ARTICLE

Establishing Parenthood through Adoption and Surrogacy: A Test Case for the ECtHR Use of the Best Interests of the Child Principle

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1. Introduction. The European Court of Human Rights and the Best Interests of the Child Principle

The ECHR, serving as the cornerstone of the European Human Rights system, lacks explicit provisions exclusively dedicated to children. Nonetheless, the ECHR has emerged as a crucial mechanism for safeguarding the fundamental individual rights of children.[1] According to Fenton-Glynn, "the key to its efficacy lies not in its provisions … but in its enforcement through the European Court of Human Rights",[2] which since 1989 has interpreted those provisions in light of the UN Convention on the Rights of the Child (CRC).[3] Over the past 50 years, the increasing need to guarantee and protect human rights affirmed by supranational sources generated a propulsive thrust towards strengthening the interpreter's role and resorting more frequently to principles.[4] In this scenario, the ECtHR occupies a central role in human rights protection, in particular through its jurisprudence which "enlightens not only national judges but also judges and committee members of the other international human rights organs".[5] Consequently, in the hands of the Strasbourg Court, the BIC principle, therefore, has the potential to become a powerful tool to guarantee and protect children's rights.

1 J. Doek, The Human Rights of Children: An Introduction, *in* T. Liefaard & U. Kikelly (Eds.), *International Human Rights of Children*, Springer 17 (2018).

2 C. Fenton-Glynn, *Children and the European Court of Human Rights*, Oxford University Press 3 (2021).

3 Id., at 6. In the area of child protection, for example, the Court has outlined a complex system of state obligations, the scope of which extends beyond the actions of the State to include those of private individuals. In doing so, the Court has referred directly to the CRC on several occasions, as in the case of *CS v. Romania*, Appl. No. 26692/05, March 2012. *See* C. O'Mahony, Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations, in *International Journal of Children's Rights* 7, at 662 (2019).

4 D. Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000, *in* D. Trubek & A. Santos (Eds.), *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press 63-67 (2006). The same process is described by Emanuela Navarretta in the context of European constitutional systems as the "new consitutionalization of private law", *see* E. Navarretta, Costituzione, Europa e diritto privato. Effettività e «drittwirkung» ripensando la complessità giuridica, Giappichelli (2017).

5 E. Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, in *New York Journal of International Law and Politics* 31, at 843 (1999).

The BIC principle, enshrined in Article 3(1) of the UN Convention on the Rights of the Child (CRC), has been a constant in the ECtHR's evolving jurisprudence on children and their rights. Despite the lack of a literal reference in the ECHR, the Court has referred to the principle on numerous occasions, relying on the wording of Article 3(1) of the CRC, which provides that:

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

From juvenile justice to migration, from property to family law,[6] the flexibility and dynamism of the principle have allowed the ECtHR to apply it in many different areas. However, the very same characteristics that make the BIC principle applicable "in all actions concerning children" are also responsible for its susceptibility to contested applications and interpretations. The ECtHR itself has been criticised for this very reason.[7] Contestable applications of the principle can lead to the protection of adults rather than children. This is particularly true in family law, where the interests of the child and those of the parents are closely intertwined. The lack of rationality and transparency in the Court's application of the principle was even highlighted by Judge Nussberger, who accused the Court of using the principle as a "formule stéréotypée pour défendre d'autres intérêts".[8]

Against this background, it is legitimate to investigate to what extent the Court is coherent with a reasonable application of the principle. For this purpose, an area of the Court's case law has been selected as a test case for the Court's use of the BIC principle. To this end, the next section will highlight the main characteristics of the chosen context, namely, family law disputes concerning the recognition of parenthood established through adoption and surrogacy. The third section will then present a model for the application of the principle to be used in the context of judicial decisions directly concerning children. The model will reflect the elements of a reasonable application of the BIC principle and, thus, provide the objective standard against which the selected case law of the ECtHR will be tested in Section 4.

6 W. Vandenhole & E. Turkelli, The Best Interests of the Child, *in* J. Todres & S.M. King (Eds.), *The Oxford Handbook of Children's Rights Law* 209 (2020), at 210; N. Ismaïli, Who Cares for the Child? Regulating Custody and Access in Family and Migration Law in the Netherlands, the European Union and the Council of Europe, at 87 (2019).

7 *See* Vandenhole & Turkelli, *supra* note 6, at 215; M. Freeman, *Commentary on the United Nations Convention on the Rights of the Child. Article 3 – The Best Interests of the Child*, Brill 12 (2007); M. Skivenes & K. Søvig, Judicial Discretion and the Child's Best Interests: The European Court of Human Rights on Adoptions in Child Protection Cases, *in* E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, Cambridge 345 (2016); C. Smyth, The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?, in *European Journal of Migration and Law* 17 (2015) 70 -103.

8 "[stereotyped formula to protect others' interests]" ECtHR, *Mandet v. France*, Appl. No. 30955/12 January 2016, dissenting opinion, para. 7; all translations in brackets [] are mine.

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doi: 10.5553/FenR/.000064

2. Establishing Parenthood through Adoption and Surrogacy

Owing to its protean nature, the BIC "cannot be understood identically irrespective of" the context.[9] To analyse the ECtHR approach, it is therefore necessary to narrow down the field of research. In our case, the chosen context is that of family law; more precisely, the case law that originates from claims brought under Article 8 ECHR concerning the establishment or recognition of parenthood through adoption or surrogacy of a specific child (or children). Using the HUDOC database, fourteen cases were selected from the relevant jurisprudence.[10] Despite the different factual matrices, all fourteen cases have a core element in common: they all deal with the formation of legal family ties. In such cases, the Court is faced with the challenge of striking a balance in the triangular relationship between the interests of the child, the parents and the State. In resolving the central issue in each case, the Court must also resolve two underlying *tensions*: the one that pits the child's interests against those of the adults and the one that pits the child's interests against those of children as a broader group.

2.1. Child versus Adults: Relational Rights

The first evident *tension* in these cases concerning the recognition of parenthood originates from the fact that the core issue affects the rights of the child and those of the adults differently. From the child's viewpoint, the same issue has repercussions on both rights protected under Article 8 of the ECHR: the right to private life and the right to family life. These disputes directly impact the child's *status filiationis*, which is an essential element of the two aforementioned rights. On the one hand, the status represents the legal acknowledgement of the child-parent relationship and, as such, is a part of the child's identity, thus constituting a core aspect of their private life.[11] On the other hand, from the perspective of their right to family life, establishing a certain *status* may either foster a potential family life or provide legal recognition of a pre-existing one.[12] In

9 ECtHR, *X. v. Latvia*, Appl. No. 27853/9 November 2011, para. 100.

10 The cases were selected through a Boolean search conducted in the HUDOC database (https://hudoc.echr.coe.int/eng#%20): the first query used the keywords 'Adoption' AND ('best interests of the child' OR 'interet superior de l'enfant'); the second query used the keywords ('surrogacy' OR 'gestation pour autrui') AND ('best interests of the child' OR 'interet superior de l'enfant'). The selection aimed at identifying the cases presenting the following characteristics: admissible cases that are decided in French or English by ECtHR Chambre or Grand Chambre; claims brought under Art. 8 alone or Art. 8 in conjunction with Art. 14; claims involving the establishment or recognition of parenthood through adoption or surrogacy of a specific child (or children); for the purpose of the research, adoption was considered only as a family law institute comprehending strong adoption, simple adoption, international adoption, stepchild adoption, second-parent adoption and excluding adoption as a measure of child protection; In the merits section of the judgment, the Court must have referred at least once to the 'best interests of the child' or 'interet superior de l'enfant'; timeframe: cases filed from January 1990 to November 2022, thus allowing to cover a span of time from the ratification of the CRC up to the present days.

11 Council of Europe: European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, para. 8 (2022).

12 *See* Fenton-Glynn, *supra* note 2, at 229.

contrast, from the adults' viewpoint, the recognition of parenthood falls solely under their right to family life.

