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The Right to Family Reunification of Children Seeking International Protection under the Convention on the Rights of the Child: Misplaced Reliance on *Travaux*?

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ABSTRACT

This article focuses on a unique provision, article 9 of the Convention on the Rights of the Child (CRC), which stipulates a right to family reunification for all children, including those seeking international protection. Relying on the rules of treaty interpretation of the Vienna Convention on the Law of Treaties (VCLT), the article argues that the desirable interpretation of article 9 prescribes a positive obligation upon States to provide entry to the territory of a State for the purposes of family unity. It also challenges the prevailing academic view that only article 10 of the CRC applies in the migration context, while article 9 of the CRC is applicable exclusively within State borders. The article contends that the text of these provisions, as well as the context of the CRC, does not support the opinion of a considerable number of scholars, who argue that children seeking international protection fall outside the scope of article 9 of the CRC. It suggests that the interpretation of article 9 of the CRC, using the proper interpretative methodology of the VCLT, demands the articulation of a distinctive child-centred approach to family reunification and a presumption against family separation of children seeking international protection.

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1. INTRODUCTION

The importance of family as a fundamental social group features in most, if not all, international human rights instruments.[1] The Universal Declaration of Human Rights (UDHR)[2] and the International Covenant on Civil and Political Rights (ICCPR),[3] for example, underline that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[4]

The significance of family is often conveyed through the use of such terms as 'family life' and 'family unity'.[5] Most international human rights treaties, however, give preference to the former – the right to family life[6] – and do not expressly establish the right to family reunification.[7] A notable exception is the Convention on the Rights of the

1 The meaning of 'family', while not the main focus of this article, is understood here in an inclusive and culturally sensitive way, taking into consideration close relationships of dependency. On the definition of 'family', see Frances Nicholson, 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification', Legal and Protection Policy Research Series, PPLA/2018/02 (UNHCR 2018) 36–62; Frances Nicholson, 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied', Legal and Protection Policy Research Series, PPLA/2018/01 (UNHCR 2018) 16–34; Samuel Ritholtz and Rebecca Buxton, 'Queer Kinship and the Rights of Refugee Families' (2021) 9 Migration Studies 1075, 1081. See also United Nations Committee on the Rights of the Child (CRC Committee), 'Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning Communication No 12/2017', UN doc CRC/C/79/D/12/2017 (27 September 2018) paras 8.10–8.11.

2 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR).

3 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

4 UDHR (n 2) art 16(3); ICCPR (n 3) art 23(1). This provision is reiterated in analogous terms in the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 18(1).

5 For a discussion of the terms 'family', 'family life', 'family unity', and 'family reunification', and of their differences, see Dallal Stevens, 'Asylum-Seeking Families in Current Legal Discourse: A UK Perspective' (2010) 32 Journal of Social Welfare and Family Law 5, 6–9. See also Kate Jastram and Kathleen Newland, 'Family Unity and Refugee Protection' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 565.

6 See eg ICCPR (n 3) art 17; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (European Convention on Human Rights) (ECHR) art 8.

7 For the purposes of this article, the term 'family reunification' refers to the act of overcoming the separation that occurs in the context of migration between a child and the members of his or her family, which would involve granting the right to enter the territory of a State to a family member. Family reunification might also include various instances of preserving family life in the event of refusals to renew residence permits, requests for readmission of family members who temporarily left the host country, and actual removals.

Child (CRC),[8] which – apart from confirming that the family is the natural environment for the growth and well-being of members of society, particularly children[9] – contains a unique provision, article 9,[10] that establishes a right to family reunification for *all* children, including children seeking international protection.[11] This article argues that article 9 creates a positive obligation upon States, regardless of their traditional role in controlling borders, to provide entry to the territory of a State for the purposes of family unity where children are involved. It thus challenges the prevailing academic view that only article 10 of the CRC applies in the migration context, while article 9 is applicable exclusively within the State borders (that is, to children who are citizens of the State).

Before examining articles 9 and 10 of the CRC, part 2 of the article provides a brief overview of the right to family life as applied to children seeking international protection under international human rights and refugee law instruments (beyond articles 9 and 10 of the CRC).[12] Part 3 outlines the desirable interpretation[13] of articles 9 and 10 of the CRC in accordance with the methodology of the Vienna Convention on the

[8] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[9] ibid preamble. See also Wouter Vandenhole, Gamze Erdem Türkelli, and Sara Lembrechts (eds), *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* (Edward Elgar Publishing 2019) 45, 113. Prior to the CRC, the 1959 Declaration of the Rights of the Child also stated that '[t]he child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents'. Declaration of the Rights of the Child, UNGA res 1386 (XIV) (20 November 1959) art 6.

[10] The only other international human rights treaty that contains a provision specifically dealing with the separation of children from their parents is the African Charter on the Rights and Welfare of the Child. African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU doc CAB/LEG/24.9/49 (ACRWC) art 19. For further discussion of art 19 of the ACRWC, and its comparison with art 9 of the CRC, see Jaap E Doek, *A Commentary on the United Nations Convention on the Rights of the Child: Article 8, The Right to Preservation of Identity and Article 9, The Right Not to Be Separated from His or Her Parents* (Martinus Nijhoff Publishers 2006) 17–18; Vandenhole, Türkelli, and Lembrechts (n 9) 116. See also Nicholson, 'The Right to Family Life' (n 1) 12–13.

[11] The term 'children seeking international protection' for the purposes of this article encompasses all children (human beings under the age of 18) who seek refugee protection or any other complementary or subsidiary forms of protection that might draw upon human rights treaties and customary rules or more general humanitarian principles.

[12] This article concentrates only on treaty rules, considering the role that treaties have played in the development of international human rights law and international refugee law. In particular, the article focuses on the CRC, since it contains the largest set of child-centred legal norms in international law and prescribes the most demanding standards for States to protect and assist children, including those children seeking international protection.

[13] For the purposes of this article, 'desirable interpretation' means the interpretation of the relevant treaty provisions achieved by application of the proper methodology of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

Law of Treaties (VCLT),[14] demonstrating that the right to family reunification of children seeking international protection is founded on *both* article 9 and article 10 of the CRC. According to this interpretation, article 9 prescribes a high threshold for the 'best interests of the child' principle in cases of the separation from their families of children seeking international protection, as a result of which the interests of the child have the most considerable weight and cannot be outweighed by countervailing interests, including the interests of States to control migration. Part 4 critiques the predominant approach in the literature, according to which States' obligations under articles 9 and 10 of the CRC are interpreted as different and separate, for its misplaced reliance on the *travaux préparatoires* of the CRC. The article concludes by suggesting an alternative interpretation of article 9 of the CRC that is supported by the United Nations Committee on the Rights of the Child (CRC Committee),[15] a body established specifically to supervise the application of the CRC.[16]

2. THE RIGHT TO FAMILY REUNIFICATION UNDER INTERNATIONAL HUMAN RIGHTS TREATIES AND INTERNATIONAL REFUGEE INSTRUMENTS

2.1 International human rights treaties

The right to respect for family life has a firm foundation in international human rights treaties.[17] Family unity, however, is not envisaged as a right *per se* in

[14] ibid.

[15] Following the reasoning of the International Court of Justice (ICJ) in the *Diallo* case, 'great weight' should be ascribed to the interpretation adopted by the 'independent body that was established specifically to supervise the application of [the] treaty'. *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639 (*Diallo*) para 66, reiterated in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Preliminary Objections) [2021] ICJ General List No 172 (*Application of ICERD*) paras 77, 101. In the context of the CRC, taking into account the interpretation of a body such as the CRC Committee accords with the object and purpose of the CRC and thus the parties' intentions, since the CRC Committee has been established to ensure the effective implementation of the CRC. Additionally, relying on the interpretative practice of the CRC Committee helps 'to achieve the necessary clarity and the essential consistency of international law, as well as legal security'. *Diallo*, para 66, reiterated in *Application of ICERD*, paras 77, 101.

