

THE CHILD'S BEST INTERESTS APPLIED TO THE PREVENTION AND CRIMINALISATION OF FEMALE GENITAL MUTILATION

By Maité BEAGUE, Assistant at the University of Namur and legal expert with the Saint-Luc SOS Enfants team

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INTRODUCTION

Female genital mutilation has been banned under Belgian law since a law promulgated on 28 November 2000 inserted its explicit proscription into the Belgian Criminal Code¹. At the European level, the Convention on Preventing and Combating Violence Against Women and Domestic Violence, signed in Istanbul on 11 May 2011, is the first legally binding European text that addresses violence against women². This convention is designed to combat all forms of violence perpetrated against women, including female genital mutilation³. Internationally, the General Assembly of the United Nations adopted a resolution condemning the practice of genital mutilation in December 2012⁴.

Female genital mutilation can be analysed from the perspectives of protecting girls and women and criminalising the practice. With regard to protection, Belgian law provides for a series of support and protection measures for a child at risk of such a practice or one who has suffered from it. As for its criminalisation, the people who have practised, promoted or enabled female genital mutilation or who have attempted to carry it out may be prosecuted and sentenced to imprisonment under Article 409 of the Belgian Criminal Code. There are doubts over whether decisions taken in cases of suspected or proven female circumcision are compatible with the child's best interests.

The best interests of the child are governed under international law by Article 3.1 of the Convention on the Rights of the Child⁵. This provision states that the child's best interests are of a primary consideration in all decisions affecting the child. This law's application in the prevention and criminalisation of female genital mutilation is complicated. On the one hand, female genital mutilation is an issue that is difficult to apprehend and regulate. It encroaches on several fundamental rights that can enter into conflict with each other; notably the child's right to be protected from all forms of violence and the child's right to a family and not be separated from his or her parents. On the other hand, the best interests of the child has been the subject of many articles and the applicability of this concept in Belgian law is still an issue of debate.

¹ Loi du 28 novembre 2000 relative à la protection pénale des mineurs [Criminal Protection of Minors Act], *M.B.*, 17 March 2001. This statute inserted Article 409 into the Criminal Code which prohibits the practice of female genital mutilation.

² Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, opened for signature in Istanbul on 11 May 2011. Belgium signed it in Strasbourg on 11 September 2012. The treaty was approved by the United Assembly of the Belgian Common Community Commission in July 2015. It was ratified on 16 March 2016 and entered into force on 1 July 2016: V. HENKINBRANT, "Migration et violences conjugales : La Belgique doit se donner les moyens de réaliser les objectifs de la Convention d'Istanbul !" [Migration and spousal violence: Belgium must provide resources to fulfil the goals of the Istanbul Convention!], *ADDE*, Newsletter no. 120, May 2016, p. 1. With regard to this convention: COUNCIL OF EUROPE, "Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique. Un outil pour mettre fin aux mutilations génitales féminines" [The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence - A tool to end female genital mutilation], Strasbourg, Council of Europe Publishing, January 2015, p. 51.

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⁴ Resolution of the United Nations General Assembly on intensifying global efforts for the elimination of female genital mutilation, no. 67/146, 20 December 2012.

⁵ Convention on the Rights of the Child, adopted by the United Nations General Assembly in New York on 20 November 1989, *M.B.*, 5 September 1991.

This intricate state of affairs should, however, be resolved. The child indeed has rights that must be respected. The adoption of the third Optional Protocol to the Convention on the Rights of the Child further attests to the importance of the rights of the child⁶. It established an individual communications mechanism to the Committee on the Rights of the Child. This mechanism allows any child claiming to have suffered a violation of their fundamental rights to make a complaint to the Committee on the Rights of the Child⁷.

The purpose of our study is to apply the concept of the child's best interests to the preventive and criminal procedures in relation to female genital mutilation. We analyse in the first part of this research the international, European and national texts governing the concept of the best interests of the child⁸. The aim of this part is to demarcate the exact limits of this concept in order to be able to substantively apply it to the preventive and criminal procedures in cases of female circumcision or risk of female circumcision. The concept of the child's best interests has existed since the first drafts of international texts on children's rights. Article 3.1 of the Convention on the Rights of the Child is the foundational provision on this topic. We will see that this concept has been the subject of numerous diverging qualifications and been criticised by many authors. Nevertheless, the Committee on the Rights of the Child developed a comprehensive detailed analysis of this concept in its General Comment

⁶ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted by the United Nations General Assembly in New York on 19 December 2011. In relation to its application in Belgian law: Act of 21 February 2014 approving the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted in New York on 19 December 2011, *M.B.*, 20 August 2014. In Belgium, the protocol was ratified on 30 May 2014 and entered into force on 30 August 2014.

⁷ Certain provisions must be respected. For a complete review of this Protocol's content, see: A.-C. RASSON, "La protection juridictionnelle des droits fondamentaux de l'enfant : une utopie ?" [THE JUDICIAL PROTECTION OF THE CHILD'S FUNDAMENTAL RIGHTS: A UTOPIA?], *Rev. trim. D.H.*, 106/2016, pp. 498 and subseq.

⁸ International and European law refer to the "best interests of the child" whereas Belgian law speaks more of the "interests of the child".

No. 14⁹. We then examine the Charter of Fundamental Rights of the European Union which refers to the concept of the best interests of the child in Article 24¹⁰. We finally study the principal Belgian laws referring to this concept as well as the issue of enforceability of the Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union under Belgian law.

In the second part, we analyse the procedures for the protection from female genital mutilation and for its penalisation in order to apply the concept of the child's best interests to those procedures. This second part aims to assess and determine in real terms the child's best interests with regard to the protection from and criminalisation of female circumcision. In the first chapter, we examine the protection and criminal measures that govern female genital mutilation in Belgian law. The second chapter presents our tangible application of the child's best interests to such measures. Given the limitations on this work, we consider two particular measures which are applicable in cases of female genital mutilation under the terms of the child's best interests: the placement of the child into care and the imprisonment of the parents.

⁹ General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, adopted by the Committee on the Rights of the Child on 29 May 2013.

¹⁰ Charter of Fundamental Rights of the European Union of 18 December 2000, *O.J.E.C.*, C 364/1.

CHAPTER I.

UNDER INTERNATIONAL LAW



PART I. THE CONCEPT OF THE CHILD'S BEST INTERESTS

In order to ascertain the exact boundaries of the concept of the child's best interests, the international, European and Belgian texts on this concept must be analysed. We will rely on Article 3.1 of the Convention on the Rights of the Child and Article 24 of the Charter of Fundamental Rights of the European Union. As for Belgian law, this concept is stated in the Constitution, several passages of the Civil Code and other protective provisions.



SECTION I. FROM THE 1959 DECLARATION OF THE RIGHTS OF THE CHILD TO THE 1989 CONVENTION ON THE RIGHTS OF THE CHILD

§ 1. Origins of the concept

The concept of the child's best interests was already present in all initial drafts of international texts on children's rights. A brief history of this concept's emergence in international treaties allows the important role attributed to this principle to be understood, although its actual scope would remain nebulous.

The first international law document that referred to the concept of the child's best interest was the 1959 Declaration of the Rights of the Child which the United Nations General Assembly adopted on 20 November 1959¹¹. This declaration was the first international consensus forming the foundational principles of the rights of the child. This text contains ten fundamental principles. Principle 2 stipulates: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

This principle was subsequently incorporated into several international conventions¹², including the Convention on the Elimination of All Forms of Discrimination Against Women adopted on 18 December 1979¹³. Article 5 (b) of that Convention provides that "States Parties shall take all appropriate measures: a) (...) b) To ensure that family education includes a proper understanding of maternity

¹¹ Declaration of the Rights of the Child adopted on 20 November 1959 by the United Nations General Assembly.

¹² T. HAMMARBERG, "Le principe de l'intérêt supérieur de l'enfant : ce qu'il signifie et ce qu'il implique pour les adultes" [The principle of the child's best interests: its meaning and implication for adults], *J.D.J.* (France), March 2011, No. 303, p. 10.

¹³ Convention on the Elimination of All Forms of Discrimination Against Women adopted by the United Nations General Assembly on 18 December 1979.

as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

The concept of the best interests of the child was then picked up by several regional treaties and many national statutes. Nevertheless, Article 3.1 of the Convention on the Rights of the Child¹⁴ (hereinafter CRC within the main text) is the main provision on this concept.

§ 2. Article 3.1 of the Convention on the Rights of the Child

Article 3.1 of the CRC is the central provision governing the concept of the best interests of the child in international law. This provision stipulates 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."

With the adoption of this provision, the concept of the best interests of the child became a primary consideration in all decisions affecting children, whether those decisions were made by public or private social welfare institutions, courts, administrative authorities or legislative bodies. In other words, any authority taking a decision that concerns a child has to take into account that child's best interests as a primary issue.

The child's interests are thus a guiding principle for legal thinking¹⁵. The Convention does not however state how this concept should be defined, interpreted or applied. Accordingly, numerous questions have been raised in relation to its application and exact interpretation¹⁶.

Due to its lack of clarity, the concept of the child's best interests gained diverse epithets¹⁷: the concept is

¹⁴ Convention on the Rights of the Child adopted by the United Nations General Assembly at New York on 20 November 1989.

¹⁵ V. DOUILLEZ, *La convention internationale relative aux droits de l'enfant en question* [Questioning the Convention on the Rights of the Child], Liege, Jeunesse et droit, 2002, p. 17.

¹⁶ N. CANTWELL, "La genèse de l'intérêt supérieur de l'enfant dans la Convention relative aux droits de l'enfant" [The creation of the child's best interests in the Convention on the Rights of the Child], *J.D.J.*, 2013, No. 323, p. 8.

¹⁷ G. MATHIEU and A.-C. RASSON "L'intérêt de l'enfant sur le fil. Réflexions à partir des arrêts de la Cour constitutionnelle en matière de filiation" [The child's interests on the line. Reflections on the Constitutional Court's judgements on parentage], *J.T.*, 2013, no. 6525, pp. 383-384, footnotes no. 7-15.

"protean"¹⁸, "adaptive"¹⁹, "difficult to define"²⁰, "pliable"²¹, "multi-faceted"²², a "magic formula"²³, an "unidentified fluttering object"²⁴, a "method-concept"²⁵ as "elusive as the Holy Grail"²⁶, a "framework-concept"²⁷, "classical"²⁸, a "highly variable concept"²⁹ and even "conceptual fog"³⁰.

Looking into the exact intention of the text, N. Cantwell underlines that "it is difficult to grasp the specific intentions of the legal drafters. Yet, it seems the main concern was

¹⁸ N. MASSAGER, "Autorité parentale et hébergement" [Parental authority and accommodation], *Droit des personnes et des familles : chronique de jurisprudence 1999-2004* [Personal and family law: case-law 1999-2004], coll. Les dossiers du Journal des tribunaux, Brussels, Larcier, 2006, p. 566, cited by G. MATHIEU and A.-C. RASSON, *op. cit.*, footnote no. 7.

¹⁹ Projet de loi modifiant diverses dispositions légales relatives à la filiation et à l'adoption, Rapport Staels-Dompas, [Bill to amend different legal provisions on parentage and adoption, Staels-Dompas Report], *Doc. Parl.*, Ch., 1984-1985, No. 904/2, pp. 61 et 88, cited by G. MATHIEU and A.-C. RASSON, *op. cit.*, footnote no. 8.

²⁰ *Ibid.*, pp. 59 and 61, cited by G. MATHIEU and A.-C. RASSON, *op. cit.*, footnote no. 9.

²¹ P. VERDIER, "Les dérives de l'utilisation de la notion de l'intérêt de l'enfant" [The excesses of using the concept of the child's best interests], Assemblée nationale de DEJ, novembre 2010, www.dei-france.org, cited by G. MATHIEU and A.-C. RASSON, *op. cit.*, footnote no. 10.

²² E. LANGENAKEN, "Le droit de la filiation face à l'inceste : norme égalitaire ou norme symbolique ?" [The right of parentage versus incest: an egalitarian or symbolic rule?], *Rev. trim. dr. fam.*, 2004, p. 365, cited by G. MATHIEU and A.-C. RASSON, *op. cit.*, footnote no. 11.

²³ J. CARBONNIER, *Droit civil*, 21^e éd., Tome 2, *La famille, L'enfant, le couple* [Civil law, 21st ed. Volume 2, The family, The child, the couple], P.U.F., 2002, p. 85, cited by T. DUMORTIER, "L'intérêt de l'enfant : les ambivalences d'une notion 'protectrice'" [The child's interests: ambiguities in a 'protective' concept], *La revue des droits de l'homme* [online], 3/2013, published on 26 November 2013. <http://revdh.revues.org/189>, footnote no. 1.

²⁴ M.-S. DUPONT-BOUCHAT, "L'intérêt de l'enfant – Approche historique" [The child's interests – A historic approach], in P. GÉRARD, F. OST and M. VAN DE KERCHOVE (eds), *Droit et intérêt* [Rights and interests], Brussels, FUSL, 1990, p. 53, cited by G. MATHIEU and A.-C. RASSON, *op. cit.*, footnote no. 13.

²⁵ A.-C. VAN GYSEL, "L'intérêt de l'enfant, mythe et réalité" [The myth and reality of the child's interests], in *Actualités de droit familial, le point en 2001*, Liège, Commission Université-Palais Université de Liège, 2001, vol. 49, p. 206, cited by G. MATHIEU and A.-C. RASSON, *op. cit.*, footnote no. 15.

²⁶ T. DUMORTIER, *op. cit.*, p. 1.

²⁷ C. LIENHARD, *Le rôle du juge aux affaires matrimoniales* [The judge's role in matrimonial cases], Paris, Economica, 1985, p. 128, cited by T. DUMORTIER, *op. cit.*, footnote no. 3.

²⁸ P. BONFILS and A. GOUTTENOIRE, *Droit des mineurs* [Youth law], Paris, Dalloz, 2008, p. 45, cited par T. DUMORTIER, *op. cit.*, footnote no. 3.

²⁹ L. GAREIL, "L'exercice de l'autorité parentale" [The exercise of parental authority], *L.G.D.J.*, 2004, p. 232, cited by T. DUMORTIER, *op. cit.*, footnote no. 3.

³⁰ G. LEBRETON, "Le droit de l'enfant au respect de son «intérêt supérieur». Critique républicaine de la dérive individualiste du droit civil français" [The child's right and their 'best interests'. Republican critique on the individualistic trend of French civil law], *Cahier de la recherche sur les droits fondamentaux*, no. 2, 2003, p. 79, cited by T. DUMORTIER, *op. cit.*, footnote no. 3.

to enhance the guarantees contained in the rights and not reduce their strength or applicability³¹. He also adds that in accordance with Article 3.1 of the CRC, the duty on the States is to ensure the systematic consideration of the child's best interests in all decision-making processes affecting the child, while also respecting all other rights, in other words, those of the children and of others³².

The Institut International des Droits de l'Enfant [International Institute for the Rights of the Child] rightly points out the particular nature of Article 3.1 of the CRC; the article does not, strictly speaking, enumerate a right, like the majority of other provisions, rather it institutes a rule of interpretation: "Contrary to the majority of articles in the Convention, Article 3 (1) does not constitute a subjective or substantive right *stricto sensu*, but rather institutes a principle of interpretation which must be used in all forms of interventions regarding children and which confers a guarantee to all children that decisions that will affect their lives will be examined in accordance with this principle of interpretation."³³

Shortly before the Committee on the Rights of the Child adopted its General Comment No. 14 on the right of the child to have his or her interests taken as a primary consideration (cf. *infra*), T. Hammarberg provided the most substantial clarifications on this provision. This commentator developed six key factors relating to the concept³⁴:

- **Firstly** the child's interests are not the only consideration to be taken into account but they must be one of the first elements to be considered and they must be assigned their due weight in all decisions affecting the child;
- **Secondly**, the concept of the child's best interests must "serve as a guide both for the interpretation and the application of the Convention"³⁵. The interests of the child are thus a guide that enables all other provisions in the Convention to be interpreted³⁶;
- **Thirdly**, the concept of the interests of the child cannot be unduly used to thwart the child's rights;

31 N. CANTWELL, "La genèse de l'intérêt supérieur de l'enfant dans la Convention relative aux droits de l'enfant" [The creation of the child's best interests in the Convention on the Rights of the Child], *op. cit.*, p. 10.

