

EXPERT PAPER

Constitutionalising Children's Rights and Domestic Courts of Member States of the Council of Europe

Julia Sloth-Nielsen
Michelle Oriel

Deutsches Kinderhilfswerk (German Children's Fund) has been working for more than 45 years as a lobbyist for a child-friendly Germany, promoting children's rights and overcoming child poverty in Germany. The non-profit association initiates and supports measures and projects, which promote the participation of children and young people regardless of their background or residence status. The political advocacy work aims at the full implementation of the UN Convention on the Rights of the Child in Germany, particularly in the areas of participation of all children, their interests in legislative and administrative measures as well as the fight against child poverty and the equal participation in society of all children in Germany.

This expert paper was produced as part of a project by the Coordination Office for Children's Rights of Deutsches Kinderhilfswerk. The Coordination Office for Children's Rights supervises and supports the implementation of the current Council of Europe Strategy for the Rights of the Child (Sofia strategy 2016-2021) and is funded by the Federal Ministry of Family Affairs, Senior Citizens, Women and Youth.

This expert paper was written by:

Prof. Julia Sloth-Nielsen, Professor, Department of Public Law and Jurisprudence, University of the Western Cape and Professor of Children's Rights in the Developing World, University of Leiden

Michelle Oliel, Executive Director of the Stahili Foundation and Deputy Director at The Talsky Center for Human Rights of Women and Children at Michigan State University

IMPRINT

Publication series of Deutsches Kinderhilfswerk e.V. – issue 7

Deutsches Kinderhilfswerk e.V.

Leipziger Straße 116-118

10117 Berlin

Fon: +49 30 308693-0

Fax: +49 30 308693-93

E-Mail: dkhw@dkhw.de

www.dkhw.de

Authors:

Prof. Julia Sloth-Nielsen

Michelle Oliel

Edited by:

Linda Zaiane

Hannah Nicklas

Layout:

Florence Baret

© 2019 Deutsches Kinderhilfswerk e.V.

Table of Contents

I. Introduction	4
II. Children’s rights as constitutional rights	6
1. Venice Commission and its recommendations	7
2. UN Committee on the Rights of the Child	8
III. Children as rights holders	12
1. General principles of children’s rights	12
a) Non-discrimination (Article 2, CRC)	13
b) Best interests of the child a primary consideration (Article 3, CRC)	13
c) Right to life, survival, and development (Article 6, CRC)	14
d) The right to express views freely in all matters (Article 12, CRC)	14
2. Reservations	15
IV. Approaches to incorporation	16
1. Monist approach	16
2. Dualist approach	17
a) The South African Example	18
V. Overview of member States and constitutions	21
1. Rights-based approach	21
a) Right to health	22
b) Families and children outside of parental care	23
2. Children as objects of special protection	23
3. General principles of the CRC	24
a) Non-discrimination	24
b) Best interests of the child	25
c) Right to life, survival, and development	26
d) Right to be heard/express views freely	26
VI. Children’s rights before national courts	27
1. General principles	30
a) Non-discrimination	30
b) Best interests of the child	31
c) Right to life, survival, and development	34
d) Respect for the views of the child	34
VII. Conclusions	37

I. Introduction

This year marks the thirtieth anniversary of the adoption of the United Nations Convention on the Rights of the Child (“CRC”).¹ The CRC – which has been ratified by all European Union (“EU”)² and Council of Europe (“CoE”) member States – sets out the civil, political, economic, social and cultural rights that all children are entitled to. It further requires that States, *inter alia*, incorporate children’s rights in national legislation and decision-making as an essential component in the protection, promotion, and monitoring of rights. CoE member States have incorporated the CRC in their domestic frameworks through a number of means: special consolidated statutes concerning the rights of children, areas such as family law, and by providing constitutional guarantees for children.³

The manner in which the CRC has been incorporated by States Parties varies significantly. As noted by Kilkelly, “[t]he variety of social, economic and political factors involved mean that it is not possible to establish the cause and effect of any particular measure with reliability or certainty...”⁴ Legal incorporation is a process which takes “different forms and paths depending on the national context...[and] its achievement may need to be done in stages...” and requires careful sensitisation, education, deliberation, and consultation with all key stakeholders.⁵ Likewise, there is no particular order in which a States Party should pursue both legal and non-legal implementation measures.⁶ In that way, legal incorporation is also just one part of general implementation measures pursuant to the CRC.⁷

Implementation of the CRC, however, requires that provisions of the CRC can be directly invoked by children and their representatives before the courts, applied by all States Parties, and in a manner which gives the CRC supremacy over national laws and practices in the event of a conflict.⁸ When an explicit reference to children’s rights is included in national constitutions and prevails in cases of conflict, it can provide binding standards for legislative, policy, and regulatory measures. Since the adoption of the CRC thirty years ago, a growing body of jurisprudence in domestic courts across the CoE has served to illuminate the challenges and limitations.⁹ These challenges relate largely to the particular legal tradition, the nature of the domestic legal order, and whether a particular State has embedded children’s rights in its legal or constitutional order and accorded it supremacy, among other things.¹⁰

1 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577, p. 3 (hereinafter “CRC”). See also UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000; UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263; UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure : resolution / adopted by the Human Rights Council*, 19 December 2011.

2 The Court of Justice of the European Union has recognised the need to respect children’s rights and requires EU law to take due account of the CRC (*European Parliament v Council of the European Union*, (2006) ECR 5769, Case C-540/03, para. 37).

3 The UN Committee has welcomed the enactment of consolidated statutes for children. Both Spain and Romania, for example, have special statutes (see Organic Law on the Legal Protection of Minors; Law no. 272/2004).

4 Kilkelly, U., (2019): “The UN Convention on the rights of the child: incremental and transformative approaches to legal implementation, *The International Journal of Human Rights*, DOI: 10.1080/13642987.2018.1558974, p. 2 (‘Kilkelly (2019)’).

5 Kilkelly (2019), pp. 10-11.

6 Kilkelly (2019), p. 11.

7 The implementation of the CRC also requires non-legal measures including, the collection of comprehensive data on children, training for those working with children, child-friendly budgets, as well as other general awareness-raising activities, among others.

8 Liefwaard, T. and Doek, J. (eds.), “Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (Springer, 2015), p. vii.

9 *Ibid*, p. 3.

10 *Ibid*.

This paper will assess, in a non-exhaustive fashion, the manner in which CoE member States have incorporated some key aspects of the rights of the child into their constitutions as well as the effect and applicability of children's rights before domestic courts. Before so doing, this study will explore the importance of children's rights, the relevant principles of children's rights pursuant to the CRC which are to guide States in the holistic implementation of rights, as well as the methods by which CoE member States incorporate the CRC into their normative frameworks.

II. Children’s rights as constitutional rights

The foundation of the rights of the child in the CoE is provided in the CRC, the European Convention on Human Rights¹¹ as well as other legal instruments addressing the specific rights of children.¹² While constitutions typically outline the structure of government and the means by which the government will operate, *inter alia*,¹³ they can also include the human rights principles to guide legislation as well as government policies and action.¹⁴

The “constitutionalisation” of children’s rights by incorporating reference to other texts such as the CRC is an emerging practice and the “predominant method” to incorporate children’s rights into domestic orders, among others.¹⁵ Constitutional incorporation demonstrates “a commitment to the recognition of children’s rights at the highest level”.¹⁶ When child-focused rights-based provisions are entrenched in constitutions, they form part of the legal order, making them harder to erode and assuring that they take precedence over all other national laws with which they may be in conflict.¹⁷ They are a “springboard” from which to change legal and policy frameworks¹⁸ and can help promote awareness and provide legitimacy to such rights.¹⁹ Constitutionalised, children’s rights become an important frame of reference for the formulation and implementation of legislation²⁰ and “strengthen children’s standing before the courts”.²¹

According to O’Mahony, “the absence of specific constitutional protection for children’s rights can be the very reason for the subordination of children’s interests to those of adults”.²² In countries where rights have been constitutionalised, they “infuse a dynamic and expanding field of judicial activity”.²³ O’Mahony argues that the inclusion of child-specific provisions as well as protection for the general principles of the CRC “has the potential to recalibrate the decision-making process so that children’s interests and the

11 The Convention applies equally to children as it does to adults.

12 The various instruments which have been adopted by the CoE will not be explored in this paper.

13 Broadly, constitutions can be classified into unitary and federal constitutions.

14 O’Mahony, C. “The Promises and Pitfalls of Constitutionalising Children’s Rights” in Dwyer (ed), *The Oxford Handbook of Children and the Law* (Oxford, Oxford University Press, 2019); Lundy, L., Kilkelly, U., Byrne, B. & J. Kang, “The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries” (UNICEF: 2012), available online <https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Fileupload,368351,en.pdf> (accessed 24 January 2019), p. 131.

15 Council of Europe, Parliamentary Assembly, Committee on Social Affairs, Health and Sustainable Development, Explanatory memorandum by Rapporteur Mr Preda, Report Doc. 13787 (6 May 2015) (“Explanatory Memorandum by Rapporteur Mr Preda”), para. 13.

16 Kilkelly (2019), p. 5.

17 *Ibid.*, p. 4; Lundy, L. et al. (2012), *supra* note 10, p. 58; Duncan, B, “Constitutional Reforms in Favor of Children” (UNICEF: 2008), available online https://www.unicef.org/policyanalysis/files/Constitutional_Reforms_in_Favour_of_Children.pdf (accessed 24 January 2019), p. 3; Explanatory memorandum by Rapporteur Mr Preda, para. 9.

18 See O’Mahony, C. (2019), *supra* note 14, p. 4. UNICEF, “Handbook on legislative reform: realising children’s rights”, vol. 1 (New York, 2008), available http://www.unicef.org/crc/files/Handbook_on_Legislative_Reform.pdf.

19 Tobin, J., “Increasingly seen and heard: the constitutional recognition of children’s rights” (2005) 21 *South African Journal on Human Rights* 86, p. 126; Explanatory memorandum by Rapporteur Mr Preda, para. 15.

20 See for e.g. Sloth-Nielsen, J. and Kruse, H, “A Maturing Manifesto: The Constitutionalisation of Children’s Rights in South African Jurisprudence 2007-2012,” *International Journal of Children’s Rights* 21 (2013): 646-678, p. 647. See also Duncan, B. (2008), *supra* note 13, p. 4.

21 Explanatory Memorandum by Rapporteur Mr Preda, para. 15.

22 O’Mahony, C. (2019), *supra* note 14, p. 3.

23 See Sloth-Nielsen and Kruse speaking of the South African experience (Sloth-Nielsen, J and Kruse, H. (2013), *supra* note 20, p. 677.

child's voice and wishes are the central focus of the decision-maker".²⁴ Although the advisable method to incorporate children's rights is by reference to relevant texts such as the CRC, such guarantees alone offer false security. As observed by the UN Committee on the Rights of the Child ("UN Committee"), constitutionalising children's rights does not automatically ensure respect for the rights of children²⁵ and implementation may require that additional legislative and other non-legal measures be adopted.²⁶

While the focus of this study is on the justiciability of children's rights before national courts, it is worth noting that children's constitutional rights can be enforced through independent human rights institutions established particularly for children.²⁷ The establishment of such institutions as well as the establishment of an ombudsman for children's rights was among the primary recommendations of the European Commission for Democracy through Law ("commonly referred to as the "Venice Commission") to establish national tools for enforcing children's rights.²⁸

1. Venice Commission and its recommendations

In 2013, the Venice Commission was seized by the Committee on Social Affairs, Health and Sustainable Development with the question of "how can children's rights be included in national constitutions with a view to thus promoting their effective implementation?" The Venice Commission undertook the study on the protection and promotion of children's rights at the constitutional level and adopted its final report at the Plenary Session in March 2014.

The Venice Commission acknowledged that the CRC embodies the recognition of children as rights-holders and constitutes the "baseline in international law of the protection of children's rights."²⁹ It opined that:

In general, constitutions that express children's rights in a manner reflecting the indivisibility of rights, enshrining the general principles of the CRC and recognising the status of children as rights holders with an entitlement to have those rights upheld against the state, are those which attain the highest degree of compliance with international norms.³⁰

It accordingly recommended, *inter alia*, that member States should provide constitutional guarantees by: (i) recognising children as rights-holders and not merely actors who need protection, notwithstanding the rights granted to the family; (ii) including the best interests of the children principle as a primary consideration in all actions concerning children; (iii) ensuring that children shall have the right to be heard in all decisions that affect them.³¹ The Venice Commission report was notably based, *inter alia*, on the comments and

24 O'Mahony, C. (2019), *supra* note 14, p. 3. See generally Sloth-Nielsen and Kruuse, *supra* note 20; Sloth-Nielsen, J. "Children's rights jurisprudence in South Africa – a 20-year retrospective" (2018).

25 This is illustrated in the Committee's Observations to Belgium where it noted that school fees being imposed greatly contributed to discrimination in the access to education despite the constitutional guarantee of free education (see UN Committee on the Rights of the Child, *Concluding Observations: Belgium*, UN Doc. CRC/C/BEL/CO/3-4 (18 June 2010), para. 66(a).

26 UN Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003 ("UN CRC General Comment No. 5"), para. 21.

27 See UNICEF / Office of Research: *Championing Children's Rights. A global study of independent human rights institutions for children – summary report*, Florence/Italy (October 2012) available online <http://www.unicef-irc.org/publications/669>.

28 Venice Commission Report, para. 146.

29 Venice Commission Report, paras 12, 15

30 Venice Commission Report, para. 26.

31 Venice Commission Report, para. 145.

observations of the UN Committee on the Rights of the Child, which, as will be discussed below, has emphasised the importance of constitutionalising the rights of the child.

