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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT**

**ON THE PROTECTION OF CHILDREN'S RIGHTS:  
INTERNATIONAL STANDARDS AND DOMESTIC CONSTITUTIONS**

**adopted by the Venice Commission  
at its 98<sup>th</sup> Plenary Session  
(Venice, 21-22 March 2014)**

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## I. INTRODUCTION

1. At its 95<sup>th</sup> plenary session (8-9 March 2013) the Venice Commission decided to launch a study on “Children’s Rights in Constitutions” as a contribution to the Council of Europe Strategy for the Rights of the Child (2012-2015). The study is also meant to respond to a request made by the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly, dated 25 March 2013, on “How can children’s rights be included in national constitutions with a view to thus promoting their effective implementation”.

2. The present report was drawn up on the basis of comments from Co-Rapporteurs Mrs Peters and Mrs H. Thorgeirsdottir, Mr C. Grabenwarter and Mr J. Helgesen, and of the contribution by Dr Conor O’ Mahony, Professor Ursula Kilkelly and Dr. Anne Lindboe, Children Ombudsperson of Norway acting as experts .

3. Preliminary discussions took place in the Sub-Commission on Democratic Institutions on 10 October and on 5 December 2013 as well as on 20 March 2014. The present report was adopted by the Venice Commission at its 98<sup>th</sup> Plenary Session (Venice, 20-21 March 2014).

## II. GENERAL REMARKS

4. The adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989 signalled international recognition of children as legal right-holders. In the intervening years, this recognition has permeated through other international instruments as well as through national legal systems at various levels, including at the constitutional level.

5. Children’s rights are protected by other international instruments, including general human rights treaties such as the European Convention of Human Rights (hereafter ECHR) and its case law, as well as specialised instruments that deal with precise aspects of children’s rights like adoption, child-friendly justice and juvenile detention, have been developed by the Council of Europe.<sup>1</sup>

6. As societies continue to evolve dynamically and as new threats to children’s well-being keep emerging, the question arises of whether the law and constitutions offer sufficient protection as they stand today. Europeans are experiencing one of the deepest economic crises since the Second World War; the new political reality of austerity threatens over six decades of growing social solidarity and human rights protection across Council of Europe Member States, as recently pointed out by the Commissioner for Human Rights<sup>2</sup>. More specifically, poverty including child deprivation is growing and is likely to lead to negative long-term effects. In its 2012 annual report, the EU agency for Fundamental Rights underlined that “child poverty in the EU is an issue of growing concern”<sup>3</sup>, the percentage of children living in poverty or social exclusion is on the rise in a number of Member States as a result of the impact of the economic crisis<sup>4</sup>. It is clear that against this background equal opportunities and rights of children are more than ever closely interrelated and must be addressed properly.

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<sup>1</sup> See the Council of Europe Revised Convention on Adoption (Revised), CETS No 202; the Guidelines on Child-friendly Justice, adopted by the Committee of Ministers on 17 October 2010 and the European Rules for Juveniles Subject to Sanctions and Measures (Recommendation CM/Rec(2008)11).

<sup>2</sup> Council of Europe Commissioner for Human Rights, “Safeguarding Human Rights in Times of Economic Crisis”, issue paper November 2013.

<sup>3</sup> Children falling victim to EU economic crisis, 18 June 2013, <http://www.eubusiness.com/news-eu/children-poverty.p8d>

<sup>4</sup> Employment, Social Policy, Health and Consumer Affairs Council Conclusions on ‘Preventing and tackling child poverty and social exclusion and promoting children’s well-being’, Brussels, 5 October 2012

7. This study aims to examine whether the current constitutional framework (CDL-REF\*\*\*) is sufficient to afford effective protection to children's rights. It therefore focuses on selected crucial elements of children's rights identified by the rapporteurs and consequently does not claim to constitute a comprehensive analysis of the whole range of the protection of children's rights in constitutions.

8. With regard to the effectiveness of the protection afforded at the constitutional level, here again the report draws on the guiding principles and legal enforcement tools that can be observed in Europe rather than providing an exhaustive analysis of the enforcement mechanisms and practices in all 47 Member States of the Council of Europe. Considering the means and time frame allocated to this study it has been oriented towards offering a constructive contribution to the Council of Europe Strategy for the Rights of the Child (2012-2015).

9. The study starts by examining the main legacies of the United Nations Convention on the Rights of the Child (hereafter CRC) and by exploring what the Committee on the Rights of the Child has said about the obligations of state parties to protect children's rights in their domestic legal system. The study continues with the description of the ins and outs of constitutional protection through international law, which is followed by details of the ECHR and its case law along with a brief analysis of the impact made by the relevant EU Fundamental Rights provisions.

10. Exploring the issue of equal opportunities and rights of children in times of crisis will shed light on crucial elements of the positive obligation of States to fulfil their international commitments.

11. The study will then move on to the national level of the protection of children rights and analyse the constitutional protection of these rights in Council of Europe Member States as well as look at their enforcement. Finally, the conclusions that can be drawn from this analysis will lead to recommendations that are deemed crucial in view of promoting the effective implementation of children's rights.

### **III. The guiding principles of the United Nations Convention on the Rights of the Child**

12. The CRC represents the recognition of the status of children as autonomous rights-holders; it represents the baseline in international law of the protection of children's rights.<sup>5</sup> Through ratification, State Parties to the Convention have re-affirmed the 'dignity of each and every child',<sup>6</sup> which the UN Committee on the Rights of the Child ( hereinafter 'the Committee') has described as 'the fundamental guiding principle of international human rights law'.<sup>7</sup> Children have rights not because they are children, but because they are human beings.

13. The CRC makes clear that children are the holders of rights, which states have the duty to vindicate and protect. These particular circumstances informed the imperative for the recognition of the legal capacity of children and the legal expression of children's rights within international law.<sup>8</sup> They underpin the momentum towards introducing legal provisions dedicated to children's rights at the national level.

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<sup>5</sup> The Convention was adopted by General Assembly Resolution 44/25 at the 61<sup>st</sup> plenary meeting on 20 November 1989 and has been ratified by 193 countries.

<sup>6</sup> Committee on the Rights of the Child, 'The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment (arts. 19; 28, para 2; and 37, inter alia)' General Comment No. 8 (2nd March 2007) UN Doc. CRC/C/GC/8 para. 16. See also, M. Freeman, 'Why it remains important to take children's rights seriously' (2007) *The International Journal of Children's Rights* 15:5-23, 7.

<sup>7</sup> Committee on the Rights of the Child, General Comment No. 8, *ibid.*

<sup>8</sup> S. Detrich (ed.) J. Doek and N. Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the 'travaux préparatoires'* (Dordrecht: Kluwer Academic Publishers, 1992), 27.

14. Unlike most other instruments of international human rights law, the CRC acknowledges that the beneficiaries of the rights that it confers are dependent not just on the state to vindicate their rights, but also on other adults (namely parents, carers and other family members).<sup>9</sup> The Convention acknowledges that children's development is best secured within a loving, safe family environment and notes that children sometimes depend on family members to exercise their rights and have them fully vindicated.<sup>10</sup> At the same time, it responds to the reality that children's needs can be ignored, diluted or trumped by the rights of the family (or those with parental responsibility),<sup>11</sup> whose authority is often recognised in very strong terms under national law. The CRC was meant to be a useful tool for advocacy and greater awareness of a new understanding of children as independent right holders – children, however, need protection within their families. As stated in the Universal Declaration of Human Rights, the family is the basic unit of society. It is a social and legal construct and, in various countries, a religious construct<sup>12</sup>.

15. The rights-based approach encompassed by the CRC proceeds from an acceptance of the universal values of dignity<sup>13</sup> towards a declaration of individual children as autonomous rights-holders with the capacity to exercise those rights as the child's capacity evolves.<sup>14</sup> In this way, the status of the child as a rights-holder should not be confused with the reality that children frequently require representation, assistance and support to exercise their rights.

16. It has been recognised that the children's rights approach requires 'a paradigm shift towards respecting and promoting the human dignity' of the child, and recognising children as 'rights bearing individuals, rather than perceiving them primarily as "victims"'.<sup>15</sup> In contrast to the paternalistic, adult-based determination of children's needs, the rights-based approach recognises the capacity of children to contribute to the realisation of their rights.<sup>16</sup>

17. Moreover, according to the Committee on the Rights of the Child, a children's rights approach aims to realise the rights of all children under the Convention by 'developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (Article 4) and capacity of rights holders to claim their rights'.<sup>17</sup> As with all human rights, the state is the primary duty-bearer under the CRC with respect to children's rights. Parents as care takers also have a role to play in the vindication of children's rights either directly or in their role as advocates. The Committee has affirmed that states must 'see their role as fulfilling clear legal obligations to each and every child ... rather than seen as a charitable process, bestowing favours on children'.<sup>18</sup>

18. The interdependence and indivisibility of human rights means that all human rights are respected and ensured 'in a fair and equal manner, on the same footing, and with the same emphasis'.<sup>19</sup> The application of these principles to children's rights is clear from the 'extraordinarily comprehensive' scope of the Convention, which 'includes all traditionally

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<sup>9</sup> U. Kilkelly, 'Children's Rights and the Family: Myth and Reality', *Studies: An Irish Review Quarterly*, Vol. 97, No. 385, Spring 2008 7-18.

<sup>10</sup> See the Preamble, Article 5 and Article 18 for example.

<sup>11</sup> See for example, Article 19 of the CRC which provides that children have the right to be protected from harm including at the hands of parents and carers.

<sup>12</sup> UN Resolution 217 A (III), article 16 (3).

<sup>13</sup> See M. Freeman, *The rights and wrongs of children* (London: Frances Pinter Publishers, 1983), chapter 2.

<sup>14</sup> Committee on the Rights of the Child, 'Implementing child rights in early childhood' General Comment No. 7 (20<sup>th</sup> September 2006) UN Doc. CRC/C/GC/7/Rev.1, para. 3.

<sup>15</sup> Committee on the Rights of the Child, 'Article 19: the right of the child to freedom from all forms of violence' (2011) *General Comment No. 13* UN Doc. CRC/C/GC/13, para. 3.

<sup>16</sup> See for example, *ibid*, para. 65.

<sup>17</sup> *Ibid*, para.59.

<sup>18</sup> Committee on the Rights of the Child, 'General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42,44, para. 6)' (2003) General Comment No. 5, UN Doc. CRC/GC/2003/5, para 11.