Even though protected under the same article, the objectives of the right to private life and the right to family life differ, and they may receive varying degrees of protection under ECtHR case law.[13] Therefore, in the cases being considered for this article, the same actions by the State may amount to a violation of the child's right to private life but not their right to family life. Nonetheless, filiation intertwines the two rights of the child, and the safeguarding of the first ultimately encompasses the preservation of the second. Furthermore, due to the specific structure of the right to family life, the protection granted to the child's rights unavoidably extends to the rights of the parents.

It appears that the right to family life possesses a relational dimension. Article 8 safeguards the right to family life as the right to live together, fostering "the harmonious flourishing of family relationships between family members who mutually enjoy each other's company".[14] Based on this definition, it is clear that both children and adults share the object of protection of the right to family life under Article 8. Consequently, decisions on parentage require a careful and transparent application of the BIC principle, since the promotion of the child's rights inevitably involves the rights of adults, particularly in situations where it is difficult to distinguish the point at which the former ends and the latter begins.

2.2. Child versus Children: De facto Family Life

The second *tension* underlying these cases stems from the Court's need to balance at least three competing interests: the adults, the child and the broader category of children as a vulnerable group. In the context of adoption and surrogacy, the establishment of filiation is determined by regulations crafted to protect not only the rights of the individual child but also, *primarily*, the rights and interests of children as a group.[15] Therefore, whenever the ECtHR validates the existence of a family contrary to the State opinion, it reshapes that "triangular relationship of interests" between children, parents and the State.[16] For this reason, the Court's assessment of the existence of family life plays a pivotal role in determining the interaction between the interests and the rights involved.

When faced with an alleged violation of the right to family life under Article 8, the initial step for the Court involves evaluating the existence of family life. Since *Marckx v. Belgium*,[17] the Court has worked on defining the notion of 'family life', trying "to strike a delicate balance between jurisdictions".[18] Therefore, because it

13 *See* Guide on Article 8, *supra* note 11, paras. 78-84, paras. 307-311.

14 Id., para. 292.

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

16 *See* Doek, *supra* note 1.

17 ECtHR, *Marckx v. Belgium*, Appl. No. 6833/74, June 1979, para. 48; this key case is the first in which the ECtHR explicitly refers to a child as a holder of fundamental rights.

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

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doi: 10.5553/FenR/.000064

was unable to rely on a specific definition in the ECHR text or on distinct domestic law classifications, the Court has developed an autonomous concept of family life. In doing so, the ECtHR adopted a functional approach, which reduced the question of the existence or nonexistence of 'family life' to a "question of fact, depending upon the existence of close personal ties".[19]

Certainly, this notion of de facto family life can more readily accommodate the dynamism of societal changes, to which the area of family law is often susceptible.[20] Furthermore, by disassociating the existence of family life from legal definitions, this notion broadens the scope of the State's obligation to safeguard family ties that comes from Article 8. This functionalist approach, however, carries a downside. The Court's delineation of the existence of family life based on 'individual circumstances'[21] – instead of *de jure* requirements – drastically restricts the State's margin of appreciation. Moreover, suppose the Court recognises the existence of a family in contrast with a domestic policy. In that case, that decision has an impact not only on the individual child but also on children in general, who are beneficiaries of that policy. Thus, in applying the BIC principle, children's interests should be distinctly identified and meticulously balanced with those of the individual child.

3. The Principle of the Best Interests of the Child: Building a Model for Its Application

The BIC is considered to be, by 'broad consensus',[22] a general principle of international law, and yet its status is 'controversial'.[23] Many authors have identified the gist of the problem with the principle's indeterminacy. This quality has been labelled as a source of manipulation, paternalistic interpretations and lack of fairness.[24] This text argues that it is necessary to elaborate criteria for the principle's use, aiming to restrict the space for subjective interpretations based on contestable meanings in those areas where 'strong discretion' is left to judges.[25] On these premises, a critical assessment of the BIC will be conducted, aiming at building a

19 ECtHR, *Paradiso and Campanelli v. Italy*, Appl. No. 25358/12, 24 January 2017, para. 140; *see* Guide on Article 8, *supra* note 11, para. 292.

20 *See* Lima, *supra* note 18, at 103; cf. Ismaïli, *supra* note 6, at 40.

21 *See also* Ismaïli, *supra* note 6, at 29; cf. Lima, *supra* note 18, at 116.

22 ECtHR, *Neulinger and Shuruk v. Switzerland*, Appl. No. 41615/7 June 2010, para. 134.

23 J. Eekelaar & J. Tobin, Art. 3 The Best Interests of the Child, *in* J. Tobin (Ed.), *The UN Convention on the Rights of the Child:* A *Commentary*, Oxford University Press 74 (2019).

24 R.H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, in *Law Contemporary Problems*, Duke Law School 36(3) (1975); N. Cantwell, Are Best Interests a Pillar or a Problem for Implementing the Human Rights of Children? in J. Sloth-Nielsen & T. Liefaard (Eds.), *25 Years of the Convention on the Rights of the Child* 62 (2015); Vandenhole & Turkelli, *supra* note 6, at 208; E. Sutherland, Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities, *in* E. Sutherland & L.-A. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, Intersentia 35 (2016).

25 R. Dworkin, *The Model of Rules*, Yale: Faculty Scholarship Series, Paper 3609, at 32 (1967); cf. L. Mengoni, I principi generali del diritto e la scienza giuridica, in I principi generali del diritto, Roma, at 319-321 (1997).

model for its application that could reflect the characteristics of a child's-rights-based approach.

3.1. Theoretical Framework

3.1.1. Terminological Premise: Indeterminacy and Vagueness

Looking at the BIC through the lens of General Theory of Law, it appears as an object at once indeterminate and vague. One may argue, however, that indeterminacy and vagueness refer to different aspects. The former is a quality of legal proposition classifiable as principles – as opposed to rules.[26] In particular, according to Ronald Dworkin, a similar standard is *indeterminate* as it states "a reason that argues in one direction but does not necessitate a particular decision".[27] Thence, the principle's *scope* can be described as the direction in which it points to "without setting out conditions".[28] On the other hand, *vagueness* is a quality that refers to the *meaning* of the propositions that make up the principle.[29] Being expressed as a general clause, the BIC principle is intrinsically vague: the vagueness of general clauses gives the judge enough leeway to build the rule to apply to the single case.[30]

Addressing the two qualities individually allows us to identify two different layers of significance that can be analysed separately: the first pertaining to the *scope* of the BIC as a principle, while the second to the *meaning* of the BIC as a concept. Once the scope is identified, it can be used as a parameter to distinguish which meanings are acceptable and which are not – hence reducing the concept's vagueness. The BIC can be described as a "concept with blurred edges".[31] Nevertheless, this does not imply that giving it determinate meanings is impossible – quite the opposite. The main challenge in the BIC's application is that, for each case, what represents the child's *best interests* can easily be identified with more than one single meaning. Hence, the *vagueness* comes from the fact that a wide range of meanings can be assigned to the concept. Therefore, to curb such vagueness, determining the borders of the category of possible meanings is necessary to restrict it to the acceptable ones.[32]

26 R. Dworkin, *Taking Rights Seriously*, Duckworth, 46 (1977).

27 Id., 47; cf. J. Eekelaar, Two Dimensions of the Best Interests Principle: Decisions about Children and Decisions Affecting Children, *in* E. Sutherland & L. Barnes Macfarlane (Eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, Intersentia 111 (2016).

28 *See* Dworkin, *supra* note 26, at 47.

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

30 L.L. Mengoni, Spunti per una teoria delle clausole generali, in *Rivista critica del diritto privato* 4, at 18-19 (1986).

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

32 *See* Waldron, *supra* note 29, at 522.

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doi: 10.5553/FenR/.000064

3.1.2. Scope

In discussing the scope of the principle, the academic debate is dominated by the long-standing dispute between two opposing conceptions of children as objects of paternalistic protection, on the one hand, and children as fully entitled rights holders, on the other.[33] For scholars like Cantwell, the BIC belongs to the paternalistic pre-CRC conception,[34] and it is often "invoked pointlessly, that is when reference to a right would or should suffice".[35] It can be argued that while the BIC may be used in a paternalistic manner, there should be a distinction made between what is intrinsic to the principle's purpose and what is dependent on how it is used.