32 *Ibid.*

33 J. ZERMATTEN, "The best interest of the child. Literal analysis, Function and Implementation", Working report, 2010, http://www.childsrights.org/documents/publications/wr/wr_best-interest-child2009.pdf, p. 16.

34 T. HAMMARBERG, *op. cit.*, pp. 11-15. It should be noted that his contribution was published barely one month before the Committee adopted General Comment No. 14.

35 *Ibid.*, p. 10.

36 *Ibid.* The author emphasises that, concerning the general implementation of the Convention, the best interests principle "must guide the preparation of laws, the taking of administrative decisions and any other measures affecting the child".

Fourthly, determining the interests of the child requires listening to the actual child;

- **Fifthly**, the child's interests must be considered in relation to the interests of other parties. Various conflicts may indeed arise: a conflict between the child's interests and the interests of others, the interests of the child and the opinion of his or her parents, and the interests of the child (or of a group of children) and the interests of society. The Convention does not offer any actual solution to sort out such conflicts but during the search for a balance between the conflicting interests, it is necessary to assess and compare the advantages and disadvantages and contemplate the measure that infringes the child's interests the least³⁷;

- **Finally**, the implementation of Article 3 comprises two steps: the assessment of what is best for the child based on the guidelines given by the Convention in relation to what is good for the child, and the reconciliation of the child's best interests with competing claims³⁸.

§ 3. Reference to the child's best interests in other provisions of the Convention

Although Article 3.1 of the CRC is the primary provision on the concept of the best interests of the child, the Convention contains other provisions that refer to this concept³⁹. They are Articles 9, 18, 21 and 37.

Article 9 of the CRC concerns the separation of the child from their parents. Such a separation should only occur if the child's interests require it. Both the first and third paragraphs of this provision refer to the child's best interests⁴⁰.

37 T. HAMMARBERG, *op. cit.*, p. 14: "The less the considered measure encroaches on the interests of the child or group of children, the greater the margin for manoeuvrability in attending to the interests of others (...)"

38 *Ibid.* In this sense, the priority must be placed on the child's interests without neglecting the interests of other parties.

39 The best interests of the child is also mentioned in several optional protocols to the Convention; they are not dealt with in this work. For further clarifications, see General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, p. 3, § 3.

40 Paragraph 1 states that "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." Paragraph 3 stipulates that "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."

Article 18 of the CRC relates to parental responsibilities. The Convention assumes that the parents will generally perform their duties in the interests of the child. Article 18.1 states that "(...) Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

Article 21 of the CRC looks at adoption. It stipulates: "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration (...)". Beyond being just one consideration among many, the Convention describes the child's best interests as the primary consideration in adoptions⁴¹.

Lastly, Article 37 of the CRC relates to torture and the deprivation of liberty. It places the child's best interests as the basis for any decision on separating or not the child deprived of liberty from adults. Point c) of this provision stipulates that "States Parties shall ensure that: (...) c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."

SECTION 2. GENERAL COMMENT NO. 14 OF THE COMMITTEE ON THE RIGHTS OF THE CHILD ADOPTED ON 29 MAY 2013⁴²

On 29 May 2013, the Committee on the Rights of the Child adopted General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration. This was not the first time that the Committee contributed clarifications on this concept⁴³ but it was the first comprehensive and detailed

41 For a detailed analysis of the concept of the child's best interests in relation to adoption: L. DIVE, "Les droits de l'enfant dans l'adoption reconnus par les textes législatifs internationaux et leur mise en œuvre en Belgique" [Children's rights recognised under international law and their application in Belgium], in M. BEDORET et al, *Les nouveaux aspects juridiques de l'adoption : quelques thématiques spécifiques* [New legal aspects for adoption: some specific themes], Les cahiers du Cefap, Brussels, Larcier, 2009, pp. 335-410 ; CODE, "Intérêt supérieur de l'enfant et droit de l'enfant et/ou droit à l'enfant ? Le cas particulier de l'adoption" [Child's best interests and the right of the child and/or the right to the child?], November 2005, 7 p., http://www.lacode.be/IMG/pdf/interet_enfant.pdf; N. CANTWELL, "The Best Interests of the Child in Intercountry Adoption", UNICEF, 2014, p. 87.

42 Aforementioned General Comment No. 14 (2013).

43 See for example General Comment No. 13 on the right of the child to freedom from all forms of violence, adopted by the Committee on the Rights of the Child on 18 April 2011, p. 23, § 61.

analysis focused on the child's best interests. Indeed, the Committee had intended to enhance the understanding and application of this notion.

The declaration that the child's best interests is a threefold concept (a substantive right, an interpretative legal principle and a rule of procedure) has often been pronounced as this Comment's main legacy. However, more than this input, the Comment also specifies how to actually determine and assess the concept.

We will now develop the threefold legal concept of the child's best interests, the resulting obligations on States parties and the implementation measures to fulfil such obligations, the factors to be considered in order to give full effect to the concept, the detailed legal analysis of the provision and finally the method to assess and determine the best interests of the child.

§ 1. The threefold legal concept of the child's best interests

The Committee on the Rights of the Child clarifies that the concept of the child's best interests is "aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child."⁴⁴ The Committee thus alludes to its General Comment No. 5 which stated that the term "development" is a holistic concept including "physical, mental, spiritual, moral, psychological and social development."⁴⁵

The remark on respecting all the rights of the Convention refers to the fact that, according to the Committee, there is no hierarchical order of rights in the Convention. All rights enumerated in it are in the interests of the child. This detail appears significant to us as it prevents Article 3.1 from taking precedence over the other rights of the Convention; it serves as a reminder that all of the Convention's rights are inseparable and indivisible⁴⁶.

44 General Comment No. 14 (2013), p. 3, § 4.

45 § 12 of General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child (Art. 4, 42 and 44, para. 6), adopted by the Committee on the Rights of the Child on 27 November 2003.

46 The concept of the child's interests are therefore applicable in all cases where a provision of the Convention is activated by a particular situation.

The Committee then emphasises that the child's best interests are a threefold concept⁴⁷:

- It is a **substantive right**: the child has the right to an assessment of his or her best interests and it be taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake. This right must furthermore be guaranteed to be applied in any decision making affecting a child, a group of identified or unidentified children or children in general.
- It is then an **interpretive legal principle**: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
- Finally, the child's best interests is a **rule of procedure**: if a decision affects a particular child, an identified group of children or children in general, the decision-making process must include an assessment of those impacts. The assessment and determination of the child's best interests must comply with certain procedural guarantees and any decision must state explicitly how the best interests of the child were taken into consideration.

§ 2. The three categories of obligations on States parties, the implementation measures and the guidelines for implementation

The Committee on the Rights of the Child in its General Comment No. 14 explains that the right contained in Article 3.1 of the CRC establishes **three types of obligations** for States parties. Firstly, States parties have the obligation to ensure that the child's best interests are appropriately integrated and consistently applied in all actions undertaken by a public institution. Then, they have the obligation to ensure that the child's best interests are a primary consideration and have been demonstrably considered in all legal and administrative decisions as well as policies and legislation⁴⁸. Finally, they have the obligation to ensure that the child's best interests have been considered in all decisions and measures taken by private-sector bodies⁴⁹.

To fulfil this triple obligation, States must carry out the following **implementation measures**: review and, where necessary, amend national legislation in order to incorporate Article 3.1 of the CRC; uphold the child's best interests in the coordination and execution of policies; establish mechanisms and procedures for complaints, remedies and redress in order to fully implement the best interests of the child; uphold the child's best interests in the allocation of national resources; ensure that this

⁴⁷ General Comment No. 14 (2013), p. 4, § 6.

⁴⁸ To this end, the best interests of the child must be shown to have been examined and assessed along with an indication as to the import ascribed to them in the decision.

⁴⁹ General Comment No. 14 (2013), p. 5, § 14.

concept is explicit in the collection and monitoring of data and support research on issues of children's rights; provide training and information programmes on this concept; provide appropriate information to children and families on the rights protected by Article 3.1; ensure that the opinions of children are given due weight; and finally, combat attitudes that impede the full realisation of the child's best interests.

Lastly, the Committee defines the parameters that should be considered in order to give full effect to the child's best interests: the universal and interrelated nature of children's rights; the consideration of children as possessors of rights; the nature and universal scope of the Convention; the obligation of States parties to respect, protect and fulfil all rights in the Convention; and, finally, analyses of the effects of actions relating to the development of the child.

§ 3. Legal analysis of Article 3.1 of the Convention on the Rights of the Child

The Committee on the Rights of the Child provides details on the exact interpretation of each term contained in Article 3.1 of the CRC⁵⁰. The following are the Committee's clarifications:

- **"In all actions"**: this term is not restricted to decisions alone. It also encompasses all acts, conduct, proposals, services, procedures and other measures taken by States parties to the Convention.
- **"Concerning"**: this addresses all decisions which affect or target, directly or indirectly, a child, a group of children or children in general.
- **"Children"**: this term refers to any person under 18 years of age without discrimination. It relates to the child as an individual, children in general or children as a group. The interests of the child is thus a collective and personal right.
- **"By public or private social welfare institutions"**: this term refers to all institutions whose activities or decisions have an impact on children.
- **"Courts of law"**: this term includes all judicial proceedings in all instances. At this time, the Committee reiterated the importance of restorative justice in criminal cases and the right of the child to defend his or her interests either directly or through a legal representative.
- **"Administrative authorities"**: this expression refers to all

⁵⁰ General Comment No. 14 (2013), p. 7-10, §§ 17-40. As a reminder, Article 3.1 reads: "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."

administrative authorities acting at all levels (education, care, health, environment, living conditions, protection, asylum, immigration and access to nationality).

- **"Legislative bodies"**: this encompasses all laws, regulations or collective agreements which specifically concern children or otherwise.
- **"The best interests of the child"**: this concept is complex, flexible and adaptable. It is to be adjusted and determined on a case-by-case basis according to the child's particular situation, taking into consideration their personal context, circumstances and needs. This concept must be taken into consideration in the resolution of any conflicts between different rights in the Convention.
- **"Shall be a primary consideration"**: the term "shall" is a strict legal duty and imposes an obligation to examine the child's best interests. "Primary consideration" means that the best interests of the child are not on the same level as other considerations. With regard to adoption, it is the paramount consideration. However, in other areas, where there is a conflict of rights, the competing interests must be balanced and an acceptable compromise found while assigning greater weight to what serves more effectively the child's best interests. Finally, the term "primary" conveys the intention of giving the child's interests priority in all situation.

§ 4. Real application of the child's best interests: assessment and implementation procedure

The Committee on the Rights of the Child clarifies how to implement the best interests of the child; they have to be assessed and determined while respecting certain procedural guarantees. The Committee thus defines how to guarantee the obligation contained in Article 3.1 of the CRC. Any entity taking a decision affecting a child, a group of children or children in general can therefore follow the instructions of the Committee in order to fulfil the duty in Article 3.1 of the CRC. This is an important contribution for our research since we can use this framework for the concept in examining the protective and criminal procedures with regard to female genital mutilation.

The Committee describes two stages for determining the child's best interests. The first stage comprises the assessment and determination of the best interests of the child with regard to the particular situation; the second stage addresses compliance with a procedure guaranteeing the proper application of the right.

A. Assessment and determination of the child's best interests

This first stage seeks to select the factors to be considered in relation to the specific situation and assign a weight to each element in relation to others. This stage occurs over three steps.

a) Analysis of the context and particular circumstances⁵¹

Before listing the factors to be taken into account, the Committee recalled that the assessment of the child's best interests must be done case by case, on the basis of each child's own circumstances as well as considering the characteristics of the child or children concerned, such as age, sex, maturity, experience, membership of a minority group, possible disability, social and cultural environment, including whether the child lives with parents or not and the quality of relationship with the family. Any authority or body taking a decision must, above all else, enquire into the context and particular situation of the child, group of children or children in general.

b) List of factors to be considered⁵²

The Comment provides, without any particular order, a non-exhaustive list of factors to be considered. All these factors should at the very least be contemplated but other elements may be added according to the particular circumstances. Those factors are:

- The child's views which means that the child must have the opportunity to express him or herself, even if he or she is at a very young age or in a vulnerable situation.
- The identity of the child which includes sex, sexual orientation, national origin, religion, beliefs, cultural identity and personality.
- Preservation of the family environment and maintaining relations which requires that any separation of the child from his or her family should only be used as a last resort, in the event of imminent harm to the child. It is furthermore necessary to ensure relations are maintained if separation is unavoidable, unless this is contrary to the child's best interests.

⁵¹ General Comment No. 14 (2013), pp. 12-13, §§ 48-51.

⁵² *Ibid.*, pp. 13-17, §§ 52-79.

- Care, protection and safety of the child which obliges the State to provide protection and care necessary for the child's well-being by guaranteeing the material, physical, educational, emotional and safety needs of the child.

- Situations of vulnerability which involve a different determination of the child's best interests based on any disability, membership to a minority group, being an asylum seeker or migrant, being a victim of abuse or the fact that the child lives on the streets.

- The child's right to health which requires the child's health condition be considered and means that, where several treatments are possible, each one must be contemplated by looking into their advantages and risks. The decision must be taken by balancing the treatment's positives and risks while taking into account the child's opinion.

- The child's right to education which includes the right to quality education free of charge.

c) Balancing the factors to be considered

The next step is to balance the different factors to be considered by assigning a weight to each one in relation to the others. All elements do not carry the same import from one situation to the other and therefore, they must be valued differently according to the particular case. Finally, where there is a conflict between these different factors, they must be balanced against each other in order to find a solution that effectively serves the best interests of the child or children. The underlying goal of this balancing act must be to ensure the "full and effective enjoyment of the rights recognised in the Convention and its optional protocols, and the holistic development of the child."⁵³

⁵³ General Comment No. 14 (2013), p. 17, § 82.

B. Procedural guarantees⁵⁴

Article 3.1 of the CRC constitutes a procedural rule. Therefore, the application of this provision requires procedural guarantees appropriate to children. To this end, the Committee draws the attention of States to the following procedural safeguards:

- Right of the child to express his or her own views: this right means that the child must be adequately informed of his or her rights and be allowed to express their views. Where a group of children are concerned, the State should collect the views of a "representative sample of children and give due consideration to their opinions(...)" in order to ensure that all categories of children are covered."⁵⁵

- Establishment of facts: all facts and information relating to the situation of the child or group of children concerned by the decision must be collected. This collection can be carried out by interviews with people who are close to the child or in daily contact with the child.

- Time perception: adults and children perceive the passing of time differently, therefore, a decision process concerning a child must take priority and take into account that the decision should be made quickly and regularly reviewed.

- Qualified professionals: the decision-making process must be undertaken by trained professionals with expertise in matters related to children, in a safe and child-friendly environment.

- Legal representation: the child must have adequate legal representation providing him or her with legal counsel in addition to his or her legal representative or guardian.

- Legal reasoning: any decision made must be legitimate, justified and explained. The stages in the assessment and determination of the child's best interests must be explicitly described⁵⁶.

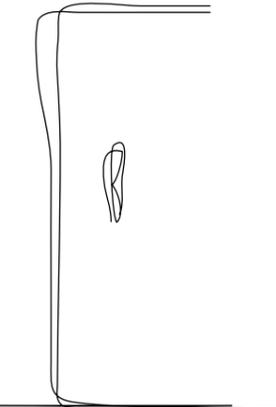
- Mechanisms to review or revise decisions: States must establish mechanisms for challenging, reviewing and revising decisions and the children must be clearly informed of these mechanisms.

⁵⁴ *Ibid.*, pp. 18-21, §§ 85-99.

⁵⁵ *Ibid.*, p. 18, § 91.

⁵⁶ The decision must state the factors considered, the weight ascribed to each factor and how the different factors were balanced.

- Child-rights impact assessment: the effects of any policy, law, regulation, budgetary decision and decision by an administrative authority on the rights of the child must be contemplated.



§ 5. Summary table of the best interests of the child with regard to General Comment No. 14 (2013) of the Committee on the Rights of the Child

Below is a summary of the clarifications of General Comment No. 14 (2013) of the Committee on the Rights of the Child.

