHR, Judgment of 22 March 2018, Nos. 68125/14, 72204/14, paras 72 et seq. – *Weifjen and Others v. Germany*. See also → Article 14 mn. 1; → Article 19 mn. 7.

¹¹⁵ ECtHR, Judgment of 10 January 2019, No. 18925/15, paras 49 et seq. – *Wunderlich v. Germany*. Further see → Article 28 mn. 12.

¹¹⁶ ECtHR, Judgment of 10 May 2001, No. 28945/95, para. 70 – *T.P. and K.M. v. The United Kingdom*; Judgment of 10 January 2019, No. 18925/15, para. 55 – *Wunderlich v. Germany*.

¹¹⁷ ECtHR, Decision of 13 July 2000, Nos. 39221/98, 41963/98, para. 138 – *Scazzari and Guaita v. Italy*.

¹¹⁸ ECtHR, Judgment of 13 July 2000, No. 25735/94, paras 53, 66 – *Elsholz v. Germany*; Judgment of 8 July 2003, No. 30943/96, paras 46 et seq. – *Sobin v. Germany*.

¹¹⁹ See S. Schmahl, Report on Child-Friendly Justice: Existing International and European Standards, in: Council of Europe, Directorate General of Human Rights and Legal Affairs (ed.), *Compilation of texts related to child-friendly justice*, 2009, p. 20, at 29.

¹²⁰ ECtHR, Judgment of 14 March 2013, Nos. 18734/09, 9424/11, paras 48 et seq. – *B.B. and F.B. v. Germany*.

against the will of the mother, withdrawn from her care by a process in which neither she nor the child's father actively participated in.¹²¹

Furthermore, after a separation of child and parents, the parents must be ensured their right to maintain personal relations and direct contact with the child¹²² in order to maintain the bonds with the original (biological) family.¹²³ The ECtHR underlines the importance of the child's interests in preserving and developing his or her ties with his or her family, and in particular with his or her mother and father. It considers that, in principle, it is in the child's best interests to maintain contact with both parents, insofar as practicable, on an equal footing, save for lawful limitations justified by considerations regarding the child's best interests. The Court expressly details that the same rationale underpins both Article 8 ECHR and Article 9 para. 3 CRC.¹²⁴ This also applies in the case of a detained or imprisoned parent. States Parties to the ECHR are therefore obliged to take measures to ensure that the child is able to visit the prison or detention centre in an appropriate and stress-free manner.¹²⁵ Specifically, the rights of direct contact between parents and children are regulated in the 2003 CoE Convention on the access rights of children.¹²⁶ This Convention relies essentially on the relevant case-law of the ECtHR. Thus, the Court regularly reiterates that in relation to the State's obligation to implement positive measures, Article 8 ECHR includes a parental right to have steps taken to reunite them with their children and an obligation on the national authorities to facilitate such a reunion.¹²⁷ In assessing whether the State's positive measures are sufficient for the purpose of Article 8 ECHR, the Court determines whether the decision-making process, seen as a whole, provided the parent with the requisite protection of his or her interests.¹²⁸ This depends on the particular circumstances of the case. The parent and the child must notably both have been placed in a position enabling them to put forward all arguments in favour of obtaining a contact.¹²⁹ In cases concerning restrictions of parent's contact with a child who has not reached his or her age of majority, the margin of appreciation accorded to the domestic courts is narrow and the ECtHR carries out a strict scrutiny.¹³⁰ The reasons for a suspension of contact cannot, as a rule, be regarded as permanent (parents' and children's attitude may change in the course of time) and should generally be reviewed at regular intervals, unless the

¹²¹ ECtHR, Judgment of 8 April 2004, No. 11057/02, para. 102 – *Haase v. Germany*.

¹²² ECtHR, Judgment of 22 June 1989, No. 11373/85 – *Eriksson v. Sweden*; Judgment of 13 July 2000, No. 25735/94, paras 48 et seq. – *Elsholz v. Germany*; Judgment of 15 September 2011, No. 17080/07, para. 94 – *Schneider v. Germany*.