Although the BIC predates the CRC,[36] its inclusion in the UN Convention has not been without consequences. The CRC Committee has identified the BIC as one of the four CRC general principles[37] that "underpin the Convention as a whole"[38] and plays a key role in the implementation of every other CRC right.[39] Moreover, Article 3(1) text represents the vessel through which the BIC has been exported in many different jurisdictions, inspiring many other international and national documents.[40] This relatively new dimension of BIC as CRC general principle detaches – or rather *may detach* – the BIC from its origins, transforming it into a "gateway for children's rights".[41] As emphasised by Ursula Kilkelly, the BIC can only serve as a catalyst for a children's rights-based approach in all actions concerning children if it is accepted "as a children's rights principle".[42] From this perspective, the BIC should be "interpreted in the light of its parent document, the CRC",[43] together with the text's *authentic interpretation* given by the CRC Committee. Within the framework of the CRC, the BIC's ultimate goal is "ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child".[44] It is, therefore, arguable that the principle's scope is the promotion of children's rights as fundamental human rights, together

33 K. Hanson, *Schools of Thought in Children's Rights, Children's Rights Unit*, University Institute Kurt Bosch (2008); *see also* D. Archard, Children's rights, in *Stanford Encyclopedia of Philosophy*, at 9-12 (2008).

34 *See* Cantwell, *supra* note 24, at 64; *see also* Freeman, *supra* note 7, at 50.

35 *See* Cantwell, *supra* note 24, at 66.

36 L.M. Kohm, Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence, in *Journal of Law and Family Studies* 10(2) (2008) 337-377.

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

38 *See* Sutherland, *supra* note 24 (2016).

39 N. Peleg, General Principles, *in* T. Liefaard & U. Kikelly (Eds.), *International Human Rights of Children*, Springer 135–157 (2018).

40 Cf. Eekelaar & Tobin, *supra* note 23, at 74.

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

42 Id., 63.

43 *See* Smyth, *supra* note 7 at 72.

44 UN Committee on the Rights of the Child (2013), General Comment No. 14 (2013): On the right of the child to have his/her best interests taken as a primary consideration, CRC/C/GC/14, para. 4.

with the concept of children as rights holders who can actively exercise these rights in accordance with their developing capacities.[45]
However, because the BIC is applicable "in all actions concerning children", according to John Eekelaar, there is a slight modulation in the BIC's scope according to whether it is applied in a decision "affecting children indirectly" or in one "directly about children".[46] In fact, when it comes to decisions that indirectly affect children, the scope of the principle is to shape the decision-makers' agenda so that children's interests are not neglected;[47] in contrast, when it comes to decisions that directly affect children, the scope of the principle is to put children's interests "at the centre of the decision-making process".[48] As will be shown in the following paragraphs, this distinction has substantial implications, particularly when assessing and determining the weight to be given to children's interests.

3.1.3. Meaning(s)

The BIC's vagueness – as anticipated – is an essential feature of the concept, making it open to different meanings. It is, in fact, impossible to determine a priori what is universally best for each child in every situation.[49] The vagueness of the BIC as a concept accommodates both this feature and the need for flexibility and capacity to adjust to various contexts. To fit this purpose, its content "must be determined on a case-by-case basis".[50] Nonetheless, vagueness has another, more problematic, side. Many influential scholars have pointed out that the principle's formulation lacks fairness and transparency[51] to the point that it may even operate as a "proxy for the interests of others".[52]

45 CRC/C/GC/14, para. 16; *see also* Archard, *supra* note 33, at 44; Freeman, *supra* note 7, at 65. For precisely the concept of evolving capacities (Art. 5 CRC) and its role in the CRC framework, *see* S. Varadan, The Principle of Evolving Capacities under the CRC, in *International Journal of Children's Rights*, Brill 26 (2019); J. Tobin, Understanding Children's Rights: A Vision beyond Vulnerability, in *Nordic Journal of International Law*, Brill 84 (2015); K. Hanson & L. Lundy, Does Exactly What It Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child, in *International Journal of Children's Rights*, Brill 25 (2017).

46 *See* Eekelaar, *supra* note 27.

47 *See* Eekelaar & Tobin, *supra* note 23, at 79.

48 Id.

49 Such openness to different meanings is functional to prevent the idea that "relationships involving children and children's interests needed to constantly conform to community rules." *See* Eekelaar, *supra* note 27, at 111.

50 The CRC Committee describes the BIC as both a dynamic and complex concept. On the one hand, the dynamicity of the concept refers to its adaptability to different contexts of application, as well as to the continuous evolution of the issues that it encompasses. On the other, the complexity of the concept relates to the wide range of factors that must be taken into account to determine its content. CRC/C/GC/14, para. 32.

51 J. Eekelaar, Beyond the welfare principle, in *Child and Family Law Quarterly*, Jordans 14(3) (2002); *see also* R.H. Mnookin, *supra* note 24; cf. N. Cantwell, Are Children's Rights Still Human? in A. Invernizzi & J. Williams (Eds.), *The Human Rights of Children: From Visions to Implementation*, Springer (2001).

52 *See* Eekelaar & Tobin, *supra* note 23, at 83.

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doi: 10.5553/FenR/.000064

One way of limiting the potentially harmful effects of the concept's vagueness is to restrict the vast array of possible meanings to those that are acceptable.[53] In this scenario, the scope of the BIC as a principle, that is, fostering children's rights and subjectivity as rights holders, is critical to preserving the concept's flexibility while reducing the space for its contestable uses. The scope acts as a landmark to determine the borders of the category of acceptable meanings. Hence, while applying the BIC principle on a case-by-case basis, whatever is identified with the child's best interests should always be assessed according to the test of the BIC principle scope.[54]

In the context of the BIC's casuistic application, the principle's scope should shape not only the outcome of a decision but also the decisional process behind that outcome. It is arguable, then, that the BIC principle has two dimensions, not only a substantive but also a procedural one.[55] The former describes how the outcome of a particular decision reflects the child's best interests, whereas the latter refers to the procedure used to reach that outcome. This second dimension is just as important as the first "to identify a child's best interests under a rights-based conception",[56] and it can be described as the best interest's determination (BID) process.

The CRC Committee's interpretation of Article 3(1) provides guidance on which elements must be considered and which procedural safeguards must be enabled during the BID process.[57] The BID starts from the analysis of the specific factual context of the case. It requires considering various elements that must be weighed

53 *See* Waldron, *supra* note 29, at 522.

54 Paraphrasing the words of a distinguished Judge of the Italian Constitutional Court, a nice metaphor describes the relationship between the principle and its scope: a principle is like a block of ice that – while meeting the different circumstances of life – breaks into many fragments, but leaving inside each one of them the same substance of the original block. G. Zagrebelsky, Valori e diritti nei conflitti della politica, 22 March 2008, La Repubblica https://eddyburg.it/eddy/valori-e-principi-secondo-zagrebelsky/.

55 *See* Eekelaar, *supra* note 27; *see also* Mnookin, *supra* note 24. This interpretation seems in line with the CRC Committee vision of the BIC as a 'threefold concept' that can best serve its purpose only if declined in three different functions, namely, substantive right, interpretative principle and rule of procedure CRC/C/GC/14, para. 6.

56 *See* Eekelaar & Tobin, *supra* note 23, at 96.

57 CRC/C/GC/14, paras. 52-79.

against one another.[58] Among these, the child's views occupy a unique position.[59] Involving the child in the process is "an important safeguard against paternalism",[60] as it requires the recognition of the child's agency in exercising their rights.[61] For this reason, the child's views should be the tip of that balancing act. Ultimately, the process itself must be disclosed in the exact outcome of the decision, as it must be clear how such an outcome benefits the child's interests and, most importantly, the child's rights.[62] Therefore, transparency represents the key to "enhance objectivity and [to] shield against discretion and bias".[63]

3.1.4. Weight

A final problematic aspect of the BIC principle relates to the weight that must be accorded to the child's interests in a decision; more precisely, the interpretation of Article 3(1) proposition "shall be a primary consideration". The problem lies in determining whether or not the principle allows the BIC to be weighed against other interests. Even the CRC Committee seems contradictory, suggesting "that these interests are to be both prioritised and subject to compromise".[64] However, it is by no means evident that prioritising the BIC necessarily conflicts with seeking a compromise with other interests. In particular, Eekelaar's distinction between decisions 'directly about' children and decisions 'indirectly affecting' them can provide a viable solution to reconcile the two interpretations.