The child's best interests and its threefold legal concept	<ul style="list-style-type: none"> The CBI* seek to ensure the full and effective fulfilment of all rights contained in the CRC as well as the holistic development of the child; there is no hierarchy among the rights The CBI encompass a substantive right, an interpretive legal principle and a rule of procedure
States' obligations	<p>The CBI must be appropriately integrated and consistently applied in all actions, measures and procedures</p> <p>The CBI must be assessed and be a primary consideration in all decisions and measures taken</p> <p>All decisions must underscore the fact that the CBI were a primary consideration</p>
Implementation measures or areas concerned by the concept	<p>Legislation</p> <p>National, regional and local policies</p> <p>Mechanisms and procedures for complaint, remedy and redress</p> <p>Allocation of national resources</p> <p>Research</p> <p>Data collection</p> <p>Information and training for actors</p> <p>Information to children and their families</p> <p>Negative attitudes hindering this right must be opposed</p>
Parameters of the concept	<p>The universal, indivisible, interdependent and interrelated nature of children's rights</p> <p>Children as possessors of rights</p> <p>The nature and universal scope of the CRC</p> <p>The obligation to respect, protect and enforce the rights contained in the CRC</p> <p>The effects of actions relating to the development of the child over time</p>
Legal analysis of Article 3.1: scope of application	<p>All decisions / actions / conduct / etc. that directly or indirectly affect a child (between 0 and 18 years), a group of children or children in general</p> <p>Whether undertaken by institutions, judicial bodies, administrative authorities or the legislature</p>
Implementation of the concept: two stages	<p>A. Assess and determine the child's best interests</p> <p>Assess the context and the child's characteristics</p> <p>Consideration of at least the following non-exhaustive elements: the views of the child; the child's identity; the preservation of the family environment and maintenance of family relationships; the care, protection and safety of the child; situations of vulnerability; the rights of the child to health and education</p> <p>Weighing of the different elements and ensuring, in the event of conflict between different elements, the solution that effectively serves the best interests of the child</p> <p>B. Procedural guarantees</p> <p>Right of the child to express his or her own views</p> <p>Collection of facts</p> <p>Necessary timeliness of the decision</p> <p>Qualified professionals</p> <p>Presence of legal counsel for the child</p> <p>Legitimacy, justification and explanation of decisions</p> <p>Possible challenging of the decision, the reviewing and revising of decisions</p> <p>Systematic child-rights impact assessments of decisions</p>

* CBI: Child's best interests

SECTION 3. CONCLUSIONS: ADVANTAGES OF THE CHILD'S BEST INTERESTS AND THE PITFALLS TO BE AVOIDED

The concept of the child's best interests has existed since the first documents on children's rights were produced. The CRC's Article 3.1 is considered the landmark provision for the concept. Yet, this provision has been the topic of many articles due to its lack of clarity on the best interests of the child.

General Comment No. 14 (2013) of the Committee on the Rights of the Child elucidated the concept. Indeed, this Comment was intended to provide States with clarifications on how they should assess and determine the child's best interests.

As the summary table above has shown, this Comment provides details on how to actually apply the concept of the best interests of the child. However, we feel it important to remember the following key elements.

Firstly, it cannot be forgotten that the child's best interests is a concept with variable content which should be applied on a case-by-case basis. It would be wrong to try establish a set, exhaustive checklist of factors as a means of ensuring that the child's best interests have been respected. Such an approach could run contrary to the rights of the child. The establishment of a fixed content for the child's best interests would be dangerous because the concept must be allowed to evolve according to the times and cultures. As J. Fierens stated: "the child's interests are not one large box whose contents should be listed. The concept points out a direction and a measure. It is the domain of the tightrope walker. On a larger scale, it is the north star that guides the judge, legislator and any person involved in the lives of children."⁵⁷

As the Committee on the Rights of the Child underscored, it should not be forgotten that the child's best interests encompass all rights in the CRC. Any decision that concerns a child or a group of children will activate several rights contained in the Convention; those rights may contradict one another and enter into conflict. In certain situations, guaranteeing respect for one right will be difficult without vitiating respect for another. Therefore, those rights must be balanced in order to arrive at a solution that effectively serves the best interests of the child. In this regard, the contributions of General Comment No. 14 of the Committee on the Rights of the Child to the assessment and determination of the child's best interests are useful.

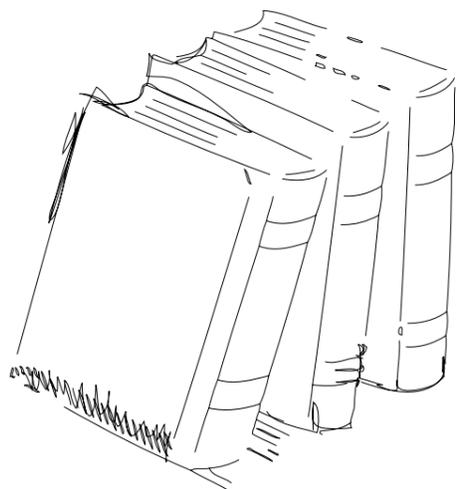
It must finally be underlined that any decision-making affecting a child is, in itself, a delicate matter since the decision is invariably one taken by an adult in the interests of the child. The clarifications of General Comment No. 14 are again undeniable on this matter since the Comment establishes a clear framework for determining the child's best interests.

⁵⁷ J. FIERENS, "Grandir avec les droits de l'enfant : surmonter les obstacles pour un avenir durable" [Growing up with children's rights: overcoming the obstacles for a long future] *J.D.J.*, no. 337, September 2014, pp. 5-8.

CHAPTER II.

UNDER EUROPEAN LAW





THE CHARTER OF FUNDAMENTAL RIGHTS OF 18 DECEMBER 2000⁵⁸

The Charter of Fundamental Rights of the European Union of 18 December 2000 was solemnly proclaimed by the EU Council, the European Commission and the European Parliament on 7 December 2000⁵⁹. As E. Bribosia underscored, this Charter did not occur “within an environment of unprotected fundamental rights”⁶⁰. The rights contained in the Charter were already protected by “the courts (...) and other one-off primary or secondary legislation”⁶¹. The issue of the Charter’s enforceability was debated until the adoption of the Treaty of Lisbon⁶² in 2009. Under Article 6.1 of that Treaty, the Charter “shall have the same legal force as the Treaties.” In this context, if the Charter of Fundamental Rights had not been included as such in the Lisbon Treaty, the rights contained therein nevertheless formed part of primary law which provided “a broader legal protection of rights than individuals could gain from European Union law”⁶³.

⁵⁸ European law encompasses a large number of texts, therefore, our analysis will be limited to the Charter of Fundamental Rights of the European Union since this text makes explicit reference to the child’s best interests.

⁵⁹ Charter of Fundamental Rights of the European Union of 18 December 2000, O.J.E.C., C 364/1.

⁶⁰ E. BRIBOSIA, “La charte des droits fondamentaux de l’union européenne : un exemple de codification au plan européen” [The Charter of Fundamental Rights of the European Union: an example of European codification], *Rev. dr. ULB*, 2003/28, p. 231.

⁶¹ *Ibid.*, p. 233.

⁶² Treaty of Lisbon amending the Treaty on the European Union, signed at Lisbon on 13 December 2007, O.J.E.C., C 306/01, 17 December 2007.

⁶³ F. PICOD, “Chronique de jurisprudence relative à la Charte des droits fondamentaux de l’Union européenne : 1er janvier 2012-1er mars 2013” [Case-law on the Charter of Fundamental Rights of the European Union: 1 January 2012 - 1 March 2013], *R.A.E.*, 2013/3, p. 597.

Before the Lisbon Treaty was adopted, O. De Schutter and E. Bribosia had already outlined the symbolic scope of the Charter; the possibility it could be used to justify new Community initiatives and, lastly, the source of inspiration it could be for the European Court of Justice⁶⁴.

The Charter is divided into several chapters relating to different categories of rights: dignity (Article 1 to 5), freedoms (Article 6 to 19), equality (Articles 20 to 26), solidarity (Articles 27 to 38), citizens’ rights (Articles 39 to 46) and, lastly, justice (Articles 47 to 50).

The principle interest of this Charter with regard to our research topic falls squarely on the fact that it is the only European legal instrument that explicitly mentions the child’s best interests. The Charter’s Article 24, The Rights of the Child, stipulates that:

“1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, **the child’s best interests must be a primary consideration.**

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

This article refers in part to the content of Article 3.1 of the CRC and furthermore stress several rights of the child: the right to protection and care, the right to be heard and the right to maintain regular contact with the parents, unless this is contrary to the child’s interests. As A. Gouttenoire remarked, this Charter is “the main instrument for the partial integration of the Convention

⁶⁴ E. BRIBOSIA and O. DE SCHUTTER, “La Charte des droits fondamentaux de l’Union européenne” [The Charter of Fundamental Rights of the European Union], *J.T.*, 2001/12, no. 6005, pp. 282-283.

on the Rights of the Child into European law”⁶⁵.

Beyond the attractive and seductive content of the Charter’s Article 24, a question mark remains over its actual scope and implications for Belgian law. This issue will be looked at in the following chapter.



⁶⁵ A. GOUTTENOIRE, “La consécration de l’intérêt supérieur de l’enfant dans l’Union européenne” [Enshrining the child’s best interests in the European Union], in R. TINIÈRE and C. VIAL (eds), *Protection des droits fondamentaux de l’Union européenne [Protection of European fundamental rights]*, Brussels, Bruylant, 2015, p. 236.

CHAPTER III.

UNDER BELGIAN LAW

The purpose of this chapter is to examine the provisions of Belgian domestic law which refer to the best interests of the child as well as the enforceability under Belgian law of Article 3.1 and Article 24 of the CRC and EU Charter of Fundamental Rights respectively.

SECTION 1. FROM THE 1804 CIVIL CODE TO ARTICLE 22A OF THE CONSTITUTION

The concept of the child's interests is addressed in several provisions of Belgian law. For the sake of brevity, we look at the provisions of the Civil Code and protective laws as a whole (§ 1)⁶⁶. We then analyse Article 22A of the Constitution (§ 2).

§ 1. The 1804 Civil Code, the protection model and the child-rights model⁶⁷

The concept of the child's interests has changed over time under Belgian law according to how the law has viewed the child.

The 1804 Civil Code sanctified the idea of paternal authority in relation to the child. It gave the father almost absolute power over the child. Contrary however to what one would think, the principle of paternal authority was not so remote from the concept of the child's interests. The quasi-absolute power over the child was in fact to serve the child. Certain texts by the Council of State of the time explicitly referred to the child's interests just as did previous texts⁶⁸. The father was thus supposed to use his authority in the interests of the child. Paternal power was therefore based on the presumption of the *bon pater familias* (reasonable man) who would use his authority for the good of his child. The idea of the child's interests existed in the 1804 Civil Code but this concept "combined with the interests of the family, embodied by the father who was also at the service of the general interest"⁶⁹.

⁶⁶ We will therefore not analyse the Civil Code's provisions on issues of parentage, adoption, attribution and exercise of parental authority or the youth-protection decrees referring to the child's interests made by the different regions.

⁶⁷ T. MOREAU, "2. Préambule : L'évolution du concept d'intérêt du mineur sur le plan juridique" [2. Preamble: The changing concept in law of children's rights], in J. MARQUET and L. MERLA, "L'intérêt supérieur de l'enfant dans la mosaïque familiale : ce que cela signifie pour les enfants" [The child's best interests in the family tapestry: its meaning for children], Final report, <http://www.oejaj.cfwb.be/index.php?id=14923>, pp. 6-18; T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], in T. MOREAU, A. RASSON-ROLAND and M. VERDUSSEN (eds), *Le droit de l'enfant au respect [The child's right to respect]*, Limal, Anthemis, 2013, pp. 145-176, spec. pp. 148-153.

⁶⁸ This concept can be found in earlier texts dating from 1803: J. FIERENS, "Le droit belge : l'enfant et ses multiples visages" [Belgian law: the child and her many faces], in T. MOREAU, A. RASSON-ROLAND and M. VERDUSSEN (eds), *op.cit.*, p. 40.

⁶⁹ T. MOREAU, "2. Préambule : L'évolution du concept d'intérêt du mineur sur le plan juridique" [2. Preamble: The changing concept in law of children's rights], *op.cit.*, p. 7.

The concept of the child's interests subsequently changed with the advent of the protective model that established the laws for child protection⁷⁰. The parental authority of the father was challenged in the name of providing support to children in dangerous situations. Consequently, for the interests of the child and, more broadly, society's interest, laws instituted the possibility of monitoring what occurred within the bosom of the family and the prospect of taking measures if the child's welfare was at stake. The child thus became a person in their own right within the family and their "interest was not automatically represented by the instruction given by the parents"⁷¹. Even though the child's interests had evolved, the concept still remained, at that time, a pretext for penetrating the inner sanctum of the family⁷².

The emergence of children's rights through the Convention on the Rights of the Child also developed the concept of the interests of the child. As mentioned above, Article 3.1 of the CRC became the reference point for this concept. The child was now seen as a human being with the same standing as an adult and it was believed the child should be able to exercise their fundamental rights. The child's interests were no longer combined with those of the family or society but were to be considered as mixing with all other rights of the child⁷³.

§ 2. Article 22A of the Constitution

Article 22A of the Constitution was adopted following the revision of the Constitution in 2000 and later amended in 2008. This provision was adopted following the Dutroux case at the end of a long reflection on the place of children within our society and how to guarantee, as best as possible, their emotional, physical, mental and sexual integrity⁷⁴.

⁷⁰ Loi du 15 mai 1912 sur la protection de l'enfance [Child Protection Act of 15 May 1912], *M.B.*, 27 May 1912; Loi du 8 avril 1965 relative à la protection de la jeunesse [Youth Protection Act of 8 April 1965], *M.B.*, 15 April 1965.

⁷¹ T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], *op. cit.*, p. 150.

⁷² *Ibid.*

⁷³ *Ibid.*, p. 16. T. Moreau points out that, if the Convention's text specifically and explicitly governs the concept of the child's best interests, the drafters of the Act of 8 April 1965 felt at the time that this concept did not require explicit reference since all measures were to be taken while respecting this principle. This is similar to the idea that every measure taken in relation to a child must be in the child's interests even where that concept does not overtly appear in the legislative text.

⁷⁴ A. RASSON-ROLAND and A.-C. RASSON, "XVIII.C. Les droits constitutionnels des enfants" [XVIII.C. Children's constitutional rights], in N. BONBLED and M. VERDUSSEN (eds), *Les droits constitutionnels en Belgique (Volume 1 et 2) [Constitutional rights in Belgium (Volume 1 and 2)]*, Brussels, Bruylant, 2011, p. 1608.

This article makes an explicit reference to the child's interests. It states:

"• Every child is entitled to respect for his or her emotional, physical, mental and sexual integrity.

• Every child has the right to express him or herself on any issue concerning them; such views shall be taken into consideration with due regard to his or her age and judgement.

• Every child has the right to partake in the measures and services contributing to his or her development.

The interests of the child shall be a primary consideration in any decision concerning the child.

Legislation, decrees and rules referred to in Article 134 shall guarantee these rights of the child."

There was no specific constitutional provision devoted to the rights of the child prior to the adoption of Article 22A of the Constitution. The provision has been the subject of certain criticisms regarding its legal value because the rights enumerated in it were already inscribed in previous provisions though not at a constitutional level. For example, S. Van Drooghenbroeck believed the provision contributed nothing new to jurisprudence, while highlighting that it could, in any case, be used as an additional legal basis for the claimant⁷⁵.

Other commentators have underlined the principally symbolic scope of the Constitution's revision in 2000 since the constitutional recognition of children's rights could substantiate their importance⁷⁶. For A. Rasson-Roland and A.-C. Rasson, Article 22A of the Constitution had a legal effect in several regards⁷⁷:

• This article places an active duty on lawmakers in the protection of the child's right to safety;

• It has an influence in the interpretation of legislation and regulations;

• It is an additional rule for the courts (especially for the Constitutional Court);

• Finally, the article, insofar as it guarantees the child's right to safety, has a direct effect.

⁷⁵ S. VAN DROOGHENBROECK, "Pour une mise à jour du droit constitutionnel belge des libertés publiques et des droits de l'homme : Réflexions au départ de l'article 22bis de la constitution garantissant le droit de l'enfant à l'intégrité morale, physique, psychique et sexuelle" [Update of Belgian constitutional law, public freedoms and human rights: Reflections on Article 22A of the constitution guaranteeing the child's right to emotional, physical, mental and sexual integrity], *A.P.T.*, 2001/2, 1 March 2002, p. 140, no. 41.