[16] Other international bodies, such as regional human rights courts and the United Nations High Commissioner for Refugees (UNHCR), have also interpreted the provisions of international treaties relating to family reunification. Their interpretations, however, concern the provisions that are *not* substantively equivalent to art 9 of the CRC, as explained further in part 2. As a result, the interpretations of such international bodies are only mentioned tangentially in this article for illustration or comparison.

[17] Nicholson, 'The Right to Family Life' (n 1) 2–8; William J Aceves, 'Protecting the Right to Family Life in US Immigration Proceedings: A Fundamental Right with a Limited Remedy' in Anne F Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (Martinus Nijhoff Publishers 2006) 352–61.

international human rights treaties;[18] rather, it is thought to derive from the right to respect for family life.[19] The right to family life is not guaranteed in absolute terms in international human rights treaties.[20] For example, article 17 of the ICCPR, article 16 of the CRC, article 8 of the European Convention on Human Rights (ECHR),[21] and article 11 of the American Convention on Human Rights (ACHR)[22] safeguard the right not to be subject to arbitrary or unlawful interference with family life.[23] There is some variation in the formulation of such provisions. In particular, article 8 of the ECHR includes a specific limitation clause, explicitly allowing restrictions on the right to family life in the interest of public order or for similar purposes.[24] Additionally, some human rights treaties include more general provisions providing that family forms the fundamental group unit of society, which should be protected.[25] Relatedly, these human rights treaties contain provisions specific to children, that require States to provide children with special measures of protection.[26] The right to family life in these treaties thus has to be interpreted in light of special protection for children, which will likely entail avoiding separating children from their families.

In relation to the provisions mentioned above on the right not to be subject to arbitrary or unlawful interference with family life, some scholars contend that '[t]he

[18] Lambert, for example, argues that this is explained by two main reasons: (1) the protection of the right to family reunification would require positive actions on behalf of States, and (2) the definition of 'family' remains unclear in international law. Hélène Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe' in Vincent Chetail (ed), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2013) 195.

[19] Ciara Mary Smyth, 'The Common European Asylum System and the Rights of the Child: An Exploration of Meaning and Compliance' (PhD thesis, Leiden University 2013) 179; Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 124. Some authors, however, contend that international human rights instruments, including the ECHR, have established a right to family reunification for refugees. See eg Mark Rohan, 'Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence' (2015) 15 Chicago Journal of International Law 347, 352.

[20] John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 555.

[21] ECHR (n 6).

[22] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

[23] Nicholson, 'The Right to Family Life' (n 1) 4, 12.

[24] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel Publisher 2005) 381; William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 402.

[25] ICCPR (n 3) art 23(1); ACHR (n 22) art 17. See also Lucius Caflisch, 'Family, Right to, International Protection' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press 2011) para 10; Nicholson, 'The Right to Family Life' (n 1) 3–4. The preamble of the CRC (n 8) contains similar language.

[26] ICCPR (n 3) art 24(1); ACHR (n 22) art 19.

right to family unity is inherent in the right to family life'.[27] This view is in line with the ordinary meaning of the term 'family', which is defined as 'a group consisting of two parents and their children *living together as a unit*'.[28] Following this definition, the unity of the family or living together may be considered as one of the essential characteristics that makes a group of individuals a 'family'.[29] This interpretation of family life has strong academic support[30] and some support from international courts.[31] As a result, family reunification may be considered a means for implementing the right to respect for family life.[32] In the case of children seeking international protection, this argument is reinforced by general non-discrimination provisions[33] included in most human rights treaties,[34] which ought to feed into the interpretation of the right to family life, thus extending the same protections available to children who are citizens. In light of these non-discrimination provisions, it would be problematic to interpret 'togetherness' as a feature of all except migrant families.

There is, however, a strong counterargument to the interpretation of family unity as inherent in the provisions relating to the right to family life. Many family models and forms do not necessarily entail living together (for example, where one parent does

[27] Jastram and Newland (n 5) 556; Erika Feller, Volker Türk, and Frances Nicholson, 'Summary Conclusions: Family Unity' in Feller, Türk, and Nicholson (eds) (n 5) 604. See also Nicholson, 'The Right to Family Life' (n 1) 3; Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 International Journal of Refugee Law 293, 311.

[28] *Oxford English Dictionary* (3rd edn, Oxford University Press 2010) (emphasis added).

[29] Nicholson, 'The Right to Family Life' (n 1) 3.

[30] See eg Jastram and Newland, who argue that '[a] right to family unity is inherent in recognizing the family as a "group" unit: if members of the family did not have a right to live together, there would not be a "group" to respect or protect'. Jastram and Newland (n 5) 555–603. Nowak confirms that '[o]f principal importance [for the existence of a family] is *life together*, economic ties or other forms manifesting an intensive, regular relationship'. Nowak (n 24) 517 (emphasis added).

[31] According to the European Court of Human Rights (ECtHR), 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life"'. *M v Croatia* App No 10161/13 (ECtHR, 3 September 2015) para 169. The Inter-American Court of Human Rights (IACtHR) has also stated that 'the mutual enjoyment of living together of parents and children constitutes a fundamental element of family life'. *Ramirez Escobar v Guatemala*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 351 (9 March 2018) para 162.

[32] Chetail (n 19) 126; Vincent Chetail, 'Migration, Droits de l'Homme et Souveraineté: Le Droit International dans Tous ses États' in Vincent Chetail (ed), *Globalization, Migration and Human Rights: International Law under Review*, vol II (Bruylant 2007) 76–79.

[33] The IACtHR argued that non-discrimination is a *jus cogens* norm. *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 101. This pronouncement, however, met strong academic criticism. See eg Caroline Laly-Chevalier, Fanny Da Poïan, and Hélène Tigroudja, 'Chronique de la Jurisprudence de la Cour Interaméricaine des Droits de l'Homme (2002–2004)' (2005) 62 Revue Trimestrielle des Droits de l'Homme 459, 464–68.

[34] ICCPR (n 3) arts 2, 26; CRC (n 8) art 2; ACHR (n 22) arts 1, 24; ECHR (n 6) arts 1, 14. See also Chetail (n 19) 153–55.

not reside with the child because the parents are separated, because living together would put the couple in danger, or where one parent works in a different location or country).[35]

In support of family unity as inherent in the right to family life, Rohan argues that a combination of articles 17 and 23 of the ICCPR (and, by analogy, of articles 11 and 17 of the ACHR) jointly establish a right to family life, from which the right to family unity can be deduced.[36] To reach this conclusion, he suggests an *a contrario* interpretation of these provisions, contending that the prohibition of unlawful or arbitrary interference with family life, if reversed, entails that the absence of the interference could only exist in the state of unity.[37] An *a contrario* interpretation, however, is generally used either to confirm the interpretation that is made on other grounds (including ordinary meaning),[38] or is one of the factors taken into account alongside other considerations (including context and object and purpose) leading to a certain interpretation.[39] It is doubtful that an *a contrario* interpretation on its own is sufficient to justify such an interpretation of articles 17 and 23 of the ICCPR (and, by analogy, of articles 11 and 17 of the ACHR) in this case. The next sections of this article argue that, even if the interpretation of family unity as inherent in the provisions on the right to family life is rejected, article 9 of the CRC obligates States to reunite children with their parents, if separated.