In decisions indirectly affecting children, the BIC's primary consideration is translated into a duty on the policymaker to assess the impact of that decision on the children's interests. Being the issue only indirectly about children, their interests should be "taken into account alongside other relevant matters",[65] although other considerations may override them. In this case, the aim of the

58 Cf. Eekelaar & Tobin, *supra* note 23, at 96: "More specifically, this process must involve as a minimum a consideration of: a) the views of a child; b) the relevance of any other rights under the Convention or other international treaties; c) the views of parents or other persons involved in the child's care; d) the individual circumstances of the child, including his or her developmental needs and any relevant social, religious or cultural practices; and e) any available empirical evidence of relevance."

59 The right of the child to be heard is enshrined in Art. 12 CRC which provides: "1. States Parties shall 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 the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." The BIC and the right to be heard are significantly connected: as noticed by W. Vandenhole & E. Turkelli, Art. 3 is "setting an objective", Art. 12 is "providing the methodology for achieving it". *See supra* note 6, at 209.

60 *See* Vandenhole & Turkelli, *supra* note 6, at 216.

61 Cf. J. Eekelaar, The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism, in *International Journal of Law and the Family*, Oxford 8 (1994) 42-61. Here, Eekelaar theorised how the only way to take a decision in the best interest of a child and at the same time recognise their position as rights holder is to make them participate in the decision – *self-determinism* – and also give the possibility to review such decision in the course of time – *dynamic*.

62 *See* Eekelaar, *supra* note 27; *see also* Smyth, *supra* note 7, at 99.

63 *See* Vandenhole & Turkelli, *supra* note 6, at 216.

64 *See* Eekelaar & Tobin, *supra* note 23, at 96.

65 *See* Eekelaar, *supra* note 27, at 99.

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principle is to ensure that children's interests and rights are not overlooked. On the other hand, whenever the focus of the decision is directly about children, the best possible outcome for the child should be chosen from among the possible outcomes. In this case, the BIC are the determining consideration. However, even though the BIC is the primary consideration both 'chronologically'[66] and hierarchically, its position is not absolute, and other competing interests should also be taken into account.[67] Again, the procedural dimension comes into play, as in both types of decisions, it is essential that the outcome clearly demonstrates how the BIC has been balanced against other interests. Whatever the outcome, any decision concerning a child should show "that the child's best interests were [treated] as a primary consideration".[68]

3.2. The Model

Having defined the characteristics of the BIC as a principle, it is possible, in the light of the previous considerations, to design a model for the application of the principle. In particular, the model represents the stages of assessment and determination of the BIC to be carried out in judicial decisions directly concerning children. Given the inherent vagueness of the principle and the variety of contexts in which it is applied, it is necessary to recognise the limits of any possible standardisation of its application. To this aim, the context has been narrowed down to judicial decisions directly about children. The proposed model serves two purposes: as an *ex ante* guide for decision-makers, towards reasonable uses of the principle; as an *ex post* evaluation instrument, on how the BIC was applied.

That said, the model structures the process into two phases: the BIC assessment and the balancing process that determines the final outcome of the decision. It appears as follows:

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

The first phase aims to identify which outcome represents the child's best interests for that specific case. To this extent, three different elements should be taken into account.[69] The first element is the child's views and wishes, which should be "given due weight in accordance with the age and maturity of the child".[70] In opposition to the welfare model, which considers a child a passive object of protection, a child's

66 *See* Smyth, *supra* note 7.
67 *See* Archard, *supra* note 33, at 34.
68 *See* Eekelaar & Tobin, *supra* note 23, at 96.
69 Cf. J. Tobin, Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children? in *Melbourne University Law Review* 33(2), at 591 (2009).
70 Art. 12(1) CRC.

rights-based approach makes the child an active participant in the process.[71] The second element to be addressed is the relevant rights of the child. The BIC principle fosters the idea of children as rights holders, and, for this reason, the language of rights should be preferred to the language of interests, as the latter "invokes paternalism and protectionism", whereas the former reflects "autonomy and individualism in its application".[72] Then, the third and last element to be considered should be the child's individual circumstances, allowing the judge to tailor the decision on a case-by-case basis. More precisely, the assessment of individual circumstances should be linked to factual evidence. An evidence-based assessment is essential to prevent the judge from importing their 'personal values' or even 'class bias' into the process.[73]

Once the BIC has been assessed, the following phase is focused on balancing the competing interests. The BIC should be a primary consideration, but to ascertain that they have been given more weight than the other considerations, the process should be characterised by two main features. First, the BIC should be weighed against other rights-based considerations,[74] and, second, the entire process should be transparently disclosed along with its outcome. If both the child's best interests and the competing interests are formulated as rights-based claims, the two can be balanced at the same level. Moreover, by pointing out which and whose rights are at stake, the process results are more transparent, and the risk of (ab)using the BIC as a trump card for interests other than those of the child is reduced.

4. Adoption and Surrogacy Case Law: The Model Applied

This section aims to examine the ECtHR practice. Fourteen cases have been selected and analysed according to the model discussed in the previous section. In the cases, the Court applies the BIC principle in addressing controversies surrounding the

71 *See* Tobin, *supra* note 69, at 591; cf. Vandenhole & Turkelli, *supra* note 6, at 216.

72 C. Fenton-Glynn, Children, Parents and the European Court of Human Rights, in *European Human Rights Law Review* 6, at 648 (2019).

73 R.H. Mnookin, Foster Care – in Whose Best Interest? in *Harvard Educational Review* 43, at 592 (1973). The author warns about the risk that "courts may sometimes be enforcing middle-class norms of cleanliness where both economic and cultural circumstances make it both unfair and in appropriate." Such a risk is extremely high for all minorities and marginalised groups and it is typical of all judicial standards; *see* G. Calabresi, *Ideals, Beliefs, Attitudes and the Law: Private Law Perspectives on a Public Law Problem*, Syracuse University Press (1985).

74 The need for balancing the BIC with other rights-based considerations has been expressed in the context of migration: *see* CRC Committee in General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc CRC/GC/2005/6, para. 86; *see also* UNHCR, Guidelines on determining the best interests of the child, 76 (2008): "the Convention does not, however, exclude balancing other considerations, which, if they are rights-based, may in certain rare circumstances, override the best interests consideration."

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establishment of filiation as a result of intercountry adoption,[75] second-parent adoption,[76] *kafala*,[77] and international surrogacy[78] as well as domestic surrogacy.[79] In all these cases, the Court has to deal with the interests of a child as an individual. In other words, they are "directly about a child", unlike cases dealing with the prohibition of single-parent adoption[80] or the limitation of access to artificial reproduction for certain groups of people.[81] This characteristic allows us to study how the Court balances three different interests together. Under Article 34 of the Convention, the applicant's private interests are held against the State's public interests. In cases about the recognition of parenthood, however, the interests of the child may be aligned either with the State's or the applicant's.

In what follows, the study's findings are displayed in two different sections: the first focuses on the BIC assessment, and the second focuses on the balancing process that determines the outcome of the decision. Before doing that, a preliminary consideration is necessary. The Strasbourg Court cannot substitute itself for the domestic authorities but rather "reviews under the Convention the decisions taken by those authorities in the exercise of their power of appreciation".[82] However, the Court also identifies the reasons why a particular decision is inadequate or insufficient and indicates what the outcome would have been if the BIC principle had been appropriately applied to that specific case.

