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Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations

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Abstract

The European Court of Human Rights has generated a significant volume of case law that imposes demanding standards on States Parties to prevent, investigate and remedy ill-treatment of children at the hands of private actors. However, confusion and inconsistency is evident on a number of key points. Similar cases are decided on different grounds; and the approach to whether the right to an effective remedy under Article 13 has been violated is erratic. This creates uncertainty as to what is required of States to implement judgments, and makes it more difficult for similarly situated victims to vindicate their rights without bringing repetitive applications to Strasbourg. This article provides the first comprehensive treatment of Convention obligations to protect children from ill-treatment. It identifies problematic aspects of the case law, and proffers a more coherent body of principles that would provide greater clarity regarding what the ECHR requires of States Parties in the sphere of child protection, and regarding the measures of implementation required of States in cases where violations are found.

Keywords: Children's rights; ECHR; child protection; child abuse; child neglect; domestic violence; positive obligations; procedural obligations; investigations; effective remedies.

1. Introduction

Since the late 1990s, the European Court of Human Rights (ECtHR) has generated a significant volume of case law governing the State's positive obligations to protect children from abuse and neglect at the hands of private actors, drawing primarily on the right to freedom from inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (ECHR). Within this case law, concepts of positive and procedural obligations have been applied to a wide variety of circumstances, and now impose demanding standards on the child protection systems of States Parties to prevent, respond to, investigate and remedy ill-treatment of children. However, the reasoning of the Court within these various cases does not always entirely line up, and some confusion and inconsistency is evident on a number of key points. Similar cases are decided on different grounds, often for no apparent reason; and the approach to whether the right to an effective remedy under Article 13 has been violated is erratic and at times unconvincing. This creates uncertainty as to what is required of States to implement judgments, and makes it more difficult for similarly situated victims to vindicate their rights without bringing repetitive applications before the hugely overburdened Strasbourg Court.

These issues are not unique to the jurisprudence on child protection: inconsistency in case law of the ECtHR has been documented in various areas, including in groups of cases relating to children's rights (Alves de Faria, 2015; Bracken, 2017). Nor are they unique to the ECHR: Monica Hakimi argues that the approach in international human rights law generally to the duty of the State to protect individuals from human rights abuses at the hands of private actors is splintered, inconsistent and conceptually confused (Hakimi, 2010:349-354). Nonetheless, while the ECtHR does not always

achieve consistency, it certainly aspires to do so. Although the ECtHR does not operate a formal system of precedent (and is willing to depart from its own previous decisions), it has stated that it 'usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law.'[1] Moreover, the Court has adopted a number of measures designed to combat inconsistencies, such as referring or relinquishing cases to the Grand Chamber; the work of the Jurisconsult, and the Conflict Resolution Committee (Costa, 2008:450-452; White and Boussiakou, 2009:180-182). Indeed, in some judgments, the Court has overruled previous decisions for the express reason of putting an end to uncertainty in the case law.[2] Thus, where conflicts within bodies of related cases can be identified as having slipped through this net, and workable solutions proposed, it is important that this be done.

This article aims to assist lawyers to formulate effective child protection arguments based on the ECHR (whether before domestic courts or before the ECtHR itself), and to assist the Court to resolve the inconsistencies and conceptual challenges arising from the case law to date. To this end, it fills a gap in existing literature by providing the first comprehensive sketch of the outlines of States Parties' Convention obligations to protect children from ill-treatment; by identifying problematic aspects of the case law; and by proffering solutions that would bring about a more coherent body of principles that could be applied in a workable fashion in future cases. The net effect of this would be to provide greater clarity regarding what the ECHR requires of States Parties in the sphere of child protection, and regarding the measures of implementation required of States in cases where violations are found. It would raise standards of human rights protection for children who are victims of or at risk of ill-treatment, while also bolstering the subsidiarity of the Convention to national law. This would assist to reduce the number of repetitive applications brought by similarly situated victims (a matter of necessity, since the backlog of cases before the Court stands in the region of 60,000 applications).

2. Convention Obligations on Child Protection

The child protection case law of the ECtHR has been primarily grounded in Article 3, which provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' However, not all cases are dealt with under this provision. More serious cases involving loss of life are dealt with under Article 2 (the right to life). For non-fatal cases, the Court has established a minimum threshold of severity necessary to bring it within the definition of inhuman and degrading treatment under Article 3.[3] Cases involving less serious breaches of personal integrity that do not reach this threshold may instead be treated as violations of the right to private life under Article 8. Less common, but displaying a similar approach, are forced labour cases involving a violation of

[1] *Cossey v United Kingdom* (10843/84, 27 September 1990) at §35. Multiple subsequent judgments have stated that the Court should not depart, without good reason, from precedents laid down in previous cases; see, e.g., *Christine Goodwin v United Kingdom* (28957/95, 11 July 2002) at §74; *Mamatkulov and Abdurasulovic v Turkey*, (46827/99 and 46951/99, 6 February 2003) at §105; and *Vilho Eskelinen v Finland* (63235/00, 19 April 2007) at §56. See further Mowbray (2009).

[2] See, e.g., *Pellegrin v France* (28541/95, 8 December 1999) at §60-61 and *Perez v France* (47287/99, 12 February 2004) at §54-56.

[3] *Ireland v United Kingdom* (5310/71, 18 January 1978) at §162: 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim …' For examples of the application of this standard to the ill-treatment of children, see, e.g., *Tyrer v United Kingdom* (5856/72, 25 April 1978) at §28-35; contrast with *Costello-Roberts v United Kingdom* (13134/87, 25 March 1993) at §29-32.

Article 4. Finally, where any of those provisions are transgressed, Article 13 (right to an effective remedy) may also come into play.

Whichever provision is involved, the basic principle is the same: children should be protected from ill-treatment that violates the Convention right in question. The most obvious obligation imposed on the State is the negative obligation to refrain from inflicting harm on children under State control (e.g. in State institutions such as residential care, schools or hospitals).[4] Issues relating to school discipline engage State responsibility even in private schools, since education is a State function and the State cannot absolve itself of responsibility by delegating its obligations to private bodies or individuals.[5] However, the majority of child abuse and neglect occurs at the hands of private actors; this is where the case law becomes more complex, and this is the primary focus of this article. Cases involving private actors are more complicated in terms of establishing a line of responsibility to the State; but nevertheless, the Court has grappled quite effectively with this problem. The Convention has been interpreted by the ECtHR in a manner that imposes demanding obligations on States Parties, and which is increasingly influenced by the United Nations Convention on the Rights of the Child (CRC).[6] These obligations include procedural obligations to investigate complaints of ill-treatment (which will be considered in Part 3 below), and substantive obligations to protect children from ill-treatment (to which attention will now turn). The remainder of Part 2 will provide the necessary background on the scope of these obligations, before focusing on inconsistencies arising in the case law regarding which provisions of the Convention have been violated.

2.1 Effective deterrence

At a basic level, States Parties to the ECHR are obliged to enact criminal laws that provide an effective deterrent to ill-treatment of children that meets the minimum level of severity to bring it within the meaning of 'inhuman and degrading treatment' under Article 3. This echoes the emphasis on prevention in General Comment No. 13 of the Committee on the Rights of the Child, which expressly calls for the explicit prohibition of all forms of violence against children.[7] Unlike the CRC, the ECHR case law has not yet required criminalisation of less serious breaches of personal integrity (such as mild corporal punishment) that fall outside the scope of Article 3; however, recent decisions are trending in that direction (O'Mahony, 2019).

The ECHR obligation to criminalise serious instances of ill-treatment of children can be traced back to *A v United Kingdom* (25599/94, 23 September 1998), which concerned a boy whose stepfather had repeatedly caned him, but was subsequently acquitted of assault on the defence of reasonable chastisement. The ECtHR stated that:

> … the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading

[4] See, e.g., *VK v Russia* (68059/13, 7 March 2017) (in which a violation of Article 3 was found in respect of ill-treatment of a child in a public nursery school).
[5] *Costello-Roberts v United Kingdom* (13134/87, 25 March 1993) at §27.
[6] On the obligation to protect children from violence under the CRC, see Committee on the Rights of the Child, (2011); Svevo-Ciancia *et al*, (2011) and Sandberg (2018). For an analysis of the influence of the CRC on the case law of the ECtHR, see Kilkelly (2001). More recent child protection case law now cites the CRC almost as a matter of course; see O'Mahony (2019).
[7] Committee on the Rights of the Child (2011) at §46.