⁷⁶ P. LEMMENS, cited by A. RASSON-ROLAND and A.-C. RASSON, *op.cit.*, p. 1610, footnote no. 65.

⁷⁷ A. RASSON-ROLAND and A.-C. RASSON, *op.cit.*, p. 1611.

Only the child's right to physical and mental integrity under Article 22A of the Constitution thus recognises a direct effect in Belgian law, unlike the other rights enumerated in this provision. Nevertheless, it is hoped that in the future the Belgian courts gradually extend the direct effect to other parts of this article. Moreover, it does not "prevent Belgian courts from recognising a ratchet effect in Article 22A (...)"⁷⁸.

In conclusion, if it were expected that Article 22A of the Constitution would bestow greater weight on the idea of the child's interests, such a result has not been straightforward. The doctrinal disputes on the direct effect of this article have been numerous and the actual implication of this provision calls for prudence⁷⁹. In mentioning the position of the Constitutional Court and Council of State regarding Article 22A's lack of direct effect, G. Mathieu rightly recalls that, in any case, a judge is obliged to ask the Constitutional Court for a preliminary ruling when the lower court questions the constitutionality of a legislative provision with Article 22A of the Constitution⁸⁰.

SECTION 2. ENFORCEABILITY OF ARTICLE 3.1 OF THE CONVENTION ON THE RIGHTS OF THE CHILD UNDER BELGIAN LAW

Having contemplated the Belgian domestic laws on the child's interests, we now look at the exact reach of Article 3.1 of the CRC within Belgian law.

§ 1. Lack of direct effect according to the Court of Cassation and the Council of State

If the Convention on the Rights of the Child is truly a treaty under international law⁸¹, the direct applicability or otherwise of the CRC's Article 3.1 must be examined. Indeed, the Belgian Court of Cassation in its famous judgement in *Le Ski* case of 27 May 1971⁸², laid down the principle that, where a rule from international law has direct effects on domestic law, that rule trumps national

⁷⁸ J. VELAERS and S. VAN DROOGHENBROECK, "Note relative au projet de modification de l'article 22bis de la constitution relatif aux droits de l'enfant" [Note on the draft amendment to the Constitution's Article 22A on children's rights], *J.D.J.*, no. 281, January 2009, p. 30.

⁷⁹ G. MATHIEU, *Le secret des origines en droit de la filiation [The secret legal origins of parentage]*, Waterloo, Kluwer, 2014, pp. 54-57.

⁸⁰ *Ibid.*, p. 56, no. 95.

⁸¹ G. Mathieu emphasises that, as a treaty, the Convention created legal effects at the international level (respect, protection, obligations) and at the national level. Nevertheless, the difficulty rests on the lack of real sanctions if a State fails to respect the Convention. For a more detailed analysis, we turn to the words of the commentator: G. MATHIEU, *Le secret des origines en droit de la filiation [The secret legal origins of parentage]*, *op.cit.*, pp. 32-35.

⁸² Cass., 27 May 1971, *Pas.*, 1971, I, p. 886.

law. Furthermore, where an international rule bestows direct effects in national law, individuals may be granted those rights that are not found under the national laws⁸³.

The Court of Cassation and the Council of State have consistently refused to recognise that Article 3.1 of the CRC has a direct effect as this clause is not sufficiently clear, precise and unconditional⁸⁴. In fact, several criteria have been established in order to determine whether an international norm has a direct effect. **The first criterion**, or the subjective aspect, concerns the intention of the States in granting personal rights to individuals⁸⁵. **The second**, or objective aspect, relates to the content of the provision: the clause must be “precisely worded, in such a way (...) that the State does not have to establish a measure for its implementation in order to apply it”⁸⁶. The Court of Cassation and the Council of State mainly rely on the second criterion for deeming that Article 3.1 of the Convention on the Rights of the Child does not contain any direct effect in Belgian law.

The French Court of Cassation has taken a different stance. In two precedent-setting judgements from 18 May 2005⁸⁷, that court recognised the direct applicability of Articles 3.1 and 12.2 of the CRC in specific circumstances. The court stated, in relation to those two provisions, that they were “recognised children’s rights, which may be directly invoked before the national judge who must apply them fully. And it is the responsibility of the Court of Cassation to ensure respect of the international norm”⁸⁸. In light of this case-law, we hope that the position of the Belgian Court of Cassation will change on the direct applicability of Article 3.1 of the CRC.

§ 2. Beyond direct effect: the role of the Constitutional Court, the ratchet effect and the judge’s role

The Constitutional Court has indirectly taken into consideration the provisions of the Convention on the Rights of the Child by means of Articles 10 and 11 of the Constitution. Under its purview of judicial review, the court has jurisdiction over determining the constitutionality of national law with regard to Articles 10 and 11 of the Constitution combined with provisions of the Convention⁹⁰. It may therefore assess whether the legislature has unfairly ignored the international commitments of Belgium⁹¹.

The Constitutional Court has explicitly recognised that the child’s interests hold additional weight even though they must not be the only consideration to be taken into account. The Court insists on the fact that the different interests involved must be balanced; while the child’s interests enjoy a special status, they are not absolute. In a judgement on parentage on 19 March 2015, the Court stated: “if the child’s interests must be a primary consideration, they are not of an absolute nature. In balancing the different interests involved, the child’s interests hold a special position as they represent the weak party in the family relations. This special position does not result in the interests of other parties being disallowed from consideration”⁹².

According to G. Mathieu, the direct effect should be kept in perspective given that an international norm that does not hold a direct effect in national law still remains useful in two ways: through the ratchet effect of certain provisions of the Convention and their usefulness for a judge as guidance for interpreting domestic laws⁹³. The ratchet effect means that the State is obliged to

refrain from backtracking in any significant way in the implementation of international law after having adopting measures applying it.

In conclusion, even if the Court of Cassation and the Council of State refuse to recognise a direct effect emanating from the CRC’s Article 3.1, this provision is not devoid of any effect whatsoever under Belgian law since the Constitutional Court can take it into consideration through Article 10 and 11 of the Constitution. It can also be considered under the ratchet effect and judges can use it as a guide to interpreting national laws.

§ 3. Looking to the future: the child’s best interests as a general principle of law?

If Article 3.1 of the CRC is not devoid of power despite its direct applicability being unrecognised, a considerable advancement of this principle would be to bestow it with the status of a **general principle of law**. As a result, the legislature, judiciary and government would be obliged to give primary consideration to the child’s best interests in all cases without exception even if it was not explicitly stated by the law⁹⁴. This would also enable, through Article 159 of the Constitution, court applications seeking to reject the enforceability of provincial and local decisions and rules that fail to comply with those interests⁹⁶.

The Court of Cassation defines the general principles of law as “fundamental and general legal rules that are unwritten but virtually a part of the legal system and likely to be articulated, established or structured by the law in specific applications”⁹⁷.

So far, the child’s best interests have not been recognised as a general principle of law either in international law or domestic law. We hope that the stance of the different courts will change in this regard.

83 G. MATHIEU, *Le secret des origines en droit de la filiation* [The secret legal origins of parentage], *op.cit.*, p. 37, no. 65.

84 J. FIERENS, “La notion d’intérêt supérieur de l’enfant dans les procédures protectionnelles et pénales” [Best interests of the child in protective and criminal proceedings], in “Pour prévenir et réprimer une forme de maltraitance issue de la tradition : le cas des mutilations génitales féminines” [Preventing and eliminating abuse disguised as tradition: female genital mutilation], Proceedings of a symposium organised by INTACT asbl, October 2014, p. 19.

85 G. MATHIEU, *Le secret des origines en droit de la filiation* [The secret legal origins of parentage], *op.cit.*, p. 37, no. 66.

86 I. HACHEZ, “Précisions et droits de l’homme dans l’ordre juridique belge : focus sur la notion polysémique d’effet direct” [Clarifications and human rights in the Belgian legal order: focus on the polysemous idea of direct effect], *Rev. dr. h.*, (online), 2015/7, published on 27 May 2015, accessed on 10 December 2015. URL : <http://revdh.revues.org/1261>

87 Judgements of 18 May 2005: 1st Civ. Div, 18 May 2005, *Bull.*, 2005, I, no. 121, appeal no. 02-20,613; 1st Civ. Div, 18 May 2005, *Bull.*, 2005, I, no. 211, appeal no. 02-16,336.

88 See the commentary on the judgements at the French Court of Cassation website: https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2009_3408/etude_personnes_3411/chambre_civile_3417/convention_new_3423/18_mai_15307.html

89 G. MATHIEU, *Le secret des origines en droit de la filiation* [The secret legal origins of parentage], *op.cit.*, pp. 39-40, no. 68-69.

90 The Constitutional Court can also decide on the compliance of a statutory provision with other constitutional provisions, such as Article 22A on the child’s interests.

91 J. FIERENS, “La notion d’intérêt supérieur de l’enfant dans les procédures protectionnelles et pénales” [Best interests of the child in protective and criminal proceedings], *op.cit.*, p. 19.

92 C.C., 19 March 2015, judgement no. 38/2015, recital B. 4.3. Numerous judgements on parentage by the Constitutional Court have referred to the child’s interests. For a fuller account: G. MATHIEU, *Le secret des origines en droit de la filiation* [The secret legal origins of parentage], *op.cit.*, pp. 58-64, no. 96-102.

93 G. MATHIEU, *Le secret des origines en droit de la filiation* [The secret legal origins of parentage], *op.cit.*, p. 40, no. 69.

94 This idea has been developed by J. FIERENS, “La notion d’intérêt supérieur de l’enfant dans les procédures protectionnelles et pénales” [Best interests of the child in protective and criminal proceedings], *op.cit.*, pp. 18-19.

95 *Ibid.*, p. 19.

96 This article states that “Courts shall apply general, provincial and local decisions and rules only insofar as they comply with the law.”

97 J. FIERENS, “La notion d’intérêt supérieur de l’enfant dans les procédures protectionnelles et pénales” [Best interests of the child in protective and criminal proceedings], *op.cit.*, p. 18.



SECTION 3. ENFORCEABILITY OF ARTICLE 24 OF THE EU CHARTER OF FUNDAMENTAL RIGHTS⁹⁸

The enforceability of the European rights in Belgian law must be considered at three levels: the consideration of the right by Belgian ordinary courts, by the Constitutional Court and by the Council of State.

For the ordinary courts, the Belgian Court of Cassation, since its famous *Le Ski*⁹⁹ decision, has recognised that judges do not have to apply a legislative rule that is contrary to an international norm with direct effect in Belgian law. Furthermore, Article 159 of the Constitution, read in conjunction with the *Le Ski* judgement, allows judges to set aside the application of administrative acts that are contrary to international norms¹⁰⁰.

What about the Constitutional Court? This Court is competent to hear claims on the constitutionality of a legal provision with regard to Articles 8 to 32 and 170, 172 and 191 of the Constitution as well as the rules on the allocation of competences. Ordinary courts can also refer preliminary rulings on matters regarding the constitutionality of a law to it. In theory, the Court would not seem to have jurisdiction for determining whether legislation complies with international or European law. However, this competence is recognised in two ways¹⁰¹. The Court can take into account the rights and freedoms contained in international treaties by contemplating them through Articles 10 and 11 of the Constitution (principle of equality and non-discrimination). The Court “also takes into account those treaty provisions binding on Belgium and with a scope similar to any of the constitutional rules for which it is a guarantor (...). The constitutional and international guarantees are thus read as a whole once

they are inextricably binding”¹⁰².

Finally, *in relation to the Council of State*, it can also monitor the compliance of administrative acts with international provisions binding on Belgium “without relying on, like the Constitutional Court, the gateway of constitutional provisions; therefore, it is competent to directly monitor the conformity of such acts with international treaties”¹⁰³.

Within the framework of judicial review for asylum applications, it is also important to emphasise the role of the Aliens' Judicial Review Council with regard to the enforceability of Article 24 of the Charter of Fundamental Rights. As an independent body, the Council has the authority to rule on appeals against decisions taken by the General Commission for Refugees and Stateless Persons¹⁰⁴. In decision no. 97,183 of 21 February 2013, the Council explicitly referred to Article 24 of the Charter of Fundamental Rights as the basis for setting aside two decisions taken by the secretary of state for asylum and migration in relation to an Azerbaijani¹⁰⁵. This provision on the best interests of the child has thus a primary role since it clearly serves as the foundation for the decision by the Aliens' Judicial Review Council¹⁰⁶.

¹⁰² *Ibid.*

¹⁰³ N. CARIAT, *op. cit.*, p. 107, no. 3.

¹⁰⁴ For a detailed analysis: B. LOUIS, “Le Conseil du contentieux des étrangers : une nouvelle juridiction administrative hybride et ambitieuse” [The Aliens' Judicial Review Council: a new ambitious administrative court], *A.P.T.*, 2007-2008, no. 4, pp. 243-289.

¹⁰⁵ C.C.E., decision no. 97,183 of 21 February 2013. See in particular recitals no. 2.8-2.10: <http://www.rvv-cce.be/nl/arr/date/2013/date/2013-02/date/2013-02-21/proc/annulatie>.

¹⁰⁶ See also on the role of the child's interests in decisions by the Aliens' Judicial Review Council: C. FLAMAND, “L'unité familiale, un droit du réfugié” [Family unity, a refugee's right], observations regarding Aliens' Judicial Review Council, 18 June 2014, decision no. 125,752, *Rev. dr. étr.*, 2014, no. 177, pp. 253-260. Relating to the use of European law before the Aliens' Judicial Review Council, see L. LEBOEUF and S. SAROLÉA, “L'invocation du droit de l'Union européenne devant le Conseil du contentieux des étrangers” [Invoking EU law before the Aliens' Judicial Review Council] in N. CARIAT and J.-T. NOWAK (eds), *Le droit de l'Union européenne et le juge belge / Het recht van de Europese Unie en de Belgische rechter* [European Union law and the Belgian judge], Brussels, Bruylant, 2015, pp. 309-340.

⁹⁸ Given the limitations of this work, we examine only the main facets of this question. For a detailed analysis, see N. CARIAT, “La Charte des droits fondamentaux de l'Union européenne et les juridictions belges. Quelques balises pour une application prometteuse” [The Charter of Fundamental Rights of the European Union and the Belgian courts. Some signs of a promising application], *J.T.*, 2010/7, no. 6383, pp. 105-110; N. BERNARD, “Les ressources – préjudicielles notamment – qu'offrent l'article 34, paragraphe 3, de la Charte des droits fondamentaux de l'Union européenne (droit à une aide au logement)” [Resources – especially preliminary rulings – offered by Article 34.3 (right to housing assistance) of the EU Charter of Fundamental Rights], *Rev. trim. dr. H.*, 2014/97, pp. 81-125.

⁹⁹ Cass., 27 May 1971, *op. cit.*

¹⁰⁰ N. CARIAT, *op. cit.*, p. 106, no. 1.

¹⁰¹ *Ibid.*, no. 2.

SECTION 4. CONCLUSIONS

The concept of the child's interests appears in the provisions of the Civil Code, protective laws and the Belgian Constitution. Article 22A of the Constitution has provoked a debate on whether or not it has a direct effect but that article is not necessarily devoid of any effect. Any court that questions the conformity of legislation with Article 22A of the Constitution must refer a preliminary question of law to the Constitutional Court.

With regard to the enforceability of Article 3.1 of the CRC, the current position of both the Court of Cassation and the Council of State is that it does not have any direct effect. However, this provision retains its relevance and is not a dead letter under Belgian law.

As for the applicability of Article 24 of the EU Charter of Fundamental Rights which also deals with the principle of the child's best interests, the Constitutional Court, Council of State and the lower Belgian courts have a vital role in taking this article into consideration.

At the end of our analysis, two paths are open. The first is to show caution in the application of Article 3.1 of the CRC because the Court of Cassation and the Council of State maintain that it does not hold any direct effect. The second is to consistently apply the child's best interests in any decision relating to a child or a group of children. The lack of direct effect of Article 3.1 of the CRC. The child's best interests should be properly investigated in all decisions taken with regard to a child or a group of children. The framework on the assessment and determination of the child's best interests in General Comment No. 14 of the Committee on the Rights of the Child forms an essential foundation for this. Any court, authority or professional deciding on an issue concerning a child or a group of children should apply that framework in order to make a decision that effectively serves the best interests of the child. It would require the balancing of conflicting interests while remembering that the child's

rights and their interests “represent (...) two sides of the same coin”¹⁰⁷, as well as balancing the child's interests with those of other parties¹⁰⁸.