2.2 International refugee instruments

The Convention relating to the Status of Refugees (Refugee Convention)[40] does not contain a specific provision related to family unity or family life.[41] In fact, the term 'family' is not mentioned in the Refugee Convention, and is referred to just once,

[35] See eg Viorela Ducu, Mihaela Nedelcu, and Aron Telegdi-Csetri (eds), *Childhood and Parenting in Transnational Settings* (Springer 2018); Ritholtz and Buxton (n 1) 7.

[36] Rohan (n 19) 352. See also Jastram and Newland (n 5) 555–603.

[37] Rohan (n 19) 352.

[38] See eg *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 3, paras 37–39; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100, para 35.

[39] Abdulqawi A Yusuf and Daniel Peat, '*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice' (2017) 3 Canadian Journal of Comparative and Contemporary Law 1, 15. See eg *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, para 40; *Frontier Dispute (Burkina Faso v Niger)* (Judgment) [2013] ICJ Rep 44, paras 88, 93, 95.

[40] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[41] Nicholson, 'The Right to Family Life' (n 1) 9; Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 70.

indirectly, in article 12(2).[42] Family unity was discussed only in the Final Act to the Refugee Convention,[43] a non-binding document[44] of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.[45] The Final Act referred to family unity as 'an essential right of the refugee' and recommended that 'the necessary measures' be taken in order to protect this right,[46] especially with regard to refugees who are minors.[47] Jastram and Newland argue that, even though the recommendation is non-binding, it may be considered as evidence of the object and purpose of the Refugee Convention.[48] The preparatory work of the Refugee Convention does not indicate why the provisions related to family life did not find their way into the text

[42] Art 12(2) of the Refugee Convention (n 40) provides that '[r]ights previously acquired by a refugee and dependent on personal status, more particularly *rights attaching to marriage*, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee' (emphasis added). Edwards, however, notes that art 12 'may be a helpful, albeit not incontestable, tool to reinforce arguments in favour of family unity'. Edwards (n 27) 293, 310. Nicholson also argues that art 3 (non-discrimination) and art 25 (administrative assistance) of the Refugee Convention may be indirectly relevant to the right of family unity. Nicholson, 'The Right to Family Life' (n 1) 10–11.

[43] United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons', UN doc A/CONF.2/108/Rev.1 (26 November 1952) (Final Act).

[44] UNHCR states that this recommendation of the Final Act, although non-binding, has been 'observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol'. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.3 (1979, reissued 2011) para 183.

[45] For the drafting history, see Paul Weis (ed), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed* (Cambridge University Press 1995) 380–81.

[46] Jastram and Newland emphasize that the adoption of Recommendation B in the Final Act (n 43) as 'one of only five' recommendations indicates its importance. Jastram and Newland (n 5) 570. See also Lambert (n 18) 198.

[47] Section IV, Recommendation B, of the Final Act (n 43) provides:
'The Conference, CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an *essential right of the refugee*, and that such unity is constantly threatened, and NOTING with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p 40) the rights granted to a refugee are extended to members of his family, RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family, especially with a view to: (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; (2) The protection of refugees who are *minors, in particular unaccompanied children and girls*, with special reference to guardianship and adoption'(emphasis added).

[48] Jastram and Newland (n 5) 570. See also Feller, Türk, and Nicholson, 'Summary Conclusions: Family Unity' (n 27) para 3.

of the Refugee Convention,[49] despite the importance of safeguarding the family unity of refugees for the purpose of normalizing their lives and their integration into the host country.[50] Some scholars argue that the right to family unity in international refugee law arises from the interaction of the Refugee Convention with international human rights law and, in particular, the provisions of international human rights treaties regarding the right to respect for family life.[51] This view, however, is not supported by the text of the Refugee Convention, which does not include any provisions on the right to family life of asylum seekers or refugees.[52]

Regional refugee instruments also lack provisions on family unity. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[53] does not make any reference to family life or family unity.[54] The Cartagena Declaration on Refugees acknowledges reunification of families as merely a 'principle' (albeit a 'fundamental' one) that should be 'the basis for humanitarian treatment in the country of asylum'.[55] In non-binding instruments, such as the 2016 New York Declaration for Refugees and Migrants and the 2018 Global Compact on Refugees, States commit

[49] Some scholars explained this by the clash of the right to family life in the forced migration context with the State's power to control access to its territory, as individuals seeking international protection are not able to return to their country of origin to enjoy their family life. See eg Lambert (n 18) 197–98.

[50] See eg Nicholson, 'The "Essential Right" to Family Unity' (n 1) 1; UNHCR, 'Statement on Family Reunification for Beneficiaries of International Protection Issued in the Context of the Preliminary Ruling Reference to the Court of Justice of the European Union in the Case of *CR, GF, TY v Landeshauptmann von Wien (C–560/20)*' (22 June 2021) para 3.1.3; UNHCR, 'Summary Conclusions: UNHCR Expert Roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons in Need of International Protection' (4 December 2017) 3 <http://www.refworld.org/docid/5b18f5774.html> accessed 29 August 2022; UNHCR, 'Refugee Family Reunification: UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)' (October 2012) 2–3.

[51] Jastram and Newland (n 5) 581; Rohan (n 19) 350; Frances Nicholson, 'The Right to Family Reunification' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 990.

[52] The Executive Committee of the High Commissioner's Programme (ExCom) has adopted Conclusions on issues relating to family unity and family life. ExCom's interpretative guidance, however, in this case is undermined by the lack of provisions on family life in the Refugee Convention. See UNHCR Executive Committee Conclusion No 9 (XXVIII), 'Family Reunion' (1977); UNHCR Executive Committee Conclusion No 104 (LVI), 'Conclusion on Local Integration' (2005); UNHCR Executive Committee Conclusion No 15 (XXX), 'Refugees Without an Asylum Country' (1979). See also Nicholson, 'The Right to Family Life' (n 1) 10. For an analysis of the role of ExCom Conclusions, see Rosalyn Higgins and others, *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 884–85.

[53] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

[54] Jastram and Newland (n 5) 586.

[55] Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984) s III para 13.

themselves to 'flexible arrangements to assist family reunification'[56] and are encouraged to 'facilitate effective procedures and clear referral pathways for family reunification',[57] respectively.

Against this background, the article now turns to the analysis of articles 9 and 10 of the CRC and examines whether these provisions provide children seeking international protection with the right to family reunification.

3. A DESIRABLE INTERPRETATION OF ARTICLES 9 AND 10 OF THE CRC

3.1 Article 9 of the CRC

Article 9 of the CRC reads as follows:

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

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

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

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.[58]

A starting point to guide the interpretation of this article is the principle of non-separation of children and their parents/families[59] or a presumption against family

[56] UNGA, 'New York Declaration for Refugees and Migrants', UN doc A/RES/71/1 (3 October 2016) para 79.

[57] UNGA, *Report of the United Nations High Commissioner for Refugees: Part 2, Global Compact on Refugees*, UN doc A/73/12 (2 August 2018) (Part II) para 95.

[58] CRC (n 8) art 9(1).

[59] Doek (n 10) 21.

separation.[60] This principle is in line with the text of the provision, as well as the object and purpose of the CRC, which is best expressed in the sixth preambular paragraph of the Convention, providing that 'the child for the full and harmonious development of his or her personality should grow up in a family environment in an atmosphere of happiness, love and understanding'.[61]

The article now focuses on article 9(1) and addresses its main textual ambiguities in turn.