> treatment or punishment, including such ill-treatment administered by private individuals … Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity. (§22)

Since the applicant had been subjected to corporal punishment of such severity to constitute inhuman and degrading treatment, but the jury had nevertheless acquitted his stepfather of assault, the Court found that the law did not provide adequate protection to the applicant against treatment contrary to Article 3 (§23-24).

MC v Bulgaria (39272/98, 4 December 2003) took a very similar stance in relation to an inadequate system of investigating and prosecuting rape complaints involving a 14 year-old girl. The Court found that the principle of effective deterrence obliges States not just to enact laws criminalising rape, but also to apply them in practice through effective investigation and prosecution (§150-153). Bulgaria was found to fall short of its obligations under both Articles 3 and 8 (a point that will be returned to in Part 2.4 below) by virtue, *inter alia*, of the fact that its rape laws made it difficult to prosecute in the absence of the use of significant force by the perpetrator; key witnesses were not confronted; and the authorities 'attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors' (§169-187). A lack of an effective investigation may also violate a State's procedural obligations under Article 3, even if the criminal law itself is deemed to be an effective deterrent; it will be seen in Part 3 below that that the dividing line between substantive and procedural obligations has been blurred by the Court in its reasoning in this case, among others.

The obligation to enact criminal laws providing effective deterrence against ill-treatment of children has also been applied in the context of forced labour. In *Siliadin v France* (73316/01, 26 July 2005), a violation was found of Article 4 where a 15 year-old girl was forced to carry out domestic duties 15 hours a day, 7 days a week with no pay and very little freedom of movement. Although she did succeed in obtaining damages against the perpetrators, a criminal conviction was quashed on appeal. In determining that the applicant had been subjected to forced labour and held in servitude, the Court repeatedly emphasised her status as a minor (§118, 120, 126 and 129), and held that the absence of a criminal conviction failed to discharge France's positive obligations under Article 4 to protect children from forced labour (§135-149).

In cases of ill-treatment which may not necessarily reach the Article 3 threshold, there is a separate obligation deriving from Article 8 to enact effective laws to protect children from abusive conduct. *Söderman v Sweden* (5786/08, 12 November 2013) concerned a 14 year-old girl whose stepfather had secretly filmed her while taking a shower, but whose prosecution in the Swedish courts was ultimately unsuccessful. Unlike in the case law on Articles 3 and 4, the Court accepted in principle that the criminal law was not the only way in which a State might fulfil its obligations under Article 8, and that the civil law might be sufficient (§108).[8] Nonetheless, the need for 'effective deterrence against such serious breaches of personal integrity' applies in the case of Article 8 in the same way as for Article 3 (§81). Since no remedy was available in either the criminal or civil law in the concrete

[8] Contrast this with *MC v Bulgaria* (39272/98, 4 December 2003), in which the Court expressly held at §186 that 'effective protection against rape and sexual abuse requires measures of a criminal-law nature' and rejected the suggestion that civil redress might suffice for ill-treatment that falls within the Article 3 threshold. However, in cases where the perpetrators of ill-treatment are below the age of criminal responsibility, the Court has accepted that the obligation to criminalise does not arise: see *Dordevic v Croatia* (41526/10, 24 July 2012) at §142.

circumstances of the case, the Court found a violation of Article 8 as it was 'not satisfied that the relevant Swedish law … ensured protection of her right to respect for her private life' (§117).

2.2. Preventive measures that mitigate foreseeable risks

Convention obligations extend beyond deterring ill-treatment through criminal or civil consequences for perpetrators. States are also obliged to take reasonable measures to mitigate foreseeable risks of ill-treatment occurring. This can arise in two contexts: i) a specific risk to an identified individual, and ii) a general risk to unidentified individuals. This echoes the CRC requirement that States engage in both 'general (primary) and targeted (secondary) prevention' (Committee on the Rights of the Child, 2011:§46).

In relation to identified individuals, a number of cases have found violations due to a failure to adequately respond to domestic violence. *Kontrová v Slovakia* (7510/04, 31 May 2007) concerned two children who were shot dead by their father. Five days previously, the father had threatened to shoot their mother (the applicant), and she had made several reports to the police. The Court observed that the duty to take preventive measures to protect an individual whose life is at risk from the criminal acts of another individual could not arise in every claimed risk to life, since this would impose an impossible or disproportionate burden on the authorities:

> For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk … (§49-50)

Nonetheless, the Court found that the situation in the applicant's family was known to the police, but they failed to discharge their obligations under domestic law (including registering the applicant's criminal complaint; launching a criminal investigation immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant's husband had made violent threats with a shotgun). The direct consequence of these failures was the death of the applicant's children, and accordingly, the Court found a violation of Article 2 (§52-55). A similar decision was reached in *Talpis v Italy* (41237/14, 2 March 2017), and the same principle was applied in the context of a risk of abuse rather than a risk to life in *E v United Kingdom* (33218/96, 26 November 2002).

The duty to protect against foreseeable risks was extended beyond specific risks to identified individuals to include general risks to unidentified individuals by the Grand Chamber in *O'Keeffe v Ireland* (35810/09, 28 January 2014).[9] This case concerned an eight year-old girl who was the victim of multiple sexual assaults by the principal of a primary school which was owned and managed by the Catholic Church. The same principal had abused 21 girls on almost 400 occasions at the same school. A number of complaints were made against him before he was eventually moved to a different school. State authorities did not discover any of this until after his retirement, when criminal complaints were made against him; the only official measure in place in the 1970s was a memorandum instructing schools to direct complaints against teachers to the school manager (almost invariably the local parish priest) (§62 and 163).

[9] See further O'Mahony and Kilkelly (2014) and Gallen (2015).

The failure by the State to respond to the first complaint against the principal, which had been made before the applicant was abused, was one aspect of the decision.[10] However, *O'Keeffe* went further in a crucial respect, in that it was not solely predicated on a failure to respond to actual abuse; the mere risk of abuse was enough to engage a positive obligation.[11] The Court relied on evidence from official reports on the incidence of sexual abuse of children in Ireland to find that the risk of abuse occurring in schools was foreseeable. Accordingly, as it was a risk of which the State had or ought to have had knowledge, the State should have taken steps to protect children against that risk. Its failure to do so was found to violate Article 3 (but not Article 8, as will be discussed in Part 2.4 below):

> The Court has found that it was an inherent positive obligation of government in the 1970s to protect children from ill-treatment. It was, moreover, an obligation of acute importance in a primary education context. That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia*, its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (National Schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring … (§169)

As *O'Keeffe* is the only judgment to date in which a violation has been found on this basis of a general risk to unidentified children, the precise scope of this obligation is as yet unclear.[12] Nonetheless, as with risks to identified individuals, States cannot choose to ignore foreseeable general risks and fail to put in place any measures to control against them.

2.3 Responding to known abuse or neglect

As noted by the Committee on the Rights of the Child in General Comment No. 13, 'commitment to prevention does not lessen States' obligations to respond effectively to violence when it occurs' (Committee on the Rights of the Child, 2011:§46). In a similar vein, the ECHR obliges states to respond to actual ill-treatment that is already occurring, in circumstances where the State knows or ought to know about the ill-treatment. This includes an obligation to respond to i) direct harm to children and ii) indirect harm caused by witnessing ill-treatment of others. In relation to direct harm, the case of *Z v United Kingdom* (29392/95, 10 May 2001) concerned a failure by social services to take adequate measures to secure the welfare of four children who were subjected to appalling levels of neglect, as well as physical and sexual abuse in the family home. A period of four and a half years elapsed between social services first coming into contact with the family and the point at which they were taken into care (at the behest of their mother), during which time they endured 'horrific' experiences causing serious psychological harm (§40). The Court acknowledged 'the difficult and sensitive decisions facing social services and the important countervailing principle of

[10] §166: "Any system of detection and reporting which allowed such extensive and serious ill-conduct to continue for so long must be considered to be ineffective … Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the present applicant being abused two years later by the same teacher in the same school."

[11] In this respect, the case is analogous to case law governing positive obligations arising under Article 2 in respect of activities that pose a risk to life: see, e.g., *Öneryildiz v Turkey* (48939/99, 30 November 2004) at §89-90.