<sup>19</sup> 'Vienna Declaration and Programme of Action' World Conference on Human Rights (Vienna: 14th -25th June 1993) (12 July 1993) UN Doc. G.A/CONF.157/23 para. 5.

defined areas of human rights – civil, political, economic, social and cultural’.<sup>20</sup> The substantive provisions of the CRC therefore affirm that ‘all human rights are universal, indivisible and interdependent and interrelated’.<sup>21</sup> Since its establishment, the Committee on the Rights of the Child has repeatedly focused attention on this core principle of international human rights law. In line with this, a holistic children’s rights approach demands implementation of Convention rights which advocate the exercise of children’s participation in decision-making – known as participation rights – on an equal basis with those which seek to protect children from harm – known as protection rights.<sup>22</sup>

19. At its first session, the Committee identified four general principles among the Convention’s provisions: non-discrimination (Art 2); the best interests of the child must be a primary consideration in all actions concerning the child (Art 3); the right of the child to life, survival and development (Art 6) and the right of the child to be heard in all decisions that affect him/her (Art 12).<sup>23</sup>

20. These general principles both exist as individual rights, to which every child is entitled, while also serving to guide the implementation and interpretation of the Convention as a whole.<sup>24</sup> The Committee on the Rights of the Child has recommended that these provisions, in particular, be given legal standing and effect in the national legal systems.<sup>25</sup>

21. In the context of article 4 of the CRC, the Committee has also expressly addressed the importance of constitutionalising children’s rights. In responding to suggestions by states that ‘the inclusion in their Constitution of guarantees of rights for ‘everyone’ is adequate to ensure respect for these rights for children’, the Committee has stated: ‘the test must be whether the applicable rights are truly realized for children and can be directly invoked before the courts.’<sup>26</sup> Where states do include child-specific provisions in their national constitutions, the Committee has emphasised the importance of a rights-based approach and the general principles of the Convention:

22. ‘The Committee welcomes the inclusion of sections on the rights of the child in national constitutions, *reflecting key principles in the Convention*, which helps to underline the key message of the Convention – that children alongside adults are holders of human rights.’<sup>27</sup>

23. The Committee has noted that constitutionalising children’s rights, like broader measures of implementation, ‘does not automatically ensure respect for the rights of children’.<sup>28</sup> Even so, the Committee has recognised that it is an important step ‘towards the full implementation’ of the rights in the Convention.<sup>29</sup>

<sup>20</sup> S. Detrich (ed.) J. Doek and N. Cantwell, *The United Nations Convention on the Rights of the Child: A Guide to the ‘travaux préparatoires’* (Dordrecht: Kluwer Academic Publishers, 1992), 27. See also, D. McGoldrick, ‘The United Nations Convention on the Rights of the Child’ 5 *International Journal of Law and the Family* (1991) 132-169.

<sup>21</sup> Vienna Declaration and Programme of Action, para. 5.

<sup>22</sup> For example, the Committee recently drew attention to the importance of having regard to ‘the universal, indivisible, interdependent and interrelated nature of children’s rights’ when implementing the fundamental right and general principle of the Convention – the best interests of the child. See Committee on the Rights of Child, ‘The right of the child to have his or her best interests taken as a primary consideration (art. para. 1)’ General Comment No. 14 (29th May 2013) UN Doc. CRC/C/GC/14, para 16.

<sup>23</sup> Committee on the Rights of the Child, 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 (30<sup>th</sup> October 1991) UN Doc. CRC/C/5. See also updated version, Committee on the Rights of the Child, 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 (23rd November 2010) UN Doc. CRC/C/58/Rev.2, para. 23-27.

<sup>24</sup> Committee on the Rights of the Child, ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42,44, para. 6)’ General Comment No. 5, para. 12.

<sup>25</sup> See for example the Concluding Observations of the Committee on the Rights of the Child: Ireland CRC/C/15/Add. 85 February 4, 1998, para 25.

<sup>26</sup> *Ibid*, para. 21.

<sup>27</sup> *Ibid*, para. 21(emphasis added).

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*.

24. This being said, it is important to analyse whether indirect constitutional protection through international laws offers an appropriate response to the CRC's demands.

#### **IV. Indirect constitutional protection of Children's rights through international law**

25. States may choose to protect children's rights by incorporating the Convention on the Rights of the Child (CRC), and the children's rights provision of Art. 24 of the European Union Fundamental Rights Charter (EU FRC) of 2000/2007 into their domestic law.

26. A constitutional type of protection through international law will be achieved only if the CRC and/, or Art. 24 EU FRC (for EU Member States), is awarded a "constitutional" status and a "constitutional" effect within the domestic legal order.

##### **A. The incorporation of the CRC into the domestic legal order**

27. The legal effect of the CRC within a given national legal order comprises four distinct aspects: (1) The method of incorporation into the domestic legal order, e.g. by allowing for an automatic effect upon ratification ("monist approach") or by requiring the adoption of a specific implementing treaty ("dualist approach"); (2) the normative rank granted to the CRC; (3) a possible direct effect granted to specific provisions of the CRC; (4) reservations.

28. While States are generally obliged to "respect and ensure the rights set forth in the (...) Convention (Art. 2 (1) CRC), the Convention does not stipulate how this must be done. Nor does the CRC say anything specific on its normative rank within the domestic order of state parties (status of constitutional law, of ordinary statutes, or the like); actually such a statement would be unusual for an international law treaty.

29. The status of a convention in domestic law and the effect of international law within the national legal system – varies from one state to another. The formal normative ranking is important however for deciding normative conflicts between the CRC and domestic law<sup>30</sup>.

30. Most state parties normally only grant the CRC the status of domestic acts within their legal order, or at best in-between statute law and the constitution. Various reservations of State parties imply that these states consider their national constitutions to prevail over the CRC. This means that the CRC's normative effect may be, in purely formal terms, less powerful than that of a constitutional clause on children's rights in a national constitution.

31. As a rule, the ratification of the CRC therefore does not render the adoption of specific constitutional provisions on children's rights superfluous or redundant; even if these merely duplicate the Convention.

##### **1. Direct and/or indirect effects of the CRC in the domestic legal order**

###### **a. Direct effect**

32. Direct effect is understood as a legal mechanism according to which a domestic body (notably a court) may apply an international rule directly, which can render a contrary rule of domestic law illegal. A possible direct effect will not pertain to the CRC as a whole, but can only be identified clause by clause. Conversely, some states have occasionally declared particular international treaties summarily to have no direct effect, mostly by pointing to the overall "soft", "imprecise", or diplomatic/political characteristics of that treaty as a whole, or its lack of "normative density".

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<sup>30</sup> For example, the national laws on the judiciary in a given state may not grant children a hearing, contrary to the prescriptions of Art.12 CRC in the interpretation given to this principle by the Children's Rights Committee. Only if the CRC enjoys (in that particular country) a normative rank which is superior to that of domestic Acts (laws), the contrary domestic provision would have to give way and could not be applied by the domestic authorities.

33. The decision whether a concrete treaty provision has a direct effect in a domestic legal order is most often answered by the domestic authorities, notably courts, which are confronted with that question in the course of the state's implementation of the CRC. Typically, the direct effect is invoked by a private person who seeks to rely on the treaty provisions and receive benefits from it.

34. Despite its occurrence in the course of domestic proceedings, the question of the direct effect is not a purely "domestic" question. National courts and authorities must rely on the acknowledged criteria of direct effect. There is in fact a convergence of criteria visible in the practice of states.

35. When examining some of the core provisions of the CRC, it is interesting to note that whether or not these clauses have a direct effect has been answered differently by various domestic courts.

36. The direct effect of Article 2 (non discrimination) CRC, for instance, seems to be disputed<sup>31</sup>. The Belgian Court of Cassation pronounced itself against the direct effect of Art. 2(1) in the Belgian legal order, but without providing any explanation.<sup>32</sup> By contrast, Art. 12 (respect for the views of the child), has been awarded direct effect within the Swiss legal order by the Swiss Federal Tribunal.<sup>33</sup>

37. The direct effect of the best-interest provision in Art. 3 (best interests of the child)<sup>34</sup>, which is a core provision, has been answered differently by various domestic courts. While Belgian institutions have pronounced themselves against a direct effect in more recent decisions,<sup>35</sup> French<sup>36</sup> and Bulgarian<sup>37</sup> courts have assumed a direct effect in their legal order and the Dutch Council of State<sup>38</sup> has recently moved towards such recognition

38. The following arguments have been given in favour of a direct effect of Art. 3: first, the wording of the provision mentions not only lawmakers, but also "social welfare institutions, courts of law, administrative authorities". Second, a teleological argument can be made: if the provision is to have any practical effect, it must address primarily the law-appliers. For these reasons, the intent of the State Parties to allow for a direct effect may be presumed.

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Stefanie Schmahl mentions Art. 2(1) among the self-executing provisions of the CRC Stefanie Schmahl, *Kinderechtskonvention mit Zusatzprotokollen: Handkommentar* (Baden-Baden: Nomos 2013). Einleitung, para. 26 (p. 39). In contrast, Sharon Detrick mentions a number of CRC provisions to be self-executing, but exactly the core provisions of Art. 2,3,6, and 12 are not included in her list Sharon Detrick, *A Commentary on the Convention on the Rights of the Child* (The Hague: Nijhoff 1999) (Detrick (note \*), at p. \*28).

<sup>32</sup> Belgian Court of Cassation, *DD v. HDP Compensation Fund for Family Allowances*, Appeal Judgment, Cass. No. S 060105 F/2008, ILDC 1114 (BE 2008), 26 May 2008, paras. 81 and 86.

<sup>33</sup> Swiss Federal Tribunal, BGE 124 III 90 (22 Dec. 1997).

<sup>34</sup> Article 3 CRC: "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

<sup>35</sup> Belgian Court of Cassation, *JH and SL v. PK*, Appeal in cassation, Case No C 10 0685 F, ILDC 1919 (BE 2012), 2 March 2012.

<sup>36</sup> French Cour de Cassation, *X v. Y*, Cassation Appeal, Case No 1810 (2005) Information Bulletin Court of Cassation 626, ILDC 770 (FR 2005), 14 June 2005.

<sup>37</sup> Bulgarian Supreme Administrative Court, *Kerezov v. Minister of Justice, Ministry of Health and others*, Appeal, Administrative Case No 2829/2002, Judgment No 9904, ILDC 606 (BG 2002), 6 Nov. 2002; Bulgarian Supreme Administrative Court, *Neychev v. Head of District Directorate Police – Burgas and Head of the Directorate 'Social Support' – Burgas*, Neychev, Cassation appeal, Judgement no 1417, 10912/2007, ILDC 1243 (BG 2008), 7 Febr. 2008.

<sup>38</sup> Dutch Administrative Jurisdiction Division of the Council of State, judgment of 7 February 2012, No. 201103064/1/V2.



39. A systematic consideration is that, unlike Art. 2(2) and 4 CRC, Art. 3 does not state that the state parties “shall take all appropriate measures to ensure”, but simply says that the best interests “shall be a primary consideration.” This is relevant for example in administrative decisions concerning aliens (requests for residence permits; request for asylum; expulsions, etc.). The child’s interest must not only be one factor in the balancing exercise, but a “primary” one. This also means that the law-applying authority must justify in detail when it decides against the child’s best interests. It places an argumentative burden on the authorities and courts. Overall, a direct effect of Art. 3 CRC will entail both procedural and substantive consequences: it prescribes detailed reasoning and engagement, and in substance points in a specific direction<sup>39</sup>.

#### ***b. Indirect effect***

40. Besides or as an alternative to a ‘direct effect’ of some provisions of the CRC, its “indirect effect” is acknowledged in state practice. An indirect effect basically means that domestic law must be interpreted in the light of the CRC by the domestic authorities (principle of treaty-consistent interpretation). In this way, clashes between domestic constitutional law and international law are kept to a minimum. A number of Council of Europe member state constitutions prescribe that the domestic legal order must be interpreted in conformity with international law, and in many states the case-law also embodies such a principle. Some states prescribe an international-law friendly interpretation of domestic statutes, but only within the limits of constitutional principles.