3.1.1 'States Parties shall ensure that a child shall not be separated from his or her parents'

The phrase 'shall ensure', where 'shall' reflects the mandatory nature of the obligation, imposes an obligation on States to take the necessary steps to safeguard children's effective enjoyment of their rights under article 9(1).[62] This phrase prescribes positive actions on the part of States to prevent separation from occurring, even if the State is not the source of the separation,[63] as in the situation of migration. The CRC Committee endorses this interpretation by instructing States to initiate 'efforts to find sustainable, rights-based solutions … including the possibility of family reunification' when children are separated from their parents owing to immigration enforcement.[64]

This interpretation is in line with the text of the first sentence in article 9(1), particularly the phrase 'a child shall not be separated'. The use of the passive voice in this phrase is not incidental – it underlines the fact that the list of actors of separation is not exhaustive and not limited to States. The beginning of the sentence in article 9(4) ('[w]here such separation results from any action initiated by a State Party') also testifies to the existence of occasions when the separation results from the actions of actors other than States, including the child and/or the parent(s) themselves.

The non-separation obligation in article 9(1) should be interpreted to include both the negative obligations not to interfere with unity of the family (except when it is necessary for the best interests of the child) and the positive obligations of the State to maintain, or even facilitate, family unity.[65] The CRC Committee has endorsed an interpretation of article 9(1) as imposing the positive obligations to maintain and facilitate

60 John Tobin and Judy Cashmore, 'Article 9: The Right Not to Be Separated from Parents' in Tobin (ed) (n 20) 308–10. cf Smyth, who argues that art 9 reflects the principle of family unity. Smyth (n 19) 176.

61 CRC (n 8) preamble.

62 Tobin and Cashmore (n 60) 313.

63 Doek (n 10) 21.

64 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and CRC Committee, 'Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', UN doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017) para 34.

65 Smyth (n 19) 178. See also Feller, Türk, and Nicholson, 'Summary Conclusions: Family Unity' (n 27) para 5.

family unity.[66] The question whether the State has an obligation to overcome the separation and facilitate the reunification of a child with his or her parents is controversial, especially in the situation where the separation has already taken place in the migration context through no fault of the State concerned.

The fact that the obligation under article 9(1) is formulated as an obligation of result ('States Parties shall ensure that a child shall not be separated')[67] supports the position that the fulfilment of the obligation entails positive actions on the part of the State in the case of the separation from their families of children seeking international protection. The obligation under article 9(1) is not concerned with the choice of the line of action taken by the State to comply with the obligation, but with the results that the State should achieve. Article 9(1) requires States to ensure the obtainment of a specific factual situation, a specified outcome.[68] The obligation of result under article 9(1) demands that States achieve non-separation of children from their parents. Phrased in mandatory terms, implementing such an obligation pursuant to article 9(1) leaves no room for manoeuvre or exceptions.

[66] For example, the CRC Committee has interpreted the non-separation obligation to include 'support to biological families [of children deprived of a family environment] with the purpose of subsequent reunification', as well as preventative measures, including a comprehensive strategy to 'avoid separation of children from their family environment *inter alia* by providing parents or guardians with appropriate assistance'. CRC Committee, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Finland', UN doc CRC/C/FIN/CO/4 (3 August 2011) paras 33–34; CRC Committee, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Norway', UN doc CRC/C/15/Add.263 (21 September 2005) para 24; CRC Committee, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Kyrgyzstan', UN doc CRC/C/15/Add.244 (3 November 2004) para 40. See also the Committee's General Comment No 6, which states, *inter alia*, that '[i]n order to pay full respect to the obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, *all efforts should be made to return* an unaccompanied or separated child [who is outside his or her country of origin] to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (art 12)'. CRC Committee, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', UN doc CRC/GC/2005/6 (1 September 2005) paras 81, 83 (emphasis added).

[67] For a discussion of obligations of result (which contrast with obligations of conduct), see generally Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 European Journal of International Law 371. This distinction was also highlighted by the ICJ and the International Law Commission (ILC). *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 99; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 123; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) 2 Yearbook of the International Law Commission 31, arts 12, 56–57.

[68] Rüdiger Wolfrum, 'General International Law (Principles, Rules, and Standards)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press 2010) paras 66, 74.

Hence, under article 9(1), the State must ensure that the child is not separated, irrespective of what or who caused the separation, what actions are required to overcome it, or when the separation began. Article 9(1) thus imposes an obligation of result, which includes an obligation not to separate children from their parents, as well as an obligation to unite them with their families when they are separated, and even to take measures to prevent separation before it occurs.

3.1.2 'against their will'

The next textual ambiguity concerns the interpretation of the phrase 'against their will',[69] which – considering the text of article 9(1) – could refer either to the parents' will or to the will of both the parents and the child.[70] The textual interpretation seems to suggest that the phrase should not be interpreted as concerning exclusively the will of children,[71] since article 9(1) uses the singular form, 'a child', rather than the plural form, 'children', which would use the pronoun 'their'.[72] Doek claims that it is evident from the drafting history that 'their will' refers to the will of parents only.[73] This interpretation is implausible. Although the *travaux* confirm that the phrase 'against their will' substituted the word 'involuntarily', which was used initially,[74] there is no clarification to be found in the preparatory work as to why the change was made, or whether it was made in order to limit the provision to the will of the parents. Based on the change of position of this phrase in the sentence, however, it is possible that the drafters used the word 'involuntarily' to concern exclusively the will of the child, whereas the phrase 'against their will' placed after the word 'parents' suggests that the parents' will should be considered as well.

It is argued that the phrase 'against their will' ought to be interpreted as taking into account the object and purpose of the CRC, as well as the principle of respect for the views of the child, which is anchored in article 12 of the CRC[75] and recognized as one of

[69] cf ACRWC (n 10) art 19(1), which refers only to the will of the child: 'No child shall be separated from his parents *against his will*, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interests of the child' (emphasis added).

[70] Doek (n 10) 21; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 1998) 121.

[71] Doek, however, concludes, based on the drafting history, that 'States Parties should provide for an adequate remedy for the child in case he or she is – as the result of a decision of her/his parents – separated from her/his parents against her/his will'. Doek (n 10) 22.

[72] Hodgkin and Newell (n 70) 121.

[73] Doek (n 10) 21, referring to Sharon Detrick, Jaap Doek, and Nigel Cantwell (eds), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff Publishers 1992) 168.

[74] The preceding version of the provision read: 'States Parties shall ensure that a child shall not be *involuntarily* separated from his parents'. See Detrick, Doek, and Cantwell (n 73) 165 (emphasis added).

[75] CRC (n 8) art 12 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'.

four 'general principles' of the Convention.[76] As a result, the desirable interpretation of 'against their will' would include the will of the parents, as well as of the child,[77] whose views should be taken into account and given due weight, as separation from parents is certainly a matter affecting the well-being and development of the child.

3.1.3 'Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence'

The second sentence of article 9(1) specifies two situations in which the best interests of the child require separation: child abuse or neglect, and custody arrangements when the parents live separately.[78] These examples have been interpreted by scholars, such as Smyth, as limiting family separation to reasons originating from the parent–child relationship or their personal circumstances, in this way excluding any other considerations related to the interests or rights of others, including States.[79] However, the ordinary meaning of the words in the second sentence of article 9(1), including the use of the phrase 'such as', signifies that the situations of abuse or neglect and the separate living arrangements of the parents constitute merely examples of situations in which separation is necessary for the best interests of the child and do not constitute an exhaustive list of the situations in which separation would be lawful. The preparatory work confirms that the two examples are 'simply illustrations of cases when separation from parents may occur'.[80]

3.1.4 'except when … such separation is necessary for the best interests of the child'

As noted earlier, irrespective of the reason for separation, the first sentence of article 9(1) is clear in stating that separation can be justified only by the best interests of the child.[81] Thus, in the case of children seeking international protection, separation from their parents would be permissible only when it is in their best interests. This approach under article 9 of the CRC departs from the standards of interference with family life under, for

[76] CRC Committee, 'General Guidelines regarding the Form and Content of Initial Reports to Be Submitted by States Parties under Article 44, Paragraph 1(a), of the Convention', UN doc CRC/C/5 (30 October 1991); CRC Committee, 'Treaty-Specific Guidelines regarding the Form and Content of Periodic Reports to Be Submitted by States Parties under Article 44, Paragraph 1(b), of the Convention on the Rights of the Child', UN doc CRC/C/58/REV.3 (3 March 2015).