[12] One potentially difficult issue to be overcome in the development of this principal is the establishment of a causal link between the State's failure and the ill-treatment suffered by the victim; see Stoyanova (2018).

respecting and preserving family life', but went onto find that '[t]he present case, however, leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse' (§74). Thus, the failure by the authorities to remove the children from the family home for a lengthy period of time after first becoming involved was found to have violated the children's rights under Article 3. A similar decision was reached in respect of a failure to respond to ongoing domestic violence and against an 8 year-old child in *TM and CM v Moldova* (26608/11, 28 January 2014).

These cases can be contrasted with *DP and JC v United Kingdom* (38719/97, 10 October 2002), which also concerned a family with a lengthy history of involvement with social services, and in which several children were subjected to sexual abuse over a lengthy period of time. However, no violation was found in *DP and JC*. The mother had covered for the abusive stepfather, and there was no evidence that the children had made unequivocal complaints to State authorities of sexual abuse. It was thus held that the State neither knew nor had reason to suspect that abuse was occurring, and could not be criticised for failing to investigate the possibility of abuse (§110-114). More recently, in *MP v Bulgaria* (22457/08, 15 November 2011), the Court also declined to find a violation of either Article 3 or Article 8 in a case where a complaint that a child had been abused by his stepfather had not (yet) been substantiated. All appropriate steps were taken to investigate and respond to the complaint, including multiple medical and psychological assessments; visits by social workers to the child's home; and the provision of assistance and counselling to his family. These two cases stand out as illustrative of the limits of State obligations under the ECHR in the child protection sphere. Of over 20 judgments of the ECtHR concerning positive obligations to protect children from ill-treatment by private actors, they are the only ones in which alleged or documented ill-treatment did not result in a violation being found of one of the substantive provisions of the Convention.[13]

Violations have also been found due to a failure to respond to known ill-treatment at the hands of other children. *Dordevic v Croatia* (41526/10, 24 July 2012) is not strictly speaking a child protection case, since the first applicant was not a child, but an intellectually disabled adult subjected to prolonged harassment by children who attended a school where he attended a workshop for adults for 12 hours a week. Nonetheless, the circumstances of the case are clearly salient in the context of child protection and prevention of bullying in schools. It was held that the totality of the harassment (which included verbal abuse, harassment at his apartment and, on one occasion, burning with cigarettes) reached the Article 3 threshold (§90-96). The State had been made aware of the ill-treatment through complaints made by the applicant's mother, but had not taken all reasonable measures to prevent the abuse, notwithstanding the fact that the continuing risk of such abuse was real and foreseeable; accordingly, a violation of Article 3 was found (§141-150).

In addition to direct harm, the State's duty to protect children from ill-treatment includes indirect harm to children caused by witnessing domestic violence.[14] In *Eremia v Moldova* (3564/11, 28 May 2013), a violation of Article 3 was found in respect of the failure of the authorities to adequately

[13] Note, however, that in *DP and JC v United Kingdom*, a violation was found of the right to an effective remedy under Article 13; see below, Part 4. A further example of a rejection of a complaint of a substantive violation is *M and M v Croatia* (10161/13, 3 September 2015), in which the Court rejected the complaint as 'the domestic authorities took reasonable steps to assess and weigh the risk of potential ill-treatment of the first applicant by her father and to prevent it', noting the close supervision of applicant in father's home and the absence of evidence indicating that she was at risk by living there (§153-162). However, a procedural violation was found due to delays in the investigation; in addition, a violation of Article 8 was found due to the failure to provide the child with an adequate opportunity to be heard.

[14] This was included in the definition of 'mental violence', and thus as coming within the scope of Article 19 of the CRC, in General Comment No. 13: see Committee on the Rights of the Child (2011) at §21.

respond to serious and ongoing domestic violence against the first applicant (the mother). A separate violation was found (notably, of Article 8 rather than of Article 3) in respect of the second and third applicants (the teenage daughters of the first applicant) due to the adverse effects suffered by them as a result of repeatedly witnessing their father's violence against their mother in the family home.

2.4 Inconsistencies in the Substantive Obligations Case Law

Even at the basic level of deciding which provision of the Convention has been violated, there is evidence of inconsistency in the case law. Since there is a minimum threshold of severity that must be reached before a case can be brought within Article 3, it is clear that not all cases that constitute a violation of personal integrity under Article 8 will involve ill-treatment of sufficient severity to amount to inhuman and degrading treatment contrary to Article 3. But what of the converse situation? If the threshold for violating Article 8 is lower, will all cases of inhuman and degrading treatment contrary to Article 3 also constitute violations of personal integrity under Article 8?

One line of cases answers this question in the affirmative; the two provisions are bundled together in the analysis, with no separate consideration of the facts grounding the violation, the submissions made by the parties or the case law governing each provision. The Court simply stipulates that both provisions have been violated, with no consideration of the differences between the rights at stake.[15] By contrast, in a parallel line of judgments, the Court separates out the two provisions, and then – having found a violation of Article 3 – rules it unnecessary to consider the arguments made under Article 8.[16] Again, in almost every case, no explanation is given for the approach taken.

As almost none of the cases articulate the reasons underpinning the approach taken by the Court, and there is no engagement between the two lines of cases, it far from clear why some cases have found a violation of both provisions while others rule out the need for a separate analysis under Article 8. Some of the confusion may stem from the fact that any good lawyer will argue both provisions in an application to the Court, so that Article 8 provides a fall-back in case the ill-treatment complained of is found not to meet the Article 3 threshold. However, while this is understandable on the part of lawyers, the failure to properly and consistently separate out the two complaints is less understandable on the part of the Court, which repeatedly describes itself as 'the master of the characterisation to be given in law to the facts of a case' and stresses that it is 'not bound by the characterisation given by the applicant or the Government'.[17] The Court may claim to

[15] See, e.g., *MC v Bulgaria* (39272/98, 4 December 2003); *ES v Slovakia* (8227/04, 15 September 2009); *CAS and CS v Romania* (26692/05, 20 March 2012) and *MGC v Romania* (61495/11, 15 March 2016). See also *MP v Bulgaria* (22457/08, 15 November 2011), in which the two provisions were considered together (citing the approach in *MC v Bulgaria*), but in which no violation was ultimately found.

[16] See, e.g., *Z v United Kingdom* (29392/95, 10 May 2001); *E v United Kingdom* (33218/96, 26 November 2002); *IG v Moldova* (53519/07, 15 May 2012); *O'Keeffe v Ireland* (35810/09, 28 January 2014); *TM and CM v Moldova* (26608/11, 28 January 2014); and *IC v Romania* (36934/08, 24 May 2016). In *M and M v Croatia* (10161/13, 3 September 2015) at §143, the Court declined to consider the Article 8 complaint, noting that it was 'absorbed' by the Article 3 complaint. See also *PM v Bulgaria* (49669/07, 24 January 2012), in which the applicant relied on both Articles 3 and 8, but the Court – having acknowledged this at the outset of the consideration of the complaint (see §54) – proceeded to simply ignore Article 8 in the remainder of the judgment.

[17] See, e.g., *Assenov v Bulgaria* (24760/94, 28 October 1998) at §132; *Söderman v Sweden* (5786/08, 12 November 2013) at §57; *M and M v Croatia* (10161/13, 3 September 2015) at §167; *MGC v Romania* (61495/11, 15 March 2016) at §48; and *Talpis v Italy* (41237/14, 2 March 2017) at §77.

shape the cases to fit the case law, but its approach to complaints under both Articles 3 and 8 displays no discernible trend in either time or court personnel; indeed; opposite approaches were taken in *MGC v Romania* (61495/11, 15 March 2016) and *IC v Romania* (36934/08, 24 May 2016), decided on almost identical facts just two months apart by chambers consisting of six out of seven of the same judges.

There is one case in which the Court has attempted to explain its decision to decline to consider the Article 8 complaint. In *O'Keeffe v Ireland* (35810/09, 28 January 2014), the Court, having found a violation of Article 3, stated the following:

> The Court notes that the complaint under Article 8 concerns the same facts and issues evoked under Article 3 and that the parties relied on essentially the same submissions. The case does not concern a particular and separate Article 8 issue, such as the specific home and family life matters to which the facts of the above-cited case of C.A.S. and C.S. v. Romania gave rise (§ 12). The impact of the abuse on the applicant's later life can equally be a consequence of the Article 3 breach established above. The Court concludes that the complaint under Article 8 does not give rise to any issue separate to that examined already under Article 3 of the Convention … (§192)

In principle, the idea that a separate violation of Article 8 should hinge on facts that are specific to home and family life (rather than a mere re-statement of the circumstances that grounded the violation of Article 3) makes sense. However, the existence of a clear and consistently-applied distinction of this nature is not supported by the case law. The Court's citation of *CAS and CS v Romania* (26692/05, 20 March 2012) as an example of a case giving rise to such 'specific home and family life matters' is unconvincing, since the Court in *CAS and CS* rejected part of the Article 8 complaint which was based on the applicants being forced to leave town to reconstruct a normal life (§60).[18] The only other 'specific home and family life matters' that can be identified in the case is the fact that the abuse was perpetrated within the family home. However, this cannot explain the difference of approach. In almost all of the cases cited above in which the Court declined to consider Article 8 separately, the ill-treatment had occurred in the family home; while conversely, in a number of the cases in which a violation of both provisions was found, the ill-treatment took place outside of the applicant's home.[19] Moreover, the judgment in *CAS and CS* made no reference to any 'specific home and family life matters' when giving its reasons for finding a violation of both Articles 3 and 8 (§73-83).