### **2. Reservations**

41. The CRC has been notoriously weakened by reservations. Numerous reservations have been made, most often with regard to the provisions of Art. 14 (freedom of religion) and Art. 21 (adoption). It is also striking that a great number of objections have been raised especially by CoE member states; against the very sweeping reservations of other (mainly non-European) states, arguing that those reservations were inadmissible under international law, especially that they were incompatible with the object and purpose of the CRC.

42. Out of the members of the Council of Europe, Austria, Belgium, Croatia, Denmark, France, Iceland, Liechtenstein, Luxembourg, the Netherlands, Poland, Spain, and the UK have made reservations. However, only very few reservations lodged by member states of the Council of Europe concern the core provisions (Art. 2, 3, 6, and 12 CRC) or have a structural significance.

43. Overall, the high number and the extensions of the reservations may be seen as seriously undermining the normative effects of the CRC. However, within the Council of Europe, the issue of reservations seems to be moving in a positive direction. While a number of CoE member states (Germany, also the Czech Republic, Malta, Norway, Slovakia, Slovenia, Serbia and the United Kingdom) had initially made reservations, these states have now withdrawn them. This is a recommendable which should be followed by other member states, too.

### **3. International monitoring of the CRC**

44. The CRC has the weakest type of monitoring mechanism in the field of international (human) rights; i.e periodic State reports. (Art. 44 CRC). The establishment of stronger mechanisms initially faced strong resistance.

45. Recently, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure was adopted. It has 45 signatories and 10 ratifications and will enter into force on 14 April 2014. The Optional Protocol foresees individual communications, inter-state communications, and an inquiry procedure for grave or systematic violations. The

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<sup>39</sup> See General Comment n°14.

entry into force should constitute a significant improvement of the implementation of the CRC in those states which have ratified the optional protocol.

46. In conclusion, this brief analysis offers a mixed picture of the effectiveness of the CRC's provisions in the domestic legal order. While the doctrine is not uniform, especially not with respect to the Convention's direct effect, the implementation process in courts reveals a process in evolution.

## **B. The Fundamental Rights Charter and the protection of Children's Rights**

47. The EU Fundamental Rights Charter contains a specific provision on the rights of the child (Art. 24 EU FRC). Art. 24 notably endorses two of the CRC's fundamental principles, namely the right to be heard and the best-interest principle, and thus corresponds to Art. 3 and 12 CRC. Whether Art.24 contains individual fundamental rights of children or merely "principles" that may be taken into account by courts (notably by the ECJ) but may not be invoked by individuals is still the subject of discussion.

48. The normative rank of the EU FRC is important with regard to the constitutional protection of children's rights. The Charter has "the same legal value" as the EU treaties (Art. 6(1) TEU). It thus functions as EU primary law, and as such enjoys priority over domestic law of the EU member states. In the eyes of the ECJ, this priority even extends over domestic constitutional law. However, some EU member states' courts have tended to refuse the application of EU law when this would infringe the "constitutional identity" of the member state.

49. The addressees of Art. 24 EU FCR are, first of all, the EU Institutions, but also the EU member states, when they are implementing Union law (Art. 5(1) FrC). Additionally, a possible binding effect for private actors in the field of the protection of children's rights would reinforce the impact of those provisions. Finally, for the sake of completeness of the overview, it is worth mentioning that the accession of the EU to the ECHR will not change the legal effect of the EUFRC for the member states.

## **C. The European Convention on Human Rights**

50. Although several guarantees of the ECHR are similar to the rights that can be found in the Convention on the Rights of the Child (CRC), the ECHR does not mention children's rights explicitly. However, a few guarantees of the ECHR refer to children in general or to special situations they might be confronted with, such as Article 6(1), Article 5 (1) (d), Article 5 of Protocol No. 7 or Article 2 of Protocol No. 1. Other guarantees have been explicitly applied to children by the jurisdiction of the European Court of Human Rights (hereinafter "ECtHR" ). This is especially true for Article 3, Article 6 and Article 8. Thus, children are obviously rights holders under the ECHR.

51. Over the last decade the ECHR has had an increased impact on the evolution of children's rights in Europe. One reason for this development is that the ECHR is the international instrument in the field of human rights that has the most effective mechanism for enforcing the rights with a Court which is open to individual applications and which delivers legally binding decisions).<sup>40</sup> When interpreting the rights of the Convention the ECtHR takes more and more account of other international and European instruments in the field of a particular guarantee. This includes the CRC enters the reasoning of the Court<sup>41</sup>.

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<sup>40</sup> See U. Kilkelly, 'Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in light of the Convention on the Rights of the Child' 23(2) *Human Rights Quarterly* (2001) 308-326.

<sup>41</sup> The latest example can be seen in ECtHR, *Söderman v. Sweden*, Grand Chamber, Judgment of 12 Nov..11.2013.

52. In addition, the ECHR is characterized by its dynamic nature. The ECtHR has repeatedly stressed that the ECHR is a living instrument, which must be interpreted in the light of present-day conditions.<sup>42</sup> Keeping in mind the significant changes of social and family structures in the last decades, the dynamic character of the ECHR is of special importance to children's issues.

53. Article 1 determines the personal scope of application of the ECHR: the Member States shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Article 14 reinforces Article 1 by prohibiting discriminations on any ground such as race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The ECtHR considers discriminations based on the age of a person as falling under the scope of Article 14. The guarantees laid down in the ECHR apply to children in the same manner they do to adults. In the Convention case law, the notion of a minor or a child encompasses persons under the age of 18.<sup>43</sup>

54. Whether or not an embryo/foetus enjoys the protection of the right to life provided by Article 2, has not been answered by the ECtHR<sup>44</sup> and is certainly one of the most disputed questions among the Member States. Other unanswered questions refer to the end of childhood and the applicability of Article 5 (1) (d) to the detention of minors, Article 6 (1) second sentence about the exclusion of the press and public from trials, when it is required by the interest of juveniles, or Article 12, which provides the right to marry. In contrast to the CRC, the ECHR does not contain any provisions dealing with the end of childhood at a certain age limit. Rather, the Member States enjoy a wide margin of appreciation in this matter.<sup>45</sup>

55. In order to be able to file a complaint before the ECtHR, a person must be a victim of violations of rights of the ECHR. There are no provisions of the ECHR that restrict children's access to the ECtHR. The parent's consent is not necessary for a child to be able to file a complaint. Nevertheless, most of the complaints concerning children's rights are filed by parents or other legal representatives on behalf of the child.<sup>46</sup>

56. The European Convention on Human Rights has been interpreted by the ECtHR to apply to children even though it contains few specific references to children's rights.<sup>47</sup> The absence of explicit children's rights provision limits the extent to which the ECHR can be interpreted to advance children's rights although references to the CRC in its case-law have enhanced its potential in in this area.<sup>48</sup>

57. However, children's rights can be found in various ECHR guarantees. For instance, while the right to liberty (Article 5 ECHR), in contrast to other human rights provisions, does not provide for any special regulations concerning the treatment of minors in case of deprivation of liberty<sup>49</sup>, the ECtHR has nevertheless developed case law on children's increased need for protection especially concerning conditions of imprisonment.<sup>50</sup>

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<sup>42</sup> E.g. ECtHR, 25/4/1978, *Tyrer v UK*, No. 5856/72, §30 et seq.

<sup>43</sup> ECtHR, 12/10/2000, *Koniarska v UK*, No. 33670/96.

<sup>44</sup> Explicitly leaving the question unanswered ECtHR, 8/7/2004 (GC), *Vo v France*, No. 53924/00, §79 et seq ; *Peukert*, Human Rights in International Law and the Protection of Unborn Beings, in: Matscher/Petzold (Hrsg.), *Protecting Human Rights: The European Dimension*, Studies in Honour of Gérard J. Wiarda, 1988, 511 (515 et seq.).

<sup>45</sup> *Kilkelly*, *The Child and the European Convention on Human Rights* (1999) 21 et seq.

<sup>46</sup> ECtHR, 13/6/979, *Marckx v BEL*, No. 6833/74, §1.

<sup>47</sup> See U. Kilkelly, *The Child and the ECHR* (Dartmouth: Ashgate, 1999) and G. Van Bueren, *Children's Rights in Europe: Convergence and Divergence in Judicial Protection* (Strasbourg: Council of Europe, 2007).

<sup>48</sup> See U. Kilkelly, 'Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in light of the Convention on the Rights of the Child' 23(2) *Human Rights Quarterly* (2001) 308-326.

<sup>49</sup> See Article 10 (2) (b), Art 14 (4) International Covenant on Civil and Political Rights; Article 37, Article 40 CRC.

<sup>50</sup> See ECtHR 28/10/1998, *Assenov v BUL*, No. 24760/94, §137; ECtHR, 29/2/1988, *Bouamar v BEL*, No. 9106/80; ECtHR, 21/2/1996, *Hussain v UK*, No. 21928/93, §52 – 54; ECtHR, 2/3/1987, *Weeks v. UK*, No. 9787/82; ECtHR, 21/2/1996, *Singh v UK*, No. 23389/94.

58. Again, in contrast to the CRC<sup>51</sup>, it is not explicitly laid down in the ECHR that the Member States have to protect children from any form of violence in all settings. Nevertheless, if a Member State fails to protect children from violent or abusive actions, this might constitute a breach of the guarantees under Article 3 or Article 8 ECHR.<sup>52</sup>

59. Article 3 prohibits torture, inhuman or degrading treatment or punishment. As Article 3 does not provide for exceptions or derogation, all interferences with Article 3 constitute a violation of the fundamental right. There is a breach of Article 3 ECHR, if the physical or mental violation of a child attains a minimum level of severity and disrespects a person's humanity.<sup>53</sup> In any event it must exceed the usual element of humiliation inherent in any punishment; it depends on all the circumstances of the case, including the nature and context of the punishment, the age or the state of health of the victim.<sup>54</sup> Violations, which do not attain the minimum level of severity, might not constitute a breach of Article 3, but they might be relevant under the scope of Article 8.<sup>55</sup>

60. Positive obligations can be derived from Article 3 ECHR.<sup>56</sup> The Member States are obliged to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment.<sup>57</sup> It is immaterial whether the real and immediate risk to physical or psychological integrity of an individual derives from the State or a third party.

61. The ECtHR has found not only that Article 3 ECHR requires the Member States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment by private individuals, but that children and other vulnerable individuals in particular are entitled to State protection, in the form of an effective deterrence, against such serious breaches of personal integrity.<sup>58</sup> The ECtHR has held that there had been a violation of Article 3 because the national legal framework did not provide adequate protection of children from ill-treatment. It is shown that even the risk of violation of the physical or psychological integrity of an individual within the family can give rise to positive obligations of the Member States.

62. By contrast, Article 8 ECHR is an important article in the field of children's rights and the ECHR. Its case law already embraces many different situations, children are confronted with: e.g., family life in general, adoption, child abduction, decisions on custody, visiting rights or identity issues. Article 8 ECHR names four different spheres of protection: private life, family life, home and correspondence. Generally, all of them are equally applicable to adults and children. There are many situations under the scope of Article 8 ECHR where not only children's rights are affected, but also the rights of other family members; this requires that a fair balance be struck between the different positions. Children may often require a greater amount of protection under Article 8 ECHR than adults.

63. Private life under Article 8 covers a person's moral and physical integrity, his privacy and the capacity of the individual to determine his or her identity. According to the ECtHR's case law, any medical intervention against the subject's will, or without the free, informed

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<sup>51</sup> See Article 19 CRC.