[77] cf Tobin and Cashmore, who contend that the phrase 'against their will' should be read as referring '*primarily* to the will of a child's parents', since 'the reality is that where a child's parents have provided their consent to separation, children will generally have no alternative but to accept their decision'. Tobin and Cashmore (n 60) 314 (emphasis added).

[78] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 172–73.

[79] Ciara 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?' (2015) 34 European Journal of Migration and Law 70, 87.

[80] Detrick (n 78) 168. See also Vandenhole, Türkelli, and Lembrechts (n 9) 117.

[81] Pobjoy (n 41) 73, 78.

example, the ICCPR, the ACHR, and the ECHR.[82] It is not sufficient under article 9 of the CRC for the decision of separation from his or her parents of a child seeking international protection to be lawful and non-arbitrary under article 17 of the ICCPR, article 11 of the ACHR, and article 8 of the ECHR.[83] The separation under article 9 of the CRC must be in the best interests of the child. This interpretation, according to which only the best interests of the child could impede the right to family reunification of children seeking international protection, has been reiterated by the CRC Committee.[84]

In the situation of a child seeking international protection and separated from his or her parents, the decision maker would need to conduct an assessment of the best interests of the child. This assessment usually involves a two-stage process: first, to determine what is in the best interests of the child, and then to conduct a balancing exercise between the interests of the child and other countervailing interests.[85] The 'best interests of the child' assessment under article 9, however, would be modified compared to that conducted under the general iteration of the 'best interests of the child' principle in article 3.[86] The 'best interests of the child' principle functions differently in these two provisions. The threshold under article 9 is higher than under article 3.[87] As noted earlier, article 9 is based on the

[82] See Eliahu F Abram, 'The Child's Right to Family Unity in International Immigration Law' (1995) 17 Law and Policy 397, 418.

[83] ibid.

[84] In General Comment No 14, the CRC Committee emphasized that the best interests of the child were explicitly referred to in arts 9 and 10. CRC Committee, 'General Comment No 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)', UN doc CRC/C/GC/14 (29 May 2013) para 3. It should also be noted that Joint General Comment Nos 3 and 22 requires States to 'ensure that the *best interests of the child are taken fully into consideration* in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, including in *granting or refusing applications on entry* to or residence in a country, decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians, and *decisions regarding family unity* and child custody, where the best interests of the child shall be *a primary consideration and thus have high priority*'. CMW and CRC Committee, 'Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the Context of International Migration', UN doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017) para 29 (emphasis added). See also CMW and CRC Committee, 'Joint General Comment Nos 4 and 23' (n 64) para 34.

[85] Jason M Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) 64 International & Comparative Law Quarterly 1, 19–20; CRC Committee, 'General Comment No 14' (n 84) para 47.

[86] Smyth (n 19) 176; Ciara Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 Human Rights Law Review 1, 30.

[87] Tobin and Cashmore (n 60) 319; Abram (n 82) 418–19. cf Alston, who contends that the formulation of the principle of the best interests of the child in art 9 is 'more neutral' than in arts 21 and 18. Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *In the Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994) 13.

presumption that family separation is against the best interests of the child ('shall not be separated'). This presumption can be rebutted only when separation is 'necessary' for the best interests of the child.[88] The rules of treaty interpretation also require that article 9 be read in the context of the CRC as a whole,[89] including article 7(1) – providing that the child has the right to know and be cared for by his or her parents as far as possible[90] – and article 8(1) – establishing the right of the child to preserve his or her identity without unlawful interference, including family relations.[91] This reading of the CRC as a whole supports the interpretation that family unity is in the best interests of the child.[92]

With regard to the second stage of the balancing exercise, article 9 attaches greater weight to the best interests of the child than article 3, so that the best interests of the child become the paramount rather than the primary consideration, owing to the use of the word 'necessary' in article 9. In this case, the interests of a child have the most considerable weight[93] and cannot be outweighed by countervailing interests, including the interests of States to control migration.[94] Pursuant to article 9, no public interest can justify the denial of family unity, only the private interest of a child seeking international protection.[95] As a result, separation from their parents of children seeking international protection exclusively on the basis of the State's immigration control policies would not be in their best interests, and thus would be incompatible with article 9(1) of the CRC. This interpretation is endorsed by the CRC Committee, which notes that, in situations of applying the best interests balancing test, '[n]on-rights-based arguments such as … those relating to general migration control … cannot override best interests considerations',[96] and '[r]eturn to the country of origin shall in principle only be arranged if such return is in the

[88] Smyth (n 19) 176.

[89] VCLT (n 13) art 31(2).

[90] CRC (n 8) art 7(1) provides that '[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'.

[91] CRC (n 8) art 8(1) provides that 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference'.

[92] See also UNHCR, 'Statement on Family Reunification' (n 50) para 3.2.1; UNHCR, '2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child' (May 2021) 50.

[93] Nicholson, in particular, argues that the best interests of the child 'can be seen as [a] key principle[] underpinning and strengthening the right to family life and family unity'. Nicholson, 'The Right to Family Life' (n 1) 36.

[94] Pobjoy (n 41) 70, 74; Abram (n 82) 397, 418.

[95] Abram (n 82) 418.

[96] CRC Committee, 'General Comment No 6' (n 66) para 85. It is worth noting that General Comment No 6 specifies that '[t]his General Comment applies to unaccompanied and separated children who find themselves outside their country of nationality (consistent with article 7) or, if stateless, outside their country of habitual residence': para 5.

best interests of the child'.[97] In fact, the CRC Committee argues that family reunification of children in the country of origin is never in their best interests if 'there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child'.[98] Thus, according to the Committee's interpretation, article 9 would not only prohibit family reunification in their country of origin of children granted refugee status, but would also be applicable to situations of 'lower level risks', where such risks should be balanced against 'other rights-based considerations, including the consequences of further separation'.[99] In accordance with this interpretation of the right to family reunification by the CRC Committee, article 9 *de facto* leaves only two options of family reunification when children seeking international protection are involved: in the host country or, as a last resort, resettlement to a third country.[100]

Article 9 must also be read in light of the non-discrimination principle envisaged in article 2 of the CRC.[101] According to this provision, children may not be discriminated against because they are non-nationals of the State, even if they are in an irregular situation.[102] For the smaller group of children seeking international protection (that is, refugee children and children seeking refugee status), article 22 of the CRC

97 ibid para 84. The Committee also identified preservation of the family environment and maintaining relations not only as one of the elements to be taken into account when assessing the best interests of the child, but also as a concrete right. CRC Committee, 'General Comment No 14' (n 84) para 58.

98 CRC Committee, 'General Comment No 6' (n 66) para 82, reiterated in CMW and CRC Committee, 'Joint General Comment Nos 4 and 23' (n 64) para 35. cf Lemberg-Pedersen for the discussion of the attempts of some States to govern unaccompanied children through humanitarianized deportation policies, depicting deportation procedures as family reunification. Martin Lemberg-Pedersen, 'The Humanitarianization of Child Deportation Politics' (2020) 36 Journal of Borderlands Studies 239.

99 CRC Committee, 'General Comment No 6' (n 66) para 82. See also Nicholson, 'The "Essential Right" to Family Unity' (n 1) 9–10.