¹⁰⁷ T. MOREAU, “Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté” [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], in T. MOREAU, A. RASSON-ROLAND and M. VERDUSSEN (eds), *op. cit.*, p. 153.

¹⁰⁸ J. FIERENS, “La balance entre l'intérêt de l'enfant et les intérêts des autres” [The balance between the child's interests and the interests of others], Session 2 organised as part of the European Conference on the Child's Best Interests, December 2014, <http://www.oejaj.cfwb.be/index.php?id=12524>.

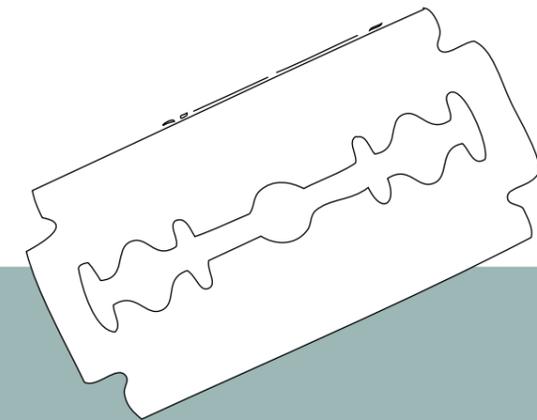
PART II. APPLICATION OF THE CHILD'S BEST INTERESTS IN PREVENTIVE AND CRIMINAL PROCEDURES ON FEMALE GENITAL MUTILATION¹⁰⁹

In order to apply the concept of the child's best interests to protective and criminal procedures on FGM, we analyse in the first chapter the protective and sanctioning measures that can be taken on such an issue. For the sake of brevity, this chapter refers to the applicable legislation and focuses on the measures that can be taken in relation to a girl at risk of or having undergone female circumcision. In the second chapter, we apply in real terms the child's best interests to the protective and criminal measures analysed in chapter I.

¹⁰⁹ Hereinafter, FGM.

CHAPTER I.

PREVENTIVE AND CRIMINAL PROCEDURES APPLICABLE TO FGM



SECTION I. PREVENTIVE PROVISIONS

§ 1. Belgian jurisprudence on child protection and the measures available

The ethos of Belgian law with regard to protecting the child is based on maintaining the cases out of the courts. The legislature has considered negotiated assistance, based on cooperation from the parents and youth, to be the most appropriate system for providing support to the child and family¹¹⁰. Consequently, when a child is suspected of being at risk, the first method is to try support that child within negotiated assistance via the Youth Assistance Service [Service de l'aide à la jeunesse]¹¹¹. Where certain conditions are fulfilled, it is possible to move from negotiated assistance towards imposed assistance¹¹². The measures that can be applied refer to negotiated assistance or imposed assistance.

A. Negotiated assistance

The assistance that can be offered to a minor and his or her family falls under the competence of the particular Belgian community. The three communities (as well as the Brussels-Capital Region) have each adopted legislation on this issue¹¹³.

¹¹⁰ For a more complete account on youth assistance within the French and Flemish communities and in Brussels: CENTRE DE DOCUMENTATION ET DE COORDINATIONS SOCIALES, "L'aide à la jeunesse à Bruxelles" [Youth assistance in Brussels], *Bruxelles sous la loupe*, June 2004, no. 2, 97 p. For legislative amendments in Flanders, see I. DETRY and C. CLAEYS, "Vers un nouveau droit de la jeunesse en Flandre ?" [Towards a new youth law in Flanders?], *J.D.J.*, no. 331, January 2014, pp. 12 and subseq.

¹¹¹ Other support professionals, like the Birth and Childhood Office, specialised teams (SOS Enfants), therapy support, medical personnel, teams specialised in the prevention and care of FGM (GAMS and INTACT), can be called in before the Youth Assistance Service or at the same time according to the child's particular issue.

¹¹² For a fuller account on negotiated assistance and imposed assistance, see A. DE TERWANWIGNE, *Aide et protection de la jeunesse. Textes, commentaires et jurisprudence* [Youth assistance and protection. Texts, comments and case-law], Liège, Jeunesse et Droit publications, 2001, 472 p.

¹¹³ It is a matter of community competence. For the French-speaking Community: French Community Decree of 4 March 1991 on Youth Assistance, *M.B.*, 12 June 1991. For Brussels, it is also necessary to take into account the ordinance by the Common Community Commission of the Brussels-Capital Region of 29 April 2004: Ordinance of 29 April 2004 on Youth Assistance by the Common Community Commission of the Brussels-Capital Region, *M.B.*, 1 June 2004. For the Flemish Community: Flemish Community Decree of 12 July 2013 by the Flemish Community on Comprehensive Youth Assistance, *M.B.*, 13 September 2013. Finally, for the German-speaking Community: German-speaking Community Council Decree of 19 May 2008 on Youth Assistance and Implementation of Youth Protection Measures, *M.B.*, 1 October 2008. The Decree of 4 March 1991 is expected to be soon amended according to the intentions of the minister: decree bill on the Code for Prevention, Youth Assistance and Youth Protection. On this topic, see T. MOREAU and al., "Dossier : Avant-projet de décret portant le code de la prévention, de l'aide à la jeunesse, et de la protection de la jeunesse" [Dossier: Draft decree on code for prevention, youth assistance and youth protection], *J.D.J.*, no. 354, pp. 2-60.

We will not analyse these provisions in detail, however, we will refer to the general underlying philosophy of these texts and the measures available where a minor is in danger, whether in the French-speaking Community, the Brussels-Capital Region, the Flemish Community or the German-speaking Community¹¹⁴.

Any person who finds it difficult to carry out their parental responsibilities or any youth in difficulty can contact the Youth Assistance Service for specialist assistance. Such specialist assistance is based on the cooperation and agreement of the parents and minor on the suggested actions¹¹⁵. The help offered can vary and includes one of the following measures:

- Inform or advise the youth and the family on general social assistance;
- Advise the youth and family on therapy;
- Implement specialised assistance in the home (for example, educational monitoring);
- Establish parental guidance;
- Removal of the youth from the family environment;
- Refer the situation to an SOS Enfants team or request a medical-psychological evaluation from the SOS Enfants team;
- Work towards emancipation of a youth aged 16 or over.

B. Imposed assistance

Where the youth's physical and mental integrity is seriously at threat at the time and the holders of parental authority or guardianship reject the measures proposed by the Youth Assistance Service, different texts provide for the implementation of imposed assistance measures. The family court (youth section) can then take over jurisdiction and order an action in relation to the parents

¹¹⁴ The specific aspects of each community cannot be covered by our study. However, we will refer the reader to other studies where of use.

¹¹⁵ The legislation states that, in general, any youth aged 14 or over must agree to the action.

or the youth or both¹¹⁶, once the case has been referred to it by the Belgian prosecution services¹¹⁷.

The actions open to the judge under imposed assistance varies from one community to another and can be among the following:

- Educational support;
- Educational instruction for the parents;
- Removal of the child from the family environment (placement in care homes or foster care);
- Emancipation of a youth aged 16 or over.

§ 2. SOS Enfants teams and welcome centres for abused children

Alongside the legislation on youth assistance and protection, there are also teams specialising in *preventing and dealing* with the abuse of children. These are the SOS Enfants teams in the French Community¹¹⁸ and the welcome centres for abused children in the Flemish Community¹¹⁹. Article 1.4 of the French Community Decree of 12 May 2004 defines abuse as "any physical violence, bodily harm, sexual abuse, psychological mistreatment or serious neglect compromising the physical, mental or emotional

¹¹⁶ Loi du 8 avril 1965 relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait [Youth Protection, the Responsibility of Minors for Criminal Offences and Redress for such Offences Act of 8 April 1965] *M.B.*, 15 April 1965. For a more detailed account on the Brussels-Capital Region: A. DE TERWANWIGNE, "Petit mode d'emploi concernant l'ordonnance du 29 avril 2004 relative à l'aide à la jeunesse en région de Bruxelles-capitale" [Brief instructions on the ordinance of 29 April 2004 on youth assistance in the Brussels-Capital Region]: http://www.jdj.be/jdj/documents/docs/Vade_Mecum_ordonnance_bxl_oct_2009.

¹¹⁷ The Youth Assistance Service thus enjoys the possibility of referring a case to the crown prosecution services, which will then assess the need for intervention by the family court (youth section). The different communities have particular aspects between the respective roles of the youth-court judge and the director of court protection services. Such divergences cannot be considered in this work. For a detailed account on these issues, see for example C. DELBROUCK and B. VAN KEIRSBILCK, "Actualités en matière d'aide à la jeunesse" [New developments in youth assistance], in T. MOREAU, (ed.), *Actualités en droit de la jeunesse* [Developments in youth law], Brussels, De Boeck et larcier, 2005, pp. 91 et subseq.; CENTRE DE DOCUMENTATION ET DE COORDINATIONS SOCIALES, "L'aide à la jeunesse à Bruxelles" [Youth assistance in Brussels], *op.cit.*

¹¹⁸ French Community Decree of 12 May 2004 on Assistance to Children who are Victims of Abuse, *M.B.*, 14 June 2004.

¹¹⁹ Article 42 of the aforementioned Flemish Community Decree of 12 July 2013 on Comprehensive Youth Assistance. See also <http://www.kindermishandeling.be/website/5-www/33-www.html>.

¹²⁰ To our knowledge, the German-speaking Community does not possess a dedicated team on abuse prevention and care. Therefore, reference has to be made to the general assistance system: German-speaking Community Decree of 19 May 2008 on Youth Assistance and Implementation of Youth Protection Measures, mentioned earlier.

development of the child; an abusive attitude or behaviour may be intentional or otherwise".

These teams attempt to provide assistance to the child and the family by drawing up a comprehensive, multi-faceted assessment of the situation and offering regular therapy¹²¹. They act in full collaboration with the family. Such teams cannot propose actions falling within the framework of negotiated assistance (or imposed assistance) but they can work in partnership with the Youth Assistance Service. Accordingly, they cannot remove the child from the family. If they believe that this measure is necessary to protect the child who is suspected of being abused or whose mistreatment has been proven, under the principle of joint parental authority, they must obtain the consent of the two parents¹²².

If the child is in serious and imminent danger and the other conditions of Article 458A of the Criminal Code are fulfilled, the team can inform the crown prosecution services. The crown prosecution services then assess whether the case should be referred to the family court (youth section)¹²³. In such a case, imposed assistance may be enforced against the wishes of the parents. There are, however, specific conditions stated in Article 458A of the Criminal Code, notably:

- There is a serious and imminent threat to the physical or mental integrity of the minor (or vulnerable person) or there are signs of a real and serious threat that other minors (or vulnerable persons) will be victims of the offences referred to in the clause;
- The offences mentioned are: indecent assault, rape, homicide, intentional bodily harm, torture, inhuman

¹²¹ For a more comprehensive account of the actions and expertise of these teams see M. BEAGUE, "Équipes SOS Enfants : le dispositif de prévention et de prise en charge de la maltraitance infantile en Communauté française de Belgique au regard de quelques normes internationales" [SOS Enfants teams: prevention and care mechanisms for child abuse in the Belgian French Community with regard to some international norms], *J.D.J.*, 2015, no. 347, pp. 12-25.

¹²² Where the family court has entrusted parental authority solely to the mother or father, only that parent has to agree to the removal of the child. However, the other parent retains the right to supervise the child's education in accordance with Article 374.1.3 of the Civil Code. That parent may be informed of the removal by the parent exercising parental authority or the team itself.

¹²³ Article 458A of the Criminal Code stipulates: "Any person who, by status or profession, is entrusted with secrets and is thus aware of an offence under Articles 372 to 377, 377C, 392 to 394, 396 to 405B, 409, 423, 425 and 426, committed against a minor or a person who is vulnerable by reason of their age, pregnancy, violence by a partner, illness, infirmity or physical or mental disability may, without prejudice to the obligations imposed by Article 422A, inform the crown prosecution services of the crime, either where there is a serious and imminent threat to the minor's or vulnerable person's physical or mental integrity and the person is unable, alone or with third-party assistance, to protect that integrity, or where there are signs of a real and serious threat to other minors or vulnerable persons becoming victims of the aforementioned offences and the person is unable, alone or with third-party assistance, to protect that integrity."

and degrading treatment, FGM, child abandonment, withholding of food or care, neglect of the minor leading to compromised health;

- The professional, the team or both are unable to protect the minor's integrity, either alone or with assistance from a third party;
- The crown prosecution services is the body that should be informed;
- Informing the prosecution services is optional and not an obligation.

It should be noted however that Article 458A of the Criminal Code does not apply when dealing with **a risk of female circumcision**. The offence proscribed in Article 409 of the Criminal Code is where FGM has been carried out. Article 458A of the Criminal Code can therefore only apply when the female circumcision has been practised and not when this offence is merely suspected.

There are nevertheless exceptions to the duty of confidentiality other than Article 458A of the Criminal Code, as well as other concepts to be borne in mind. On the one hand, Article 458A must be weighed against Article 422A of the Criminal Code which obliges a person to come to the aid of another who is in serious danger¹²⁴. Failure to do so can lead to imprisonment of between eight days and one year and a fine. The sanction can be increased if the person in danger is a minor or in a vulnerable situation. On the other hand, breach of professional secrecy could be justified under the concept of necessity which "has a basis in theory and case-law"¹²⁵. As T. Moreau has pointed out, such necessity only arises when several conditions come together:

- "The interest that the professional attempts to protect in committing the breach is equal to or greater than the sacrificed interest. (...).

¹²⁴ Article 422A of the Criminal Code states: "Any person who refrains from coming to the aid of or seeking aid for a person in serious danger, which has been noted by that first person or been described to him by those seeking his aid, shall be liable to imprisonment of between eight days and one year, or a fine of between fifty euros and five hundred euros, or both.

The person must have refrained from providing such aid where there was no serious danger to himself or another. Where the person refraining from giving aid was unable to personally observe the danger to the person requiring aid, that person refraining from helping shall not be liable where the circumstances in which he is invited to act could have led him to believe that the call to assistance was not serious or there was no danger.

The punishment stated in paragraph 1 may extend to two years where the person in serious danger is a minor or a person whose vulnerability by reason of age, pregnancy, illness, infirmity or physical or mental disability was apparent or known to the person failing to act."

¹²⁵ T. MOREAU, "Le code de déontologie des psychologues et le respect des dispositions légales relatives au secret professionnel" [Psychologists' code of ethics and respecting laws on professional secrecy], *J.D.J.*, no. 340, December 2014, p. 30.

- The interest to be protected must be under a definite, serious and imminent danger. (...).
- There must not be any other way to protect the threatened interest other than committing the breach. (...).
- There must not be a legal obligation to avoid the wrong that the professional seeks to avoid. This may be the case, for example, where the breach of professional secrecy is the only way to help a person in danger, thereby fulfilling the obligation whose violation is punishable under Article 422A of the Criminal Code"¹²⁶.

This commentator recalls that these conditions should be assessed "strictly and great caution is warranted in relying on this justification, even in cases of children in danger"¹²⁷.

A joint discussion on this topic was carried out by the non-profit organisation Intact and the Federal Public Service of Justice¹²⁸. Their joint position regarding the risk of female circumcision and professional secrecy is that, on the basis of the different concepts mentioned above and their balancing, necessity could lift the veil of professional secrecy in order to prevent the occurrence of female circumcision.

§ 3. Application of FGM legislation: protective measures available in relation to parents and the girl

The assistance and protection that can be provided to a girl who is at risk of or has undergone FGM was logically incorporated into the existing legal framework on child protection and assistance.

A girl who is at risk of or has undergone FGM can receive the intervention of any front-line professional, SOS Enfants team, Youth Assistance Service or collaborative action from several of these services. If the legal conditions explained above are satisfied, imposed assistance can be implemented. Thus, all measures considered earlier are applicable.

However, the Youth Assistance Service and the SOS Enfants teams are seldom enlisted for this type of

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Joint discussion by Intact asbl and the Federal Public Service of Justice from ... to ... (period). Can a reference be added here? documents and/or meetings you've had?

situation¹²⁹. The role of front-line services and non-profit organisation, such as GAMS and INTACT, are vital in discovering these cases.

C. Janssen and K. Wintgens carried out an interesting study on the specific measures and decisions relating to FGM which were taken as part of negotiated assistance and imposed assistance within the French Community and Brussels Region¹³⁰. The two authors classified those measures under two headings depending on whether they were taken **without removal from the family or in addition to removal from the family**¹³¹.