<sup>52</sup> ECtHR, 28/1/2014, *O'Keeffe v IRL*, No. 35810/09, §§144 et seq.

<sup>53</sup> ECtHR, 18/1/1978, *IRL v UK*, No. 5310/71, §162; ECtHR, 22/9/1993, *Klaas v GER*, No. 15473/89, §§23 et seq (alleged ill-treatment of a detainee in the presence of his minor daughter); ECtHR, 27/8/1992, *Tomasí v FRA*, No. 12850/87, §114 (number and intensity of hits); ECtHR, 28/1/1994, *Hurtado v SUI*, No. 17549/90, §12 (refusal of medical care and sanitation despite of injuries); ECtHR, 25/4/1978, *Tyrer v UK*, No. 5856/72; ECtHR, 25/3/1993, *Costello Roberts v UK*, No. 13134/87, §31.

<sup>54</sup> ECtHR, 23/9/1998, *A. v UK*, No. 25599/94, §20; ECtHR, 23/11/2009, *Cığırhun Öner (No. 2) v TUR*, No. 2858/07, §§89 et seq.

<sup>55</sup> ECtHR, 13/5/2000, *Juhnke v TUR*, No. 52515/99, §69 et seq.

<sup>56</sup> U. Kilkelly, 'Protecting Children's Rights under the ECHR: the Role of Positive Obligations' 61(3) *Northern Ireland Legal Quarterly* (2010) 245-261.

<sup>57</sup> ECtHR, 23/9/1998, *A. v UK*, No. 25599/94, §22; ECtHR, 10/10/2002, *D. P. a. J. C. v UK*, No. 38719/97, §109.

<sup>58</sup> ECtHR, 23/9/1998, *A v UK*, No. 25599/94, §23.

and express consent of the subject, constitutes an interference with his or her private life.<sup>59</sup> For instance, a compulsory test of tuberculosis for children,<sup>60</sup> or the administration of force-feeding or diamorphine to a seriously ill and handicapped child against the firm opposition of the mother to this form of treatment.<sup>61</sup> In this context it must also be mentioned that questions concerning medically assisted procreation can also be regarded to fall within the ambit of Article 8 ECHR.<sup>62</sup>

64. The right to respect for family life is not only guaranteed to parents, but also to other family members and in particular children. The scope of the right to family life was early extended by the ECtHR's case law from a marriage-based relationship with or without minor children to other *de facto* 'family' ties.<sup>63</sup> Cohabitation is therefore not a necessary requirement for Article 8 to apply under the head of "family life" and the existence of a family tie between the parents and their child. The natural family relationship is not terminated by the fact that the child is taken into public care;<sup>64</sup> however, the relationship is terminated by adoption.<sup>65</sup>

65. Interferences with the right to respect for family life protected by Article 8 ECHR can be found in all measures that hinder the mutual enjoyment by parent and child of each other's company.<sup>66</sup> Member States enjoy a wide margin of appreciation for decisions on rights of custody and rights of access, because the ECtHR considers that the national authorities have the benefit of direct contact with all the persons concerned.<sup>67</sup> National authorities must strike a fair balance between the interests of the child and those of the parents.<sup>68</sup> Particular importance should be attached to the best interest of the child<sup>69</sup> which may override the interests of the parents. In particular, a parent is not entitled under Article 8 to have such measures taken as would harm the child's health and development.<sup>70</sup> With a view to adoption the ECtHR found, that the child's best interest should always build the focus of the national authority's decision and that the key purpose of adoption was "to provide a child with a family and not a family with a child".<sup>71</sup> It is also the child's opinion that should be taken into account concerning its adoption, once the child has attained the necessary maturity to express itself in that matter.<sup>72</sup>

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<sup>59</sup> Assumption of a situation of coercing due to the particularly vulnerable psychological state of a female prisoner, ECtHR, 13/5/2008, *Juhnke v TUR*, No. 52515/99, §76 et seq.; ECtHR, 7/10/2008, *Bogumil v POR*, No. 35228/03, §73.

<sup>60</sup> EComHR, 10/12/1984, *Acmanne*, DR 40, 251.

<sup>61</sup> ECtHR, 9/3/2004, *Glass v UK*, No. 61827/00, §70 et seq.

<sup>62</sup> Vgl ECtHR, 10/4/2007, *Evans v UK*, Nr 6339/05, §71; ECtHR, 1/4/2010, *S.H. a. o. v AUT*, No. 57813/00, §60; ECtHR, 4/12/2007, *Dickson v UK*, No. 44362/04, §66; *Gallus*, La procréation médicalement assistée et les droits de l'homme, RTDH 2008, 879 (887 et seq).

<sup>63</sup> EComHR, 6/4/1994, *M.B. v UK*, No. 22920/93; EComHR, 3/7/1992, *C. v UK*, No. 14247/88.

<sup>64</sup> ECtHR, 8/7/1987, *W. v UK*, No. 9749/82, §59; ECtHR, 24/3/1988, *Olsson (No. 1) v SWE*, No. 10465/83, §59; ECtHR, 22/6/1989, *Eriksson v SWE*, No. 11373/85, §58; ECtHR, 13/7/2000 (GC), *Scozzari a. Giunta v ITA*, No. 39221/98 a. o., §169.

<sup>65</sup> EComHR, 11/7/1977, *X.*, No. 7626/76, DR 11, 160 (162); see further ECtHR, 28/10/1998, *Söderbäck v SWE*, No. 24484/94, §31; ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78.

<sup>66</sup> ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §52; ECtHR, 9/6/1998, *Bronda v ITA*, No. 22430/93, §51; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §43.

<sup>67</sup> ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §49; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §62.

<sup>68</sup> ECtHR, 27/11/1992, *Olsson (No. 2) J. SWE*, No. 13441/87, §90; ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §50; ECtHR, 12/4/2011, *Gluhakovic v CRO*, No. 21188/09, §§56 et seq.

<sup>69</sup> ECtHR, 25/2/1992, *Margareta a. Roger Andersson v SWE*, No. 12963/87, §95; ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §48; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §64.

<sup>70</sup> ECtHR, 7/8/1996, *Johansen v NOR*, No. 17383/90, §78; ECtHR, 13/7/2000, *Elsholz v GER*, No. 25735/94, §49; ECtHR, 13/7/2000 (GC), *Scozzari a. Giunta v ITA*, No. 39221/98 a. o., §169; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §64.

<sup>71</sup> ECtHR, 26/2/2002, *Fretté v FRA*, No. 36515/97, §42.

<sup>72</sup> ECtHR, 22/6/2004, *Pini a. o. v ROM*, No. 78028/01 a. o., §§164 et seq; ECtHR, 25/11/2008, *Jucius a. Juciuciené v LTU*, No. 14414/03, §31. See also *Berro-Lefèvre*, Adoption et filiation. Droit à l'enfant ou droits de l'enfant?, Mélanges en l'honneur de Jean-Paul Costa, 2011, p. 25 et seq.

66. A number of positive obligations have been derived from Article 8 by the ECtHR. For instance, positive obligations have great importance for the protection against sexual assaults against children and persons unable to give their consent by creating criminal offences.<sup>73</sup> In particular, the ECtHR assumes a positive obligation deriving from Article 8 taken in conjunction with Article 14 to avoid discrimination between children born out of marriage and children born in marriage, and to provide legal recognition of family life where appropriate ties exist.<sup>74</sup>

67. The prohibition on discrimination guaranteed by Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights set down in the Convention, entails a response for the effectiveness of equal opportunity. In addition, Protocol 12 (2000) to the ECHR, ratified by 18 States, expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law). According to the Explanatory Report to the Protocol, it was created out of a desire to strengthen the protection against discrimination which was considered to form a core element for guaranteeing human rights.

68. The ECtHR has found that 'age' is included among 'other status'.<sup>75</sup> In the ECtHR's case law the protected ground of age relates simply to differential treatment or enjoyment that is based on the victim's age. Although age discrimination per se does not fall within the ambit of a particular right in the ECHR (unlike religion, or sexual orientation), issues of age discrimination may arise in the context of various rights. As such the ECtHR has, as in other areas, adjudicated on cases the facts of which suggested age discrimination, without actually analysing the case in those terms – in particular in relation to the treatment of children in the criminal-justice system.

69. In sixty years the ECHR has become an instrument of international human rights law which applies to many different fields of law and which covers all parts of society. It was only a question of time for the Convention to develop in a way to also covers children and their specific human rights. Apart from the few rights that mention the situation of children explicitly nearly every other Convention right has an impact on children. It is to be expected that the case law of the ECtHR will further develop "children's rights content" without a specific legal basis focused (only) on children.

#### **D. Binding nature of the CRC and of Art. 24 EU FRC on private actors**

70. The binding effect for private actors is of utmost importance with regard to children's rights. Risks for children emanate most of all from private persons, ranging from parents to private institutions.

71. As a rule, state constitutions are not addressed to private persons, but contain rules binding the state and its institutions. A so-called direct third party effect of (some parts of) constitutional law is rather rare and often controversial. Therefore, the CRC and notably Art. 24 EU FRC would in this respect embody an added legal value for the protection of children's rights – if these international norms directly addressed private actors. In other words, a "direct third-party effect" of the CRC provisions would have an eminent practical significance.

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<sup>73</sup> ECtHR, 22/10/1981, *Dudgeon v UK*, No. 7572/76, §49; ECtHR, 26/3/1985, *X. a Y. v NED*, No. 8978/80, §27 et seq.

<sup>74</sup> See ECtHR, 13/6/1979, *Marckx v BEL*, No. 6833/74, §45; ECtHR, 18/12/1986, *Johnston a.o. v IRL*, No. 9697/82, §74; ECtHR, 8/7/2003 (GC), *Sommerfeld v GER*, No. 31871/96, §86; ECtHR, 7/4/2009, *Turnali v TUR*, No. 4914/03, §46.

<sup>75</sup> ECtHR, *Schwizgebel v. Switzerland* (no. 25762/07), 10 June 2010.

## 1. Binding nature of the CRC on private actors

72. Generally speaking, the CRC – being an international human rights covenant – does not as a whole directly create obligations for private persons. In contrast, it imposes obligations on the State Parties. It notably obliges them to protect persons (children) under their jurisdiction from harm emanating from private persons and institutions. This means that states are obliged to take positive action as opposed to mere abstention. Also, some provisions of the CRC (Art. 5, Art. 18) explicitly mention “duties” or “responsibilities” of parents towards their children. However, it is not clear that these duties flow directly from the Convention itself.

73. Likewise, the best interests clause of Article 3 CRC mentions private actors: “1. in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” It is frequently assumed in scholarship that this provision, due to its wording, deploys a direct obligation (only) for private welfare institutions, but not for all private actors, notably not for parents or guardians.

74. In the debate on business and human rights, the UN has adopted guiding principles (“Ruggie principles”). These apply to “transnational corporations and other business enterprises”. Some institutions commercially dealing with children (private schools, foster homes, etc.) might fall under their scope. The UN Guiding Principles (2011) establish three pillars. (1) Governmental obligation to protect; (2) business responsibility (principles 11-24); (3) remedies. The Guiding Principles’ cannot create new hard international law obligations; their contribution is soft. To the extent that they are applicable, the Guiding Principles foresee that private actors carry some “responsibility” (which is less than hard legal obligations) for respecting and fulfilling the CRC.