100 The CRC Committee clarified that '[r]settlement to a third country may offer a durable solution for an accompanied or separated child who cannot return to the country of origin and for whom no durable solution can be envisaged in the host country. … Resettlement is particularly called for if such is the only means to effectively and sustainably protect a child against *refoulement* or against persecution or other serious human rights violations in the country of stay'. CRC Committee, 'General Comment No 6' (n 66) para 92.

101 VCLT (n 13) art 31(2).

102 Samantha Besson and Eleonor Kleber, 'Article 2 The Right to Non-Discrimination' in Tobin (ed) (n 20) 54, 56. See also the statement of the United States from the drafting process, in which it attempted to limit the scope of protection to only children who were 'lawfully' in a territory. This proposal was harshly criticized and eventually abandoned. UN Economic and Social Council, *Report of the Working Group on a Draft Convention on the Rights of the Child*, UN doc E/CN.4/L.1575 (17 February 1981) paras 39–56, reproduced in Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007) 321–23.

additionally provides special protection against discrimination owing to their particularly vulnerable situation.[103]

Therefore, the desirable interpretation of article 9, employing the proper treaty interpretation methodology, is that a State should ensure that children seeking international protection are not separated from their parents, unless the State is able to demonstrate that the separation of the children is necessary to secure their best interests and that no other measure to achieve this aim is reasonably available.[104]

3.2 Article 10 of the CRC

Article 10 refers directly to article 9(1) twice and states:

> 1. In accordance with the obligation of States Parties under *article 9, paragraph 1*, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
>
> 2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under *article 9, paragraph 1*, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.[105]

The text of article 10(1) makes clear that articles 9 and 10 function together in situations of family reunification.[106] If State obligations under articles 9 and 10 were different and separate, as some drafters of the CRC[107] and most scholars claim,[108] it seems illogical to include a direct reference to article 9(1) in article 10. The ordinary meaning of the phrase 'in accordance with' in article 10 is defined as 'in a manner conforming with',[109] which entails that the obligation to deal with family reunification applications 'in a positive, humane and expeditious manner' follows, and should conform to, the

[103] Besson and Kleber (n 102) 54, 56. See also the reasoning of the ECtHR in *Rahimi v Greece* App No 8687/08 (ECtHR, 5 April 2011), where the court recognized that children are among the 'most vulnerable persons in society': para 87.

[104] Tobin and Cashmore (n 60) 320.

[105] CRC (n 8) art 10(1) (emphasis added).

[106] See Edwards (n 27) 315; Chetail (n 19) 128.

[107] UN Economic and Social Council, 'Question of a Convention on the Rights of the Child', UN doc E/CN.4/1989/48 (2 March 1989) para 203.

[108] Doek (n 10) 21; Detrick (n 78) 170, 184; Pobjoy (n 41) 70, 73; Tobin and Cashmore (n 60) 310.

[109] *Oxford English Dictionary* (n 28).

non-separation obligation under article 9(1). The textual interpretation of article 9 also supports the application of articles 9 and 10 together to ensure family unity and to prevent the separation from their parents of children seeking international protection. Particularly instructive is article 9(4), which specifies 'deportation' as one of the actions that might result in the separation of one or both parents, or of the child, and which by definition involves the crossing of a border.

Therefore, article 10 sets out the procedure for a special (and procedurally more strenuous) category[110] of the separation cases covered by article 9(1) – occurring in different States.[111] Thus, article 9 establishes a substantive obligation of non-separation, and article 10 clarifies the procedural side of it where more than one State is involved,[112] such as handling the applications for reunification, visa issues, and so forth.[113]

This proposed interpretation of articles 9 and 10 of the CRC would require a substantive shift in the practice of some States regarding family reunification of children seeking international protection. In response to the argument that such practice may constitute 'subsequent practice' within the meaning of article 31(3)(b) of the VCLT, and as a result may challenge the proposed interpretation of article 9 of the CRC, the following four counterarguments are advanced. First, the weight to be accorded to State practice depends on its extent, consistency, and uniformity, as well as on which States are involved.[114] To fall within the meaning of article 31(3)(b) of the VCLT, State practice should establish the agreement of the parties, which requires convincing evidence to show the 'concordant' conduct of the parties.[115] The restrictive practice of some States regarding family reunification of children seeking international protection does not seem to be sufficiently general and widespread to limit the proposed interpretation

[110] Further, art 22(2) extends the procedural rights under art 10 to refugee children by imposing an obligation on States to 'trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family'. In fact, Rohan states that art 22(2) creates an 'explicit duty to assist reunification' in the context of refugee children. Rohan (n 19) 354. See also Nicholson, 'The Right to Family Life' (n 1) 5. cf Pobjoy, who argues that the obligation under art 10 does not go further than the general duty to cooperate. Jason Pobjoy, 'Article 22: Refugee Children' in Tobin (ed) (n 20) 852.

[111] Chetail, however, argues that art 10 includes a mixture of both procedural and substantive obligations, since art 10 contemplates a presumption of approval of the applications for family reunification. Chetail (n 19) 128. See also Rohan (n 19) 354.

[112] Edwards, in particular, argues that art 10 of the CRC contains 'a corrective obligation' on States to process any family reunification application in a positive, humane and expeditious manner, which is more than 'simply an obligation to efficiently process an application for family reunification', since the failure to grant family reunification may lead to the violation of arts 9 and 3 of the CRC. Edwards (n 27) 315.

[113] See CMW and CRC Committee, 'Joint General Comment Nos 4 and 23' (n 64) 35–37.

[114] Jane McAdam, 'Interpretation of the 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press 2011) 96–97.

[115] ibid 97; Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 255; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 137.

of article 9 of the CRC. Secondly, the practice of some States limiting family reunification of children seeking international protection could represent non-compliance with their obligations under the CRC. In fact, the CRC Committee argues that the State practice of prohibiting the application for family reunification even for children whose refugee status is recognized, or of permitting family reunification with unnecessarily restrictive conditions, may be deemed as diverting the obligations under the CRC, which leads to a serious 'protection gap' faced by children.[116] Thirdly, State practice should be expressly in pursuance of a particular treaty. In this sense, it is safe to assume that at least part of State practice regarding limiting family reunification is the practice related to other (adult-centred) international treaties, described in part 2 of this article, whose provisions impose lesser restrictions on the interference with family life than the CRC.[117] However, even under the less demanding standards of these treaties, restrictive family reunification State practice relating to children seeking international protection has still been challenged.[118] Fourthly, some scholars remain cautious about reliance on subsequent practice in the interpretation of multilateral treaties (such as the CRC) because of the *pacta tertiis* rule.[119] Consequently, the restrictive practice of some States with regard to family reunification cannot constitute 'subsequent practice' within the meaning of article 31(3)(b) of the VCLT.

4. THE PREVAILING ACADEMIC VIEW OF THE INTERPRETATION OF ARTICLE 9 OF THE CRC

The prevailing position in the literature is that State obligations under articles 9 and 10 are different and separate.[120] In particular, it is argued that article 9 concerns domestic situations and article 10 concerns situations involving the crossing of a border, which could imply that article 9 extends only to children who are citizens of the State. The primary source of this distinction is a declaration of the Chairman of the Working Group drafting the Convention:

[116] CRC Committee, 'General Comment No 6' (n 66) para 3.

[117] See eg ICCPR (n 3) art 17, ECHR (n 6) art 8, and ACHR (n 22) art 11, which limit arbitrary and unlawful interference with the right to family life.