Under negotiated assistance, where there is **no removal from the family environment**, the Youth Assistance Service in both the French Community and the Brussels Region consider the following measures¹³²:

- Inform, advise and guide the girl and the family or relatives on general social assistance;
- Request the intervention of SOS Enfants teams;
- Coordinate the action of other services;
- Engage different services;
- Implement specialised assistance in the home.

If these various measures do not seem enough, the service then contemplates implementing specialised assistance **outside the home**.

¹²⁹ INTACT, "Pour prévenir et réprimer une forme de maltraitance issue de la tradition : le cas des mutilations génitales féminines" [Preventing and eliminating abuse disguised as tradition: female genital mutilation]. Proceedings of a symposium organised by INTACT asbl, October 2014, p. 40: this issue is only rarely brought to the attention of the Youth Assistance Services, four to five cases out of 4000 assistance requests per year. <http://www.intact-association.org/images/stories/documents/colloques/2014/acte-colloque-2014-fr.pdf>

¹³⁰ C. JANSSEN and K. WINTGENS, "La protection des victimes potentielles de mutilations génitales féminines en droit belge au regard des droits fondamentaux" [Fundamental rights and the protection of possible female genital mutilation victims under Belgian law], Service du droit des jeunes de Namur [Youth Rights Service of Namur], unpub., 60 p.; C. JANSSEN and K. WINTGENS, "La protection des victimes potentielles de mutilations génitales féminines en droit belge au regard des droits fondamentaux" [Fundamental rights and the protection of possible female genital mutilation victims under Belgian law], *J.D.J.*, no. 314, 2012, pp. 21-24.

¹³¹ C. JANSSEN and K. WINTGENS, "La protection des victimes potentielles de mutilations génitales féminines en droit belge au regard des droits fondamentaux" [Fundamental rights and the protection of possible female genital mutilation victims under Belgian law], Service du droit des jeunes de Namur, *op.cit.*, pp. 4-24.

¹³² *Ibid.*, pp. 7-10.

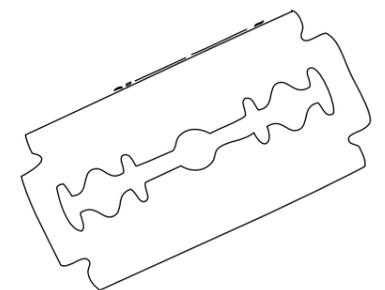
As part of imposed assistance, the following measures are considered for the French Community (excluding the Brussels Region):

- Educational support;
- Removal from the home;
- Emancipation of the minor.

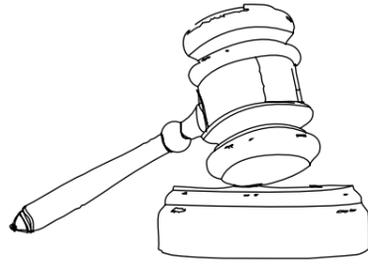
In relation to imposed assistance in Brussels, the following measures can be enforced¹³³:

- Refer the persons with parental authority to educational instruction;
- Place the youth under social services monitoring (obligation to regularly attend an educational institute, obligation to follow medical and educational instruction at an education centre, regular meetings with a social-care worker);
- Arrange family, psycho-social, educational and/or therapy guidance for the youth, the family and/or relatives;
- Enforce an educational programme for the youth, family or relatives;
- Have the youth visit a residential service.

All measures that can be implemented **without removal from the family environment** can be considered for a girl at risk of FGM or one who has undergone FGM. On the other hand, removal is often considered the only measure that can properly guarantee the protection of a girl against the risk of female circumcision. Such removal raises many questions as it infringes the child's right to live, as much as possible, with her parents. In chapter II, we consider this measure and apply it to the concept of the child's best interests.



¹³³ Article 10 of the Ordinance of 29 April 2004 on Youth Assistance by the Common Community Commission of the Brussels-Capital Region, mentioned above; C. JANSSEN and K. WINTGENS, "La protection des victimes potentielles de mutilations génitales féminines en droit belge au regard des droits fondamentaux" [Fundamental rights and the protection of possible female genital mutilation victims under Belgian law], Service du droit des jeunes de Namur, *op.cit.*, pp. 15-16.



SECTION 2. CRIMINALISATION

§ 1. Article 409 of the Criminal Code

Article 409 of the Criminal Code was restored by the Criminal Protection of Minors Act of 28 November 2000¹³⁴. This article prohibits any form of FGM¹³⁵.

Under it, any person who practises, facilitates or encourages any form of mutilation of the genital organs of a female person, regardless whether consent was given, shall be liable to imprisonment of between three and five years. The attempt of this offence is also punishable¹³⁶.

Moreover, the article recognises aggravating circumstances that can extend imprisonment beyond five years. Those aggravating circumstances are: "the minority of the victim or the view to making a profit, which will be punished by imprisonment of between five and seven years (Art. 409.2); the victim having an incurable illness or permanent disability, which will lead to imprisonment of between five and ten years (Art. 409.3); or causing the death of the victim which will be punished by imprisonment from ten to fifteen years (Art. 409.4). If the victim is a minor or a vulnerable person and the perpetrator is a relative in the ascending line or holds authority over the victim, the minimum imprisonment is doubled for an offence under paragraph 1 and increased by two years for offences under paragraphs 2 to 4"¹³⁷.

Article 10B, paragraph 2 of the Preliminary Title of the Criminal Procedure Code explicitly addresses FGM and extends court jurisdiction beyond the Belgian borders. By virtue of this provision, any person who commits an offence proscribed under Article 409 of the Criminal Code outside the Belgian territory may be prosecuted in Belgium, regardless of the accused's nationality, as long as two conditions are fulfilled: the victim must have been a

¹³⁴ Loi du 28 novembre 2000 relative à la protection pénale des mineurs [Criminal Protection of Minors Act of 28 November 2000], M.B., 17 March 2001, Art. 28. Article 409 of the Criminal Code had been repealed by a statute dated 9 April 1930. The 28 November 2000 legislation restored the offence with new wording.

¹³⁵ For a comprehensive analysis of the history and implementation of this article, see M. Alié, "Les mutilations génitales féminines : de l'incrimination aux poursuites. Etat des lieux en Belgique et regards européens" [Female genital mutilation: from criminalisation to prosecutions. State of play in Belgium and European perspectives], Brussels, INTACT asbl publications, October 2014, 111 p.

¹³⁶ M. PREUMONT, *Mémento de droit de la jeunesse [Youth law handbook]*, Waterloo, Kluwer, 2013, p. 267; S. DEGRAVE, "Droit pénal de la famille" [Family criminal law], in J.-P. MASSON et al., *Droit des personnes et des familles : chronique de jurisprudence 1999-2004 [Personal and family law: case-law 1999-2004]*, Brussels, Larcier, 2006, p. 978, no. 785.

¹³⁷ P. JASPIS, "Table-ronde pénale" [Criminal roundtable], in "Pour prévenir et réprimer une forme de maltraitance issue de la tradition : le cas des mutilations génitales féminines" [Preventing and eliminating abuse disguised as tradition: female genital mutilation], *op.cit.*, p. 69.

minor and the accused must now be in Belgium¹³⁸.

§ 2. Practical application of criminalisation

Article 409 of the Criminal Code was adopted over ten years ago but convictions for this offence are rare.

M. Alié has carried out extensive research on this provision in order to take stock of the prosecutions for FGM in Belgium. The commentator has noted that there is no precise data on such prosecutions and a low number of open files¹³⁹. M. Alié makes reference to the data of the Criminal Policy Service. The assessment of the sexual offences legislation of 1995 and 2000 revealed a dearth of accusations on this issue and the results did not change hugely some years later¹⁴⁰. Between 2009 and 2013, fourteen cases of female genital mutilation were recorded in the database of the public prosecutor but none of them led to a conviction¹⁴¹. As of 10 January 2016, thirteen cases have been dismissed, four are under investigation and two have been referred for a decision on whether a trial is warranted¹⁴².

A. Low reporting rate and the issue of proof

M. Alié highlights the following factors as the reason for the low reporting rate¹⁴³:

- The secretive and taboo nature of a practice affecting a very private part of the person;
- Targeted communities close ranks;
- Conflict of loyalty within the family;
- Unease among professionals;

¹³⁸ M. ALIÉ, "Mutilations génitales féminines : de l'incrimination aux poursuites" [Female genital mutilation: from criminalisation to prosecutions], in "Pour prévenir et réprimer une forme de maltraitance issue de la tradition : le cas des mutilations génitales féminines" [Preventing and eliminating abuse disguised as tradition: female genital mutilation], *op.cit.*, p. 58. See also pp. 58-59 in relation to the statute of limitations for this offence being 15 years when the offence is committed on a minor, the time limit begins only when the victim turns 18.

¹³⁹ M. ALIÉ, "Mutilations génitales féminines : de l'incrimination aux poursuites" [Female genital mutilation: from criminalisation to prosecutions], *op.cit.*

¹⁴⁰ *Ibid.*

¹⁴¹ M. ALIÉ, "Les mutilations génitales féminines : de l'incrimination aux poursuites. Etat des lieux en Belgique et regards européens" [Female genital mutilation: from criminalisation to prosecutions. State of play in Belgium and European perspectives], *op.cit.*, pp. 53.

¹⁴² See the statistics on the website of the College of Public Prosecutors: <http://www.om-mp.be/stat/corr/start/f/home.html>.

¹⁴³ M. ALIÉ, "Les mutilations génitales féminines : de l'incrimination aux poursuites. Etat des lieux en Belgique et regards européens" [Female genital mutilation: from criminalisation to prosecutions. State of play in Belgium and European perspectives], *op.cit.*, pp. 59 et subseq.

- Professional secrecy;
- Lack of information/training for participants in law enforcement (police, magistrates, lawyers);
- Lack of screening measures.

The commentator also proposes some arguments on the inherent difficulties in reporting as well as proving the facts¹⁴⁴.

The low rate in reporting can be explained by the fact that very few victims are willing to come forward, which coincides with the difficulty in identifying victims in schools or the Birth and Childhood Office. The lack of systematic screening raises the issue of establishing regular examination of genital organs, which in turn generates ethical and practical problems. For the author however, the systematisation of similar examinations would not raise ethical concerns¹⁴⁵. The flagging of at-risk girls or proven female circumcision remains a difficult and delicate matter, for the victims, their relatives and professionals¹⁴⁶.

As for establishing the facts, proof has to be shown that the offence was committed, in accordance with the principle applicable under Belgian criminal law. Several methods can be used in garnering proof during a criminal enquiry: medical observations (physical exam), interviews (of victims, witnesses or people referred to in Article 458A of the Criminal Code), and psychiatric assessment of the victim (child psychiatric assessment in the case of a minor). There are also other methods to obtain proof specific to prosecuting possible perpetrators (searches, seizure of passports, fingerprint analysis, etc.).

B. Lessons learned and recommendations

Despite the low level of cases handled, M. Alié has drawn up several lessons and advanced some reflections, such as¹⁴⁷:

- The assessment of the possibility of creating a specific record number for FGM cases. Currently, such situations fall under the code "43K". However, not all court officials are aware of this code; it also encompasses all types of mutilation. This prevents establishing accurate statistics on FGM;
- The creation of a deputy prosecutor within the prosecution services who will specialise in these cases due to the technical nature of this issue that requires

¹⁴⁴ *Ibid.*, pp. 59-75.

¹⁴⁵ M. ALIÉ, "Les mutilations génitales féminines : de l'incrimination aux poursuites. Etat des lieux en Belgique et regards européens" [Female genital mutilation: from criminalisation to prosecutions. State of play in Belgium and European perspectives], *op.cit.*, pp. 63.

¹⁴⁶ *Ibid.*, p. 66.

¹⁴⁷ *Ibid.*, pp. 89-90.

particular expertise. Contact with "youth" prosecution services are also needed;

- An increase in police attention on this issue by entrusting this particular problem to local police departments or sections specialising in youth and family;
- The training of police officers in the proper handling of the report in order to identify at-risk situations and improve reporting and victim care;
- The establishment of common, clear reference points and behaviour for those confronted with situations where there is suspected FGM;
- The development of international cooperation adapted to the practice of female circumcision;
- The raising of awareness among lawyers who could become indirectly involved in these cases.

§ 3. Conclusions

The issues raised on the criminalisation of FGM are complicated.

The difficulty in identifying those at risk, the low incidence of reporting and flagging as well as the actual prosecution methods used when a situation is reported lead to a cautious conclusion: the prevention of such situations should be prioritised, along with raising awareness within the legal, medical and educational professions and the care and assistance sectors.

Even if the number of FGM prosecutions is low and no complaint has so far led to a conviction, it nevertheless remains pertinent to consider the child's best interests in relation to the criminalisation of FGM. The offence exists within the Belgian legal system and the application of the concept of the child's best interests in FGM prosecutions will enlighten all parties who are directly or indirectly concerned by these possible prosecutions.

CHAPTER II.

APPLICATION OF THE BEST INTERESTS OF THE CHILD



SECTION I APPLICATION OF THE CHILD'S BEST INTERESTS TO MEASURES PROTECTING AGAINST FGM

§ 1. Analysis of a specific measure: removal from the home

A. Why consider this measure?

As we stated earlier, the protective measures that can be implemented in cases of female circumcision fall within two categories: those *without removal from the family environment* and those *including removal from the family environment*.

Two situations need to be distinguished: *one where it is suspected that the girl will undergo FGM and where the girl has already* suffered it. Indeed, the measure to be taken should be envisaged differently in each of these situations.

Where there is a suspicion that a girl is at risk of circumcision, removal from the home may be seen as the measure that effectively and immediately guarantees the protection of the girl's physical integrity against the threat of FGM. The placement of a child into care is however an extreme measure affecting the child's fundamental right to live with her parents. The family is "seen as the indispensable structure for the development and well-being of the child"¹⁴⁸. Thus, we can question whether the application of this measure on a girl who risks undergoing FGM is compatible with the best interests of the child and which measures should be prioritised¹⁴⁹.

In the case where the girl has undergone FGM, the issue rests on the necessary medical and psychological care for the girl as well as on the possible risk of FGM being carried out on other girls¹⁵⁰. Placement into care differs from the first situation¹⁵¹.

B. Placement into care with regard to human and children's rights

Article 9.1 of the Convention on the Rights of the Child guarantees the child's right not to be separated from his or her parents unless the separation is required in the child's best interests¹⁵². In short, paragraph 1 of Article 9 states: "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."

Article 8 of the European Convention on Human Rights (hereinafter, ECHR) guarantees protection for the private and family life¹⁵³. Paragraph 2 of this article sets out strict conditions for any encroachment on this right: the interference must be allowed under law, address a legitimate objective and be necessary in a democratic society. There is ample case-law from the European Court on Human Rights in relation to the placement of a child into care¹⁵⁴.

The child has the right to have her family life protected but she also has the right to have her safety protected. This right is safeguarded by Article 3 of the ECHR. This article prohibits the use of torture on any person¹⁵⁵. The

¹⁵² This paragraph stipulates that "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."

¹⁵³ This article states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

¹⁵⁴ For a detailed analysis: T. MOREAU, "Quelques apports de la jurisprudence de la Cour européenne" [Some case-law contributions from the European Court] », in: *Actualités en droit de la jeunesse [Developments in youth law]*, *op.cit.*, pp. 254-318; T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], *op.cit.*, pp. 156-166; FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Handbook on European law relating to the rights of the child*, FRA, June 2015, pp. 73-93: http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf. See also: L. MAUFRÖID and F. CAPELLIER, "Le placement du mineur en danger : le droit de vivre en famille et la protection de l'enfance (première partie et deuxième partie)" [Placement of an at-risk minor into care: the right to live with family and childhood protections (part one and part two)], *J.D.J.*, 2011/8, no. 308, pp. 11-24 and *J.D.J.*, 2011/9, no. 309, pp. 28-36.

¹⁵⁵ Article 3 of the ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Convention on the Rights of the Child also establishes in Article 19 the right of the child to be protected from any form of mistreatment, while its Article 24 guarantees the child's right to enjoy the highest standard of health possible¹⁵⁶.