Following the work of the Venice Commission, a resolution was unanimously adopted by the Committee on Social Affairs, Health, and Sustainable Development. According to Rapporteur Cezar Florin Preda in his explanatory memorandum to the report on the inclusion of children's rights in national constitutions as an essential component of effective national child policies:

“Even though legislative action alone does not ensure the translation of children's rights into national policy, the inclusion of children's rights in national constitutions may represent a strong signal and starting point for reinforcing national legislation and mechanisms in favour of child protection and development. In this respect, the CRC provides a strong basis for the inclusion of children's rights in constitutions among national measures for the protection of children, without, however, explicitly requesting this.”³²

The resolution called upon member States to, *inter alia*, analyse current constitutional provisions and provide constitutional guarantees for children in line with the recommendations of the Venice Commission.³³

2. UN Committee on the Rights of the Child

The UN Committee on the Rights of the Child – which monitors compliance with the CRC and advises on its implementation³⁴ – issues General Comments on key thematic areas of the CRC. The UN Committee also issues concluding observations which typically indicate the progress achieved by the reviewed State, outline main areas of concern, provide recommendations, and set the date for the submission of the next State report.

The UN Committee has consistently welcomed the recognition of children's rights in national constitutions, and where no such recognition exists, has urged States Parties to amend their constitutions to include children's rights. The inclusion of sections on the rights of the child in national constitutions which reflect key principles contained in the CRC, according to the UN Committee, “underline[s] the key message of the Convention - that children alongside adults are holders of human rights”.³⁵ To ensure effective implementation, the UN Committee has stressed that States which have delegated powers to “subsidiary governments” must ensure that those governments legislate within the framework of the CRC.³⁶ The inclusion of children's rights in national constitutions “does not automatically ensure respect for the rights of children” and implementation may require that additional legislative and other measures be adopted.³⁷

The inclusion of children's rights in national constitutions has been addressed by the UN Committee in its observations to a number of CoE member States. For instance, in its 2014

32 Explanatory Memorandum by Rapporteur Mr Preda, para. 2.

33 *Ibid.*, para. 5.

34 The Committee has issued 24 such comments on a variety of topics, e.g. children living in street situations, HIV/AIDS and the rights of the child, adolescent health, early childhood, children's rights in juvenile justice, to name a few.

35 UN CRC General Comment No. 5, para. 21. See also Explanatory Memorandum by Rapporteur Mr Preda, para. 21.

36 UN CRC General Comment No. 5, para. 21. See UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Austria, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, UN Doc. CRC/C/AUT/CO/3-4, para. 10, where the UN Committee raises concern in relation to harmonising the laws of the Länder. See also Explanatory Memorandum by Rapporteur Mr Preda, para. 20.

37 UN CRC General Comment No. 5, para. 21.

observations to Germany, the UN Committee noted with satisfaction that “most Länder have explicitly recognized children’s rights in their constitutions”. It, however, expressed concern that “children’s rights have not yet been explicitly recognized in the constitutions of Hamburg and Hesse, or in the Federal Constitution (Basic Law)”.³⁸ Accordingly, the UN Committee urged Germany to “take all the necessary measures to ensure that the Convention takes precedence over federal laws through its incorporation into the Basic Law or by any other procedure”.³⁹

In its 2006 Concluding Observations to Ireland, the UN Committee determined that Ireland had not fully incorporated the CRC into its domestic law. It recommended that Ireland adopt constitutional provisions recognising a child’s “right to express their views in all matters affecting them and to have those views given due weight, in particular in families, schools and other educational institutions, the health sector and in communities”.⁴⁰ A commitment was subsequently made by Government to hold a children’s rights referendum and a Joint Parliamentary Committee on the Constitutional Amendment on Children was established to examine how to “elevate the rights of all children in the Constitution and to propose wording for the amendment. O’Mahony contends that intent behind the proposal to amend the constitution “was a concern that the constitutional rights afforded to parents and the family were acting as a barrier to the realisation of children’s rights in the absence of independent protection for the latter”.⁴¹ A consensus on the wording of the referendum was reached in 2010 and a referendum was held in 2012, with 58% to 42% in favour of the amendment. The 2012 referendum resulted in Ireland’s recognition of children as rights holders, among other things.⁴² Both the best interests principle and the right to be heard were included but not, however, formulated as free-standing principles with supremacy in case of conflict. Instead, the Constitution requires that legislation be enacted and limits its applicability to a specified range of court proceedings. As noted by O’Mahony, “it should still be noted that this represents at least some progress, given that the legislation governing proceedings governing either family law or child protection did not previously mandate that the views of the child should be sought as part of those proceedings”.⁴³ The UN Committee welcomed Ireland’s express recognition of children as rights-holders in 2012⁴⁴ and more recently in relation to Norway’s 2014 constitutional amendment, introducing a provision in relation to children.⁴⁵

38 Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Germany*, UN Doc. CRC/C/DEU/CO/3-4 (25 February 2014), para. 9. It should be noted that in 2018, Hesse incorporated an article on children’s rights stipulating the best interest principle, child participation and the right to development.

39 *Ibid.*, para. 10.

40 UN Committee on the Rights of the Child, *Concluding Observations: Ireland*, UN Doc. CRC/C/IRL/CO/2(29 September 2006) (“Concluding Observations: Ireland (2006)”), para. 4(a). Ireland’s constitution had been criticised as being parent and family centric which impeded the realisation of rights for children. See Article 41 of previous Irish Constitution. See also e.g., O’Mahony, C. (2019), *supra* note 14, p. 4 (referring to the UN Committee’s recommendation that it accelerate the recommendations of the Constitution Review Group that a constitutional provision on children’s rights be included to “counteract an imbalance towards the protection of the rights of ‘the family unit’”); Kilkelly, U. and O’Mahony, C., “The Proposed Children’s Rights Amendment: Running to Stand Still?” (2007) 10(2) *Irish Journal of Family Law* 19.

41 O’Mahony, C. (2019), *supra* note 14, p. 4. See generally O’Mahony, C., “Falling short of expectations: the 2012 children amendment, from drafting to referendum”, *Irish Political Studies* (2016) 31:2, pp. 252-281.

42 See Thirty-First Amendment to the Constitution (Children) Act 2012, which was signed into law in 2015. For a discussion on the changes to Article 42A.2.1 concerning state intervention to protect children, see O’Mahony, C. (2019), *supra* note 14, p. 14.

43 O’Mahony, C. (2019), *supra* note 14, pp. 15-17. O’Mahony notes that the right to be heard has been restated in a number of new provisions governing declarations of parentage, applications for guardianship, applications for access, and enforcement orders.

44 Ireland 2006 Concluding Observations, *supra* note 35, para. 4(a).

45 UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Norway*, UN Doc. CRC/C/NOR/CO/5-6 (4 July 2018), para. 3.

In 2014, Norway amended its Constitution to strengthen children's rights. The inclusion of children's rights in Norway's constitution can be traced to a 1993 law commission expert report which recommended the adoption of a Constitutional provision in addition to a Human Rights Act to strengthen the protection of rights. The constitution was subsequently amended, making human rights treaties binding and supreme in Norway's national order⁴⁶ and a Human Rights Act was ultimately adopted. During the debates, the parliamentary committee had encouraged the Government to incorporate the CRC as well as the Convention on the Elimination of All Forms of Discrimination against Women.⁴⁷ The Ministry later proposed the CRC's inclusion which was passed by parliament in 2003.⁴⁸ According to Søvig, the purpose of including the CRC by the parliamentary committee in the Human Rights Act was to "ensure that Norwegian court decisions, to the possible largest extent, reflect the practice of the international supervision bodies" which he argues is indicative that "the legal status of the CRC Committee's practice is not decisive" before Norwegian courts. Norway also made a series of amendments to other relevant legislative acts⁴⁹ and has implemented other non-legal measures. While the Human Rights Act already incorporated the CRC into Norwegian law, a decade later an amendment was made to the Constitution in 2014 which resulted in the adoption of Article 104 of the Constitution of Norway:

Children have the right to respect for their human dignity.

They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development.

For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration. Children have the right to protection of their personal integrity.

The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.

According to Supreme Court Justice Arnfinn Bårdsen, the intention behind adopting this provision was to "strengthen the constitutional protection of certain rights and freedoms already protected elsewhere, in order to make them more resistant against shifting, short-sighted political change".⁵⁰ This amendment and resulting series of amendments to other relevant legislative acts have, according to Søvig, implications for all branches of Norway's government. It has also resulted in other non-legal implementation measures, including, for example, the systematic introduction of "a local practice of applying the Convention in municipalities through a programme called the 'Giant Leap'" which consists of "an analysis and follow-up tool that municipalities can use to ensure that the Convention is applied actively across their services".⁵¹ These are but a few examples of the wide-ranging changes made by Norway as a result of the amendment to its Constitution.

The UN Committee similarly welcomed Austria's adoption of the Federal Constitutional Law on the Rights of Children, noting its direct applicability in the courts as well as provisions protecting the best interests of the child, respect for the views of the child and several

46 See Section 92.

47 Søvig, K. H., 'Incorporating the Convention in Norwegian Law', available online https://www.idunn.no/childrens_rights_in_norway/9_incorporating_the_convention_in_norwegian_law.

48 *Ibid.*

49 *Ibid.*

50 Supreme Court Justice dr. juris Arnfinn Bårdsen, "The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms", "Norway in Europe", Centre for European Law, Oslo 18 September 2017, available <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/supreme-court---constitutional-rights---bardsen18092017.pdf> (accessed 24 January 2019), para. 2.

51 Norway's third report to the UN Human Rights Council under the Universal Periodic Review (UPR) mechanism (4 February 2019), available online https://www.regjeringen.no/contentassets/a9d8cb7a312d-41fe955414f97259b7af/upr_report2019.pdf para. 68.

other rights.⁵² Concern was, however, raised that the law does not include the social and cultural rights of children. The adoption of Austria's amendments are said to be a result of the fact that the CRC's "constitutional status was denied [by Austrian Courts], and Parliament also prevented its direct application by the Austrian authorities."⁵³ Therefore, the CRC could not be relied upon in the Austrian courts. As a result of this lacuna, the Austrian National Coalition for the Implementation of the CRC lobbied for the constitutional inclusion of children's rights with the objective of clearly and comprehensively establishing children as holders of constitutional rights. The intent was "to end the questioning of their capacity to hold and to claim rights, and to establish a binding legal basis for mainstreaming of children's rights into legislation, policy and practice".⁵⁴ Notably, advocates argued for wider protections than were ultimately adopted in Austria. In particular, they argued for greater protection for social (living standard, health, social security) and cultural rights (education in a comprehensive sense, leisure time) of children or specific target groups (e.g. refugee children). Furthermore, budgetary legislation effective as of 2013 imposes mandatory impact assessment of draft legislation on children, making explicit reference to the CRC in accompanying guidance documents.

The UN Committee and academics have in the past addressed the assertion that explicit guarantees for children may be unnecessary as children already hold rights.⁵⁵ In response, the UN Committee opined "[t]he test must be whether the applicable rights are truly realized for children and can be directly invoked before the courts".⁵⁶ Despite the fact that Article 4 does not explicitly mention the role of courts in the implementation of the CRC, the UN Committee has addressed the role of the courts as part of the general mechanisms for the implementation of the CRC.⁵⁷ The important role of courts has been made clear by the UN Committee which, in recent years, has required that States Parties accompany their reports with copies of principal judicial decisions relevant to the CRC,⁵⁸ provide information on the judicial application of some provisions,⁵⁹ and provide information how the principles of the best interests of the child (article 3) and respect for the views of the child (article 12) are addressed and implemented in judicial decisions,⁶⁰ *inter alia*. According to the UN Committee, "[f]or rights to have meaning, effective remedies must be available to redress violations".⁶¹

52 UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Austria, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, UN Doc. CRC/C/AUT/CO/3-4, para. 3(a).

53 Eurochild, 'Mainstreaming Children's Rights in EU Legislation, Policy, and Budget: Lessons from Practice' (February 2014), available https://www.cnape.fr/documents/document-paper_eurochild_mainstreaming-childrens-rights/, p. 18.

54 Eurochild, 'Mainstreaming Children's Rights in EU Legislation, Policy, and Budget: Lessons from Practice' (February 2014), available https://www.cnape.fr/documents/document-paper_eurochild_mainstreaming-childrens-rights/, p. 18. See also Netzwerk Kinderrechte Österreich/National Coalition for the Implementation of the UN Convention on the Rights of the Child Austria, "Supplementary Report on the 3rd and 4th Report of the Federal Republic of Austria to the United Nations, Pursuant to Article 44, paragraph 1b of the UN Convention on the Rights of the Child", available https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUT/INT_CRC_NGO_AUT_14153_E.pdf.

55 UN CRC General Comment No. 5, para. 21. See also Explanatory Memorandum by Rapporteur Mr Preda, para. 18. See also O'Mahony, C. (2019), *supra* note 14 for a discussion on this argument and why "reliance on general provisions as the sole vehicle for providing constitutional protection for children's rights can be problematic and can generate confusion about the precise application of those rights to children".

56 UN CRC General Comment No. 5, para. 21.

57 UN Committee on the Rights of the Child, *General comment no. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, UN Doc. CRC/C/GC/2013.

58 UN Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by State parties under Article 44, Paragraph 1(b), of the Convention*, UN Doc. CRC/C/58/Rev.1 (2005) ("General Guidelines"), para. 7. See also *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child*, CRC/C/58/Rev.3 (3 March 2015) ("Treaty-specific Guidelines"), para. 25. See also *ibid.*, para. 15.