75. Recently, the Committee on the Rights of the Child issued General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights. Recognising that States have obligations regarding the impact of business activities and operations on children’s rights arising from the CRC and its Optional Protocols, the General Comment provides States with a framework for implementing the CRC as a whole with regard to the business sector whilst focusing on specific contexts where the impact of business activities on children’s rights can be most significant.

76. The Committee on the Rights of the Child recognizes that the business sector’s impact on children’s rights has grown over the past decades because of factors such as the globalized nature of economies and of business operations and the ongoing trends of decentralization, and outsourcing and privatizing of State functions that affect the enjoyment of human rights.<sup>76</sup> States must therefore ensure that all legislation, policies and programmes that deal with business issues are not intentionally or unintentionally discriminatory towards children in their content or implementation; for instance, those that address access to employment for parents or caregivers, or access to goods and services for children with disabilities.

77. States are required to prevent discrimination in the private sphere in general and provide a remedy if it occurs.<sup>77</sup>

78. With regard to discrimination, as pointed out by the CRC Committee in an earlier General Comment, the right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for

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<sup>76</sup> General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights.

<sup>77</sup> General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights.

all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality. Concerns over inequality are particularly meaningful in times when governments have introduced social expenditure cuts that are directly felt by children and their families. These have undermined their access to adequate resources, limited their access to – and damaged the quality of – service provision (e.g. health, education, welfare), and restricted opportunities for children to participate fully in family and social life. In many countries child poverty has increased more sharply than poverty rates among the general population .

## **2. Binding nature of Art. 24 EU FRC on private actors**

79. The EU FRC as a whole normally addresses public institutions (notably the EU, and implementing member states), but not private actors. However, it has been asserted specifically for Art. 24 EU FRC that this provision binds private actors and directly creates obligations for them. This debate has been triggered by the wording of the provision which specifically mentions “private institutions”, and endorses a “right to maintain ... contact with both his and her parents”. The prevailing view in scholarship seems to be that Art. 24 does not directly oblige private actors, but has an only “indirect third party effect” by obliging public institutions to adopt laws and measures ultimately bringing private actors in line with the yardstick of Art. 24.

### **E. Conclusions on international law**

80. In conclusion, the fact that, within the Council of Europe, the EU member states are (possibly in addition to the CRC and the ECHR) bound by Art. 24 EUFC does not render superfluous the enactment of specific constitutional clauses on children’s rights.

81. The analysis above briefly shows to what extent Member States of the Council of Europe have a positive obligation under International law and European law to respect, protect and fulfil the rights children are to enjoy under international law. Because children are reliant on governance systems, over which they have little influence to have their rights realised, the analysis of the national constitutional protection of children rights will complete the picture.

## **V. The Constitutional Protection of Children Rights in Europe**

### **A. Constitutions that omit children’s rights altogether**

82. Only three Council of Europe member states currently have no constitutional provision on children whatsoever: France, Norway and the United Kingdom.

83. In all three cases, however, significant qualifications apply to this initial statement. In France, 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). The Cour de Cassation has held however that at least some provisions of the CRC can be applied directly.<sup>78</sup> The Norwegian Constitution is currently silent on children, but discussions about reform leading to the adoption of a children’s rights provision have been ongoing for some time. This is part of a possible inclusion of a more general human rights catalogue in the Norwegian Constitution. Moreover, the CRC forms part of the domestic

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<sup>78</sup> *Lejeune* case, Assemblée Nationale, Rapport No 87 'Rapport fait au nom de la Commission d'enquête sur l'état des droits de l'enfant en France, notamment au regard des conditions de vie des mineurs et de leur place dans la cité 6 May' 1998 *Journal Officiel* 22; see Tobin, 'Increasingly seen and heard: the constitutional recognition of children's rights', *South African Journal on Human Rights*, vol. 21, 2005, pp. 96-97 and Innocenti Research Centre, *Law Reform and Implementation of the Convention on the Rights of the Child* (UNICEF: 2007), p. 7.



legal order and takes precedence over conflicting national statutes.<sup>79</sup> The United Kingdom does not have a written constitution; however, the Human Rights Act 1998 incorporates the European Convention on Human Rights into domestic law, and there are many examples of the national courts giving effect to children's rights by interpreting national law in light of Article 8 ECHR or declaring it incompatible with Article 8.<sup>80</sup>

## **B. Constitutions that contain provisions on children or their rights in some form**

### **1. Scope of protection**

84. In 43 Council of Europe Member States, the constitution contains provisions relating to children or their rights in some form.

85. The most widespread provision is the right to education, which is contained in the 43 constitutions.

86. In seven states (Bosnia and Herzegovina, Cyprus, Denmark, Liechtenstein, Luxembourg, Monaco and the Netherlands), the provision on education is the only child-specific provision in the constitution, and in this sense education provisions could be viewed as the entry-level form of child-specific constitutional provisions.

87. 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<sup>81</sup> – most obviously, the child's right to development (emphasised throughout the CRC and recognised as a general principle by the Committee),<sup>82</sup> but also specific rights such as the right to health. Moreover, a broad interpretation of education provisions can result in them having an expansive impact beyond the context of scholastic education in schools. This will particularly be the case for children with serious disabilities (who, for example, benefitted extensively from constitutional litigation based on the education provisions of the Irish Constitution),<sup>83</sup> but also has the potential to impact on issues in other areas such as healthcare.

88. Having said that, these provisions on education do not always set forth child-specific rights or even rights *per se*. A small number of constitutions (Croatia, Germany, Ireland, Italy, Liechtenstein, Luxembourg and the Netherlands) contain provisions on education that focus entirely on the rights and duties of parents and the state, without making any express reference to an individual right of the child to receive education.

89. In addition to a provision on the right to education, Azerbaijan<sup>84</sup> and Latvia<sup>85</sup> also include provisions that refer broadly to the rights of children, without expressly enumerating other specific rights.

90. Other states such as Moldova<sup>86</sup> and Romania<sup>87</sup> have an initial, broad statement that children are entitled to a special form of assistance in the pursuit of their rights, and further

<sup>79</sup> See L. Lundy, U. Kilkelly, B. Byrne, & J. Kang, *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (UNICEF: 2012), pp. 58-59.

<sup>80</sup> See, e.g., *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190; *Mabon v Mabon* [2005] EWCA Civ 634; *Re P and others* [2008] UKHL 38 and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, among many other examples. See further J. Fortin, "Accommodating Children's Rights in a Post Human Rights Act Era", *Modern Law Review*, vol. 69, 2006, pp.299-326.

<sup>81</sup> See C. O'Mahony, 'Constitutionalism and Legislation in Special Educational Needs Law: An Anglo-Irish Comparison' *Public Law*, 2008, pp. 126-128.

<sup>82</sup> See the Preamble and Articles 6, 18, 23, 27, 28, 29 and 32.

<sup>83</sup> See C. O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall: 2006), Chapters 6 and 7.

<sup>84</sup> Article 17(vi).

<sup>85</sup> Article 110.

<sup>86</sup> Article 50(2).

<sup>87</sup> Article 49(1).

specify which particular rights children enjoy and which particular duties the state must fulfil in this regard.

91. After education, the next most common child-specific provision concerns provisions on the equal status of children irrespective of parentage which can be found in 18 Constitutions, closely followed by the protection of children from economic exploitation. This is present in the constitutions of 17 member states<sup>88</sup>. Frequently (in ten constitutions), such a provision is combined with a provision requiring that children have equal status before the law. Article 3 of the Austrian Constitutional Act on the Rights of Children provides for a general prohibition of child labour.

92. In nine constitutions<sup>89</sup> both provisions (equal status and protection from economic exploitation) can be found.

93. The third child-specific right which is directly identified at constitutional level is the right to protection from harm. While some constitutions identify children as a vulnerable group in need of special protection, others acknowledge the right of the child to protection from harm and detail the duties imposed on the state to protect children from violence or abuse, including a rights-based approach to protecting children from exploitation. For example, the Constitution of Albania provides in Article 54(3) that “[e]very child has the right to be protected from violence, ill treatment, exploitation and their use for work, especially under the minimum age for work, which could damage their health and morals or endanger their life or normal development.” A similar approach can be seen in Hungary, which combines provisions on the first three issues<sup>90</sup> with a broader statement that “[e]very child shall have the right to the protection and care required for his or her proper physical, mental and moral development.”<sup>91</sup> The phrasing of special protection provisions varies: in Albania,<sup>92</sup> protection is a right of children; in Montenegro<sup>93</sup> and Slovenia,<sup>94</sup> it is a guarantee owed to children; and in Portugal,<sup>95</sup> it is an entitlement of children. In Poland, the Constitution states that “[e]veryone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation”.<sup>96</sup> In Serbia<sup>97</sup> and Turkey,<sup>98</sup> it is phrased as a duty of the state to protect children from such treatment, while in Ukraine,<sup>99</sup> the Constitution obliges the state to prosecute any violence against or exploitation of a child. In Belgium, the Constitution uses quite a different formulation to address a broadly similar point, providing that “[e]ach child is entitled to have its moral, physical, mental and sexual integrity respected.”<sup>100</sup> In Austria, a special provision of constitutional law provides for a right to education free from violence; corporal punishment, “Zufügung seelischen Leides”, sexual abuse and other forms of ill-treatment are explicitly forbidden.<sup>101</sup> In Spain, the Constitution includes a child protection provision,<sup>102</sup> but additionally provides that “[c]hildren shall enjoy the protection provided for in the international agreements safeguarding their rights.”<sup>103</sup>

<sup>88</sup> Albania – Art 54(3); Armenia – Art 32; Azerbaijan – Art 17 (IV) and (V); Croatia – Art 64(2); Hungary – Art XVIII; Macedonia – Art 42; Malta – Section 16; Moldova – Art 50(4); Montenegro – Art 74; Poland – Arts 65(3) and 72(1); Portugal – Art 70(1); Romania – Art 49(3) and (4); Serbia – Art 64; Slovak Republic – Art 38(2); Slovenia – Art 56(2); Ukraine – Art 52 .

<sup>89</sup> Albania, Moldova, Montenegro, Portugal, Romania, Serbia, Slovak Republic, Slovenia, Ukraine

<sup>90</sup> Articles XV and XVIII.

<sup>91</sup> Article XVI(1).

<sup>92</sup> Article 54(3).

<sup>93</sup> Article 74.

<sup>94</sup> Article 56(2).

<sup>95</sup> Article 69(2).

<sup>96</sup> Article 72(1).

<sup>97</sup> Article 64.

<sup>98</sup> Article 41.

<sup>99</sup> Article 52.

<sup>100</sup> Article 22bis. See further L. Lundy, U. Kilkelly, B. Byrne, & J. Kang, *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (UNICEF: 2012), p. 37.

<sup>101</sup> Article 5 of the 2011 Constitutional Act on the Rights of Children.

<sup>102</sup> Section 39(2); see Picontó-Navales, “The Application of Spanish Child Welfare Law” *International Journal of Law, Policy and the Family*, vol. 12, 1998, pp. 180-201.

<sup>103</sup> Section 39(4).

94. The right of disabled children to special care is protected in some constitutions, either in the form of a right (Austria,<sup>104</sup> Croatia<sup>105</sup>) or in the form of an obligation of the state (for example Latvia,<sup>106</sup> Moldova<sup>107</sup> and Romania<sup>108</sup>).