[118] For instance, while considering whether there was a violation of art 8 of the ECHR, the ECtHR confirmed that there was an international consensus that both refugees and children 'need' stronger procedural guarantees for family reunification. *Mugenzi v France* App No 52701/09 (ECtHR, 10 July 2014) para 54; *Tanda-Muzinga v France* App No 2260/10 (ECtHR, 10 July 2014) para 75. See also *Mayeka v Belgium* (2008) 46 EHRR 449, para 85. Similarly, UNHCR ExCom Conclusions, which are regarded as among the documents evidencing State practice of over 100 States on refugee issues, confirm a positive obligation of States to 'facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted' to exercise family reunification. UNHCR ExCom Conclusion No 15 (XXX) (n 52).

[119] James C Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021) 162–66. cf McAdam (n 114) 97.

[120] Doek (n 10) 21; Detrick (n 78) 170, 184; Pobjoy (n 41) 70, 73; Tobin and Cashmore (n 60) 310.

> It is the understanding of the Working Group that article 6 [now article 9] of this Convention is intended to apply to separations that arise in domestic situations, whereas article 6 *bis* [now article 10] is intended to apply to separations involving different countries and relating to cases of family reunification. Article 6 *bis* [now article 10] is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.[121]

It is worth noting that the rest of the Working Group did not agree with this statement by the Chairman. In fact, the representative of the Federal Republic of Germany 'reserved the right to declare that silence in the face of the Chairman's declaration did not mean agreement with it'.[122]

Most scholars, including Doek, Detrick, Pobjoy, Tobin, and Cashmore, however, share the view of the Chairman of the Working Group that articles 9 and 10 contain separate and different obligations, where article 9 regulates the separation of children from their parents domestically, and article 10 regulates such separation across different States.[123] Doek, for example, quotes the Chairman of the Working Group's statement without any additional commentary to explain the relationship between articles 9 and 10.[124] Similarly, Detrick relies on the same statement to argue that the *travaux* reveal that '[a]rticle 9 was intended to apply to separations between children and their parents in domestic situations'.[125] Pobjoy, in turn, distinguishes between the principle of non-separation (under article 9 of the CRC) and the principle of family reunification (under article 10 of the CRC). He argues that the principle of non-separation in the refugee context concerns only a narrowly defined group of children – those who are already together with their parents within the borders of a host State. In all other scenarios, children seeking international protection would not receive protection from family separation.[126] Pobjoy's distinction is based not on the text of articles 9 and 10 of the CRC, but on the position outlined in the Canadian case of *Casetellanos v Canada (Solicitor General)*.[127]

Three aspects of the prevailing academic view on article 9 and its relationship with article 10 are questioned. First, this view is at odds with the express language of articles 9 and 10 of the CRC and the context of the CRC as a whole, as well as with the interpretation of the CRC Committee, as demonstrated in the previous part of this article. Secondly, this view ignores the relationship between preparatory work (article 32 of the VCLT) and the other elements of treaty interpretation (article 31 of the VCLT),

121 UN Economic and Social Council (n 107) para 203.

122 ibid para 207, reported in Detrick, Doek, and Cantwell (n 73) 168, 181–82.

123 Doek (n 10) 21; Detrick (n 78) 170, 184; Pobjoy (n 41) 70, 73; Tobin and Cashmore (n 60) 310.

124 Doek (n 10) 21.

125 Detrick (n 78) 170. Doek and Detrick are authors of commentaries to the *travaux*, which emphasize the statement of the Chairman of the Working Group drafting the CRC. Detrick, Doek, and Cantwell (eds) (n 73).

126 Pobjoy (n 41) 70, 73.

127 *Casetellanos v Canada (Solicitor General)* [1995] 2 FC 190, 198 (Nadon J).

according to which preparatory work is subordinate to the general rule.[128] Thirdly, even if recourse to preparatory work is justifiable in this case, this view misinterprets the preparatory work.

Article 31 of the VCLT outlines the general rule of interpretation. Commentators accept that there is no hierarchy between the various elements (paragraphs) of article 31 and all the elements (paragraphs) constitute the general rule of interpretation.[129] Commentators, however, also agree that the logical starting point for interpretation is the text of the treaty. As explained by Abi-Saab, '[t]he interpreter has to start with the hard core of the operation, which is the *text* to be interpreted'.[130] The text of articles 9 and 10 of the CRC does not provide any indication that the personal scope of these provisions is different. On the contrary, the text suggests that these provisions reinforce one another. For example, as mentioned earlier, article 10 refers twice in its text to article 9. Additionally, the text of article 9 does not in any way expressly exclude children seeking international protection (or any children who are non-citizens). Further, articles 9 and 10 should be interpreted in the context of the CRC as a whole, including articles 2, 22, 7(1), and 8(1).[131] Consideration of the context confirms the textual interpretation of articles 9 and 10. Thus, the interpretation of articles 9 and 10, based on the text of these provisions, and in light of the CRC as a whole, suggests that children seeking international protection should be equally entitled not to be separated from their parents. The CRC Committee, a body established specifically to supervise the application of the CRC,[132] confirms this interpretation by founding the right to family reunification of children seeking international protection on both article 9 and article 10, as demonstrated in part 3 of this article. This interpretation is also confirmed by the fact that, of 196 States parties to the CRC, only Japan made an interpretative declaration to article 9, asserting that article 9(1) should not apply to

[128] Oliver Dorr, 'Article 32: Supplementary Means of Interpretation' in Oliver Dorr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 618; Yves le Bouthillier, 'Article 32: Supplementary Means of Interpretation' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 843.

[129] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 Yearbook of the International Law Commission 187, 219. See also Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 166, 179; Gardiner (n 115) 161–62.

[130] Georges Abi-Saab, 'The Appellate Body and Treaty Interpretation' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers 2010) 104 (emphasis in original). The ICJ has also repeatedly stated that '[i]nterpretation must be based above all upon the text of the treaty'. See *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Judgment) [1994] ICJ Rep 22, para 41, reiterated in *Application of ICERD* (n 15) para 81.

[131] For a detailed analysis, see part 3 above.

[132] See n 15.

'a case where a child is separated from his or her parents as a result of deportation in accordance with [Japan's] immigration law'.[133]

The second questionable aspect of the prevailing view of the interpretation of article 9 is that its only source lies in the *travaux*, that is, the declaration of the Chairman of the Working Group drafting the Convention. Recourse to the preparatory work, which constitutes a supplementary means of interpretation as the very title of article 32 of the VCLT indicates, is only available to confirm the meaning resulting from the application of the general rule of interpretation (article 31 of the VCLT), or when the interpretation according to the general rule leaves ambiguity or leads to a manifestly unreasonable or absurd result.[134] In this sense, the use of the preparatory work is meant to be only an exceptional occurrence.[135] The declaration of the Chairman of the Working Group drafting the CRC thus cannot 'hijack the meaning of treaty interpretations as would be established under article 31'.[136]

The first route for incorporating the preparatory work into the VCLT analysis (confirmation) is discussed below. But with regard to the remaining routes that permit reliance on *travaux*, they are inapplicable to the analysis of article 9 of the CRC. The ambiguity route occurs in cases of *prima facie* uncertainty, where – even after a thorough study of the text, the context, and the other elements of article 31 of the VCLT – the meaning of the provision remains 'ambiguous or obscure'.[137] As described earlier, it is possible to determine the meaning of articles 9 and 10 of the CRC without any ambiguity by examining

133 United Nations Treaty Collection, 'Convention on the Rights of the Child', Declarations and Reservations <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 29 August 2022. Japan made a similar statement during the drafting process after the adoption of the Convention: '[t]he representative of Japan drew the attention of the Working Group to the Chairman's declaration contained in paragraph 203 of the report stating that art 6 of the Convention (present art 9) was intended to apply to separations that arise in domestic situations and also that art 6 *bis* (present art 10) was not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations. His delegation accepted arts 9 and 10 provided that the Chairman's declaration was maintained'. UN Economic and Social Council (n 107) para 722.