Dordevic v Croatia (41526/10, 24 July 2012, §151-153) provides an illustration of a genuinely separate Article 8 violation, albeit in respect of a separate applicant: the ill-treatment of the first applicant contrary to Article 3 was found to give rise to a separate violation of the Article 8 rights of the second applicant (his mother), due to the impact it had on her private and family life.[20] There is no clear illustration in the case law to date of facts that might give rise to separate and clearly distinguishable violations of both Articles 3 and 8 in respect of the ill-treatment of a single applicant. Thus, the presence or absence of 'specific home and family life matters' does not presently offer a principled dividing line on this point in the manner suggested by the Court in *O'Keeffe*; but it is

[18] *ES v Slovakia*, 8227/04, 15 September 2009 might provide another example, since in that case, the applicants were forced to flee the family home and a separate violation of Article 8 was found. However, since the Government admitted that it had failed to meet its positive obligations under both Articles 3 and 8, and contested only the admissibility of the application, the relatively brief judgment of the Court did not provide any analysis of why a separate violation of Article 8 should be found.

[19] *MC v Bulgaria* (39272/98, 4 December 2003) and *MGC v Romania* (61495/11, 15 March 2016).

[20] See also *Eremia v Moldova* (3564/11, 28 May 2013). Both of these cases are discussed above, Part 2.3.

plausible that it could perform this role in future, if the Court were to attempt to resolve the inconsistencies discussed in this Part, and suitable cases were to arise.

In all likelihood, nothing in particular turns on the Court's inconsistent approach to finding violations of one or both provisions. In all of the above cases, the applicant succeeded in establishing a violation under the higher and non-derogable standard set under Article 3. A finding of a separate violation under Article 8 would not have added anything either to the outcome of the case at hand or to the general measures that would be expected of the respondent state in executing the judgment. But the inconsistencies in the case law on this point are indicative of a certain lack of rigour on the part of the Court in its jurisprudence on child protection. As will be seen in Parts 3 and 4 below, this spills over into other issues, where more obvious consequences flow from inconsistencies in the judgments.

In the interests of legal certainty, the approach that best lends itself to a clear and consistent application would be for the Court, in cases where a violation of Article 3 is found, to decline to consider the Article 8 complaint if it is based on essentially the same facts. The finding of a violation of Article 3 is sufficient to vindicate the rights of the applicant and to require general measures of the respondent State to prevent similar violations in future. If some clearly distinguishable factual issue can be identified that grounds a separate violation of Article 8, then the complaint should of course be considered, and a violation found if appropriate. However, for clarity, the Court should give its reasoning in a separate section of the judgment instead of bundling the two provisions together. Lawyers, for their part, should continue to cite both provisions if in doubt about the severity of the treatment; but in cases clearly reaching the Article 3 threshold (such as any form of sexual assault), there is nothing to be gained by making a separate Article 8 complaint.

3. Procedural Obligations

Part 2 was concerned with States Parties' substantive obligations to prevent ill-treatment from occurring, or to respond to it where the State is or ought to be aware that it is occurring. It was seen that the case law here was generally quite strong in imposing demanding obligations on States and achieving a high level of protection for the rights of children, albeit that inconsistency is evident on the question of whether complaints under Articles 3 and 8 should be taken together or separately. Part 2 will turn attention to procedural obligations to investigate complaints of ill-treatment. Here, the jurisprudence is a little more patchy. While the Court has imposed high standards on States and has not shied away from finding violations, it has not always articulated its judgments with the consistency and clarity that might be expected. This has potential to cause confusion as to why precisely a violation has been found, and what is required of a State in executing the judgment.

3.1 Scope of Procedural Obligations

Where a violation of the right to life under Article 2 of the ECHR is alleged to have occurred, it is firmly established that States Parties have a procedural obligation to carry out an effective investigation into the alleged incident.[21] After some initial inconsistency in the case law (Mowbray, 2002), the same obligation now seems similarly well-established in cases involving an alleged violation of the right to freedom from torture or inhuman or degrading treatment under Article 3.

[21] See, e.g., *McCann v United Kingdom*, 18984/91, 27 September 1995; *Ergi v Turkey*, 23818/94, 28 July 1998; *Jordan v United Kingdom*, 24746/94, 4 May 2001; and *Ramsahai v Netherlands*, 52391/99, 15 May 2007.

Furthermore, the Court has not excluded the possibility that a similar obligation could arise in respect of alleged violations of Article 8 (albeit that this has yet to be clearly established in a case based solely on Article 8).[22]

In the context of abuse against children, the leading case on the procedural obligations arising under Article 3 is *CAS and CS v Romania* (26692/05, 20 March 2012), which concerned an investigation into an allegation of repeated serious and violent sexual abuse of a seven year-old boy. The Court set out the key principles as follows:

> … Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment even if such treatment has been inflicted by private individuals …
>
> For the investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia,* eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context (§69-70).

The Court made specific reference to Articles 19, 34 and 39 of the CRC, as well as General Comment No. 13, noting in particular the Committee's emphasis on the importance of prevention, the need for an easily accessible report mechanism, the importance of rigorous and child-sensitive investigation and of effective and child-friendly justice where due process must be respected (§52-53).[23] It summarised that the CRC requires that 'a series of measures must be put in place so as to protect children from all forms of violence which includes prevention, redress and reparation' (§72).

The investigation in the case at hand was found to be ineffective on the basis of a combination of factors, including delays in commencing it and in progressing key aspects[24] (such as questioning the alleged perpetrator[25]), showing evidence of a 'lax attitude' on the part of the authorities (§74-79). The authorities 'did not try to weigh up the conflicting evidence and made no consistent efforts to establish the facts by engaging in a context-sensitive assessment', and placed undue emphasis on the fact that the child and his family did not make a complaint for some time after the alleged events:

> … the Court considers that the authorities were not mindful of the particular vulnerability of young people and the special psychological factors involved in cases concerning violent sexual abuse of minors, particularities which could have explained the victim's hesitations both in reporting the abuse and in his descriptions of the facts. (§79-81)

[22] *MC v Bulgaria*, 39272/98, 4 December 2003 at §152.
[23] In so finding, the Court cited the Committee on the Rights of the Child (2011) at §45-58.
[24] See also *PM v Bulgaria* (49669/07, 24 January 2012) at §63-67, in which delay of more than 10 years in the investigation of the rape of a 13 year-old girl, with the result that the prosecution of the perpetrators was eventually time-barred, led to a finding of a violation.
[25] See also *IG v Moldova* (53519/07, 15 May 2012) at §40-45, in which a violation was found in respect of the investigation of the rape of a 14 year-old girl due largely to the fact that the decision to drop the charges was made without two of the three key witnesses being questioned and without any attempt made to establish the credibility of the statements made by the applicant and the alleged perpetrator (e.g. by questioning people who could have shed light on their trustworthiness).

Moreover, no proper counselling services were provided to the child, which was not consistent with the need to provide adequate measures for recovery and integration (§82). This latter point goes beyond the scope of mere investigation of the alleged offences and is particularly influenced by Article 39 of the CRC.

3.2 Confusion between Substantive and Procedural Obligations

The dividing line between substantive and procedural obligations is not always as clear as it might be. On its face, there are two distinctions. One relates to timing: substantive violations arise where the State fails to do something prior to or during the ill-treatment, while procedural violations relate solely to the aftermath of the ill-treatment. The other relates to substance and culpability: a substantive violation involves a finding that the State is partly responsible for the occurrence of the ill-treatment (whether by failing to deter it, mitigate the risk of it or respond to it once occurring), whereas a procedural violation does not hinge on State culpability for the ill-treatment, but arises even where substantive obligations have been discharged and the State is found not to bear any responsibility for the ill-treatment in question. Indeed, a procedural violation can arise even in circumstances where it has not been satisfactorily established that ill-treatment actually occurred. In *Assenov v Bulgaria* (24760/94, 28 October 1998), a 14 year-old boy alleged that he had been beaten with truncheons by police in the course of arresting him; while it was held that the evidence did not substantiate this allegation, a violation was nonetheless found as the investigation into his complaint of ill-treatment was not sufficiently thorough.