4.1. Phase 1: BIC Assessment

To analyse the Court assessment concerning the BIC, each judgment was reviewed to find whether the Court considered the elements relevant to the child's best interests' identification, that is, the views of the child, the relevant rights of the child and the individual circumstances of the child – possibly linked to any available factual evidence. Overall, the three elements contributed to the BIC's assessment only in one judgement out of fourteen. In eight cases, the Court determined the BIC in connection with only two elements, namely, the child's relevant rights and individual circumstances. By contrast, in the remaining five cases, almost a third of the total, the Court's assessment is based on only one of the three elements.

75 ECtHR, *Wagner and JMWL v. Luxembourg*, No. 76240/1 June 2007.

76 ECtHR, *Chepelev v. Russia*, No. 58077/00 July 2007; ECtHR, *Eski v. Austria*, No. 21949/3 January 2007; ECtHR, *Gas and Dubois v. France*, No. 25951/7 March 2012; ECtHR, *X and Others v. Austria*, No. 19010/7 February 2013.

77 ECtHR, *Chbihi Loudoudi and others v. Belgium*, No. 52265/10 December 2014; ECtHR, *Harroudj v. France*, No. 43631/9 October 2012.

78 ECtHR, *A.M. v. Norway*, No. 30254/18 March 2022; ECtHR, *D v. France*, No. 11288/18 July 2020; ECtHR, *Foulon and Bouvet v. France*, Nos. 9063 and 10410/14 July 2016; ECtHR, *Mennesson v. France*, No. 65192/11 June 2014; ECtHR, *Paradiso and Campanelli v. Italy*, No. 25358/12 January 2017; ECtHR, *D.B. and Others c. Suisse*, Nos. 58252 and 58817/15 November 2022.

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

80 *See*, for instance, *ECtHR, Schwizgebel v. Switzerland*, Appl. No. 25762/7 June .2010, or ECtHR, *E.B. v. France*, Appl. No. 43546/2 January 2008, or ECtHR, *Fretté v. France*, Appl. No. 36515/97, February 2002.

81 *See*, for instance, prisoners' access to IVF in *Dickson v. the United Kingdom*, Appl. No. 44362/4 April 2007 or same-sex couple's access to IVF in *SH and others v. Austria*, Appl. No. 57813/00, November 2011.

82 *Harroudj v. France, supra* note 77, para. 45.

4.1.1. Findings: The Child's Views on the Matter

The child's views are the less represented element in the analysed judgements, being part of the BIC assessment in just one case. The case in question is *Eski v. Austria*[83] and it is also the only case where the Court considered all the model's elements. It is therefore interesting to take a brief look at the Court's reasoning. The case's applicant is the biological father of a child who the mother's new partner has adopted without his consent. The Court had to establish whether the State's decision to allow adoption against the father's will amounted to a violation of the applicant's rights under Article 8 ECHR. Regarding the BIC's assessment, first, the Court looked at both the Austrian Civil Code and the European Convention on the Adoption of Children,[84] identifying two conflicting rights of the child: the "right to her biological father"[85] as opposed to her "legal interest in consolidating and formalising de facto family ties with her adoptive father".[86] Secondly, it investigated the child's individual circumstances, namely the reality of her relationship with both the biological father and the adoptive father.[87] Last, the Court focused on the child's opinion: she saw the adoptive father as a parent and that she wanted to live with him.[88] Eventually, the Court held that the State's decision had been made in the child's best interest.

Eski v. Austria represents a good example of how the Court can conduct a comprehensive BIC assessment. However, it seems to be an exception rather than a rule. In three other cases,[89] the Court considered the psychological study reports used during the national proceedings to determine what was best for the child. However, in the remaining cases, there was no indication of the child's perspective, either through direct expression or through expert reports.

The reasons for this blatant shortcoming may be several and not utterly imputable to the Court's approach.[90] Firstly, the views of the child are not always taken into account in the domestic proceedings that give rise to the case. However, in at least one case, *Chbihi Loudoudi and others v. Belgium*,[91] the Court was aware of the child's views. Yet they were never mentioned in the reasoning,[92] not even to explain why it was decided that the child's best interests coincided with a solution that was not in accordance with her wishes. Second, the child may be too young or not mature enough to express themselves. However, although the children's age in the analysed cases varied from three to seventeen years, the Court never explicitly referred to

83 *See Eski v. Austria, supra* note 76.
84 Id., para. 37.
85 Id., para. 30.
86 Id., para. 32.
87 Id., para. 39
88 Id., para. 40.
89 *Chepelev v. Russia, supra* note 76; *Paradiso and Campanelli v. Italy, supra* note 78 and *A.L. v. France, supra* note 79.
90 *See* Smyth, *supra* note 7, at 91; cf. Ismaïli, *supra* note 6, at 26.
91 *See Chbihi Loudoudi and others v. Belgium, supra* note 77.
92 Id., para. 48 and para. 104.

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the children's ages or maturity and how it could influence their position.[93] Lastly, the lack of knowledge of the child's views may be because the child may not be an applicant of the case, thus making it difficult for the Court to consider evidence from a non-party.[94] By contrast, it is noticeable that in *Eski*, as well as in the cases where the Court referred to psychological study reports, the children were not applicants, and their interests conflicted with those of the cases' applicants, that is, their parents.

4.1.2. Findings: Relevant Rights of the Child

For what concerns the child's individual rights, the Court mostly referred to the child's rights arising from Article 8 ECHR since the complaints are brought under that provision. Only in two of the thirteen analysed cases did the Court refer generically to the child's interests without addressing which rights were at stake.[95] More precisely, the Court practice fluctuates from generically recalling the right to private and family life[96] to identifying the single component of that right more specifically. First, in dealing with the right to family life, the Court may consider it the right to a de facto family life or the right to family life based on biological ties.[97] On the other hand, the right to private life puts the relevant right of the child within the frame of the right to identity. The Court sometimes may even directly point out different components of that right, some of them substantive – biological ties, nationality, succession rights[98] – and some even procedural. Specifically, in *D v. France*,[99] the Court examined the violation of Article 8 regarding the effectiveness and rapidity of the means provided by the State to recognise the parent-child relationship. Meanwhile, in *AL v. France*,[100] it found the State in violation of Article 8 because it failed to honour its duty of exceptional diligence – required by the case's circumstances – in carrying out the whole judicial proceeding.

Lastly, it is worth mentioning that the Court reached the highest level of detail in identifying the child's rights in a case where it integrated the relevant CRC provisions into its reasoning.[101] The case is *Harroudij v. France*, where the Court was called to evaluate the refusal of permission for a French national *kafhil* to adopt the

93 The same was reported by Smyth (*see supra* note 7, at 74) and T. Spijkerboer, Structural Instability: Strasbourg Case Law on Children's Family Reunion, in *European Journal of Migration and Law* 11, at 280 (2009).

94 *See* Smyth, *supra* note 7, at 91; cf. Fenton-Glynn, *supra* note 2, at 395 where the author suggests that the reason may be that the child is actually an applicant, as one of the parents has applied on her behalf: in this case, risk is that when a parent stands also on behalf of her child, the views of the first overshadow those of the second.

95 *See Wagner and JMWL v. Luxembourg, supra* note 75 and *A.M. v. Norway, supra* note 78.

96 *See*, for instance, *A.L. v. France, supra* note 79, para. 56.

97 *See X and Others v. Austria, supra* note 76, para. 146; *Chepelev v. Russia, supra* note 76, para. 26; cf. *Paradiso and Campanelli v. Italy, supra* note 78, para. 207.

98 *Mennesson v. France, supra* note 78, paras. 95, 97 and 98.

99 *D v. France, supra* note 78.

100 *A.L. v. France, supra* note 79.

101 For an approach consistent with the Court's growing practice of seeking interpretive guidance from general principles of international law and from other international treaties, *see* G. Letsas, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer, in *European Journal of International Law* 21, at 530 (2010).

Moroccan child entrusted to her through judicial *kafala*. In doing so, the ECtHR first stated that

> the positive obligations that Article 8 lays on the Contracting States in this matter, they must be interpreted in the light of the Convention on the Rights of the Child.