59 General Guidelines, paras 13, 15, 16, 19, 21, 23, 25, 31.

60 Treaty-specific Guidelines, para. 25.

61 UN CRC General Comment No. 5, para. 24.

III. Children as rights holders

The Preamble of the CRC reaffirms fact that children, because of their vulnerability, need special care and attention. At the same time, and as aptly noted by the CoE, children are “fully-fledged holders of human rights and not mere subjects of protection”.⁶² This is in concordance with the status of children as autonomous rights-holders pursuant to the CRC⁶³ which is “...anchored in the child’s daily life from the earliest stage”.⁶⁴

In that way, duty bearers – primarily States⁶⁵ – are obliged to respect, protect and fulfill children’s rights while rights holders (*i.e.* children) are entitled to the fulfillment of their rights from duty bearers. Children are not passive recipients but are to be active participants in ensuring that their rights are promoted, protected, and monitored. As emphasised by the UN Committee, “States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children”.⁶⁶ As noted by O’Mahony, constitutional provisions dedicated to protecting children’s rights have the potential to significantly advance children’s rights, and notably in their recognition as rights-holders.⁶⁷ Constitutions which adopt a protection-only approach portray children as objects of concern and fail to recognise their autonomy or agency.

1. General principles of children’s rights

The rights enshrined by the CRC are reinforced by the four general principles of the Convention: non-discrimination (Article 2), the best interests of the child (Article 3), the right to life, survival, and development (Article 6), and respect for the views of the child (Article 12). The Charter of Fundamental Rights of the European Union endorses two of these four principles in Article 24 (*i.e.* the right to be heard and the best interests principle).⁶⁸ The UN Committee, as will be discussed below, has emphasised the need to enshrine these principles within domestic legal systems.⁶⁹ It opines that such inclusion “helps to underline the key message of the Convention – that children alongside adults are holders of human rights”.⁷⁰

62 Council of Europe, Children’s Rights, available <https://www.coe.int/en/web/children/children-s-rights> (accessed 24 January 2019).

63 See e.g. European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child* (2015), available https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF (accessed 24 January 2019), p. 17.

64 UN Committee on the Rights of the Child, *General comment no. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1 (“UN CRC General Comment No. 7”), para. 14.

65 The CRC also recognises the role and duty of parents and caregivers. Article 5, for instance, provides: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

66 UN CRC General Comment No. 5.

67 O’Mahony, C. (2019), *supra* note 14.

68 As noted by the Venice Commission in its report, “[w]hether Art. 24 contains individual fundamental rights of children or merely ‘principles’ that may be taken into account by courts (notably by the [European Court of Justice]) but may not be invoked by individuals is still the subject of discussion” (Venice Commission Report, para. 47).

69 In 2011, the EU Commission’s Agenda for the Rights of the Child stated that “the standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child” (European Commission, “An EU Agenda for the Rights of the Child”, COM (2011) 0060 final (Brussels)).

70 UN CRC General Comment No. 5, para. 21.

a) Non-discrimination (Article 2, CRC)

EU and CoE law prohibit discrimination on the grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation.⁷¹ Similarly, Article 2 of the CRC ensures rights to every child:

without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Prohibited grounds of discrimination also include sexual orientation and health status (including HIV/AIDS and mental health).⁷² Article 2 of the CRC further instructs states to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. In that way, the non-discrimination principle applies to prohibited grounds of discrimination against the child as well as the child's parents or legal guardians, thereby "insulat[ing] the child from discrimination based on the acts or attributes of the persons with whom the child lives".⁷³

b) Best interests of the child a primary consideration (Article 3, CRC)

Article 3(1) provides that the best interests of the child be a *primary consideration* in all actions concerning children.⁷⁴ The expression "primary consideration" has been interpreted by the UN Committee to mean "that the child's best interests may not be considered on the same level as all other considerations".⁷⁵ The purpose of the best interest principle is to ensure the "full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child".⁷⁶ Constitutionalised, the best interests standard becomes a "benchmark for the review of all proceedings in which decisions are taken regarding children".⁷⁷ In that way, the best interests standard safeguards children's rights against arguments based purely on legal technicalities which do not take into account their individual circumstances.⁷⁸

Despite the relevance of children's rights considerations in increasingly diverse areas of legal and social interaction,⁷⁹ the best interests principle, where reflected in national legislation or constitutions, tends to do so in relation to legislation concerning decision-making about individual children in relation to only certain matters, *i.e.* in family or care

71 See Article 21, EU Charter of Fundamental Rights; Article 14, ECHR (Article 14).

72 See UN Committee on the Rights of the Child, *General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, UN Doc. CRC/GC/2003/4 General Comment No. 4, para. 2.

73 Sloth-Nielsen, J. and Mezmur, B.D., '2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)', *The International Journal of Children's Rights* 16 (2008) 1–28, p. 6.

74 UN Committee on the Rights of the Child, *General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC /C/GC/14 ("UN CRC General Comment No. 14"), para. 11.

75 *Ibid.*, paras 37, 39.

76 *Ibid.*, para. 51.

77 Sloth-Nielsen, J., "The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa", *International Journal on Children's Rights* 4 (1996): 323-344, p. 342.

78 Sloth-Nielsen, J and Mezmur, B.D., "Illicit Transfer by De Gree", 2007 *Law Democracy and Development*.

79 See Sloth-Nielsen, J. (2018), *supra* note 24. Sloth-Nielsen notes that the constitutional best interests principle has been applied in South Africa in diverse fields outside of child and family law such as asset forfeiture, the interpretation of criminal law in a prosecution of an adult for possession of child pornography and in the invalidation of tenders awarded through incorrect processes.

proceedings.⁸⁰ This field should be extended and to that end, the UN Committee recommends that States introduce the right of the child to have his or her best interests taken into account as a primary consideration in its Constitution from which it would have extended and wide-ranging reach.

c) Right to life, survival, and development (Article 6, CRC)

Article 6 of the CRC refers to the child's inherent right to life and the obligation to ensure – to the maximum extent possible – the survival and development of the child. In that way, it brings together civil and political rights as well as social and cultural rights. While a child's right to survival and development have garnered extensive commentary which "warrants a book, if not several volumes",⁸¹ the general acceptance of the child's right to life explains the lack of detailed comment on it.⁸² Suffice to say, the right to survival and development must be implemented in a holistic manner through the enforcement of all other provisions of the CRC, including the rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play.⁸³ More recently, the UN Committee provided that "States must create an environment that respects human dignity and ensures the holistic development of every child".⁸⁴

d) The right to express views freely in all matters (Article 12, CRC)

The notion of children as rights holders is inextricably linked to the right every child has under the CRC (and the EU Charter of Fundamental Rights) to express her or his views freely in all matters affecting her or him.⁸⁵ According to the UN Committee, "even the youngest children are entitled to express their views, which should be 'given due weight in accordance with the age and maturity of the child'".⁸⁶ It imposes a clear legal obligation on States Parties to recognise this right and ensure its implementation by adopting or revising laws.⁸⁷

Children are to be provided the opportunity to be heard in any judicial and administrative proceedings affecting her or him, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁸⁸ The right to be heard is also fundamental to a child's right to a fair trial. In General Comment No. 12, the UN Committee recommends that every judicial procedure concerning minors should be both "accessible and child-appropriate".⁸⁹ In connection with the exercise of this right, States must also ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests. To give meaning to rights and provide effective remedies, the UN Committee has recommended that States Parties need to ensure that effective child-sensitive procedures are available which include child-friendly information, advice, and advocacy, among other things.⁹⁰ Likewise, States Parties are to

80 The Committee has observed that the lack of inclusion of the best interests principle in legislation concerning "health, education and social security which have a bearing on the respect for the rights of the child" (UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 15 January 1995, UN Doc. CRC/C/15/Add.34, para. 11).

81 E. Sutherland, *The Child's Right to Life, Survival and Development: Evolution and Progress*, 26 *Stellenbosch Law Review*, pp. 272-294 (2015), p. 291.

82 *Ibid.*

83 See UN CRC General Comment No. 7, para. 10.

84 UN CRC General Comment No. 14, para. 42.

85 See CRC, Article 12; EU Charter of Fundamental Rights, Article 24(1).

86 See UN Committee on the Rights of the Child, *General comment no. 12 (2009): The right of the child to be heard*, 20 July 2009, UN Doc. CRC/C/GC/12 ("UN CRC General Comment No. 12"); See also UN CRC General Comment No. 7, para. 14; UN CRC General Comment No. 14, para. 54.

87 CRC Committee, General Comment No. 5, para. 12.

88 See also European Convention on the Exercise of Children's Rights (1996), CETS No. 160, Articles 3, 4, 6.

89 UN CRC General Comment No. 12, para. 34.

90 See UN CRC General Comment No. 5, para. 24.

ensure that a child can express her or his views under conditions which take into account the child's individual and social situation and in an environment in which the child feels respected and secure so as to freely express her or his opinions.⁹¹

2. Reservations

Reservations to certain provisions of the CRC are maintained by eleven CoE member States (Belgium, Croatia, Denmark, France, Iceland, Liechtenstein, Luxembourg, the Netherlands, Poland, Spain, and the UK). Notably, a number of CoE member States have withdrawn their reservations in recent years in line with recommendations of the UN Committee.⁹² Most reservations relate largely to freedom of religion (Article 14) and adoption (Article 21). However, some reservations have been made in relation to core provisions. Belgium, for instance, maintains a reservation on the principle of non-discrimination set forth in Article 2 of the CRC which restricts the enjoyment by non-Belgian children of their rights.⁹³ In this vein, it is observed that reservations serve to weaken the ability for children, as rights holders, to fully claim their rights.

91 UN CRC General Comment No. 12, para. 23.

92 While the Venice Commission reported twelve States (Venice Commission Report, para. 42), Austria withdrew its reservation on 28 September 2015, the Government of the Republic of Austria notified the Secretary-General of its withdrawal of the reservations to Articles 13, 15, 17, 38 (2) and (3); Germany withdrew its reservation on 15 July 2010, the Government of the Federal Republic of Germany notified the Secretary-General of its withdrawal of the declarations concerning articles 9, 10, 18, 22 and 38(2).

93 Belgium's reservation reads as follows: "With regard to article 2, paragraph 1, according to the interpretation of the Belgian Government non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals. This concept should be understood as designed to rule out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies." The Committee has recommended that Belgium withdraw its declarations (see e.g. UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Belgium*, UN doc. CRC/C/BEL/CO/34, 18 June 2010, para. 10).

IV. Approaches to incorporation

The status of the CRC and other relevant conventions, as well as the effect of international law in national constitutional and legal systems, varies from one CoE member State to another. Upon ratification of the CRC, States Parties undertake an obligation to implement it by adopting all appropriate legislative and administrative pursuant to Article 4. Implementation has been described as “the process whereby States Parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction”.⁹⁴ The CRC does not, however, dictate the manner in which the CRC is to be implemented. The CRC does itself not create an express obligation for States Parties to ensure that the courts engage with the Convention. States Parties are recommended to find the “appropriate constitutional path” to ensure that the provisions of the CRC and its Optional Protocols will allow it to have a comprehensive legal framework fully incorporating the provisions of the Convention and its Optional Protocols.⁹⁵

Four general factors are relevant to the assessment of the legal effect of the CRC in a particular domestic order. First, the method of incorporation into domestic legal order (monism or dualism).⁹⁶ Broadly speaking, States adopt either a monist or dualist approach to incorporating international law into the domestic legal order. The former approach is more typically prevalent in civil law jurisdictions while the latter is common to common law systems. Second, the hierarchy afforded to the CRC within a domestic legal order. Third, a possible direct effect can be granted to a specific provision. Fourth, the reservations made to provisions of the CRC.

Incidentally, the UN Committee has noted the important need to clarify the “extent of applicability of the Convention in States where the principle of ‘self-execution’ applies and others where it is claimed that the Convention ‘has constitutional status’ or has been incorporated into domestic law”.⁹⁷ It is important to bear in mind that whether a State is a monist or whether it applies the CRC directly or indirectly does not fully illuminate how domestic courts apply the CRC.

1. Monist approach

In member States which adopt a monist approach, international treaties, like the CRC, automatically form part of national law upon ratification. The direct effect refers to the exercise of judicial power to apply international law in the national legal order. In that way, the direct effect operates “as a sword...whereby international rights or obligations pierce the shield of the national legal order”.⁹⁸ The direct effect does not necessarily imply that rights holders can automatically invoke all treaties and provisions and have those taken into account. Domestic courts often examine children’s rights in relation to specific provisions, as will be addressed below.⁹⁹

For instance, Switzerland is a monist state whereby any treaty ratified does not require

94 See UN CRC General Comment No. 5, para. 1.

95 Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, UN Doc. CRC/C/CAN/CO/3-4 (“Concluding Observations: Canada (2012)”), para. 11.

96 This paper will not address the third approach whereby the CRC can be applied both directly and indirectly as in the case of South Africa.

97 UN CRC General Comment No. 5, para. 19.

98 See Nollkaemper, A., “The Duality of Direct Effect of International Law”, *EJIL* Vol. 25 no. 1, p. 112.

99 Venice Commission Report, para. 32.

further implementing legislation in order to take force automatically upon ratification.¹⁰⁰ In its initial report to the UN Committee, Switzerland stated that “[a] provision is directly applicable when this rule, considered in its context and in the light of both the subject and the purpose of the treaty, is unconditional and sufficiently precise to produce a direct effect, to apply as such to a particular case and to constitute the basis for a concrete decision”.¹⁰¹ Swiss Courts have established that in order for the provision in question to have direct effect, it must: (i) relate to the rights and obligations of the individual; (ii) be sufficiently concrete and clear to be applied by an authority or court; and (iii) be aimed at the authorities responsible for applying the law and not at legislatures.¹⁰² The direct application of the CRC is therefore subject to review by the courts. This reality, as will be discussed in the section below concerning children’s rights before courts, is prevalent in domestic courts across the CoE and has an impact on the ability of children to consistently and holistically assert their rights before courts. In France, international treaties can also be directly applied by courts. The French Constitution provides that international treaties have a supra-legislative but under-constitutional status. In effect, international treaties like the CRC prevail over acts of parliament but not over the constitution. The manner in which this approach has worked in practice will be discussed below. It is important to note at this juncture that children’s rights pursuant to the CRC are not addressed by domestic courts in a watertight compartment. They are often considered alongside other statutory and/or constitutional rights.