On the question of timing, cases involving a single instance of ill-treatment are comparatively clear-cut regarding whether State failures occurred before or after the event (and thus fall to be classified as substantive or procedural). However, cases involving the abuse or neglect of children often involve a series of related events, which may be spread over a period of months or even years and do not lend themselves to identifying a clear 'before' and 'after'. A complaint made to State authorities at any point in the sequence will trigger the procedural obligation to investigate the allegation of ill-treatment; and depending on the circumstances, it may also trigger the substantive obligation to respond to the ill-treatment and to take measures to prevent further instances.[26] As such, the Court has stated that substantive and procedural violations 'often overlap'.[27] Indeed, in several judgments, the Court has referred to inadequate investigations creating a 'situation of impunity'.[28] This suggests, without clarifying the terminology, that procedural violations may eventually reach a point where the law fails to provide an effective deterrent or fails to prevent a re-occurrence of ill-treatment (which would be a substantive violation).

Nonetheless, while overlap can arise, it is still both important and possible to separate out which category of violation has been found, and on the basis of which failures. It is important because it determines the nature of the failure in the case and the measures of implementation required of the respondent State in executing the judgment; and it is possible because, notwithstanding the overlap

[26] See, e.g., *MP v Bulgaria* (22457/08, 15 November 2011) at §110 and *M and M v Croatia* (10161/13, 3 September 2015) at §140-141.
[27] *M and M v Croatia* (10161/13, 3 September 2015) at §136.
[28] See *IC v Romania* (36934/08, 24 May 2016) at §55: '… the Court is of the view that failure to properly investigate or provide appropriate judicial response to complaints of sexual abuse against children or other vulnerable persons such as persons with intellectual disabilities creates a background of impunity which may be in breach of the State's positive obligations under Article 3 of the Convention.' See also *Talpis v Italy* (41237/14, 2 March 2017) at §117.

in the circumstances giving rise to the obligations, the obligations themselves are still clearly distinguishable. Every violation can still be categorised as a substantive violation (failing to deter/prevent), a procedural violation (failing to investigate) or both.

Sometimes, the Court is exceptionally clear in its approach; a good example is *O'Keeffe v Ireland* (35810/09, 28 January 2014), where the judgment considered the alleged substantive and procedural violations under separate headings that expressly used the terms 'substantive' and 'procedural'.[29] The Court concluded that even though a substantive violation had occurred due to the failure to take steps to mitigate the risk of sexual abuse in primary schools, there was no separate procedural violation, as the perpetrator of the applicant's abuse was prosecuted shortly after complaints were first made to the police (§170-174).

This separation of substantive and procedural obligations is noticeably absent from some of the other cases, and not just those involving a protracted sequence of ill-treatment. The best example is *MC v Bulgaria* (39272/98, 4 December 2003).[30] As noted in Part 2.1 above, this case found a violation of Articles 3 and 8 against Bulgaria due to the manner in which a case involving a double rape of a 14 year-old girl was handled by the authorities. Yet it is unclear from the judgment whether the violation turned on the ineffectiveness of the criminal laws in question (in which case it would be a substantive violation similar to *A v United Kingdom* (25599/94, 23 September 1998), due to the absence of an effective deterrent); the ineffectiveness of the investigation of the offences (in which case it would be a procedural violation); or both.

The Court began by examining the definition of the offence and the requirement to show physical force and physical resistance in order to establish that a rape had occurred; but this aspect was not found to ground a violation in itself (§170). Instead, the Court stated, '[w]hat is decisive … is the meaning given to words such as "force" or "threats" or other terms used in legal definitions.'[31] The applicant alleged that there was 'restrictive practice' in respect of the definition of these terms in Bulgaria, and the Court found that it would be sufficient to ground a violation if it found that this position was 'based on reasonable arguments and has not been disproved by the Government' (§174). So while the wording of the law did not in itself ground a violation, the interpretation and application of that law in practice could do. The judgment focused on a trend in the interpretation and application of the law, which was not dissimilar to the trend in the interpretation and application of the defence of reasonable chastisement that grounded a violation in *A v United Kingdom*. Both cases involved an allegation that while a criminal offence existed, the manner in which the law in question was interpreted and applied made it extremely difficult to secure a conviction, and thus failed to provide a sufficient deterrent.[32] Indeed, while the Court did not cite *A v United Kingdom*, it used almost identical language to that case in holding that 'effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at

[29] The judgment was separated into the following sections: 'II. ALLEGED VIOLATION OF THE SUBSTANTIVE ASPECT OF ARTICLE 3 OF THE CONVENTION (§122) and 'III. ALLEGED VIOLATION OF THE PROCEDURAL ASPECT OF ARTICLE 3 OF THE CONVENTION' (§170). Headings were also used to separate out the two aspects in *VK v Russia* (68059/13, 7 March 2017) (in which both substantive and procedural violations were found). For an example of a similar approach in a case not involving children, see *Cestaro v Italy* (6884/11, 7 April 2015).

[30] Other cases that illustrate this tendency to bundle substantive and procedural obligations together include *MGC v Romania* (61495/11, 15 March 2016) and *IC v Romania* (36934/08, 24 May 2016).

[31] *Ibid* at §171.

[32] In *Siliadin v France* (73316/01, 26 July 2005) at §89, the Court characterised *MC v Bulgaria* as establishing that States were obliged both to 'adopt criminal-law provisions which penalise the practices … and to apply them in practice'. Subsequently, at §112, the Court cited *MC* as establishing that 'the Convention must be seen as requiring the penalisation and effective prosecution of any act [violating Articles 3 or 4]'.

stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection …' (§150).[33]

So up to this point, *MC v Bulgaria* sounds like a substantive violation analogous to *A v United Kingdom* due to the absence of effective deterrence before the event. However, as the judgment proceeds, it begins to sound more like a procedural violation due to ineffective investigation after the event, analogous to *Assenov v Bulgaria* (24760/94, 28 October 1998) and *CAS and CS v Romania* (26692/05, 20 March 2012) (neither of which found a substantive violation):

> In the light of the above, the Court's task is to examine whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention. (§167)

Here, the Court bundles the interpretation and application of the law ('the impugned legislation and practice and their application in the case at hand') together with the effectiveness of the investigation – not quite conflating positive and procedural obligations, but certainly not separating them out. The factors relied on in finding that the investigation was inadequate were strikingly similar to those present in *CAS and CS v Romania*. In both cases, the Court highlighted delays, failures to test evidence and confront witnesses, failure to make a 'context-sensitive assessment' of the evidence, and failure to take into consideration the particular vulnerability of young people and victims of sexual offences.[34] The Court in *MC v Bulgaria* concluded:

> In sum, the Court, without expressing an opinion on the guilt of P. and A., finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse. (§185)

It is difficult to disagree with the Court's conclusion in *MC v Bulgaria* that a violation had occurred; but it is possible to find fault with the manner in which it articulated this finding. Was it a substantive violation, due to restrictive practice in the interpretation and application of the laws governing rape, such that the chances of conviction were reduced to a level where the law did not provide an effective deterrent? Or was it a procedural violation, due to flaws in the investigation of the particular offences involved in this case? Or was it both? The similarities with *CAS and CS v Romania* are such that *MC* almost certainly involved a finding of a procedural violation; but it is unclear whether it also involved a finding of a substantive violation. And this matters: if a substantive violation is found, then the State has been found to bear part responsibility for the occurrence of the ill-treatment itself, and the general measures required of the State will be more extensive, taking on a preventive dimension rather than a purely investigatory one.[35]

The potential for confusion is further illustrated by the extremely similar case of *MGC v Romania* (61495/11, 15 March 2016), which closely followed *MC v Bulgaria*, but with a crucial distinction: the

[33] Compare with *A v United Kingdom* (25599/94, 23 September 1998) at §22: 'Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity …'

[34] Compare *MC v Bulgaria* (39272/98, 4 December 2003) at §177-184 with *CAS and CS v Romania* (26692/05, 20 March 2012) at §73-83.

[35] For a discussion of the system of general measures, see Council of Europe (2008) at 26-29.

perpetrator, although not convicted of rape, was convicted of the lesser offence of sexual intercourse with a minor. Most likely, the violation in *MGC v Romania* was just procedural, based on the failure to properly investigate whether the applicant had consented to the intercourse;[36] but the bundling of substantive and procedural obligations together in the analysis allows for a plausible reading of the decision as having found a substantive violation on the basis that the perpetrator was convicted of a criminal offence deemed not serious enough to be a sufficient deterrent. This would be a significant extension of the principles set down to date on deterrence, and it is unsatisfactory that the judgment did not clarify whether this was what the Court was holding.

The failure to adequately delineate substantive and procedural violations in these judgments leaves doubt as to the response demanded of the respondent States on foot of the violations found. Must the general measures include legislative reform of the criminal law; or an alternative interpretation and application of the law by the domestic courts; or a new approach to the investigation of offences, including such matters as procedural reforms in the handling of investigations or specialised training for investigating officers; or all of the above? As formulated, the judgments in *MC* and *MGC* do not make it sufficiently clear which of these reforms is essential to achieve future compliance with Convention obligations, which makes fulsome and effective execution of the judgment (and supervision of same by the Committee of Ministers) more challenging. This in turn increases the likelihood of repetitive applications involving the same State in the future.

4. Remedies against the State

Of the various inconsistencies arising in the child protection case law of the ECtHR, the most difficult to untangle is the approach of the Court to the question of whether a case in which a violation is found of Article 3 or 8 also involves a violation of Article 13 by virtue of a failure to provide the applicant with an effective remedy in domestic law.[37] Numerous child protection cases have found with little difficulty that an Article 13 violation follows; while other judgments have expressly ruled out a violation of Article 13, often with little justification provided for this finding. As a starting point for this discussion, it is apposite to quote the text of Article 13 in full:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

4.1 Scope of the Right to an Effective Remedy

Article 13 does not entitle a victim to a remedy against a private actor (although, as seen in Part 2.1 above, the provision of a remedy against a private actor may come within the scope of the State's positive obligation to deter ill-treatment). In *Z v United Kingdom* (29392/95, 10 May 2001), the Court held that the right is to a remedy against the State on foot on any acts or omissions on the part of State officials or bodies involving the breach of Convention rights, and compensation for the non-

[36] See §72-74: 'The investigation and its conclusions must be centred on the issue of non-consent … That was not done in the applicant's case … the Court finds that the investigation of the applicant's case and, in particular, the approach taken by the national courts, in the context of a lack of a consistent national practice in the field, fell short of the requirements inherent in the States' positive obligations to apply effectively a criminal-law system punishing all forms of rape and sexual abuse against children.'

[37] On Article 13, see generally Council of Europe (2013).

pecuniary damage flowing from the breach should in principle be part of the range of available remedies (§109). As such, the inability of the applicants to secure compensation before the national courts for the failure of State authorities to protect them from abuse (in violation of Article 3) grounded a separate violation of Article 13. The same line of reasoning was applied in *O'Keeffe v Ireland* (35810/09, 28 January 2014). The right to an effective remedy was found to also arise on foot of procedural violations due to inadequate investigations in *Assenov v Bulgaria* (24760/94, 28 October 1998). Indeed, the case law goes so far as to establish that it may arise in cases not disclosing any substantive or procedural violation. In *DP and JC v United Kingdom* (38719/97, 10 October 2002) (discussed in Part 2.3 above), a violation of Article 13 was found in circumstances where the applicants' complaints raised arguable claims of violations of the Convention, but the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that State authorities failed to protect them from serious ill-treatment or obtaining compensation for the damage suffered thereby (§136-138).

Any remedies granted should clearly acknowledge fault on the part of the State. Thus, a criminal conviction of a perpetrator is not a sufficient remedy: in *O'Keeffe*, the Court specifically stated that the criminal conviction, while central to the procedural guarantees of Article 3, was not an effective remedy within the meaning of Article 13 the Convention (§179). The Court also stipulated that an award of damages arising from a civil action against the abuser was insufficient, as was an *ex gratia* payment from the Criminal Injuries Compensation Tribunal (§179). The latter was also found to be an inadequate remedy in *Z v United Kingdom* (§107-111).

Article 13 is central to the underlying principle of the subsidiarity of the ECHR to national law. Coupled with the admissibility criteria set down in Article 35, it aims to keep cases away from the Strasbourg Court by requiring that States Parties provide a system in which violations of Convention rights can be effectively remedied before a national authority. As noted in *Kudla v Poland* (30210/96, 26 October 2000):

> Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux preparatoires*, is to provide a means whereby individuals can obtain relief at a national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. (§152)

It is only where national authorities fail to provide a remedy that the ECtHR will become involved.

On its face, the text of Article 13 seems clear that every case in which a remedy in domestic law was denied, but in which the applicant subsequently establishes a violation of a Convention right before the ECtHR, should involve a finding of a violation of Article 13. However, it will be seen below that multiple child protection cases depart from this interpretation. Since no explanation is provided in these cases for why the Article 13 complaint was rejected, it is necessary to briefly examine the broader body of case law on Article 13 so as to establish the limits of the right to an effective remedy, and consider whether or not a justification exists for the approach taken in the child protection cases.

The case law on Article 13 is somewhat muddled on the question of whether every breach of a substantive Convention provision also entails a breach of Article 13. It has been suggested that Article 13 merely requires that a complaint regarding a breach of a Convention right be ventilated before a national authority, and not that a remedy actually be granted. In *Pine Valley Developments*

v Ireland (12742/87, 29 November 1991), a violation was found of Article 1 of the First Protocol (right to private property) taken together with Article 14 (freedom from discrimination). However, notwithstanding the fact that no remedy had been provided before a national authority for this violation, the Court declined to find a separate violation of Article 13. It was held that:

> The applicants not only could but also did raise the substance of their Convention complaints (including that relating to the discriminatory effect of the 1982 Act) before the Irish courts in the second Pine Valley case ... And it has to be recalled that the effectiveness of a remedy, for the purposes of Article 13 (art. 13), does not depend on the certainty of a favourable outcome (see, inter alia, the Soering judgment of 7 July 1989 …). (§66)

This position seems difficult to square both with the text of Article 13 (which says that '[e]veryone' whose rights are violated 'shall have an effective remedy', and not merely a potential avenue to pursue a remedy) and with other judgments of the Court. While the procedural obligation to carry out an effective investigation has been repeatedly described in the case law as an obligation of means, not one of result (i.e. it need not lead to a conviction),[38] the obligation under Article 13 seems more likely to be an obligation of result (i.e. an effective remedy must be provided). Multiple subsequent judgments have held that '[t]he effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief'.[39] Surely, in any case disclosing a violation of a Convention right, the requirement to 'grant appropriate relief' applies, and not just a lesser obligation to allow the complaint to be ventilated?[40]

Soering v United Kingdom (14038/88, 7 July 1989), cited by the Court in *Pine Valley Developments*, does not seem to provide sound authority for the decision. In *Soering*, a violation of Article 3 was found in respect of the proposed extradition of a prisoner from the UK to the US, where he was likely to face the death penalty following a considerable period of time on death row (§111). It is true that the Court declined to find a separate violation of Article 13; however, there is a crucial distinction between *Soering* and *Pine Valley Developments*. The Court in *Soering* pointed out that the applicant could have pursued judicial review of the extradition decision at a different point in time and relying on different grounds (§122). It was in that context that the Court observed that the effectiveness of a remedy does not depend on certainty of a favourable outcome. There had been a reasonable course of action available to the applicant in domestic law; he should have pursued it, and cannot complain of an absence of domestic remedies having failed to do so.[41]

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[38] See, e.g., *CAS and CS v Romania*, 26692/05, 20 March 2012 at §70.

[39] See, e.g., *Conka v Belgium* (51564/99, 5 February 2002) at §75, and *Kudla v Poland* (30210/96, 26 October 2000 at §157). Lee (2015) at 34 states that '[t]he principle of effectiveness comprises two distinct aspects. It ensures, first, the availability of an effective mechanism for determining liability for breaches of Convention rights, and, secondly, the granting of relief in cases where breaches are well-founded … In this respect, Art. 13 is closely linked with Art. 41 which provides for "just satisfaction".'

[40] See also *Leander v Sweden* (9248/81, 26 March 1987) at §77: 'where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order *both* to have his claim decided and, if appropriate, to obtain redress' (emphasis added).

[41] Note that even this position seems out of line with a strong line of ECtHR case law that has held that when a remedy has been pursued, use of another remedy which has essentially the same objective is not required: see, e.g., *O'Reilly v Ireland* (24196/94, 22 January 1996); *TW v Malta* (25644/94, 29 April 1999) at para 34; *Moreira Barbosa v Portugal* (65681/01, 29 April 2004); *Jeličić v Bosnia and Herzegovina* (41183/02, 15 November 2005); *Shkalla v Albania* (26866/05, 10 May 2011) at §61; *Leja v Latvia* (71072/01, 14 June 2011) at §46; and *O'Keeffe v Ireland* (35810/09, 16 June 2012 (Chamber)) at §85.

This is clearly distinguishable from the position in *Pine Valley*, where the applicants had unsuccessfully pursued multiple arguments all the way to the Supreme Court, and no alternative domestic remedy was identified by the Court (§12-27). *Pine Valley Developments* takes the *Soering* rule that you cannot claim a breach of Article 13 if you failed to pursue a potentially viable domestic remedy, and converts it into the very different rule that Article 13 does not require that you actually be granted a remedy before a national authority, provided that you had some outlet to ventilate your complaint. This position (if correct and applied rigorously) would make it almost impossible to establish a violation of Article 13 in the vast majority of cases, since the requirement under Article 35 to exhaust domestic remedies means that almost all applicants to the Strasbourg Court will have ventilated their complaint in unsuccessful domestic litigation. Moreover, by deeming unsuccessful domestic litigation to be an 'effective remedy', it would require subsequent applicants in similar cases to pursue what would effectively be futile domestic litigation before taking a case to Strasbourg. This is out of line with the well-established ECHR principle that futile domestic remedies need not be exhausted.[42]

4.2 Inconsistent Application of Article 13 in Child Protection Cases

In the child protection case law, a number of clear examples suggest that *Pine Valley Developments* was incorrectly decided on this point. In *Z v United Kingdom* (29392/95, 10 May 2001), discussed above, the applicants (who social services had left in the family home, exposed to severe abuse and neglect, for several years) had pursued a claim in negligence against the local authorities all the way to the House of Lords (§57-68). On the face of it, to borrow the phrasing of the Court in *Pine Valley Developments*, they 'not only could but also did raise the substance of their Convention complaints' at the highest level in the domestic courts. But precisely because this domestic litigation ruled out the possibility of a remedy being granted, it was found that there was a violation of Article 13. The pattern in *O'Keeffe v Ireland* (35810/09, 28 January 2014) is extremely similar; again, the applicant had argued before the domestic courts at first instance and on appeal that the State bore partial responsibility for her abuse by a school principal, but her case was rejected (§22-48). And again, it was the very fact that domestic litigation did not provide her with an effective remedy that grounded a violation of Article 13. The State argued that alternative causes of action were available to her which could in principle have succeeded; but, in contrast to *Soering*, the Court found that these causes of action would not have succeeded even if pursued (§183-186).

Both *Z v United Kingdom* and *O'Keeffe v Ireland* are therefore incompatible with any suggestion that the mere existence of an avenue to ventilate a complaint is sufficient to discharge the obligation under Article 13; on the contrary, they are more in line with a literal reading of the provision which requires that a remedy must actually have been granted (subject perhaps to the exception arising from *Soering* where a reasonable cause of action was not pursued). This would suggest that in any child protection case where a violation of Article 3 or 8 (or indeed Article 2 or 4) is found, and no effective remedy has been granted in domestic law (which is a given in cases before the ECtHR, since anyone granted an effective remedy can no longer claim to be a victim of a violation), a separate violation of Article 13 should follow.

[42] See, e.g., *Selmouni v France* (25803/94, 28 July 1999) at §74 and *A, B and C v Ireland* (25579/05, 16 December 2010) at §149. In *Akdivar v Turkey* (21893/93, 16 September 1996), it was held that where there was no evidence of State compensation having been provided in a single similar case to that before the court, there was therefore no need to exhaust domestic remedies.

However, other child protection cases depart decisively from this approach. While in some cases, the applicant rather curiously did not raise any issue under Article 13,[43] there are a number of judgments in which Article 13 was relied on, but in which the Court expressly rejected the complaint that it had been violated. These cases are notable for the paucity (and, on occasion, complete absence) of any reasoning justifying the decision. For example, in *MC v Bulgaria* (39272/98, 4 December 2003), the Court dismissed the Article 13 complaint in a single sentence:

> The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention. It also holds that no separate issue arises under Article 13 of the Convention. (§187)

The complete failure of the Court to articulate any reasons for its rejection of the Article 13 complaint in this case is both disappointing and out of line with the express requirement in Article 45(1) of the ECHR that '[r]easons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.'

Söderman v Sweden (5786/08, 12 November 2013) is not much better in this regard, although it hints at some sort of reasoning: 'In the present case, it [i.e. the Court] considers that the applicant's complaint concerns exclusively the remedies available to her against her stepfather, not those available against the State to enforce the substance of a Convention right or freedom at the national level' (§57). Here, we see the Court trying to distinguish between remedies sought against the State and remedies sought against private individuals, holding that a violation of Article 13 would only arise in respect of the former. In simple terms, the applicant in *Söderman* never tried to sue the State in the domestic litigation. However, this distinction is unconvincing, in that the violation for which the State was responsible arose precisely out of its own inaction in failing to enact domestic laws that would have provided the applicant with a remedy against her stepfather, and its consequent failure to provide an effective deterrent against the type of rights violation seen in that case.[44]

If responsibility for a violation lies solely at the feet of a private individual, with no State culpability, then it would make sense to say that there is no violation of Article 13 (or indeed any other Article) by the State. However, as soon as the State is found in breach of positive obligations (as it was in *Söderman*), then a violation of Convention rights has occurred for which the State is responsible. The plain text of Article 13 and the approach taken in *Z v United Kingdom* and *O'Keeffe v Ireland* would suggest that if no remedy for this violation has been afforded to the applicant before a national authority, a violation of Article 13 should follow. All three cases involved a failure by the State to discharge a positive obligation by implementing measures which might have prevented the ill-treatment from occurring; and in none of the three cases was the applicant able to obtain a remedy

[43] See, e.g., *CAS and CS v Romania* (26692/05, 20 March 2012); *Eremia v Moldova* (3564/11, 28 May 2013), and *DMD v Romania* (23022/13, 3 October 2017). Most curious in this regard in *ES v Slovakia* (8227/04, 15 September 2009), where the applicant successfully secured a declaration of a breach of rights in the Constitutional Court. At §33, this was found (for the purposes of determining admissibility) not to be an effective remedy because no compensation was paid. If it was not an effective remedy for admissibility purposes, then most likely it would have been found not to be an effective remedy for the purposes of Article 13; so although Article 13 was not pleaded in that case, it almost surely would have been successful if it was.

[44] See §117, in which the Court's concluding reason for finding a violation of Article 8 was that 'neither a criminal remedy nor a civil remedy existed under Swedish law that could enable the applicant to obtain effective protection against the said violation of her personal integrity in the concrete circumstances of her case.'

before a national authority for this failure (which, as discussed earlier, should in principle include financial compensation).[45] So why was a violation of Article 13 only found in two of the three?

Thus, a principled dividing line cannot to be identified by reference to whether the violation occurred at the hands of the State or of a private individual; nor can one be situated at the dividing line between substantive and procedural violations, as is clear from *Assenov v Bulgaria* (24760/94, 28 October 1998). In that case, the Court found that no substantive violation had occurred; but having found that there was a procedural violation, the Court held that this almost automatically led to a separate violation of Art 13:

> Where an individual has an arguable claim that he has been ill-treated in breach of Article 3, the notion of an effective remedy entails, in addition to a thorough and effective investigation of the kind also required by Article 3 …, effective access for the complainant to the investigatory procedure and the payment of compensation where appropriate … The Court refers to its above findings that Mr Assenov had an arguable claim that he had been ill-treated by agents of the State and that the domestic investigation of this claim was not sufficiently thorough and effective. It follows from these findings that there has also been a violation of Article 13 ... (§117-118)

The contrast between *MC v Bulgaria* and *Assenov* seems particularly stark. In both cases, a significant part of the complaint was that allegations of ill-treatment had not been effectively investigated. This was upheld in both cases, for very similar reasons; but the complaint of a violation of Article 13 was quickly upheld in *Assenov*, but summarily dismissed in *MC*.

Aside from the inconsistent approach to finding violations of Article 13, a further difficulty is a tendency in some judgments to blur the lines between the procedural obligation to investigate allegations of ill-treatment and the Article 13 obligation to provide a remedy for failures to deter or prevent ill-treatment. Some older cases had sown the seeds for this confusion by locating the obligation to investigate allegations of torture and ill-treatment in Article 13 rather than in the procedural limb of Article 3.[46] This confusion has spilled over into several recent child protection cases.

In *VK v Russia* (68059/13, 7 March 2017), the Court, having found both substantive and procedural violations following the ill-treatment of a child at a public nursery school, dismissed the Article 13 complaint on the grounds that it raised the same issues as the procedural violation, and that it was thus unnecessary to examine it separately (§196). This ignores the fact that the applicant had not been able to obtain a remedy before a national authority for the failures that led to the procedural violation; while the question of whether the applicant been provided with an effective remedy for the substantive violation was completely ignored. In *DMD v Romania* (23022/13, 3 October 2017), while no violation of Article 13 was claimed by the applicant, a procedural violation of Article 3 was found, *inter alia*, due to the fact that the applicant did not receive compensation either for the ill-treatment inflicted on him or for the delays in the investigation and prosecution of the ill-treatment (§47-48). The provision of compensation at national level is not normally viewed as a relevant factor to determining whether a substantive or procedural violation has occurred; whereas, as seen in *Z v United Kingdom* and *O'Keeffe v Ireland*, it is central to determining whether Article 13 has been violated. Thus, the judgment in *DMD* is unhelpful in its conflation of these issues.

[45] *Z v United Kingdom* (29392/95, 10 May 2001) at §109.
[46] See, e.g., *Aksoy v Turkey* (21987/93, 18 December 1996) at §98.

The clearest example of confusion between procedural obligations and Article 13 in the child protection case law is *Kemaloğlu v Turkey* (19986/06, 10 April 2012), in which the applicants argued 'there had been no effective remedy capable of holding accountable those responsible for the death of their son', who had frozen to death following the failure of a school principal to notify the transport provider that the school was closing early due to a snow storm (§30). The Court stated that it was 'called upon to examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have amounted to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victims' (§43), which shows the complaint to be directly analogous to the Article 13 complaint in *Z v United Kingdom*. Nevertheless, the Court chose to examine this complaint under the procedural limb of Article 2, ultimately finding a violation due to the excessive delays and 'the failure of the domestic courts to hold accountable those responsible for the death of the applicants' child and to provide an appropriate redress to the applicants' (§46). Conversely, in *DP and JC v United Kingdom* (38719/97, 10 October 2002), complaints of an ineffective investigation were considered under Article 13 rather than Article 3. Both of these cases appear to have incorrectly categorised these complaints.

As with the inconsistent approach to demarcating substantive and procedural violations, the inconsistent approach to finding separate violations of Article 13 becomes most relevant in the context of the measures of implementation required of a State found to have violated the Convention. All cases involve both specific measures of execution (addressed to the applicant) and general measures of execution (addressed to the legal system and society at large). In the context of remedies, a successful applicant will be awarded just satisfaction by the Court (usually involving compensation) as a specific measure of implementation. Since this will happen whether or not a separate violation of Article 13 is found, and the level of compensation that the ECtHR awards is generally quite modest, it will most likely make little concrete difference to the applicant whether a separate violation of Article 13 is found (other than the personal satisfaction and vindication that this would bring). The issue is more pressing for other, similarly situated victims of ill-treatment. If a separate violation of Article 13 is found, then the State will be required, as part of its general measures, to take steps to provide a remedy (usually in the form of financial compensation) for victims whose case is clearly established, and to ensure that a mechanism exists whereby claims for compensation for ill-treatment analogous to the case adjudicated on can be heard by a national authority. An example of such a general measure of implementation is the redress scheme for victims of sexual abuse in primary schools established by the Irish Government in response to the judgment in *O'Keeffe v Ireland*.[47]

However, if no separate violation of Article 13 is found, then there will be no general measures required of the respondent State to provide remedies to similarly situated victims. As a result, other victims would have to litigate their claims in the same way as the applicant in the original Strasbourg proceedings. Their prospect of doing so successfully will depend in large part on the extent to which judgments of the ECtHR are applicable (and taken seriously) in the domestic courts. If they are, then the precedent set in the relevant Strasbourg judgment may provide them with a winning argument (although they would still be forced to undertake the costs, delays and stress inherent in litigation, which can be avoided by an out-of-court redress scheme). But conversely, if ECtHR judgments are not applicable or influential in domestic courts, then it is entirely possible that subsequent applicants will, like the original applicant, be unable to secure a remedy at national level, and will be forced to

[47] Government of Ireland (2018) at 9-11.

take a repeat application to Strasbourg. This is clearly out of keeping with the system of subsidiarity envisaged by the Convention, of which Article 13 is a crucial component.[48]

5. Conclusion

This paper has aimed to provide the first comprehensive sketch of the outlines of States Parties' obligations under the ECHR to protect children from ill-treatment at the hands of private individuals, and to untangle a number of difficulties and inconsistencies arising from the case law to date. In doing so, the impressive scope of those obligations has been highlighted, including obligations arising before ill-treatment occurs (including effective deterrence and mitigation of risk); obligations to respond to ill-treatment that is ongoing; and obligations arising after ill-treatment has occurred (including procedural obligations to investigate complaints of ill-treatment, and an obligation to provide an effective remedy in domestic law for acts or omissions of the State that contributed to rights violations). The obligations recognised by the ECtHR over several decades of jurisprudence are strikingly coherent with (and, at times, expressly influenced by) Article 19 of the CRC; and they add to that body of material an element of concrete illustration provided by the factual matrices of the various cases that can serve as a valuable guide to States as to what they should and should not do in the sphere of child protection.

While the scope of the obligations is impressive, the reasoning underpinning some of the judgments is somewhat less so, with confusion and inconsistency in evidence on a number of points. It was acknowledged in the introduction that this is not unique to this line of ECtHR case law, or even to the ECHR itself: the construction of positive obligations to protect individuals from rights violations at the hands of private actors has proven a difficult task across international human rights law (Hakimi, 2010). But that does not change the fact that the child protection case law contains various inconsistencies of the kind that the ECtHR aspires to avoid. Obvious and glaring inconsistencies should be addressed if the jurisprudence is to develop in an effective and coherent manner, especially where those inconsistencies have negative impacts on the human rights outcomes that will be achieved by the judgments.

The fact that some cases find violations of both Articles 3 and 8, while others expressly exclude Article 8 once a violation of Article 3 has been found, is primarily a matter of rigour: any Court should seek to avoid anomalies of this nature, but nothing especially negative flows from this particular one. The same cannot be said of the Court's failure to clearly and consistently distinguish between substantive and procedural violations, which is crucial to the framing of whether the State's faults arose before, during or after the occurrence of the ill-treatment in question (and thus crucial to the framing of what is required of the State by way of execution of the judgment). The inconsistent approach to whether a separate violation of Article 13 is found is even more problematic. The case law often falls short of basic ECHR standards by failing to provide any reasons for the decision on this point, and the judgments that have declined to find a violation of Article 13 create a situation where repeat cases for similar violations are likely to find their way to Strasbourg.

[48] See *Kudla v Poland* (30210/96, 26 October 2000) at §155: if States fail to provide effective remedies, 'individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened'. See further Council of Europe (2013) at 7-9.

This undermines the subsidiarity of the ECHR and the machinery for ensuring the execution of judgments.

On the plus side, the above difficulties could be addressed quite easily. When lawyers argue that ill-treatment violates both Articles 3 and 8, and the treatment is found to reach the Article 3 threshold, the cleanest solution would be to always decline to consider the alleged Article 8 violation unless some clearly distinguishable factual issue can be identified to separate out the violations. Substantive and procedural violations should be addressed separately, using headings that make consistent use of that terminology, so that it is always clear which limbs of the relevant provisions have been violated and why. This in turn will clarify what measures of implementation are required of the respondent State, as well as of other States Parties in future. And finally, in any case where Convention rights have been violated, and the applicant has not foregone some reasonable domestic remedy against the State, a separate violation of Article 13 should be found. This in turn will compel the respondent State, as part of its general measures, to provide remedies to similarly situated victims, which will serve to keep repeat litigation away from the Strasbourg court (as Article 13 is intended to ensure).

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