The right of the child to her family life being protected encompasses several rights: the right to be raised by her parents, the right to maintain contact with the two parents, the right not to be separated from her parents unless it is in her best interests and, finally, the right to family reunification¹⁵⁷. After an in-depth analysis of the case-law from the European Court of Human Rights on placement of the child into care and the child's rights, T. Moreau has noted that this measure must be used exceptionally, be a temporary measure, limited to what is strictly necessary and be child-friendly¹⁵⁸.

We now expand on the guiding principles for placing the child into care with regard to human and children's rights.

a) Placement must be an exceptional measure

The child's right to be raised by her two parents means the State has, on the one hand, an obligation not to interfere in the family life, and on the other hand, a positive duty to establish all the necessary measures that could support the parents thereby reducing the risk of child neglect.

The States' obligation is thus to prioritise and foster family life. So, the child can be separated from the parents only in exceptional circumstances. Even if the European Court underlines that States have a margin of appreciation in relation to the decision of separating the child from the parents, the court applies a strict supervision over this and requires States to comprehensively investigate the

¹⁵⁶ Article 19.1 of the CRC stipulates: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." Article 24.1 of the CRC provides that "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." Article 24.3 is particularly interesting because it states: "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

¹⁵⁷ FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Handbook on European law relating to the rights of the child*, *op.cit.*, p. 79.

¹⁵⁸ T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], *op.cit.*, pp. 156 et subseq.

situation¹⁵⁹.

b) The child has the right not to be separated from her parents unless it is in her best interests

The child's right not to be separated from her parents means that she can be separated from them only if the competent authority provides relevant and sufficient reasons. Placing the child into care can only be considered if it is that child's best interests. In several cases, the European Court of Human Rights has found against the national authorities in relation to the merits of their decisions, the methods of the decision or the decision-making process¹⁶⁰. States must "ensure that placement in care is strictly limited to the situations where the protection of the minor's safety is in conflict with protection of the right to family life"¹⁶¹.

c) Placement must be temporary and limited to what is strictly necessary¹⁶²

A decision to place the child into care must address the issue of reuniting the family. Placement must be considered as a measure limited in time and should end as soon as its underlying reasons disappear¹⁶³. For the court, "state authorities should put forward strong reasons to support their decision to maintain the separation."¹⁶⁴

d) Placement must be child-friendly¹⁶⁵

As emphasised above, the European Court of Human Rights has ruled against several States because their decision-making process for placement did not respect

¹⁵⁹ ECtHR, *Y. C. v. United Kingdom*, no. 4547/10, 13 March 2012; FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Handbook on European law relating to the rights of the child*, *op.cit.*, p. 77.

¹⁶⁰ FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Handbook on European law relating to the rights of the child*, *op.cit.*, pp. 99-104.

¹⁶¹ T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], *op.cit.*, p. 157.

¹⁶² *Ibid.*, p. 160.

¹⁶³ *Ibid.*, p. 161; ECtHR, *Olson v. Sweden*, 24 March 1988 and ECtHR, *Olson v. Sweden*, 27 November 1992, no. 2.

¹⁶⁴ FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Handbook on European law relating to the rights of the child*, *op.cit.*, p. 77; ECtHR, *Y. C. v. United Kingdom*, mentioned above.

¹⁶⁵ T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], *op.cit.*, pp. 163-166.

¹⁴⁸ M. PREUMONT, *op.cit.*, p. 15.

¹⁴⁹ It should be noted that placing the child into care is one of the most utilized measures under the protective system: T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], in T. MOREAU, A. RASSON-ROLAND and M. VERDUSSEN (eds), *op.cit.*, p. 156.

¹⁵⁰ The concern here is on siblings or the extended family as well as on other possible victims of female circumcision.

¹⁵¹ We will return to this distinction in § 3 below.

Article 8 of the ECHR. The placement of the child into care must thus abide by certain procedural safeguards. On this issue, T. Moreau speaks of child-friendly placement; the measure must be in the child's interests, be beneficial to the child and respect the child's fundamental rights and particular circumstances¹⁶⁶. In this regard, the procedural guarantees developed by the Committee on the Rights of the Child in its General Comment No. 14 should be recalled¹⁶⁷.

e) Rights of the child who is placed into institutional care

A general recommendation to Member States by the Committee of Ministers of the Council of Europe elaborated on the rights of the child placed into institutional care¹⁶⁸. In particular, the child has the right to maintain contact with both parents, the right not to be separated from siblings and, where appropriate, the right to maintain contact with them, the right to respect of the child's ethnicity, private life, human dignity, etc. Any authority that decides on placement should, in a meaningful way, guarantee such rights and ensure their compliance.

§ 2. Child placement and the best interests of the child

As we have explained in the first part of this work, the concept of the child's best interests places several obligations on the States parties, while also encompassing several guidelines. Some indispensable principles ought to be recalled before the actual determination and assessment of the best interests of the child in a situation of being placed into care due to a risk of undergoing FGM.

- Any decision, action, conduct (etc.) that directly or indirectly affects a child, a group of children or children in general must assess and determine the child's best

¹⁶⁶ T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], *op.cit.*, p. 163.

¹⁶⁷ Chapter I, Section II, § 4, B above. For a more detailed account of child-friendly justice: COUNCIL OF EUROPE, "Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice", Council of Europe publishing, 17 November 2010, p. 22. and pp. 58 and subseq.: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9>

¹⁶⁸ Recommendation (2005) 5, of the Committee of Ministers to member states on the rights of children living in residential institutions, adopted by the Committee of Ministers on 16 March 2005. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805daac2; see also T. MOREAU, "Intérêt et droits de l'enfant ou les deux éléments constitutifs du droit de l'enfant au respect. L'exemple du placement et de la privation de liberté" [The child's interests and rights or two foundations of the child's right to respect. The example of care and loss of liberty], *op.cit.*, p. 165.

interests and make them a primary consideration. The assessment must be demonstrably considered by the decision taken by the institutions, judicial bodies, administrative authorities or the legislature.

- The unavoidable implication is that any professional¹⁶⁹ considering placing the child into care must show within the decision that the child's best interests were analysed and demonstrate that, after weighing the different rights of the child, placement is the measure that effectively serves the best interests of the child.
- The child's best interests is a concept that aims to ensure the full and effective realisation of all rights contained in the Convention on the Rights of the Child as well as the child's holistic development. There is no hierarchical order to the rights of the child; they are universal, indivisible, interdependent and interrelated.
- Accordingly, the placement measure has to be considered in relation to all rights within the Convention on the Rights of the Child, while choosing the measure that will be in the child's best interests.
- The child's best interests cover a substantive right, an interpretive legal principle and a procedural rule.

As a substantive right, the best interests of the child must be assessed and be a primary consideration when other interests are involved. As an interpretive legal principle, the child's best interests mean that, in the case of several possible interpretations, the one that effectively serves those interests should be chosen. Finally, as a rule of procedure, decisions must explicitly state that the child's best interests were analysed, what weight was given to those interests and how they were balanced against other important factors, while also respecting the procedural guarantees highlighted by the Committee on the Rights of the Child.

¹⁶⁹ The professional may be with the Youth Assistance Service dealing with negotiated assistance, or a judge or the Court-Protection Services acting within the imposed assistance framework.

§ 3. Assessment and determination of the child's best interests in measures protecting against FGM

Beyond the guiding principles in relation to the placement of the child into care elaborated above, placement should be used only if the child's best interests have been assessed and determined. That assessment comprises two stages: assessing and determining the best interests of the child, and complying with certain procedural guarantees.

A. Assessing and determining the child's best interests

This stage is composed of three steps: assessing the context and the child's characteristics, considering the non-exhaustive, non-hierarchical factors listed by the Committee and, lastly, weighing up the different factors. Where different factors come into conflict, the solution that serves the child's best interests should be found.

The factors raised by the Committee relate to the child's views and identity (sex, sexual orientation, nationality, religion, beliefs, cultural identity, personality), the preservation of the family environment and maintenance of relationships, the care, protection and safety of the child, situations of vulnerability, the right of the child to health and the child's right to education.

Among the elements to be considered, the Committee highlighted the preservation of the family environment and maintenance of relationships. In this regard, placement into care immediately appears inappropriate. We also find, however, other factors such as the child's right to health and to have her physical integrity protected. Furthermore, other factors, which are not mentioned in this non-exhaustive list, could be taken into consideration.

The set of factors to be considered may conflict with one another and seem irreconcilable. In such a case, the issue is then balancing those particular factors in order to arrive at a solution that is in the child's best interests. The measure for protecting a child who is at risk of or has undergone female circumcision brings to the fore several fundamental rights of the child: the right to be protected from any harm to her physical integrity, the right to health and the right not to be separated from her parents.

B. Complying with procedural guarantees

For the procedural guarantees, the Committee established a list of guarantees to be respected in order to comply with Article 3.1 of the Convention on the Rights of the Child: the right of the child to express his or her opinion; the collection of facts; the necessary timeliness of the decision; the use of qualified professionals; the presence

of legal counsel for the child; the legitimacy, justification and explanation of the decisions; the opportunity to contest the decision along with the review and revision of such decisions; and, lastly, the systematic child-rights impact assessment of decisions.

Although these guarantees are predominantly governed by specific statutes in Belgium, they should still be systematically guaranteed when there is a decision to be taken which particularly affects a child or a group of children. All professionals should ensure these guarantees are respected.

C. Conclusions

The assessment and determination of the child's best interests as part of FGM-protection measures lead to different conclusions depending on whether the child is at risk of FGM or has already been subjected to it.

With regard to the guiding principles on the placement of the child and the actual application of the child's best interests in cases where *a girl is at risk of female circumcision*, placement clearly does not seem the most appropriate measures given the infringement on the child's right to have her family life protected, which includes the right to live with her parents.

The necessary balancing of the right to family life (Article 8 of the ECHR and Article 9 of the CRC), the right to be protected against all forms of violence (Article 3 of the ECHR and Article 19 of the CRC) and the child's right to health (Article 24 of the CRC) involves finding the solution that effectively serves the child's best interests. The prioritisation of assistance measures within the family environment occurs once the child's physical integrity can be ensured. One concrete solution can be to consider an urgent, quick meeting of the child's parents on the issue and make them aware of the right of their child not to undergo FGM.

The difficulty obviously rests on the lack of an ideal solution in gaining an effective guarantee that the parents, even if now aware, will not subject their daughter to the mutilation. Specialists on this issue can however demonstrate the possibility of working with and assisting the parents who are confronted with the contradiction between their culture, their idea of the child's education and well-being and the practices prohibited by international and national laws.

If, after weighing up the different interests involved, placement into care turns out to be the measure that suits the child's best interests, the guiding principles of the placement must be respected. It must be an exceptional temporary measure, taken in the interests of the child, limited in time and complying with the rights of the minor and procedural guarantees. If the girl is in imminent danger,

it is possible to consider temporary removal for a period that would allow for a comprehensive medical exam and gaining the cooperation of the parents in support measures revolving around this particular issue. Creativity is called for in any situation involving the necessary protection of a child while not forgetting that the child is part of a family. The rights of each family member and of the family itself have to be guaranteed.

In relation to cases where a girl has undergone FGM, the issue on the measure to be taken is different. In these cases, the placement of the girl into care is obviously inappropriate since the serious and imminent danger to her physical integrity no longer exists. The measure to be taken actually relates to the establishment of regular medical or psychological care, or both, for the girl already subjected to FGM. Indeed, according to her right to health and to enjoy all measures necessary for her development, the required medical and psychological care must be provided. Apart from the assistance to be given to her, there is also the issue of whether there are other potential victims. The risk could exist for the girl's sister, relative or the larger community to which she belongs. As we have seen with regard to girls at risk of FGM, the assistance measures within the family environment should be prioritised, in particular through the involvement and education of the parents on the prohibition of this practice.

SECTION 2. APPLICATION OF THE CHILD'S BEST INTERESTS TO FGM CRIMINALISATION

§ 1. Analysis of the measure: imprisonment of the child's parents

A. Why consider this measure?

As we have seen earlier, the prosecution rate for FGM is low and, as of writing, there have been no convictions for the offence in Belgium. Nevertheless, the application of the best interests of the child to Article 409 of the Criminal Code is pertinent since that offence forms part of our criminal system.

Under Article 409 of the Criminal Code, any person who practises, facilitates, encourages or attempts an act of FGM may be imprisoned for between eight days and five years.

Where an offence under Article 409 is committed or even attempted, the parents of a child subjected to female genital mutilation could be imprisoned¹⁷⁰. Incitement of this practice is also proscribed.

The purpose of this penalty is to punish an offence and guarantee public safety. It can indirectly protect the child from the commission of an offence that has not yet been committed as long as there has been an attempt¹⁷¹. However, it impinges on the fundamental right of the child to live with her parents. It is therefore useful to apply the concept of the child's best interests to this action.

B. Imprisonment, human rights and the rights of the child

Imprisonment can be analysed through the prism of Article 5 and 7 of the ECHR. These articles guarantee the right to liberty and security as well as the basis on which any legal punishment must rest.

Article 5.1 of the ECHR provides the conditions under which a person may be deprived of their liberty. In any case, everyone has the right to be informed of the reasons for the detention, the right to be brought before a court and the right to a proper appeal, among other rights.

By virtue of Article 7.1 of the ECHR, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence

¹⁷⁰ It would have to be shown the parent had practised, facilitated or encouraged the female genital mutilation.

¹⁷¹ It should be noted that the offence could still be practised or encouraged by the unprosecuted parent, the extended family or any other person.

under national or international law at the time when it was committed."

As for the Convention on the Rights of the Child, Articles 9 (right not to be separated from the parents), 12 (right to be heard), 18 (joint responsibility of the parents in raising their child)¹⁷² and 20 (right to special protection for children deprived of their family environment) can be used with regard to the parents being sentenced to imprisonment.

Article 9.4 of the Convention on the Rights of the Child is the provision that specifically addresses the situation where the parents, child or both are detained. It provides that: "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."

As T. Moreau outlines, the ECHR does not grant specific rights on family life for imprisoned parents and their children¹⁷³. The commentator emphasises however that, through Article 1 of the ECHR, the rights contained in the convention are applicable to imprisoned parents and their children¹⁷⁴. Furthermore, the case-law of the European Court of Human Rights pays particular attention to the obligation of prison authorities to assist inmates in maintaining actual contact with their family members¹⁷⁵.

Apart from Article 9.4 of the Convention on the Rights of the Child which addresses the right of family members to be informed of the place of detention of another member of the family, the Convention does not refer specifically to

¹⁷² Article 18.1 stipulates: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

¹⁷³ T. MOREAU, "Les relations entre un parent détenu et son enfant mineur au regard de la jurisprudence de la Cour européenne des droits de l'homme" [Relations between an imprisoned parent and their child with regard to European Court of Human Rights case-law], *J.D.J.*, 2006, no. 259, p. 29.

¹⁷⁴ *Ibid.* Article 1 of the European Convention of Human Rights stipulates that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The rights contained in the Convention thus apply to imprisoned parents.

¹⁷⁵ C. FRÈRE, "Séparés par des barreaux. La situation des enfants dont les parents sont détenus" [Separated by bars. The situation of children with imprisoned parents], *J.D.J.*, 2008, no. 278, p. 5.

the rights of a child whose parents are detained. Article 2.1 of the Convention on the Rights of the Child states that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind (...)." Therefore, the rights contained in the Convention on the Rights of the Child apply to every child, including those whose parents have been imprisoned.

With regard to human and children's rights, the following guiding principles should be recalled on the issue of an imprisoned parent:

a) Even if the ECHR does not mention specific rights for imprisoned parents, the Convention's rights, including the right to family life, still apply to them

The European Court of Human Rights has emphasised the right of detainees to maintain real contact with family members; it has stressed the fact that "justice cannot stop at the prison gate"¹⁷⁶. Inmates thus have the right to continue enjoying the rights guaranteed by the ECHR and States cannot simply argue that they have not actively violated them. The proper fulfilment of that right must be ensured by taking into account the situation of the imprisoned parent¹⁷⁷.

b) The situation of imprisoned parents must be viewed from the standpoint of Article 9, 12, 18 and 20 of the Convention on the Rights of the Child which involve respecting certain fundamental principles¹⁷⁸

A child whose parents are in prison is a child deprived of her family environment. In relation to the mentioned articles, the right of the child to maintain relations and contact with imprisoned parents has to be considered alongside the right of the imprisoned parent to preserve the features of parental authority¹⁷⁹, the child's right to express her views and the right of a child deprived of her family environment to enjoy special state protection.