2. Dualist approach

Other member States bring the CRC into its domestic legal order either at the constitutional level and/or through the adoption of other legislation (dualist states). In dualist states, children, as rights holders, are unable to directly invoke provisions of the CRC before courts unless constitutionalisation of rights has occurred or other implementing legislation has been adopted. The UN Committee has expressed concern in relation to a number of dualist states which fail to adopt comprehensive national legislation in relation to the rights of the child, noting the resulting fragmented and inconsistent approach to the implementation of children’s rights.¹⁰³

On the other hand, the CRC has formed part of Spain’s domestic law since its ratification of the CRC. Section 39(4) of the Spanish Constitution, for instance, provides that “[c]hildren shall enjoy the protection provided for in the international agreements safeguarding their rights”. According to Kilkelly *et al.*, “Spain stands out as the only country, short of full incorporation, which has incorporated other substantive rights into a children’s statute”.¹⁰⁴

Ireland’s Constitution, in Article 29.6, is a clear expression of a dualist approach. It provides that, “[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament]”. This provision, as will be discussed, has been interpreted as precluding the Irish courts from giving effect to an international agreement if it is contrary to domestic law or grants rights or imposes obligations additional to those of domestic law. The United Kingdom (“UK”) is also a dualist

100 See e.g. Article 190 of the Swiss Constitution which provides that the “Federal Supreme Court and the other judicial authorities apply the federal acts and international law.”

101 *Initial report of Switzerland to the UN Committee on the Rights of the Child*, UN Doc. CRC/C/78/Add.3, 19 October 2001, para. 15.

102 129 II 249 (Swiss Federal Tribunal).

103 See e.g. Ireland 2006 Concluding Observations, *supra* note 35. See also Concluding Observations: Canada (2012), *supra* note 5, para. 10.

104 Lundy, L., Kilkelly, U., & Byrne, B. (2013), “Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review. *International Journal of Children’s Rights*, 21(3), 442-463. They also note that “only Spain could be said to have incorporated the Convention into its constitution in its entirety, notwithstanding that this constitutional provision predates the CRC itself”.

state. Unlike Ireland, the UK does not have a codified and written constitution. Instead, its constitution consists of a collection of legal and non-legal rules. This does not, however, imply that children's rights have not been given effect. For instance, the Human Rights Act 1998, which incorporates most of the substantive provisions of the European Convention on Human Rights into UK domestic law, codifies many of the rights typically contained in written constitutions. At the same time, Williams opines that the common law is an important source of human rights protection. She contends that the CRC has been used as a means of construction, to develop legal notions, and has influenced decisions of the court on administrative decision-making.¹⁰⁵ Rapporteur Preda has, however, cautioned that a system which relies on judicial precedent "...at common law favours a retrenchment of the status quo, thus change is gradual and occurs over extended periods of time".¹⁰⁶ That said, while outside the CoE, there are cases of dualist states, like South Africa, which have arguably "crossed an invisible line" from being a dualist to a monist state regarding the incorporation of children's rights.¹⁰⁷

a) The South African Example

In South Africa, the growing inclusion of children's rights considerations in increasingly diverse areas of legal interaction outside of family law coupled with the consideration of the CRC along with non-binding sources of international law (e.g. UN CRC general comments) have substantively informed and enriched the decisions of courts. As a result, South Africa's jurisprudence in relation to the rights of the child is arguably the most far-reaching in the world.

The past twenty years have yielded a rich and remarkably interesting array of cases as a result of enshrining the paramountcy of the best interests of the child principle, and other constitutional rights. As a self-standing right and a guiding principle,¹⁰⁸ it has been drawn into a variety of cases she cites concerning the right to parental or family care, international child abduction, child pornography, the right to housing, adoption, customary inheritance law, health care, the right to social assistance, child's right to privacy and dignity, the testimony of child victims and witnesses, the right of children removed from their families to have that removal reviewed by a court, the right of children not to be prosecuted for consensual sexual activity, the right of child sex offenders not to be automatically placed on the sex offenders register, and the rights of children in conflict with the law not to be detained except as a measure of last resort.¹⁰⁹ As concluded by Ann Skelton, the case law "demonstrates a real commitment by the courts towards interpreting and applying these paper rights to the real-life situation of children. The approach to children in litigation encompasses both the need to protect children and advance their [autonomy] rights."¹¹⁰

As jurisprudence has developed, so too has a high level of the strategic intention behind children's litigation, including in its ambit cases that were brought to court, as well as those that were not. Issues brought before the courts are wide-ranging broad and as was held in *S v M (Centre for Child Law as Amicus Curiae)*,¹¹¹ the language of s 28 of the Constitution is "comprehensive and emphatic" and it has indeed come to pass that "statutes must be interpreted and the common law developed in a manner which favours protecting and

105 J. Williams, "England" in Ton Liefwaard and Jaap Doek (eds.), "Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (Springer, 2015), pp. 53-69.

106 Explanatory memorandum by Rapporteur Mr Preda, para. 17.

107 See Sloth-Nielsen, J. (2018), *supra* note 24; Sloth-Nielsen, J. and Kruise, H (2013), *supra* note 20.

108 Although as courts have pointed out, this does not mean that s 28(2) is not itself capable of limitation: see for a fuller discussion *S v M* 2008 (3) SA 232 (CC) par 25 and 26 and *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SA SACR 477(CC).

109 Skelton at note 24 above, 346- 347.

110 Op cit at 358.

111 [2007] ZACC 18; 2008 (3) SA (CC).

advancing the interests of children”.¹¹² This has continued to occur, in fields as diverse as striking down provisions which enshrined the prescription of sexual offences committed against children,¹¹³ upholding the genetic link requirement for confirmation of a valid surrogacy agreement on children’s rights grounds (on behalf of yet- to- be- born children),¹¹⁴ and confirming the hopelessness of an appeal to overturn the schools Norms and Standards judgment. As has been noted, children’s rights litigation has become socially accepted and legitimated – it is no longer necessary to first argue the virtues of children’s rights or claim them on a basis of good morals: their legal function is now “self- executing”. And they demand accountability on the part of the state. Recognition of children’s evolving maturity warranting their need for protection and at the same time awareness of their autonomy has been a key theme identified in the construction of the “constitutional child”.

An array of remedies have been brought about in children’s rights constitutional litigation including striking down legislation, reading in, structural interdicts, intervention in procurement disputes to mitigate the impact on children’s rights,¹¹⁵ and damages. But the litigation around school provisioning has undoubtedly seen some of the most inventive remedies being devised. This has been ascribed to the non-compliance of departments with prior orders or settlements, prompting applicants to return to court to restructure relief.¹¹⁶ In the criminal law sphere, courts have been unwavering in their recognition that children are different from adults, and that their culpability is affected by their lack of maturity.

It is also worth noting the nascent but significant dynamic of children’s direct involvement in litigation¹¹⁷ as well as the gains for children’s rights brought about by settlements and agreements. The recent settlement between the Child Law Center and health, social development and education departments in one province¹¹⁸ relating to the absence of services for children with severe or profound disruptive behaviour disorders who come into conflict with the law is one example. This settlement saw the Departments agreeing to the development of a properly costed and budgeted intersectoral policy and implementation plan to ensure that the attitudinal and environmental barriers which hinder these children from enjoying full and effective participation in society on a full and equal basis with others are removed; that appropriate prevention and early intervention plans are implemented to cater for children at risk of developing severe or profound disruptive behaviour disorders, within their families and communities as far as possible; an appropriate spread of residential programmes specifically geared towards catering for children with severe or profound disruptive behaviour disorders, with due consideration of the resource-intensive nature of programmes geared towards this category of children; the provisions of basic education of

112 Para 15.

113 *Levenstein and others v Estate Late Sidney Frankel and others* 2018 ZACC 16, although the case was won on behalf of all victims (adults as well).

114 *AB and another v Minister of Social Development* 2017 BCLR 267 (CC)CC

115 See P Proudlock “Children’s socio-economic rights” in T Boezaart *Child Law in South Africa* (2ed) gives an overview of the relevant cases.

116 See C MacConachie and S Breener “Litigating the Right to Basic Education” in J Brickhill (ed) *Public Interest Litigation in South Africa* (Juta 2018), p. 299.

117 See *Centre for Child Law v Hoerskool Fochville*, 2016 (2) SA 121 (SCA) in which a group of children were represented collectively by the Centre for Child Law, and had their expressed views and interests taken into account by way of questionnaires that they had completed. The case was also “somewhat unusual” in that the children were not parties to the proceedings in their individual capacity, and were represented as a group. They were the subject of an interdict that the school had applied for (against the Department of Education) barring the Department from compelling the school to admit English speaking learners. The school argued, upon receipt of the application to intervene on behalf of the learners by the Centre for Child Law, that the children were already parties through their parents, who were cited as such. The Court upheld the intervention on the grounds of children’s separate constitutional right to legal representation and to participation in all matters affecting them, affirming that post the Constitution and the Children’s Act 38 of 2005 (s 14 and 15), assistance in litigation by a parent or guardian or by a curator ad litem had expanded to encompass situations where children could participate in litigation on their own. See for further discussion C Du Toit “Legal Representation of Children” in T Boezaart (ed) *Child Law in South Africa* (2nd Ed) Juta and Co Cape Town 2017 at 121.

118 Case 77362/16 Gauteng Provincial Division Pretoria.

an adequate quality; and of mental health care services accessible to these children whether in community-based or in residential programmes; as well as the provision of support for families including respite care, to ensure that they are not unnecessarily removed from the family environment.

While South African courts are not alone in innovating remedies for violations of children's rights, the range of remedies and results do seem to set a rather high bar for other jurisdictions, like Germany, to follow.

V. Overview of member States and constitutions

Within the CoE, all but two of the 47 member States (France and the United Kingdom)¹¹⁹ have constitutions which contain certain provisions relating to children and their rights.¹²⁰ Generally speaking, we find constitutions that adopt one of four approaches. First, some member States employ a protection approach whereby member States recognise every child's right not to be subjected to harm. Second, some states employ a rights-based approach whereby children are identified as rights-holders. Third, some States employ a mix of a protection and rights-based approach. Finally, in some CoE member States, we find an approach whereby the constitution mandates further legislative action to effectuate rights. For example, in Iceland, the constitution requires that the law guarantee care and protection to children.¹²¹ It is interesting to note that efforts to strengthen children's rights in the Icelandic Constitution failed following the economic crash. In Lithuania, the Constitution similarly provides that children are to be protected by law,¹²² thereby requiring additional measures to effectuate those rights.

1. Rights-based approach

Few constitutions within the CoE expressly recognise children as rights holders. Most States follow a mixed approach combining protection as well as rights-based expressions and none explicitly refer to the CRC. The Irish Constitution, for instance, provides that “the state recognises and *affirms the natural and imprescriptible rights of all children* and shall, as far as practicable, by its laws protect and vindicate those rights” (emphasis added) and sets out other child-related provisions related to protection.¹²³ As such, Ireland can be said to adopt a blended approach, adopting both protection-need and rights-based expression. The Latvian Constitution broadly provides that the state is to protect the rights of the child but does not express any specific rights in relation thereto. A survey of CoE constitutions reveals that the most widespread child-specific provisions concern the right to education. In this regard, the Venice Commission Report stated that:

The presence of a constitutional right to education has significant potential to advance the indivisible rights of children, and particularly their right to development, since education is a pre-requisite to the enjoyment of other rights – most obviously, the child's right to development (emphasised throughout the CRC and recognised as a general principle by the Committee)...¹²⁴

Education has been expressed in a number of ways in the constitutions of CoE member States. Notably, not all constitutions have included education in a manner which establishes rights for children. Some constitutions refer to the right to education, without specifically referring to children at all.¹²⁵ For instance, Section 16(1) of the Finnish Constitution

119 Pursuant to Section 55 of the Constitution international treaties have a superior authority to that of legislation, which applies to the CRC (as concerns its self-implementing provisions).

120 For France, treaties such as the CRC take precedent over national legislation while the UK does not have a codified constitution. See discussion in relation to the UK below.

121 Article 76(3) of the Icelandic Constitution provides that the law shall guarantee the protection and care which is necessary for children's well-being. This is the only reference to children's rights in Iceland's Constitution. That said, Article 76(2) of the Constitution provides that the law shall guarantee for *everyone* suitable general education and tuition, without making any express reference to an individual right of the child to receive education.

122 Article 39 of the Lithuanian Constitution provides that children and their rights are to be protected by law.

123 Irish Constitution, Article 42A(1).

124 Venice Commission Report, para. 87.

125 Article 35(1) of the Constitution of Georgia enshrines the right to education of everyone.

provides that everyone has the right to basic education, free of charge. Other constitutions refer to the duties and rights of parents and guardians with respect to education rights. For example, although the Constitution of Liechtenstein provides that education shall be universal and compulsory,¹²⁶ it contains provisions on education that focus entirely on the rights and duties of parents and the State.¹²⁷ Similar provisions which express education in relation to the rights and duties of parents can be found in the constitutions of Italy,¹²⁸ Croatia,¹²⁹ Ireland,¹³⁰ and Germany,¹³¹ for instance.

Some member States adopt an “alternative approach”, as set forth above, whereby additional legislation is required to effectuate such rights. For example, the Estonian Constitution stipulates that “education is compulsory for school-age children *to the extent specified by law*, and shall be free of charge in state and local government general education school” (emphasis added). Likewise, Article 35(3) of the Constitution of Georgia, *inter alia*, guarantees pre-school education *as determined by law*.

a) Right to health

Few constitutions provide for the right to health. In those instances where the right to health is expressed, it is typically done alongside the rights of other vulnerable groups. For instance, the Constitution of Montenegro provides for health protection of children and states that “[a] child, a pregnant woman, an elderly person and a person with disability shall have the right to health protection from public revenues if they do not exercise this right on some other grounds”.¹³² The Polish Constitution does not stipulate a child’s right to health but rather imposes a duty on public authorities to “ensure special health care to children, pregnant women, handicapped people and persons of advanced age”.¹³³ The duty of public officials to provide health care to children from public revenues unless provided in some other manner in accordance with the law is expressed in Serbia’s Constitution.¹³⁴ Portugal’s Constitution, on the other hand, provides that the right to health protection shall be fulfilled “[b]y creating economic, social, cultural and environmental conditions that particularly guarantee the protection of childhood, youth and old age”.¹³⁵

126 Constitution of Liechtenstein, Article 16.

127 Article 15 requires the State to devote special attention to education and schooling and requires education and schooling to be designed and administered so that “through the cooperation of family, school and church, the members of the younger generation are endowed with religious and moral learning, patriotic attitudes, and skills for their future occupations”. Article 16(1)-(8) also include a number of specific provisions related to education. Article 16(5) stipulates that “[a]ll persons with children in their care shall ensure that they receive education of the standard prescribed for public elementary schools.” See also Article 17(1) which provides that the State bears an obligation to support and promote education and schooling, including providing appropriate scholarships to help children of good intellectual attainments but without financial means attend institutes of higher education.

128 See Constitution of Italy, Articles 33- 34.

129 Constitution of Croatia, Article 20(3). The Constitution explicitly provides that “[p]arents have the right to decide the type of education for their children...”

130 Article 42(1) of the Irish Constitution provides that: The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

131 See Article 7(2) of the Basic Law which provided that “[p]arents and guardians shall have the right to decide whether children shall receive religious instruction”. Also in Article 7(1) “The entire school system shall be under the supervision of the state.” That means that schooling is also compulsory in Germany. The Länder regulate schooling and education in their own constitutions and legislation.

132 Constitution of Montenegro, Article 69.

133 Constitution of Poland, Article 68(3).

134 Constitution of Serbia, Article 68(2).

135 Constitution of Portugal, Article 62(4)(b).

b) Families and children outside of parental care

Parental rights and the right to and protection accorded to the family is a common thread in a number of constitutions across the CoE. As noted by the Venice Commission, “[i]t is much more common for constitutions to refer to parents’ rights and duties to raise, educate, and support their children”.¹³⁶ For instance, Article 48(1) of the Romanian Constitution provides that family is founded on the right and duty of the parents to ensure the upbringing, education and instruction of their children, *inter alia*.¹³⁷ It should, however, be noted that while the CRC recognises the important role of parents, “viewing responsibility for children as an issue solely for parents is not consistent with the CRC, which makes clear that the state is the ultimate duty bearer”.¹³⁸ In that way, some constitutions provide an obligation to support families.¹³⁹

Parental rights are also not absolute.¹⁴⁰ The constitutions of Moldova and the Czech Republic provide that a child’s right to parental care can only be restricted as determined by a court of law (or by statute). Some constitutions provide some sort of expression to the rights and/or protection for children deprived of parental care. The constitutions of Azerbaijan, Armenia, Croatia, Latvia, Poland, and the Slovak Republic, for instance, impose a duty upon the State to provide care and assistance to children outside of parental care. These types of provisions have been used, for example, to challenge prevailing conditions in state-run care institutions.¹⁴¹

2. Children as objects of special protection

Prevalent among constitutions are provisions pertaining to the protection of children. Some constitutions recognise that children as a vulnerable group have a special need for care and protection. Protection is sometimes expressed as a right of children or a duty which is owed to children by the state.¹⁴² Romania provides a good example in Article 45 entitled: “The Protection of Children and the Youth”. This provides that “[c]hildren and young people shall enjoy special protection and assistance in the pursuit of their rights”. Switzerland’s Constitution provides that “children and young people have the right to the special protection of their integrity and to the encouragement of their development”.¹⁴³ Albania also expresses protection from violence, ill-treatment, exploitation, *inter alia*, as a right.¹⁴⁴ The right to protection from harm, exploitation, abuse, ill-treatment, and the like, can be found in a number of constitutions.¹⁴⁵ Some link protection to the notion of child development.¹⁴⁶

A number of constitutions set forth protection rights for childhood as opposed to children. The Ukrainian Constitution, for instance, stipulates that childhood (as well as family, maternity and paternity) is to be protected by the state¹⁴⁷ and is to be accorded protection

136 Venice Commission Report, para. 107.

137 See also Article 26: “The public authorities shall respect and protect the intimate, family and private life” (Constitution of Romania, Article 26(1)) Article 6 (2) of the German Basic Law: The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

138 Venice Commission Report, para. 108.

139 See for e.g. Constitution of Greece, Article 21; Constitution of Italy, Article 31. Article 6(1) of the German Basic Law “Marriage and the family shall enjoy the special protection of the state.”

140 This issue has indeed garnered attention by domestic courts but is outside of the scope of this paper.

141 See e.g. South African context.

142 See Constitution of Montenegro, Article 74.

143 Constitution of Switzerland, Article 11(1).

144 See Constitution of Albania, Article 54(3); Constitution of Slovenia, Article 56(2).

145 For a discussion on the inclusion of protection from harm in national constitutions, see generally Venice Commission Report, paras 92-93.

146 See e.g. Albania, Austria, Hungary, Moldova and Romania.

147 Constitution of Ukraine, Article 51.

by the laws of Ukraine.¹⁴⁸ Similar provisions protecting “childhood” can be found in the constitutions of Azerbaijan,¹⁴⁹ Greece,¹⁵⁰ Italy,¹⁵¹ Lithuania,¹⁵² Portugal,¹⁵³ and Russia.¹⁵⁴ Children, in a number of member States, are often grouped alongside other perceived vulnerable groups like “mothers and children”. For example, in Montenegro, Serbia, and Macedonia, children are referred to in relation to their mothers. Similarly, in 20 constitutions, special protection is afforded to “parenthood” or the family without elaborating on what such protection entails.¹⁵⁵

Children with disabilities are sparsely mentioned (five constitutions) and rarely in relation to their status as autonomous rights-holders. Instead, constitutions focus either on the right of children with disabilities to special care or oblige the state to provide such care. The Austrian Constitutional Act on the Rights of Children provides that “[e]ach child with a disability shall be entitled to the level of protection and care that is required for his/her special needs”.¹⁵⁶ In Croatia, Article 63(3) of the Constitution provides that “[p]hysically and mentally handicapped and socially neglected children shall have the right to special care, education, and welfare”. Likewise, the Latvian Constitution imposes a duty on the state to provide “special support to children with disabilities” while the Romanian Constitution imposes a duty on the state to grant allowances for disabled children¹⁵⁷ as does Moldova.¹⁵⁸

3. General principles of the CRC

A number of CoE member States have constitutionally enshrined the general principles of the CRC. The majority of States that have incorporated the general principles have done so in relation to the principle of non-discrimination. A child’s right to survival and development as well as the right to be heard have been included in a few constitutions.

a) Non-discrimination

The second most common provisions among constitutions pertain to the equal status of children (18 constitutions). The Federal Constitutional Act of Austria provides for the equal treatment of people while expressly highlighting that this right should be provided to children with and without disabilities.¹⁵⁹ Other constitutions which have included the principle of non-discrimination have done so without specifically referring to children.¹⁶⁰

148 *Ibid.*, Article 92(6).

149 Constitution of Azerbaijan, Article 34.

150 Constitution of Greece, Article 21(1).

151 Constitution of Italy, Article 31.

152 Constitution of Lithuania, Article 38.

153 Constitution of Portugal, Article 64(2)(b), referring to the right to health protection.

154 Constitution of Russia, Articles 7, 38.

155 For discussion see Venice Commission Report, para. 96. The German Basic Law in Article 6(1) provides: “Marriage and the family shall enjoy the special protection of the state.” The Irish Constitution, pursuant to Article 41 (1), the family is recognised as the natural primary and fundamental unit group of society. The Constitution of Croatia also imposes on parents and families of a duty to protect the child (see Article 63).

156 Pursuant to Article 7(1) of the Federal Constitution Act, the equal treatment of people with and without disabilities shall be guaranteed in all spheres of daily life.

157 Constitution of Romania, Article 45(2).

158 Constitution of Moldova, Article 50(3).

159 Federal Constitutional Act on the Rights of Children, Article 6., Article 6. Within the meaning of Article 7(1) of the Federal Constitution, the equal treatment of disabled and non-disabled children in all areas of daily life must be guaranteed.

160 Constitution of Albania, Article 18 (Albanian Constitution, for example, guarantees general equality before the law and non-discrimination of all). Article 3 German Basic Law provides equality for all persons before the law, that men and women have equal rights, and that “[n]o person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.”

This provision has also often been expressed in combination with protection from economic exploitation.

However, when expressed constitutionally, most states have expressed the right to equal treatment in relation to parentage and/or the marital status of a child's parents. Notably, sixteen constitutions among CoE member States do so. For instance, section 39(2) of the Spanish Constitution states that public authorities are to "ensure full protection of children, who are equal before the law, regardless of their parentage, and of mothers, whatever their marital status". Similarly, Article 54(2) of the Albanian Constitution stipulates that "[c]hildren born out of wedlock have rights equal to those born within marriage". The Constitution of Andorra, pursuant to Article 13, also recognises that all children are equal before the law, regardless of their parentage. Article 6(5) of the German Basic Law similarly provides that "Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage."

b) Best interests of the child

Despite the importance of the best interests principle (Article 3, CRC) being reflected in national constitutions, and as noted by the Venice Commission, very few constitutions include the best interests of the child as a primary consideration. Provisions reflecting this general principle are only reflected in the constitutions of Belgium, Armenia, Ireland, Norway, Malta, and Serbia. The Belgian Constitution, which reflects three out of the four general principles of the CRC (save for non-discrimination), provides that "[i]n all decisions concerning children, the interest of the child is a primary consideration". Similarly, Article 37 of the Armenian Constitution – titled "The Rights of a Child" – stipulates: „[i]n matters concerning the child, the interests of the child shall merit primary attention”.¹⁶¹ Likewise, the best interest principle was introduced into the Norwegian Constitution in 2014 along with other provisions intended to strengthen human rights. Section 104 provides that the best interests of the child shall be a fundamental consideration in actions and decisions that affect children. The provision takes precedence in the event of conflicts with other legislation.¹⁶²

The Serbian Constitution, while referring to the best interests principle, does so not as a general principle but in relation to the deprivation of parental rights.¹⁶³ Both the Irish and Maltese constitutions reflect the principle but in relation to certain circumstances. The Irish Constitution, for instance, limits this principle as a paramount consideration to certain areas of decision making. In that way, it applies only to child protection and care proceedings brought by the State and proceedings concerning adoption, guardianship or custody of, or access to, any child and does not apply to other proceedings. The effectiveness of Ireland's amendment, which also does not properly provide for the constitutional right, will be discussed below. The Maltese Constitution also expresses the principle in a provision which permits the exclusion of persons, other than the parties to a legal dispute and their legal representatives, from legal proceedings where to do so is in the interests of the welfare of persons under the age of eighteen years.¹⁶⁴

Switzerland has incorporated the "well-being" of the child as a guiding principle, as opposed to the best interests of the child. The UN Committee is of the view that this term (*i.e.* "well-being") has a different meaning and is applied differently to the principle as

¹⁶¹ See Constitution of Armenia, Article 37(2).

¹⁶² Article 104 of the Constitution of Norway.

¹⁶³ Constitution of Serbia, Article 65.

¹⁶⁴ Article 39(4)(c)(ii) of the Constitution of Malta.

provided in the CRC.¹⁶⁵ It recommended that Switzerland consistently incorporate the best interests principle into all related federal and cantonal legislation, in administrative and judicial proceedings, as well as policies and programmes relating to children.¹⁶⁶

c) Right to life, survival, and development

The right to development “features prominently” among European constitutions and similar to other areas, takes on many forms.¹⁶⁷ The Austrian Constitution provides that children:

are to be allowed the optimal intellectual, mental and physical development to let them become healthy, self-confident, happy, performance-oriented, dutiful, talented and creative humans capable to take over responsibility for themselves, fellow human beings, environment and following generations, oriented in social, religious and moral values.¹⁶⁸

The constitutions of Portugal,¹⁶⁹ Hungary,¹⁷⁰ and Switzerland¹⁷¹ similarly provide that children have the right to the fullest possible development of their personality and potential. Some constitutions refer to the duties of states, *e.g.* that children should benefit from measures of the state¹⁷² or that the state should “create favourable conditions for the complete and comprehensive development of the individuality of children”.¹⁷³ Some constitutions, on the other hand, link the right to development with protection. For instance, Article XV of the Hungarian Constitution stipulates that every child shall have the right to the protection and care necessary for his/her development. While Article 11(1) of the Swiss Constitution stipulates that children may personally exercise their rights to the extent that their power of judgement allows.¹⁷⁴

d) Right to be heard/express views freely

As noted by the Venice Commission, few constitutions expressly include the principle enshrined in Article 12 of the CRC.¹⁷⁵ Article 37(1) of the Armenian Constitution provides the right of a child to “express his opinion freely, which shall be taken into consideration in matters concerning the child in accordance with his age and maturity”. The Austrian,¹⁷⁶ Irish, and Polish constitutions similarly recognise the right of children to be heard in decisions that affect her or him.