¹²³ ECtHR, Judgment of 13 March 2012, No. 4547/10, paras 134 et seq. – *Y.C. v. The United Kingdom*; Judgment of 12 February 2013, No. 48494/06, para. 35 – *Tóth v. Hungary*; Judgment of 14 June 2016, No. 30955/12, para. 56 – *Mandiet v. France*; Judgment of 27 July 2018, No. 16112/15, para. 60 – *Fröhlich v. Germany*.

¹²⁴ ECtHR, Judgment of 10 January 2017, No. 32407/13, para. 81 – *Nowakowski v. Poland*.

¹²⁵ ECtHR, Judgment of 17 April 2012, No. 13621/08, para. 131 – *Horych v. Poland*. See also ECtHR, Judgment of 9 October 2008, No. 62936/00, para. 246 – *Moiseyev v. Russia*; Judgment of 23 February 2012, No. 39758/05, paras 39, 47 – *Trosin v. Ukraine*.

¹²⁶ CETS No. 192.

¹²⁷ See ECtHR, Decision of 15 January 2000, No. 31679/96, para. 94 – *Ignaccolo-Zenide v. Romania*;

Judgment of 23 September 1994, No. 19823/92, para. 58 – *Hokkanen v. Finland*; Decision of 27 June 2000, No. 32842/96, para. 128 – *Nuutinen v. Finland*; Judgment of 26 July 2011, No. 6457/09, para. 64 – *Slaw v. Hungary*.

¹²⁸ ECtHR, Judgment of 10 November 2005, No. 40324/98, para. 89 – *Süß v. Germany*; Judgment of 6 October 2016, No. 23280/08, para. 75 – *Moog v. Germany*.

¹²⁹ ECtHR, Judgment of 8 July 2003, No. 31871/96, paras 68–69 – *Sommerfeld v. Germany*; Decision of 3 April 2018, No. 43976/17, paras 17 et seq. – *Sangoi v. Germany*.

¹³⁰ ECtHR, Judgment of 8 July 2003, No. 31871/96, para. 63 – *Sommerfeld v. Germany*; Judgment of 6 October 2016, No. 23280/08, para. 82 – *Moog v. Germany*.

Article 10 [Family Reunification]

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

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I. Generalities

Article 10 CRC, which regulates family reunification, is strongly connected to Article 9 CRC.¹ However, whereas Article 9 CRC considers the relationship between parent and child from a domestic legal perspective and within a State's jurisdiction,² Article 10 CRC concerns situations where children and parents live or reside geographically apart in different countries. The child's right to maintain regular personal contact, as provided for in Article 9 para. 3 CRC, and the fundamental principle of the unity of the family, as reflected in Article 9 para. 1 CRC, are under Article 10 CRC extended to those cases in which children and parents reside in different States. The drafters expressly decided that the international aspects of familial and parental separation and reunification should be dealt with distinctively from Article 9 CRC in a separate provision.³ Under a cross-border scenario and an inter-State dimension of familial separation, the main goal of preservation of the family environment for the child is additionally complicated by the fact that the child's parents, and often a child and one of his or her parents, are separated by the State borders.⁴

¹ C. Kirchhof, Die UN-Konvention über die Rechte des Kindes, 2001, p. 245.

² See → Article 9 mn. 3.

³ See Commission on Human Rights, Report of the Working Group, E/CN.4/1983/62, 1983, paras 8-10, 20-21; E/CN.4/1989/48, 1989, para. 203.

⁴ O. Khazova, in: U. Kilkey/T. Liefaard (eds.), International Human Rights of Children, 2019, p. 161, at 178.

review would in itself seriously affect the child's well-being.¹³¹ Furthermore, in view of Article 8 ECHR, it is inadmissible if, in a case for enforcing the right of contact between the child and the separated father, only a fine of 300 Euros is imposed on the mother who persistently undermines the contacts between the father and his son, although the possibility of ordering a fine of up to 25,000 Euros was provided for by domestic law.¹³²

The CJEU holds a similar opinion in view of the Regulation (EC) No. 2201/2003¹³³ concerning jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility.¹³⁴ It also underscores that the reason why the best interests of the child have to be taken into consideration is to ensure respect for the child's fundamental rights.¹³⁵ Therefore, when applying the rules of jurisdiction in matters of parental responsibility recourse must be had to the criterion of proximity. Under that criterion, the jurisdiction of the courts of the EU Member States in matters of parental responsibility is, as a general rule, determined by the fact where the child is habitually resident at the time the courts are seized.¹³⁶ In order to be regarded as habitually resident, the child must be physically present in a Member State, and his or her presence must not be temporary or intermittent.¹³⁷

There is ample case-law on the part of the IACtHR with regard to enforced disappearances, which are the subject of Article 9 para. 4 CRC. Thus, in the landmark decision *Velasquez Rodríguez v. Honduras* (1988) the Court rightly held that the phenomenon of enforced disappearances is a complex and often continuing form of human rights violation that must be understood and confronted in an integral fashion.¹³⁸ In Europe, however, the relevant case-law focuses less on enforced disappearances but rather on the so-called extraordinary renditions. After 9/11, the US Central Intelligence Agency set up an apparatus, by which it collected information about suspected terrorists abducted them, transferred them to distinct third countries in Europe where they were detained *incommunicado* and tortured for interrogation purposes. In several judgments, starting with the ground-breaking decision in *Khaled el-Masri v. Macedonia* (2012), the ECHR held that the cooperation of national security authorities of the States Parties to the ECHR with the CIA in extraordinary renditions infringed their positive duty, under Articles 3, 5 and 13 ECHR, to protect and to ensure human rights.¹³⁹

¹³¹ ECtHR, Decision of 19 June 2003, No. 46165/99 – *Nekvedaricius v. Germany*; Judgment of 28 April 2016, No. 20106/13, para. 49 – *Buchleither v. Germany*.

¹³² ECtHR, Judgment of 15 January 2015, No. 62198/11, paras 105 et seq. – *Kuppinger v. Germany*.

¹³³ OJ EU 2003, No. L 338, p. 1.

¹³⁴ See CJEU, Judgment of 2 April 2009, Case C-523/07, ECLI:EU:C:2009:225, paras 29 et seq. – *Korkein hallinto-oikeus*.

¹³⁵ CJEU, Judgment of 23 December 2009, Case C-403/09 PPU, ECLI:EU:C:2009:810, paras 53-55 – *Detitzek*; Judgment of 5 October 2010, Case C-400/10 PPU, ECLI:EU:C:2010:582, para. 60 – *McB*; Judgment of 27 October 2016, Case C-428/15, ECLI:EU:C:2016:819, para. 44 – *Child and Family Agency*.

¹³⁶ CJEU, Judgment of 27 October 2016, Case C-428/15, ECLI:EU:C:2016:819, paras 45-46 – *Child and Family Agency*.

¹³⁷ CJEU, Judgment of 17 October 2018, Case C-393/18 PPU, ECLI:EU:C:2018:835, paras 50 et seq. – *UD v. XB*, with further references.

¹³⁸ IACtHR, Judgment of 29 July 1988, No. 7920, paras 130 et seq. – *Velasquez Rodríguez v. Honduras*. Since *Velasquez Rodríguez* the Inter-American Court of Human Rights has delivered more than 30 judgments on enforced disappearances.

¹³⁹ ECtHR, Judgment of 13 December 2012, No. 39630/09, paras 215 et seq. – *el-Masri v. Former Yugoslav Republic of Macedonia*. For a fuller account on the case-law of the ECHR in the matter see S. Schmahl, in: F-H Dietrich/S. Sule (eds.), Intelligence Law and Policies in Europe, 2019, p. 291, at 315 et seq.