Imprisonment of the child's parents infringes the right to respect for family life as guaranteed by Article 8 of the ECHR and 9 of the Convention on the Rights of the Child

¹⁷⁶ ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984, § 69, cited by T. MOREAU, "Les relations entre un parent détenu et son enfant mineur au regard de la jurisprudence de la Cour européenne des droits de l'homme" [Relations between an imprisoned parent and their child with regard to European Court of Human Rights case-law], *op.cit.*, p. 30, footnote no. 13.

¹⁷⁷ For a fuller analysis of this issue, see the study by T. MOREAU, "Les relations entre un parent détenu et son enfant mineur au regard de la jurisprudence de la Cour européenne des droits de l'homme" [Relations between an imprisoned parent and their child with regard to European Court of Human Rights case-law], *op.cit.*, pp. 28-36 including an analysis of several judgements from the European Court of Human Rights.

¹⁷⁸ C. FRÈRE, *op.cit.*, pp. 5 and 6.

¹⁷⁹ Continued responsibility over education and oversight.

The imprisonment of a parent infringes the right to respect for family life but it is justified on the grounds of public security and respect for the rights of another. Accordingly, the right to family life cannot be invoked on its own in order to prevent the imprisonment of a parent.

Nevertheless, such punishment must be analysed in relation to the right to respect for private and family life alongside the best interests of the child¹⁸⁰. According to the case-law of the European Court of Human Rights, respect for the family life between an inmate and their child “appears secondary to the requirements of public security”¹⁸¹. Article 8.2 of the ECHR allows restrictions to be placed on the right to have one’s family life protected if such limitations pursue “a pressing social need”. T. Moreau has noted that Court interprets this concept very broadly¹⁸². However, the imprisonment of a parent has significant psychosocial effects on both the parent and child¹⁸³. The right to a family life places an obligation on States to bring together parents separated from their children.

§ 2. Imprisonment in relation to the child’s best interests

The essential principles elaborated in the section on the child’s best interests as part of FGM-protection procedures are also applicable to its criminalisation, namely:

- Any decision that directly or indirectly affects a child, a group of children or children in general must assess and determine the child’s best interests and make them a primary consideration. The assessment must be demonstrably considered by the decision taken by the institutions, judicial bodies, administrative authorities or the legislature.
- The best interests of the child are intended to ensure the full, effective fulfilment of all rights contained in the Convention on the Rights of the Child as well as the child’s holistic development.
- Lastly, the child’s best interests encompass a substantive right, an interpretive legal principle and a rule of procedure.

¹⁸⁰ This would require a thorough analysis of the entire penal system and the punishment of imprisonment.

¹⁸¹ T. MOREAU, “Les relations entre un parent détenu et son enfant mineur au regard de la jurisprudence de la Cour européenne des droits de l’homme” [Relations between an imprisoned parent and their child with regard to European Court of Human Rights case-law], *op.cit.*, p. 36.

¹⁸² *Ibid.*

¹⁸³ An analysis of these effects are beyond the scope of our study. However, we direct the reader to C. FRÈRE, *op.cit.*, pp. 7 and subseq. and the work of G. WEISSGERBER and I. DELENS-RAVIER, *Les enfants de pères détenus [Children of imprisoned fathers]*, Les Politiques sociales publications, Brussels, 2006, 141 p. (especially the contributions of the two above-mentioned authors and those of D. KAMINSKI and A. BOUREGBA).

§ 3. Application of the child’s best interests to the criminalisation of FGM

Although imprisonment is considered as a means to protect public security and the interests of society, human and children’s rights require the respect of certain indispensable principles on this issue. Furthermore, any decision affecting a child must take into account the right contained in Article 3.1 of the Convention on the Rights of the Child.

The criminalisation of FGM should inevitably consider the child’s best interests by following the two stages elaborated by the Committee on the Rights of the Child: assessing and determining the child’s best interests and compliance with certain procedural guarantees.

A. Assessing and determining the child’s best interests

As we have underlined above, this stage is composed of three steps: assessing the context and characteristics of the child, considering the non-exhaustive, non-hierarchical list of factors established by the Committee and, lastly, balancing the different factors. Where different factors come into conflict, the solution that serves the child’s best interests should be found.

The factors raised by the Committee relate to the child’s views and identity (sex, sexual orientation, nationality, religion, beliefs, cultural identity, personality), the preservation of the family environment and maintenance of relationships, the care, protection and safety of the child, situations of vulnerability, the right of the child to health and the child’s right to education.

Among the elements to be considered, the Committee outlined the preservation of the family environment and maintenance of relationships. However, this factor cannot be considered alone and must be weighed against the preservation of public security and, more broadly, the protection of the minor’s physical integrity. The factors to be considered in relation to the criminalisation of FGM can therefore appear irreconcilable because of their inherent conflicting natures. On this basis, such factors have to be balanced against each other by giving each one a particular weight and opting for the solution that serves the child’s best interests.

The imprisonment of the child’s parents involves the weighing up of several fundamental rights of the child: the right to family life (Article 8 of the ECHR and Article 9 of the CRC), the right to protection from all forms of

violence (Article 3 of the ECHR and Article 19 of the CRC) and the right to health (Articles 23 and 24 of the CRC).

It is fair to ask whether the imprisonment of the child’s parents does respect her best interests. The objective of imprisonment is to protect public security, punish an offence and prevent the possible genital mutilation of another girl. In a broader sense, this criminalisation can act as a deterrent because it will dissuade other people from carrying out female genital mutilation due to the fear of being prosecuted. It therefore protects the interests of a group of at-risk children. Yet, the imprisonment will deprive the child of her family life and will have long-term repercussions on her development.

B. Complying with procedural guarantees

As we have stated in the section on protective procedures, the Committee stresses the following procedural guarantees should be respected: the right of the child to express his or her opinion; the collection of facts; the necessary timeliness of the decision; the use of qualified professionals; the presence of legal counsel for the child; the legitimacy, justification and explanation of the decisions; the opportunity to contest the decision along with the review and revision of such decisions; and, lastly, the systematic child-rights impact assessment of decisions.

These guarantees should perforce be respected in the criminalisation of female genital mutilation.

C. Conclusions

The imprisonment of one or both parents clearly infringes the child’s fundamental right to live with her parents. Application of the child’s best interests to the criminalisation of female genital mutilation raises the issue of the actual appropriateness of using imprisonment in such situations. The existence of this offence may however deter parents from carrying out such procedures.

Like P. Jaspis, we believe that the symbolic role of the law should not be ignored; it is “not for eliminating bad behaviour, which is illusory, but is a reminder of restrictions”¹⁸⁴.

If we limit our analysis to the application of the child’s best interests in the specific case of a child who has suffered female genital mutilation and whose parents have been imprisoned, such punishment obviously violates the right of the child to live with her two parents. Furthermore, such a measure will have long-term psychosocial effects for both the imprisoned parent and child.

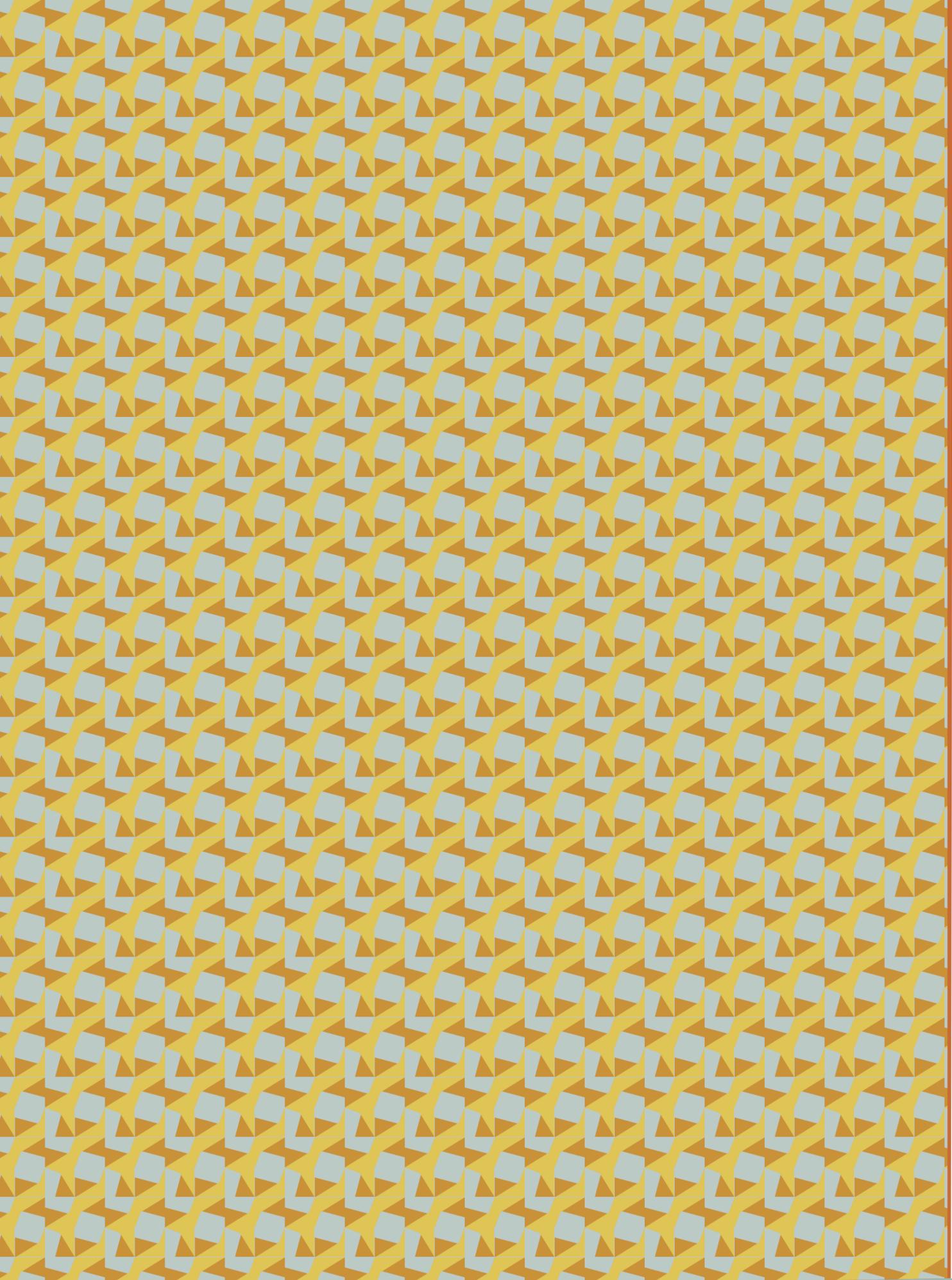
In keeping this legal offence in our legal arsenal, it seems necessary to prioritise the recommendations advocated by M. Alié. This commentator proposes the appointment of a deputy prosecutor within the prosecution services, increasing police attention on the matter and improving the proper handling of reports¹⁸⁵.

Prevention and cooperation with the child’s parents before an act of female genital mutilation is essential. This again raises the question of fair intervention into the life of a child who is at risk of FGM.

We finally note that, if a parent is to be convicted for an offence under Article 409 of the Criminal Code, the parent and child retain their rights, including the imprisoned parent’s parental authority and their right to maintain relations.

¹⁸⁴ Intervention of P. JASPIS, in J. FIERENS, “La notion d’intérêt supérieur de l’enfant dans les procédures protectionnelles et pénales” [Best interests of the child in protective and criminal proceedings], *op.cit.*, p. 27.

¹⁸⁵ M. ALIÉ, “Mutilations génitales féminines : de l’incrimination aux poursuites” [Female genital mutilation: from criminalisation to prosecutions], *op.cit.*, pp. 61-62. See also INTACT, GAMSBELGIQUE and STRATÉGIES CONCERTÉES MGF, “Secteur de la police et de la justice” [Police and justice section], in “Guide de bonnes pratiques améliorant la PREVENTION et la PROTECTION des filles et des femmes victimes ou à risques d’excision” [Good practices guide for improving the PREVENTION and PROTECTION of victims or possible victims of female genital mutilation], 24 November 2015, <http://www.strategiesconcertees-mgf.be/tool/guide-de-bonnes-pratiques/>



CONCLUSION

Female genital mutilation is the total or partial ablation of the external sexual organs for non-medical reasons. It “is recognised internationally as a violation of the human rights of girls and women.”¹⁸⁶

Under Belgian law, FGM has been prohibited for over fifteen years. Any person who practises, facilitates or encourages this procedure can be prosecuted and be imprisoned upon conviction. Although criminalisation can act as a deterrent, the imprisonment of the parents violates the right of the child to live with her parents. It also entails significant psychosocial repercussions on the imprisoned parent and the child.

In order to protect a child who is at risk of or has undergone female circumcision, Belgian law also has support measures that can be utilised within the framework of negotiated assistance or imposed assistance. The measures fall into two categories: those excluding removal from the family environment and those involving removal. Obviously, the placement of a child into care encroaches on the parents’ and child’s right to a family and private life.

Even though FGM must clearly be combated, appropriate intervention in relation to a child at risk of or having undergone FGM is nevertheless a very sensitive matter. This issue indeed touches on several fundamental rights that can conflict with one another: the right to protection from all forms of violence, the right to health and the right to having one’s family and private life protected. Any issue that affects several fundamental rights of the child will involve the balancing of the different rights while its settlement will be based on trying to find the solution that is in the child’s best interests, without neglecting the interests of other parties.

The concept of the best interests of the child is covered under Article 3.1 of the Convention on the Rights of the Child; it has become the benchmark on this concept. The Charter of Fundamental Rights of the European Union also refers to the concept in its Article 24. As for Belgian law, several civil and protective provisions allude to the child’s interests. Moreover, the Belgian Constitution stipulates in Article 22A that the child’s interests shall be a primary consideration in any decision relating to said child.

The Court of Cassation and the Council of State have consistently refused to recognise that Article 3.1 of the Convention on the Rights of the Child has a

¹⁸⁶ WHO, Fact sheet no. 241, February 2016, <http://www.who.int/mediacentre/factsheets/fs241/en/>

direct effect. It is hoped that the Belgian Court of Cassation will follow the lead taken by the French Court of Cassation on this issue and change its stance. In any case, Article 3.1 is not wholly devoid of effect in Belgian law since this absence of recognition can be mitigated by the role of the judge, the ratchet effect and the role of the Constitutional Court.

The concept of the child's best interests has been the subject of many critiques and it has received numerous different epithets. We believe the reluctance of some judges to apply this concept probably originates from a poor understanding of the provision.

The Committee on the Rights of the Child in its General Comment No. 14 has brought some illumination to the concept, which should enable it to be more extensively applied. It is stated that the child's best interests are a threefold legal concept: it is a substantive right, an interpretive legal principle and a rule of procedure. The Committee also specified how to assess and determine this concept in real terms. These elaborations have enabled the boundaries of the concept to be better demarcated.

However, it should never be forgotten that the child's best interests have to be analysed on a case-by-case basis and that the concept could change over time and according to culture and period. The concept does not have a fixed set of content nor can it be applied by merely ticking a checklist of elements to be considered. Moreover, the child's interests are not the only consideration even though they are one of the first factors to be examined and given weight in a decision concerning a child. As the Committee on the Rights of the Child has stated, this concept actually encompasses all rights contained in the Convention.

Taking these clarifications on board, we believe that any professional making a decision concerning a girl who is at risk of or has undergone FGM, whether in a protective or criminal context, can rely on the general comment in order to assess and determine the child's best interests while abiding by the essential procedural guarantees. After applying those interests to the protective and

criminal procedures on FGM, especially in relation to the placement of the child into care and imprisonment of the parents, we do not think those measures are the most conducive to serving the child's best interests. A case-by-case analysis of the situation should be performed and use of child placement or imprisonment of the parent should only occur if those measures are the most effective in meeting the best interests of the child. In either case of the child being placed into care or the parents being imprisoned, the respective rights of both the child and her parents must be considered. It is clearly on this point that the current situation needs to change.

As a final point to this study, we wish to emphasise more than ever the role of preventing and raising awareness about female genital mutilation among all parents, professionals and citizens. Although it is difficult to prove, generally to the chagrin of jurists, prevention plays a major role in the well-being of the parents and children.

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Rue du Progres 333 - 1030 Bruxelles - Belgium
T : +32 (0)2 539 02 04
F : +32 (0)2 215 54 81
contact@intact-association.org

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