134 VCLT (n 13) art 32.

135 There are also commentators who argue that art 32 of the VCLT has not relegated *travaux* to an inferior position in the treaty interpretation process. This, however, is a minority view. See eg Julian D Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?* (2013) 107 American Journal of International Law 780; Stephen M Schwebel, 'May Preparatory Work Be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?' in Stephen M Schwebel (ed), *Justice in International Law: Further Selected Writings* (Cambridge University Press 2011) 289; Hathaway (n 119) 59; John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 24.

136 Alexander Orakhelashvili, 'The Recent Practice on the Principles of Treaty Interpretation' in Alexander Orakhelashvili and Sarah Williams (eds), *40 Years of the Vienna Convention* (British Institute of International and Comparative Law 2010) 151.

137 Mortenson (n 135) 787. cf Tobin, who argues that the threshold for relying on *travaux* is rather low owing to the limited capacity of art 31 of the VCLT to produce a determinate meaning for any treaty provision. Tobin (n 135) 25.

the text of articles 9 and 10 and the context of the CRC as a whole. It is also unlikely that the interpreter can resort to the absurdity route in this case, as the interpretation of the right to family reunification as applicable to all children without discrimination is not such a manifestly absurd result of interpreting articles 9 and 10 of the CRC that it would be difficult to believe the drafters intended the provision to be interpreted this way.

In terms of the third aspect of the prevailing academic view, to explore whether recourse to the preparatory work is justifiable in this case, it is necessary to explore the confirmation route of article 32 of the VCLT, which permits reliance on the preparatory work to check and re-examine the initial interpretation resulting from the application of article 31 of the VCLT. In this context, the interpreter would need to enquire whether an interpretation of article 9 of the CRC that does not exclude from its personal scope children seeking international protection – which was achieved following article 31 of the VCLT – can be confirmed by the preparatory work. A fair and careful analysis of the preparatory work in this case does not indicate that the drafters meant to convey something other than the initial interpretation. First, articles 9 and 10 of the CRC were originally combined into one article – article 6 – and only in 1989 (the last of the 10 years of the drafting process) was this article separated into two articles – articles 6 (now 9) and 6 *bis* (now 10). Secondly, the preparatory work indicates that there was one declaration of the Chairman of the Working Group drafting the Convention that might be interpreted as contradicting the provisional interpretation of articles 9 and 10 of the CRC. This declaration, however, did not lead to a discussion of the personal scope of article 9 (or an exclusion from it of children seeking international protection or any other categories of non-citizen children) or an agreement by other drafters. The discussion of this declaration was limited to the statements of representatives of four States. Portugal, Sweden, and Italy commented on the last sentence of the declaration: '[a]rticle 6 *bis* [now 10] is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their *international obligations*'.[138] In particular, these States clarified the meaning of 'international obligations' as including not only treaties but also 'principles recognized by the international community, particularly United Nations legal instruments for the promotion and protection of human rights'.[139] Thus, these States specified only the procedural aspects envisaged in article 10 of the CRC. The representative of Germany, as mentioned earlier, stressed that the lack of comments from other representatives did not indicate agreement with the Chairman's declaration.[140]

The representative of Japan, later in the discussion of the draft convention, questioned the legal nature of the Chairman's declaration,[141] and eventually concluded that Japan accepted articles 9 and 10, 'provided that the Chairman's declaration was maintained'.[142] No other representative made a similar statement.

138 UN Economic and Social Council (n 107) paras 204–06 (emphasis added).

139 ibid paras 204–05.

140 ibid para 207.

141 'The representative of Japan expressed the reservation of his Government with regard to the legal nature of the declaration that the Chairman of the Working Group should make on article 6 *bis* [now art 10] to the effect that this article was not intended to affect the immigration laws of States Parties'. ibid para 22.

142 See n 133.

Finally, the preparatory work also includes various statements that contrast with the Chairman's statement. For example, the French representative, when discussing the situation of children of parents with different nationalities who separated, stated that:

> the Convention, which constituted a basic text at the international level, must by its very nature be universal. Preventive measures should be taken to *impede that its provisions be interpreted from a nationalistic point of view*. It was absolutely necessary that the child's interests should be evaluated on the basis of all the elements of his family background, *whether such elements were national or international*. Experience had shown that the *nationalistic approach to the child's interests had in most cases resulted in making a legal orphan of a child with a foreign father or mother*.[143]

As a result, it is impossible to conclude that reliance on the *travaux* in this case invalidates the initial hypothesis with regard to the interpretation of articles 9 and 10 of the CRC. At most, the preparatory work may clarify the procedural aspects of article 10 and how they ought to correlate with other international obligations and domestic immigration laws.

Articles 9 and 10 thus must be interpreted based on their text and read in the context of the CRC as a whole,[144] including article 2, which provides that States must ensure the rights under the CRC without discrimination of any kind based on, *inter alia*, national or ethnic origin or other status. Such interpretation does not allow States to withdraw the right to family unity under article 9 from children seeking international protection as it would be discriminatory in nature.

This proposed interpretation of articles 9 and 10 of the CRC is based on the text and context of the relevant provisions, is achieved employing proper VCLT methodology, and is in line with the interpretation of the CRC Committee.

5. CONCLUSION

It is often difficult to ignore the tension between State sovereignty and human rights agendas as the right to family reunification is a matter of immigration as well as a matter of family life.[145] Nonetheless, it is evident that the CRC establishes the right to family reunification for children, including children seeking international protection, pursuant to articles 9 and 10 of the Convention. The text of these provisions, as well as the context of the CRC, does not support the opinion of a considerable number of scholars, who argue that children seeking international protection fall outside the scope of article 9 of the CRC. In addition, the CRC Committee confirms that obligations under *both* article 9 and article 10 of the CRC 'come into effect and should govern the State's decision on family reunification' of children seeking international protection.[146]

[143] UN Economic and Social Council, 'Commission on Human Rights: Report on the Thirty-Eighth Session', UN doc E/CN.4/1982/30/Add.1 (15 March 1982) 51 (emphasis added).

[144] VCLT (n 13) art 31(2).

[145] See Rohan (n 19) 356.

[146] CMW and CRC Committee, 'Joint General Comment Nos 4 and 23' (n 64) para 35. See also CRC Committee, 'General Comment No 6' (n 66) para 81.

The reliance on the *travaux*, or specifically on one declaration of the Chairman of the Working Group, is misplaced, as such reliance ignores the relationship between articles 31 and 32 of the VCLT. Further, even if the recourse to the preparatory work is justifiable in this case, the analysis of the *travaux* does not indicate that children seeking international protection are excluded from the scope of article 9 of the CRC. In contrast, an interpretation of article 9 using the proper interpretative methodology of the VCLT demands the articulation of a distinctive child-centred approach to family reunification, and a presumption against family separation of children seeking international protection.

Considering that the standard prescribed by the principle of the 'best interests of the child' (in article 3 of the CRC) is often considered vague,[147] article 9 of the CRC clarifies the standard for the 'best interests of the child' principle in cases of family reunification of children seeking international protection, where the best interests of the child become the paramount rather than the primary consideration. Thus, article 9 is usefully instructive about the high threshold for the 'best interests of the child' principle in the context of separation of children from their families. In line with this standard, the only limitation on the right to family life that could be imposed is when separation from their parents of children seeking international protection is in their best interests.

147 Smyth (n 19) 17; Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF 1996) 2; Robert H Mnookin, *In the Interest of Children: Advocacy, Law Reform and Public Policy* (WH Freeman 1985) 17–18.