Then, it assessed whether the child's status derived from the recognition of *kafala* from the French authorities[102] was allowing the child to enjoy not only her de facto family life with the applicant (Art. 8, ECtHR)[103] but also her rights under Articles 20 and 21 of the CRC.[104] The Court noticed that the recognition of *kafala* did not create filial ties, confer inheritance rights or entitle the child to acquire the nationality or surname of the guardian.[105] Yet the Court pointed out that the State provided alternative legal means to acquire these rights, and the child was already benefitting from some of them. Eventually, the Court decided that the refusal was legitimately grounded in the child's best interests because the State recognition of *kafala*, in line with Article 20 CRC,[106] allowed the integration of the child without cutting her off from the rules of her country of origin, where adoption is prohibited.

4.1.3. Findings: Individual Circumstances

In general, the Court emphasises the importance of domestic authorities making a case-by-case determination of the BIC. This approach goes beyond simply repeating what is considered the best interests of children in general and requires an analysis of the specific circumstances based on available evidence. The Court appears to be consistent on this point.[107] Nonetheless, the Court investigated the child's individual circumstances in only nine out of fourteen cases, and its assessment varies in terms of different levels of depth and precision. Comparing the cases where the Court's assessment was more superficial with those in which it was more thorough, two other factors seem to influence the Court's assessment: the nature of the child's right at stake and the Court's case law.

a. The Nature of the Child's Rights

The first factor is the individual or relational nature of the right at stake. When the Court had to evaluate a potential breach of the right to family life, the Court's assessment rotates mainly around determining if a de facto family life exists vis-à-vis the presence of other relevant relationships (legal or biological). In these cases, though, where the child and parent(s) "enjoy family life together",[108] the child's right to family life becomes indistinguishable from that of the others. By

102 *Harroudj v. France, supra* note 77, para. 48.
103 Id., para. 46.
104 Id., para. 42.
105 Id., para. 51.
106 Id., para. 52.
107 *X and Others v. Austria, supra* note 76, para. 146; *Paradiso and Campanelli v. Italy, supra* note 78, para. 210; *Gas and Dubois v. France, supra* note 76, para. 62.
108 *X and Others v. Austria, supra* note 76, para. 146.

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doi: 10.5553/FenR/.000064

contrast, when the applicant's right to family life is weighed against the child's right to family life, a more child-specific analysis was conducted, for instance, in *Eski v. Austria* or *AL v. France*.[109]

A deeper level of individual circumstances assessment is also noticeable when the child's right to private life is the Court's primary concern.[110] This is visible, for instance, in the *Mennesson v. France* judgement. In this pivotal case, the applicants were two couples of French nationals and their children born in the United States via surrogacy. France refused to grant legal recognition to parent-child relationships established in the United States between the children and the couples. Therefore, the applicants claimed a violation of their rights under Article 8 ECHR. First, the Court examined the case from the perspective of adults and children sharing the right to family life. It is established that the parent-child relationship could not be recognised based on an existing de facto family life because doing so would have legitimated an unlawful practice. For this reason, the issue was approached from the perspective of the child's right to private life. In so doing, the Court did not simply assess the presence of biological ties with the parent but looked further into factual evidence to assess how the State's refusal impacted the other two elements of the child's right to identity: nationality and succession rights.[111]

b. The Influence of the Court's Jurisprudence

Of the fourteen selected cases, at least three subgroups share the same factual matrix.[112] Comparing the cases of each subgroup, it is noticeable how the Court seems to follow her precedents. While this allows for the Court case law to maintain a certain level of coherence, it seems to reduce the accuracy of the Court's evaluation of the individual case. This is visible, for instance, in cases about the Sates' refusal to permit the adoption of the child by her *kafhil*. In the first of the two cases on the matter, *Harroudj c. France*, the Court displayed a thorough evaluation of the child's individual circumstances based on factual evidence,[113] whereas, in *Chbihi Loudoudi et autres c. Belgique*, the Court repeated the same conclusions of the previous case without acknowledging the specificities of the individual context of the child, like the difference in the effects of the recognition of *kafala* in the two defendant States, France and Belgium. This rather superficial approach was pointed out in the case of dissenting opinion, which portrays the majority's reasoning as based on general

109 Cf. *Eski v. Austria, supra* note 76 and *Paradiso and Campanelli v. Italy, supra* note 78.

110 Cf. *Mennesson v. France* and *Paradiso and Campanelli v. Italy, supra* note 78.

111 *Mennesson v. France, supra* note 78, paras. 97-98. Cf. *Labassee v. France* (65941/11) 26 June 2014: due to the similarities of facts the Court based the judgement on the *Mennesson* one, using almost the same exact words.

112 *See* international surrogacy, such as in *Mennesson v. France*; *Foulon and Bouvet v. France, supra* note 78; *Laborie c. France*, *infra* note 115; *see also* cases about second-parent adoption without consent of the biological father, *Eski v. Austria* and *Chepelev v. Russia, supra* note 76; *see also* cases about the State's refusal of adoption for children in *kafala* care – *Harroudj v. France* and *Chbihi Loudoudi, supra* note 77.

113 Harroudj, *supra* note 77, para. 51.

assumptions and lacking any "appréciation in concreto de l'intérêt supérieur de l'enfant".[114]

A similar pattern is also noticeable in surrogacy cases where the Court has been carrying on a less and less accurate inquiry into the child's individual circumstances.[115] While deciding these cases, the Court relies heavily on the *Mennesson* jurisprudence and its Advisory Opinion (AO) No. P16-2018-001.[116] This Opinion was requested by the French Court of Cassation under Protocol No. 16 of the ECHR to obtain clarification about the recognition in the domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother. There, the Court stated that the child's right to respect for private life requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended parent, designated in the birth certificate legally established abroad. However, the recognition does not have to take the form of entry in the register of births of the birth certificate if other means, such as adoption, are available.

The influence of the Court's jurisprudence is then particularly evident in the most recent case decided by the Court on the matter, *DB et autres c. Suisse*. The case concerned a same-sex Swiss couple of registered partners who had entered a surrogacy contract in the United States under which the child, the third applicant of the case, had been born. The Swiss authorities recognised the parent-child relationship with the genetic father and the child, but – as the applicants complained – the State refused to do the same with the intended father. The Court stated that the chief feature distinguishing the case from its precedents was that the applicants were a same-sex couple in a registered partnership. For this reason, in assessing the child's best interests, the Court applied the principles it established in *Mennesson and the AO*.[117] Focusing on the child's individual circumstances pertaining to his right to private life, the Court noticed that the child was eventually adopted eight years after his birth – and three after the application to the ECtHR – by the intended father, when the possibility to adopt was extended to same-sex partnerships. Yet the Court stated that the span of time without recognition was too long and that, without providing alternative means of recognising the relationship, it was not in the BIC. Therefore, it found that Switzerland had overstepped its margin of appreciation, and by not making timely legislative provision for such a possibility, it interfered with the child's right to private life.[118]

However, in determining the child's best interests while evaluating the State's conduct, the Court overlooked at least two factual elements that distinguish the

114 "[*in concreto* assessment of the best interests of the child]", *Chbihi Loudoudi and others v. Belgium, supra* note 77, Common Dissenting Opinion of Judges Karakaş, Vučinić and Keller, para. 9.

115 Cf. *Mennesson v. France*, paras. 81-101 and *Foulon and Bouvet v. France*, paras. 55-58, *supra* note 78; *see also Laborie c. France*, No. 44024/13 January 2017, decided by the Fifth Section of the ECtHR Committee.

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

117 *D.B. and Others c. Suisse, supra* note 78, paras. 74 and 79.

118 Id., paras. 87-89.

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case from the precedents. First, when the State promptly recognised the relationship between the child and the biological father, the child not only acquired succession rights deriving from it but also the Swiss nationality.[119] Secondly, regarding the relationship between the child and the intended father, the Court did not address that during the period preceding the adoption, Swiss law granted certain "droits et devoirs d'assitance" to the biological child of the registered partner.[120]

4.2. Phase 2: Balancing the Competing Interests

Once the BIC has been assessed, the child's interests must be balanced with the other interests involved in the decision. In matters concerning Article 8 ECHR, the ECtHR has to establish whether the domestic authorities have struck a fair balance "between the competing interests of the individual and of the community as a whole".[121] To study how the Court conducted this second phase, each judgement was reviewed to find whether the Court's approach reflects the two key features of a child's rights-based model: whether the BIC has been weighed against other rights-based considerations and whether such a balancing process has been disclosed with transparency together with its outcome.

4.2.1. Findings: Rights-Based Considerations

The selected cases are distinguished by the presence of two different groups of interests other than those of the child: private interests and public interests. Overall, it is noticeable that the Court was able to translate the private interests at stake into rights-based considerations. Being the applicants' interests, they are usually identified with allegedly violated rights. By contrast, when it comes to public interests, the Court addressed them in the way the States had framed them. Thus, instead of rights-based considerations, the State's interests are identified, for instance, as the protection of "children against illicit practices",[122] or the protection of "health and morals" and "rights and freedoms" of children,[123] or the principle of "indisponibilitè de l'etat de personnes".[124]

In only one case of the fourteen selected, the Court had contested the State's definition of public interests; the case is *X and others v. Austria*, and it concerned the Austrian courts' refusal to grant the adoption of a child to the same-sex partner of the child's mother. In particular, the applicants complained that they had been discriminated against compared with unmarried, different-sex couples and that their right to family life was violated. The State justified the difference in treatment with the protection of the family in the "in the traditional sense"[125] based on the

119 Id., para. 14.

120 "[rights and duties of assistance]", Id., para. 14. Moreover, it is worth noticing that Judge Elosegui points out in her dissenting opinion on the case (*see* paras. 1-13) that, unlike France, Switzerland hasn't signed Protocol No. 16 raising some doubts about the applicability of the AO principles to the present case.

121 *Harroudj v. France, supra* note 77, para. 42.

122 *Paradiso and Campanelli v. Italy, supra* note 78, para. 202.

123 *Wagner and JMWL v. Luxembourg, supra* note 75, para. 126.

124 *Mennesson v. France, supra* note 78, para. 82.

125 *X and Others v. Austria, supra* note 76, para. 19.

assumption that it was in the BIC to grow in a traditional family composed by a father and a mother. However, the Court established that "protecting the family in the traditional sense is rather abstract"[126] and because of that, it was not enough to justify the differentiated treatment.

4.2.2. Findings: Balancing Process

In nine out of fourteen cases, the Court disclosed all the steps of the balancing process. However, to make the findings' exposition easier, in the following subsections, a distinction is made between the cases where children are applicants together with their parents and those cases where the adults are the only applicants. The reason for this distinction is that the interaction between the interests of children and their parents is structured differently in these two groups. On the one hand, when adults are the only claimants, their interests are usually considered in opposition to those of the child. On the other hand, when children and adults are joint claimants, their interests are on the same side as opposed to those of the state.

a. Clear Balancing Process: Adult Applicants

In five of the cases where the Court displayed a clear balancing act, the claims are brought by adults who, because of biological or de facto ties with the child, are or aspire to be recognised as the child's parents. Here, the Court evaluates the potential breach of the adults' rights against the State's interests. However, the State's interests may well coincide with the interests of children as a group and the interests of the individual child either because children's interests represent the *ratio* behind rules on recognising parenthood or because the domestic authorities are supposed to have applied that general rule having assessed that it was also in the individual child's best interests.

Here, the Court followed a similar pattern in each judgment. First, it identified the public interests by highlighting how the domestic law or policy serves the interests of children as a group.[127] Second, it pointed out the private interests at stake, which usually are "those of the child on the one hand and those of the applicants on the other".[128] The Court then assessed which interests were given more weight and if 'particular importance'[129] was attached to the BIC.

Paradiso and Campanelli v. Italy offers the best example of this line of reasoning. The case concerned the non-recognition of parenthood of a child born in Russia following a surrogacy agreement entered into by an Italian couple. The Italian State refused to recognise their parenthood, as established by the Russian authorities, and due to the lack of any biological ties between the couple and the child, the State placed the child in the care of social services. The applicants claimed that both these measures violated their rights under Article 8 ECHR. In the balancing

126 Id., 139.

127 *Eski v. Austria, supra* note 76, para. 32; *Harroudj v. France, supra* note 77, para. 49; *A.L. v. France, supra* note 79, para. 49.

128 *Paradiso and Campanelli v. Italy, supra* note 78, 205; *Harroudj v. France, supra* note 77, para. 37; *Eski v. Austria, supra* note 76, para. 42; *A.L. v. France, supra* note 79, paras. 56 and 58.

129 *Eski v. Austria, supra* note 76, para. 35; *Chepelev v. Russia, supra* note 76, para. 27.

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process, the Court first focused on identifying the public interests pursued by the State. It found that Italian authorities acted in the interests of children as a group; more precisely, to "protect children against illicit practices, some of which may amount to human trafficking".[130]

The Court acknowledged that the child was not an applicant but that, being the decision directly about his life, the BIC should nonetheless be the primary consideration.[131] To this extent, the ECtHR pointed out that the domestic Court first "assessed the impact which the separation from the applicants would have"[132] on the child and, only after, determined that it was against the BIC to continue the child's relationship with the couple. As a matter of fact, domestic authorities found that the BIC aligned with those of the children in general. For this reason, it decided not to legalise "the unlawful situation created … as a fait accompli" and instead took "measures with a view to providing the child with a family in accordance with the legislation on adoption".[133] Eventually, the ECtHR endorsed the Italian authorities' balancing of interests by noticing how

> the public interests at stake weigh heavily … while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child.[134]

b. Clear Balancing Process: Child and Adult Applicants

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

As for the previous group of cases, it is possible to notice that the Court follows a similar pattern in each judgement. First, it identifies the public interests by highlighting how the domestic law or policy serves the interests of children in general. Second, it identifies the private interests at stake, but, differently from the previous group, it distinguishes the interests of the family from those of the child as an individual. Last, the Court assesses separately how each of the two kinds of interests was weighed against the public ones.[135]

This line of reasoning is visible, for instance, in *Mennesson c. France*. In the balancing process, the Court first identified the public interest with the principle of "indisponibilité del'état des personnes", due to which surrogacy contracts cannot produce effects on filiation.[136] Then, it conducted two separate balancing acts. First, it balanced the public interests against those of the applicants concerning the right

130 *Paradiso and Campanelli v. Italy, supra* note 78, para. 202.
131 Id., para. 208; here, the Court refers directly to Art. 3 CRC.
132 Id.
133 Id., para. 209.
134 Id., para. 215.
135 *Mennesson v. France, supra* note 78, para. 86; *X and Others, supra* note 76, para. 152.
136 "[unavailability of the status]", Id., para. 82.

to family life they all enjoy.[137] Then, it balanced the public interests against those of the child applicants, particularly those related to their right to identity.[138] As a result, the Court stated that while in the first case, public interests could legitimately prevail over the family's, they could not take precedence over those of the child, which must be the primary consideration.[139]

c. Unclear Balancing Process

In five of the analysed cases, the Court's approach did not follow a particular pattern, and the Court's balancing process lacked clarity.[140] This miscellaneous group of cases corresponds to those where the Court determined the child's best interests in relation to only one of the three elements of the model. There, the balancing process seems to lose coherence either because the Court did not clearly distinguish the child's interests from the others involved or because it used the BIC in the decision's outcome without evaluating the child's position in the rest of the judgements.

The *Wagner and JMWL v. Luxembourg* case offers an example of the first kind of problem. In particular, the Court established that the State's refusal to enforce a full adoption order by a Peruvian court in favour of a single woman amounted to a violation of the applicants' right to family life because the State action stood against the BIC.[141] However, the Court did not refer to the child's relevant rights and ended up assigning the same 'paramount'[142] consideration to both the child's and the mother's interests, as they were not addressed separately. Another example is the *Chbihi Loudoudi* decision, where the child's interests are not distinguished from those of children in general. There the Court found that the BIC were "la principale considération des juridictions belges dans l'évaluation des intérêts concurrents en presence".[143] However, as noted in the previous section, the Court did not consider the child's individual circumstances. By simply assuming that the child's BIC matched those of children as a group, the Court surreptitiously made the latter prevail over the former.