95. The constitution of Turkey<sup>109</sup> makes explicit reference to the right of the child to have and maintain a personal and direct relationship with his/her parents, while the Serbian constitution contains a provision recognising a child's right to identity.<sup>110</sup>

96. In twenty Council of Europe member states, the constitution addresses the family and the special protection of children. In a significant number of states, the provisions are primarily focused on the family, but make broad reference to the protection of children (without defining in any detail what that protection entails). The most common formulation in this category is a subsection of a general provision on the family that guarantees special state protection to parents and children; this approach can be seen in Bulgaria, the Czech Republic, Estonia, Iceland, Italy, Lithuania, Macedonia and the Russian Federation. In Bulgaria, some limited specificity is included in the form of a specific obligation to protect abandoned children. The Greek Constitution contains a little more detail, but not necessarily any more precision: its provision on the family begins by stating that “[t]he family ... as well as marriage, motherhood and childhood, shall be under the protection of the State,” and continues by stipulating that “[f]amilies with many children ... are entitled to the special care of the State” and that the State “shall adopt special measures for the protection of youth”.

97. These provisions, like those concerning economic exploitation, acknowledge the vulnerability of children and their need for special protection, but only in general terms.

98. Some states have given constitutional expression to the general principles of the CRC, as explained above, in varying forms and combinations.

99. *Non-Discrimination*: a principle very commonly represented in national constitutions in the Council of Europe is the non-discrimination principle set out in Article 2 of the CRC. The requirement that children have equal status before the law, irrespective of the marital status of their parents, is present in 16 states and accordingly is one of the most common child-specific provisions. Such provisions are significant in that they recognise children's status as rights-holders as well as dealing with children's entitlement to equal treatment. This provision is commonly (in ten states) combined with the protection from economic exploitation.

100. *Child development*: the principle set out in Article 6 of the CRC – the child's right to survival and development – features prominently in many European constitutions, although the importance of ensuring the adequate development of children takes many forms. Some constitutions stipulate that children have a right to the fullest possible development of their personality and potential (Austria<sup>111</sup>, Hungary,<sup>112</sup> Portugal<sup>113</sup> and Switzerland<sup>114</sup>); others refer to development by imposing duties on the state to protect children from specific dangers to their development, such as economic exploitation (Albania,<sup>115</sup> Austria<sup>116</sup>, Hungary,<sup>117</sup>

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<sup>104</sup> Article 6 Constitutional Act on the Rights of Children

<sup>105</sup> Article 63(3): Physically and mentally handicapped and socially neglected children shall have the right to special care, education and welfare.

<sup>106</sup> Article 110.

<sup>107</sup> Article 50(3).

<sup>108</sup> Article 49(2).

<sup>109</sup> Article 41.

<sup>110</sup> Article 64. See Kovaček Stanić, “Serbian Family Law: Rights of the Child” *International Journal of Children's Rights*, vol. 17, 2009, p. 593.

<sup>111</sup> Article 1 Constitutional Act on the Rights of Children.

<sup>112</sup> Article XVI(1).

<sup>113</sup> Article 69(1).

<sup>114</sup> Article 11(1).

<sup>115</sup> Article 54(3).

<sup>116</sup> Article 5 (1) Constitutional Act on the Rights of Children combined with the protection from sexual abuse..

<sup>117</sup> Article XVIII(1).

Moldova<sup>118</sup> and Romania<sup>119</sup>). Other jurisdictions emphasise the importance of education to the development of children (Andorra,<sup>120</sup> Croatia,<sup>121</sup> Portugal<sup>122</sup> and Spain<sup>123</sup>).

101. *Right to be heard*: the principle set out in Article 12 of the CRC is not yet common in constitutions. To date, the right of children to be heard in decisions that affect them is set out in the constitutions of Austria<sup>124</sup>, Ireland<sup>125</sup> and Poland,<sup>126</sup> although it also features in the constitutional case law of some other states.<sup>127</sup> A specific application of the Article 12 principle – relating to the child's participation in society – is to be found in several constitutions. Three states have provisions stating that public authorities have a duty to establish conditions that allow children to participate freely in society (Sweden) or the political, social, economic, cultural and sporting life of the country (Moldova<sup>128</sup> and Romania<sup>129</sup>). Finally, a principle related to Article 12 – Article 5 which addresses the child's evolving capacity – is present in several national constitutions. The concept of the evolving capacities of children features in constitutional provisions in seven states, namely Austria<sup>130</sup>, Finland,<sup>131</sup> Ireland,<sup>132</sup> Montenegro,<sup>133</sup> Slovenia,<sup>134</sup> Serbia<sup>135</sup> and Switzerland.<sup>136</sup>

102. *Best interests of the child*: it is perhaps surprising that the principle set out in Article 3 of the CRC – requiring that the best interests of the child is a primary consideration in all matters affecting the child – is set out in very few national constitutions. It is given explicit protection in the constitutions of just two member states – Ireland<sup>137</sup> and Serbia<sup>138</sup> – although it has featured in the constitutional case law of other states.<sup>139</sup>

## 2. Form of protection

103. A review of the constitutions of the Council of Europe member states reveals that the traditional approach consists in focusing on the children's need for protection, while a more recent and modern approach presents children as rights-holders. An intermediate approach consists in delegating this choice to the legislator.

### a. Children as the object of special protection

104. Constitutions following this approach present children as objects of concern and give little, if any recognition to children's agency or autonomy. They rarely use rights language and often group children together with other perceived vulnerable groups, like mothers or families. For instance, 'mothers and children' are entitled to special protection under the

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<sup>118</sup> Article 50(4).

<sup>119</sup> Article 49(3).

<sup>120</sup> Article 20(1).

<sup>121</sup> Article 63(2).

<sup>122</sup> Article 73(2).

<sup>123</sup> Section 29(2).

<sup>124</sup> Article 4 Constitutional Act on the Rights of Children.

<sup>125</sup> Article 42A.4.

<sup>126</sup> Article 73(3).

<sup>127</sup> See, e.g., Long, "The Impact of the UNCRC on the Italian Legal System" *International Journal of Children's Rights*, 2009, vol. 17, pp. 161-162. See also Germany's 3<sup>rd</sup> and 4<sup>th</sup> Periodic Reports to the Committee on the Rights of the Child, CRC/C/DEU/3-4, para.91, and Third and Fourth Periodic Reports submitted by Spain to the Committee on the Rights of the Child, CRC/C/ESP/3-4, paras.308 and 451.

<sup>128</sup> Article 50(5).

<sup>129</sup> Article 49(5).

<sup>130</sup> Article 4 Constitutional Act on the Rights of Children

<sup>131</sup> Section 6(3).

<sup>132</sup> Article 42A.4.

<sup>133</sup> Article 74.

<sup>134</sup> Article 56(1).

<sup>135</sup> Article 64.

<sup>136</sup> Article 11(2).

<sup>137</sup> Article 42A.

<sup>138</sup> Article 65.

<sup>139</sup> See, e.g., Askola, "Cut-Off Point? Regulating Male Circumcision in Finland" *International Journal of Law, Policy and the Family*, vol. 25(1), 2011, p. 107 and Third and Fourth Periodic Reports submitted by Spain to the Committee on the Rights of the Child, CRC/C/ESP/3-4, paras.274-276. It also features in legislation in many states.

Montenegro Constitution<sup>140</sup>, the Constitution of “the former Yugoslav Republic of Macedonia<sup>141</sup> and the Serbian Constitution<sup>142</sup> while the Ukraine Constitution<sup>143</sup> groups children together with families and mothers. Children and young people/adolescents are protected in the Constitutions of Croatia<sup>144</sup>, the Czech Republic<sup>145</sup> and Greece.<sup>146</sup>

105. In some countries, “childhood” rather than children is deemed worthy of protection, with an even greater abstraction (Azerbaijani<sup>147</sup>, Italy<sup>148</sup> and Lithuania<sup>149</sup> and to some extent the Russian Federation<sup>150</sup>). Certain constitutions recognise expressly that the family is the fundamental unit of society<sup>151</sup>, while the Portuguese Constitution also provides for the protection of parenthood (while also referencing the rights of children – see below). Along similar lines, the Bulgarian Constitution<sup>152</sup> provides that ‘the family ... and children shall enjoy the protection of the State and society’. The Moldovan Constitution<sup>153</sup> contains strong protections for the family (as well as for children).<sup>154</sup>

106. A further common theme is the imposition on parents and families of a duty to protect the child. For example, the Croatian Constitution<sup>155</sup> provides that parents shall have the duty to ‘bring up, support and educate their children’ whereas the Montenegrin Constitution<sup>156</sup> requires parents to ‘take care of their children to bring them up and educate them’.<sup>157</sup> Rare is the Constitution that recognises the raising of children purely as a right of parents. For example, the Constitution of the Czech Republic<sup>158</sup> provides that ‘the care and upbringing of children ... is the right of their parents’. Similarly, the Hungarian Constitution<sup>159</sup> provides that parents shall have the right to choose the upbringing of their children and shall provide for their minor children including their education.

107. It is in much more common, however, for constitutions to refer to parents’ rights *and* duties to raise, educate and support their children. For example, the constitutions of Montenegro<sup>160</sup>, Romania<sup>161</sup>, Croatia<sup>162</sup>, Estonia<sup>163</sup>, Italy<sup>164</sup>, Lithuania<sup>165</sup>, all refer – in

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<sup>140</sup> Article 73

<sup>141</sup> Article 42

<sup>142</sup> Article 66

<sup>143</sup> Article 51

<sup>144</sup> Article 62

<sup>145</sup> Article 32(1)

<sup>146</sup> Article 21(3) This provides that the state shall adopt special measures for the protection of youth.

<sup>147</sup> Article 34

<sup>148</sup> Article 31

<sup>149</sup> Article 38

<sup>150</sup> The Constitution of the Russian Federation provides, in Article 7, that state support shall be ensured to the family and childhood. Article 38 provides that childhood shall be under state protection and that the care for children and their upbringing shall be the equal right and duty of the parents.

<sup>151</sup> Article 67 of the Portuguese Constitution and Article 41 of the Irish Constitution

<sup>152</sup> Article 14

<sup>153</sup> Article 48

<sup>154</sup> Article 49 provides that the state undertakes to protect children and the young and to develop the institutions required to put that into effect. It provides that all children, including those born out of wedlock shall enjoy the benefits of the same social assistance. It also provides that children and young people enjoy a special form of assistance in the enforcement of their rights and that exploitation of minors is forbidden.

<sup>155</sup> Article 63(1)

<sup>156</sup> Article 72

<sup>157</sup> See also Article 48 of the Moldova Constitution.

<sup>158</sup> Article 32(4)

<sup>159</sup> Article XV

<sup>160</sup> Article 72

<sup>161</sup> Article 48

<sup>162</sup> Article 63(1) of the Croatian Constitution, parents shall have the duty to ‘bring up, support and educate their children’. Article 63(2) states that ‘parents shall be responsible for ensuring the right of their children to a full and harmonious development of their personalities’ Interestingly, the Croatian Constitution also recognises the rights of the child - Article 63 (4) provides that the State is bound to take ‘special care of parentless minors and or parentally neglected children’ whereas under Article 63(3), ‘physically and mentally disabled and socially neglected children shall have the right to special care, education and welfare’. Further evidence of the blended approach in the Croatian Constitution is found in Article 64 that ‘everyone shall have the duty to protect children’.

