The interaction between the UN CRC and the ECHR in Belgian custody and access rights proceedings

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Central Problem Statement
Contrasting the law in books versus the law in practice regarding child-friendly justice in custody and access rights proceedings.

Elaborate Abstract
The UN CRC strives to prioritise the well-being of children in the decision-making process concerning measures that (in)directly affect them. As children frequently encounter judicial proceedings in the context of their parents’ separation and lack procedural capacity in most member States, a concrete clarification of these provisions in custody proceedings is sorely needed. In this regard, the European Court of Human Rights has developed extensive case-law under article 8 ECHR, which frequently draws inspiration from the UN CRC. Therefore, these instruments succeed in offering domestic authorities tools in which they can best protect the interests of children who are caught in the crossfire of their parents’ conflict.

Interaction between the UN CRC and the ECHR

The UN CRC
The best interests-principle, contained in article 3 UN CRC, is criticised extensively due to its vagueness and dubious nature. However, the best interests-principle can provide protection to children who are excluded from custody or access rights procedures because they are not regarded as party to the conflicts as such. Furthermore, the Committee stresses that the principle should be determined on a case-by-case basis, in a flexible and adaptable manner in light of the specific circumstances of the particular child. Furthermore, Member States should assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him or her according article 12. Their views should be given due weight in accordance with the age and maturity of the child. In particular, the Committee outlines specific obligations in the case of divorce and separation proceedings. All legislation on separation and divorce has to include the right of the child to be heard and should enable an individual assessment of the capacity of the child to form its own views freely.

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3 UN Committee on the Rights of the Child, General Comment No. 14, CRC/C/GC/14, 2013, 9, nr. 32.
The ECHR

Article 8 ECHR is a frequently litigated provision in children’s cases. The Court relies heavily on the CRC to uphold the most recent standards in children’s rights and applies them sensu lato by not only referring to the legal text but also to General Comments and Concluding Observations. However, the interaction between the UN CRC and the ECHR is not solely characterised by a top-down approach. U. Kilkelly argues that the theory of positive obligations led to a unique contribution of the Court to international children’s rights standards. Nevertheless, it is important to remark that the principle of subsidiarity primarily trusts the task of assessing the relevant facts to the national authorities. Therefore, the Court will solely examine whether the State Party adopted all necessary, relevant and sufficient measures that can be reasonably expected to facilitate contact between parent and child and whether a fair balance has been struck between competing interests bearing in mind that the interests of the child should be the primary consideration.

The best interests of the child

The ECtHR has explicitly referred to the CRC and General Comment no. 14 when the best interests of the child have to be analysed in international child abduction cases. However, the Court distinguishes international child abduction cases from custody cases, as the Hague Convention proposes explicit criteria that need to be evaluated in the best interests-assessment. Thankfully the Court does refer to the CRC in regular custody cases and stresses that it contains the human rights of children and that all governments should aspire to realise the standards proposed by it. The ECtHR has also referred to the recent General Comment on the best interests of the child, stating that if a compromise between competing interests cannot be found, a larger weight should be attached to what serves the child best.

The child’s interests consist primarily of two factors according to the Court: to have its ties with its family maintained (unless such ties are proved to be undesirable) and to have its development in a sound environment ensured. The child’s best interests will vary according to the specific circumstances of the case, in particular its age and maturity, the presence or absence of its parents, its environment and experiences.

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7 See amongst others: ECtHR, M. and M. v. Croatia, 2015, §96-97 and §146; ECtHR, Vujica v. Croatia, 2015, 56.
8 ECtHR, G.B. v. Lithuania, 2016, §65.
10 ECtHR, G.B. v. Lithuania, 2016, §94.
11 ECtHR, Bostina v. Romania, 2016, §57.
12 ECtHR, Mitrova and Savik v. the former Yugoslav Republic of Macedonia, 2016, §78-79; ECtHR, Stasik v. Poland, 2015, §81; ECtHR, Krasicki v. Poland, 2014, §83; ECtHR, Plaza v. Poland, 2011, §71.
14 ECtHR, G.S. v. Georgia, 2015, §33.
15 ECtHR [GC], X. v. Latvia, 2013, §101.
17 ECtHR, Vujica v. Croatia, 2015, §56.
The **behaviour** of parents can be an important factor in the decision-making process concerning the award of custody. Parents need to show interest in the development of their children and be supportive towards their health and special needs.\(^{20}\) These needs can also include the interest of the child to maintain contact with the other parent.\(^{21}\) State parties need to ensure the **swift expedition** of custody proceedings, as they can entail considerable emotional damage to the children involved.\(^{22}\) State parties thus need to recognise the seriousness and urgency of the situation if the children involved are traumatised.\(^{23}\) Finally, after the pronouncement of the judgement, the custody decision needs to be effectively and rapidly **enforced.**\(^{24}\)

The ECtHR emphasises that “the likelihood of family reunification will be progressively diminished and eventually destroyed if the biological (parent) and the child are not allowed to see each other”.\(^{25}\) This statement can explain the numerous violations of article 8 that the Court has pronounced regarding the obstruction of contact arrangements by the resident parent. Contrary to the wide margin of appreciation which State Parties are granted when deciding on custody, the ECtHR decides that a stricter scrutiny is necessary on any further limitations such as restrictions placed on parental rights of access.\(^{26}\) Furthermore, the Court acknowledges that the enforcement of custody decisions can be a difficult task if State Parties are confronted with the destructive behaviour of one or both parents.\(^{27}\) However, lack of cooperation is not a determining factor that can exempt the State Party from its positive obligation under article 8 ECHR.\(^{28}\) It rather imposes on the authorities an **obligation to reconcile the conflicting interests** of the parties.\(^{29}\)

Several **social institutions** can provide assistance in these delicate situations, such as the school, an Ombudsperson, psychologists, child care services, guardians and the police.\(^{30}\) The Court is highly appreciative of social welfare centres that guide families through these proceedings and provide in psychological assistance for divorcing parents\(^{31}\) and reprimands State Parties who do not provide this guidance.\(^{32}\) These centres can play a crucial role in evaluating the situation and the child’s living conditions, contacting the involved parties and proposing solutions to occurring problems.\(^{33}\)

When a resident parent refuses to hand over a child to the other parent, the first and most obvious step entails adopting a **contact order**. Furthermore, bereaved parents can request the court to impose a **fine** on the obstructing parent.\(^{34}\) However, if the attitude of the obstructing parent is particularly challenging, the Court acknowledges that more direct and specific

\(^{25}\) ECtHR, *Mitrova and Savik v. the former Yugoslav Republic of Macedonia*, 2016, §91; ECtHR, *Mitovi v. the former Yugoslav Republic of Macedonia*, 2016, §64; ECtHR (dec.), *Cârstoiu v. Romania*, 2013, §43.
\(^{28}\) ECtHR, *Ribic v. Croatia*, 2015, §94.
measures should be explored by the domestic authorities. Obstructed parents can call for the aid of a bailiff to ensure the execution of judicial decisions. State parties can impose custodial sentences if they are necessary in a democratic society. However, they can be detrimental to the wellbeing of the child and can obliterate any possibility of cooperation between parties in the future.

The right to be heard
In the past, the ECtHR has also relied upon the UN CRC, the concluding observations and the General Comment of the Committee in child custody cases concerning the right of the child to be heard. Furthermore, in the case of M. and M. vs. Croatia, the Court evaluates article 12 CRC, not only in its discussion of the relevant international instruments, but also in its assessment. This approach of the Court proves that the CRC directly influences the case-law of the ECtHR concerning article 8 ECHR.

The children involved should, in general, be heard (in)directly, having due regard to the age and maturity of the children concerned and the specific circumstances of the case. The Court finds that a mature child should have its wishes respected regarding its residence if both parents are equally (un)fit to raise their child. The views of children can also lead to the suspension of a parent his or her access rights. However, the Court refuses to grant mature children an unconditional veto power and even when they have clear views, there needs to be a careful and full consideration of all the evidence and a weighing up of the competing rights.

In conclusion, the ECtHR has integrated the principles of the CRC in its case-law. Not only does it refer to the principles in a formalistic manner, the autonomous interpretation of these principles by the Court reach far beyond the scope of even the General Comments of the Committee. However, due to the extensive margin of appreciation that Member States are being granted by the Court and the mostly parent-oriented focus of the judgments, it does occur that the analysis of the best interests of the children involved are not always analysed to a maximum.

36 For example: ECtHR (dec.), Cârstoiu v. Romania, 2013, §44.
37 ECtHR, Mitrova and Savik v. the former Yugoslav Republic of Macedonia, 2016; ECtHR, Krasicki v. Poland, 2014, §96.
38 ECtHR, Fourkiotis v. Greece, 2016, §68.
41 Ibid., §171, §181 and §184.
45 ECtHR, Süss v. Germany, 2005, §46.
Implementation in Belgian legal order

In its concluding observations of 2010, the CRC Committee regretted the fact that previous recommendations concerning the right to be heard were not sufficiently followed up.\(^{47}\) The Committee stressed that Belgium should reflect the best interests principle as a general principle in all legislation regarding children.\(^{48}\) Concerning the right to be heard, the Committee noted with concern the fact that children feel that their opinions are rarely taken into consideration.\(^{49}\) Furthermore, the Committee noted that the implementation of the right to be heard remained largely discretionary. The Committee also specifically expressed its concern regarding the obligation of judges to hear children in divorce cases, because it was not effective in practice.\(^{50}\)

In 2012, Belgium was convicted by the ECtHR for a violation of article 8 ECHR in an international child abduction case.\(^{51}\) The ECtHR stated that the Court of Appeal had not analysed the best interests of the child thoroughly and that it should have ordered an independent expert opinion.\(^{52}\) Furthermore, the Court of Appeal had not taken into account the level of integration of the child in the Belgian society.\(^{53}\) In another international child abduction case the Court reprimanded Belgium for only taking into account a report of the social services on the children’s state of health and education, thereby neglecting an analysis of their psychological wellbeing.\(^{54}\) Furthermore, Belgium had not taken timely and adequate measures, ensuring the return of the children to their fathers and had consequently attributed to the total rupture of family ties between them.\(^{55}\)

Apparently, Belgium took some of these findings seriously by adopting the law concerning the family and youth court.\(^{56}\) Article 1253ter/6 of the new Judicial Code stipulates that a judge, when confronted with the involvement of a minor, will order all necessary investigate measures while taking into account the best interests of the child. These can entail a social investigation, a medical-psychological examination and the opportunity to be heard.\(^{57}\) This opportunity is now granted to all minors in matters of custody and access disputes, based on article 1004/1 of the Judicial Code. Children above the age of twelve are even notified of this right.\(^{58}\) The judge can also impose compulsory measures to entice parents to respect judicial arrangements.\(^{59}\) Article 387ter, §1 of the Judicial Code offers the judge the opportunity to take new decisions regarding custody and the right to access to the child, to appoint a bailiff to execute the judgment, with the option to let him be accompanied by other actors or he can impose a fine.

\(^{47}\) CRC, Concluding observations of the Committee on the Rights of the Child: Belgium, 18 June 2010, CRC/C/BEL/CO/3-4, §4(b) and §6.
\(^{48}\) Ibid., §33.
\(^{49}\) Ibid., §35.
\(^{50}\) Ibid., §37.
\(^{52}\) Ibid., §72.
\(^{53}\) Ibid., §74.
\(^{54}\) ECtHR, Leschiatta and Fraccaro v. Belgium, 2008, §33.
\(^{55}\) Ibid., §34.
\(^{57}\) Art. 200 Wet 30 juli 2013 betreffende de invoering van een familie- en jeugdrechtbank, BS 27 september 2013.
\(^{58}\) Ibid.
Shortcomings
However, the law in books does not necessarily correspond to the law in practice. This analysis will be the focal point of my PhD research. Despite these successes, international law is not fully equipped to handle all the complications that arise due to the local social realities. These complications concern for instance the threshold for children to apply to international and domestic bodies, the parent-oriented focus of most judgments and the manipulative behaviour of some parents who often present authorities with a *fait accompli*. 