165 UN Committee on the Rights of the Child, *Concluding observations on the combined second to fourth periodic reports of Switzerland*, UN Doc. CRC/C/CHE/CO/2-4 (26 February 2015), para. 26.

166 *Ibid.*, para. 26.

167 Venice Commission Report, para. 100.

168 Constitution of Austria, Article 14(5).

169 Article 69(1) of the Constitution of Portugal states that children have a right to the fullest possible development of their personality and potential. At the same time, Article 73(2) emphasises the importance of education to the development of children.

170 Constitution of Hungary, Article XVI(1).

171 Article 11(1) of the Swiss Constitution stipulates that children have a right to the fullest possible development of their personality and potential. Article 41(1)(g) provides that “[t]he Confederation and the Cantons shall, as a complement to personal responsibility and private initiative, endeavour to ensure that: children and young people are encouraged to develop into independent and socially responsible people and are supported in their social, cultural and political integration.”

172 Pursuant to Article 22*bis* of the Belgian Constitution, every child is entitled to benefit from measures and facilities which promote his/her development.

173 See also Article 36(1) of the Constitution of Armenia which provides that parents “shall have the right and obligation to take care of the rearing, education, health, and comprehensive and harmonious development of their children.”

174 Constitution of Switzerland, Article 11.

175 Venice Commission Report, para. 101. See for *e.g.* Articles 22*bis* and Article 104 of the Belgian and Norwegian constitutions, respectively.

176 Austrian Federal Constitutional Act on Children, Article 4. See also Article 14(5) of the Federal Constitution.

VI. Children's rights before national courts

The direct application of the CRC and the declaration of its supremacy over national laws falls within the jurisdiction of the courts.¹⁷⁷ In practice, there seems to be a limited ability or willingness of courts to give direct effect to the CRC as a whole. There is also no uniformity in approach among member States and sometimes also within States. Although the justiciability of children's rights varies, what is clear is that incorporation does provide a heightened potential for using children's rights in litigation. The following, while not exhaustive, will highlight the status of the CRC in domestic courts as well as the judicial treatment of the CRC's general principles and relevant constitutionalised child-specific rights.

In Norway, and as noted above, there is no ambiguity as to the status of the CRC which has been incorporated into Norwegian law through the Human Rights Act.¹⁷⁸ The CRC has been afforded primacy over other legislation which results in the rights therein to be directly applicable before Norwegian courts.¹⁷⁹ This is also reinforced by the inclusion of two of the four general principles of the CRC into the Constitution. As noted by Supreme Court Justice Arnfinn Bårdsen, courts have tended in recent years to admit cases involving the interpretation and application of the CRC in connection with a diverse range of cases, with the best interests principle being at issue in half of all cases.¹⁸⁰ Since the adoption of constitutional amendments, the Supreme Court has shown a willingness to consider its previous case law in light of Article 104, and often in considering the best interests of the child.¹⁸¹ In so doing, the Supreme Court expressly considered the UN Committee's General Comments as interpretive guides to implementing children's rights.¹⁸²

The article-by-article approach adopted by member States, on the other hand, has resulted in a fragmented and often uncertain approach to the ability of children to exercise of rights before national courts. French courts have found that a number of provisions of the CRC have direct effect (*i.e.* Articles 2,¹⁸³ 3(1),¹⁸⁴ 3(2),¹⁸⁵ 3(3),¹⁸⁶ 4,¹⁸⁷ 5,¹⁸⁸ 6,¹⁸⁹ 8,¹⁹⁰

177 Notably, only Germany had made a declaration that the CRC was not directly applicable by its courts. This reservation was later withdrawn.

178 See HR-2015-00206-A, Case No. 2014/1583, paras 57, 64.

179 Supreme Court Justice dr. juris Arnfinn Bårdsen, The Norwegian Supreme Court, "Children's Rights in Norwegian Courts Seminar on Children's Rights" (Kathmandu: June 2015), available <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/childrens-rights-in-norwegian-courts---kathmandu-250615.pdf> (accessed 24 January 2019), para. 10.

180 *Ibid*, paras 15-16.

181 See for e.g. HR-2017-2015-A, Case no. 2017/614, paras 49-50.

182 While there are diverging views on the role of General Comments from the CRC Committee in Norwegian law, General Comments, nonetheless, play a major role when the Court is interpreting the Convention (for discussion see Søvig, K.H. (2019)). See also Supreme Court Justice dr. juris Arnfinn Bårdsen, "The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms", "Norway in Europe", Centre for European Law, Oslo 18 September 2017, available <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/supreme-court---constitutional-rights---bardsen18092017.pdf> (accessed 24 January 2019), para. 24.

183 CE No. 359223, 2014, para. 7; CE No. 262670 (2004); CE No. 320321 (2011) (also finding that Articles 3(2), 3(3), 5, 19, 20 and 27 do not have direct effect); CE No. 323758 (2010).

184 Some of the jurisprudence will be addressed below with respect to Article 3(1), the best interests of the child.

185 CE No. 291561 (2008); CE No. 293785 (2008).

186 CE No. 293785 (2008); CE No. 320321 (2011).

187 CE No. 176205 (1997).

188 CE No. 320321 (2011).

189 CE No. 170098 (1997).

190 CE No. 173470 (1997) (finding that Articles 2, 4, 8, 9, 10 and 28 create obligations between states); CE No. 155096 (1998); CE No. 364895 (2013).

11,¹⁹¹ 24(1),¹⁹² 26(1),¹⁹³ 27(1)).¹⁹⁴ At the same time, others do not (Articles 1, 3, 7, 8, 9, 10, 12(2), 13, 16, 20 and 21, 32). At other times, courts have ruled differently from each other.¹⁹⁵ There is no discernible uniformity and decisions often lack reasons as to why certain provisions apply and others do not. At the same time, practice demonstrates that French courts are reluctant to declare statutes incompatible with the CRC.¹⁹⁶ French courts also rarely use the CRC as an interpretive tool. As noted by Couzens, outside of the best interests principle, as will be discussed below, French courts have not addressed controversial issues in a more child-oriented manner.¹⁹⁷ Couzens posits that this weakness comes from the sub-constitutional status of the CRC and points to the need to explore ways to introduce the CRC in jurisprudence and encourage the use of the CRC as an interpretive tool.¹⁹⁸

While Dutch Courts have increasingly made use of the CRC, they have similarly held disparate views on the direct effect of various provisions, creating legal uncertainty around the direct effect of almost all of the provisions of the CRC.¹⁹⁹ Only Article 2(1) has been expressly considered as having a direct effect. According to Limbeek and Bruning, to successfully invoke the CRC before Dutch courts, it must be asserted in conjunction with other treaty rights.²⁰⁰ That said, the CRC has been used as an interpretive tool and has “influenced courts and judges in different ways”.²⁰¹

As noted by Kilkelly, “in Belgium, where the CRC acquired binding legal status on ratification, research has found that the Convention is frequently invoked in litigation and the legal framework is accepted to be largely compliant with the Convention”.²⁰² Belgian courts have taken a mixed approach, denying the direct effect of some provisions while accepting it in relation to others. Different courts in Belgium have also addressed the notion of direct effect differently. As noted by Vandenhole, the Constitutional Court which is “liberated from the doctrine of direct effect, has engaged most actively and substantively with the CRC provisions”.²⁰³ It is observed in both the Dutch and Belgian context that the CRC is used to fill gaps in domestic legislation and as an interpretive tool. As noted by Vandenhole, the full potential of the CRC and the UN Committee’s general comments have yet to be fully capitalised by Belgian courts.

191 The Conseil d’Etat decided that Articles 7, 10 and 11 did not apply to the deportation of an applicant married to a French resident and the mother of his child (CE No. 150167, 1996).

192 CE No. 163043 (1997) (*Groupe d’information et de soutien des travailleurs immigrés (GISTI)*). See also CE No. 204784 (2000); CE No. 253365 (2004) (article 24); CE No. 320321 (2011) (Article 27).

193 *Ibid.* See also CE No. 204784 (2000); CE No. 253365 (2004); CE No. 320321 (2011).

194 CE No. 163043 (1997). See also CE No. 204784 (2000); CE No. 253365 (2004); CE No 320321 (2011).

195 CE No. 170098 (1997); CE No. 220588 (2002).

196 Notably, French courts can set aside domestic norms which are incompatible with the CRC but cannot declare them invalid. Only twice has the Conseil d’Etat found incompatibility between a domestic statute and the CRC.

197 Couzens, M., “France”, Ton Liefaard and Jaap Doek (eds.), “Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (Springer, 2015), pp. 123-138.

198 *Ibid.*, p. 137.

199 See Limbeek, M. and Bruning, M. “The Netherlands: Two Decades in Dutch Case Law” in Liefaard and Jaap Doek (eds.), “Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (Springer, 2015), p. 95.

200 *Ibid.*, pp. 96-97.

201 *Ibid.*, p. 103.

202 Kilkelly, U., “The UN convention on the rights of the child: incremental and transformative approaches to legal implementation”, (2019) *International Journal of Human Rights*, DOI: 10.1080/13642987.2018.1558974p. 5.

203 Vandenhole, W., *The Convention on the Rights of the Child in Belgian Case Law*, in Ton Liefaard and Jaap Doek (eds.), “Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (Springer, 2015), p. 120.

Conversely, the direct application of the CRC by Romanian courts is uncontroversial, unlike in other monist countries.²⁰⁴ This, however, has not resulted in a child-rights approach before the courts. While the constitutional framework gives the CRC supra-legislative status, it has not substantially influenced jurisprudence.²⁰⁵ Romanian courts often assess children's rights in relation to other statutes and conventions such as the European Convention on Human Rights while giving little to no attention to the independent normativity of the CRC rule or decision.²⁰⁶ Romanian courts are also often readily willing to assume that domestic laws are consistent with the CRC.²⁰⁷ Authors, such as Couzens, have raised concerns over the lack of systematic application of the CRC by Romanian courts. This demonstrates that a constitutional framework which incorporates the CRC in the domestic legal order can be insufficient to ensure a meaningful application of the CRC by national courts.

In Ireland, on the other hand, courts have declared that the CRC is of no effect in the domestic legal order. In *Kavanagh v. Governor of Mountjoy Prison*, the Irish Supreme Court interpreted Article 29.6. It held that the Irish Constitution “establishes an unmistakable distinction between domestic and international law” and that had the Government wanted the terms of an international agreement to have the force of domestic law it would have to “ask the Oireachtas to pass the necessary legislation”.²⁰⁸ The result is that rights holders – which include children – cannot rely directly on international law before Irish courts. This was affirmed in the case of *Olaniran & Others v Minister for Justice, Equality and Law Reform*,²⁰⁹ whereby Clarke J stated that ratification of the CRC is of no effect in Irish courts. He opined:

“The fact that Ireland is a signatory to the CRC confers no rights on individuals to rely on its provisions before the domestic courts nor does it impose any obligations on the Irish state to police the adherence of other states who are signatories to the same Convention.”

As noted by O'Mahony, “Irish courts have displayed a marked reluctance to engage in creative constitutional interpretation and judicial identification of unenumerated rights”.²¹⁰ That is not to suggest that Irish courts have never considered unenumerated rights prior to recent constitutional amendments²¹¹ but children's rights, as is argued, were often subsumed by the rights of the family.²¹²

Since amending the Constitution, courts have started to interpret and apply Article 42 in a variety of cases, most of which have concerned families, adoption, care orders and re-

204 The direct effect of the CRC has not resulted in a consistent and meaningful application. Although the CRC has direct effect, judges have been reluctant to set aside national statutes on the basis of incompatibility with the CRC.

205 See for e.g. Couzens, M., “Romanian Courts and the UN Convention on the Rights of the Child: A Case Study”, *The International Journal of Children's Rights*, Vol. 2, Issue 4 (2016),

206 *Ibid.*

207 *Ibid.*

208 *Kavanagh v. Governor of Mountjoy Prison*, (2002) 3 IR 97.

209 (2010) IEHC 83.

210 O'Mahony, C. (2019), *supra* note 14, p. 14.

211 See e.g. *DG v Eastern Health Board*, [1997] 3 IR 511; *G v. An Bord Uchtála*, [1980] 1 IR 3, pp. 55-56. See also Alan D.P. Brady. “Children's Constitutional Rights: Past, Present and Yet to Come” (6 December 2018) available https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Alan%20DP%20Brady%20-%20Childrens%20Constitutional%20Rights%20-%206%20Dec%202018.pdf (accessed 24 January 2018). Brady contends that pre-amendment case law had already provided children with unenumerated rights related to the protection of their welfare (*ibid.*, para. 12).

212 See *N v Health Service Executive*, [2006] 4 IR 374; Kilkelly, U. and O'Mahony, C. (2007), *supra* note 40.

lated proceedings.²¹³ The Irish Supreme Court has also recently interpreted Article 42A.1° of the Constitution which provides that “the state recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights”.²¹⁴ In its 2018 decision in *M (Immigration - Rights of Unborn) v. Minister for Justice and Equality & ors*,²¹⁵ the Supreme Court overturned a decision of the trial judge who concluded that reference to “all children” as found in Article 42A.1° should be given a wide interpretation and “should include the child before birth”.²¹⁶ In so doing, it rejected that the unborn have constitutional rights other than those provided in Article 40.²¹⁷ The full effect of Ireland’s amendments will, however, only be seen through litigation in the coming years. It is, however, hoped that the new amendment will be a driver for the further development of rights.²¹⁸

1. General principles

The four general principles have been addressed by a number of courts in the CoE and in disparate fashions. However, the best interests of the child has attracted the most attention.

a) Non-discrimination

In the Belgian context, the Constitution contains three out of the four general principles of the CRC.²¹⁹ The Belgian Constitution was amended to incorporate the non-discrimination principle and its legal framework has a strong focus on non-discrimination, with the rights of children and of persons with disabilities “well reflected in the national and regional legislation.”²²⁰

In France, the situation is similar, with French courts declaring that Article 2 of the CRC has no direct effect. In one case, the Court rejected its applicability, finding that Article 2 creates obligations only between States.²²¹ Other cases have similarly rejected the article’s direct effect, but have provided different reasons.²²² Dutch courts have also addressed Article 2 of the CRC in a disparate manner; sometimes finding it applies while finding to the contrary in other cases.²²³

213 For instance, Irish courts have identified the rights of children to be cared for by their parents, regardless of marital status in light of Article 42; noting the paramouncy of the best interests principle (*PH v Child and Family Agency*, [2016] IEHC 106; *Chigaru v Minister for Justice*, [2015] IECA 167). The High Court has found the same but referred to this right more generally without referring to the Constitution (*SMcG v. Child and Family Agency*, [2016] 1 ILRM 106, para. 41).

214 Irish Constitution, Article 42A(1).

215 (2018) IESC 14.

216 (2018) IESC 14, para. 13.3(viii).

217 Article 40.3.3° provides that: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”

218 Brady, A., “Children’s Constitutional Rights: Past, Present and Yet to Come” (6 December 2018) available https://www.childrensrightrights.ie/sites/default/files/submissions_reports/files/Alan%20DP%20Brady%20-%20Childrens%20Constitutional%20Rights%20-%206%20Dec%202018.pdf (accessed 24 January 2018), para. 13.

219 See Article 22bis.

220 European Parliament, “Country Report on Belgium for the Study on Member States’ Policies for Children with Disabilities” (2013), available http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/25_becountryreport_/25_becountryreport_en.pdf.

221 CE No. 262670 (2004).

222 See e.g. CE No. 359223 (2014), para 7; CE No 320321 (2011).

223 Limbeek, M. and Bruning, M. (2015), *supra* note 189, p. 95.

b) Best interests of the child

The Belgian Constitution provides that the interests of the child must be a primary consideration in all decisions affecting them. The constitutionalisation of this right has had an impact on legislation in a number of areas affecting children including in relation to adoption, in case of separation from parents, unaccompanied minors, among others. Not all legislative acts contain this principle even where they directly impact the rights of children (see e.g. Youth Protection Act). Regional legislation also varies with some enshrining explicit rights with strong protections. For example, in Flanders' legislation concerning social welfare services states that "the interest of the child is determined in dialogue with the minor him/herself. An appropriate follow-up is provided for the minor's opinion, given her/his age and maturity."²²⁴ It follows that the judicial approach to the constitutionally enshrined principle that the interest of the child is a primary consideration in all decisions concerning children is fragmented and has been addressed in a number of ways and by different judicial bodies in Belgium.²²⁵ While some judges have ruled that Article 3(1) has a direct effect, others have found it has no direct effect, or have found its direct effect only when invoked in relation to other provisions.²²⁶ The Court of Cassation (*Cour de Cassation*), for instance, has generally denied its direct effect²²⁷ while the Constitutional Court has relied on Article 3(1) of the CRC to underline the need for judicial bodies to take into account the best interests principle. The Court held that "a legislative arrangement according to which a judge can only marginally assess the best interests of the child and take them into account only if they are seriously damaged" violates Article 22bis of the Belgian Constitution and Article 3(1) of the CRC.²²⁸

French courts have given direct effect to Article 3 of the CRC. In its concluding observations on the fifth periodic report of France, the UN Committee noted with appreciation that the principle of the best interests of the child has been raised at the constitutional level and that the Court of Cassation (*Cour de Cassation*) and the Council of State (*Conseil d'État*) have adopted a common position in this regard²²⁹. In *Cinar*,²³⁰ the Council of State recognised the direct effect of Article 3(1) of the CRC and invalidated an administrative decision setting aside national law in favour of a direct application of article 3(1) of the CRC.²³¹ The *Conseil d'État* has been more reluctant to apply article 3(1) in matters concerning children indirectly. For instance, Article 3(1) was unsuccessfully invoked in the sentencing of parents²³² or against the confiscation of a family home from the accused convicted of drug trafficking.²³³ The UN Committee has, however, noted that while the right has been integrated at the legal level, it has not been sufficiently integrated in practice in France.²³⁴

While Ireland amended its constitution to include the best interests principle, it is, however, important to bear in mind it did not make it a constitutional obligation to make it the

224 See Article 5 of the Flemish Decree of 7 May 2004 on the minor status with regards to integrated youth welfare.

225 See Vandenhole, W. (2015), *supra* note 192, p. 118.

226 *Ibid.*, pp. 110-111.

227 Vandenhole argues that the fact that the court utilises Article 3 of the CRC in its reasoning "suggests an implicit recognition that it does indeed have direct effect" (*ibid.*, p. 111).

228 See *ibid.*, p. 118, citing Constitutional Court 7 March 2013, no. 30/2013, B.10-B11.

229 UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of France*, UN Doc. CRC/C/FRA/CO/5 (23 February 2016).

230 CE No. 161364 (1997) (commonly known as *Cinar*).

231 Reydellet, M., "La convention des droits de l'enfant n'est pas un traite 'hors-jeu'", (*Conseil d'Etat*, 22 September 1997).

232 See e.g. Crim No. 09-83032 (2010).

233 See e.g. Crim No. 10-87811 (2011); Crim No. 09-81239 (2009); Crim No 09-81710 (2009).

234 UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of France*, UN Doc. CRC/C/FRA/CO/5 (23 February 2016).

paramount consideration in court proceedings affecting children.²³⁵ Instead, it imposed a duty to enact legislation providing that the best interests of children are to be the paramount consideration in court proceedings affecting them.²³⁶ In this regard, O'Mahony notes that the "welfare" of a child was already included in legislation prior to the constitutional amendment and that an extremely high threshold has been set by the courts to rebut the constitutional presumption, in light of Article 41,²³⁷ that the welfare of the child is to be found within the family, "such that parents were entitled to make decisions that were objectively not in the best interests of their child".²³⁸ As Article 41 had not been amended, any legislation remains subject to this threshold.²³⁹ The effect of Ireland's inclusion of the best interests principle is, as argued by O'Mahony, unlikely to change much. The Irish example serves to illuminate the importance of ensuring that the best interests principle is a free-standing constitutional principle and given the interests of the child priority over the interests in case of conflict. The amendments to the Norwegian Constitution also introduced the best interests principle in Section 104, as set forth above. In contrast to the Irish experience, in the early days of the constitutional amendment, more than half of the cases concerning the CRC before the Supreme Court pertained to Article 3(1) and Article 104.²⁴⁰ The Norwegian Supreme Court has characterised the best interests of the child principle in Section 104, modeled after Article 3(1) of the CRC, as the "cornerstone" in children's legal protection. Recent Norwegian Supreme Court judgments have considered Section 104 of the Constitution and Article 3 of the CRC, emphasising that the best interests of a child principle is at the forefront of its assessment in cases involving children.²⁴¹

In 2018, the Supreme Court, referring to both Articles 3 of the CRC and Section 104 of the Constitution, found that the decision to exceptionally grant the right to adoption against the will of parents must be motivated by "an overriding requirement pertaining to the child's best interests".²⁴² The Supreme Court has also addressed the right in relation to expulsion orders and in so doing referred to the best interests principle as set forth in national law and in the CRC. In *Maria*,²⁴³ the Supreme Court considered the expulsion order made against a single Kenyan mother who falsified her asylum application and illegally resided in Norway after her claim of asylum was rejected. The Supreme Court considered the child's best interests, notably relying on the UN Committee's General Comments as interpretive guidance. The Court concluded that the daughter's best interests weighed in

235 See O'Mahony, C. (2019), *supra* note 14, p. 14. In speaking of the amendments to the constitution, he argues that "what is left is a narrow formulation of the best interests principle that applies only in the contexts of private family law proceedings and public law child protection proceedings, as already set out in the Guardianship of Infants Act 1964, the Child Care Act 1991, and the Adoption Act 2010" (*Ibid.*, p. 16).

236 *Ibid.*

237 Article 41 of the Constitution of Ireland provides: "1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State".

238 *Ibid.*, pp. 9, 15-16, referring to the *North Western Health Board v HW (the PKU Case)*, [2001] 3 I.R. 635.

239 *Ibid.*, p. 16, citing *Health Services Executive v B* [2016] 2 IR 350.

240 Supreme Court Justice dr. juris Arnfinn Bårdsen, The Norwegian Supreme Court, "Children's Rights in Norwegian Courts Seminar on Children's Rights" (Kathmandu: June 2015), available <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/childrens-rights-in-norwegian-courts---kathmandu-250615.pdf> (accessed 24 January 2019).

241 *A v. The Prosecution*, HR-2015-00289-A, Supreme Court Judgment and Order, Case no. 2014/1787 (6 February 2015) ("*Rwanda case*"), available <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/rwanda-kjennelsen-hr-2015-00289.pdf> (accessed 24 January 2019), para. 20.

242 *A and B v. The Municipality of X, Supreme Court Judgement*, HR-2018-1720-A Case no. 2018/77, available <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2018-1720-a.pdf> (accessed 24 January 2019), para. 59.

243 *A, B, SELF (intervener) v. The state repr. by The Immigration Appeals Board*, Supreme Court judgment and order of 29 January 2015, HR-2015-206-A, Case no. 2014/1583, available <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/saknr-2014-1583-engelsk.docx.pdf> (accessed 24 January 2019).

favour of allowing the mother to remain in Norway.²⁴⁴ As noted by the Court, “the circumstances on which the expulsion order was based, i.e. illegal residence in the realm and providing a false identity in her asylum application, could not outweigh these factors”.

The Norwegian Supreme Court also considered the extradition to Rwanda of an individual accused of grave crimes, including genocide and crimes against humanity. In so doing, it considered, *inter alia*, the best interests of his children (Norwegian citizens).²⁴⁵ The Supreme Court found that since the decision to extradite one of the parents of a child affects the child, the best interests of the child principle “shall be a fundamental consideration... [that] must apply irrespective of whether the child has a formal status as a party in the case”. The Supreme Court opined that “there is no doubt that on their own the best interests of the children indicate that the accused should not be extradited”.²⁴⁶ It considered that prosecuting the individual in Norway would put less strain on the children than extraditing their father to Rwanda, noting the consequence on the children who would not be able to maintain “contact of significance with their father” or reestablish family life.²⁴⁷ However, when balancing the best interests of the children with an allegation of a serious crime, Justice Matheson opined:

“I find it decisive that we, as mentioned, are faced with an allegation of a rare serious crime. In light of this and other circumstances justifying extradition, I cannot see that there are grounds for giving the best interests of the child absolute priority. In my view, the interests of international criminal judicial cooperation and a proper hearing of the serious charge require that the allegation of genocide is brought before the court in the country in which the crime has been committed and from where the accused has escaped. The individual burdens an extradition decision impose on A’s children can therefore not outweigh the reasons that without a doubt support that the accused is extradited.”²⁴⁸

The Court, therefore, adopted an approach which was heavily influenced by the nature of the offences.²⁴⁹ These cases, however, signal that the Norwegian Supreme Court is prepared to address the best interests of children who are not a party to the proceedings. Prior to the 2014 constitutional amendment, the Supreme Court had also considered the applicability of the best interests principle. In one case, the Supreme Court deferred to the assessment of the best interests of the child conducted as part of immigration-regulating considerations.²⁵⁰ In another, the Court determined that immigration considerations respect and for the other rules of the law outweigh the best interests of the child.²⁵¹ In another immigration case, the Supreme Court held that the absence of a reference in the CRC to an obligation for the state to secure access to effective national remedies meant that an order declaring the violation of Article 3(1) of the CRC provision could not be granted.²⁵² It

244 The Court considered that the mother is the child’s only caregiver, the child is a Norwegian citizen, with the rights this status entails, and that the child’s care situation would be difficult if her mother were to move to Kenya.

245 *Rwanda case*, *supra* note 215.

246 *Ibid.*

247 *Ibid.*, para. 75.

248 *Ibid.*, para. 76.

249 *Ibid.*, para. 77.

250 See HR-2013-704-A (Summary), Case no. 2012/886, Norway: Supreme Court, 3 April 2013, available https://www.refworld.org/cases,NOR_SC,58500c604.html (accessed 24 January 2019).

251 *A, B, C, and D v. The Norwegian Association for Asylum Seekers (NOAS) (third-party intervener) v. The State, represented by the Immigration Appeals Board* (21 December 2012), HR-2012-02398-P, Case no. 2012/688, available <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/case-2012-688.pdf> (accessed 24 January 2019).

252 See *A, B, C and D. The Norwegian Association for Asylum Seekers (NOAS) (third party intervener) v. The State, represented by the Immigration Appeals Board*, HR-2012-02399-P, Case no. 2012/1042), Supreme Court of Norway available <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/the-supreme-court-of-norway-/> (accessed 24 January 2019).

had, however, considered the principle in a case concerning the sentencing of a juvenile offender, finding that the best interests of the child come first when determining which punitive measures to apply.

c) Right to life, survival, and development

According to the CRC Committee, states are under an obligation pursuant to Article 6 to create an environment that respects human dignity and the holistic development of every child. States are under an obligation to ensure that children survive and develop healthily. This invariably touches upon many aspects of a child's life and his or her rights which cannot be addressed in a comprehensive fashion in this study. Suffice to say, and according to Pimberton *et al.*, “[d]omestic courts have been adept at arriving at complex decisions in cases relating to civil and political rights, but they have tended to dodge issues of poverty, access to health care, and non-fulfilment of other economic and social rights”.²⁵³ While some courts have given Article 6 direct effect,²⁵⁴ at the same time, the article has not always been expressly considered but is often assessed in conjunction with other rights or overarching principles. A 2017 decision of the Norwegian Supreme Court concerning parents' visitation rights after the removal of the child is demonstrative of this approach. In considering the “child's interest”, the Supreme Court considered that:

On the one hand, it dictates that the child's ties with its family may only be severed “in very exceptional circumstances”. On the other hand, *it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 [of the European Convention on Human Rights] to have such measures taken as would harm the child's health and development.* I cannot see how this quote suggests a different norm than what the Supreme Court has now applied. This norm is in my view also consistent with the Constitution sections 102 and 104 (emphasis added).²⁵⁵

The Court went on to also consider domestic legislation in the same context.²⁵⁶ This approach is reflected in the practice of CoE member States whereby the rights contained in Article 6 are usually not expressly mentioned, do not form the sole reason for a decision, or are included in an assessment of the best interests of the child alongside domestic law and other legal instruments like the European Convention on Human Rights.²⁵⁷ As a result, the manner in which jurisprudence takes Article 6 into account is not easily discernible as compared to the other general principles.

d) Respect for the views of the child

Article 12, which concerns the respect for the views of the child, has been less contentious in the courts than some of the other general principles.

253 Pimberton, J., et al., “Child Rights and Child Poverty: Can the International Framework of Children's Rights Be Used to Improve Child Survival Rates?”, (23 October 2007), PLoS Med. 2007 Oct; 4(10): e307 available https://tampub.uta.fi/bitstream/handle/10024/103481/international_perspectives_on_child_responsive_2018.pdf?sequence=1&isAllowed=y (accessed 24 January 2019).

254 CE No 170098 (1997) (France). See also the decision of the CE to authorise the commercialisation of an oral contraceptive (CE No 216521 (2001)).

255 See for e.g. HR-2017-2015-A, Case No. 2017/614, para. 49.

256 The Court also considered this right in the context of the Child Welfare Act which provides that “decisive importance shall be attached to finding measures which are in the child's best interests” (*ibid.*, paras 51-52).

257 The rights to survival and development have accordingly been addressed before the European Court of Human Rights but is outside of the scope of this paper.

The right to be heard is expressed in Article 22*bis* of the Belgian Constitution.²⁵⁸ In Belgium, Article 12 has influenced courts and judges, with lower courts and tribunals in Belgium tending to unanimously recognise the direct effect of Article 12 of the CRC.²⁵⁹ It should be noted that following Belgium's ratification of the CRC, it enacted legislative changes in relation to the right to be heard. In 1994, Belgium enacted the Youth Protection Law which stipulated that the youth court is obliged to hear the child from 12 years of age onward, even if the child is not a direct party but when his/her interests are involved in disputes between persons having parental authority. In the same year, Belgium revised its judicial code which provides that a child can be heard in all judicial or administrative proceedings (except for those procedures before the youth court for which the *lex specialis* applies) that concern him or her by a judge or a person designated by a judge at his/her own demand or based on decision of the judge.²⁶⁰ While no age is provided expressly, and it is for the judge to decide upon the maturity and the capacity of the child, in practice Belgian judges notably follow the age of 12 as set forth in the Youth Protection Law.²⁶¹ In 2003, the UN Committee expressed concern over the fact that Article 12 was not fully applied in practice, noting that the right to be heard is insufficiently guaranteed in relation to cases which concern the separation of parents, divorce, adoption, foster care, and education.²⁶² As noted by a European Commission report, Belgian government stakeholders interviewed note that it would be impossible to identify, for example, all of the programmes and the amount of money spent on participation. Similarly, given Belgium's federal structure, administrative measures may differ though they include, in some cases, well-established participation mechanisms in policy-making such as requirements on the active participation of youth before actions are taken. In Flanders, for example, any decrees must also be accompanied by an impact assessment. Generally speaking, it can be said that this has impacted other laws, policies, administrative measures and practices especially in relation to care placements, asylum and immigration, education, employment, health care, and other areas, with varying degrees of effectiveness.

In 2012, Italy's Constitutional Court has declared Article 12 of the Convention to be directly applicable in the domestic legal system and that a child may be considered an interested party in certain proceedings (*e.g.* parental separation, divorce, and custody),²⁶³ a development that was welcomed by the UN Committee.²⁶⁴ The UN Committee, however, remained concerned that the right of the child to be heard in all civil, criminal and administrative proceedings had not been explicitly recognised.²⁶⁵

The right to be heard has been addressed by a number of courts. Article 11(2) of the Swiss Constitution provides that children "may personally exercise their rights to the extent that their power of judgement allows". A case arose in relation to a six-year-old child's right to visit a father she had not previously known. The Swiss Federal Tribunal found that Article 12 of the CRC – namely, the right to be heard – "is a directly applicable legal rule" but no-

258 « Chaque enfant a le droit de s'exprimer sur toute question qui le concerne; son opinion est prise en considération, eu égard à son âge et à son discernement. Chaque enfant a le droit de bénéficier des mesures et services qui concourent à son développement. Dans toute décision qui le concerne, l'intérêt de l'enfant est pris en considération de manière primordiale. La loi, le décret ou la règle visée à l'article 134 garantissent ces droits de l'enfant ».

259 See Vandenhoele, W. (2015), *supra* note 192, p. 111, citing Summary Proceedings, Leuven (16 September 2010), NJW 2011 236.

260 See further European Commission, "Evaluation of legislation, policy and practice on child participation in the European Union (EU)" available http://publications.europa.eu/resource/cellar/6d80dae5-0248-420a-aa55-034e11be616f.0001.01/DOC_1.

261 *Ibid.*

262 UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Italy*, U.N. Doc. CRC/C/15/Add.198 (2003), para. 25.

263 Constitutional Court, Decision No. 1 (16 January 2002).

264 UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, UN Doc. CRC/C/ITA/CO/3-4 (31 October 2011), para. 26. The UN Committee provided a series of recommendations (see *ibid.*, para. 27).

265 *Ibid.*, para. 26(a).

ted that this right is not unlimited.²⁶⁶ While applicable, on the facts of the case, the Court found a six-year did not have the necessary maturity to express her views, noting that she would only be expressing her expectations as she did not know her father. The Dutch Supreme Court has also underlined the importance of the right of a child to be heard, noting that any exception to the rule must be explicitly justified.²⁶⁷

In Norway, the case of *Maria* (noted above) also briefly addressed the issue of Article 12 of the CRC. It considered the appellant's contention that the Immigration Board committed a procedural error by failing to hear the views of the child in light of Article 12 of the CRC and the Immigration Regulations. The Court, however, found that since the Appeals Board's starting point was that it would be in the child's best interests to remain in Norway, there is no basis for assuming that the decision would have been a different one if the child had been heard. In this regard, the Court noted that the child's interests had been safeguarded by the family's lawyer.²⁶⁸

In France, a fragmented approach to Article 12 can be found across courts. As Article 12(2) is indirectly addressed to the state, the Constitutional Court recognised its direct effect once, and only after legal reform gave it domestic effect.²⁶⁹ This suggests that it is easier for courts to give effect to the CRC when there is the narrower the gap between domestic law and the CRC. The Council of State has approached Article 12 in a fragmented manner. For instance, it considered a case challenging the refusal of a minister to abrogate a decree concerning the delivery of medical care to a child against the wishes of the parents. The Council of State rejected the application of Articles 12(1) and (2) of the CRC on the basis that they create obligations between states.²⁷⁰ The court, at other times, has engaged the article but readily assumed compatibility with the CRC. This is poignant in a case where the Council of State, in finding that Article 12(2) had not been breached, considered that the child conveyed her views through her grandmother and that listening to the child directly would not have changed the outcome because the child's view was not determinant.²⁷¹ This case therefore also demonstrates a fundamental misunderstanding of the application of Article 12 of the CRC which does not require that the view of the child determines the outcome but that it is a primary consideration, among others.

In Ireland, courts had previously recognised the rights of a child to be heard in proceedings concerning their welfare. However, following the amendment to the constitution – which enshrines this right – the High Court appears to have placed great emphasis on the constitutionally enshrined right. It stated: “Article 42A which puts the welfare and interests of the child clearly within the sphere of constitutional, and not merely common law or statutory rights”. It went on to state that the “new Article must be seen as enhancing the rights of the child, and add more weight...”.²⁷² This demonstrates the positive effects of enshrining rights constitutionally in that they provide binding standards from which courts can no longer derogate.

266 *Julia X*, BGE 124 III 90 (1997) (Swiss Federal Tribunal).

267 Limbeek, M. and Bruning, M. (2015), *supra* note 189, p. 96.

268 *Maria supra* note 217, para. 57.

269 See also Rongé, J.L., “La Convention internationale relative aux droits de l'enfant: On avance ou on recule?” 2004(10) 240 *Journal du Droit des Jeunes*, pp. 9-15.

270 CE No. 140872 (1996).

271 CE No 291561 (2008).

272 *AO'D v Judge O'Leary*, [2016] IEHC 555.

VII. Conclusions

As aptly stated in the famous dictum of Justice Sachs of the South African Constitutional Court:

“Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.”

This image of constitutional childhood is one of protection coupled with emancipation, of freedom to explore, blended with adult guidance and compass.²⁷³ It is true that while including children’s rights in national constitutions is key to implementing the CRC, it does not automatically guarantee the implementation of such rights. It can, however, be a driver for their further development and implementation of children’s rights in the domestic order when given direct effect and supremacy and may be used as an interpretive tool when deciding cases involving children.

As noted above, practice does not provide clear steps which a State Party must undertake before or following constitutional amendments to include children’s rights. What is clear from experience is that any efforts must be preceded by a consultative process, sensitisation, and training and followed up with mechanisms to monitor, support and enforce implementation.

As seen above, there is no uniformity in how member States express children’s rights in their constitutions, how they incorporate the CRC into their domestic orders, give it effect, or apply it in practice. At the same time, there is no particular order in which to pursue legal or non-legal measures of implementation. However, where states have incorporated children’s rights into the national legal system (e.g. Belgium, Norway, and Spain), children are more commonly perceived as rights-holders.²⁷⁴

Despite unanimous ratification across the CoE and the constitutionalisation of some children’s rights to varying degrees, it is clear that children still do not enjoy the right to bring claims of violations against *all* of their rights before *all* courts across the CoE. The automatic incorporation of the CRC into the domestic law as in the case of many monist states does not necessarily guarantee meaningful judicial engagement with its provisions. In countries where the direct effect and applicability of the CRC remains uncertain, courts have approached each provision in a piecemeal and disparate fashion. The CRC has, nonetheless, remained an important tool in a number of countries for interpreting national standards in domestic courts in some jurisdictions²⁷⁵ and where the direct effect has been accepted, it has played a gap-filling role in the absence of domestic legislation.²⁷⁶ When the rights contained in the CRC can be directly applied by courts and given supremacy, they can be an important tool in setting aside norms, decisions, or acts which are in conflict.

In Belgium, the mixed approach taken by courts – denying the direct effect of some provisions while accepting it in relation to others – has resulted in the full potential of the CRC not being fully implemented by the courts, especially in relation to rights not specifically enumerated like the principle of non-discrimination. The CRC is, however, used to fill gaps in domestic legislation and as an interpretive tool.

273 Sloth-Nielsen, J. (2018), *supra* note 20; Sloth-Nielsen and Kruuse (2013), *supra* note 24, p. 671.

274 See also Kilkelly (2019), p. 10.

275 Limbeek, M. and Bruning, M. (2015), *supra* note 176, p. 103.

276 See e.g. Vandenhole, W. (2015) *supra* note 179, p. 120.

As is demonstrated in the case of Norway, its recent constitutional amendments coupled with the primacy it has afforded the CRC over other legislation, has resulted in a child's rights centered approach whereby children can bring their rights before courts and have them carefully considered in their best interests. According to Justice Dr. juris Arnfinn Bårdsen of the Supreme Court of Norway:

“The essential legal effect of constitutionalizing rights and freedoms is that they acquire the force of *lex superior*; in the hierarchy of legal norms within the Norwegian jurisdiction, constitutional rights and freedoms have the highest rank.”²⁷⁷

Kilkelly contends that the “Norwegian experience of internalising the international standards by bringing them back to the national system shows that this is an important way to ensure systematic and effective legal implementation of the Convention”.²⁷⁸

While Irish courts are starting to consider the newly adopted amendments to its constitution, the failure to adopt the best interests and the right to be heard principles as free-standing constitutional principles which apply in case of conflict and in all decisions affecting children calls the effectiveness of Ireland's well-intentioned amendments into question. Ireland's experience also exposes the potential risk to constitutional amendments which do not produce strong protections or balance the rights of the child against strong constitutional protection for parents and families. In such cases, amendments can entrench “power dynamics that act as a barrier to children's rights”.²⁷⁹ The effect of the new article in Ireland will only become clear as it continues to be interpreted and applied by the courts.

277 See Supreme Court Justice dr. juris Arnfinn Bårdsen, “The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms”, “Norway in Europe”, Centre for European Law, Oslo 18 September 2017, available <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/supreme-court---constitutional-rights---bardsen18092017.pdf> (accessed 24 January 2019), para. 3.

278 Kilkelly (2019), p. 10.

279 See O'Mahony (2019), *supra* note 14, pp. 19-20. O'Mahony advises that “[g]iven the difficulty of changing a constitutional provision once it has been enacted, it would be better to walk away from constitutional reform and try again another day than to press ahead and settle for a weak or counter-productive amendment” (*ibid.*, p. 20).



Deutsches Kinderhilfswerk e. V.

Leipziger Straße 116-118
10117 Berlin
Fon: +49 30 308693-0
Fax: +49 30 308693-93
E-Mail: dkhw@dkhw.de
www.dkhw.de



Gefördert vom:



Bundesministerium
für Familie, Senioren, Frauen
und Jugend

ISBN 978-3-922427-38-4