<sup>163</sup> Section 27

<sup>164</sup> Article 30

<sup>165</sup> Article 38(6)

reasonably similar wording – to the right and duty of parents to raise their children. Rather uniquely, under the Spanish Constitution<sup>166</sup>, (1) public authorities ensure the social, economic and legal protection of the family; (2) public authorities must ensure full protection of children and (3) parents must provide their children with assistance of every kind while they are still under age.

108. It should be stressed in this context that the CRC recognises the very important role played by parents and family in the realisation and exercise of children's rights<sup>167</sup>; however, 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. More consistent with this approach are the (rare) instances in European constitutions where expression of the right or responsibility of parents to protect or raise children is combined with recognition of state responsibility in this regard. For example, the Azerbaijan Constitution<sup>168</sup> provides that parents must take care of their children and their education, noting also that the state implements this responsibility. Similarly, the Bulgarian Constitution<sup>169</sup> recognises that the raising of children is a right and obligation of parents, assisted by the state.<sup>170</sup>

109. Although most states articulate the raising of children as a parental right and a duty, some constitutional provisions articulate clearly that it is also the state's responsibility to support parents and the family in this area. For example, the Finnish Constitution<sup>171</sup> provides that the public authorities shall support families and others responsible for caring for children so that they have the ability to ensure the wellbeing and personal development of the children.

110. The German Constitution provides, in several different provisions, for the protection of the child and the family. For instance, Article 6(2) provides that the care and upbringing of the child is the natural right and duty of parents and that the state shall supervise performance of this duty. This balancing of parental responsibility with state responsibility is found in other constitutions too. The Greek Constitution<sup>172</sup> provides that childhood shall be under the protection of the state and also provides<sup>173</sup> that families with many children are entitled to the special care of the state. Similarly, the Italian Constitution states that it is the duty of the state to support families, notably those with many children.<sup>174</sup>

111. Consistent with the CRC<sup>175</sup>, several constitutions consider that parents' rights with regard to their children are not absolute. For example, the Serbian Constitution<sup>176</sup>, while recognising the right and duty of parents to support, raise and educate their children, notes that these rights may be revoked from parents if this is in the best interests of the child.<sup>177</sup> The Irish<sup>178</sup>, the Italian and the Portuguese<sup>179</sup> Constitutions recognise the duty of the state to provide for the child where parents fail in their responsibilities to the child or are incapable of caring for them, whereas the Polish Constitution provides that the restriction or deprivation of parental rights may be affected only as provided by law.<sup>180</sup> Drawing on Articles 20 and 21 of the CRC, which provide for the rights of children without parental care, both the Constitution

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<sup>166</sup> Section 39

<sup>167</sup> See Articles 5 and 18 for example

<sup>168</sup> Article 17.II

<sup>169</sup> Article 47(1)

<sup>170</sup> Article 47(4) of the Bulgarian Constitution also provides that abandoned children shall enjoy protection of the State and society.

<sup>171</sup> Section 19(3)

<sup>172</sup> Article 21(1)

<sup>173</sup> Article 21 (2)

<sup>174</sup> Article 31.

<sup>175</sup> Notably article 19 which recognises that children can be harmed by their care givers

<sup>176</sup> Article 65

<sup>177</sup> See the case-law of the European Court of Human Rights under Article 8 of the European Convention on Human Rights in *U. Kilkelly, 'Child Protection and the European Convention on Human Rights'*. *Irish Journal of Family Law*, 2 (2000):12-20.

<sup>178</sup> Article 42A

<sup>179</sup> Article 36(6)

<sup>180</sup> Article 48.

of “the former Yugoslav Republic of Macedonia” and the Latvian Constitution recognise that the state must provide for children without parental care.

### **b. Children as holders of rights**

112. There are different types of examples of rights-based language that can be used to express children’s entitlements and needs in a way that is consistent with the CRC. These include explicit references to the ‘rights’ of children, clauses that describe that ‘children have the right to’ have their needs met and phrases that place duties on the state, and others, to implement those rights. These practices are not widespread in the constitutions of Council of Europe member states. The Hungarian Constitution<sup>181</sup> contains a very good example of rights language by providing that every child shall have the right to the protection and care necessary for his/her development. In Austria, a special Constitutional Act on the Rights of Children was enacted in 2011; it contains a number of specific rights of children. Under the Irish constitution<sup>182</sup> the state recognises the rights of the child and undertakes to vindicate those rights. Similarly, Montenegro<sup>183</sup>, the Slovenia<sup>184</sup> and Poland<sup>185</sup> all recognise that children shall enjoy rights and freedoms appropriate to their age and maturity and be guaranteed special protection from exploitation or abuse. A different formulation is used in the Romanian Constitution<sup>186</sup>, which provides that children and young people shall enjoy protection and assistance in the pursuit of their rights and the Albanian Constitution, similarly, provides that ‘children, the young ... have the right to special protection by the state’.<sup>187</sup> Crucially, both forms reflect the status of children as rights holders, while making clear that there is an onus on the state to vindicate those rights. More indirectly, the Latvian Constitution provides that the state shall support the right of parents and the rights of the child.<sup>188</sup> This recognition of the rights of the child falls short, perhaps, of the more explicit rights-based approach by requiring that the state supports the rights of the child.

113. There is a mixed practice in the approaches that states take to the protection of children’s rights in their constitutions. In reality, very few states take a solely, rights-based approach to the issue, with most mixing the protection-need with rights-based expression. In Ireland’s new Article 42A, for example, the first section contains an explicit recognition of children as the bearer of rights, but its provisions, explained below, reflect a focus on protection over rights. Similarly, the Portuguese Constitution<sup>189</sup> provides that children ‘have the right to’ the protection of society, but it then goes on to provide that children are ‘entitled to special protection’ (not the right to protection) from the abuses of authority in the family. A rare exception is the Serbian Constitution, whose provision titled ‘the Rights of the Child’ contains several uses of rights language, especially in relation to the child’s right to name and identity and to protection from exploitation and abuse.

### **c. Delegation to the legislature**

114. A final approach to how children’s rights are treated in constitutional instruments can be found in those states whose constitutions make reference to children’s rights, but who stop short of giving constitutional expression to them. A significant number of constitutions undertake, require or mandate legislative or other action to protect children’s rights. While these could be categorised as either protection-need or rights-based, in reality they are neither because they stop short of enshrining rights in the constitution per se. Although these could be considered to fall short of CRC requirements for this reason, at the same time, the recognition of a duty to take legislative action reflects the duty to implement the CRC, as

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<sup>181</sup> Article XV(1)

<sup>182</sup> Article 42A, yet to be enacted

<sup>183</sup> Article 74

<sup>184</sup> Article 56

<sup>185</sup> Article 74

<sup>186</sup> Article 49

<sup>187</sup> Article 54(1).

<sup>188</sup> Article 110.

<sup>189</sup> Article 69.



Article 4<sup>190</sup> requires. This section highlights this apparently common trend in European constitutions.

115. There are many examples of this kind of approach (which may say more about the constitutional tradition in those countries than the approach to children's rights) and they are framed in different ways.

116. The first approach is where the constitution requires that the law shall guarantee care and protection to children. For example, the Icelandic Constitution<sup>191</sup> provides that the law shall guarantee the protection and care which is necessary for children's well-being. In a similar approach, some constitutions provide that children and/or their rights are protected by law. This is the approach adopted in the Lithuanian Constitution<sup>192</sup> and the Constitution of Georgia<sup>193</sup>. The Ukrainian Constitution<sup>194</sup> which provides that any violence against a child shall be prosecuted by law. Other approaches include the duty to make legislative provision for children's rights<sup>195</sup> and the requirement that children's rights and their protection be regulated<sup>196</sup>. The Azerbaijani Constitution<sup>197</sup> provides that the state 'supervises the implementation of rights of a child'.

117. Although this approach stops short of giving full constitutional status to children's rights, it is an important way to promote the use of the law to express and protect children's rights. For example, Sweden<sup>198</sup>, provides that the public institutions shall promote the opportunity for the rights of the child to be safeguarded. Although this provision is rarely referred to, the value of such approaches is that they provide a vehicle, based on the constitution, to bring children's rights closer to the level at which they are implemented.<sup>199</sup>

118. To summarise, there is clearly no single way to express children's rights in national constitutions and every country will have a range of factors to take into account in deciding what rights to enshrine at a constitutional level, how to express those rights and the state's corresponding duties and how to ensure that those rights are enforced. In general, constitutions that express children's rights in a manner reflecting the indivisibility of rights, enshrining the general principles of the CRC, recognising the status of children as rights holders with an entitlement to have those rights vindicated against the state express the highest forms of compliance with international norms. At the other end of the spectrum, constitutions that enshrine general human rights protections but refer to children's interests merely in a language of protection and needs rather than to express them in a rights-based language, and which allow only for limited justiciability of those constitutional provisions cannot be considered as models of good practice in terms of children's rights.

119. What is revealing is that constitutions, taken as a whole, often occupy multiple points on this spectrum all at once. States rarely choose a single approach from one end of the scale and their variety of approaches means that good practice about how to best enshrine children's rights in the constitution can be found almost anywhere in the constitutions of individual Council of Europe states.

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<sup>190</sup> Article 4 CRC reads : Article 4 .

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

<sup>191</sup> Article 76.

<sup>192</sup> Article 39. This provides that children who are under age shall be protected by law.

<sup>193</sup> Article 36.

<sup>194</sup> Article 52.

<sup>195</sup> See Ireland, Article 42A, yet to be enacted.

<sup>196</sup> See Serbia, Article 64 and Slovakia Article 41.

<sup>197</sup> Article 17. VI.

<sup>198</sup> Chapter I, Article 2.

<sup>199</sup> L. Lundy, U. Kilkelly, B. Byrne, & J. Kang, 'The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries' (London: UNICEF UK, 2012), at p. 60.

## **D. The Enforcement of Children's Rights provisions**

120. The inclusion of a children's rights provision in a constitutional document only tells part of the story: its mere inclusion does not secure a remedial avenue in the event of a failure to vindicate that right. A key indicator in assessing the level of constitutional protection of children's rights therefore is the extent to which those rights are justiciable, through the courts or another mechanism such as a children's ombudsman. However justiciability is not the sole indicator. As revealed by a survey to which the Liaison officers of the Constitutional Justice's network of the Venice Commission answered<sup>200</sup>, the enforcement of children's rights provisions also goes through a wide range of public authorities ranking from specific ministries, to local specialised bodies.

121. A comprehensive assessment of the justiciability of children's constitutional rights across all 47 Member States is outside the scope of this study, since it would require an assessment of case law, legislation, policy, practice and attitudes, all of which combine to determine the extent to which a right can be enforced. Moreover, any attempt to draw firm conclusions on justiciability is further complicated by the fact that some rights might be more justiciable than others (perhaps even within a single constitution): for example, civil and political rights tend to be more justiciable than economic and social rights. In light of these challenges, the analysis will be restricted to giving examples of varying approaches to justiciability, which can range from complete non-justiciability, to non-judicial enforcement through administrative remedies such as a children's ombudsman, to full justiciability before the courts using weak or strong judicial remedies (such as declaring laws, actions or inactions to be in breach of rights and possibly invalidating them in the process; awarding damages or granting injunctions ordering actions to be taken or ceased).