The second kind of problem emerges from analysing the Court's reasoning in *A.M. v. Norway*. In this case, the applicant complained that the State violated her rights under Article 8 by refusing to acknowledge her legal parenthood established in the United States over the child born via surrogacy. At first, the Court pointed out that the only private interests at stake were the applicant's as the case did "not relate to any rights of the child, X, under Article 8 of the Convention".[144] The reasoning,

137 Id., para. 87.
138 Id., paras. 96-99.
139 Id., paras. 82 and 101.
140 *Wagner and JMWL v. Luxembourg, supra* note 75; *Gas and Dubois v. France, supra* note 76; *Chbihi Loudoudi et autres c. Belgique*, Appl. No 52265/10 December 2014; *A.M. v. Norway, supra* note 78; *D.B. and Others c. Suisse, supra* note 78.
141 *Wagner and JMWL v. Luxembourg, supra* note 75, para. 146.
142 Id., para. 133.
143 "[The primary consideration of Belgian judges in the assessment of the present concurring interests]", *Chbihi Loudoudi et autres c. Belgique, supra* note 140, para. 97.
144 *A.M. v. Norway, supra* note 78, para. 127.

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then, focused solely on the adult applicant. However, in the final passage of the Court's balancing of the conflicting interests, the BIC appears to be the decisive consideration. The Court endorsed the domestic decision because it "concluded that X's best interests did not require that the applicant's claims should be granted".[145]

5. Conclusion

This work analysed fourteen cases about the establishment of parenthood through adoption and surrogacy with a view to ascertaining to what extent the ECtHR adopted a reasonable approach in its use of the BIC. By studying the cases through the lenses of a proposed model for the principle's application, it was found that the Court's approach does not seem coherent with a reasonable use of the BIC. As a matter of fact, all the elements of the proposed model can be found throughout the analysed case law, though they can hardly be seen together. It appears, then, that the Court lacks consistency in its application of the BIC – in some cases, it displays linear reasoning grounded on a thorough BIC assessment, whereas in others it resorts to the principle without a clear connection to the circumstances of the case. In a third of the cases (five out of fourteen), the inaccurate assessment of the child's rights and individual circumstances compromises the outcome of the balancing process, which is flawed by the fact that whatever weight the Court assigns to the BIC is also covertly assigned either to the parents' or to the State's interest. Overall, the most problematic issue – that emerged from the analysis – is the absence of the child's voice in assessing their best interests. The child's views are, in fact, mostly absent from the Court's evaluation. The lack of child participation – especially when paired with a tendency to rely more on its precedents than on factual evidence in evaluating the child's individual circumstances – makes the Court assessment less individualised and more generalised. A result that seems far from the BIC principle's scope of putting the child at the centre of the decision-making process "as holder of distinct individual rights".[146]

145 Id., para. 134.

146 "The ECHR is rooted in the protection, and balancing, of the rights of everyone within a State's jurisdiction, including those who have formed a family, whereas the CRC is focused on strengthening and protecting children as holders of distinct individual rights." ECtHR, *Strand Lobben v. Norway*, No. 37283/13 September 2019, Dissenting opinion on the merits Judges Kjølbro, Poláčková, Koskelo and Nordén, para. 9.

Appendix: Table of Selected Cases

Case	Facts	Applicants	Claims and Decision
***Eski v. Austria*, Appl. No. 21949/3 January 2007**		Biological father	**Article 8** Decision to allow his daughter to be adopted by the mother's new partner without his consent: *no violation*.
***Wagner and JMWL v. Luxembourg*, Appl. No. 76240/ 1 June 2007**	Intercountry adoption	Adoptive mother on her own and on the adopted child's behalf	**Article 8** Mother living with her adopted daughter since the date of the foreign adoption order. Refusal to enforce a full adoption order by a foreign court in favour of a single woman: *violation*. **Article 14** Refusal to recognise as valid in domestic law a full adoption order by a foreign court: *violation*. **Article 6** Failure by a court of appeal to examine one of the applicants' main grounds of appeal and one based on an alleged violation of the Convention: *violation*.
***Chepelev v. Russia*, Appl. No. 58077/00, July 2007**		Biological father	**Article 8** Decision to allow his daughter to be adopted by the mother's new partner without his consent: *no violation*.
***Gas and Dubois v. France*, Appl. No. 25951/7 March 2012**		Same-sex partners	**Article 14 (in conjunction with Article 8)** Refusal of simple adoption order in favour of homosexual partner of biological mother: *no violation*.
***Harroudj v. France*, Application No. 43631/9 October 2012**	*Kafala*	Woman entrusted with the child (*Kafhil)*	**Article 8** Refusal of permission to adopt owing to prohibition of adoption in child's country of birth: ***no** violation*.
***X and others v. Austria*, Appl. No. 19010/7 February 2013**		Same-sex partners and the biological child of one of them	**Article 14 (in conjunction with Article 8)** Refusal of second-parent adoption in favour of the homosexual partner of the child's biological mother: *violation*.
***Mennesson v. France*, Appl. No. 65192/11 June 2014**	International surrogacy	Intended parents and children	**Article 8** Refusal to grant legal recognition in France to parent-child relationships established in the United States, between children born as a result of a surrogacy arrangement and the couples of intended parents: Right to family life of the applicants: *no violation*. Right to private life of child applicants: *violation*.

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(Continued)

Case	Facts	Applicants	Claims and Decision
***Chbihi Loudoudi et autres c. Belgique*, Appl. No 52265/10**	*Kafala*	The couple entrusted with the child on their and the child's behalf	**Article 8** Refusal to grant adoption of a child placed in *kafala* care by her biological parents: ***no*** *violation*.
***Foulon and Bouvet c. France*, Appl. Nos. 9063/14 and 10410/14 July 2016**	International surrogacy	Intended parents and children	**Article 8** Refusal to grant legal recognition in France to parent-child relationships established in the United States, between children born as a result of a surrogacy arrangement and the couples of intended parents: Right to family life of the applicants: *no violation*. Right to private life of child applicants: *violation*.
***Paradiso and Campanelli v. Italy*, Appl. No. 25358/12 January 2017**	International surrogacy/ intercountry adoption	Intended parents	**Article 8 Respect for private life** Non-recognition of parent-child relationship established in Russia and removal of a child born there as a result of a surrogacy arrangement entered into by a couple later found to have no biological link with the child: *no violation*.
***D c. France*, Appl. No. 11288/18 July 2020**	International surrogacy	Intended parents and children	**Article 8** Obligation for children born under a surrogacy arrangement to be adopted to ensure recognition of legal mother-child relationship: *no violation*. **Article 14** Obligation for children born under a surrogacy arrangement to be adopted to ensure recognition of legal mother-child relationship: *no violation*.
***A.M. v. Norway*, Appl. No. 30254/18 March 2022**	International surrogacy	Intended mother	**Article 8** (in conjunction with Article 14) Refusal to grant legal recognition of parent-child relationship established in the United States, between a child born as a result of surrogacy and the intended mother: *no violation*.

(Continued)

Case	Facts	Applicants	Claims and Decision
***A. L. v. France*, Appl. No. 13344/20 April 2022**	Domestic surrogacy	Biological father	**Article 8** Refusal to establish the applicant's biological paternity: *no violation*. Domestic court's failure to attend to their duty of exceptional diligence as regards the length of proceedings: *violation*.
***D.B. et autres c. Suisse*, Appl. Nos. 58252 and 58817/15**	International surrogacy	Intended parents (same-sex couple) and child	**Article 8** (in conjunction with Art. 14) Refusal to grant legal recognition of parent-child relationship established in the United States, between a child born as a result of surrogacy and the intended father: *violation*.

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doi: 10.5553/FenR/.000064