### **1. Non-justiciability**

122. In some cases, the constitutions of Council of Europe states contain provisions regarding children's rights that are entirely non justiciable because they are merely guidance for the legislator and shall not be cognizable by any court. For example, the Irish Constitution contains a provision entitled "Directive Principles of Social Policy", which includes provisions in which the State pledges to safeguard the economic interests of the weaker sections of the community (including, in particular, orphans), and to endeavour to ensure that the tender age of children shall not be abused by being forced by economic necessity to engage in labour unsuited to their age or strength. However, these Directive Principles of Social Policy are made expressly non-justiciable: a preambular paragraph stipulates that they are for the guidance of the Oireachtas (Parliament) only, and shall not be cognisable by any court under any provision of the Constitution. Thus, no remedy is available in the event of a failure to vindicate the rights envisaged by these constitutional provisions.

### **2. Administrative remedies**

123. An increasingly common and relatively accessible form of remedial avenue for breaches of children's constitutional rights is through an administrative body such as a children's ombudsperson, or more broadly speaking an independent national human rights institution, which is present in a significant number of member states.

124. This has been advocated by the Committee on the Rights of the Child in its General Comment N.2 (2002) for the promotion and monitoring of implementation of the Convention. While such an institution should be established in compliance with the "Paris Principles" the Committee underlines that "additional justifications exist for ensuring that Children's human rights are given special attention". In addition to key features that can be drawn from the Paris Principles the Committee has identified key features and specially tailored for the

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<sup>200</sup> The question put to the Confidentialia Forum of Liaisons Officers read : " What institutions are competent to enforce children's rights that are enshrined in the Constitution of your country".

protection of children's rights, which range from accessibility and participation to power to receive and investigate complaints regarding breaches of children's rights, but the powers available where such breaches are disclosed varies from state to state. The baseline power of children's ombudsmen across Europe is the power to make findings of failures by administrative agencies to adequately observe children's rights and to make recommendations on how this could be avoided in the future, as well as to prepare an annual report that is generally submitted to the legislature or executive. In some states, the children's ombudsperson has extensive powers beyond this baseline and plays a significant role in the enforcement of children's rights. For example, like in Serbia, the Ombudsperson can be entitled to initiate proceedings before the Constitutional Court for the assessment of legality and constitutionality of laws, other regulations and general by-laws which govern issues related to the liberties and rights of citizens. This is an extremely important mechanism that could be usefully replicated in other states, given the barriers that children often face in initiating legal proceedings in their own right. The Ombudsperson like in Montenegro can also be vested of the power to submit to the Government or to the National Assembly an initiative to amend laws and other regulations. They are then obliged to consider the initiatives submitted by the Ombudsman. Again, this is a significant mechanism that has the potential to overcome the tendency for children's rights issues to be overlooked by elected officials who are not directly accountable to children at the ballot box.

125. According to the results of a survey<sup>201</sup> conducted within the European Ombudspersons for Children ( ENOC) network, the vast majority, out of the twenty ombudsperson who replied, expresses the view that if children's rights are included in the Constitution, the rights of children are made more visible and will be made more operational in the legal and political system. In addition, a majority regrets that the constitutional protection does not reflect the rights protected by the CRC, while some would argue that if the CRC is given the status of constitutional law, the enumeration of rights is not important. Some of the ombudspersons accept that even if the CRC is not incorporated at the constitutional level but at the statutory level, the rights of the children will be effectively protected. A tiny minority of the ombudspersons argue that children are effectively protected by the Constitution even though their rights are not specifically spelled out, the Constitutions protecting "everyone".

126. However, a children's ombudsperson is not the only way in which administrative remedies can be provided for breaches of children's constitutional rights. A wide range of administrative bodies – some of which are dedicated child-focused bodies and some of which are not – are given specific responsibilities in order to assist the courts with the task of vindicating the constitutional rights of children exist in Europe.

### **3. Judicial remedies<sup>202</sup>**

127. Generally, the most obvious way in which constitutional rights can be enforced is through litigation in the courts. This has been widely confirmed by the Liaison officers of the Constitutional Justice's network of the Venice Commission.

128. However, recourse to the courts is less straightforward in the context of enforcing the constitutional rights of children, since children may often face barriers to accessing court proceedings. As John Tobin has observed, "[m]ost constitutions only grant standing to victims but in practice children are unlikely to know about their constitutional rights let alone how they can enforce them." The role of a Children Ombudsperson is one possible way

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<sup>201</sup> See CDL-REF (to come); The Norwegian Ombudsperson for Children, Dr. Anne Lindboe, has conducted the survey; The main focus of the survey is to explore the practical role of constitutional protection of rights of children, seen from the perspective of the ombudspersons. Three questions have been presented:

- if children's rights as such are protected in the Constitution, which elements are specified and included?
- to what extent does the ombudsperson see that the constitutional protection of the rights of children have practical impact?
- if the rights of children are not protected in the Constitution, does the ombudsperson see it would be advantageous to include rights of children in the Constitution?

around this difficulty; other options include the possibility of standing being afforded to special interest groups. In Ireland, the “next friend” procedure allows another party (usually a parent or guardian) to bring a constitutional action in the name of the child whose rights are at issue – but there is no possibility for a child to bring a constitutional action independently, and thus adults are cast in the role of gatekeepers to access to justice.

129. While one can argue that the failure to create a suitable mechanism allowing for children’s rights claims to reach the courts “risks reducing the good sentiments expressed in the text of a constitution to empty rhetoric rather than translating them into substantive change”, the role of parents and careers in children’s access to justice, as long as their interest run parallel, is not to be disregarded nor undermined.

130. Here again, variety constitutes one of the main features of the effects of the enforcements of constitutional children’s rights. The vindication of some rights can be achieved relatively easily by court order – particularly when significant public resources are not required for that purpose. For example, where legislation infringes on a child’s constitutional rights, that legislation could be declared unconstitutional and invalid; in some cases, the removal of the offending law will immediately vindicate the rights of that child (and indeed every child in that country). For example, in Liechtenstein, the Constitutional Court found that a law imposing an age limit of 16 for family reunification pertaining to children of third-State foreigners was unconstitutional. The effect of this decision was to allow all children of citizens of third countries to be granted reunification with their families up to the age of 18.<sup>203</sup>

131. Seeking a remedy for a failure to vindicate social and economic rights potentially involves asking the courts to make decisions over the allocation of public resources, which ordinarily is a matter reserved to the elected organs of state. It is often said that courts lack the necessary expertise and information, as well as the democratic mandate, to override budgetary decisions made by the executive or legislative branch. For this reason, the majority of the constitutions of the Council of Europe’s member states include limited, if any, provisions expressly granting socio-economic rights to children. The right to education is a significant exception to this trend, being present in forty-four out of forty-seven constitutions; however, even such a widely accepted socio-economic right of children gives rise to challenges in its enforcement.

132. This brief overview reveals that a full set of efficient mechanisms - judicial or non-judicial - to remedy possible violations of children’s’ rights are available. This range of mechanisms shall be, however, coupled with adequate procedural safeguards so that the specificities of the needs and rights of the child are answered effectively and appropriately.

## **VI. Conclusions**

133. Twenty five years after the adoption of the Convention on the Rights of the Child, the analysis of the protection of children’s rights at the constitutional level offers an interesting picture not only of great and complex variety but also of recent and continuing evolution.

134. At the international level, the CRC still constitutes the baseline of the status of children as autonomous rights holders and of the protection of children’s rights. It has been echoed, at the European level, by the sixty year old European Convention on Human Rights and its case law, which has developed a “children rights content” without much specific textual basis focused on children and, more recently, by the inclusion of specific children’s rights issues at the level of the EU Fundamental Rights Charter.

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<sup>203</sup> Second Report of Liechtenstein to the Committee on the Rights of the Child, CRC/C/136/Add.2, July 14, 2005, para. 84.

135. Certainly, the standard setting activity that has been undertaken more recently by the Council of Europe has inevitably increased awareness among member States about the importance of the constitutional expression of children's rights.

136. States do have a positive obligation under International law to respect, protect and fulfil children's rights. However, the limits of the effects of this international protection underline the importance for member states to adopt domestic law provisions on children's rights.

137. The CRC was meant as a useful tool for advocacy and greater awareness of a new understanding of children as independent right holders. This is without prejudice to the children needing protection within their families, which remains, as stated in the Universal Declaration of Human Rights, "the basic unit of society".<sup>204</sup> While the role of a loving family for the best development of a child remains undisputable, the impact of state legislation for the protection of children of their rights and needs, cannot be underestimated

138. The analysis of constitutional provisions reveals that there is clearly no single way to express children's rights in national constitutions and every country will have a range of factors to take into account in deciding what rights to enshrine at a constitutional level, how to express those rights and the state's corresponding duties and how to ensure that those rights are enforced.

139. In general, constitutions that express children's rights in a manner reflecting the indivisibility of rights, enshrining the general principles of the CRC, recognising the status of children as rights holders with an entitlement to have those rights vindicated against the state express the highest forms of compliance with international norms.

140. At the other end of the spectrum, constitutions that enshrine general human rights protection, use merely a protection - rather than a rights-based expression of children's needs and commit to weak justiciability, exemplify a low level of protection for children's rights.

141. What is revealing is that constitutions, taken as a whole, often occupy multiple points on these spectrums all at once. States rarely choose a single approach from one end of the scale and their variety of approaches means that good practice about how to best enshrine children's rights in the constitution can be found almost anywhere in the constitutions of individual Council of Europe states.

142. Given the specificities of children's protection and rights, a meaningful protection implies an access to appropriate and accessible enforcement mechanisms including an access to judicial remedies and courts. In addition, provisions on specific rights of complaint, of formal power/legal standing for an ombudsman or other institutions (preferably set up in line with the Paris principles) are essential.

143. This study has identified considerable good practices in the constitutional protection of children's rights and of their enforcement. The merit of identifying such good practices is that States can learn from each other in promoting higher standards.

144. Against this background, the Venice Commission has identified a set of key measures that would best answer the question "How can children's rights be included in national constitutions with a view to thus promoting their effective implementation?"

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<sup>204</sup> See UN Resolution 217 A (III), article 16 (3).  
[http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf)

145. The Venice Commission recommends that Member States of the Council of Europe provide, according to their constitutional system, constitutional guarantees for the recognition and protection of children's rights, along the following lines:

- notwithstanding the status and rights granted to the family, children shall be addressed as rights-holders and not merely as actors who need protection;
- in all actions concerning children, the best interest of the child shall be a primary consideration (in line with Article 3 of the Convention on the Rights of the Child);
- children shall have the right to be heard in all decisions that affect them (in line with Article 12 of the Convention on the Rights of the Child).

146. The Venice Commission further recommends Member States to:

- provide strong guarantees for the enforcement of children's rights, including by setting up an independent institution with responsibility to promote and protect children's rights (preferably set up in line with the Paris principles),<sup>205</sup>
- make sure that efficient mechanisms - judicial and non-judicial – are in place to remedy possible violations of children's rights, coupled with adequate procedural safeguards.<sup>206</sup>

147. Moreover, Member States and their institutions have a positive obligation to ensure the effective implementation of children's rights.

148. The Venice Commission recalls that positive obligations to ensure effective human rights protection, consistent with the case law of the ECtHR, are of particular importance for children.

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<sup>205</sup> In line with General Comment N° 2 CRC.

<sup>206</sup> The Venice Commission recalls in this regard the Council of Europe's Recommendation Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice.