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KATRE LUHAMAA

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Universal Human Rights in National Contexts: Application of International Rights of the Child in Estonia, Finland and Russia

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PRESS
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Faculty of Law, University of Tartu, Estonia

Dissertation is accepted for the commencement of the degree of Doctor of Philosophy (PhD) in law on June 30, 2015, by the Council of the Faculty of Law.

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Commencement will take place on September 14, 2015 at 14.00 in the Faculty of Law, Näituse 20 room K-03.

Publication of this dissertation is supported by the Faculty of Law, University of Tartu.

ISSN 1406-6394
ISBN 978-9949-32-899-4 (print)
ISBN 978-9949-32-900-7 (pdf)

University of Tartu Press
www.tyk.ee

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LIST OF ABBREVIATIONS

ALCSCd	Decision of the Administrative Law Chamber of the Supreme Court (Estonia)
CAT	Convention Against Torture
CCSCd	Decision of the Civil Chamber of the Supreme Court (Estonia)
CCSCr	Ruling of the Civil Chamber of the Supreme Court (Estonia)
CEDAW	Convention on Discrimination Against Women
CLCSCd	Decision of the Criminal Law Chamber of the Supreme Court (Estonia)
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRCSCd	Decision of the Constitutional Review Chamber of the Supreme Court (Estonia)
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HE	Hallituksen esitys (‘Proposal of the Government’, Finland)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial
ICESR	International Covenant on Economic, Social and Cultural Rights
ILA	International Law Association
ILC	International Law Commission
KHO	Korkein hallinto-oikeus (‘Supreme Administrative Court’, Finland)
KKO	Korkein oikeus (‘Supreme Court’, Finland)
OSCE	Organization for Security and Cooperation in Europe
RT	Riigi Teataja (‘State Gazette’, Estonia)
SC *en banc*	Supreme Court *en banc* (Estonia)
UDHR	Universal Declaration on Human Rights
UN	United Nations
ÜNT	Ülemnõukogu Teataja (‘Supreme Council Gazette’, Estonia)

FOREWORD

Writing this dissertation has been a long but very interesting process. I have always been fascinated by the fact that the theories on human rights and the practices on the ground are so diverse. Teaching international human rights often feels like teaching ideas that are detached from real life and that have more to do with human rights advocacies than national realities. At the same time, I have always felt that international human rights have had a deeply positive effect on many developments in different states. The transition of Estonia to democracy is one such example.

Initially, I planned to analyse whether nation-states understood the general values behind international human rights similarly. I was interested in the notion of human dignity. This project proved, however, to be too vague to suit the purposes of the dissertation. Therefore, the current dissertation touches only on the more practical elements of this wider topic.

As a mother of three sons who is sensitive to the value of human rights, I have received first-hand experience on the difficulties relating to the everyday micro-level implementation of the rights of a child. This is my primary subjective reason for selecting the Convention on the Rights of the Child, and the rights of children in general, as material rights for the current work. I still have to admit that practical implementation seems now even more complicated.

Writing the dissertation has connected me with numerous persons in several countries, particularly in Estonia and Finland, to name only a few.

My interest in international human rights was first triggered by Juhani Kortteinen, who taught international human rights in Tartu. I would like to thank my supervisor, Prof. Lauri Mälksoo, for guidance, patience, and insight. I am also indebted to Prof. Matti Mikkola, who inspired and fuelled my interest in the rights of the child and supervised me in the University of Helsinki.

There were numerous encounters in the University of Helsinki and other institutions from which my researcher ethics grew. I would also like to thank all members of the staff at the Faculty of Law, the University of Tartu, especially those who offered support and advice at various stages of this work. I am indebted to Prof. Irene Kull for the advice on Estonian civil law.

I am grateful for my reviewers, Prof. Martin Scheinin and Prof. Ria Wolleswinkel, for their helpful and substantive comments. Special thanks are due to Christopher Goddard, Kerli Valk and Kadri Vider with the help on the language of the dissertation. All the mistakes that remain are, however, mine.

I would like to acknowledge the financial support received for my research from the following grants – an individual research grant (INTLAWRUS) awarded to Professor Lauri Mälksoo by the European Research Council, and an institutional grant (IUT20-50) awarded by the Estonian Research Council.

And finally, I would like to thank my friends and my family and especially my sons, Uku, Pärt, and Laurits for their inspiration and patience, and for showing me the true substance of the rights of the child. I am grateful for my husband Andres for things too many to mention here.

INTRODUCTION

Claims that any normative order is underpinned by a certain value system are a commonplace.[1] An international normative order would therefore also require the existence of an international value system, which would justify the existence of superior norms. World War II triggered a paradigm shift in international law – sovereignty as the central concept and value of international relations and international law was complemented with new values as the basis for the United Nations.

Although the international law is still a state-centric system, mechanisms have been developed that constrain states from acting independently in some domestic and international matters. The emergence of the concepts of *erga omnes* obligations and *jus cogens* norms are exemplary reflections of this as they manifest common practices and beliefs among the international community. The underlying rationale of constraints on state power is the interests of the international community.[2]

With the creation of the United Nations, strong emphasis on international human rights and their universality, in the sense of worldwide and general applicability, is now a commonplace of international law and rhetoric.[3] International politics of the last 15 years has, however, scattered this conviction and raised a question as to the theoretical and practical possibility of universal human rights.

To substantively enforce international human rights, they have to become part of states' constitutional law and domestic legal systems. At the same time, national constitutions uphold states' values and traditions, which might conflict with universal, individualist and Western human rights. It is clear that states have different motivations for committing to international human rights treaties. Beth Simmons argues that whatever the motivation or hoped-for benefit, commitment to human rights treaties always brings about a change in states' national legal system.[4] Global international human rights instruments consider

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1 See e.g., Jure Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?," in *Hierarchy in International Law the Place of Human Rights*, ed. Erika De Wet (Oxford; New York: Oxford University Press, 2012), 13–41; Dinah Shelton, "Normative Hierarchy in International Law," *Am. I. Int'l L.* 100 (2006): 291; or Erika De Wet, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order," *Leiden Journal of International Law* 19, No. 03 (2006): 611–32.

2 See discussion in Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?," 15–16.

3 The preamble of the Charter of the United Nations reaffirms "*faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small*".

4 Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 77–80. Simmons emphasises that every ratification is backed by some benefits and positive developments. Whether states follow

human rights vested directly in every human independently of states and their constitutions. This view is reinforced by the individual universality claim of international human rights as the international human rights order is seen to guarantee those rights and obliges states to respect, protect and fulfil those rights in their domestic legal systems.[5]

Universality of human rights has been challenged in the recent years by the 'traditional values' movement; this opposition has formalised through the resolutions of the Human Rights Council of the UN.[6] This development might endanger the implementation of human rights;[7] at its extreme, traditional values might justify violations of international human rights and render the protection of the individual rights moot.[8] This, in turn, would make the universality of international human rights an empty concept.

This possible clash of the human rights' ideal of universality and *de facto* implementation, together with the recent developments, have triggered current research and posed a question of the possibility of the substantive universality of international human rights. It might well be that all the states are, in fact, following their own traditional or national values when adopting and implementing national laws, and apply and make reference to international human rights only when it coincides with already existing national values.

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international human rights substantively depends on the expected benefits. Thus, there are also some false positives i.e., states that genuinely do not share the same values but ratify because of other expected benefits such as positive publicity, investments; uncertainty over consequences; short time horizons. Posner has been critical towards these findings and claims that because of the ambiguity of the empirical data, the study does not lead to any solid conclusion. Fewer violations of human rights show merely modest causations and can not be regarded as compliance with international human rights obligations. Eric A. Posner, "Some Skeptical Comments on Beth Simmon's Mobilizing for Human Rights," *New York University Journal of International Law and Politics* 44 (2012–2011): 819.

5 Henry J. Steiner, Philip Alston, and Ryan Goodman, eds., *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 3rd ed (Oxford [etc.]: Oxford University Press, 2007), Part C "Rights, Duties and Dilemmas of Universalism", 473 *et seq*.

6 Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind," October 12, 2009; Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind," April 8, 2011; and Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practices," October 9, 2012.

7 As an example, the EU has stated: "*human rights are universal, enshrined in international law, and States have a positive obligation to promote and protect these rights. In this regard, given the potential harm … posed by the concept of traditional values in undermining the universality and inalienability of human rights.*" EU Permanent Delegation to the United Nations Office and other international organisations in Geneva, Contribution of the European Union: Traditional Values, February 15, 2013.

8 See e.g., the argumentation used by President Putin before signing the "accession" treaty of Crimea. Vladimir V. Putin, "Transcript: speech to a joint session of the Russian parliament", English version published in *The Washington Post*, March 18, 2014.

A. Research task and central statements

The current dissertation analyses the universality/traditional values debate from an internal position and tests these approaches from the perspective of the national implementation of the international rights of the child. Human rights are supposedly context-neutral. At the same time, they are made through international compromise and should be applied in real-life cases and have an impact on the ground. For the international human rights regime to be successful, or at least functional, the implementation of norms requires relevant domestic policies and institutions that are able and willing to carry out the requirements of international law in the midst of opposition or debate. Moreover, the implementation must resonate with the country's larger human rights agenda to be successful.[9]

The universalist claim of international human rights is a mainstream argument among international human rights lawyers and international human rights bodies; it is stressed in the practice of the international human rights courts as well as by the political bodies dealing with international human rights law.[10] At the same time, international human rights treaties create obligations for their member states, which are responsible for guaranteeing the respect, protection and, fulfillment of these rights in their particular domestic context.

The correctness of the universality claim can only be tested through analysis of the practical implementation of the international human rights norms. For it to be true, the national practices have to follow and implement, at least, the minimum core of the rights. This, in turn, refers to the functions of the international human rights law and the hierarchy of national and the international law.[11]

There is a variety of questions that need to be answered in this context. Are arguments about cultural and traditional values permitted before the international treaty bodies, and are they used by the states to justify domestic (non)implementation of the human rights norms? Are the standards and requirements of the CRC clear? Does the work of the UN treaty bodies and the CRC Committee, in particular, support the uniform implementation practice?

The approach taken might be questioned: If a state chooses not to follow or apply international human rights as binding, does it mean that the universality argument is rendered moot? The answer should be 'yes' when the arguments for such non-application are based on different understanding of the substance of these obligations compared to the ordinary interpretation given to them by the supervisory institutions or arguments of cultural differences and traditional values are used; furthermore, the answer should also be 'yes' when the inter-

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9 See further Simmons, *Mobilizing for Human Rights*, chapter 4.

10 See e.g., World Conference on Human Rights and United Nations, "Vienna Declaration and Programme of Action."

11 See e.g., Gertrude Luebbe-Wolff, "Who Has the Last Word? National and Transnational Courts – Conflict and Cooperation," *Yearbook of European Law* 30, no. 1 (2011): 86–99.

national supervisory institutions accept these arguments as valid despite their previous interpretation. The signing of a treaty should indicate the states' willingness to apply these norms in good faith and in accordance with the objective and purpose of the treaty;[12] the universality of human rights through application that is similar at least at its core is one of those objectives in international human rights treaties.

There is a variety of general research available on the influence of particular human rights treaties on the particular national legal systems with varying degrees of intensity and detail.[13] There are also a number of studies that comparatively analyse the actual national implementation of specific treaties, these analyses tend to be, however, quite general in nature and they traditionally analyse the ICCPR or ICESCR. In 1999, Heyns and Viljoen made an overreaching analysis of the application of six core treaties of the UN in selected states.[14] More recently, McGrogan analysed the application of international human rights in Asia, in the context of universality-cultural relativism.[15] The CRC has received much less attention; and these analysis are more general by nature.[16] As an example, in 2008, Mikkola examined the application of selected rights of the child in Finland and Russia.[17] Lundy *et al.* have analysed the implementation of the CRC in 12 countries;[18] none of the states of the current research was included in it. Analyses of national implementation of specific rights or international judgments in individual member states are, however, common.

UN treaty bodies, as well as other international human rights courts and institutions, analyse the implementation of the respective treaties in national legal systems during their supervisory processes. They base their General Comments and General Recommendations on such practice and generalize their practice as guidance for the states. Implementation of the treaties is analysed by

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[12] On methods of treaty interpretation, see e.g., Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014).

[13] On the implementation of the UDHR, see e.g., Vinodh Jaichand and Markku Suksi, eds., *60 Years of the Universal Declaration of Human Rights in Europe* (Antwerp: Intersentia, 2009). On the implementation of the ECHR, see e.g., Leonard M. Hammer and Frank Emmert, eds., *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague: Eleven International Publishing, 2012).

[14] Christof H. Heyns and Frans Viljoen, eds., T*he Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002).

[15] David McGrogan, *"Cultural Values and Human Rights: A Matter of Interpretation"* (University of Liverpool, 2012).

[16] For a recent analysis of the central issues of the rights of the child, see e.g., Karl Hanson and Olga Nieuwenhuys, eds., *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations* (Cambridge University Press, 2013).

[17] Helsingin yliopiston koulutus- ja kehittämiskeskus Palmenia, *Lastensuojelu Euroopassa ja Venäjällä*, ed. Virge Mikkola (Helsinki: Helsingin yliopiston koulutus- ja kehittämiskeskus Palmenia, 2008).

[18] Laura Lundy et al., *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (UNICEF UK, 2012).

the states themselves during the reporting process and in the Universal Periodic Review. All these documents are valuable sources for the current research.

The national implementation of international human rights depends on a variety of choices that states have made, two of which have central relevance for the purposes of this dissertation. Firstly, it depends on the position that international human rights occupy in the domestic legal setting. Here, states traditionally have a choice between monist and dualist approaches to international law. To put it crudely, monist states have theoretically fewer possibilities not to apply international human rights in accordance with their international supervisory practice. While this debate has been more or less concluded in the context of the European Court of Human Rights, this is still an issue for international human rights treaties that do not have such a strong implementation and supervisory mechanisms. UN human rights treaties are supervised by specific treaty bodies that adopt a variety of instruments; the domestic legal effect of these instruments in comparison with the practice of the ECtHR is less clear. States distinguish between these bodies; their credibility and states' willingness to cooperate with them varies; so do the standards of the treaty bodies together with their supervisory practice employed.

Secondly, national interpretation of international treaty norms depends on whether states share the values behind particular human rights norms or whether they give their independent interpretation to the values behind them. Here, the discussion on the universality, relativity, traditional values and minimum core approach to international human rights is of importance.

Rights of the child should be a particularly appropriate example for the current research, as the understanding that children are weaker participants in society requiring strong protection does not, in principle, vary in the opinions of states.[19] This has manifested in the nearly universal acceptance of the CRC.[20] At the same time, the CRC and the work of the CRC Committee have not received too much attention.

Recent years show an increase in the global emphasis and importance on the rights of the child. The year 2014 marked the 25th anniversary of the Convention on the Rights of the Child[21] (CRC). 25 years of practice mean that most of the states have gone through several cycles of reporting, and, thus, there is a considerable amount of interpretation available. Furthermore, the importance of

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[19] This research does not embark on discussion whether the rights of children should be protected through the children's rights paradigm. For this discussion, see e.g., the analysis by Lucinda Ferguson, "Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights," *International Journal of Children's Rights* 21 (2013): 177–208.

[20] As of 1 August 2015, the CRC has 195 members. Somalia ratified the CRC in January 2015 but has not completed the ratification process. Sourth Sudan completed its ratification process in May 2015. UNICEF, "Press Release: Government of Somalia Signs Instrument of Ratification of UN Convention on the Rights of the Child," January 20, 2015.

[21] CRC, UN GA, GA Res 44/25, annex, 44 UN GAOR Supp (No. 49), at 167, UN Doc A/44/49 (1989).

the rights of the child were stressed globally when Malala Yousafzai and Kailash Satyarthi, two renowned children's rights activists and advocates, officially received the Nobel Peace Prize in Oslo, Norway in 2014.[22] The CRC is interesting also in the context of the universal rights and traditional values debate as it introduced human rights dogma and language deep into the traditionally private sphere – the family as an institution is the central carrier as well as the transmitter or enhancer of the tradition and cultural values of a society.

At the same time, investigating the rights of children has difficulties as in contemporary childhood studies children are not a static group.[23] Instead, childhood is seen as a social phenomenon where children should be viewed not only as passive subjects but also as active subjects with their particular social life and their environment and as builders and determinants of society.[24] Furthermore, the capacity of a child is evolving – a child is not merely an adult in miniature but a human being under development in need of different degrees and levels of guidance, protection, provision, and participation in various stages of their life.[25]

Additionally, an interesting tension occurs between the rights of the child and the rights of the family and those of the parents. A child acts mainly within the family and, therefore, the rights of the child are strongly connected to the rights and obligations of the child's parents. Direction and guidance should be given to children to compensate for their lack of knowledge, experience and understanding; moreover, their actions must be restricted according to their evolving capacities. In other words, the more a child knows, experiences, and understands, the more the parents, legal guardians, or other persons legally responsible for the child must limit their directions and guidance. Moreover, as the child develops, their level of dependence recedes in direct proportion to the inverse growth of their degree of autonomy. This emancipation of a child touches the heart of some cultures and traditional values.

The rights of the child cover all traditional human rights, as well as some child-specific rights. These rights include: environmental interests, cultural protection, education – pre-school and school, public services, status and rights of the child in the family; extreme protection against sexual abuse, ill-treatment, trafficking, economic use of children, and public care. Still, there are general rights and principles that govern the implementation of all the rights of the child. These principles are material rights relevant to the current dissertation. The

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[22] Nobel Media AB 2014, "The Nobel Peace Prize 2014," *Nobelprize.org*, December 16, 2014.

[23] For a recent analysis of the variety of issues children face in different parts of the world, see e.g., Karl Hanson and Olga Nieuwenhuys, eds., *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations* (Cambridge [etc.]: Cambridge University Press, 2013).

[24] See e.g., Juha Eskelinen and Petri Kinnunen "Lapsuuden loppu vai uusi lapsuus." in Maritta Törrönen and Pelastakaa lapset, *Lapsuuden hyvinvointi: yhteiskuntapoliittinen puheenvuoro* (Pelastakaa lapset, 2001), 10–19.

[25] See e.g., Gerison Lansdown, UNICEF, and Innocenti Research Centre, *The Evolving Capacities of the Child* (Florence, Italy: Save the Children: UNICEF, 2005).

Committee on the Rights of the Child (CRC Committee or the Committee) has defined four such general principles in its General Comment No. 5:[26] non-discrimination (art. 2); the best interests of a child (art. 3 (1)); right to life, survival, and development (art. 6); and right to express one's opinion (art. 12). The definition of a child determines the material scope and addressees of the CRC. The current dissertation analyses the national implementation of two of these general concepts.

Firstly, the implementations of the definition of the child is analysed through some respective age limits (sexual consent, marriage, employment, criminal liability, enlistment in armed forces). Secondly, the concept of the best interests of the child is analysed as it influences all the procedures relating to children and is an interpretative tool that puts other relevant values into a hierarchy.

B. Purpose and structure of the research

The ultimate aim of this dissertation is to analyse the interpretation and implementation of selected children's rights in three states: Estonia, Finland, and Russia (hereinafter 'the states' or 'the three states'). In particular, I am interested in whether significant differences occur in the national implementation of the minimum core of these – purportedly universal – rights and what factors might cause any such differences. The main hypothesis of the work is that even in such a universally recognized document as the CRC, the universality claim does not hold true for the understanding and, furthermore, the interpretation and practical application of the minimum core of rights in these states differs considerably.

The dissertation is divided into two chapters. The first chapter introduces and defines the theoretical and general legal framework for the analysis; the second chapter analyses the compliance of the national practice with international standards. The first chapter begins by discussing theories of national acceptance of international law and analyses the position of international treaties in the domestic legal systems. Theoretical concepts behind the work include the monist-dualist approaches to international law and the relevance of these approaches to international and national human rights practice. These approaches are hardly new, but they are a backdrop that is used for justifying domestic practices. However, I am not only interested in monist or dualist solutions on the level of constitutional texts only but rather in their application in state practice. The central hypothesis of the first chapter is that monism and dualism distinctions do not have notable importance for the adherence to international human rights law.

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[26] CRC Committee, "General Comment No. 5. General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6)" (CRC/GC/2003/5, November 27, 2003).

When the universalist-relativist arguments are used by the states, they could in principle complement, reinforce, and inform the former monist-dualist division. Thus, the second part of the first chapter introduces the universalist-relativist debate and shows the possible perspectives on the traditional values debate. It continues by discussing the theoretical position of international human rights in international and national law and the general rules of their implementation. This would determine the nature of obligations deriving from international human rights treaties, including the way these treaties and their subsequent practice are to be applied within the national legal systems. This discussion includes an analysis of the legal effect that instruments of the reporting procedure (Concluding Observations and General Comments) have. The norm-making capacity of international organisations, including human rights treaty bodies, is analysed, as states are likely to implement only the provisions that they deem binding. The current dissertation concentrates on the work of the CRC Committee and the position of their instruments. It remains for other researches to analyse the efficiency and credibility of this Committee vis-à-vis other UN treaty bodies comparatively. The presumption here is that a universality claim does not differentiate between treaties and treaty bodies; therefore, it is possible to draw more general conclusions on the universality of international human rights from the implementation of any minimum core right.

The third part of the first chapter introduces a substantive legal framework of the research by showing the central aims of the rights of the child, together with a general overview of relevant universal and regional instruments and multitude of supervisory mechanisms. All three states belong to the UN and the Council of Europe;[27] Estonia and Finland are also part of the EU.

The fourth part of the first chapter analyses the position of international human rights treaties in the three states (Estonia, Russia and Finland) and their supervisory practice. It finishes by concluding whether the distinction of monism/dualism is of relevance. Here, the analysis is made on the level of constitutional law. There are two hypotheses in this part. Firstly, all three states consider international human rights as part of their national legal system; secondly, all three states deem supervisory practice of relevant international bodies, including the CRC Committee, as binding.

The second chapter concentrates on national implementation practice of the rights of the child in the three states. It asks firstly what the minimum core requirements of the substantive rights are and continues by analysing the compliance of the national practice with the requirements and the impact the international law and the instruments of the CRC Committee has had. The impact is understood here as the way in which domestic actors have referred to,

[27] The Parliamentary Assembly of the CoE renewed the sanctions against Russia in January 2015 due to the conflict in Ukraine; thus, the standing of Russia is controversial. PACE, "Citing Ukraine, PACE Renews Sanctions against Russian Delegation," January 28, 2015. In July 2015, these sanctions were not abolished. PACE, "Committee Proposes Not to Annul Russian Credentials 'at This Time,'" June 1, 2015.

used, and discussed selected standards of the CRC. Domestic actors include the governments, parliaments, courts, and selected ombudsmen. The dissertation uses secondary sources such as the views of the NGOs and the media for illustration of the national attitudes. Compliance is viewed as the extent to which policy, legislative, judicial, or other measures have been taken as a result of the adoption of the CRC and related international political processes. It refers to a state of conformity or identity between an actor's behavior and a specific rule of international law.[28]

The first part of the second chapter analyses the definition of a child, and the second part deals with the best interest of a child. In both of these cases, the minimum core requirements of the CRC are first defined. Here the wording of the CRC, relevant General Comments, and state practice are used. In the light of these minimum requirements, state practice (legislation as well as court practice), together with the political rhetoric, is analysed. The central hypothesis of the second chapter is that the states do not fulfil and implement the minimum requirements set forth, and, at least some of them use culture or traditional values arguments as a justification for it.

Insight into national implementation of the obligations undertaken by signing international human rights treaties is partly analysed through constructive dialogue in the United Nations. Thus, the end result has two dimensions. Firstly, it shows the way the CRC Committee analyses state reports through constructive dialogue. The Committee uses General Comments to define the minimum core standards of the CRC; it should examine their application in the constructive dialogue. Ultimately, the universal implementation of the CRC should be guaranteed by the practice of the CRC Committee as only the CRC Committee is in a position to guarantee any type of uniformity. It would be interesting to compare the working-methods and instruments used by the CRC Committee with those of the other UN treaty bodies. It might well be that the CRC Committee is a weak supervisory body and that this is the reason why CRC is not implemented uniformly. Such a comparison is not the aim of the current dissertation; rather, as the CRC can be regarded as an instrument where international consensus is the highest, and as the CRC Committee, as a fairly recent treaty body, has had time to learn from the weaknesses of other treaty bodies, it is seen as the best instrument for the current research.

The hypothesis here is that when analysing the state parties' reports, the CRC Committee checks the compatibility of state practice against these minimum core standards. If this is not the case, the objectivity of the standards, as well as the interpretative value of the CRC and the GCs, is questionable. It is also important to see whether the Committee uses comparative methods in its analysis and whether it clearly identifies the standards it aims to apply. The

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[28] The dissertation follows the approach taken by Kal Raustiala, "Compliance &(and) Effectiveness in International Regulatory Cooperation," *Case Western Reserve Journal of International Law* 32 (2000): 391.

existence of such common minimum standards is the substance of the universality claim, as indeed is the impression that the CRC Committee gives in its General Conclusions.[29]

Secondly, this research gives an insight into the implementation ethics of the three states – how do they see the international obligations imposed by international human rights treaties as well as the practice of the supervisory institutions? Although the number of countries in this study is low, the research looks into the argumentation of each selected state when making implementing efforts in order to conclude: what are the central arguments of non-compliance or compliance with international human rights standards? Clearly, this is a qualitative rather than a quantitative analysis.

Concluding from the above, this research proposes that a harmonization vision is, indeed, behind the work of supervisory committees when they scrutinize national legislation and implementation practice by states against the standards of international law. The theoretical part of the work proposes that these differences in implementation might be present because of the monist-dualist distinction and/or the philosophical understanding of the function, substance, and limitations of international human rights law.

C. Methodology and sources of the research

This dissertation examines a field that is situated at the intersection of public international law and constitutional law since human rights law in specific contexts is intrinsically linked with both. The central legal method used is the comparative method [30] – comparative human rights and, to some extent, comparative public (constitutional) law. Here, the dissertation follows the proposal of Mattei:[31]

> *in recent years, because of the emphasis of the role of interpreters in the making of the law, the assumed universalism in international law has been questioned by a variety of new approaches to international law.… Hence it becomes possible to compare one vision of international law with another vision, and such an effort claims its own academic identity as one of the comparative disciplines, namely comparative international law.*

Current dissertation views national legal systems as pluralist legal systems that are influenced by several exterior and interior influencers – today, legal centrism of nation-states has been replaced by polycentrism with many

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[29] See e.g., CRC Committee, "General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)" (CRC/C/GC/14, May 19, 2013).

[30] See e.g., Peter de Cruz, "Comparative Law, Functions and Methods," *Max Planck Encyclopedia of Public International Law*, 2009.

[31] Ugo Mattei and Boris N. Mamlyuk, "Comparative International Law," *Brooklyn Journal of International Law* Vol. 36 No. 2 (2011): 450–1.

competing laws.[32] Comparative analysis of the application practice of states shows what importance states grant to international human rights instruments and their supervisory practice. At the same time, the comparative method sheds light on the value of the practice of the treaty bodies. Central to the analysis are legal dogmatics i.e., the law in force. This means that besides the comparative method, I will also apply the analytical method more generally as, in fact, every legal study would do.

In a number of ways, the states of Estonia, Finland, and Russia have a common historical heritage but, at the same time, have several very different characteristics. The clash of cultural and historical backgrounds and the effect of international human rights as a unifier here present an interesting dilemma. All three neighbouring countries have a common geographical location and decades or even centuries of shared history under Russian rule. There are, however, also vast differences – the main religion in Russia is Orthodox Christianity whereas Finland is a Lutheran country and Estonia has the lowest number of people proportionally with affiliations, and among those people who have affiliations to a Church, there is an almost equal number of Lutherans and Russian Orthodox.

The selection is further intriguing as Estonia was occupied and annexed, although illegally, by the Soviet Union and had common foundations in the political and legal system for 50 years with Russia during the Soviet period. This does not automatically mean that the application of these systems carried the same or even similar values or had the same effect on the legal culture of today's states. Both Estonia and Russia have gone through a rapid transition and democratization of their legal systems, as well as the central values of society, though with quite different outcomes.[33] All these make the comparison between the countries interesting and might give a real insight into the functioning and meaning of the rights of the child and the values behind those rights.

The approach of the states to the rights of the child has varied. Finland has stressed the importance of the rights of the child and is traditionally considered to be a state that complies with international treaties.[34] The Estonian legal system has formally been opened to all international human rights norms.[35] At

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[32] Husa has proposed a comparativist approach to such pluralist legal systems in Jaakko Husa, "The Method Is Dead, Long Live the Methods – European Polynomia and Pluralist Methodology," *Legisprudence* 5 (2011): 249–271.

[33] For an interesting account on Russia's recent political history, see e.g., Edward Lucas, *The New Cold War: How the Kremlin Menaces Both Russia and the West* (Bloomsbury Publishing, 2012). For a short account of the history of Estonia, see e.g., Andres Kasekamp, *A History of the Baltic States* (Palgrave Macmillan, 2010).

[34] Jasper Krommendijk, "Finnish Exceptionalism at Play? The Effectiveness of the Recommendations of UN Human Rights Treaty Bodies in Finland," *Nordic Journal of Human Rights* 32, No. 1 (jaanuar 2014): 18–43.

[35] René Värk and Carri Ginter, "Estonia," in *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*, ed. Leonard M. Hammer and Frank Emmert (The Hague: Eleven International Publishing, 2012), 183–96.

the same time, its regulation has often remained formal, and there is little substantive legal practice in relation to a number of international human rights treaties. Recent empirical research into the rights of the child shows that although theoretically the rights of the child are deemed important, the opinion of the family and parents still prevails, with little regard to the participatory rights of the children.[36] Russia, on the other hand, has, in recent years, stressed the need to protect children traditionally through the institution of the family; it has openly questioned the value of the individual rights of the child.[37] Thus, the interpretations of Russia, given to a number of provisions of the CRC, reflect these values and this, from the outset, is in conflict with the central notions of the CRC.

One might question the choice of states for the analysis. Indeed, it was a particular challenge in this study to choose the key states for the analysis taking into account the significantly different approaches to balancing the public and individual interests in general, which are distinctive of the three countries. It might be less challenging to compare legal approaches within more similar cultural or historical legal traditions – although it would also have been possible to choose three states that historically and culturally would have differed much more from each other.

Nevertheless, all of the selected states are parties to the Convention on the Rights of the Child. Furthermore, they are also parties to the European Convention on Human Rights[38] (ECHR) and European Social Charter (revised) (ESC (rev)); [39] all three countries have accepted the jurisdiction of the European Court of Human Rights (ECtHR). Thus, we can say they 'operate' in the same legal field or under the same international obligations.

As discussed above, one of the questions of this research is whether the CRC Committee and the states implement the same – or at least as similar as possible – minimum standards. Through this angle, the application of the rights of the child in different state parties' legal systems can be a valuable example and contribute to the discussion on the universality of international human rights. It has to be noted that this dissertation does not aim to give an exhaustive account of all the legislative initiatives and practices of the three states. [40]

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[36] Marre Karu et al., Lapse õiguste ja vanemluse monitooring. Laste ja täiskasvanute küsitluse kokkuvõte (Poliitikauuringute Keskus Praxis, 2012).

[37] Vladimir V. Putin, "State Council Presidium Meeting on Family, Motherhood and Childhood Policy," February 17, 2014, http://eng.kremlin.ru/news/6687 (accessed 1.06.2015).

[38] ECHR, Council of Europe, CETS No. 5.

[39] ESC (Revised), Council of Europe, CETS No 163. ComSR stated in a collective complaint from the International Federation of Human Rights Leagues (FIDH) v. France, App. No. 14/2003 (EComSR, November 3, 2004), Decision on the merits of 5 September 2003, para. 36: "*Article 17 of the Charter is further directly inspired by the United Nations Convention on the Rights of the Child. It protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance*."

[40] All the legal acts as well as court cases are checked on April 1, 2015. Current dissertation does not reflect posterior developments.

Comparative material is selected bearing in mind the general purpose of the research and thus should rather be taken as examples of implementation practice. The standard used was the information that the CRC Committee collects and analyses during the constructive dialogue process.

A meaningful comparison in international human rights law presupposes certain cultural sensibility and linguistic knowledge by the researcher – it is easier to compare familiar legal systems that operate in familiar languages. In the present case, the legal systems of the selected three countries were accessible in their original language – a factor that is considered a *sine qua non* for making meaningful comparisons.

Comparative legal analysis often takes place on the assumption that the jurisdictions being compared are operating in separate spheres. In the human rights context, however, national legislators, as well as the domestic courts in different jurisdictions, are operating in the same or at least in overlapping legal space ('*espace juridique*'), and their performance is evaluated against their international obligations that are then the '*tertium comparationis*'.[41]

International and regional instruments central for the current analysis are:

1. The UN Convention on the Rights of the Child, where the substance of a number of provisions is further supported by the International Covenant on Economic, Social and Cultural Rights (ICESCR)[42] and the International Covenant on Civil and Political Rights (ICCPR).[43] In some instances, certain ILO treaties have relevance.
2. The ECHR and the practice of the ECtHR as creating possibly stricter minimum standards for the protection of some rights of the child; and the ESC (Rev) together with the supervisory practice of the European Committee on Social Rights (EComSR).

Material rights central for the current research are part of the rights of children and general principles of the rights of a child in particular – these include a definition of the child and the best interests of the child. The progress of states is periodically analysed by the CRC Committee, who concludes whether standards of the CRC have been met. The same is also done in the practice of the ECtHR when it applies the rights of the child, as well as the EcomSR. This research takes a step further and looks at whether and how these standards are used in national legislation as well as in the practice of domestic courts. This gives an indication as to the value or importance these particular human rights standards have for member states.

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41 See also the discussion in Christopher McCrudden, "The Pluralism of Human Rights Adjudication," in *Reasoning Rights: Comparative Judicial Engagement*, ed. Liora Lazarus, Christopher McCrudden, and Nigel Bowles (Rochester, NY: Hart Publishing, 2014).

42 ICESCR, UN GA, GA Res 2200A (XXI).

43 ICCPR, UN GA, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

CHAPTER I
SETTING THE SCENE: UNIVERSALITY OF HUMAN RIGHTS

No legal system can exist without a value system, and some view international human rights as representing that in international law. Since the adoption of the Universal Declaration of Human Rights in 1948, international human rights have been referred to as a universal morality of international law.[44] That is to say that international human rights aim at defining universal rights that are obligatory for all the national legal systems that have accepted these international treaties.[45]

The current chapter constructs the foundation for the dissertation – it introduces and defines the theoretical and general legal framework for the analysis, and analyses the general position and role that international human rights treaties have in the three states.

There is wide-ranging disagreement in contemporary international scholarship about the effect as well as the content of international human rights. Mendus pointed out as long ago as 1995 that "*in recent years, as political commitment to human rights has grown, a philosophical commitment has waned.*"[46] In the past few decades, this philosophical debate has been followed by the cultural relativist discussion and the claim that international human rights, including the rights of the child, represent Western value-imperialism that insists on imposing its values on the rest of the world.[47]

One can see international human rights as having had a positive and liberating effect for the global protection of individual rights. As an example,

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[44] See e.g., the discussion in Seyla Benhabib, "Another Universalism: On the Unity and Diversity of Human Rights," *Proceedings and Addresses of the American Philosophical Association* 81, No. 2 (November 1, 2007): 7–32; or Romuald R. Haule, "Some Reflections on the Foundation of Human Rights – Are Human Rights an Alternative to Moral Values?," in *Max Planck Yearbook of United Nations Law*, ed. Armin von Bogdandy et al., vol. 10 (Leiden; Biggleswade: Martinus Nijhoff, 2006), 367–395.

[45] World Conference on Human Rights and United Nations, "Vienna Declaration and Programme of Action" para. 1 in particular. For a wider discussion and critical views, see e.g., Jack Donnelly, "The Relative Universality of Human Rights," *Hum. Rts. Q.* 29, No. 2 (2007): 281–306. An alternative view has been to regard international human rights as a political overlapping consensus. See e.g., Martha Nussbaum, "Capabilities and Human Rights," *Fordham L. Rev.* 66, No. 2 (January 1, 1997): 273.

[46] Susan Mendus, "Human Rights in Political Theory," *Political Studies* 43, No. s1 (August 1995): 1. Classical examples of this debate are arguments of Nussbaum, who has stated that human rights form "*reasonable conditions of a world political consensus*" in Nussbaum, "Capabilities and Human Rights"; and Walzer, who has argued that human rights constitute the "*core of a universal thin morality*" in Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press 1994), 54.

[47] See e.g., Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," *Harv. Int'l L.J.* 42 (2001): 201–46.

the international court practice has granted international human rights a prominent position in international law; the ICJ affirmed as long ago as 1980 in the Tehran Hostages case that:

> *Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enumerated in the Universal Declaration of Human Rights.*[48]

Therefore, as Rodley points out, the UDHR has been slowly given the status of general international human rights law.[49] In their effect, international human rights are safeguards and constraints against domestic political decision-making. As Dworkin puts it, "*rights are political trumps held by individuals.*"[50] The effectiveness of these constraints, however, depends on the good will of each state, as the international community seldom interferes with domestic matters of states for the protection of international human rights.

There are also those who consider the rhetoric of international human rights law stronger than its true potential or functioning. As an example, even if sufficiently detailed international standards and international practice are available, domestic courts are still likely to reflect on domestic constitutional values rather than universal ones.[51] Koskenniemi, for one, argues that the rhetoric of human rights is not as powerful as it seems because international human rights do not hold a coherent set of normative demands that could be resorted to in the administration of society.[52] His argument does not deny the principal importance of international human rights but proposes that they do not have the quality of legal norms but function rather as general principles. The

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[48] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), (1980) I.C.J. Reports 1980, p. 3 (ICJ) [91].

[49] Nigel Rodley, "Is There General International Human Rights Law?" *EJIL: Talk!*, October 16, 2014, http://www.ejiltalk.org/is-there-general-international-human-rights-law (accessed October 16, 2014). For a more detailed discussion on general international law, see e.g., Rüdiger Wolfrum, ed., "General International Law (Principles, Rules, and Standards)," *Max Planck Encyclopedia of Public International Law*, MPEPIL 1408 (Oxford, 2010); or Menno T. Kamminga, "Final Report on the Impact of International Human Rights Law on General International Law," in *The Impact of Human Rights Law on General International Law*, ed. Menno T. Kamminga and Martin Scheinin (Oxford University Press, 2009), 2.

[50] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), xi. Dworkin elaborates on his theory of rights in Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, N.J.: Princeton University Press, 2006), 31; and Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Harvard University Press, 2000), 120–210.

[51] See similar discussion relating to *erga omnes* obligations in Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 25.

[52] Martti Koskenniemi, *The Politics of International Law* (Oxford ; Portland, Or: Hart, 2011), 133.

current dissertation shows whether it is possible to find clear normative requirments from the provisions of the CRC.

This is why setting the scene first requires analysis of the position of international human rights treaties and the practice of the supervisory institutions within the international law system. It helps to establish the true potential of these treaties and instruments and gives an indication of the expected effect for national legal systems. Secondly, the position of international treaties within domestic legal systems is analysed with reference to the monism and dualism theories.

As discussed below, the way that international human rights treaties function in a given legal system depends on several criteria among which the approach of the state to international law is of importance. Traditionally this is believed to be determined by whether the legal system recognizes the concept of monism or dualism.[53] Although international treaty bodies and human rights courts stress the supremacy of international human rights norms as well as their direct applicability in national legal systems, this choice is at least formally still in the realm of national sovereignty.[54] Nevertheless, as the aim of international human rights treaties is their enforceability and the possibility for individual justiciable claims, they all foresee exhaustion of domestic legal remedies and require domestic justiciability.[55]

Secondly, application of international human rights norms might depend on the acceptance or rejection of the universality claim of international human rights standards. This has been especially clear in the recent discussion on 'traditional values.' As an example, it was noted by the Special Rapporteur on violence against women that: "*Cultural relativism is often used as an excuse to permit inhumane and discriminatory practices against women in the community, despite clear provisions in many human right instruments*".[56] All these concepts form a theoretical framework for the empirical study in the second chapter.

Thirdly, national acceptance and implementation of particular and more detailed interpretations of the state obligations by supervisory institutions depend on whether these institutions are seen as being credible interpreters of the treaty. They also may depend on the tools employed by the treaty bodies. Thus, the positions of the interpretative instruments of the treaty bodies and those of the CRC Committee in the national legal systems are analysed.

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[53] For recent analysis, see e.g., Jordan J. Paust, "Basic Forms of International Law and Monist, Dualist, and Realist Perspectives," in *Basic Concepts of Public International Law – Monism & Dualism*, ed. Novakovic (Belgrade, 2013), 244–65.

[54] See on the UK example Craig William Alec Webber, "The Decline of Dualism: The Relationship between International Human Rights Treaties and the United Kingdom's Domestic Counter-Terror Laws," 2012.

[55] See e.g., art. 7 (h) of the Optional Protocol to the CRC; art. 3 (2(a)) of the Optional Protocol to the ICESCR.

[56] UN Economic and Social Council, Integration of the Human Rights of Women and the Gender Perspective. Violence Against Women., January 31, 2002, para. 1.

I National acceptance of international law

The effectiveness of the global human rights regime depends on national implementation or recognition of international human rights. Norm creation is, thus, internationalized, while the application or enforcement of rights is almost entirely up to the member states. This is further made obvious by the work of the international monitoring bodies. With the exception of a few regional systems where international human rights courts are present, global international monitoring bodies engage in political dialogue with states and are able to use mainly persuasion as a tool.

As will be discussed below (chapter 1, part 4), Estonia and Russia are formally monist legal systems while Finland represents a dualist legal system. Analysis of the implementation practice, however, shows that Russia is *de facto* a dualist country while Finland is *de facto* a monist country. Of course, this confusing situation also raises the question of the analytical usefulness of the two labels, monism and dualism. As De Wet points out, in reality, the difference between monist and dualist systems has always been one of degree.[57]

1.1 Dualism and pluralism

Domestic application of international human rights treaties is still an area governed by domestic constitutional regulation. According to the dualist doctrine,[58] international law and domestic law are separate and self-contained regimes that govern different subjects and legal relations. While the international law regulates the conduct of states and interstate relations, the domestic law regulates a whole range of relations from those between the state organs and individuals as well as those between individuals themselves.[59] International law and international human rights rules can enter the national legal system through rules of reference, and this is traditionally regulated by the relevant constitutions of states. This, in turn, means that the concrete position or rank of international law in these legal systems is not predetermined. The classical dualist view[60] does not accept the prevailing understanding of public inter-

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[57] Erika De Wet, "The Constitutionalization of Public International Law," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, 1st ed (Oxford, U.K: Oxford University Press, 2012), 1212.

[58] Giorgio Gaja, "Dualism – a Review," in *New Perspectives on the Divide Between National and International Law*, ed. Janne E. Nijman and André Nollkaemper (Oxford University Press, 2007), 52–62. Dualism is a 'traditional' theory explaining the relationship between international and national law.

[59] *Ibid*., 52–54.

[60] Until the World War II, dualism was globally accepted and prevailing doctrine. As Dupuy points out, contemporary dualism recognises the role of the international organisations and accepts that international law regulates the rights of individuals vis-à-vis states. Pierre-Marie Dupuy, "International Law and Domestic (Municipal) Law," *Max Planck Encyclopedia of Public International Law*, MPEPIL 1056, April 2011, para. 5–10.

national law according to which international law takes precedence over domestic law.[61] This also means that international law cannot reach individuals directly without acts of incorporation.

The dualist doctrine strongly emphasizes state sovereignty and the lack of formal sanctions in international law.[62] It would, thus, be logical that dualist countries would not regard the provisions of international treaties as rules, but would rather apply them as guidelines or principles. This would further mean that a dualist country would not regard outcomes and recommendations of political dialogue with treaty bodies as binding.

Central to the dualist claim, then, is the understanding that domestic institutions cannot apply international law directly in their jurisprudence – individuals and domestic institutions cannot legally be the addressees of international law.[63] Simmons claims that as adjustment costs are high, dualist law systems provide initiatives for governments to go slow with treaty ratifications.[64] Finland, as the only dualist example in the current research, confirms this hypothesis as it ratified the ECHR very late, in 1990; as will be discussed, this was also one of the inducers of constitutional change in Finland.

1.2 Monism

The monist doctrine views the relationship between international and domestic law as being part of a uniform legal order.[65] Within this legal system, international law is generally seen to be supreme and can be invoked before the national courts without prior incorporation.[66] The monist approach ensures the binding character of international law and aims at preventing norm conflicts between legal systems. This, however, does not imply the invalidity of domestic law conflicting with international law.[67]

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61 De Wet, "The Constitutionalization of Public International Law," 1211–12.

62 Dupuy, "International Law and Domestic (Municipal) Law," para. 21. In the extreme cases of international human rights violations, the Security Council of the UN could still take action for the protection of international peace and security. See further Jure Vidmar, "International Community and Abuses of Sovereign Powers," *Liverpool Law Review* 35, No. 2 (August 2014).

63 Gaja, "Dualism – a Review," 59–60. This has been contested e.g., at the World Conference on Human Rights and United Nations, "Vienna Declaration and Programme of Action.", where it is stressed in para 2 of the preamble that "*the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms*".

64 Simmons, Mobilizing for Human Rights, 71–77.

65 Dupuy notes that there are many varieties of monist doctrine. For an overview see Dupuy, "International Law and Domestic (Municipal) Law," para. 12–18.

66 We can leave here aside the antiquated variation of monism according to which both are the same legal order, but domestic law dominates. The hierarchy of legal norms is principally dependent on the national constitutional order.

67 Gaja, "Dualism – a Review," 53.

From the perspective of monist theory, international law can be, and is addressed to individuals as well. Thus, those rules of international law that intend to govern the conduct of state organs and individuals are directly applicable to their norm addressees irrespective of any intermediary role played by municipal laws.[68] Dupuy points out that monists state stress as the obligation of the state to bring a national legal system into conformity with international law. This obligation is backed by the state responsibility.[69]

Monist theory has especially been emphasizing the supremacy of hierarchically more important values and norms. One example that is frequently made is the supremacy of international human rights norms as hierarchically central to the modern international law system.[70]

Following the argumentation of Simmons, as the implementation costs of monist countries should be relatively small, these states should be relatively receptive towards international human rights treaties unless there are some reverse costs that are higher.[71] As discussed below, typically of monist states, the Russian Federation and Estonia acceded to international human rights treaties very quickly in the beginning of their transitions. After the initial momentum, Russia has gradually delayed acceptance of new international human rights obligations, and there are even discussions of turning officially towards dualism. Estonia formally fulfils the requirements of international human rights law; the substantive implementation of these norms is often superficial and formal.

1.3 Human rights – bridging the gap?

Nijman and Nollkaemper find that the segregation of national and international law is diminishing. They list the following trends: 1) emergence of common values (including international human rights); 2) dispersion of authority (globalisation has changed the reality, and the state has lost its controlling power); 3) deformalization (relationship between international and national law steps away from formal positivism and allows for numerous additional authorities).[72] For practical purposes, this would diminish the monist-dualist division as only the monist view would adequately support these developments.

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68 *Ibid*. 59.

69 Dupuy, "International Law and Domestic (Municipal) Law," para. 20.

70 See e.g., the discussion in Gaetano Arangio-Ruiz, "International Law and Interindividual Law," in *New Perspectives on the Divide Between National and International Law*, ed. André Nollkaemper and Janne Elisabeth Nijman (Oxford University Press, 2007), 15–51.

71 On different types of implementation costs of rights-respecting governments see further Simmons, *Mobilizing for Human Rights*, 63–77.

72 Janne Nijman and André Nollkaemper, "Beyond the Divide," in *New Perspectives on the Divide Between National and International Law*, ed. Janne E. Nijman and André Nollkaemper (Oxford University Press, 2007), 341–360.

International human rights law has the capacity to reconcile international and national law and reform both the dualist and monist understandings; due to its specific characteristics, it creates direct applicability that depends on national practice. Nollkaemper for one suggests that direct effect in international law can have both the function of a sword and the function of a shield – they enter national legal order to protect individual rights; often, however, they legitimize the non-application of international law.[73] Vidmar concludes that the UN Security Council considers serious national violations of international human rights to be a threat to peace and security and to permit recourse to measures under chapter VII of the UN Charter.[74] Furthermore, there are examples where domestic courts have relied directly on international human rights treaties.[75] This has, in particular, been the case within regional systems with international human rights courts overseeing compliance with international obligations.[76]

It is still currently impossible to conclude that international human rights law could function as supranational law and be applied directly without taking into account national legal orders. As discussed below, this has brought about discussion of the importance and position of international human rights treaties in international law as well as the constitutionalization of international law. The choice between monism and dualism is presumed to have practical consequences for the way international law norms, including treaty norms and international practice, function and influence national law. This is particularly important for the full and principled implementation of international human rights law.

Firstly, this choice influences whether international human rights treaties have a direct effect on the national legal system and can, thus, be directly relied on in the national legal system by individuals.[77] In dualist states, international treaties require national implementation mechanisms. They could potentially distort the meaning of norms or the court system might limit the possibility to rely on treaty norms in the absence of such implementation mechanisms or when those implementation mechanisms do not correspond to the requirements

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[73] André Nollkaemper, "The Duality of Direct Effect of International Law," *EJIL* Vol. 25, No. 1 (2014): 108–109.

[74] Jure Vidmar, "International Community and Abuses of Sovereign Powers," *Liverpool Law Review* 35, No. 2 (August 2014). It would be wrong to assume that all human rights have such character; moreover, as Vidmar puts it: "*one should not overstretch the effect of these norms. Despite their special value-based standing, they do not operate as hierarchically superior law.*" *Ibid*. 209.

[75] Nollkaemper cites examples from other jurisdictions such as Australia, where the Australian High Court acknowledged the legal status of the CRC in Australia, even though it had not been made part of Australia's legal system in the case of Minister of State for Immigration and Ethnic Affairs v Teoh, [1995] ILDC 779. [75] André Nollkaemper, "The Duality of Direct Effect of International Law," *EJIL* Vol. 25, No. 1 (2014): 110.

[76] See e.g., André Nollkaemper and Janne Elisabeth Nijman, *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007).

[77] See for details the discussion in Andre Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011).

of the treaties. There have been cases in the practice of the ECtHR where states have used the argument of dualism, claiming that this was the reason the national courts could not apply an international treaty.[78]

While the ECHR has a strong supervisory mechanism through which direct application of the ECHR has clearly been stressed,[79] the same does not necessarily apply to UN human rights treaties. However, the UN treaty bodies have also emphasised the primacy and direct effect of all human rights treaties in national legal systems. The CESCR Committee has stated:

> *In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.*[80]

Secondly, when a monist state accepts a constitutionality review, international human rights treaties have the potential to function as standards of constitutionality. This depends on the status those international human rights treaties enjoy in the given legal system. This would require acceptance of these treaties as higher than national legislation, sometimes even giving them equal status to basic rights. Based on the above, the hypothesis is that monist states are more prone to apply international human rights standards directly and also give effect to international supervisory practice.

Alternatively, national compliance with international human rights standards might prove to be disconnected with this division. Instead, other factors, such as principled acceptance of the human rights value system together with the universality of human rights, or the separation of powers and the existence of a strong and independent judiciary, might prove to be more relevant for compliance. Hillebrecht argues that compliance with international human rights standards presupposes strong and independent domestic institutions (courts in particular) that advocate compliance: "*Domestic institutions not only provide a check on executive authority, but they also can become important partners in compliance*".[81]

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[78] See e.g., Greens and M.T. v. the United Kingdom, App. No. 60041/08 60054/08 (Eur. Ct. H.R., November 23, 2010) [88].

[79] Although Hillebrecht argues that this strength has been overstressed. Courtney Hillebrecht, "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights," *Human Rights Review* 13, No. 3 (September 1, 2012): 284.

[80] CESCR Committee, "General Comment No. 9: The Domestic Application of the Covenant" (E/C.12/1998/24, December 3, 1998), para. 4.

[81] Hillebrecht, "Implementing International Human Rights Law at Home," 284.

Therefore, the existence of actual as opposed to the merely formal separation of powers and substantive not mere rhetorical support for the human rights ideal by state institutions could be more relevant indicators. Furthermore, domestic and international cooperation between domestic powers (including all levels of the government, legislator, and judiciary) are key to implementation. That is, implementing human rights per the interpretation given to them by international supervisory institutions is a political process. To understand the implementation, we must understand the value system of a particular country together with the institutional capacity and the legal and political culture surrounding domestic implementation.

2 Position of human rights treaties in international law

International human rights treaties are part of the international law, but due to the nature of the obligations created by them, they are substantively different from traditional reciprocal international agreements. This has been recognized both by the legal practice as well as theory. Thus, it has to be questioned whether and how the general international law applies to these treaties. This would help to determine the nature of obligations deriving from international human rights treaties, including the way these treaties together with their subsequent practice have to be applied to the national legal systems. It would be impossible to analyse the implementation of international human rights in the national legal systems without clear understanding of what the international requirements for such implementations are.

The UN Human Rights Committee has stressed in the General Comment No. 24 that the requirements of the Vienna Convention on the Law of Treaties are:

> *inappropriate to address the problem of reservations to human rights treaties. Such treaties and the Covenant, in particular, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place [vis-à-vis such treaties].*[82]

In addition, the international human rights regime consists not only of international human rights standards and their interpretation; instead, their full realization depends on the application of international treaty norms in national jurisprudence – the national upholding of the values of international human rights treaties is vital for the full application of this regime.

[82] HRC, "General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant" (CCPR/C/21/Rev.1/Add.6, 1994), 17.

Thus, the International Law Commission has included international human rights law in the category of self-contained regimes and *lex specialis*.[83] The ILA upheld an alternative view and stressed the need to reconcile general international law and human rights.[84]

Brilmayer has analysed the difference between international human rights treaties and traditional treaties and observed that international human rights developed rapidly through written agreements that fulfill, in essence, the requirements of traditional treaties. Still, "*International rights agreements are so different from traditional treaties that they might better be analysed as a distinct jurisprudential phenomenon.*"[85] The central difference is that human rights treaties do not protect the reciprocal interests of contracting parties[86] but the interests and rights of 'non-parties' (i.e., individual rights holders who are, by the traditional conservative account, not subjects of international law). This means that the ordinary treaty rules are not applied here – enforcement is not left to an individual state whose rights are violated. Instead, the entire international community is activated with enforcement of an obligation *erga omnes*.[87] Additionally, countermeasures in kind are a not permitted response to

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[83] Self-contained regimes form the heart of the fragmentation approach; it emphasizes the particular nature of such regimes. This approach has been firmly supported, e.g., by the ILC and Martti Koskenniemi in Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 2006, A/CN.4/L.702 para. 123 *et seq*., paras 161–164 in particular. On self-contained regimes see further Eckart Klein, "Self-Contained Regime," *Max Planck Encyclopedia of Public International Law*, MPEPIL 1467, November 2006; or Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law," *The European Journal of International Law* 17, No. 3 (2006): 483–529.

[84] Kamminga, "Final Report on the Impact of International Human Rights Law on General International Law", 1–2.

[85] Lea Brilmayer, "From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements," *British Yearbook of International Law* 77, No. 1 (January 1, 2006): 164.

[86] Sivakumaran discusses the effect of international human rights to state obligations mainly through the lens of *jus cogens* norms and *erga omnes* obligations. He argues that international human rights have changed the reciprocal nature of international obligations and, as they now form a substantive part of *jus cogens* norms, they also have a general effect on international obligations. Among other consequences, they may invalidate conflicting treaty provisions and render invalid Security Council resolutions. Sandesh Sivakumaran, "Impact on the Structure of International Obligations," in *The Impact of Human Rights Law on General International Law*, ed. Menno T. Kamminga and Martin Scheinin (Oxford University Press, 2009), 133–150.

[87] The view that certain human rights amount to obligations *erga omnes* is also shared by the ICJ. See e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (International Court of Justice, July 9, 2004) I.C.J. Reports 2004 136 [155]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), (International Court of Justice, February 26, 2007) I.C.J. Reports 2007 43 [147]; Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), (International Court of Justice, February 5, 1970) I.C.J. Reports 1970 3 [34].

a breach; it would violate the rights of the subjects of the treaties and, thus, be against the aim and purpose of these treaties. According to Brilmayer, "*[human rights] agreements are not reciprocal exchanges of conditional promises but parallel and independent commitments to respect pre-existing moral norms – 'pledges'*".[88]

International human rights law is still characterised by voluntarism – states freely pledge themselves to protect the rights of persons under their jurisdiction and, in the better part of the cases, have placed themselves under the scrutiny of international supervision by international judicial, semi-judicial bodies, or specific political dialogue. Schlütter notes that if human rights have the character of *lex specialis* that differentiate them from the rules of general international law, interpretation of human rights treaties must also take into consideration this particular nature, or even develop special rules of interpretation.[89] She further observes that scholars agreeing with the *lex specialis* nature of human rights highlight the particular character of human rights treaties as 'lawmaking' treaties, while underscoring the high degree of abstraction and vagueness of human rights norms as well.[90]

Without denying the special nature of the obligations undertaken in international human rights treaties, Brilmayer's argument is convincing – international human rights treaties are legal agreements that are including voluntary commitments (with the exception of customary international law and *erga omnes* obligations). Thus, the states also freely accept international scrutiny by either international judicial bodies as well as by supervisory committees.[91] There is, however, a difference between the functioning of the human rights treaty bodies and all other court-like or judicial bodies that are involved in international conflict resolution. As Moravcsik puts it:

> *Unlike international institutions governing trade, monetary, environmental or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities.*[92]

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[88] Brilmayer, "From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements," 165.

[89] Birgit Peters (Schlütter), "Aspects of Human Rights Interpretation by the UN Treaty Bodies," in *UN Human Rights Treaty Bodies Law and Legitimacy*, ed. Helen Keller and Geir Ulfstein (Rochester, NY, 2012), 263.

[90] *Ibid*., 265.

[91] McCorquodale points out that treaty monitoring bodies are using general international law and the law of state responsibility in its practice. For examples see Robert McCorquodale, "Impact on State Responsibility," in The Impact of Human Rights Law on General International Law, ed. Menno T. Kamminga and Martin Scheinin (Oxford University Press, 2009), 236–238.

[92] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization 54, 2* Spring (2000): 217–52.

Some of these systems have proved to be successful (examples of this are the European Court of Human Rights and the Inter-American Court of Human Rights),[93] while the legal relevance of others is often questionable despite fairly universal acceptance by states.[94] At least the ICJ recognized the influence of human rights monitoring systems in its Nicaragua judgment:

> *where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.*[95]

Thus, it has been the opinion of the ICJ that international human rights monitoring mechanisms create an adequate system for international human rights monitoring.[96] Therefore, the observation by Brilmayer, namely that pledges seem more stable than they really are, can be contested. She is of the opinion that as international human rights treaties look like treaties, it is assumed that signatory states will treat them like treaties.[97] Still, as there is no reciprocity guarantee supporting the enforcement of these agreements, it cannot be taken for granted that states will comply altruistically, or that other states will or could compel them to comply with these obligations. Reciprocity is substituted by international adjudication – voluntary individual and state-to-state complaints procedures and political control.

It is clear that research focusing only on international law is not sufficient for understanding the relevance and substantive impact on international human rights. As McCrudden has put it, implementation of international human rights

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[93] Still, a backload of cases has hindered the work of the ECtHR; the real effect of its decisions on the national human rights implementation essentially also depends on the state.

[94] The relevance of international treaty bodies is often stressed in the international human rights law. For analysis of the work of the UN treaty bodies and their implementation practice, see e.g., Rosanne Van Alebeek and André Nollkaemper, "The Legal Status of Decisions by Human Rights Treaty Bodies in National Law," in *UN Human Rights Treaty Bodies: Law and Legitimacy*, ed. Helen Keller and Geir Ulfstein (Cambridge University Press, 2012), 356–413. International human rights law has also substantively influenced the development of all areas of general international law. Menno T. Kamminga and Martin Scheinin, eds., *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009). Still, their effect on national legal systems is hardly discussed in the three states of the research. One exception here is perhaps the UN Human Rights Committee; its jurisprudence has received attention in the practice of the Estonian Supreme Court as well as in Finland. See e.g., Krommendijk, "Finnish Exceptionalism at Play?."

[95] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986, p. 14 (ICJ) [267].

[96] In its advisory opinion on The Wall, the ICJ followed the findings of the UN human rights treaty bodies closely. The instruments referred to included individual cases, state reports, and concluding observations. ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, in particular, paras 109–113. See also the discussions in Kamminga, "Final Report on the Impact of International Human Rights Law on General International Law," 10.

[97] Brilmayer, "From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements," 201.

standards on the national level has to be analysed to "*understand better the developing content and implications of international human rights law.*"[98] This is the space where the potential of international human rights lies.

There are also a number of obstacles and challenges in the international and national implementation of human rights law. Firstly, the relationship of international human rights law to the national law has numerous layers; international treaties establish diverse and sometimes conflicting human rights obligations; at the same time, their monitoring mechanisms are relatively weak. Secondly, even when possibilities are available for international adjudication, they require, as a general rule, exhaustion of domestic remedies. As Slaughter points out, basic human rights issues are regulated both by national constitutions and international human rights treaties. Interpretation and application of these treaties fall under the obligations of both the national adjudicator and to an international body, and as these jurisdictions join, the result is a "*genuinely global community of courts and law.*"[99]

A consensus exists that implementation of international human rights should primarily be achieved through action at the national level. This means, in the first place, the inclusion of international human rights provisions in the national legal order. This is particularly essential in states belonging to the 'dualistic school'; this action could also be required from states belonging to the 'monistic school'. The effect and meaning of a treaty, then, only derives from domestic legal provisions.

This means that provisions without self-executing character should always be translated into national provisions to be enforceable. Furthermore, sometimes legislative reform is necessary in order to comply with an international treaty – states must attune their national policy to the ratified provisions of a treaty. Thirdly, the domestic courts play a significant role in the implementation process; at the same time, they often use international human rights only in the cases they can be shown as supporting argument for already formulated decision.[100]

Most international human rights treaties create an international supervisory system with the task of monitoring national progress; and, in some cases, with the possibility of individual complaints mechanisms. On the UN level, the treaty bodies' system is complemented with the Universal Periodic Review (UPR) at the Human Rights Council, where all international human rights treaty obligations of states are analysed through a mainly political process.[101]

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98 McCrudden, "The Pluralism of Human Rights Adjudication," 5.

99 Anne-Marie Slaughter, *The New World Order*, (Princeton University Press, 2005), 80–82.

100 Current research shows that CRC is rarely used by the courts of the three states as substantive and decisive arguments. Courts refer to CRC usually as a sidenote, reinforcing the conclusion already reached on the basis of domestic regulation.

101 UN GA, "Resolution 60/251. Human Rights Council" (A/RES/60/251, April 3, 2006).

2.1 International human rights law norms in the hierarchy of norms

A normative hierarchical order would require the existence of an agreed formal hierarchy and an international value system, which would justify the existence of such superior norms. The concepts of *erga omnes* obligations and *jus cogens* norms reflect such a value system. As Vidmar emphasises, "*they manifest a strong sense of international community, which is 'glued together' by the international value system.*"[102]

International law is generally seen as having a horizontal nature – the rules and principles of international law are not hierarchical to each other, nor are there ranks between different types of sources of international law.[103] The position of international human rights norms within the general international law is relevant on two different levels. Firstly, it is important to specify whether there are international legal obligations that should be given precedence over international human rights law norms. Secondly, it will help to indicate what kind of obligations international human rights law imposes on states.

States traditionally adhere to international human rights law through accession to relevant treaties. Human rights form a bulk of norms that are considered to have *jus cogens* quality. As McCorquodale asserts:

> *some human rights create legal obligations on a state irrespective of whether it has ratified a particular treaty, either because the human right is part of customary international law and so binding on all states or by virtue of a rule of jus cogens, which no state can derogate from or evade by contrary practice.*[104]

There are a number of universal treaties covering a range of subjects as well as themes;[105] the international human rights law system is further complicated by

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[102] Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 14.

[103] International Law Commission and Koskenniemi, Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, para. 324.

[104] Robert McCorquodale, "An Inclusive International Legal System," *Leiden Journal of International Law* 17, No. 3 (September 2004): 485. Consequences of violations of jus cogens norms are explained in the art. 26 of the ILC Articles on State Responsibility: "*Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.*" International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts," January 28, 2002; see also the Commentary to art. 41 in International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries" (*Yearbook of the International Law Commission*, 2001, vol. II, Part Two), art. 26.

[105] There are currently eight core human rights treaties adopted under the auspices of the UN. They are the International Covenant on Economic, Social and Cultural Rights (CESCR; 16 December 1966, entered into force 3 January 1976, 993 UNTS 3); the International Covenant on Civil and Political Rights, (CCPR; 16 December 1966, entered into force 23

the different institutions interpreting these treaty norms. Furthermore, there is the possibility of regarding international human rights law norms as either principles or rules and, thus, allowing arguments for the different treatment of these norms.

At the same time, domestic law is usually organised with a clear hierarchy; the position of international human rights provisions within these systems depend on the approach the state has taken regarding the position of international treaties within their constitutional law. While the position of international law norms within the legal system is clearly defined in dualist countries, this is not necessarily the case in monist legal systems. At the same time, one of the successes of monist approaches to international law has been ideological – international law and human rights, in particular, have been seen as enjoying supremacy over national law and being part of general international law.[106] One of the expressions of this approach has been found in the Vienna Convention on the Law of Treaties art. 27, which prohibits justifications of nonperformance based on national law.[107]

De Wet proposes that the core values underpinning contemporary international law[108] are linked to the UN Charter:

March 1976, 999 UNTS 171); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD; adopted 21 December 1965, entered into force 4 January 1969, 660 UNTS 195); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT; 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85); the Convention on the Rights of the Child (CRC; 20 November 1989, entered into force 2 September 1990. 1577 UNTS 3); and most recently the Convention on the Rights of Persons with Disabilities (CRPD; 13 December 2006, entered into force 3 May 2008, 2515 UNTS 3).

[106] For a recent discussio, see e.g., Rodley, "Is There General International Human Rights Law?"

[107] Vienna Convention on the Law of Treaties (VCLT; 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331) art. 27 stipulates: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*" Scheinin points out that the VCLT has considerable limitations in relation to international human rights treaties, as it does not formally acknowledge the whole range of actors in international law, nor does it fully acknowledge existence of semi-judicial interpreters of such treaties. He, therefore, proposes that VCLT should be applied to international human rights treaties with caution; rather, international human rights might be "*embryonic form of a global constitution*". Martin Scheinin, "Impact on the Law of Treaties," in *The Impact of Human Rights Law on General International Law*, ed. Menno T. Kamminga and Martin Scheinin (Oxford University Press, 2009), 27–30.

[108] Erika De Wet, *The International Constitutional Order* (Amsterdam: Vossiuspers UvA, 2005), 7; and Erika De Wet and Jure Vidmar, *Hierarchy in International Law the Place of Human Rights* (Oxford; New York: Oxford University Press, 2012), chap. 2.

> *as the latter´s connecting role is not only structural but also substantive in nature. In addition to providing a structural linkage of the different communities through universal state membership, the UN Charter also inspires those norms which articulate the fundamental values of the international community.*[109]

The heart of these values in international human rights is often linked with art. 1 (3) of the UN Charter, which stresses the value of international human rights when specifying the purposes and principles of the UN.[110] These values have helped to build up comprehensive universal and regional systems of international human rights treaties and bodies dealing with their supervision. At the same time, there are also other general values and principles, such as the principle of humanity, that are central to general international law, and these are often seen as superior to other legal norms.[111] One of the reasonings for such an interpretation comes from art. 103 of the UN Charter;[112] although it does not specify what norms would prevail in a conflict of norms, it is often interpreted as referring to *jus cogens* norms; *erga omnes* obligations and obligations under the Charter. Some also include here the rights entailed in the Universal Declaration of Human Rights.[113] As is discussed below, the traditional values movement is aimed at positioning traditional values among such other universal values.

It can be claimed that all the global international human rights instruments adopted under the auspices of the UN are part of this "international bill of rights".[114] At the same time, others claim that the reference to human rights in the art. 1 (3) is too vague to place international human rights top of the international hierarchy of norms.[115] Still, the international community has tried to stress the importance of international human rights and the centrality of international human rights norms in several declarations. As an example, the

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[109] De Wet, The International Constitutional Order, 9.

[110] Art. 1 (3) of the UN Charter states that one of the aims of the UN is: "*To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*"

[111] The Martens clause is one representation of such a humanity clause. For a recent account, see e.g., Rotem Giladi, "The Enactment of Irony: Reflections on the Origins of the Martens Clause," *European Journal of International Law* 25, No. 3 (August 1, 2014): 847–869.

[112] Article 103 of the UN Charter reads: "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*."

[113] See generally De Wet, "The Constitutionalization of Public International Law," 1213–19; and Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?"

[114] Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?"

[115] Anthony Aust, "The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner`s View.," in *Review of the Security Council by Member States*, ed. Erika De Wet, André Nollkaemper, and Petra Dijkstra (Intersentia, 2003).

centrality of international human rights was stressed in the 1993 Vienna Programme of Action together with the need to incorporate international human rights standards in domestic legislation;[116] such references are a commonplace.

2.1.1 Legal nature of international human rights obligations

International human rights are traditionally viewed as applicable positive law.[117] At the same time, human rights have foundations in moral thinking and sociology.[118] There is a strong tension between these different functions of human rights. On the one hand, international human rights protect the individual against arbitrary intervention by the state and government. At the same time, enjoyment of international human rights strongly depends on the assistance of the state.

A number of theorists stress that international human rights and moral rights amount in principle to the same thing.[119] Others stress the need to separate justiciable rights from moral rights and doubt whether international human rights as such are legal rights at all. As Tomuschat observes,

> *No watertight dividing line exists between human rights as legal concepts and their reflection in moral and religious thinking. If human rights had their only basis in positive law, their effectiveness would be structurally threatened.*[120]

There are a number of ways international obligations could be conceptualized; these approaches are relevant for the current dissertation as far as they help to understand the practical obligations some norms of the CRC entail. Firstly, it is possible to analyse norms of international human rights treaties through the classification of rules and principles. This is a theory used mainly when analysing constitutional rights but is easily transferred also to international law and international human rights in particular. Secondly, it is possible to divide human rights based on their corresponding obligations. Here, the tripartite

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[116] The program "*urges Governments to incorporate standards as contained in international human rights instruments in domestic legislation and to strengthen national structures, institutions and organs of society which play a role in promoting and safeguarding human rights.*" World Conference on Human Rights and United Nations, "Vienna Declaration and Programme of Action," para. 83.

[117] See e.g., Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd ed, The collected courses of the Academy of European Law vol. 13/1 (Oxford: Oxford University Press, 2014), 3.

[118] For a recent account of the historical overview of the philosophical foundations see Jarna Petman, *Human Rights and Violence: The Hope and Fear of the Liberal World.* ([S.l.]: Hart Publishing, 2014), pt. 1; and the discussion in Sabine C. Carey, *The Politics of Human Rights: The Quest for Dignity* (Cambridge ; New York: Cambridge University Press, 2010).

[119] See e.g., generally the discussion by James Griffin, "The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights," *Proceedings of the Aristotelian Society* 101, New Series (jaanuar 2001): 1–28.

[120] Tomuschat, *Human Rights*, 9.

division of respect, protect and fulfill is traditionally used. Thirdly, it is possible to differentiate between human rights norms based on the expected end-result – obligations of result and conduct. Besides, the level of commitment to the norms might vary depending on whether these norms are 'hard law' or 'soft law'.

Rules and principles

The international legal theory proposes that a difference exists between rules and principles.[121] Hart as a representative of legal positivists has discussed this differentiation through the concepts of legal norms as coercive orders and moral commands. Legal norms are backed by the coercive power of the state while moral commands do not have such backing.[122] Dworkin, representing the natural law, sees a substantive difference between legal rules and principles in the concreteness of norms together with the preciseness of obligations. Dworkin proposes in his "Taking Rights Seriously" that:

> *the difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligations in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion /whereas/ principles have the dimension of weight and importance.*[123]

Therefore, in his understanding, principles are applied in a more-or-less manner while rules create precise and concrete rights or obligations. Legal systems commonly have some kinds of general principles applicable to that legal order.[124] Alexy has emphasised that the application of legal principles is also problematic for the justification of legal judgments as principles allow for exceptions and may be mutually inconsistent and even contradictory; they do not have all-or-nothing applicability. For their actual interpretation, they require concretization via subordinate principles and particular value-judgments with an independent material content.[125]

This does not mean to say that it is impossible to base arguments on a system of values and goals, that is, to argue from an axiological-teleological system or

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[121] Interestingly, this is one point where the legal positivists and natural law supporters are in agreement. For an overview of the Hart-Dworkin debate, see e.g., Scott J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," *U of Michigan Public Law Working Paper* No. 77 (February 2, 2007).

[122] H.L.A. Hart, *The Concept of Law* (Oxford University Press, 2012). See also the discussion of Hart`s positions on international law more generally Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," *European Journal of International Law* 21, No. 4 (November 1, 2010): 967–95.

[123] Dworkin, Taking Rights Seriously, 24–26.

[124] Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Clarendon Press, 1989), 4.

[125] *Ibid*., 4–5. Alexy also explaines that many of the implications of understanding fundamental rights as principles include the need for optimization.

on some other system. However, it does clarify that this kind of argumentation is never entirely conclusive.[126] All international human rights norms have practical goals. Wolfrum suggests that legal principles help to systematize legal norms. They may also function as tools of interpretation, application, and, in particular, assist in the progressive development of international law by showing the direction for it.[127]

As international human rights treaties are meant to be applied at all levels of the national legal system, the practical value of the principles lies in the use of them in the legal argumentation.[128] According to Alexy, there are three possibilities for the inclusion of principles as value-judgments in legal argumentation:[129]

1. appeal to value-judgments of the community (this could mean local, regional or global community);
2. reference to the inner evaluative coherence of the legal order;
3. appeal to some objective order of values.

There is no dispute on the understanding that international human rights treaties create legal obligations that are strongly connected with their underlying morality; thus, they function at least to some extent both as norms and as principles in international law.[130]

There are also those who consider international human rights norms as something other than either rules or principles. David Feldman proposes that human rights represent a desirable state, an aspiration, and protection of human rights can improve the chances of that aspiration.[131] Dorothy Jones argues that one of the significant developments in international law since the UN Charter is what she calls the 'declaratory tradition'.[132] This tradition establishes a certain style of reasoning in international documents according to which leading principles are delineated in order to produce a common standard of understanding and interpretation of legal norms. She proposes that the concept of 'human dignity' is the best example of this tradition. This is supported by Dicke, who claims that functional analysis shows that the dignity of human beings in

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126 *Ibid*., 5.

127 Wolfrum, "General International Law (Principles, Rules, and Standards)," 7.

128 'Legal argumentation' has to be understood in the broadest sense and including all levels of the governance and decision-making.

129 Alexy, *A Theory of Constitutional Rights,* 11–13.

130 As Koskenniemi puts it: "*The usefulness of rights lies in their acting as "intermediate stage" principles around which some communal values and individual interest can be organised.*" Koskenniemi, The Politics of International Law, 134. See also the discussion in Dworkin, Taking Rights Seriously, 71–80.

131 David Feldman, "Human Dignity as a Legal Value: Part 1," *PL* Winter (1999): 682.

132 Dorothy V. Jones, "The Declaratory Tradition in Modern International Law," in *Traditions of International Ethics*, ed. Terry Nardin and David Mapel, Cambridge Studies in International Relations (Cambridge University Press, 1992), 42–61.

the UDHR is a formal, transcendental norm to legitimize human rights claims.[133]

Current thesis takes the view that even though contemporary human rights include such aspirations and values, their norms are practically usable, and, thus, some of these norms function as principles and some of them function as rules. Still, there remains a question of who has the rights or, indeed, an obligation to decide which norms in the human rights treaties are principles, what is the allowed leeway, and which norms are rules in the meaning of the above theories.

Institutionalisation of international human rights[134] has meant that there are numerous international human rights treaty bodies and international human rights courts or quasi-judicial organs that interpret the respective treaty norms and give them precise content. While the substance of norms in terms of the individual rights they create is relatively straightforward, the substance and extent of the corresponding obligations is often unclear and needs both international as well as domestic interpretation.

As discussed above, the distinction between rules and principles has practical consequences for the national implementation. Thus, the current dissertation follows the distinction formulated by Alexy whereby rules are norms that require something definite, and they are, thus, definitive commands. By contrast, principles are norms requiring that something has to be realized to the greatest extent possible, given the factual and legal possibilities involved. Thus, principles are optimization requirements; this in turn means that they can be satisfied to varying degrees.[135] Functionally, this distinction helps in understanding the state obligations that particular rights carry and whether a particular right gives a state some margin.

The practice of the CRC Committee explicates clearly between 'principles and provisions,' and it has defined a number of norms that create 'general principles'.[136]

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[133] Klaus Dicke, "The Founding Function of Human Dignity in the Universal Declaration of Human Rights," in *The Concept of Human Dignity in Human Rights Discourse*, ed. David Kretzmer and Eckart Klein (The Hague ; New York: Kluwer Law International, 2002), 118. For general discussion of the principle of human dignity and its functions see the debate of Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *Eur J Int Law* 19, No. 4 (September 1, 2008): 655–724; Paolo G Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply," *Eur J Int Law* 19, No. 5 (2008): 931–44, or Christopher McCrudden, ed., *Understanding Human Dignity* (British Academy, 2013).

[134] Institutional legal theory as developed e.g., by Neil MacCormick stresses that law is an institutional normative order. Neil MacCormick, *Institutions of Law* (Oxford University Press, 2007).

[135] Robert Alexy, "Rights and Liberties as Concepts," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, 1st ed (Oxford, U.K: Oxford University Press, 2012), 291.

[136] CRC Committee, "General Comment No. 5. General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6)" (CRC/GC/2003/5, November 27, 2003), para. 12 in particular.

1) Definition of the child (Article 1)[137];
2) Non-discrimination (Article 2);
3) Best interests of the child (Article 3);
4) Right to life, survival, and development (Article 6); and
5) Respect for the views of the child (Article 12).

According to the CRC Committee, these norms first and foremost require legislative and administrative measures. In the General Comment No. 14, the Committee finds that principles express "*the fundamental values of the Convention*"; and that the task of the principles is to guide interpretation and implementation all the rights of the child.[138] The Committee considers these "principles" to be general measures of implementation,[139] i.e., they have to be taken into account for the implementation of all the provisions of the CRC. Although the CRC Committee does not state it directly, it seems to follow the logic proposed by Alexy to an extent. The CRC Committee sees general principles as objective values that should be taken into account in relation to all norms and standards of the CRC. The fact that these norms are considered to be principles does not mean that they automatically entail progressive development. To complicate things further, next to their principal quality, these norms can also entail individual rights and function as rules bringing along concrete obligations.

Other typologies of state obligations

There are different ways international obligations included in rules could be divided. Such typologies are abstract instruments that help clarify the content of international treaty norms. Wolfrum proposes that the following types of obligations can be distinguished in international law.[140] (1) Obligations of result – goal-oriented obligations where a state has to ensure a particular factual result.[141] (2) Obligations of conduct – a state has to undertake a particular action, depending on a particular obligation, and an end result might also be required.[142] (3) Goal-oriented obligations – states have to undertake a particular process leading to a particular direction, and a specific result is not defined.[143] (4) Obligations that address natural and juridical persons – states have an obligation to guarantee the fulfillment of these obligations in their national

[137] Definition of a child is not a traditional principle. Rather, it defines the subjects of the CRC.
[138] CRC Committee, "General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, Para. 1)" (CRC/C/GC/14, May 19, 2013), para. 1.
[139] *Ibid.*, para. 6.
[140] Wolfrum, "General International Law (Principles, Rules, and Standards)," para. 67.
[141] *Ibid.,* paras 74–83.
[142] *Ibid.,* paras 84–93.
[143] *Ibid.,* paras 94–99.

law.[144] (5) Obligations of conduct require states to undertake a particular conduct irrespective of the end result; obligation of result requires the state to ensure the obtainment of a particular result, leaving the choice of means to the state. Each of these obligations requires a different type of action from the state and helps to substantiate the more precise obligations that different human rights norms entail.[145]

The practice of the UN treaty bodies show that they have traditionally resorted to using tripartite obligations of 'respect, protect and fulfill';[146] sometimes, a fourth obligation of 'promote' is also included.[147] There are even some treaty bodies that organise their General Comments following the logic to these obligations.[148] The CRC Committee is using the tripartite typology of obligations often in its General Comments, and has defined such obligations as follows: "*to respect freedoms and entitlements, to protect both freedoms and entitlements from third parties or from social or environmental threats, and to fulfil the entitlements through facilitation or direct provision*."[149] Furthermore, the CRC Committee stresses the interdependence of the rights.[150]

Writings on the international rights of the child use an additional typology of child-specific obligations – the 'three P's' of 'provision, protection and participation'.[151] Provision means, in this context, the right to get one's needs fulfilled; protection means the right to protection from harmful practices; participation refers to the right of a child to be heard on decisions affecting his

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144 *Ibid.,* paras 100–104.

145 *Ibid.,* paras 105–107.

146 The Human Rights Committee is a notable exception here that does not utilise the tripartite obligations as clearly as other treaty bodies. Still, also the HRC uses the language of respect, protect, and fulfill in its practice. See e.g., HRC, "General Comment No. 35: Article 9 (Liberty and Security of Person)" (CCPR/C/GC/35, December 16, 2014), where the HRC refers in para 63 to obligation to respect; and in para 7 to obligation to protect. It does not refer to obligation to fulfill or promote.

147 This typology was developed to its current state by Asbjørn Eide in relation to economic, social, and cultural rights. Asbjørn Eide, UN Special Rapporteur for the Right to Food, *The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide*, E/CN.4/Sub.2/1987/23 (1987), paras 67–69. For an overview of typologies of obligations used by different treaty bodies, see e.g., Tomuschat, Human Rights, 141–146. For a more detailed overview, see e.g., Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties?" *Human Rights Law Review* 5, No. 1 (January 1, 2005): 81–103.

148 See e.g. CESCR Committee, "General Comment No. 21: Right of Everyone to Take Part in Cultural Life" (E/C.12/GC/21, December 21, 2009) paras 48–54.

149 CRC Committee, "General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)" (CRC/C/GC/15, April 17, 2013), para. 71.

150 See e.g., CRC Committee, "General Comment No. 14," para. 16

151 This typology was first proposed by Thomas Hammarberg in "The UN Convention on the Rights of the Child – And How to Make It Work," *Human Rights Quarterly* 12, No. 1 (February 1990): 100. For critique on this typology see Ann Quennerstedt, "Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the '3 P's,'" *The International Journal of Children's Rights* 18, No. 4 (November 1, 2010): 619–635.

or her life. In substance, two of these obligations refer to the two first tripartite obligations. Only the obligation to participate is specific to the rights of the child and refers to the right of the child to be heard (art. 12 of the CRC). As the more complete tripartite typology of obligations together with general principles of the CRC cover the 'three P's', the current dissertation does not consider this typology the most useful tool.

As is shown below, CRC norms that are classified under the general principles create a variety of obligations; some of them are principles and others are clear rules, some entail some elements of both categories. Thus, labeling any norms as principles should not mean that they cannot create obligations that are, in substance, rules. Current research shows that the definition of a child includes precise age limits that should be regarded as rules requiring specific end results. The best interests of the child, on the other hand, function both as principles and as rules; they includw a whole range of the above obligations.

An additional distinction of human rights obligations relates to their binding force. International 'soft law' relates to non-binding obligations that nevertheless can produce some legal effects.[152] According to Thürer, soft law describes principles, rules, and standards governing international relations that do not stem from one of the sources of international law enumerated in art. 38 (1) ICJ Statute.[153]

The dissertation uses practice of the UN treaty bodies for substantiation of the legal obligations entailed in the CRC. Such practice fulfills the 'soft law' requirements; thus, the legal validity and effect of such norms has relevance for the current research. The assumption here is that the UN treaty bodies as well as the EComSR are supervisory bodies who have the authority for informal international lawmaking. Thürer notes that such soft law has importance for the national legal system as it interprets international law and, thus, gives guidance

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[152] Guzman and Meyer propose that there are four complementary reasons or instances when states use international soft law: 1) finding a consensus for coordination of activities; 2) to avoid higher losses but still keep the possibility for positive developments; 3) to have more flexible rules; and, 4) 'international common law' created by international institutions that gives cooperation-minded states the opportunity to deepen cooperation in exchange for surrendering some measure of control over legal rules. Andrew T. Guzman and Timothy L. Meyer, "International Soft Law," *Journal of Legal Analysis* Vol. 2 (2010): 171–172.

[153] Daniel Thürer, "Soft Law," *Max Planck Encyclopedia of Public International Law*, MPEPIL 1469, March 2009, para. 5. According to Thürer, there are four distinctive characteristics of soft law: "*First, soft law generally expresses common expectations concerning the conduct of international relations, as it is often shaped by, or arises within, the framework of international organizations. Second, soft law is created by subjects of international law – in contrast to commercial customs and rules such as codes of conduct set up by private organizations or companies. Third, soft law rules have not – or not entirely – passed through all stages of the procedures prescribed for international law-making; they do not stem from a formal source of law and thus lack binding legal force. Fourth, soft law, despite its legally non-committal quality, is characterized by a certain proximity to the law, and above all by its capacity to produce certain legal effects.*" *Ibid*., para. 9.

for the national implementation of the treaty obligations. It, still, does not formally enter into the hierarchy of legal norms of national legal systems. Thus:

> *"By opting for soft law as a non-binding instrument of international relations, governments have a means to avoid parliamentary or other democratic influence on, or interference with, the elaboration of international agreements. Thus, the constitutional system of competence may be circumvented."*[154]

It has to be noted that international treaty bodies themselves see at least some of the instruments they adopt as being binding to the states. As an example, the Human Rights Committee has formalised a follow-up procedure and asks the states to provide information vis-à-vis to the violations ascertained.[155] The CRC Committee has not formalised similar procedure. The precise effect of some of the instruments adopted by the UN treaty bodies is further discussed below.

2.1.2 Constitutionalization of international human rights

Alexy proposes that human rights enter positive, i.e. national, law through constitutional rights and, thus, constitutional rights match the requirements of human rights.[156] The trend to the internationalization of constitutional law and the comparative constitutional law has been noted by a number of authors.[157] As Chang and Yeh point out, one of the features of this trend is incorporation of international human rights in the domestic constitution, often making rights guaranteed by the domestic constitution identical with rights entailed in international human rights treaties – this is the global triumph of rights-based discourse.[158]

The current research concurs with the view that a harmonization vision is behind the work of the supervisory committees when they scrutinize national

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[154] Daniel Thürer, "Soft Law," para. 31.

[155] HRC, "Note by the Human Rights Committee on the Procedure for Follow-up to Concluding Observations" (CCPR/C/108/2, October 21, 2013). Similar procedures are also adopted by the CAT, CERD, CEDAW, CRPD, and CED committees.

[156] Robert Alexy, "Rights and Liberties as Concepts," 290.

[157] See e.g., Scheinin, "Impact on the Law of Treaties," 29–31; Herman Schwartz, "The Internationalization of Constitutional Law," *Human Rights Brief* 10 No. 2 (2003): 10–12; or Wen-Chen Chang and Jiunn-Rong Yeh, "Internationalization of Constitutional Law," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, 1st ed (Oxford, U.K: Oxford University Press, 2012), 1165–84. For a theoretical account of the international constitutionalism, see e.g., Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford Constitutional Theory, Oxford University Press 2014).

[158] Chang and Yeh, "Internationalization of Constitutional Law," 1170–72. In general, as research shows, the effectiveness and substantive application of the CRC are best ensured if an international human rights treaty is made part of national law. See the recommendation in Heyns and Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level," 527 and examples in Heyns and Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*.

legislation and implementation practice of states against the standards of international law. It has to be remembered, that every state is bound by a different international global and regional layers of human rights law, and the practice of a state is viewed and scrutinized by different international institutions that might apply different standards. As Peters puts it, international law has progressed from a law of coordination between states to a law of close cooperation that reaches far into the realm of traditional domestic concerns and thus, international law has constitutionalized.[159]

One of the features of constitutionalization is the emergence of trans-governmental networks, consisting of various international organisations and disaggregated components of the state, which interact and cooperate in relation to a particular area.[160] As described by De Wet, within a network there would be a criss-cross interaction of norms with a possible additional hierarchy. This interaction would be both horizontal in nature (between different international organisations with a functional overlap) as well as vertical (between the international organisation and the state).[161] As will be discussed below, it ultimately depends on the national constitution of the state whether and how particular international treaties and the outcome of these networks enter the domestic legal system and what is their position in those systems.

One area where constitutionalization and trans-governmental co-operation is perhaps clearest is the regime of international human rights law. As discussed below, this is one of the rare regimes where states have accepted the compulsory, even if subsidiary, jurisdiction of international bodies and, more importantly, have granted exceptional rights for individuals to bring cases against them.[162]

As an example, it has been a consistent claim of the ECtHR that the ECHR is the "*constitutional instrument of European public order in the field of human rights*."[163] However, as Slaughter warns, it is a system of vertical checks and balances as national courts adhere to the supremacy of international courts – up to a point. When an international tribunal moves too far out with the prevailing

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[159] Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures," *Leiden Journal of International Law* Vol. 19 (2006): 579–610.

[160] Anne-Marie Slaughter, "The Real New World Order," *Foreign Affairs* 76, No. 5 (1997): 183; see further discussion of global networks in Slaughter, *The New World Order*.

[161] De Wet, "The Constitutionalization of Public International Law," 1222–24.

[162] See e.g., Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009) ch. 2 in particular.

[163] See e.g., Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89 (Eur. Ct. H.R., March 23, 1995) [75]; Al-Skeini and Others v. the United Kingdom (Grand Chamber), App. No. 55721/07 (Eur. Ct. H.R., July 7, 2011) [141]. See further discussion in Paolo Carozza, "Subsidiarity as a Structural Principle of International Human Rights". *American Journal of International Law* 97 (2003): 38.

national consensus, the national courts do not follow.[164] The practical tool of operation with which the ECtHR tries to overcome this dilemma is the use of the margin of appreciation, whereby the member states are given room to decide politically sensitive matters themselves.[165]

However, the attitudes of the member states differ on the nature and direct application of international treaties. While the ECHR and its direct application today receive no major objections, in the case of the CRC, views have differed. As an example, Germany upon ratification made a declaration according to which the CRC is not domestically applicable.[166] Indeed, a number of reservations have been made to the CRC where states have limited the direct application of certain rights, and there are states parties whose courts have initially denied the CRC´s self-executive character.[167]

The CRC has global acceptance; nevertheless, the influence of it is not as high as could be expected when taking into account the number of ratifications. It is a common frame of references for the other and more general international human rights treaties and bodies on the issues of the rights of the child.[168] However, it has not gained the relevance some of the other UN treaties have gained. It could be that rights of the child, in general, are a conceptually difficult branch of law for the states as they often require more interference with the family life, untraditional flexibility of the decision maker, or application of general and relative principles. It could also be that the existence of such a vast amount of human rights treaties and supervisory bodies has scattered the focus of the states; then it is easy to use the CRC as a pronouncement of general attention to children.

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[164] Slaughter, *The New World Order*, 82. It has to be noted that her observations follow further the domestic application of international treaties by the US Supreme Court. Similar position was stressed by the Secretary General of the Council of Europe, Torbjørn Jagland, who said at the Interlaken Conference in 2010: "*In recent years, there has been undefined talk of the Court becoming a 'Constitutional Court'. […] The Convention is not intended to be a 'European constitution' and it is difficult to see how the Court could become like any existing national constitutional court.*" Quoted in Alastair Mowbray, "Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights, The," *Hum. Rts. L. Rev.* 10 (2010): 523.

[165] See e.g., discussion in Geir Ulfstein, "The European Court of Human Rights as a Constitutional Court?," Festschrift to the 40th Year Anniversary of the Universität Der Bundeswehr, Munich: "To Live in World Society – To Govern in the World State", Forthcoming; PluriCourts Research Paper No. 14–08. (March 19, 2014): 2.

[166] This declaration was withdrawn on 1 November 2010. The declaration read: "*The Federal Republic of Germany also declares that domestically the Convention does not apply directly. It establishes state obligations under international law that the Federal Republic of Germany fulfils in accordance with its national law, which conforms with the Convention.*"

[167] See the examples in Tomuschat, *Human Rights*, 175.

[168] See e.g., Ursula Kilkelly and Laura Lundy, "Children's Rights in Action: Using the UN Convention on the Rights of the Child 1989 as an Auditing Tool," *Child and Family Law Quarterly* Vol. 18, No. 3 (2006): 331–350.

2.1.3 International human rights monitoring bodies as international law-makers

International organisations and UN treaty bodies, in particular, are central to the international protection of human rights as they supervise the implementation of treaties and interpret international treaties.[169] Evaluations of the effectiveness and the role and position of the UN human rights treaty bodies in national legal systems has varied.[170] In the beginning of the new millennium, Connors argued that UN treaty monitoring is an "*empty diplomatic ritual*" that "*should be disbanded;*"[171] Clapham went further and stated that the "*treaty bodies are becoming more and more peripheral.*"[172] Even after the creation of the Human Rights Council and the introduction of the Universal Periodic Review system in 2006, Morijn still finds that while the concerns and deficiencies of the treaty body system are widely known, hardly any structural reform has taken place.[173]

A report of June 2012 by the UN High Commissioner for Human Rights compiled various proposals for strengthening the treaty body system. These included a comprehensive reporting calendar and a simplified, aligned reporting process.[174] The treaty bodies have limited enforcement tools at their disposal (e.g. reports, recommendations and general comments); reporting by states has increased as a consequence of pressure applied in the Human Rights Council's Universal Periodic Review process.[175] It has also meant a diversion of resources away from the treaty bodies to support that process. At the same time, UN treaty bodies have the obligation to interpret the treaties and guarantee that they are implemented universally among the member states.

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[169] For general analysis of international organisations as law-makers, see e.g., José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2006). For a comprehensive overview of the historic origin of the treaty bodies as well as their legitimacy debate, see e.g., Andrew Kloster and Joanne Pedone, "Human Rights Treaty Body Reform: New Proposals," *Journal of Transnational Law & Policy* Vol. 22, Spring 2013 (June 27, 2011).

[170] See e.g., Peter Uvin, *Human Rights and Development* (Kumarian Press, 2004), 44; Anne F. Bayefsky, *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International, 2000), 315; Jasper Krommendijk, "Finnish Exceptionalism at Play?"; Christof H. Heyns and Frans Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level," *Hum. Rts. Q.* 23 (2001): 483.

[171] J Connors, "An Analysis and Evaluation of the System of State Reporting," in *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International, 2000), 4.

[172] Andrew Clapham, "UN Human Rights Reporting Procedures: An NGO Perspective," in *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), 175–98.

[173] John Morijn, "Reforming United Nations Human Rights Treaty Monitoring Reform," *Netherlands International Law Review* 58, No. 03 (2011): 58.

[174] Navanethem Pillay and OHCHR, Strengthening the United Nations Human Rights Treaty Body System, 2012.

[175] See e.g., Nadia Bernaz, "Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism," in *New Institutions for Human Rights Protection*, ed. Kevin Boyle (Oxford University Press, 2009), 75–92.

International human rights at the UN level are supervised through the political process and the Human Rights Council, which carries out both the UPR and deals with specific human rights issues. Treaty bodies regularly supervise the implementation of international treaties and report their findings to the Human Rights Council or the General Assembly. The mandate of the treaty-based bodies of the UN is strictly limited to the respective treaty, and they take a non-conflictual stance towards states that violate a treaty and engage them in political dialogue. Furthermore, treaty bodies are expert bodies and do not represent particular member states.[176]

Although these bodies receive their legitimacy from the respective human rights treaties, the general legal nature and force of the instruments (General Comments and Concluding Observations in particular) adopted by these bodies is unclear.[177] The position of views based on individual communications is considerably clearer, and many states have opened their national legal system to changes, including revision of a court decision, when a treaty body has ascertained a violation of some rights in its communication process.[178]

As the current research concentrates on the application of the rights of the child, the position and possible legislative power of the CRC Committee is of relevance.[179] The current part discusses the law-making capacities and legal effect of instruments of human rights treaty bodies in general and cites examples from the practice of the CRC.

As Pauwelyn convincingly proposes, the institutional legal theory[180] could assist in analysing the nature of obligations or norms created by this kind of expert body.[181] In reality, scepticism seems to be growing among states parties to human rights conventions towards the further development of substantive human rights by their treaty bodies. States seem to fear that – through interpretation – the treaty bodies could further encroach on their sovereign sphere

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[176] For a detailed analysis, see e.g., Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012). For a general overview of the functioning and competences of the UN treaty bodies, see e.g., Peter-Tobias Stoll, "Human Rights, Treaty Bodies," *Max Planck Encyclopedia of Public International Law*, May 2008; or Tomuschat, *Human Rights*, chap. 11.

[177] For an overview, see Nisuke Ando, "General Comments/Recommendations," *Max Planck Encyclopedia of Public International Law*, November 2008.

[178] See further Rosanne van Alebeek and André Nollkaemper, "The Legal Status of Decisions by Human Rights Treaty Bodies in National Law."

[179] For an earlier but substantive account on CRC Committees work, see e.g., Jutta Gras, *Monitoring the Convention on the Rights of the Child*, Erik Castrén Institute Research Reports 8/2001 (Helsinki, 2001).

[180] Institutional Legal Theory combines legal positivism with institutionalism founded in the linguistic philosophy of John Searle. For an in-depth analysis of institutional legal theory, see e.g. Dick WP Ruiter and Ramses A Wessel, "The Legal Nature of Informal International Law: A Legal Theoretical Exercise," in *Informal International Lawmaking*, ed. Joost Pauwelyn, Ramses Wessel, and Jan Wouters (Oxford University Press, 2012), 162–84.

[181] Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, eds., *Informal International Lawmaking*, 1st ed (Oxford: Oxford University Press, 2012).

and consequently exceed the bounds of their original consent to the treaty in question.[182]

For the interpretative statements of the treaty bodies to have any theoretical or real effect on national law, they should, firstly, be regarded as having legal relevance or binding force. Non-binding norms may have legal effects, which makes them relevant for lawyers. At the same time, however, ignoring the non-binding nature of norms does not lead to a formal infringement or to legal consequences. There is disagreement among those who argue in favour of a sharp line between law and non-law and those arguing for the existence of a grey zone.[183] In practice, this division may not always be clearly visible, and some states follow the positions of international treaty bodies even if they do not regard these as law, and vice versa. Thus, it is relevant how these statements are generally perceived in international law as well as within the relevant national legal systems.

Generally, in order for some statement to have legal force i.e., be able to create legal rights and duties, it has to be performed by a competent actor. Both the creation of 'legal acts' and the existence of 'legal competence' are important elements for this analysis. Legal norms deriving their validity from a legal instrument have been issued.

UN treaty bodies typically issue three different types of instrument:

1. General Comments / Recommendations[184];
2. views on individual cases or communications[185];
3. concluding observations on state reports[186].

As the individual communications procedure of the CRC Committee has as of March 2015 just been accepted and to date there have been no communications, this function and its outcomes are not analysed here.

In principle, states parties agree only to the provisions of the treaties as binding. Thus, any subsequent practice by supervisory bodies could be used as an interpretational aid.[187] The interpretation rules of customary international law

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[182] There are convincing examples of the reluctance of states to implement e.g. the quasi-judicial view deriving from individual communications procedures of the CCPR, CAT and CERD. Peters (Schlütter), "Aspects of Human Rights Interpretation by the UN Treaty Bodies," 266.

[183] For an overview, see e.g. Ruiter and Wessel, "The Legal Nature of Informal International Law," 163.

[184] Ando, "General Comments/Recommendations."

[185] See e.g. Van Alebeek and Nollkaemper, "The Legal Status of Decisions by Human Rights Treaty Bodies in National Law."

[186] For general overview see Walter Kälin, "Examination of State Reports," in *UN Human Rights Treaty Bodies*, ed. Helen Keller and Geir Ulfstein (Cambridge: Cambridge University Press, 2012), 16–72.

[187] See generally on treaty interpretation Enzo Cannizzaro, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011); on methods of treaty interpretation, see e.g. Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press,

laid down in Articles 31 and 32 of the Vienna Convention apply to human rights treaties as much as they apply to other international law treaties. Art. 31 of the VCLT regulates treaty interpretation generally – central to this are the principle of good faith and the context of the treaty.[188] Documents and decisions of supervisory bodies are secondary to treaty interpretation and are covered by art. 31 (3) b of the VCLT, according to which "*there shall be taken into account, together with the context any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*". In addition, art. 32 of the VCLT allows for supplementary means of interpretation. Thus, the instruments adopted by the treaty bodies should fall under these categories.

Schlütter discussed, whether the practice of the treaty bodies could also be seen as 'state practice', and concluded that such an approach is problematic.[189] Practical problematics of this issue is also visible in the current dissertation. Among other issues, implementation of the definition of a child is analysed; concrete age limits used as minimum core obligations do not derive from the text of the CRC but the practice of the CRC Committee. At the same time, this practice also represents some consensus between the states – states have tacitly accepted this obligation as there have been no objections to such an interpretation.

There is a possible tension between the positions of interpretative bodies on the one hand and member states on the other. Supervisory bodies have been active in using dynamic interpretation, at times exceeding the original wording of treaty rules, and have even extended material obligations as binding upon the state.[190]

The CRC does not *per se* authorize the Committee to adopt any new standards or interpretations of the CRC; nor does it grant the CRC Committee any judicial or quasi-judicial powers. Only after the Optional Protocol to the CRC on the Communications Procedure[191] entered into force in 2014 is the CRC Committee able to accept individual communications. As of 1 May 2015

2014). Specifically on human rights interpretation see Peters (Schlütter), "Aspects of Human Rights Interpretation by the UN Treaty Bodies."

188 See further on different approaches to treaty interpretation Pierre-Marie Dupuy, "Evolutionary Interpretation of Treaties: Between Memory and Prophecy," in *The Law of Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford University Press, 2011), 123–37.

189 Peters (Schlütter), "Aspects of Human Rights Interpretation by the UN Treaty Bodies," 292-294.

190 Here the notion of international human rights treaties as living instruments is of importance. For the practice of UN treaty bodies see Peters (Schlütter), "Aspects of Human Rights Interpretation by the UN Treaty Bodies." 296–98; on the practice of the ECtHR, see e.g. George Letsas, "The ECHR as a Living Instrument: Its Meaning and Its Legitimacy," *SSRN Scholarly Paper* (March 14, 2012).

191 UN GA, "Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure" (A/RES/66/138, December 19, 2011).

there are 15 members of the protocol and no communications have been submitted.

As a word of caution, Krommendijk proposes that the implementation and use of international supervisory instruments and the process of reporting has more impact in countries with the considerable bureaucratic and financial capacity to participate in the process.[192] This could mean that the real reason behind the approach by a state towards international soft law instruments does not have legal-theoretical reasons but depends on the state's own well-being and similar other practicalities.

Legal status of General Comments or Recommendations[193]

General Comments or Recommendations form part of international practice subsequent to conclusion of a human rights treaty that may be viewed as conforming with the scope of application of article 31 (3) b of the VCLT. As briefly discussed above, none of the core UN human rights treaties or their rules of procedure regulate the legal position or legal nature of General Comments/ Recommendations. There is also no general consensus among states on the effect and legal nature of these instruments – they have not always become accepted as hard law by states parties to the relevant treaty. In legal scholarship General Comments have been defined as follows:

> *[They are] means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance. In essence the aim is to spell out and make more accessible the 'jurisprudence' emerging from its work.*[194]

As to their legal status or effect, it is clear that the term 'General Comments' implies that they have no legally binding effect as such. Their main purpose is to assist and guide states parties to the treaties in preparing their reports to be submitted to the CRC Committee; and they can have up to three meta-functions:

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192 Krommendijk, "Finnish Exceptionalism at Play?," 20.

193 Different UN treaties allow for different instruments. The CRC recognizes both General Comments and Recommendations; the CRC Committee adopts General Comments as general interpretative documents of specific articles of the CRC; it uses the term "recommendations" for less formal instruments (i.e., documenting the outcomes of General Days of Discussion). See CRC Committee, "Rules of Procedure" (CRC/C/4/Rev.3, April 16, 2013). CEDAW on the other hand allows the CEDAW Committee to adopt "General Recommendations" (art. 21 (1) of CEDAW).

194 Philip Alston, "The Historical Origins of the Concept of 'General Comments' in Human Rights Law," in *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, ed. Laurence Boisson de Chazournes et al. (The Hague: Nijhoff, 2001), 764. Alston considers General Comments potentially most significant and influential tool available to deepen the understanding and strengthen the influence of international human rights norms. *Ibid*. 763.

legal analytical; policy recommendation; and practice direction.[195] As the quality of information contained in the reports is decisive as to effective and substantive monitoring by the bodies, the reports are a vital instrument in the implementation of states parties' legal obligations under the treaties.

While the decisions of the regional human rights courts often find domestic acceptance as binding interpretations of the treaties[196], this is not the case with the instruments adopted by the UN treaty bodies.[197] A 2004 report by the International Law Association addressed the impact of statements of UN Human Rights treaty bodies. The ILA summarised their finding on General Comments as follows:

> *Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of an expert body in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty. While States will give them careful consideration, they may not give effect to them as a matter of course.*[198]

As will be discussed below (chapter 1 part 4), the three states of the current study have been receptive towards the General Comments of the UN treaty bodies and they have referred to General Comments both in the preparatory works of their respective parliaments as well as in the practice of the highest courts. The nature of these references has, however, varied.

The CRC is temporally one of the latest of the core UN human rights treaties; and by the time it was adopted, the other treaty bodies such as the Human Rights Committee had adopted several General Comments as well as having

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[195] A similar understanding was expressed by Pillay in her report on strengthening the work of treaty bodies: *"[General Recommendations and General Comments] now constitute detailed and comprehensive commentaries on specific provisions of the treaties and on the relationship between the articles of the treaty and specific themes/issues. By issuing general comments, treaty bodies aim at making the experience gained so far through the examination of states parties' reports and, when relevant to individual communications, available for the benefit of all states parties, in order to assist and promote their further implementation of the treaties."* Pillay and OHCHR, Strengthening the United Nations Human Rights Treaty Body System, 82.

[196] While for the last 25 years the states parties to the ECHR have rarely objected to the binding nature of judgments

[197] The ILA report on the impact of UN human rights treaty bodies emphasises: "*None of the human rights treaties explicitly confers on the relevant treaty bodies the power to adopt binding interpretations of the treaties, and the practice of at least some States suggest that this power has not been conferred implicitly, as part of the implied power that a body established by treaty is considered to possess in order to carry out the functions conferred on it by the states parties*". International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (London, 2004), para. 18.

[198] *Ibid*., para. 16.

created some 'jurisprudence'.[199] Still, regulation of the activities of the CRC Committee in articles 43–45 is vague, it does not explicitly give the CRC Committee the right to adopt binding interpretations of the treaty and specify the legal effect or nature of the instruments the committee adopts.

The legal basis for the General Comments can be found in the "Rules of Procedure"[200] adopted by the CRC Committee; art. 77 stipulates that the Committee may prepare General Comments based on the articles and provisions of the CRC '*with a view to promoting its further implementation and assisting states parties in fulfilling their reporting obligations'*. The Committee may include such General Comments in its reports to the General Assembly. The CRC Committee has, as of 1 May 2015, made 18 General Comments and the wording of the comments states that its aim is to "*outline states parties' obligations*"[201].

Several of the General Comments of the CRC Committee reflect the experience of monitoring bodies in the consideration of states parties' reports, but the monitoring task ultimately aims to improve the human rights situation of a reporting state. Hence, General Comments tend to have a quasi-legislative character. In that sense, they are not a mere reflection of the human rights situation of a state party. Rather, they could and should reflect goals for the attainment of which the monitoring bodies wish the state party to strive and serve as an authoritative interpretation of the provisions of treaties.[202]

It has been pointed out that General Comments are based upon the experience gained by the Committee through examination of state reports. The Committee summarizes its findings and makes them available to all the member states. These comments relate to a) interpretation of specific provisions of the CRC; b) general issues (e.g. reporting, NGO participation); c) thematic. The general aim of these comments is to improve implementation of the CRC and guide governments in implementing the CRC.[203]

In its first General Comment on the right to education, adopted after 10 years of functioning of the CRC in 2001, the Committee did not specify the legal nature or effect of the Comment. Only in the section dedicated to implementation did the Committee emphasize the need to adopt concrete implementation measures and policies at national level in order to fulfil the obligations set forth

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[199] Here reference is made to individual communications procedures under UN core human rights treaties. For an overview, see e.g. Van Alebeek and Nollkaemper, "The Legal Status of Decisions by Human Rights Treaty Bodies in National Law."

[200] CRC Committee, "Rules of Procedure."

[201] CRC Committee, "General Comment No. 5. General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6)" (CRC/GC/2003/5, November 27, 2003).

[202] See further the discussion in Nisuke Ado, 'General Comments/Recommendations' in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford University Press; Max Planck Institute for Comparative Public Law and International Law, 2012).

[203] See e.g. Mieke Verheyde and Geert Goedertier, *Articles 43–45: The UN Committee on the Rights of the Child* (Martinus Nijhoff, 2006), chap. 2.3.

in the Convention.[204] It has, however, in several of its points used commanding language and, as an example, defined the values which the school environment must reflect.[205] In later Comments, the CRC Committee has defined the aim of each General Comment at the beginning of the document.[206] Furthermore, the language of the Committee has lately become stronger.[207]

It is somewhat confusing that the CRC Committee also has the right to make recommendations based on information received during the reporting process or from other sources. These recommendations have traditionally followed general days of discussion or relate to the practical functioning of the Committee and they are addressed to the General Assembly.[208] To date, the CRC Committee has adopted 18 General Comments; the latest General Comment, No. 18, is a joint comment with the CEDAW Committee on harmful practices.[209]

In principle, Keller and Grover point out three meta-functions that General Comments could have.[210]

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[204] CRC Committee, "General Comment No. 1: The Aims of Education (Article 29 (1))" (CRC/GC/2001/1, April 17, 2001), para. 17.

[205] *Ibid*., para. 19.

[206] As an example, in General Comment No 2, the committee stated: "*The Committee issues this general comment in order to encourage states parties to establish an independent institution for the promotion and monitoring of implementation of the Convention and to support them in this regard by elaborating the essential elements of such institutions and the activities which should be carried out by them.*" CRC Committee, "General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child" (CRC/GC/2002/2, November 15, 2002). In General Comment No. 14 the Committee stated: "*The present general comment seeks to ensure the application of and respect for the best interests of the child by the states parties to the Convention. It defines the requirements for due consideration, especially in judicial and administrative decisions as well as in other actions concerning the child as an individual, and at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines – that is, all implementation measures – concerning children in general or as a specific group. The Committee expects that this general comment will guide decisions by all those concerned with children, including parents and caregivers.*" CRC Committee, "General Comment No. 14," para. 10.

[207] It has stated that the aim of the Comment is to: "*clarify the obligations of states parties to CEDAW and CRC by providing authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the two Conventions to eliminate harmful practices.*" CRC Committee and CEDAW Committee, "Joint General Recommendation/ General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices" (CEDAW/C/GC/31-CRC/C/GC/18, November 4, 2014), para. 10.

[208] CRC Committee, "Report of the Committee on the Rights of the Child" (A/67/41, June 21, 2012).

[209] CRC Committee and CEDAW Committee, "General Comment No. 18."

[210] See in particular Keller and Grover, "General Comments of the Human Rights Committee and Their Legitimacy," chap. 2.1.

1. Legal analytical function – by interpreting rights, clarifying their scope of application, as well as setting out legal tests and factors for determining a violation. As an example, the CRC Committee emphasized in General Comment No. 14 that the right to non-discrimination is not a passive obligation but requires positive measures to ensure effective enjoyment of rights.[211] In General Comment No. 13 on the right of the child to freedom from all forms of violence, the CRC Committee provides a non-exhaustive list of harmful practices.[212]
2. Policy recommendation – assisting state or non-state actors (including international and national NGOs) with thinking through policy issues and determining what legislative, political or other action to take. Providing support to NGOs for the preparation of shadow reports. As an example, General Comment No. 14 of the CRC Committee emphasized that it aims to promote a real change in attitudes leading to full respect for children as rights holders.[213] In General Comment No. 18 the Committee stressed the need to establish and support social and cultural norms challenging the practice of female genital mutilation.[214]
3. Practice direction – providing guidance to domestic courts and authorities on how to interpret and apply specific Covenant guarantees, where this is possible. As an example, in General Comment No. 14, the CRC Committee dedicated a separate section to procedural safeguards that decision-makers at different levels should take into account and follow.[215] General Comments direct the practice of the Committee itself during constructive dialogue with the member states and evaluation of periodic reports. As an example, the Committee drew the attention of the Russian Federation to five different General Comments in its Concluding Observations.[216]

General Comments are also practice directions for the Committee itself in evaluating state reports. As will be discussed below, General Comments are cited in the Concluding Observations on state reports as examples of legal standards as well as policy and implementation recommendations.
Thus, it can be concluded that General Comments in general as well as the CRC Committee's General Comments in particular amount, at least, to 'soft law instruments' and are sources of non-binding norms that interpret and add detail to the rights and obligations contained in the respective human rights treaties.

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211 CRC Committee, "General Comment No. 14," para. 41.
212 CRC Committee, "General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence" (CRC/C/GC/13, April 18, 2011), sec. IV. A. 1.
213 CRC Committee, "General Comment No. 14," para. 10.
214 CRC Committee and CEDAW Committee, "General Comment No. 18," para. 56.
215 CRC Committee, "General Comment No. 14," chap. V.
216 CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)" (CRC/C/RUS/CO/4-5, February 25, 2014).

Legal status of Concluding Observations

Article 44 sets out the obligations of states parties to the CRC to report to the CRC Committee within two years of ratification and then every five years.[217] Article 44 (1) of the CRC provides that states parties undertake to submit reports on measures they have adopted to give effect to the rights recognized in the CRC, and gives the CRC Committee authority to review these reports and that "*the Committee may make suggestions and general recommendations based on information received ... and shall transmit such suggestions and General Recommendations to any state party concerned and ... to the General Assembly, together with comments, if any, from states parties.*"[218]

State reporting procedure is, in essence, a 'constructive dialogue' between the supervisory body and the reporting state. In it, some voice is also given to the NGOs who have the right to submit shadow reports and recommend questions for discussion. This is still often perceived as the weakest process among existing human rights monitoring mechanisms[219] – there is no establishment of violations of rights; it can only result in Concluding Observations by the treaty body concerned that do not go beyond an expression of concern, usually in rather broad terms and with equally broad recommendations.

Concluding Observations are not binding on the member states, and they contain suggestions and recommendations to come closer to full implementation of the CRC. It has been pointed out that Concluding Observations do not amount to condemnation for non-fulfilment of treaty obligations,[220] i.e., they cannot be regarded as a proof of violation of obligations within the meaning of state responsibility.

They do, however, contain the view of the Committee and, in principle, should be observed as a basis for implementation and action by the member states. It can be observed that correct and politically sensitive formulation of the concluding observations is relevant for the success of the reporting procedure. As Kjaerum puts it, "*the aim is to carry out a constructive dialogue in a non-judgmental atmosphere*".[221]

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217 For general overview see Kälin, "Examination of State Reports."

218 Art. 45 (d) of the CRC.

219 For literature overview see Kälin, "Examination of State Reports," 17–19; for implementation statistics see Pillay and OHCHR, *Strengthening the United Nations Human Rights Treaty Body System*, sec. 2.3.1.

220 See e.g. Verheyde and Goedertier, *Articles 43–45*, para. 38.

221 Morten Kjaerum, "State Reports," in *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, ed. Gudmundur Alfredsson, Jonas Grimheden, and Bertrand G. Ramcharan (Martinus Nijhoff Publishers, 2009), 21.

Constructive dialogue generally consists of the following stages:[222]

1. States submit their reports following the Reporting Guidelines.[223] The report should indicate relevant legislative, judicial, administrative and other information, including statistical data, to give the Committee a good basis for its analysis. States parties are requested to give information about 'factors and difficulties encountered' and 'progress achieved', while 'implementation priorities' and 'specific goals' for the future are also requested.
2. Reports are made public and interested parties are invited to submit their shadow reports;
3. A pre-sessional working group of the Committee draws up a list of issues that are communicated to the state party. The list of issues is intended to give the government a preliminary indication of the issues which the Committee considers to be priorities for discussion. It also gives the Committee the opportunity to request additional or updated information in writing from the government prior to the session.
4. States have an opportunity to address the list of issues in writing.
5. Based on the information received, the constructive dialogue includes discussion of the report in an open and public meeting of the Committee; this results in a summary of records.
6. After discussion with the state party, the Committee will, in a closed meeting, agree on written Concluding Observations, which include suggestions and recommendations. The Concluding Observations usually contain the following aspects: positive features (including progress achieved); factors and difficulties impeding implementation; principal subjects for concern; suggestions and recommendations addressed to the state party.

Typically of other UN human rights treaties, the CRC is supervised by an expert committee.[224] Art. 43 of the CRC establish the Committee on the Rights of the Child (CRC Committee). Art. 43 (8) gives the Committee the right to establish its own rules of procedure. The functions of the Committee are listed in art. 44; similarly to all UN treaty bodies, states have to submit to the Committee regular reports "*on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights*". These reports should include both positive developments as well as indicating factors involving difficulties. These reports are often complemented with shadow reports by national or international interest groups or NGOs.

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[222] For details see OHCHR, Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process, (HRI/ICM/2011/4, May 23, 2011).

[223] CRC Committee, "Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports" (CRC/C/58/Rev.3, March 3, 2015).

[224] For a general and historical overview, see e.g. Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague [etc.]: Nijhoff, 1999), 41–43; or Verheyde and Goedertier, *Articles 43–45*.

2.2 Universality or particularity of international human rights

International human rights have traditionally been linked with the enlightenment project as well as with different schools of natural law.[225] This philosophical-historical outlook has evolved into the debate of values.[226]

2.2.1 Universality argument

Central to the debate is the claim that international human rights represent European stories, myths and metaphors that continue to set the conditions for understanding international law's past as it does for outlining its future.[227] This has been countered by the claim of Forst that international human rights have four central dimensions that all have to be taken into account when discussing their applicability.[228] Firstly, they have a moral dimension representing the universal moral claims of the international community. Secondly they have a legal dimension representing different binding international and national legal norms. Thirdly they have a political dimension expressing the standard of basic political legitimacy and, fourthly, the social dimension of applicability. He proposes that the difference of opinions on the position of international human rights treaties is caused by the difference in focus on one of these elements.[229]

Arnold, on the other hand, proposes that theories on the universality of international human rights deal with the inner or outer dimensions of international human rights. The outer dimension consists then of the acceptance rate of international human rights treaties while the inner dimension looks at the substance of rights and the specific characteristics of protection.[230]

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[225] For recent analysis, see e.g. Anthony Robert Sangiuliano, "Towards a Natural Law Foundationalist Theory of Universal Human Rights," *Transnational Legal Theory* 5, No. 2 (August 29, 2014): 218–40.; James Griffin, *On Human Rights* (Oxford University Press, 2008), chap. 1.1.; or Charles R Beitz, The Idea Of Human Rights (Oxford University Press 2009).

[226] For a historical account of the universalism vs relativism debate, see e.g. Michael K Addo, "Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights," *Hum. Rts. Q.* No. 3 (2010): 601.

[227] As Koskenniemi puts it, "*The histories of jus gentium, natural law, and the law of nations, Völkerrecht and Droit public de l'Europe are situated in Europe; they adopt a European vocabulary of 'progress' and 'modernity'*." Martti Koskenniemi, "Histories of International Law: Dealing with Eurocentrism," *Rechtsgeschichte* 19 (2011): 155.

[228] Rainer Forst, "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach," *Ethics* 120, No. 4 (juuli 2010): 711–12.

[229] *Ibid*., 713–16.

[230] See e.g. Rainer Arnold, *The Universalism of Human Rights* (Springer Science & Business Media, 2012), xix – xxi.

This division has been substantively analysed in the work of Donnelly, who, having looked at different expressions of the universality claim, observed that the following universality theories have been present:[231]

1. Conceptual and substantive universality.[232] Conceptual universality states that if there are human rights, they are universal in the sense that they belong equally to all humans;[233] this does not reflect on the substance of rights nor does it grant a specific list of rights the status of international human rights. This, in turn, shows why national implementation is of central importance for the substantive protection of rights.
2. Historical or anthropological universality refers to the fact that most cultures or practices have recognised or even practised international human rights in their history. While these practices often agree with the central values of society, there is disagreement as to the necessary steps to realize these values as well to understanding how these values restrict the functioning of government.[234]
3. Functional universality. Human rights ideas and practices arose from the social, economic and political transformations of modernity. Thus, human rights grant individuals the best protection in a society dominated by markets and states, i.e., human rights are an attractive remedy for some of the threats to human dignity.[235]
4. International legal universality. Acceptance of the central international human rights treaties is quite universal. Six core central human rights treaties have relatively universal coverage.[236] States that do not follow their international human rights obligations do not lose their legitimacy as sovereignty still trumps international legal obligations; however, acceptance of international human rights is seen as a precondition for full political

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[231] Donnelly, "The Relative Universality of Human Rights." For a longer account see Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2013), chap. 6. It has to be noted that some forms of universality discussed by Donnelly are not relevant here i.e., the current research does not enter into philosophical discussion on the nature of humans or look deeper into different cultural or religious understandings of universality. For a longer account of these issues, see e.g. Griffin, "The Presidential Address."

[232] Donnelly, "The Relative Universality of Human Rights," 382–83. Benhabib here uses the term "*essential universalism*". Benhabib, "Another Universalism," 11–12.

[233] Buchanan stresses the distinction between human rights as moral rights on the one hand and international legal rights constraining the state on the other hand. See e.g. Allen Buchanan, "The Egalitarianism of Human Rights," *Ethics* 120, No. 4 (juuli 2010): 679–710.

[234] For analysis of the central world religions and their attitude to rights in international human rights treaties see Donnelly, *Universal Human Rights in Theory and Practice*, chap. 5.

[235] Donnelly, "The Relative Universality of Human Rights," 286–88.

[236] As of 21 October 2014, each of the 6 central UN human rights convention (CEDAW, ICCPR, ICESCR, CRC, CAT, CERD) has an average of 174 members, while total membership of the UN is 193. Thus, an average of 90% of states accept the 6 central human rights treaties. What is particularly interesting is that there are 195 members of the CRC. For a typical analysis, see e.g. Tomuschat, *Human Rights*, chap. 4.

legitimacy.[237] As Benhabib argues, this universality does not presuppose an acceptance of a concrete theory of human nature or a philosophical understanding of international human rights law.[238]

5. Overlapping consensus universality. The moral equality of all human beings is strongly endorsed by most leading comprehensive doctrines in all regions of the world. Although a great number of possible practices could be the basis of central egalitarian values, human rights have, for the time being, become the preferred option.[239]

The last two understandings of universality have been central as well as strongly present in the work of the UN treaty bodies; they also form the basis of the current research. There is a strong consensus among states that certain human rights are globally protected and that these represent the values of the member states. This consensus is visible in a number of resolutions and declarations of the international community.[240]

It has to be stressed that universality in international human rights cannot be confused with uniformity. International human rights do take into account the different positions of different groups as well as in some cases allowing for economic, development-based, or cultural arguments in the application of treaty norms.[241] Carozza argues that there "*is an inherent tension in international human rights law*" *between upholding a universal understanding of human rights and* "*respecting the diversity and freedom of human cultures.*"[242] He argues that human rights do not form a set of uniform norms but rather form a new *ius commune* that "*is a metaphor for a complex of human rights norms and legal relationships that combine unity and universality with pluralism and differentiation*."[243] McGrogan, on the other hand, stresses that it is more relevant

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237 Donnelly, "The Relative Universality of Human Rights," 288–89.

238 Benhabib, "Another Universalism," 13.

239 Donnelly, "The Relative Universality of Human Rights," 289–91; see also Benhabib, "Another Universalism," 12.

240 The most cited of these being the Vienna Programme of Action, which emphasized that: *"The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question. /.../ Human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of Governments."* World Conference on Human Rights and United Nations, "Vienna Declaration and Programme of Action," para. 1.

241 The latter has been especially important for implementation of economic, social and cultural rights. See e.g. CESCR Committee, "General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)" (E/1991/23, December 14, 1990).

242 Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," 1.

243 Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply," 934.

whether the actual interpretation of international human rights and their implementation differs due to these theoretical differences.[244]

2.2.2 Criticism of universality claim

Cultural diversity is a social fact – cultures differ across both time and space. Therefore, it can be argued that the diverse understanding and application of international human rights shows the impossibility of universal understanding and application of these rights in a diverse cultural context. Cultural relativists have several angles through which to contest the universalism claim of international human rights.[245]

Twining has identified the following types of relativist positions:[246] (i) strong cultural relativism (i.e., that rights depend on culture rather than upon universal norms); (ii) acknowledgement of cultural differences (still only the Western concept of human rights is the basis for universal norms); (iii) moderate cultural relativism (a common core of human rights is derived from overlapping values of different cultures); (iv) harmonization of cultural pluralism with international standards by internal reinterpretation of cultural tradition; and (v) an enriched version of rights can be developed by intercultural discourse, which can lead towards a new form of universalism.

Most of these approaches emphasise the Western heritage and history of international human rights, albeit they emphasise different elements of these. Human rights, as a matter of historical fact, did develop in the West, and their background is strongly rooted in Christian culture[247]. Interestingly, Donnelly points out that "*what we view today as western culture is a result, not a cause, of human rights ideas and practices.*"[248] Therefore, he concludes, no culture is by nature either compatible or incompatible with international human rights; compliance with them depends on the level of development of the specific culture and society.[249]

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244 McGrogan, "Cultural Values and Human Rights: A Matter of Interpretation," 14.

245 Brems is of opinion that it is uncorrect to label non-Western critics to international human rights as "cultural relativism". She sees the universality-relativity debate as being on the modalities of universal human rights. Eva Brems, "Inclusive Universality and the Child-Caretaker Dynamic," in *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations*, ed. Karl Hanson and Olga Nieuwenhuys (Cambridge: Cambridge Univ. Press, 2013), 199–200.

246 William L. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Law in context (Cambridge, UK ; New York: Cambridge University Press, 2009), 412.

247 For a general philosophical analysis of the foundations of international human rights, see e.g. David Kretzmer and Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* (The Hague; London: Kluwer Law International, 2002).

248 Donnelly, Universal Human Rights in Theory and Practice, 107.

249 *Ibid.*, 107–8.

A second view notes that human rights are relative because human beings are constrained by the limits of their own existence. This can be in terms of culture, religion, economy, ethnicity, class, and so on. Since a nation has its own culture, religion, ethics or other traditional values, and since these values must be respected, the relativists argue, the imposition of "universal values" is not permissible.[250] As an example, Mutua views the international human rights narrative naming cultures of states as savages-victims-saviours.[251]

Onuma, while developing his transcivilization perspective on international human rights, includes in this list an idea that regards human rights as part of the contemporary West-centric intellectual discourse that dominates the entire world.[252] He proposes that neither the universal nor the relativist approaches to international human rights are flawless and, thus, that the international human rights system requires alternative or at least complementary mechanisms to the strictly legal approach to human rights.[253]

Alternatively, the functionalist approach to international human rights looks at the functions of rights and grounds them in their practical significance. In this approach international human rights limit the sovereignty of states as this is practically unavoidable for the substantive implementation of the international human rights treaties.[254]

Chimni in 2006 presented the 'third world approach' to the universality of international human rights law and argued that the third world sees the universality of international human rights as a feature of recolonization. He goes further and claims that "*international law is the principal language in which domination is coming to be expressed in the era of globalization. It is displacing national legal systems in their importance and having an unprecedented impact on the lives of ordinary people,*" bringing with it the spreading of neo-liberal goals.[255]

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[250] See further the discussion in Klaus-Georg Riegel, "Inventing Asian Traditions: The Controversy Between Lee Kuan Yew and Kim Dae Jung," *Development and Society* vol 29, no 1 (2000): 75–96.

[251] See e.g. Mutua, "Savages, Victims, and Saviors." and Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2011), chap. 1 in particular.

[252] Yasuaki Onuma, A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of Thetwenty-First Century, Hague Academy of International Law (Leiden ; Boston: Nijhoff, 2010).

[253] Yasuaki Onuma, "In Quest of Intercivilizational Human Rights: Universal vs. Relative Human Rights Viewed from an Asian Perspective," *Asia-Pac. J. on Hum. Rts. & L.* 1 (2000): 70, 78 *et seq*.

[254] See e.g. Joseph Raz, "Human Rights Without Foundations," *Oxford Legal Studies Research Paper No. 14/2007* (March 1, 2007). For critique on the theory of Raz, see e.g. Pavlos Eleftheriadis, "Human Rights as Legal Rights," *Oxford Legal Studies Research Paper No. 51/2010* (June 10, 2010).

[255] B.S. Chimni, "Third World Approaches to International Law: A Manifesto," *International Community Law Review* 8 (2006): 3.

Critical observation of relativist claims shows that these theories do not explain why such a vast number of states still freely ratify and show interest in implementing different international human rights treaties. Moreover, as McGrogan suggests, these theoretical views do not indicate or even hint to what extent different international treaties *should* accept cultural relativist arguments.[256]

The rights of the child present an excellent example where a huge discrepancy exists between the text of the convention and the number of states' parties, on the one hand, and the traditional or special interpretation of the rights contained in the CRC on the other. Furthermore, the preamble of the CRC recognises the traditional values' arguments and emphasises: "*Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child*." There are a number of dangerous traditional practices associated with such arguments; child marriage, female genital mutilation and the circumcision of boys, limiting access to medical services without the consent of a parent, limiting the educational rights of girls, and so on, are only some examples of everyday occurrences where the rights of children are limited or even violated on the grounds that the practices conform to cultural or traditional values. Furthermore, the family, community, society and educational institutions occupy a central role in maintaining and passing on the values of any society, including the values of human rights and traditional values.

Traditional values argument

Currently, one of the strongest challengers to the universality of human rights is the traditional values argument, which has recently succeeded even in the Human Rights Council of the UN.[257] As McCrudden points out, different sources that are seen to generate traditional values, understand and define this notion differently – they might represent (1) national sovereignty (or the values of the nation); (2) religious practices (as well as beliefs); (3) traditional societies (indigenous practices); and, (4) conservative political thought.[258] Thus, confusion exists as to what exactly is meant by 'traditional values' in the resolutions of the Human Rights Council as there is "*no clear-cut, universally agreed*

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256 McGrogan, "Cultural Values and Human Rights: A Matter of Interpretation," 16.

257 The United Nations Human Rights Council has passed three different resolutions on traditional values. Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind," October 12, 2009; Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind," April 8, 2011; and Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practices," October 9, 2012.

258 Christopher McCrudden, "Human Rights, Southern Voices, and 'Traditional Values' at the United Nations," *U of Michigan Public Law Research Paper* No. 419 (May 28, 2014).

definition' of what is meant by 'traditional values". The variety of definitions was also visible in submissions by stakeholders.[259]

As the case-studies of Estonia, Finland, and Russia will show while all of these countries have used some notion of tradition in their argumentation before the CRC Committee, nevertheless, the substance given to these notions has differed from expressions of national sovereignty and national legal custom to conservative orthodox values.

2.2.3 Minimum core and margin of appreciation as the practical middle ground

Much of the debate regarding pluralist legal orders is characterised by polarised presumptions that disregard the complexity and variety of local situations. While recognising that cultural differences are significant and real to people, complexity exists in the relationship between law and culture; at the same time, culture is a dynamic process that is continuously contested both socially and politically.[260]

The most common approach analyses human rights norms from the perspective of the individual. The rights approach is interested in subjective rights. The common deficiency of this system is drawing conclusions on the subjective nature of rights without fully discussing all the obligations imposed on the state. Another way of analysing these norms is from the perspective of state obligations and the discretion given to states in the application of rights.

Thus, the alternative to absolute cultural relativism comes from an approach claiming the existence of a minimum core of international human rights, a core that is not dependent on cultural values.[261] Classification of state obligations helps to analyse the material scope of rights in order to conclude the minimum measures the state has to take in order to provide full realization of a specific right. Furthermore, as the consequences of obligations differ, the consequences of violations of rights can be looked at in a more systematic way.

The minimum core of rights refers to rights that have to be guaranteed irrespective of available resources or other considerations. As an example, the CRC Committee has referred to the minimum core approach as follows: "*Core obligations are intended to ensure, at the very least, the minimum conditions*

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[259] OHCHR, Summary of Information from States Members of the United Nations and Other Relevant Stakeholders on Best Practices in the Application of Traditional Values While Promoting and Protecting Human Rights and Upholding Human Dignity, (A/HRC/24/22, June 17, 2013).

[260] On pluralist legal orders see further e.g. International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Geneva: International Council on Human Rights Policy, 2009).

[261] For a general overview of the minimum core approach, see e.g. Katharine G. Young, "Minimum Core of Economic and Social Rights: A Concept in Search of Content," *Yale J. Int'l L.* 33 (2008): 113.

under which one can live in dignity."[262] The CESCR Committee has stated further that: "*a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.*"[263]

The subsidiarity of human rights[264] or margin of appreciation is the practical tool through which national policy preferences and values receive acceptance in international human rights. The ECtHR has developed this principle through its case-law and, where no European consensus could be found, states have the right to refer to their national values when applying international human rights.[265]

The margin of appreciation should not, however, infringe on the minimum core of rights. At its minimum, states do not have the freedom to decide whether and how to apply the CRC. This minimum core of requirements cannot be seen as allowing limitation of the 'right to participate'. This is one example where the progressive realisation is in the core of a right. Generally, gradual the progressive protection should still be discussed in a constructive dialogue between states and the treaty body.

An extreme representation of the subsidiarity of the human rights approach is referenced to traditional values. With the strong support of the Russian Federation, on 27 September 2012 the UN Human Rights Council adopted its third resolution on traditional values.[266] This resolution on the one hand recognises international human rights as universal rights but on the other hand it stresses the significance of national and regional particularities and various historical, cultural and religious backgrounds that have to be taken into account when applying these rights.[267] As an exception to the typical procedure, this resolution was accepted by vote – 25 in favour, 15 against, and 7 abstentions.[268]

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[262] CRC Committee, Day of General Discussion on 'Resources for the Rights of the Child – Responsibility of States,' September 21, 2007, paras 48–49.

[263] CESCR Committee, "ComESCR GC 3," para. 10.

[264] Carozza has borrowed the subsidiarity principle from European Union law and claims that international human rights mechanisms should be subsidiary to national implementation. This generally accords with the margin of appreciation approach adopted by the ECtHR. See further Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law."

[265] A vast amount of literature on the issue is available. For the most recent analysis, see e.g. Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," *Human Rights Law Review* 14, No. 3 (September 1, 2014): 487–502; or Dean Spielmann, "Whither the Margin of Appreciation?" (UCL – Current Legal Problems (CLP) lecture, UCL, March 20, 2014); or Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights," Human Rights Law Review 15, No. 2 (June 1, 2015): 313–41.

[266] See fn 257 for details.

[267] *Ibid*., paras 1–3.

[268] In favour: Angola, Bangladesh, Burkina Faso, Cameroon, China, Congo, Cuba, Djibouti, Ecuador, India, Indonesia, Jordan, Kuwait, Kyrgyzstan, Libya, Malaysia, Maldives, Mauritania, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda. Against: Austria, Belgium, Botswana, Costa Rica, Czech Republic, Hungary, Italy, Mauritius, Mexico, Norway, Poland, Romania, Spain, Switzerland, United States of America. Abstaining: Benin, Chile, Guatemala, Nigeria, Peru, Republic of Moldova, Uruguay.

The passing of this resolution showed a clear difference of opinion between the 'West' and 'the rest' (including states from Africa, Asia and the Middle East). It is still too early to conclude whether this marks a change in the universality rhetoric of international human rights or rights of the child, and whether the minimum core concept with a wider margin of appreciation will become a norm.

3 International rights of the child

This dissertation uses children's rights and, in particular, the CRC as a substantive instrument. The CRC is an instrument that deals specifically with the needs and problems of children. Thus, it could be regarded as a *lex specialis* vis-à-vis general international human rights treaties. The CRC covers the whole range of rights: the civil and political rights as well as the economic, social and cultural rights of children. This, in turn, means that the norms of the CRC cover the whole range of obligations described in part 1.2.1.1. The comprehensive nature of the Convention, its focus on child well-being and welfare, and its legally binding nature mean that it is a good basis for assessing the situation of and opportunities for children. The current part introduces the central instruments and defines the international legal framework of the dissertation. Precise legal obligations deriving from selected norms of the CRC are defined in Chapter 2.

The rights of the child function in two complementary but also sometimes mutually exclusive directions. On the one hand, most measures for the protection of children have a protectionist character i.e., different age limits should protect children who might not understand the full complexity of the world. At the same time, children also need empowering and, thus, limits set by laws could hinder this goal.[269]

Rights of the child have many layers and objectives.[270] They should ensure the current interests and rights of the child; and, at the same time, they should also look ahead and guarantee the 'future interests of the child'. There is also a possible tension between the individual rights of the child, the rights and needs of the family and the rights of other children in the family; and, thirdly, the rights of the responsible parents (together and separately) in connection to the

[269] Wall argues that children's rights will adequately transform societies only when the very concept of "human rights" is reimagined in light of childhood. John Wall, "Human Rights in Light of Childhood," *The International Journal of Children's Rights* 16, No. 4 (September 1, 2008): 523–43.

[270] Freeman has presented comparative arguments in connection to the best interests of the child. These tensions and considerations have relevance, however, in connection to all the rights of the child. Michael D. A. Freeman, *Article 3: The Best Interests of the Child*, Commentary on the United Nations Convention on the Rights of the Child v. 3 (Leiden: Martinus Nijhoff, 2007), 2–4.

said child.[271] Thus, implementation of the rights of the child is a delicate balancing act where all these considerations have to be weighed and evaluated.

There is an additional problem of decision-making and representation. When adults have the right and capacity to decide what rights to actively realise, the majority of the rights of the child are protected through some representative i.e., children are politically and economically powerless.

It is possible to use all the typologies discussed in part 1.2.1.1 for the conceptualization of the rights of a child. Firstly, the tripartite division (respect, protect, provide) could be used.[272] Secondly, rights of the child might be divided into general human rights (e.g. the right to life, right to work) and child-specific rights (e.g. the right to engage in play).[273] Most often, children's rights are divided into three groups, also known as the 'three P-s' (provision, protection and participation).[274]

The debate over children's rights always entails a social construction of childhood.[275] The modern conception of childhood sees children as distinctly set apart from adults, marked out by their individuality, dependency and vulnerability; yet, at the same time, inextricably bound to their parents and the family, and in the inevitable process of becoming adults;[276] the CRC with its near universal acceptance represents this prevailing perception of the child.[277]

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[271] Brems discusses the dension between the rights of the child and those of the parents in Eva Brems, "Inclusive Universality and the Child-Caretaker Dynamic."

[272] The CRC Committee frequently uses this typology in its General Comments. See e.g. CRC Committee, "General Comment No. 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights" (CRC /C/GC/16, March 15, 2013).

[273] See e.g. Michael Freeman, *The Future of Children's Rights* (Hotei Publishing, 2014), 111.

[274] See further e.g. Jens Qvortrup and European Centre for Social Welfare Policy and Research, *Childhood as a Social Phenomenon: An Introduction to a Series of National Reports* (Vienna, Austria: European Centre, 1991), 121–30. Quennerstedt is of opinion that this division does not fully reflect the substance of the rights of the child and hampers the full protection of the rights of the child. Examples of such rights could be as follows: provision rights (e.g. the right to health, education, family, recreation, and the like, that ensure the full development of the child according to the child's abilities and potential); protection rights (e.g. the right to be protected against discrimination, unfair treatment, physical and sexual abuse); participation rights (e.g. the right to express one's opinion, to be included).

[275] For introduction of the relationship of childhood and the rights of the child, see e.g. Trevor Buck, *International Child Law*, 3. ed. (London: Routledge, 2014), chap. 1.

[276] For a recent account of the historical development of the concept of childhood, see e.g. Michael Freeman, "Introduction," in *Law and Childhood Studies: Current Legal Issues* Vol. 14 (Oxford University Press, 2012).

[277] Holzscheiter has analysed the creation and transformation of the emancipated child presented in the CRC through the drafting of the CRC from the perspective of the international relations theory in Anna Holzscheiter, *Children's Rights in International Politics: The Transformative Power of Transnational Discourse*, Transformations of the state (Basingstoke (Hampshire) ; New York: Palgrave Macmillan, 2010).

According to modern theories of childhood, children are present here and now as subjects and active social actors in their own right.[278] As children, they are human beings who share social environments with adults. The cornerstone of the international rights of children is that children are competent according to their age to make choices and to act on them. CRC has moved the focus from the protection of children to the protection of the rights of the child.[279]

3.1 The UN Convention on the Rights of the Child

The Convention on the Rights of the Child was adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990. In comparison with other international human rights treaties, it entered into force shortly after adoption. The CRC acquired a very large number of states parties in a relatively short period of time. To date, it has the largest number of states parties – as of 1 May 2015, it has 195 states parties.

There are three optional protocols to the CRC. The Optional Protocol to the CRC on the involvement of children in Armed Conflict[280] was adopted in New York on 25 May 2000 and entered into force on 12 February 2002. As of 1 May 2015 it has 154 parties including Finland, Estonia, and the Russian Federation. The Optional Protocol requires that states make a declaration during ratification and specify the age of conscription in the given member state.

The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography[281] was adopted in New York on 25 May 2000 and entered into force on 18 January 2002. As of 1 May 2015, it has 169 states parties including Finland, Estonia and the Russian Federation. The Optional Protocol to the CRC on a Communications Procedure was adopted in New York on 19 December 2011 and entered into force on 14 April 2014. As of 1 May 2015, it has 17 parties; the states of the current research have not joined it.

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278 See further e.g. Michael Freeman, "Towards a Sociology of Children's Rights," in *Law and Childhood Studies: Current Legal Issues*, ed. Michael Freeman, Volume 14 (Oxford University Press, 2012), 30–38; Julia Fionda, ed., *Legal Concepts of Childhood* (Hart Publishing, 2001); or Ann Quennerstedt, "Transforming Children's Human Rights—From Universal Claims to National Particularity," in *Law and Childhood Studies: Current Legal Issues*, ed. Michael Freeman, Volume 14 (Oxford University Press, 2012).

279 See for critique of this development e.g. Barbara Arneil, "Becoming Versus Being: A Critical Analysis of the Child in Liberal Theory," in *The Moral and Political Status of Children*, ed. David Archard and Colin M. Macleod (Oxford University Press, 2002), 70–93; and Harry Brighouse, "What Rights (If Any) Do Children Have?," in *The Moral and Political Status of Children*, ed. David Archard and Colin M. Macleod (Oxford University Press, 2002), 31–52.

280 UN GA, "Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict" (A/RES/54/263, May 25, 2000), United Nations, Treaty Series, vol. 2173, p. 222.

281 UN GA, "Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography" (A/RES/54/263, May 25, 2000).

The obligations entailed in the CRC are clarified by the CRC Committee; in its General Comment No. 5,[282] the Committee defined the general obligations under the CRC and stated that the first and foremost obligation in art. 4 of the CRC is to ensure that domestic legislation is fully compatible with the provisions of the CRC and that the Convention's principles and provisions can be directly applied and appropriately enforced. Thus, the CRC includes mainly goal-oriented obligations and foresees certain results. The CRC Committee has also identified a wide range of measures that are relevant to the full protection of the CRC. It is also clear that the Committee sees the provisions of the CRC generally as rules.

Reading of article 41 of the CRC reveals that the provisions of the CRC should be regarded as minimum standards – member states are free to adopt measures which are more conducive to realizing the rights of the child. These provisions can derive either from national legislation or from international obligations that grant children stronger protection.

None of the three states has made any reservations to the treaty monitoring provisions of the CRC, and they have all submitted at least some of their reports for review by the CRC Committee in a more-or-less timely manner.[283] The treaty-specific monitoring procedure of the CRC Committee is complemented by the Universal Periodic Review (UPR) in the Human Rights Council.

By ratifying the CRC as a legally binding instrument, the states parties assume under conditions of normalcy the full responsibility of giving effect to the Convention's provisions.[284] However, articles 43–45 reveal that implementation of its standards is not solely a national concern but undergoes international scrutiny.[285] Reports submitted to the CRC Committee show measures adopted by states to give effect to the obligations under the treaty concerned and progress made in realizing the rights guaranteed therein. Compared to the other core instruments of the UN the CRC system is lacking a follow-up mechanism. Thus, the immediate effect of the concluding observations is not visible; in order to analyse this effect, the national implementation practice, as well as the statements of the states during the next reporting cycles, might show the effect of the constructive dialogue.

3.2 European Convention on Human Rights

The Council of Europe has adopted a number of treaties specifically to protect children's rights and which may be invoked before the Court to challenge breaches of those rights:

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[282] CRC Committee, "General Comment No. 5."

[283] Estonia has been constantly late with its reports. It submitted its first report ten years after accession to the CRC; and submitted its II–IV report in 2015, six years after the due date.

[284] For a general analysis of the national implementation of international human rights, see e.g. Tomuschat, *Human Rights*, chap. 10.

[285] For detailed commentary see Verheyde and Goedertier, *Articles 43–45*.

- Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[286]
- European Convention on the Exercise of Children's Rights[287]
- European Convention on the Legal Status of Children born out of Wedlock[288]
- European Convention on the Adoption of Children[289]
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children[290]
- European Convention on the Repatriation of Minors[291]

The scope of the ECHR for enforcing and protecting the rights of children is not immediately evident given that it contains few specific references to the rights of the child. However, the European Commission of Human Rights and the ECtHR have made a considerable contribution to European law and practice in the areas of private and public family law, the protection of children from abuse and neglect and, most recently, juvenile justice and detention.[292]

The ECHR and the practice of the ECtHR are relevant for the current research only as far as, firstly, their implementation practice takes inspiration from the CRC, drawing standards from the provisions of the CRC.[293] Secondly, in some areas the ECHR might grant children more rights or more protection. While it is not apparent that the ECtHR has followed a consistent strategy to refer to the CRC in all children's cases, it has been making such references with increasing frequency and with significant effect, in order to ensure that its judgments reflect current standards in children's rights.[294] The ECtHR's approach to the specific rights of children is analysed, when necessary, in the second part of the current work and under the appropriate provisions of the CRC.

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[286] Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Council of Europe, October 25, 2007, CETS No. 201.

[287] European Convention on the Exercise of Children's Rights, Council of Europe, January 25, 1996, CETS No. 160.

[288] European Convention on the Legal Status of Children born out of Wedlock, Council of Europe, October 15, 1975, CETS No. 085.

[289] European Convention on the Adoption of Children, Council of Europe, April 24, 1967, CETS No. 058.

[290] Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, Council of Europe, May 20, 1980, CETS No. 105.

[291] European Convention on the Repatriation of Minors, Council of Europe, May 28, 1970, CETS No. 071.

[292] See Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate/Dartmouth, 1999).

[293] Ursula Kilkelly, "Best of Both Worlds for Children's Rights – Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child," *Hum. Rts. Q.* 23 (2001): 308–26.

[294] Ursula Kilkelly, "Protecting Children's Rights under the ECHR: The Role of Positive Obligations," *N. Ir. Legal Q.* 61 (2010): 245.

The ECHR contains only a few norms that refer directly to the rights of children (art. 6 deals with the right to fair trial, art. 5(1)(d) refers to the detention of a minor, and art. 3 has been used in cases of violence against children). The ECtHR has dealt with the rights of the child mainly under art. 8 of the Convention that entails respect for private and family lives;[295] it includes a variety of different types of obligations, including negative obligations of respect and positive obligations to protect and fulfill. It also covers a whole range of rights protected by the CRC.

3.3 European Social Charter

The European revised Social Charter does not concentrate *per se* on the rights of children. However, it deals with central rights of children under several of its articles, and it is a major regional treaty which secures children's rights as it guarantees the rights of the child in many circumstances from birth to adulthood in two different manners.

Firstly, many of the rights guaranteed by the Charter have specific relevance to children; for example Article 16 (right of the family to social, legal and economic protection) which protects the rights of children as family members and Article 11 (right to protection of health). Secondly, the Charter contains specific rights relating exclusively to children; Article 7 (right of children and young persons to protection) and Article 17 (right of children and young persons to social, legal and economic protection).

The function of the European Committee of Social Rights (EComSR) is to evaluate the conformity of national law and practice with the Charter. States have the obligation to submit periodic reports to the EComSR on the implementation measures of the Charter. Compared to the CRC Committee, the conclusions of the EComSR analyse the implementation of the Charter article by article and are very detailed; they also include a conclusion on whether or not the practice of the state is in conformity with the Charter.

Estonia ratified the ESC (revised) in 2000, Finland in 2002; and the Russian Federation in 2009. Only Finland has accepted the collective complaints procedure of the ESC, whereby international and national NGOs can bring complaints before the EComSR. The specific obligations deriving from the ESC and their application is analysed under relevant provisions of the second part of the dissertation.

[295] Article 8 is the most litigated provision from a perspective of the rights of children; its case law has touched on many areas of family law including adoption, child abduction, alternative care, custody and access, guardianship, and identity issues. For a detailed analysis, see e.g. Ursula Kilkelly, "Protecting Children's Rights under the ECHR: The Role of Positive Obligations," *Northern Ireland Legal Quarterly* 61 (2010): 245.

3.4 EU law

Estonia and Finland are further bound by the requirements of the EU legal system. It has to be noted, that the EU does not disregard the rights of the children; to the contrary, the EU analyses the effect of its legal acts as well as policies to the rights of the child. Article 2 (5) of the Lisbon Treaty[296] states that the EU will contribute to the protection of human rights and, in particular, the rights of the child. The minimum core of the rights of the child is stressed in art. 24 of the Charter of Fundamental Rights.[297] The EU uses the CRC as a policy document,[298] and in recent years, the protection of the procedural rights of children have been emphasised.[299]

As the EU does not have general competence to legislate on the rights of the child, and as Russia is not bound by its regulation, the EU regulations do not have focal importance for the purposes of the dissertation. Nevertheless, the EU legislation has relevance is some areas of the dissertation (e.g., in the area of family reunification) as the EU has a joint asylum and migration policy that, in some cases, provides protection on a higher level than the CRC.[300]

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[296] Consolidated Version of the Treaty of the European Union, Official Journal of the European Union, 30.3.2010 C 83/15.

[297] Charter of Fundamental Rights of the European Union (OJ EU C 83/399 2010). Art. 24 of the Charter reads:

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

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

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

[298] See e.g. Helen Stalford and Eleanor Drywood, "Using the CRC to Inform EU Law and Policy-Making," in *The Human Rights of Children from Visions to Implementation*, ed. Antonella Invernizzi and Jane Williams (Farnham: Ashgate, 2011), 199–218.

[299] For recent analysis, see e.g. FRA – European Union Agency for Fundamental Rights, "Press Release: Justice Needs to Be More Child-Friendly, Finds FRA," May 5, 2015; and FRA – European Union Agency for Fundamental Rights, "Child-Friendly Justice. Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States" (Luxembourg: Publications Office of the European Union, 2015).

[300] See e.g. Council Directive on the right to family reunification, 2003/86/EC OJ L 251, 03/10/2003 P. 0012 – 0018 (2003); Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008/115/EC OJ L 348, 24.12.2008, pp 98–107; Directive on preventing and combating trafficking in human beings and protecting its victims, 2011/36/EU OJEU L 101/1 (2011).

4 Position of international human rights in national legal systems of Estonia, Finland and Russia

The aim of this part is to analyse the general position of international human rights in the constitutional system of the states, Estonia, Finland, and Russia. This analysis includes insight into the constitutional values of the state, the position of international human rights treaties and the practice of the supervisory bodies. When possible, examples include implementation of the rights of the child and the CRC. The current subsection has two hypotheses. Firstly, irrespective of monism or dualism, all the three states consider international human rights as part of their national legal system. Secondly, all three states deem practice of the international supervisory bodies as binding.

International human rights, following their reception into the national legal system, enter the regulations of the relevant constitution. Therefore, the division between monism and dualism is important here. Niemi proposes that national implementation can be said to consist of:[301]

1. translation and dissemination of the treaty and treaty body output as a precondition for its effective use at the national level;
2. establishment of a national mechanism for implementation of the treaty and treaty body findings; follow-up of progress;
3. use of the treaty and treaty body output in the legislative process; and
4. use and implementation by the judiciary of the treaty and treaty body findings.

It can be assumed that next to the provisions of the treaty itself, the views and general comments, being the Committees' primary vehicles of legal analysis of their respective conventions, would be of greater interest to national courts and tribunals than concluding observations, which are of a more policy-oriented nature.

The following analysis starts by looking generally at the central values behind the constitutions of the three states; secondly, the status of international treaties is analysed; thirdly, the legal relevance of international practice within the respective constitutional systems is analysed. This discussion is followed by initial conclusions and hypothesis on expected implementation of the CRC and the practice of the CRC Committee within these national legal systems.

4.1 Human Rights in the Finnish Constitution

The Nordic countries, in general, have the reputation of a positive or supportive human rights record that covers the whole diapason of human rights. At the

[301] Heli Niemi, *National Implementation of Findings by United Nations Human Rights Treaty Bodies: A Comparative Study*, Research Reports of the Institute, December 2003, 7, http://www.abo.fi/media/24259/report20.pdf, (accessed May 1, 2015).

same time, using international human rights law in domestic legal practice is not a long tradition in Finland.[302] However, as will be discussed below, this stance somewhat changed after the constitutional reform in 2000; and international human rights are seen as binding at the same level as the legal acts of the *Eduskunta* (Parliament).[303]

4.1.1 Constitutional values

Central to the Finnish legal system is the universal emphasis on legality.[304] As Husa puts it, a common feature of the Finnish law is the commitment to a doctrine of sources of law; the legislative acts of the Parliament are the source of law *par excellence.*[305] The Finnish legal system has had strong influences from the Swedish and German legal systems; the central idiosyncrasy was, however, shaped during the Grand Duchy era.[306] As noted by Ojanen, the Finnish legal system is founded on a highly formal, rule-focused legalism, that has to adhere "*the letter of the Constitution.*"[307] At the same time, the Finnish constitution is not closed; it is open to amendments when such societal needs appear.

Finnish system of government has strong presidential powers and a parliamentary form of government.[308] One of the peculiarities of the Finnish legal system prior to the 2000 was the absence of a constitutional review mechanism. It is now expressly stipulated in section 106 of the Constitution that the Courts are empowered to set aside statutes on the grounds of unconstitutionality, but only in the case of 'manifest' contrast or 'clear contradiction' with the Constitution. A pre-eminent role for *ex ante* constitutional control by the Constitutional Law Committee of the Parliament is emphasized.[309]

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[302] See e.g. Martin Scheinin, "Protection of the Right to Housing in Finland," in *National Perspectives on Housing Rights*, ed. Scott Leckie (Martinus Nijhoff Publishers, 2003), 241.

[303] Suvianna Hakalehto-Wainio, "Lapsen oikeudet ja lapsen etu lapsen oikeuksien sopimuksessa," in *Lapsioikeus murroksessa*, ed. Suvianna Hakalehto-Wainio and Liisa Nieminen (Helsinki: Lakimiesliiton Kustannus, 2013), 43.

[304] Aulis Aarnio, "Introduction," in *An Introduction to Finnish Law*, ed. Juha Pöyhönen, 2nd, revised ed (Helsinki: Kauppakaari, 2002), 8.

[305] Jaakko Husa, "Panorama of World's Legal Systems – Focusing on Finland," in *Introduction to Finnish Law and Legal Culture*, ed. Kimmo Nuotio, Sakari Melander, and Merita Huomo-Kettunen (Helsinki: Faculty of Law, Univ. of Helsinki, 2012), 10.

[306] The years 1809–1917, in particular 1905–1917. For constitutional history and development, see, e.g., Jaakko Husa, *The Constitution of Finland: A Contextual Analysis*, Constitutional systems of the world (Oxford ; Portland (Oreg.): Hart, 2011), 1–40; Ilkka Saraviita, *Constitution of Finland. I Ed*, Updated in 2008 (Kluwer Law International, 2004); and Aarnio, "Introduction."

[307] See e.g., the discussion in Tuomas Ojanen, "The EU at the Finnish Constitutional Arena," *TvCR* 2013 (2013): 245.

[308] Husa, The Constitution of Finland, 42.

[309] Husa stresses that historically the Constitutional Law Committee of the Parliament had to ensure the constitutionality of domestic legislation. Even though there is now a

Sovereignty has traditionally been the central value of the Finnish constitutional law system. Ojanen describes it as follows:

> *Prior to European integration, and even in the 1990s, the sovereignty doctrine was markedly formal and strict: international obligations were almost automatically deemed to be in conflict with the sovereignty of Finland if these obligations even in a minor way entailed the transfer of powers to international organisations or the authorities of other states. At that time, the Constitution assumed a notoriously minimalist approach to international affairs and, accordingly, lacked a constitutional provision permitting limitations of sovereignty or the transfer of powers to international organisations.*[310]

Accession to the ECHR, acceptance of the jurisdiction of the ECtHR and accession to the EU brought about constitutional reform with the Constitution of Finland being changed in 2000; changes include an extensive list of basic rights.

4.1.2 Position of international human rights treaties

Finland ratified all the UN human rights treaties relatively early, whilst it joined the Council of Europe only in 1989 and ratified the ECHR and its protocols on 10 May 1990. Finland is a party to the following central UN and Council of Europe treaties:

Treaty	**Signature**	**Ratification**
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	1966	1970
International Covenant on Civil and Political Rights (CCPR)	1967	1975
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (OPII CCPR)	1990	1991
International Covenant on Economic, Social and Cultural Rights (CESCR)	1967	1975
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	1980	1986
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	1985	1989
Convention on the Rights of the Child (CRC)	1990	1991
Optional Protocol to the CRC on the involvement of children	2000	2002

constitutional review procedure, this function is still exercised jointly and the authoritative statements of the Constitutional Law Committee still play a decisive role. *Ibid*., 157–64. See also the discussion in Tuomas Ojanen, "EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament," *Scandinavian Studies in Law* 52 (2007): 203–226.

[310] Ojanen, "The EU at the Finnish Constitutional Arena,"p. 245.

Treaty	Signature	Ratification
in armed conflict		
Optional Protocol to the CRC on the sale of children, child prostitution and child pornography	2000	2012
European Convention on Human Rights		1990
European Social Charter (revised)	1996	2002

Typically for a dualist state, the ratification of some treaties has included a lengthy internal procedure. At the same time, once Finland has acceeded to a treaty, it usually also accepts the respective complaints mechanism and international scrutiny.

Finland is a party to the following international adjudication procedures:

Complaints mechanism	Date of accession
Individual complaints procedure under the CAT	2014
Optional Protocol to the CCPR	1975
Optional Protocol to the CESCR	2014
Optional Protocol to the CEDAW	2000
Optional Protocol to the ECHR, jurisdiction of the ECtHR	1990

Rosas suggests that the relatively late accession of Finland to ECHR was the result its policy of 'active neutrality' together with the need to uphold positive relations with both East and West during the Cold War. Finland had not joined the Council of Europe because it was perceived as a 'Western European' human rights system.[311]

The constitution of Finland was reformed in 2000 and one of the central steps of the reform was adoption of the chapter including fundamental rights. Länsineva has described this as a paradigmatic change that "*launched a new era in Finnish constitutional history*".[312] Today the fundamental rights guaranteed in the constitution together with the international treaties that Finland has acceded to form a binding body of norms positioned at the highest place in the Finnish legal system – according to section 22 of the constitution, all public actions guarantee the observance of constitutional and human rights.

The inviolability of human rights of all in the Finnish Constitution is stressed in the human dignity provision and is positioned among the fundamental provisions in art. 1. In the Constitution, the inviolability of human dignity is

[311] Allan Rosas, "Nordic Countries and the International Protection of Human Rights," *Nordic J. Int'l L.* 57 (1988): 426.

[312] Kimmo Nuotio, Sakari Melander, and Merita Huomo-Kettunen, *Introduction to Finnish Law and Legal Culture* (Helsinki: Faculty of Law, Univ. of Helsinki, 2012), 111.

considered to be by nature a general constitutional principle[313] that assists in substantiating and interpreting other constitutional rights and provisions. As McCrudden has observed, in it's background lies the Nordic social state: "*in Finland the socialist influence was clear.*"[314] According to the preparatory legislative materials for Finnish constitutional reform, human dignity refers to recognition of the inherent dignity and worth of all human beings. It also belongs to all persons irrespective of the prevailing will of the state or positive law.[315]

In Finland, UN human rights treaties have been specifically incorporated into domestic law by an Act of Parliament, a procedure required by section 95 of the Constitution. This means that Finland follows the traditional dualist approach to international law, but it has been suggested that a more appropriate term in the Finnish context might be '*de facto* monism' or 'mitigated dualism'.[316] Scheinin argues that section 22 of the Constitution introduces a monistic stand into the national legal system as it refers to fundamental and human rights ('*perusoikeuksien ja ihmisoikeuksien'*).[317]

Typical for a dualist country, treaties have to be incorporated into the Finnish domestic legal order before they can be applied directly by the courts. Treaties of this type are also transformed (or incorporated) into Finnish legislation by legislative acts through a government proposal.[318] The position of subsequent acts of supervisory bodies is, however, not clear.

An extensive catalogue of bill of rights was included in the Constitution in 1995 in order to make it consistent with international human rights treaties and to incorporate the ECHR into the national legal system.[319] Husa observes that

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313 See e.g. the opinion of the working group on the Constitution OLJ 8/1995, 55–6.

314 McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," 664.

315 Article 1 paras 2–3 of the Finnish Constitution establishes: "*The constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society. Finland participates in international co-operation for the protection of peace and human rights and for the development of society.*" See also Perustuslakivaliokunta, "Hallituksen esitys uudeksi Suomen Hallitusmuodoksi (New Form of Governance of Finland)" (PeVM 10/1998 vp – HE 1/1998 vp, January 21, 1999).

316 Scheinin, "Protection of the Right to Housing in Finland," 243. While the ICERD and ICESCR were incorporated by government decree or statutory order, for the more recent human rights treaties an Act of parliament was used. Nonetheless, incorporation is nothing more than a "*blank legislative act*" which simply pronounces the treaty to be part of Finnish law. *Ibid*., 428; Tuomas Ojanen, "From Constitutional Periphery toward the Center – Transformations of Judicial Review in Finland," *Nordic Journal of Human Rights* 27 ER, No. 02 (2009): 197.

317 Martin Scheinin, "Constitutional Law and Human Rights," in *An Introduction to Finnish Law*, ed. Juha Pöyhönen, 2nd, revised ed. (Helsinki: Kauppakaari, 2002), 34.

318 The Finnish government refers progressively to the CRC in its proposals. See e.g. HE 3/2012 or HE 341/2014.

319 One of the aims of the reform was to enhance the domestic protection of human rights to a level higher than the minimal level required by the ECHR so as to diminish the need for individuals to go to Strasbourg. See e.g. Heyns and Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level," 525.

the Finnish Constitution regards rights as legal in nature, meaning that these rights exist under the rules of constitutional law.

The constitutional reforms were completed in 2000 and introduced a system of 'decentralised constitutional review'.[320] As a result, courts have the capacity not to apply national legislation that manifestly conflicts with the constitution (section 106 of the Constitution). Section 22 of the Constitution includes an obligation for public authorities to "*guarantee the observance of basic rights and liberties and human rights*". Similarly, the obligation of the parliamentary Constitutional Law Committee has been detailed as to "*issue statements on the constitutionality of legislative proposals... as well as on their relation to international human rights treaties*" (section 74 of the Constitution).[321]

The Constitutional Law Committee and Finnish courts have generally tried to avoid open conflicts and use human rights friendly interpretation of national legislation.[322] Husa concludes that the Finnish Constitution is considerably open to international human rights.[323]

Children as a group needing special attention are not mentioned in the constitution. Van Dijk noted:

> *For a young Constitution as the Finnish one is, it is somewhat surprising that Ch. 2, dealing with basic rights and liberties, is not more closely tuned to the regulation of these rights and freedoms in the ECHR and its Protocols and in the European Social Charter, both as concerns the selection of rights and freedoms, their formulation and scope, and the conditions for the limitation of and derogation from some of them. ... there is also no reference to the international legal obligations of Finland in this area. There is, of course, no obligation for Finland to implement these international obligations by incorporating them literally in its Constitution, but a deviating or more restrictive constitutional guarantee can never be used as a defence against allegations of non-fulfilment of these obligations.*[324]

Finland scrutinised its legal system prior the CRC entered into force in order to find out, whether any substantive change was necessary. It was concluded that child protection laws of Finland follow already the requirements of the CRC and the best interest of a child is protected.[325] Hakalehto-Wainio observes that this analysis addressed only compatibility of the legal acts with the CRC, and it

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320 Krommendijk, "Finnish Exceptionalism at Play?," 21.

321 In addition, both the Chancellor of Justice and the Parliamentary Ombudsman have an express constitutional task to monitor "the implementation of basic rights and liberties and human rights" in the performance of its duties (sections 108 and 109).

322 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, "Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review," *Int J Constitutional Law* 9, No. 2 (April 1, 2011): 524.

323 Husa, The Constitution of Finland, 172.

324 Pieter Van Dijk, "Comments on the Constitution of Finland" (Venice Commission, CDL(2007)075, September 17, 2007), para. 78.

325 Sami Mahkonen, "Lapsen oikeuksien sopimus ja sen merkitys Suomessa," *Lakimies* (1990): 41–58.

discarded possible effects on the administration or policy measures; there was no wider debate on the substantive implementation of the CRC. This is also the reason it has been claimed that implementation of the CRC in Finland is partial and unfinished.[326]

The role and position of international human rights treaties, as well as the practice of the ECtHR, is high in the Finnish Constitutional system. In 1990, the Constitutional Law Committee of the Parliament stated that the ECHR and its protocols would be given precedence in a case of norm conflict with the prior national law. Although this was not the intention at the time, the doctrine of allowing precedence to be given to ECHR law has since prevailed.[327]

4.1.3 Position and role of the practice of supervisory institutions

There are some UN treaty bodies that have had a substantive effect on the Finnish legal system. Views of the Human Rights Committee should be noted as one such positive example. After receiving the views of the HRC in the cases of Vuolanne,[328] Torres,[329] and Kivenmaa,[330] the Finnish legal system was substantively updated, and a number of legislative and administrative changed were adopted.[331] This indicates that Finland considers the views of the HRC as binding. Finnish readiness to participate in the follow up procedure shows also the potential for including similar measures to the work of the CRC.

Finland stressed throughout its fourth report to the CRC Committee that it values and analyses all the observations and recommendations of that Committee. Finland is generally following its reporting obligations, although some irregularities can be observed. As an example, Finland has delayed latest submission of its reports under both optional protocols of the CRC.

On the effectiveness and implementation of the Concluding Observations Krommendjik notes:

> *Most of the Concluding Observations have remained ineffective. The great majority of them have been ineffective because they simply coincided with existing or intended policy or legislative measures without having had any effect on them. This is primarily because Concluding Observations are generally and vaguely formulated without prescribing any specific course of action. A smaller number of Concluding Observations has been rejected or has remained completely unaddressed.*[332]

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326 Hakalehto-Wainio, "Lapsen oikeudet ja lapsen etu lapsen oikeuksien sopimuksessa," 20.
327 As referred to in Husa, *The Constitution of Finland*, 171.
328 HRC, Vuolanne v. Finland, Communication No. 265/1987 (1989).
329 HRC, Torres v. Finland, Communication No. 291/1988 (1990).
330 HRC, Kivenmaa v. Finland, Communication No. 412/1990 (1994).
331 See e.g. HRC, "Report of the Human Rights Committee" (A/54/40, 1999), para. 468.
332 Krommendijk, "Finnish Exceptionalism at Play?," 27.

One positive example from the practice of the CRC Committee is the establishment of the Children's Ombudsman, whose work has proved highly successful in Finland.[333] There is, however, no reference to the opinions or positions of the CRC Committee in Finnish court practice.[334]

Concluding from the above, Finland is still formally a dualist country, although it is open both to international human rights treaties and subsequent supervisory practice. It has participated in the constructive dialogue and taken the suggestions in the concluding observations of the HRC seriously. Thus, it could be concluded that Finland considers these instruments to be binding; they were, however, more used in the legislative process of the *Eduskunta*.

4.2 Human Rights in the Estonian Constitution

International human rights treaties played an important role in the transition of Estonia to a democracy at the end of the 1980s and the beginning of the 1990s.[335] It is possible to take as a starting point of the transition 16 November 1988 when the Supreme Soviet of the Estonian SSR passed three significant documents for the restoration of Estonia's sovereignty[336]:

1. the Declaration of Sovereignty of the Estonian SSR[337];
2. the Law amending the Constitution of the Estonian SSR[338];
3. the Resolution on the Union Treaty[339].

It is significant that the first two of these documents were based on international human rights instruments – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – and that the preamble to the 1978 Constitution was supplemented by them.[340]

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[333] *Ibid*., 30. For an overview of the functions of Children's Ombudsman, see e.g. Kirsti Kurki-Suonio, "Oikeusasiamies lapsen oikeuksien valvojana," in *Eduskunnan oikeusasiamies 90 vuotta. Juhlakirja.* (Vammalan Kirjapaino Oy, Sastamal, 2010), 297–310.

[334] Hakalehto-Wainio, "Lapsen oikeudet ja lapsen etu lapsen oikeuksien sopimuksessa," 46.

[335] For an analysis of the influence of international human rights and UDHR in particular on the transition to democracy, see e.g. Katre Luhamaa, "Estonia: Transition Through Human Rights."

[336] For a collection of instruments relating to the restoration of independence as well as draft constitutions see Heinrich Schneider and Eesti Akadeemiline Õigusteaduse Selts, eds., *Taasvabanenud Eesti põhiseaduse eellugu* (Tartu: Juura, Õigusteabe AS, 1997).

[337] Eesti NSV suveräänsusest (Declaration of Sovereignty of the Estonian SSR) ENSV ÜVT 1988, 48, 685.

[338] Muudatuste ja täienduste tegemise kohta Eesti NSV konstitutsioonis (põhiseaduses) (Law amending the Constitution of the Estonian SSR) ENSV ÜVT 1988, 48, 684.

[339] ENSV Ülemnõukogu resolutsioon liidulepingust (Resolution on the Union Treaty) ESSR Gazette 1988, 48, 686.

[340] Article 1 changed the last paragraph of the preamble to the Constitution and stated that an inseparable part of the Estonian legal system includes "covenants that are generally accepted by the international community and ratified by the USSR, CESCR and CCPR and

A general referendum on the question of independence was held on 3 March 1991; participation in the referendum was high and 77.83 percent of participants voted for the restoration of an independent Republic of Estonia.[341] The Supreme Council adopted a Decision on the Independence of Estonia on 20 August 1991, whereby the statehood of the Republic of Estonia was restored *de facto*. It also established the Constitutional Assembly.[342]

At the same time, Estonia was looking for support from the international community. The General Assembly of the UN accepted Estonia as a member of the United Nations on 17 September 1991[343] and on 21 October 1991 Estonia signed the ICCPR and the ICESCR as well as numerous other UN human rights instruments. The Constitution was adopted on 28 June 1992.[344] Estonia joined the Council of Europe in May 1993.[345]

4.2.1 Constitutional values

The Estonian legal system is part of the continental European legal system; thus, central to the Estonian constitution is legality and the rule of law. The preamble to the Constitution states that the Estonian state is founded on "liberty, justice and the rule of law".[346] The Constitution of Estonia strongly stresses democratic values as the basis of the Estonian legal system. Due to historical development, the constitution includes a long list of constitutional rights and, at the same time, is also open to additional international human rights. Ernits has mentioned the

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to other international treaties and declarations that protect civil and human rights." (translation by the author), Tunne Kelam, *Tunne Kelam: elulointervjuu: valik artikleid ja esinemisi* (Tallinn: SE & JS, 1999). All three instruments were declared unconstitutional by the USSR Presidium of the Supreme Council on 26 November 1988.

341 Statement of the Supreme Council on 11 March 1991, Eesti Vabariigi Ülemnõukogu avaldus, RT 1991, 8, 124.

342 Eesti riiklikust iseseisvusest, RT 1991, 25, 312.

343 General Assembly of the UN, Admission of the Republic of Estonia to membership in the United Nations, A/RES/46/4

344 State Gazette, 1992, 26, 349. See also Markku Suksi, *On the Constitutional Features of Estonia*, Meddelanden från ekonomisk-statsvetenskapliga fakulteten vid Åbo akademi 502 (Åbo: Åbo Akademi, 1999); Caroline Taube, *Constitutionalism in Estonia, Latvia and Lithuania: A Study in Comparative Constitutional Law*, Skrifter från Juridiska fakulteten i Uppsala 86 (Uppsala: Iustus Förlag, 2001) 79–111 in particular; and Rait Maruste, *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* (Tallinn: Juura, 2004).

345 For a personal account on the accession to the Council of Europe see L. Meri, 'Euroopa kui eesmärk', speech in the Council of Europe, Strasbourg on 26 November 1991. Published in Estonian in Lennart Meri, *Presidendikõned*, Eesti mõttelugu 9 (Tartu: Ilmamaa, 1996), 268–70.

346 Ülle Madise et al., eds., *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne.*, 3rd ed. (Tartu: Juura, 2012), http://www.pohiseadus.ee/ (accessed January 16, 2014)., preamble. See also Raul Narits, "About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia," *Juridica International* 16 (jaanuar 2009): 56–64.

following basic principles of Estonian constitutional law: human dignity, democracy, rule of law, and social state. This list is not necessarily exhaustive.[347]

Although the constitution includes the principle of the social state, there is strong emphasis on liberal rights and freedoms. This also seems to be the wider mentality of society – Estonia has had a liberal government now for more than 20 years and the liberal party also won the latest parliamentary elections in 2015. There are also tendencies to give children more freedom. As an example, the Parliament will discuss granting children from 16 years of age the right to vote in local elections.[348]

4.2.2 Position of international human rights treaties

The Estonian legal system and the court system have been open to international human rights law. Article 3 of the Estonian Constitution stipulates that principles of international law form an inherent part of the Estonian legal system. Therefore, the Estonian constitutional law system can be seen as representing a monist approach to international law. Estonia is a party to the following central UN and Council of Europe treaties:

Treaty	**Signature**	**Ratification**
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)		1991
International Covenant on Civil and Political Rights (CCPR)		1991
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (OP II CCPR)		2004
International Covenant on Economic, Social and Cultural Rights (CESCR)		1991
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)		1991
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)		1991
Convention on the Rights of the Child (CRC)		1991
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	2003	2014
Optional Protocol to the Convention on the Rights of the	2003	2004

[347] Madis Ernits, *Põhiõigused, demokraatia, õigusriik* (Tartu: Tartu Ülikooli Kirjastus, 2011) 67–70.

[348] Priit Luts, "Valitsus toetas valimisea langetamise eelnõu," *Uudised, ERR*, July 31, 2014, http://uudised.err.ee/v/f8ccfa48-3d80-4044-a6b2-682df33649ab (accessed April 1, 2015).

Treaty	Signature	Ratification
Child on the sale of children, child prostitution and child pornography		
Convention on the Rights of Persons with Disabilities (CRPD)		2012
European Convention on Human Rights	1993	1996
European Social Charter (revised)	1998	2000

As can be seen, most of the human rights treaties were quickly adopted at the beginning of the transition process and several of these treaties were forgotten for a number of years after that. The CRC is one such example. At the beginning of the transition, accession to the treaties was an easy way to secure an international standing as a state. At the same time, Estonia has been reluctant in accepting voluntary supervisory procedures.

Estonia is a party to the following international human rights adjudication mechanisms; it has clearly favoured instruments relating to civil and political rights.

Complaints mechanism	Date of accession
Individual complaints procedure under the CAT	2006
Optional Protocol to the CCPR	1991
Optional Protocol to the ECHR, jurisdiction of the European Court of Human Rights (ECtHR)	1996
Optional Protocol to the CRPD	2012

Basic rights are enumerated in the second chapter of the Constitution; this list of rights is not exhaustive (art. 10). Moreover, "the generally recognised principles and rules of international law are an inseparable part of the Estonian legal system".[349]

The Constitution of 1992 created a three-tier court system, at the top of which stands the Supreme Court with a double function: it acts as a court of cassation and also has the functions of a constitutional review court.[350] The Supreme Court and its Constitutional Review Chamber in particular frequently uses international human rights arguments and instruments. In all major cases

[349] Art. 3 of the Constitution. Art. 123 of the Constitution establishes the hierarchy between the international treaties and the national legal system: "*The Republic of Estonia shall not conclude international treaties which are in conflict with the Constitution. If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply."*

[350] On constitutional review see Peeter Roosma, "Constitutional Review under 1992 Constitution," *Juridica International* III (1998): 35–42; and Madis Ernits, *Põhiõigused, demokraatia, õigusriik*, 244–259.

involving the Chamber, the need for interpretation of some basic right has arisen.[351]

The European Convention of Human Rights, the International Covenants and the European Charter of Fundamental Rights and practice of the relevant supervisory bodies are, therefore, the Court's main instruments that help to substantiate and interpret basic rights.

The Administrative Law Chamber clarified the position and use of international treaties among sources of law in its decision No. 3-3-1-58-02, part of which concerned direct application of the CESCR. The Court stated that international treaties usually have a supportive interpretative function. However, there may be cases where an international treaty is, in an individual matter, clearer than the Constitution. In such situations, international treaties can be directly applicable. Prerequisites for the direct application of a norm of international law are that, firstly, the norm regulates internal relations, and, secondly, that the norm is clear enough and does not need additional national regulation. International treaties with this potentiality should also have been ratified by the Riigikogu.[352]

Although the other Chambers of the Court have not clarified their position in relation to the application of international treaties, the practice of the Court (and all its Chambers) seems to follow the same line of argumentation. There are numerous cases where one or several international instruments have been used and applied.[353]

4.2.3 Position and role of the practice of supervisory institutions

International human rights treaties as well as the supervisory practice of the UN human rights treaty bodies are often used during preparation of legislative acts. The same is true of the CRC and the General Comments and Concluding Observations of the CRC Committee.

The practice of the Supreme Court as well as lower courts is more limited. The CRC has been referred to in several cases involving the Supreme Court, and the number of such references has risen in recent years. The court has referred to several provisions of the CRC. The best interests of the child (art. 3 CRC) was central to the interpretation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[354] In deciding the maintenance allowance for children living abroad, the Supreme Court referred to the

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[351] Recent cases involving application of the CRC include e.g. CCSCr No. 3-2-1-6-12, (14 March 2012); and CLCSCd No. 3-1-2-4-14, (18 March 2015). A search in the database of the Supreme Court shows that as of April 2015, approximately 500 cases contain a reference to some international treaty. Among these cases 15 refer to the CRC.

[352] ALCSCd No. 3-3-1-58-02, (20 December 2002), para. 11.

[353] E.g., CLCSCd No. 3-1-3-10-02, (17 March 2003), para. 21.

[354] CCSCr No. 3-2-1-142-06, (22 February 2007).

principle of equal treatment of children and relied on art. 2 of the CRC.[355] The Supreme Court has also taken the position that unemployment is not a sufficient reason to be released from the obligation to pay maintenance allowance (art. 18 concerning the primary responsibility of parents for the upbringing and development of the child)[356].

While referring to the practice of the ECtHR as well as recommendations and other soft law instruments is a commonplace in the practice of the Supreme Court, there has been only one reference to a General Comment.[357] There have been no references to the supervisory practice of the CRC Committee. Still, it can be concluded that Estonia views the products of the UN treaty bodies as authoritative interpretations that are capable of creating binding principles and rules.

Concluding from the above, Estonia is clearly a monist country that uses international treaties and supervisory practice actively in its legal practice. Thus, the Estonian legal system is receptive to the universality of international human rights law.

4.3 Human Rights in the Russian Constitution

The current attitude of the Russian Federation towards international law and international human rights law in particular can be traced back to the history of Russian Empire and Soviet legal system in particular, and the USSR's approach to international human rights law.[358] As Bowring points out, Soviet international legal theory was full of contradictions and, he argues, these positions have continuing relevance.[359] It could be argued that a number of current problems of implementation of international human rights could be traced back to difficulties in transitioning from Soviet doctrine to a new constitutional democracy.[360]

The Soviet Union was pragmatic in its approach to international law and followed a strictly dualist approach concerning the relationship between

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355 CCSCd No. 3-2-1-21-07, (28 March 2007).

356 See e.g., CCSCd No. 3-2-1-65-07, (19 June 2007).

357 ALCSCd No. 3-3-1-58-02, (20 December 2002) para. 11.

358 For a comprehensive overview, see e.g., Anton Burkov, *Konventsiia o zashchite prav cheloveka v sudakh Rossii* (Moskva: Wolters Kluwer, 2010), chap. 2; or Lauri Mälksoo, *Russian Approaches to International Law* (New York, NY: Oxford University Press, 2015), chap. 2.

359 Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Milton Park, Abingdon, Oxon: Routledge, 2013), 81–83.

360 Most of the overviews or analyses of the current Russian constitutional system and the role of international law in it start with a description or discussion of the Soviet approach to international law. This is a custom even if current constitutional law system has formally turned to monism. See e.g., Burkov, *Konventsiia o zashchite prav cheloveka v sudakh Rossii*, chap. 2.

domestic and international law.[361] The 1977 Constitution of the USSR regulated the relationship between domestic and international law in more modern terms in article 29:

> *the USSR shall fulfil the obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the USSR.*

This was, at the time, however, clearly seen as a law on paper but it did not incorporate international law such as international human rights into the domestic law of the USSR. As Nußberger notes, international and domestic law were, under Soviet law, considered to be two completely separate systems, based on the concept of strict national sovereignty. There was no constitutional rule providing for direct incorporation of international law into Soviet law, nor could international treaties be invoked before national courts i.e., Soviet legal theory followed a "strictly dualist approach".[362] As Långström puts it, in the Soviet Union – until *perestroika* at least – implementation of human rights treaties belonged exclusively to the domestic jurisdiction. Voluntary reporting submitted by the states parties was seen as a sufficient device to monitor compliance.[363] Feldbrugge has showed that the background to this approach relates to the heritage of autocracy, dictatorship and enforced orthodoxy of Russian society.[364]

Still, the first and primary obligation is to ensure national implementation of international human rights treaties. Legislation is the principal way that international treaties and their supervisory practice should be implemented. This is also the approach of the Russian Federation – it sees its first and foremost task as to transform relevant treaty norms as well as selected recommendations into federal legislation.[365]

4.3.1 Constitutional values

Russia is one of the countries where 'civilizational' arguments and the importance of traditional values have been stressed in recent years, including in connection with application of international human rights treaties. Russian

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[361] For an overview of the Soviet approach to international law see Mälksoo, *Russian Approaches to International Law*, chap. 2; or for a shorter analysis, see e.g., Angelika Nußberger, "Russia," *Max Planck Encyclopedia of Public International Law*, October 2009.

[362] Nußberger, "Russia," para. 127–28.

[363] Tarja Långström, *Transformation in Russia and International Law* (Martinus Nijhoff Publishers, 2003), 296.

[364] Ferdinand Joseph Maria Feldbrugge, "Human Rights in Russian Legal History," in *Human Rights in Russia and Eastern Europe: Essays in Honor of Ger P. van Den Berg*, ed. Ferdinand Joseph Maria Feldbrugge and William B. Simons, Law in Eastern Europe 51 (The Hague [etc.]: Njihoff, 2002), 65–90.

[365] See e.g., CRC Committee, "State Party Report: Consolidated Fourth and Fifth Report of the Russian Federation" (CRC/C/RUS/4-5, August 27, 2012), para. 18.

scholarship refers to Orthodox values and the Orthodox Declaration on Human Rights[366] as representing central values of Russian society.[367] One of the initiators and strongest supporters of traditional values resolutions has been the Russian Federation. Russian sociologist Zakharova explains that the central difference between the European and Russian understandings and interpretation of international human rights lies in the language used:

> *European language of human rights is primarily a legally oriented language…. Arguments justifying the importance of this concept are built on professional legal language and this language is closely linked to the right as a phenomenon[368]. The very idea of human rights in Europe implies the principle of the rule of law, and western 'language of human rights' defines all related legal categories.*[369]

She contrasts this view with the Russian understanding of human rights where "morality" language prevails along with traditions and patriotism.[370] McCrudden observes that Russia, in particular, is strongly reasserting its national interests internationally, and in reinventing a narrative of national sovereignty the external scrutiny of human rights bodies and their 'interference' was perceived as threatening and unwelcome.

The central difference from traditional human rights dogmatics is its definition of human dignity – there is a difference between worth and dignity; worth is given while dignity is acquired by doing "good things".[371] Furthermore:

> *There are values no smaller than human rights. These are faith, morality, the sacred, the motherland. Whenever these values come into conflict with the implementation of human rights, the task of society, state and law is to bring both to harmony. It is unacceptable, in pursuit of human rights, to oppress faith and moral tradition, insult religious and national feelings, cause harm to revered holy objects and sites, jeopardize the motherland. Likewise we see as dangerous the "invention" of such "rights" as to legitimize behaviour condemned by both traditional morality and historical religions.*[372]

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366 The Tenth World Russian People's Council, "The Orthodox Declaration of Human Rights and Dignity," June 4, 2006.

367 For in-depth analysis see Lauri Mälksoo, "The Human-Rights Concept of the Russian Orthodox Church and Its Patriarch Kirill I: A Critical Appraisal," in *Russia and European Human-Rights Law*, ed. Lauri Mälksoo (Brill, 2014), 15–29. For the views of the Patriarch, see e.g., Kirill, *Vabadus ja vastutus harmoonia otsinguil: inimõigused ja isiksuse väärikus* (Tallinn: Moskva Patriarhaadi Eesti Õigeusu Kiriku Kirjastusosakond : Tarbeinfo, 2012).

368 I.e., theory on the position and function and role of rights in European legal culture.

369 Olesya Zakharova, "Na Raznykh Yazykdakh," *Nezavisimaya Gazeta*, March 25, 2013, http://www.ng.ru/ideas/2013-03-25/9_values.html (accessed March 21, 2015). Translation here and elsewhere by the author.

370 *Ibid*.

371 Mälksoo, "The Human-Rights Concept of the Russian Orthodox Church and Its Patriarch Kirill I," 16–17.

372 The Tenth World Russian People's Council, "The Orthodox Declaration of Human Rights and Dignity."

At first, these traditional morality arguments were mainly used in political discussion. In more recent years, this language has also found international legitimization with the help of strong support from Russia – the UN Human Rights Council adopted the "traditional values resolution" in 2012.[373] During constructive dialogue on the fourth and fifth report on the implementation of the CRC, Russia was asked to explain the influence of the Russian Orthodox Church on state policy and the state's attitude towards the "anti-juvenile" campaign of the Church.[374] Russia stressed in its reply that Russia is a secular state, it did not make its position on the campaign of the Church clear; rather, it explained the aim of the campaign from the perspective of the Orthodox Church.[375]

The Constitutional Court of Russia has used the concept of traditional values in its jurisprudence when deciding on the constitutionality of the prohibition of gay propaganda. The Supreme Court found that the law prohibiting gay propaganda with the aim of protecting the value of family and the rights of minors was in accordance with the Constitution.[376] The Court stated that the Russian legal system has "constitutionally significant moral values, predefined historical, cultural and other traditions of the multinational people of the Russian Federation". Furthermore, the Constitutional Court found that these values correspond to the international obligations of Russia as international human rights treaties are general in nature. The Russian legal system is based

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[373] Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practices."

[374] CRC Committee, "List of Issues – Russian Federation CRC" (CRC/C/RUS/Q/4-5, July 19, 2013), No. 9. From June 2012, the so called "anti-juvenile" campaign was developed against the "National Strategy of Actions in the Interests of Children for 2012–2017". 141,000 signatures were collected in September 2012 to Appeal to President Putin to stop implementation of the National Strategy because it follows "Western juvenile principles which are alien to Russian traditions and which threaten Russian families and Russian parents in favor of abstract rights of children". The same campaign attacked draft laws on the Public Inspectorate of Children's Institutions, on restoring work with vulnerable families, on juvenile courts, and widely – it declared as 'subversive' the priorities of the Convention on the Rights of the Child. On 9 February 2013 the "All-Russia Parents' Meeting" was visited by President Vladimir Putin who in his 15-minute talk expressed his agreement with the goals of the movement. See further Coalition of Russian NGOs, "Comments on Russia's Answers to the CRC Committee's Additional Questions" (CRC/RUS/INT_CRC_NGO_RUS_15907, November 29, 2013); and Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child'" (INT_CRC_NGO_RUS_15815_E, April 3, 2013), http://www.pravorebenka.narod.ru/eng/.

[375] CRC Committee, "Replies of the Russian Federation to the list of issues" (CRC/C/RUS/Q/4-5/Add.1, November 21, 2013), paras. 115, 117–20.

[376] Po delu o proverke konstitutsionnosti chasti 1 stat'i 6.21 Kodeksa Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh v svyazi s zhaloboy grazhdan N.A. Alekseyeva, YA.N.Yevtushenko i D.A.Isakova [2014] Case no 24-П (September 23, 2014).

on a traditional notion of humanism in the context of the national and religious peculiarities of Russian society. These include social, cultural and historical characteristics that are generally accepted in Russian society (and shared by all traditional religious denominations) such as ideas about marriage, family, maternity, paternity and the child; according to the state, these values are formally embodied in the Constitution.[377]

It can also be observed that the understanding of the separation of powers in Russia differs from the traditional view. According to Zorkin, it is first and foremost the obligation of the legislator to decide what solution is most suitable for society and the administrative as well as the judicial powers should as far as possible follow the position of the legislator i.e., "the constitution lives in laws".[378]

4.3.2 Position of international human rights treaties

The Constitution of the Russian Federation of 12 December 1993[379] radically changed the legal relationship between national and international law; and the Russian Federation adopted a monist attitude towards international law[380]. Article 15 (4) of the Constitution regulates the correlation between national and international law, and from the outset this provision seems to be relatively clear[381]:

> *The universally recognized*[382] *norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.*

Burkov stresses the importance of the position of this provision – as it is situated in the first chapter of the Constitution entitled "The Fundamentals of the Constitutional System", this provision has priority over all subsequent norms of the Constitution and, as an example, it cannot be trumped by lower

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377 CRC Committee, "Replies of the Russian Federation to the list of issues," para. 115, 117–20.

378 Valery Zorkin, "Konstitutsiya zhivet v zakonakh," *Rossiyskaya gazeta*, December 17, 2014, http://www.rg.ru/2014/12/18/zorkin.html (accessed April 1, 2015).

379 Konstitutsiya Rossiyskoy Federatsii (The Constitution of the Russian Federation). Published in *Rossiiskaya Gazeta*, 25 December 1993.

380 As Mälksoo shows, there is still disagreement among Russian scholars on whether the Russian constitutional system is monist or dualist. See Mälksoo, *Russian Approaches to International Law*, 194.

381 Butler discusses semantic and doctrinal problems relating to interpretation and implementation of art 15(4) in William E. Butler, "Russia," in *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, ed. David Sloss (Cambridge University Press, 2009), 425–38.

382 In some translations "generally" or "commonly".

legislation.[383] The wording of art. 15 (4) makes an interesting distinction and limitation. Firstly, the sources of international law include both norms and principles of international law; secondly, superiority is granted only to treaty norms.[384]

Art. 15 (4) as a general principle of the Russian Constitution, has to be read in conjunction with other provisions of the Constitution granting competences to different institutions and regulating the relationship between federal and local law. International relations and international treaties of the Russian Federation are under federal authority (art. 71) and article 106 requires that federal laws on the ratification and denunciation of international treaties must be considered by the Council of the Federation. Fulfilment and application of international treaties fall under the joint jurisdiction of the Federation and its subjects (art. 72) (1). Specific competences are also conferred on the President of the Russian Federation – under art. 86 (b) of the Constitution, the President has the competence to sign international treaties and agreements. Finally, in accordance with art. 125 (6) of the Constitution of the Russian Federation, international treaties inconsistent with the Constitution of the Russian Federation cannot be enforced or applied.[385]

Sovereignty is a key concept in the Russian understanding of the relationship between international and national law. This means that international criticism should not in principle influence Russian national law – it is up to the Parliament to decide what effect the international law norm has domestically. Antonov notes that the discourses of political and legal practitioners in Russia show proneness for the dualist concept of international order, where the binding force of the norms of international law depends on recognition by the authorities of the state concerned.[386]

It has to be noted that in the years following adoption of the ECHR in 1998, Russian openness to accept and apply international human rights was high among the legal elite. As an example, resolution No. 5 of the Plenum of the

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383 Burkov, Konventsiia o zashchite prav cheloveka v sudakh Rossii, 61–62.

384 Mikhail Antonov, "The Philosophy of Sovereignty, Human Rights, and Democracy in Russia," *Higher School of Economics Research Paper* No. WP BRP 24/LAW/2013 (August 13, 2013): 6. For an earlier discussion on this topic, see e.g., G. M. Danilenko, "Implementation of International Law in CIS States: Theory and Practice," *Eur J Int Law* 10, No. 1 (January 1, 1999): 51–69.

385 For an analysis of the application of international human rights in Russian courts, see e.g., Sergei Yurievich Marochkin, "International Law in the Courts of the Russian Federation: Practice of Application," Chinese Journal of International Law 6, No. 2 (2007): 329–44; Burkov, Konventsiia o zashchite prav cheloveka v sudakh Rossii, pt. 2; or Butler, "Russia."

386 Antonov, "The Philosophy of Sovereignty, Human Rights, and Democracy in Russia," 6.

Supreme Court [387] explained that judges have to apply both sources of international law. After an international treaty is ratified and enters into force, it becomes a part of the Russian legal system. Issuance of additional normative documents is not required.[388]

As Tikhomirov explains, Russian courts apply the doctrine of self-executing and non-self-executing treaties. Only the officially published provisions of international treaties that do not require the issue of additional domestic legal acts are directly applicable.[389] This approach is not fully in conformity with the monist approach to international law as it potentially limits application of e.g. social rights and would support the argumentation that not all international human rights create individual and justiciable rights.

Article 15 (4) does not limit the application of international treaties only to the level of legislation; instead, it recognizes the importance of international law for the whole Russian legal system, thus including, besides legislation, legal practice (both judicial and administrative), and legal doctrine.[390] The Plenum of the Supreme Court defined applicable instruments as follows:

> *The universally recognized norms of international law should be understood as rules of conduct, accepted and recognized as legally binding by the international community of states as a whole. The contents of the said principles and norms of international law may be construed, in particular, in the documents of the United Nations and its specialized agencies.*[391]

International human rights are connected to basic rights protected through the constitution. As such, they have a special role within the constitutional system. Article 2 of the Constitution stresses the priority of basic rights; article 17 (1) of the constitution recognises that these basic rights include rights protected through international human rights treaties:

> *In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and the citizen according to universally recognized principles and norms of international law and according to the present Constitution.*

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[387] Ruling of the Plenary Session of the Supreme Court of the Russian Federation No. 5 "On the Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction" [2003] (October 10, 2003). The English text of the resolution is available at: http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801 (accessed June 1, 2015).

[388] Yury Tikhomirov, "Russia," in International Law and Domestic Legal SystemsIncorporation, Transformation, and Persuasion, ed. Dinah Shelton (Oxford University Press, 2011), 522.

[389] *Ibid*.

[390] See further the discussion in Anton Burkov, "Russia," in *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*, ed. Leonard M. Hammer and Frank Emmert (The Hague: Eleven International Publishing, 2012), 429.

[391] *Plenary Ruling No. 5* [2003] (October 10, 2003) sec. 1.

Russia is a party to the following core human rights instruments of the UN and Council of Europe:

Treaty	Signature	Ratification
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)	1985	1987
International Covenant on Civil and Political Rights (CCPR)	1968	1973
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	1980	1981
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	1966	1969
International Covenant on Economic, Social and Cultural Rights (CESCR)	1968	1973
Convention on the Rights of the Child (CRC)	1990	1990
Optional Protocol to the CRC on the involvement of children in armed conflict (CRC-OP-AC)	2001	2008
Optional Protocol to the CRC on the sale of children child prostitution and child pornography (CRC-OP-SC)	2012	2013
Convention on the Rights of Persons with Disabilities (CRPD)	2008	2012
Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the protocols	1996	1998
European Social Charter (revised)	2000	2009

Russia has also accepted number of individual complaints mechanisms of the UN; it has refrained from accessing the more recent mechanisms.

Complaints mechanism	Date of accession
Individual complaints procedure under the CAT	01 Oct 1991
Optional Protocol to the CCPR	01 Oct 1991
Optional Protocol to the CEDAW	28 Jul 2004
Individual complaints procedure under the CEDR	01 Oct 1991
Optional Protocol to the ECHR, jurisdiction of the European Court of Human Rights (ECtHR)[392]	5 May 1998

[392] Issues relating to the accession to the ECHR are discussed e.g., in Angelika Nußberger, "The Reception Process in Russia and Ukraine," in *A Europe of Rights*, ed. Helen Keller and Alec Stone Sweet (Oxford University Press, 2008), 603–76; or Anton Burkov, "Russia," in *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*, ed. Leonard M. Hammer and Frank Emmert (The Hague: Eleven International Publishing, 2012), 425–77.

Russia has observed its reporting obligations relatively well; the CRC Committee noted that while all formal legislative changes in Russia were reported in their latest report, it lacked information about implementation of the CRC as well as relevant statistics.[393]

As will be discussed below, Russia selectively applies the views of the CRC Committee and takes them into account mainly during the development of policy measures. Creation of the post of the Children's Rights Commissioner for the President of the Russian Federation is a prime example of it.[394]

4.3.3 Position and role of the practice of supervisory institutions

The legal status of subsidiary instruments (including decisions and other documents of supervisory bodies) under ratified international treaties is not clear. The Plenum of the Supreme Court has stressed the obligation to apply directly international treaties, and their priority over national law. At the same time, Valery Zorkin stated in 2010:

> *Every decision of the ECtHR is not only a legal but a political act. When such decisions are made for the benefit of protecting the rights and freedoms of citizens and the development of our country, Russia will always strictly comply with them. But when certain decisions of the Strasbourg Court are controversial in terms of the spirit of the European Convention on Human Rights and affect national sovereignty directly, and our fundamental constitutional principles, Russia has the right to defend itself against such decisions. The correlation between the decisions of the Russian Constitutional Court and the European Court of Human Rights must be addressed through the prism of the Russian Constitution.*[395]

As every legal norm requires interpretation, any subsequent practice of the treaty body should be taken into account.[396] Even if Tikhomirov states in strong terms that recommendations by international treaty bodies are not considered to be legally binding[397], these instruments are relevant for interpretation of treaty norms. Moreover, there are a few cases where the Russian Supreme Court has

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393 See e.g., CRC Committee, "Summary Records of the 1863 Meeting: Russian Federation CRC" (CRC/C/SR.1863, February 5, 2014), para. 14.

394 Also known as Presidential Commissioner for Children's Rights. This institution does not, however, substantively fulfil the requirements of an independent body as the post is situated within the office of the President. See also Yelena Mikheyev, "Zakonotvorcheskaya Deyatel'nost' Upolnomochennogo Po Pravam Rebenka V Rossiyskoy Federatsii," *Probely v rossiyskom zakonodatel'stve. Yuridicheskiy zhurnal* (2012).

395 Valery Zorkin, "Predel ustupchivosti," *Rossiyskaya gazeta*, October 29, 2010, http://www.rg.ru/2010/10/29/zorkin.html (accessed March 3, 2015).

396 See also the discussion in Anton Burkov, The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996–2006 (Columbia University Press, 2007), 29.

397 Tikhomirov, "Russia," 525.

taken into account the full diapason of UN treaty bodies' instruments. Marochkin and Khalafyan observe:

> *There is an extension of usage of international soft law by all subjects of domestic law. The constitutional principle in art. 15 (4) is not only considered in a formally juridical way. On the contrary, courts have developed its content and rely practically on all the elements of the international normative system, such as resolutions and recommendations of international organisations, decisions of international bodies, model acts, legal positions and rulings of judicial bodies. /.../ Strictly speaking, courts do not apply but use them to specify the terms they employ, to formulate and give proof of their position, to affirm or emphasize their legal argumentation.*[398]

As an example, when the Russian Supreme Court was considering the legality of expelling Mr. Abdullayev, it used the General Comment and jurisprudence of the CAT Committee to establish the criteria to be applied. Furthermore, it used Concluding Observations to determine the *de facto* situation relating to extradition and an alleged threat of torture in Kyrgyzstan.[399]

There is even more clarity regarding the jurisprudence of international courts and the European Court of Human Rights in particular. The Plenary of the Supreme Court analysed the effect of the ECHT and the practice of the ECtHR in its opinion No. 21. The principal position of the Supreme Court is that:

> *the legal positions of the European Court of Human Rights /.../ contained in the final judgments of the Court delivered in respect of the Russian Federation are obligatory for the courts. In order to effectively protect human rights the courts take into consideration the legal positions of the European Court expressed in its final judgments taken in respect of other States which are parties to the Convention. However this legal position is to be taken into consideration by the court if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the European Court.*[400]

More recently, in its judgment of 6 December 2013, the Constitutional Court stated that final judgments of the ECtHR are binding on Russia. The state has an obligation to pay compensation to the victim and ensure that rights violated are restored. On the other hand, the ECtHR is not a body that stands over national

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398 Sergei Yurievich Marochkin and Rustam Khalafyan, "The Norms of International Soft Law in the Legal System of the Russian Federation," *Journal of Politics and Law* 6, No. 2 (2013): 92.

399 Apellyatsionnoye opredeleniye ot 30 yanvarya 2014 g. N 56 – APU13-48 [2014] (January 30, 2014).

400 Ruling of the Plenary Session of the Supreme Court of the Russian Federation No. 21 "On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction" [2013] (June 27, 2013) [2].

courts. If the judgment of the ECtHR clashes with the Constitution, the state must act accordingly, bearing its national interests in mind.[401]

Thus, the jurisprudence of the international courts is a source of principles of international law and as such give guidance to the Russian courts. At the same time, as was shown by Burkov, this ideal does not always materialise in practice and international human rights law has remained rather as a secondary source of interpretation.[402] Butler even concludes that it is unknown whether Russian courts consult foreign decisions for treaty interpretation (with the exception of ECtHR) as it would not be part of the style of judicial decision drafting to so indicate.[403]

If international or foreign powers (including organisations of the international community) try to introduce any legal rules (or undermine the validity of Russian laws), they limit or even violate the sovereign rights of the people.[404] This was clear from the statement of (former) Justice of the Constitutional Court Tatyana Morschtshakova, who in 2007 stated that "*Unfortunately, our country is coming into collision with a politicization of judicial decisions… undermining trust in the international judicial system.*"[405]

For at least the last five years, the discussion over whether the Russian constitutional system needs reform has been on the agenda.[406] The vast number of cases against the Russian Federation and decisions of the ECtHR that have not taken into account Russian arguments of culture and tradition have raised the need to return to the dualist legal system.[407] Recent discussions have stressed the need to adhere to the legal obligations of the Russian Federation but

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401 Po delu o proverke konstitutsionnosti polozheniy stat'i 11 i punktov 3 i 4 chasti chetvertoy stat'i 392 Grazhdanskogo protsessual'nogo kodeksa Rossiyskoy Federatsii v svyazi s zaprosom prezidiuma Leningradskogo okruzhnogo voyennogo suda [2013] Case no 27-П/2013 (June 12, 2013).

402 For recent analysis, see e.g., Lauri Mälksoo, "Russia and European Human Rights Law: Progress, Tensions, and Perspectives Introduction," *Review of Central and East European Law* 37, No. 2 (May 1, 2012): 161–70. For earlier practice see Burkov, *The Impact of the European Convention on Human Rights on Russian* Law.

403 Butler, "Russia.", 446.

404 Antonov, "The Philosophy of Sovereignty, Human Rights, and Democracy in Russia," 8.

405 Bill Bowring, "Russia and Human Rights: Incompatible Opposites?," *Göttingen Journal of International Law* 1, No. 2009 (November 18, 2009): 251.

406 One of the recent triggers for this discussion was the decision of the ECtHR in the case of Konstantin Markin v. Russia, App. No. 30078/06 (Eur. Ct. H.R., March 22, 2012). For a casenote, see e.g., Lauri Mälksoo, "Markin v. Russia – Application No. 30078/06," *Am. I. Int'l L.* 106 (2012): 836.

407 For recent calls for change, see e.g., Sputnik, "The Russian Duma is Set to Consider the Legitimacy of the Primacy of International Law over National Legislation in the Russian Constitution," *Sputnik International*, February 26, 2015, http://sputniknews.com/russia/20150226/1018811175.html (accessed March 16, 2015).

at the same time to only apply international law that does not violate the spirit of the Constitution.[408]

At the political level, President Vladimir Putin has constructed the territorial integrity and historical greatness of Russia as the highest value to which other values, such as tacitly human rights and liberty, must subordinate themselves. In his recent speeches, one of the values standing before individual rights is the stability and importance of the family.[409] At the same time, in the UN Human Rights Council Russia has tried to combine its support for cultural relativism and traditional values with the universality and interdependence of international human rights.[410]

The Russian Foreign Policy Concept[411] stresses the need to increase participation in international human rights institutions as well as the need to increase protection of human rights. It is interesting to note that in relation to children, the Foreign Policy Concept emphasizes the importance of "*extending the legal framework of international cooperation in order to improve the level of protection of rights and legitimate interests of Russian children living abroad*".[412] There is no specific mention of the need to increase domestic protection of the rights of the child in Russia.

The sovereignty argument has been strongly present in the recent practice of Russia. In relation to the rights of the child this argument has recently been made in the Markin case in which the Russian government insisted that "*By assessing Russia's legislation, the Court would encroach upon the sovereign powers of the Parliament and the Constitutional Court*".[413] Interestingly, as Vaypan notes, despite the earlier call by the President of the Constitutional Court to set the "*limits to [Russia's] acquiescence,*"[414] the Constitutional Court refrained in 2013, when dealing with the national implementation of the Markin judgment,[415] from laying down any general principles or proclaiming its own

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408 See e.g., Lyuba Lulko, "Should International Law Prevail over Russian Constitution?," *English Pravda.ru* (December 12, 2013); or Vladimir V. Putin, "Vstrecha S Zaveduyushchimi Kafedrami Konstitutsionno-Pravovykh Distsiplin (Meeting with Heads of Departments of Constitutional and Legal Disciplines)" (Moskva, November 7, 2013), http://www.kremlin.ru/events/president/news/19579 (accessed May 16, 2015).

409 Vladimir V. Putin, "Meeting of the Valdai International Discussion Club," October 19, 2013, http://eng.kremlin.ru/news/6007 (accessed July 16, 2014).

410 Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practices."

411 MFA of Russia, *Concept of the Foreign Policy of the Russian Federation*, December 2, 2013, para. 39, http://www.mid.ru/brp_4.nsf/0/76389FEC168189ED44257B2E0039B16D (accessed June 12, 2014).

412 *Ibid*.

413 Konstantin Markin v. Russia, App. No. 30078/06 (Eur. Ct. H.R., March 22, 2012) [85].

414 Zorkin, "Predel ustupchivosti."

415 Po delu o proverke konstitutsionnosti polozheniy stat'i 11 i punktov 3 i 4 chasti chetvertoy stat'i 392 Grazhdanskogo protsessual'nogo kodeksa Rossiyskoy Federatsii v svyazi s zaprosom prezidiuma Leningradskogo okruzhnogo voyennogo suda [2013] Case no 27-П/2013 (June 12, 2013).

superiority vis-à-vis the ECtHR. Rather, the Court's reasoning is open-ended and "*leaves the Court free to embrace the international human rights law and the ECHR in particular just as much as to deviate from it, depending on the circumstances of future cases.*"[416]

The sovereignty argument was also used as the *prima facie* reason in the arguments of the Russian authorities against the Magnitsky Act whereby adoption of the Russian children by US citizens was banned to protect national sovereignty, in the so-called Dima Yakovlev Act.[417]

Thus, even when formally Russia is following the international human rights standards it has recognized, application of these standards often faces a shortfall. Frei and MacLaren noted already in 2004 that, while formally Russia follows its international obligations and treaties, it nevertheless gives a different meaning to the concepts used in treaties and instruments:

> *It appears to many observers, however, as if this desire to integrate fully into the international order has given way to disillusionment with the West and even a willingness to reject its standards.*[418]

At the same time, Russia has signed up to most of the international human rights instruments. The sovereignty argument would here support the view that Russia has accepted the wording of the CRC; but does not see the practice of the CRC Committee as binding. Therefore, even if the CRC Committee gives authoritative interpretations, they are not of the same legal force as the provisions of the treaty itself. Therefore, it can be concluded that Russia views the instruments deriving from the political dialogue as soft law or as law that does not have any effect.

As practice shows, international human rights treaties are used in Russia in order to support conclusions based on national law and practice. This means that the real substance of the international obligations is not analysed, or at least, this analysis is not obvious from the practice. Furthermore, human rights arguments are not used to introduce change in the legal system – this is not seen as the role of judiciary. All legislative initiatives have to come from the President or the State Duma and the practice of the courts should uphold the legislation as far as possible.

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[416] Grigory Vaypan, "Acquiescence Affirmed, Its Limits Left Undefined: The Markin Judgment and the Pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights," *Russ. Law J.* 2, No. 3 (February 7, 2015), 131.

[417] Federal'nyy zakon "O merakh vozdeystviya na lits, prichastnykh k narusheniyam osnovopolagayushchikh prav i svobod cheloveka, prav i svobod grazhdan Rossiyskoy Federatsii" (Federal Law on measures against persons involved in violations of fundamental human rights and freedoms, rights and freedoms of citizens of the Russian Federation), N 272-FZ (2012).

[418] Michael Frei and Malcolm MacLaren, "A 'Common European Home'? The Rule of Law and Contemporary Russia," *German Law Journal* 5, No. 10 (2004): 1296.

5 Concluding remarks

A primary analysis of the constitutional systems of the three states shows that despite the monist-dualist divide between them, fundamentally, their attitude towards the position of international law and the supervisory practice of the treaty bodies does not differ. Thus, I have to agree with Paulus, who states:

> *The relationship between international and local law – and even less so between international and domestic courts – cannot be described by a simplistic monist or dualist framework. Rather, in the contemporary world, every legal regime must relate, by one way or another, to other legal systems and their judicial 'products.'*[419]

All the three states value their international treaty obligations. Thus, the first hypothesis of this chapter is confirmed – all the three states consider international human rights as part of their national legal system. There are no differences in this attitude based on the observance of monist-dualist approaches, and the high regard to international human rights does not depend on the chosen approach to international law.

In their domestic practice, all three states apply or at least refer to both international treaties and their supervisory practice. This, at least partially, confirms the second hypothesis of the first chapter – all three states deem the practice of the international supervisory bodies at least somewhat binding.

UN human rights instruments are not at the centre of this practice; rather, the ECHR and the practice of the ECtHR is referred to. Only in limited cases have UN instruments and the CRC in particular been applied. However, references have been made to the CRC at all levels of power – in legislative procedure, as well as in the courts. The research does not clearly show whether any of these references really indicate the supremacy of international human rights over national law.[420] It is still proposed that Estonia and Finland consider the instruments of the UN treaty bodies as binding, whereas Russia considers these tools to represent the voluntary soft law.

It is possible that reference style and substance might be dependent on the central values of the national legal system as considerably larger differences exist in the central values of the legal systems analysed. The Finnish legal system has a strong belief in legality and the power of the legislator together with separation of powers. The Russian legal system has similar support or

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[419] Andreas Paulus, "A Comparative Look at Domestic Enforcement of International Decisions," *Am. Soc'y Int'l L. Proc*. 103 (2009): 47. These ideas were further developed in Andreas Paulus, "From Dualism to Pluralism: The Relationship between International Law, European Law and Domestic Law," in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, ed. Pieter H. F. Bekker et al. (Cambridge: Cambridge Univ. Press, 2010), 132–53.

[420] For an analyses of "the last word" problem, see e.g., Gertrude Luebbe-Wolff, "Who Has the Last Word? National and Transnational Courts – Conflict and Cooperation," *Yearbook of European Law* 30, No. 1 (2011): 86–99.

belief in the legislator, but the separation of powers seems to be less relevant. There is also a strong emphasis on national pride and, in recent years, a new emphasis on traditional values. The Estonian legal system stresses liberal values. This is also reflected in a strong emphasis on the separation of powers. The legal culture expresses itself also in the practice – references to international supervisory practice are much more general in Finland and Russia than in Estonia.

Thus, it could be suggested that instead of the monist-dualist distinction, application of rights might rather reflect these value systems, so that the universalism-relativity discussion might prove to be a more relevant framework for analysing the national implementation of the CRC.

CHAPTER 2
Application of selected rights of the child in Estonia, Finland, and Russia

Before embarking on a substantive analysis of the national application of the rights of the child in the countries of Estonia, Finland, and Russia, the basic principles that guide analysis of the implementation of the Convention has to be sketched. Current chapter concentrates on the implementation practice and its central hypothesis is that the three states do not fulfil the minimum requirements set forth, and, at least some of them use culture or traditional values arguments as justification. Finding precise causes of change in *de lege lata* is often a gruesome task; thus, the current chapter concentrates on the existing law in force and uses other sources such as the court cases, opinions and statements of the CRC Committee as complementary proof of the *de lege lata*.

The current analysis is systematized according to the substantive themes of the CRC. The topics researched follow to some extent the way the CRC Committee has systematized the obligations of the state;[421] the obligations analysed fall under the general obligations of states that govern application of all other substantive rights in the CRC. The general principles analysed in the current study are:

1. Definition of child (art. 1 CRC), and
2. Best interests of the child (art. 3 CRC).

Both of these norms are formulated in general terms in the CRC and have thus required further explanation and interpretation through the practice of the CRC Committee. It is proposed that a harmonization vision is behind the work of supervisory committees when the Committee and other supervisory institutions scrutinize national legislation and implementation practice by states against the standards of international law. The practice of the ECtHR and ComER of the Council of Europe also has relevance here – besides the standard of the CRC, the states have to apply these norms taking into account the practice of the European framework. This is especially important when regional instruments provide stronger protection.

In order to systematize material rights for the purposes of the current dissertation these general principles are reviewed separately. Within the analysis of application of this right when necessary, the application of other general principles as well as substantive provisions are looked at. In every substantive issue, a minimum core standard is found and the practice of the state is evaluated against this standard in order to conclude whether the practice of the respective state complies with the standard or whether the state has used some

[421] CRC Committee, "Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports."

cultural or legal arguments in order to apply the right differently. This is followed by a short insight into the evaluation and argumentation or lack of it by the CRC Committee, whereby the clarity and application of the standard used could be evaluated – it is interesting in the context of the current research to see whether the standards listed are the minimum standards that, in the opinion of the CRC Committee, the member states should implement or whether there also exists an element of progressive realization in their implementation.

The following analysis first looks at different definitions of a child (art. 1 CRC), with examples brought from the following areas – marriage, sexual consent, employment and conscription. Secondly, the central principle of the rights of the child i.e., the principle of best interests is looked at. Here the examples of placement into care and family reunification are analysed.

In order to analyse the application of international soft law in national legal systems, Keller and Grover have listed several factors that are relevant for determining compliance.[422] For the purposes of the current research, the following factors are deemed relevant.[423]

(1) The linkage between the norm and hard law established by the international legal system or by domestic legal systems. Here, complementary international law norms (deriving from ILO Conventions, the ECHR, the ESC (revised) and the practice of the ECtHR are relevant. Additionally, national constitutional provisions and, in particular, domestic legislation inspired by international law are analysed. The link between these instruments need not be explicit; it could be deemed sufficient when the linkage is made by the CRC Committee itself in soft law instruments.
(2) The linkage of the norm to other 'soft' norms. Other UN treaty bodies often analyse application of the relevant treaty in relation to children. Thus, the existence of complementary soft law from e.g. other treaty bodies shows a wider consensus on the substance of the soft law norm.
(3) The relationship of the norm to past practices. Consistency in time as well as consistency in applying these norms vis-à-vis all the member states is thus relevant.
(4) The clarity of the obligation and the ability of others to determine whether the target of the norm is in compliance or not. As is shown below, the minimum requirements of some obligations are clearer than others. The current analysis does not aim to expand the minimum obligations protected by the CRC; rather, it remains conservative in its definitions.
(5) The legitimacy of the process by which the norm was created. The minimum obligations analysed in the current thesis have been mostly defined through the General Comments of the CRC Committee. Although they

[422] Keller and Grover, "General Comments of the Human Rights Committee and Their Legitimacy," 138–39.

[423] See also generally on compliance Jonathan L Charney, "Commentary Compliance With International Soft Law," in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford University Press, 2003).

represent the view of the CRC Committee, the drafting process includes analysis of past practice; consultation with the states parties through days of general discussion and possible acceptance of written communications. All the General Comments are also presented for potential discussion in the UN Human Rights Council as well as the General Assembly. Thus, the legitimacy of the process is not a question for the current analysis.

I Definition of a 'child'

Before the application of the rights of the child is possible, it has to be ascertained who is a child i.e., whose rights are protected by the CRC. The definition of child stipulates who in international law as well as in the national legal systems is defined as a child and has through this status the right to the protection provided by the CRC. At the same time, even within the same state the upper age limit of the status of child is set at various ages depending on the domain concerned. Hence, the age for marriage may be younger or older, for instance, than the age of criminal culpability or the legal age of recruitment into the armed forces, all within the same state. Further, married children are, in practice, excluded from the protections afforded to unmarried children under the Convention on the Rights of the Child.[424]

Compliance with a numerical definition or requirement is comparatively easy to analyse as well as for a member state to legislate. This is an area where the precision of legislation has a central role. A number of age limits might be of interest. For the current research, the following general areas have been selected for analysis – child marriage, minimum age of employment, enlistment in armed forces, sexual consent. The selected topics are all also culturally sensitive and are often mentioned in relation to relativist arguments but they have also been mentioned by the CRC Committee as having particular importance for protection of the rights of the child.[425] The list of the CRC Committee also includes other issues such as the minimum age for criminal responsibility, juvenile justice as well as the rights of the child in different court procedures. However, analysing these elements of the definition of a child in the three states would require going into too much detail in the particular area of material law, which would shift the focus from the general picture to details of specific domestic legal conceptions and procedures.

[424] See also discussion in Sonja Grover, "Children's Rights as Ground Zero in the Debate on the Universality of Human Rights: The Child Marriage Issue as a Case Example," *Original L. Rev.* 2 (2006): 72.

[425] CRC Committee, "Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports," para. 24.

1.1 Definition of a 'child' in international human rights

Article 1 of the CRC defines a child as "*every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*" This definition applies as a general principle to all substantive provisions of the convention and defines the subjects of the convention. In doing so, Article 1 defines the subject of the CRC itself, but it does not address the issue of when the life of a child begins and is inherently neutral on the pro-choice/pro-life debate.[426] Art. 1 is worded vaguely; it, in principle, gives the states a right to grant a majority to children earlier. Thus, the CRC Committee has defined areas where attaining majority earlier is against the aim of the CRC and where specific age limits should be followed.

Such definitions are clearly rules that entail obligations to conduct and result – these requirements should be included in respective laws, and they have to be applied in practice without derogations. It would be against the aim and purpose of the CRC to consider the age limits as soft law, even if these definitions do not derive directly from the wording of the CRC and are, in substance, defined by the CRC Committee.

Age limits are often also connected to cultural considerations such as the child and planned marriages, early sexual consent; different age limits for boys and girls are examples of such traditional cultural practices. Thus, the attitude of the CRC Committee in defining the minimum requirements and also supervising adherence to these requirements would reveal its attitude towards relativity arguments. Similar attention to age limits in developed countries and European countries would send a strong signal to all countries suggesting that there are no double standards applied among the states. At the same time, the age limits have been defined through the practice of the CRC Committee, so that and, therefore, the attitude of the member states towards these requirements would show whether they regard these limits as obligatory.

The age limit in article 1 is not fully fixed as it does allow for derogations from the designated age of majority in instances where the legal age of majority in a given country is less than eighteen years old. At the same time, article 1 does not allow for the age of majority used by a state to be more than eighteen years old.

In general, minimum ages that are protective should be set as high as possible (for example protecting children from hazardous labour, criminalization, custodial sentences or involvement in armed conflict). Minimum ages that relate to the child gaining autonomy and to the need for the state to respect the child's civil rights and evolving capacities, demand a more flexible system, sensitive to the needs of the individual child. Some minimum age issues relate both to increased autonomy and to protection. For example, the child's right to seek legal and medical counselling and to lodge complaints without parental consent,

[426] Detrick, A Commentary on the United Nations Convention on the Rights of the Child, 53–57.

and to give testimony in court, may be crucial to protection from violence within the family. It is not in the child's interests that any minimum age should be defined for such purposes.[427]

Porterfield and Stanton have argued that when international agreement permits each state to decide at what age childhood ends and when adulthood begins, this could destroy the international uniformity of the CRC and thus might lead to unequal treatment of children based solely on their national domicile.[428] As the CRC Committee also looks for inspiration from other sources or central international treaties, the definition in art. 1 is complemented with a number of specific provisions of the ICCPR and ICESCR that apply to 'a child',[429] 'children',[430] 'young persons'[431] or 'juvenile persons'.[432] All of these terms encompass the definition provided in the CRC. According to Alston, the aim of the definition of a child in the CRC was to maximize the protection given to children and ensure that the rights protected would apply uniformly to as large an age group as possible.[433]

Therefore, the definition of a child is wide and indefinite; allowing states to limit application of the convention in case majority is achieved earlier. Majority as a general term in art. 1 of the CRC refers to full legal capacity.

Setting an age for the attainment of certain rights or for the loss of certain protection is complex. It requires balancing the rights of a child as a subject and whose evolving capacities must be respected (acknowledged in arts 5 and 14 of the CRC) with the concept of the state's obligation to provide special protection. On some issues, the Convention and its interpretation practice sets a clear line – no capital punishment or life imprisonment without the possibility of release for those under the age of 18 (art. 37); no recruitment into the armed forces or direct participation in hostilities for those under the age of 15, preferably not before 18 (art. 38 and the Optional Protocol on the involvement of children in armed conflict). On other issues the CRC is less concrete and gives states a margin, and usually setting a minimum age for different acts, such as

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427 See further analysis of art. 1 in Rachel Hodgkin, Peter Newell, and UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (New York: UNICEF, 2007).

428 "The Age of Majority: Article 1," *N.Y.L. Sch. J. Hum. Rts.* 7 (1990 1989): 31.

429 Arts 10 and 14 of the ICCPR.

430 Arts 14, 18, 23 of the ICCPR; arts 10 and 13 of the ICESCR.

431 Art. 10 of the ICESCR.

432 Arts 10 and 14 of the ICCPR.

433 Philip Alston, "The Legal Framework of the Convention on the Rights of the Child," *Bulletin of Human Rights* No. 91/2 (1992): 1–15. It has to be noted that the CRC does not answer whether it also protects the rights of the foetus or an unborn child. This question was left open to interpretation. The legislative history of article 1 is provided in the compendium by the OHCHR, *Legislative History of the Convention on the Rights of the Child, Vol. I* (New York and Geneva: HR/PUB/07/1, United Nations, 2007), 301–12.

employment (art. 32 CRC), criminal responsibility (art. 40 CRC), and regulation of compulsory education.[434]

When states legislate these minimum ages, all the general principles of the CRC have to be taken into account including the principle of non-discrimination (art. 2), the best interests of the child (art. 3), the evolving capacities of the child (art. 5) and the right to life and maximum survival (art. 6). As the CRC Committee has underlined:

> *young children are holders of all the rights enshrined in the Convention. They are entitled to special protection measures and, in accordance with their evolving capacities, the progressive exercise of their rights.*[435]

The Human Rights Committee (HRC) confirmed in its General Comment No. 17 the need to protect all children under the age of 18:

> *The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. In this respect, States should indicate ... the age at which the child attains his majority in civil matters and assumes criminal responsibility. States should also indicate the age at which a child is legally entitled to work and the age at which he is treated as an adult under labour law. States should further indicate the age at which a child is considered adult …. However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.*[436]

European human rights treaties do not specify further the age of maturity; however, some CoE recommendations define children as anyone younger than 18[437] and this approach is also followed by the ECtHR.

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[434] See analysis of the obligations under art. 1 Hodgkin, Newell, and UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 1–10.

[435] CRC Committee, "General Comment No. 7: Implementing Child Rights in Early Childhood" (CRC/C/GC/7/Rev.1, September 20, 2006), para. 3.

[436] HRC, "General Comment No. 17: Article 24 (Rights of the Child)" (HRI/GEN/1/Rev.9 (Vol. I), 1989), para. 4.

[437] Council of Europe, Committee of Ministers, "Recommendation CM/Rec(2012)2 of the Committee of Ministers to Member States on the Participation of Children and Young People under the Age of 18" (CM/Rec(2012)2, March 28, 2012), 6. In Council of Europe member states, 18 years is the usual age of majority. While the UNCRC defines people under 18 as children, in daily discourse the term "young people" is often used to describe people older than 12 or 13 years. Also, people who are 13 to 17 years old commonly identify themselves as "young people" rather than as "children" and often prefer to be addressed as such. For statistical purposes, the UN defines persons between the ages of 15 and 24 as youth. This definition is without prejudice to the legal definition of the child provided in the UNCRC and other relevant international treaties.

1.1.1 Child marriage

At the time when the Human Rights Council adopted resolutions supporting wider recognition of traditional values, it was passing other resolutions in efforts to prevent child marriages and forced marriages[438]. In these resolutions 'traditional values' and practices were seen as a threat to human rights standards. Child marriage is thus an example of a practice where the justification of culture and tradition is a commonplace, albeit it is a cultural practice related to the "south".

The CRC does not regulate the right nor does it prohibit child marriage as such: this has rather been an issue under the CEDAW.[439] Askari has even proposed that this is why the CRC does not adequately protect and promote the rights of female children. The absence of a provision against child marriage is such an example. While the CRC was designed to be gender blind, violations that primarily affect boys (i.e., child soldiers) are covered under CRC article 38. The same consideration is not given to violations predominantly affecting girls, that is, specifically child marriage.[440]

In its General Comment No. 4 on "Adolescent health and development in the context of the Convention on the Rights of the Child", the Committee expresses concern:

> *early marriage and pregnancy are significant factors in health problems related to sexual and reproductive health. Both the legal minimum age and the actual age of marriage, particularly for girls, are still very low in several states parties. There are also non-health-related concerns: children who marry, especially girls, are often obliged to leave the education system and are marginalized from social activities. Further, in some states parties married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled to under the Convention. The Committee strongly recommends that states parties review, and where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.*[441]

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438 Human Rights Council, "Strengthening Efforts to Prevent and Eliminate Child, Early and Forced Marriage: Challenges, Achievements, Best Practices and Implementation Gaps" (A/HRC/RES/24/23, September 27, 2013).

439 Elimination of child marriage (in global practice often connected with some form of violence against girls e.g., with forced or planned marriage) has long been an issue for the CEDAW Committee, which in this connection has always also referred to the CRC. See also CEDAW Committee, "General Recommendation No. 21. Equality in Marriage and Family Relations," 1994.

440 Ladan Askari, "Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages, The," *ILSA J. Int'l & Comp. L.* 5 (1999 1998): 123–24.

441 CRC Committee, "General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child" (CRC/GC/2003/4, July 1, 2003), para. 20.

This view was stressed even more strongly at the end of 2014 when the CRC Committee adopted its formal position on child marriage through its GC 18.[442] Thus, although the CRC does not *per se* include prohibition of child marriage, this prohibition has been derived from art. 18 of the CEDAW and CRC Committees, child marriage is defined as a marriage where at least one of the parties is fewer than 18 years old. The committees continue:

> *A child marriage is considered as a form of forced marriage given that one or both parties have not expressed their full, free and informed consent. As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions.*[443]

Thus, even if some derogations are allowed, the minimum core criteria should be that marriage of children can be allowed only to children of 16 and older; this should be the child's own decision uninfluenced by other parties (including parents); and that allowing the marriage should follow a strict procedure supervised by a judge without taking into account culture and tradition. This view was supported by the UN General Assembly which in December 2014 adopted a resolution calling upon the member states to eliminate child marriages.[444]

None of the sample states has a distinct culture or tradition that has required or accepted child marriage or forced or planned marriages. Thus, it could be presumed that all the sample states follow the minimum criteria or even fully prohibit child marriage.

1.1.2 Sexual consent

The CRC requires that a minimum age is set below which children are judged incapable of consenting to any form of sexual activity with others. The definition of sexual abuse and exploitation includes not only conduct involving violence or other forms of coercion, but also all sexual conduct with a child below a certain age, even when it was or appeared to be consensual.[445] Consequently sexual intercourse with a child below the age of consent involves criminal responsibility and renders the perpetrator automatically liable to a charge of rape.[446]

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442 CRC Committee and CEDAW Committee, "General Comment No. 18."

443 *Ibid*., para. 19.

444 UN GA, "Child, Early and Forced Marriage" (A/RES/69/156, December 18, 2014).

445 Hodgkin, Newell, and UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*. See discussion on art. 19 on p. 257 and on art. 34 see p. 523.

446 It has to be noted that sexual consent is also connected to possible sexual exploitation of children prohibited in OP SC and the legal consent of a child is not a valid basis for such

The CRC Committee has emphasized the importance of setting a minimum age below which a child's consent is not to be considered valid. The Committee has proposed to various countries that the age set for sexual consent should be raised, but has not proposed that it should be raised to 18. In this context, the CRC Committee refers to the need to set a minimum age for sexual consent and marriage (see below) and has stated:

> *These minimum ages should be the same for boys and girls (article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity (arts. 5 and 12–17).*[447]

It may be assumed that the status of marriage implies an ability to consent to sex with one's partner. The age of sexual consent is closely connected with the right to non-discrimination. First and foremost, the age for the sexual consent of boys and girls should be the same; furthermore, there should be no differentiation relating to sexual orientation. The guidelines for periodic reports asked whether the non-discrimination requirements of the Convention's article 2 have been given ample consideration "*in cases where there is a difference in the legislation between girls and boys, including in relation to marriage and sexual consent...*"[448]

The Committee has expressed concern at disparities between ages of consent to heterosexual and to homosexual activities, which amount to discrimination on the grounds of sexual orientation:

> *concern is expressed at the insufficient efforts made to provide against discrimination based on sexual orientation. While the Committee notes the Isle of Man's intention to reduce the legal age for consent to homosexual relations from 21 to 18 years, it remains concerned about the disparity that continues to exist between the ages for consent to heterosexual (16 years) and homosexual relations. It is recommended that the Isle of Man take all appropriate measures, including of a legislative nature, to prevent discrimination based on the grounds of sexual orientation and to fully comply with article 2 of the Convention.*[449]

At the same time, this time-limit should not relate to the right of a child to sexual education as well as reproductive information and services.[450] Thus, the minimum requirements of the CRC concerning sexual consent are:

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activities. UN GA, "Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography."

447 CRC Committee, "General Comment No. 4," para. 9.

448 CRC Committee, "Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports," para. 24.

449 CRC Committee, "Concluding Observations: United Kingdom – Isle of Man (initial Report)" (CRC/C/15/Add.134, October 16, 2000), para. 22–23. See also CRC Committee, "Concluding Observations: United Kingdom – Overseas Territories (initial Report)" (CRC/C/15/Add.135, n.d.), para. 25–26.

450 See further CRC Committee, "General Comment No. 15."

1. the age of sexual consent is set and sexual intercourse with a child below that age is criminalized;
2. the age of sexual consent does not have a discriminatory effect either between boys and girls or relating to sexual orientation;
3. the age of sexual consent corresponds with the age of marriage.

1.1.3 Minimum age of employment

Article 32 of the CRC requires states to protect children from *"any work that is likely to be hazardous or to interfere with the child's education"*, to *"provide for a minimum age or minimum ages for admission to employment"* and to *"provide for appropriate regulation of the hours and conditions of employment."* The CRC Committee has, in several cases, recommended that the minimum age for employment should be raised; and has frequently recommended that states should ratify the relevant ILO Conventions on the minimum age for employment.[451]

Article 32 requires states to protect the child from any work that is likely to interfere with the child's education. The CRC Committee has indicated the need to coordinate the age at which compulsory education ends with the age for access to full-time employment.[452] In several cases, the Committee has expressed concern at "discrepancies" between these ages and proposed "*an equal age.*"[453]

The Revised ESC[454] and the practice of the EComSR differentiate between children of different ages and grant some groups of children more protection than others. This differentiation depends on the rights in question. Article 7 of the Charter deals with balancing the work related rights of children. For example it defines the minimum age of admission to employment – at 15 years in general (para. 1), 18 years in the case of dangerous or unhealthy work (para. 2) while prohibiting work by children who are subject to compulsory education (para. 3). The minimum age for work is also established at 15 in ILO Convention No 138 on Minimum Age.[455]

In addition, these requirements should be implemented taking into account that the right to the highest attainable standard of health of the child is protected

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[451] The ILO has adopted a number of general as well as field specific conventions. For the full list, see e.g., http://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang--en/index.htm (accessed March 29, 2015). Recently, the CRC Committee has referred to the following instruments as relevant: Minimum Age Convention (No. 138), ILO; and Worst Forms of Child Labour Convention (No. 182), ILO. See also Hodgkin, Newell, and UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 481.

[452] Hodgkin, Newell, and UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 495.

[453] *Ibid*., 496.

[454] For a detailed overview of individual provisions, see e.g., European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights.*, 2008.

[455] Minimum Age Convention (No. 138), *supra* note 386.

(art. 24)[456] and the right of the child to child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31).[457]
Thus, the minimum standard derived from the practice of the CRC Committee can be defined as follows:

1. the minimum age of employment is set at 15 years; if possible, corresponding with the end of compulsory education or taking account the educational needs of the child;
2. adoption of the relevant ILO Conventions, Convention No. 138 in particular.[458]

Limiting the right of the child to work is a protective and paternalistic measure. Nevertheless, in a modern society, children younger than 15 do work. This might be due to family needs where a child has to bring food to the table in order for the family to survive. It might also be the wish of the child or the parents to earn some additional money (such as child models, children in the cinema, newspaper boys, work related to IT).

It can be concluded that the CRC does not sufficiently regulate labour issues. Thus, without appropriate legislation together with an official ban on work, the protection granted to children is insufficient and is not in the best interests of the child. The CRC has recognised this problem and asks states for information about the hidden economy and, in particular, information about street children. At the same time, this could also be a case where the division of work between different institutions (the CRC Committee, the ILO Committee and on the regional level the EComSR) works well and there is no need for the CRC Committee to look at the minimum age of employment more thoroughly.[459]

It would be interesting to see whether the states have understood the limitations of the CRC and whether they have adopted more elaborate standards that would suit today's world. In addition, it would be interesting to see whether the CRC Committee accepts such arguments.

1.1.4 Voluntary enlistment and conscription into armed forces

Article 38 of the CRC requires states to refrain from recruiting into their armed forces anyone who has not attained the age of 15, and, in recruiting children between the ages of 15 and 18, "*to give priority to those who are oldest*". It prohibits both voluntary enlistment as well as conscription of children into armed forces. In addition states parties must "*take all feasible measures to*

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456 CRC Committee, "General Comment No. 15."
457 CRC Committee, "General Comment No. 17 on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (art. 31)" (CRC/C/GC/17, April 17, 2013).
458 This requirement is particularly interesting as it requires taking additional obligations on the state and subjecting the state under additional supervision by the ILO Committee.
459 This is unfortunately an issue that would fall outside the scope of the current research.

ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities".

In May 2000 the United Nations General Assembly adopted the Optional Protocol to the Convention on the involvement of children in armed conflict[460] to increase protection. This requires states parties to it to ensure that nobody under the age of 18 is compulsorily recruited into their armed forces and to "*take all feasible measures*" to ensure that under-18-year-old members of their armed forces do not take a direct part in hostilities (art. 2 of the Protocol).

The obligation under the Optional Protocol should also be followed by the armed groups in the territory of states as states must take all feasible measures to prevent recruitment and use by armed groups in hostilities of children under 18 years by armed groups. States have to define their minimum voluntary conscription age when ratifying the OP on Children in Armed Conflicts. States parties to the Optional Protocol must rise "*in years*" the minimum age for voluntary recruitment, set at 15 in the Convention.[461] The CRC Committee has commended States that have set a higher age limit on recruitment than 15 and that have ratified the Additional Protocols to the Geneva Conventions.[462] It has further recommended that states adopt the relevant Optional Protocol to the CRC.

All these requirements are complemented by international criminal law, which has criminalized as a war crime conscripting or enlisting children under the age of 15.[463] Further, on 14 March 2012, the International Criminal Court found Thomas Lubanga Dyallo guilty as a co-perpetrator in the use of child soldiers. This was the first case completed by the ICC.[464] Thus, one of the requirements stressed by the CRC Committee also includes national criminalization of involving children in armed forces.[465]

Thus, the minimum requirements for enlistment in armed forces under the CRC are:

1) The minimum age for voluntary recruitment and conscription is set at 15 years; this age limit should be gradually raised to 18; no child should take part in direct hostilities.

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460 UN GA, "Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict."

461 For full discussion see Hodgkin, Newell, and UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 659–65.

462 See e.g., CRC Committee, "OPAC Concluding Observatons: New Zealand" (CRC/C/OPAC/CO/2003/NZL, 2003), chap. C.

463 As an example, art. 8 (2) b (xxvi) of the ICC statute prohibits as a war crime: Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. Rome Statute, UN GA, A/CONF.183/9; the Statute entered into force on 1 July 2002.

464 The Prosecutor v. Thomas Lubanga Dyilo, [1 December 2014] ICC-01/04-01/06 (Appeals Chamber).

465 See e.g., CRC Committee, "OPAC Concluding Observations: Finland" (CRC/C/OPAC/FIN/CO/1, October 21, 2005), para. 3.

2) The minimum age for voluntary conscription is 15; this limit should be raised to 18.
3) Criminalization of earlier enlistment in armed conflict.

Conscription in armed forces is an important issue for all three states due to their historical background. As will be shown, they all have obligatory military service. Estonia has, besides regular defence forces, a strong voluntary Defence League together with its youth organisations. Finnish history has required enactment of a strong obligation to participate in national defence.

1.2 Definition of a 'child' in Finland

There were 1,212,105 children (i.e., persons under 18 years of age) living in Finland in 2013.[466] They all have the protection provided to children. Article 6 § 3 of the Finnish Constitution[467] emphasises the special position of children as well as their need for specific protection:

> *"Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development."*

In Finnish legislation, a person who has not attained 18 years of age is a minor. In accordance with art. 6 of the Child Welfare Act[468] a person under 18 years of age is considered a child and a person 18 to 20 years of age is regarded as a young person. The legislation, however, contains numerous provisions granting a minor, by means of derogation, the right to decide matters concerning him or her or the right to participate in the decision making. As an example, according to art. 89 (5)[469] of the Child Welfare Act, a child who is at least 12 years old has the right the right to appeal in child welfare matters concerning themselves. The High Administrative Court has found that this right includes the right to receive information on decisions concerning them; this age limit, however, is to be interpreted strictly.[470]

In general, the Ombudsman for Children in Finland has noted two inconsistencies with the definition of the child in her supplementary report to the CRC Committee[471] and stated that there exist two areas where the age limit has been set too low in laws, in effect hindering full protection of the rights of

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466 Population, http://tilastokeskus.fi/tup/suoluk/suoluk_vaesto_en.html.
467 Art. 6 of the Suomen perustuslaki (The Constitution of Finland), 11.6.1999/731, AMENDED 1112/2011 (1999).
468 Child Welfare Act, 417/2007 English.
469 Latest change 12.2.2010/88.
470 5.11.2010/3137 Case no 1543/2/09 (KHO).
471 Office of the Ombudsman for Children, "Report to the UN Committee on the Rights of the Child – Supplementary report to Finland's 4th Periodic Report January 2011".

children. According to the Child Allowances Act[472], a child is entitled to a child allowance until their 17th birthday. It is the view of the ombudsman that this entitlement should be extended to the 18th birthday.[473]

Disability benefits for disabled or chronically ill persons are determined differently depending on whether they are under or over 16 years of age (Act on Disability Benefits[474]). Art. 2 of the Act entitles a child under the age of 16 to disability benefit if the treatment, care and rehabilitation required by their illness, disability or injury causes unusually great stress and commitment for a period of at least six months compared to a healthy child of the same age. This benefit ceases when the child turns 16, after which the individual/she is covered by the same provisions as disabled and chronically ill adults. The size of the benefit does not change, but the eligibility requirements are stricter after the age of 16. According to the view of the ombudsman, all disabled persons under the age of 18 should be treated the same way.[475]

Child protection in Finland is strongly decentralised and all the obligations relating to the organisation as well as administration of child protection services fall on the shoulders of local government. Central regulation of child protection was revised in 2007 when the new Child Welfare Act was adopted; this law detailed the methodology of child protection, gave directions concerning work processes and emphasized the importance of prevention and flow of information.[476]

1.2.1 Marriage

The right to marry in Finland is generally given to persons older than 18[477]. The Ministry of Justice may, however, for special reasons grant a person under 18 years of age a dispensation to marry. Before the matter is decided, the custodian of the minor is offered an opportunity to be heard (art. 4 (2) Marriage Act). It has to be noted that the law sets forth no minimum age limit for the application of art. 4 (2). Furthermore, no judicial process is required for establishing the will of a minor; instead, the law gives an opportunity for the legal guardians of the minor to express their opinion. The law does not clearly state that judicial control is available or that the opinion of the child is heard.

Nevertheless, legal practice shows that the right to marry at an earlier age is granted only for "special reasons" and this has not included e.g. arguments

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472 Art. 1 of the Lapsilisälaki (Child Allowances Act), 21.8.1992/796.

473 Office of the Ombudsman for Children, "Report to the UN Committee on the Rights of the Child – Supplementary report to Finland's 4th Periodic Report January 2011," 13.

474 Art. 1 of the Laki vammaisetuuksista (Act on Social Assistance), 11.5.2007/570.

475 Office of the Ombudsman for Children, "Report to the UN Committee on the Rights of the Child – Supplementary report to Finland's 4th Periodic Report January 2011," 13.

476 See further: Sosiaali- ja terveysministeriö, "Toimiva lastensuojelu. Selvitysryhmän loppuraportti." (Sosiaali- ja terveysministeriön raportteja ja muistioita 2013:19, 2013).

477 Art. 4 of the Avioliittolaki (Marriage Act), 234/1929.

where the domestic law of the spouse allows for an earlier marriage. The High Administrative Court has stated that "*16 years can be considered as the minimum age below which when entering marriage is held to be contrary to the Finnish legal system.*"[478]

Thus, regulation is not formally in conformity with the standards set forth in GC No. 18 or the CEDAW Committee, in that it does not follow the age limit of 16 proposed by the committees, nor does it include supervision by the court. The practice of the state seems, however, to follow the appropriate age limit. Interestingly, the CRC Committee has not commented on this discrepancy either during constructive dialogue or in the Concluding Observations, nor has it been noted by the CEDAW Committee. At the same time, Finland has supported adoption of the UN GA Resolution "Child, early and forced marriage".[479] Adoption of the resolution also raised the issue in the Finnish media, calling for the abolition of child marriage.[480]

1.2.2 Sexual consent

The Criminal Code[481] criminalizes sexual offences against children. A person who has sexual intercourse with a child younger than 16 years of age or otherwise performs a sexual act with a child younger than 16 years of age can be sentenced for sexual abuse of a child to imprisonment for a maximum of four years. Attempted abuse is also punishable.[482]

If the victim of sexual abuse is a child whose age or stage of development is such that the offence is conducive to causing special injury to him/her, is committed in an especially humiliating manner, or conducive to causing special injury to the child owing to the special trust he/she has put in the offender or the special dependence of the child on the offender, the offender can be sentenced for aggravated sexual abuse of a child to imprisonment for at least 1 year, with a maximum of 10 years. An attempt is also punishable.[483]

The purchase of sexual services from a young person, that is, a person who is younger than 18 years of age is a punishable act.[484] Procurement or soliciting is also punishable if it involves a person under the age of 18.[485]

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478 5.12.2005/3219, KHO:2005:87 (KHO).

479 UN GA, "Child, Early and Forced Marriage."

480 Kristiina Markkanen and Aleksi Teivainen, "UN Urges Finland to Prohibit Child Marriage," *The Helsinki Times*, December 9, 2014, Finland section, http://www.helsinkitimes.fi/finland/finland-news/domestic/12986-un-urges-finland-to-prohibit-child-marriage.html (accessed March 27, 2015).

481 Rikoslaki (The Criminal Code), 39/1889.

482 See ch. 20 sec. 5 (amended by 563/1998) and ch. 20 sec. 6 (amended by 540/2011).

483 Ch. 20 sec 7 (amended by 540/2011).

484 Ch. 20 sec 8a amended by 743/2006 and 540/2011.

485 Ch. 20 sec 8b.

Production, possession and dissemination of obscene pictures of a child, that is, child pornographic material, are punishable acts since the beginning of 1999. These provisions are included in the Offences against Public Order, criminalized in the Criminal Code.[486]

Furthermore, persons working for the social, youth, education or health services now have a duty to report to the police any suspected cases of violence against children. All sexual offences committed against children are subject to public prosecution and are punishable even when committed in a country where they are not criminalized.

Finnish legislation clearly follows the requirements of the CRC Committee – the age of consent is generally 16, in some sexual offences also 18. The law does not make a distinction between boys or girls nor does it differentiate between sexual orientation; sexual relationships with those younger than 16 years are criminalized by law.

1.2.3 Employment

As required by ILO Convention No. 138 and art. 7 of the European Social Charter (revised), Finland has established a general minimum age for work at 15 years but this is allowed only to those who have completed their basic education.[487] Finland ratified ILO Convention No. 138 on 13 January 1976 and ILO Convention No. 182 on 17 January 2000.

Regarding the implementation practice of Finland, the EComSR found that:

> *The report states that occupational safety and health inspectors obtain information about young workers from the records that employers are legally obliged to keep and that there have been no statistics available on illegal work carried out by children under 15. The Committee notes also from another source that there were no reports of children engaged in work outside the parameters established by law.*[488]

Thus, the legal requirements of employment are in conformity with CRC requirements, even the recommendation to co-ordinate between the age of compulsory education and employment. There is, however, a suggestion from practice that a segment of children exists that do not fall under the allowed category but who nonetheless work. However, this was not brought up by the CRC Committee itself during the last constructive dialogue.

Rather, the dialogue and Concluding Observations of Finland brought up an issue that was previously not identified as part of the minimum core but that in in a way represents double standards or, more neutrally, progressive protection.

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486 Ch. 17 sec. 19, amended by 540/2011.

487 Laki nuorista työntekijöistä (Young Workers' Act), 19.11.1993/998.

488 EComSR, "Conclusions 2011: Finland" (EComSR, January 2012), 5.

According to this, Finland should make an effort to see that businesses in Finland also apply the same age limit in their businesses abroad.[489]

1.2.4 Voluntary enlistment and conscription into armed forces

The Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict entered into force in Finland in May 2002[490]. The Constitution of Finland obliges the participation in national defence (art. 127). Thus, when the ratification instrument of the Protocol was deposited, Finland submitted a declaration based on article 3 (2) of the Protocol according to which all persons recruited to serve in the national armed forces are at least 18 years of age and that the minimum age requirement applies to both men's compulsory military service and women's voluntary military service.[491]

The new Conscription Act[492] entered into force as from the beginning of 2008. The purpose of the reform was to amend the Act to comply with the requirements of the Constitution, updating it and making it more functional in all of its aspects. According to the Act, all Finnish men are liable for military service as from the beginning of the year in which they attain the age of 18 (art. 2 (1)). In comparison to what was already brought up in the Third Periodic Report and the First Periodic Report on the Implementation of the Protocol,[493] the only significant change brought about by the revision is that the legislation on conscription no longer contains provisions on entering military service voluntarily.

Thus, Finnish regulation fulfils the minimum age limit of the CRC and the OPAC. Curiously and uncharacteristically, Finland has delayed submission of its second report under the CRC OPAC for 10 years now, which and this hints at specific substantial problems in implementing the CRC OPAC.

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489 See CRC Committee, "Summary Records of the 1628th Meeting: Finland" (CRC/C/SR/1628, January 17, 2011), para. 31 and CRC Committee, "Concluding Observations: Finland (fourth Report)" (CRC/C/FIN/CO/4, August 3, 2011), para. 23.

490 Tasavallan presidentin asetus lapsen oikeuksien yleissopimuksen lasten osallistumisesta aseellisiin selkkauksiin tehdyn valinnaisen pöytäkirjan voimaansaattamisesta ja valinnaisen pöytäkirjan lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta annetun lain voimaantulosta, 31/2002 (2002).

491 Finland declared: "The Government of Finland declares in accordance with Article 3, paragraph 2, of the Optional Protocol that the minimum age for any recruitment of persons into its national armed forces is 18 years. The minimum age applies equally to the military service of men and to the voluntary service of women."

492 Asevelvollisuuslaki (Conscription Act), 1438/2007.

493 CRC Committee, "OPAC Concluding Observations: Finland." See also CRC Committee, "Concluding Observations: Finland (third Report)" (CRC/C/15/Add.272, October 20, 2005), sec. VIII A 2.

1.3 Definition of a 'child' in Estonia

The number of children in Estonia has decreased within the last four years and as of 2012, there is a total of 237,622 children in Estonia.[494] At the same time, the number of children without parental care and in need of state support has been constantly increasing within the last seven years.[495] These trends as well as the fact that the Estonian child protection system has remained basically the same since 1992 mean that the Estonian child protection system in 2014/5 has been undergoing substantive reform. The need for such reform was recognised already in 2003 when the CRC Committee gave its opinion on the Estonian initial report and recommended the overall process of harmonization of the child protection system including necessary regulations being made for the effective implementation of those legislative measures, including adequate budgetary allocation together with children's rights impact assessments.[496]

The Estonian Constitution gives special protection to children and families in its art. 27, but it does not give a definition of a child; moreover, basic rights provided in the constitution are in principle applicable to everyone.[497] Full enjoyment of rights might, however, depend on the age of the person as some rights are dependent on legal capacity.[498] The Constitutional Review Chamber of the Supreme Court has stated:

> *Due to the psychological and social immaturity of a minor he may, in certain circumstances, cause harm to himself and others more easily than an adult. Due to immaturity a minor, unlike the majority of adults, has limited legal liability. This justifies the need to impose on minors such legal restrictions that are usually not imposed on adults.*[499]

According to art. 2 of the Child Protection Act[500] (hereinafter CPA), a child is a person below 18 years of age. Passive legal capacity begins with the birth of the person and ends with his or her death. An adult person, i.e., a person of 18 years of age, has full active legal capacity according to the General Part of the Civil Code Act (hereinafter GPCCA).[501] According to art. 9 of the GPCCA a court

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494 Statistikaamet, "Loendatud püsielanikud emakeele ja soo järgi" (RLE02, December 31, 2011).

495 Heidi Ojamaa, "Eelmisel aastal võeti Eestis arvele 2808 vanemliku hoolitsuseta last," *Postimees*, May 16, 2013, Eesti uudised section, http://www.postimees.ee/1237474/eelmisel-aastal-voeti-eestis-arvele-2808-vanemliku-hoolitsuseta-last (accessed May 19, 2015). For full statistics see also Statistikaamet, "Aasta jooksul arvele võetud vanemliku hoolitsuseta ja abivajavad lapsed soo järgi" (SK30).

496 CRC Committee, "Concluding Observations: Estonia (initial Report)" (CRC/C/15/Add.196, March 17, 2003), para. 6.

497 Madise et al., Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne., 131.

498 See also *Ibid*., 130–32.

499 CRCSCd No. 3-4-1-3-97, (6 October 1997), para. I.

500 Lastekaitse seadus (Child Protection Act), RT I, 13.12.2013, 12.

501 Art. 8 (2) of the Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act.), RT I, 13.03.2014, 103.

has the right to extend the restricted active legal capacity of a minor who is at least 15 years old if this is in the interests of the minor and the level of development of the minor so permits. In that case, the court decides what transactions a minor is independently permitted to enter into. Here the consent of the parent is generally required; it is, however, in the discretion of the court to look after the best interests of a child in the case of their refusal (art. 9 (2) of the GPCCA).

Further regulation concerns children under seven years of age, whose unilateral transactions are void (art. 12 (1) of the GPCCA). On their behalf, transactions are entered into by a legal representative who is a parent, or exceptionally also a guardian appointed by the court. A minor under the age of seven may independently enter into a transaction by means have been granted to them for the purpose or for free use (art. 12 (2)).

The definition of child has been amended in the Child Protection Act in order to implement Directive 2011/36/EU.[502] The central principle of this directive is that if the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection granted to children (art. 2(2)[503] of the CPA). National law includes the same principle in the art. 17(10) of the Act on Granting International Protection to Aliens.[504]

The Estonian child protection system was scrutinized and analysed in 2013 in order to work out the new Child Protection Act. As result of this study, it was concluded that the Estonian child protection system has structural problems as it does not have one central coordinating and implementing organisation responsible for ensuring that different stakeholders co-operate effectively and efficiently and that protection of children's rights is assured in all domains of government intervention that have a direct or indirect impact on children. The research concluded:

> *Currently, the Ministry of Social Affairs co-ordinates the child protection system through the subordinate units of the Ministry of the Interior and county governments; however, the Ministry of Social Affairs does not have effective levers to manage county governments nor does it have a say in their budgetary or staff choices. Furthermore, it can only allocate tasks to county governments through negotiations with the Ministry of the Interior.*
>
> *The main burden of financing and performing child protection work thus lies with local governments. The budgets allocated to child protection are decided by*

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[502] Directive on preventing and combating trafficking in human beings and protecting its victims, 2011/36/EU OJEU L 101/1 (2011).

[503] Amended by art. 2 (1) of the Karistusseadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seadus (Law Amending the Penal Code and Related Legal Acts), RT I, 13.12.2013, 5, entered into force 23 October 2013.

[504] Välismaalasele rahvusvahelise kaitse andmise seadus (Act on Granting International Protection to Aliens), RT I, 23.03.2015, 25.

> *local government councils, and have tended to decrease in recent years. The administrative capacity of local governments is uneven throughout the country, and local governments with a smaller revenue base often do not have enough resources to develop or deliver child protection services to the extent that would be necessary in their jurisdiction. Developing child protection activities and capacities mainly remains project-based, and so far the government has not allocated specific funds for continuous and sustainable development in this domain. Furthermore, the government does not have a detailed view of how the funds allocated to child protection are used and whether this use is efficient and achieves the desired impact.*[505]

As is shown below, Estonia is moving very slowly towards substantive implementation of the rights of the child. Analysis shows that formal legislative requirements of international human rights treaties are usually clearly established; their implementation is, however, often problematic.

1.3.1 Marriage

Marriage is regulated by the Family Law Act[506] (hereinafter FLA), whereby generally only adults may marry (art. 1(2)). According to art. 1(3), a court may extend the active legal capacity of a person who has attained at least 15 years of age pursuant to the provisions concerning the extension of active legal capacity of minors for the performance of acts required to contract marriage and to exercise the rights and perform the obligations related to marriage.[507]

During supervision of the Estonian report under the CEDAW in 2007, the CEDAW Committee urged Estonia to raise the legal age of marriage for women and men to 18 years, in line with article 16, paragraph 2, of the CEDAW, the Committee's general recommendation 21[508] and the Convention on the Rights

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[505] AS PricewaterhouseCoopers, "Lastekaitse korralduse uuendamise alusanalüüs. Lõpp-aruanne." (Sotsiaalministeerium, November 27, 2013), 10.

[506] Perekonnaseadus (Family Law Act), RT I, 29.06.2014, 105.

[507] CRC Committee, "State Party Report: Initial Report of Estonia" (CRC/C/8/Add.45, July 11, 2002), para. 36.

[508] CEDAW Committee, "CEDAW GR: Estonia." The Committee stated in para. 36: "Article 16 (2) and the provisions of the Convention on the Rights of the Child preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority. In the context of the Convention on the Rights of the Child, "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Notwithstanding this definition, and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted."

of the Child.[509] Furthermore, statistics show considerable discrepancies between the number of girls and boys who are married before the age of 18. On average, 2–4 boys are married each year; the number of girls getting married has decreased from 54 in 2003 to 17 in 2010.[510] This statistics hints on the existence of *de facto* understanding that girls traditionally mature at an earlier age, and therefore it is normal when they are able to marry also at an earlier age.

Concluding from the above, Estonian regulation is not in conformity with the minimum requirements of the CRC. The minimum age of marriage is 15; nevertheless, the procedure is supervised by a judge. Similarly to Finland, the CRC Committee has not commented on this discrepancy.

1.3.2 Sexual consent

Sexual intercourse with a child (art. 145 Penal Code[511]) and satisfaction of sexual desire with a child (art. 146 Penal Code) are punishable acts under criminal procedure. An adult person who engages in sexual intercourse with a person of less than 14 years of age faces punishment of up to five years' imprisonment, and an adult person who involves a person of less than 14 years of age in satisfaction of sexual desire in a manner other than sexual intercourse faces punishment of up to five years' imprisonment. This age limit coincides with the age of criminal capacity.[512] In 2006 the punishments for these crimes were increased: instead of two-three years' imprisonment the punishment was set to up to five years' imprisonment.

From the outset, Estonian legislation is in conformity with the requirements of the CRC. It is, however, comparatively low and there are no clear reasons for such a low limit. Here exists a discrepancy with the age of marriage – the age for sexual consent is 14 and the earliest age for marriage is 15. It is positive that the minimum age of marriage is higher than the age of sexual consent; furthermore, the age limit of 14 is non-discriminatory both in terms of gender and sexual orientation.

The CRC Committee analysed this age limit during supervision of the first report by Estonia under OP SC and found that the age of sexual consent is relatively low. It commented on the fact that the age of sexual consent is also connected with a number of criminalized activities i.e., satisfaction of sexual desire with a child (art. 146 Criminal Code), child stealing (art. 172 Criminal Code), and use of minors in the manufacture of erotic works (art. 177 Criminal

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509 CEDAW Committee, "Concluding Comments of the CEDAW Committee: Estonia" (CEDAW/C/EST/CO/4, October 8, 2007), para. 31. For background see Rangita de Silva-de-Alwis, "Child Marriage and the Law." (UNICEF working paper, 2008).

510 Statistics provided in Annex 4 of the Estonian Report. CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia" (CRC/C/EST/2-4, 2014).

511 Karistusseadustik (Penal Code), RT I, 12.03.2015, 21.

512 See further CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia," para. 146.

Code). The Committee recommended that for these crimes the age limit should be raised to 18 irrespective of the age of sexual consent.[513]

Practice shows that this low age limit for sexual consent hinders also investigation of sexual violence or rape cases against 14-year-old children, as it is implied that sexual relations with them are based on consent that is similar to that of adults. This, however, does not take into account the vulnerability of mental development of children and potentially further stigmatizes the child-victim.[514]

1.3.3 Employment

Minors are allowed to work in Estonia; such work is supervised by the Labour Inspectorate. According to the Labour Contracts Act[515], a person who has attained 18 years of age may be employed. In exceptional cases, with the written consent of a parent or guardian, a minor having attained 15 years of age may be employed if the work does not endanger the minor's health, morals and acquisition of education and if the work is not prohibited for minors. A minor between 13 and 15 years of age may be employed with the written consent of a parent or guardian and the labour inspector of the employer's location and for work included in the list approved by the Estonian Government if the work does not endanger the minor's health, morals and acquisition of education and if the work is not prohibited for minors. An employer may enter into an employment contract with a minor of 13–14 years of age or a minor of 15–16 years of age subject to the obligation to attend school and allow them to work if the duties are simple and do not require major physical or mental effort i.e., light work (Labour Contracts Act, art. 7 (4)). Minors of 7–12 years of age are allowed to do light work in the fields of culture, art, sports or advertising.

Minors have a reduced working time: for minors 13–14 years old 20 hours a week; for minors 15–16 years old 25 hours a week; for minors 17 years old 30 hours a week. Minors may not work overtime, at night or on holidays. This regulation is, however, not all-inclusive as it does not regulate work of children outside employment contracts. As noted by the ILO in 2010:

> *the Labour Contracts Act, and its provisions relating to the minimum age of admission to employment or work, do not apply to work performed outside the framework of a formal labour relationship, such as self-employment or non-remunerated work. In this regard, the Committee reminds the Government that the Convention applies to all branches of economic activity and covers all kinds*

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513 CRC Committee, "OPSC Concluding Observations: Estonia" (CRC/C/OPSC/EST/CO/1, March 5, 2010), para. 29–30.

514 See e.g., Kadri Ibrus, "Politsei jättis uurimata alaealise väited tema enesetapukatseni viinud vägistamise kohta," *Eesti Päevaleht* (May 26, 2015), http://epl.delfi.ee/news/eesti/politsei-jattis-uurimata-alaealise-vaited-tema-enesetapukatseni-viinud-vagistamise-kohta?id=71555635 (accessed May 27, 2015).

515 Töölepingu seadus (Employment Contracts Act), RT I, 12.07.2014, 146.

> *of employment or work, including work performed by children and young persons in the absence of a contractual employment relationship or on an unpaid basis.*[516]

According to statistics presented to the ILO by the Estonian Tax and Customs Board, in 2013, 8,603 minors, including 112 aged between 7 and 11 years and 1,882 aged between 12 and 14 years, worked for at least one month during the year. As the Committee did not make any recommendations on the information provided by Estonia, it has to be presumed that Estonian practice is in conformity with the requirements of the ILO.[517]

Estonian legislation allows for different age limits even if the central age is 15 as required by the CRC Committee. Estonia acceded to ILO Convention No. 182 on 24 September 2001 and ILO Convention No. 138 on 15 March 2007. It has to be noted that Estonia has also seen current regulation as sufficient as it did not discuss child labour in its last report to the CRC Committee.[518]

1.3.4 Voluntary enlistment and conscription into armed forces

On 18 December 2013 Estonia ratified the Optional Protocol to the CRC on the involvement of children in armed conflict, which entered into force on 12 March 2104. Estonia made the following declaration in ratification:

> *According to article 3 paragraph 2 the Republic of Estonia declares that the minimum age for voluntary recruitment into national armed forces is 18 years.*

Male Estonian citizens have an obligation to serve in the defence forces according to the Military Service Act.[519] An Estonian citizen`s national defence obligation starts from the age of 17 years (art. 2 (3)). Call-up selectees are called up for conscript service at the age of 18–27 years i.e., the law does not allow inclusion of a person younger than 18 years of age in the reserve to call him up into service as a reservist. Active service, i.e., professional military service, accepts Estonian citizens 18–60 years of age into service on a voluntary basis. Only servicemen in active service may be deployed on an international military operation.[520]

In the case of mobilisation, persons at least 18 years of age may be called up for service. Therefore, although Estonian legislation specifies as a call-up selectee a male person at least 17 years of age, only a person at least 18 years of age may sign up for conscript service or active service and be deployed on an

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[516] ILO Committee of Experts, "Direct Request (CEACR) on Minimum Age Convention (No. 138): Estonia (2010)" (published 100th ILC session (2011), adopted 2010).
[517] ILO Committee of Experts, "Direct Request (CEACR) on Minimum Age Convention (No. 138): Estonia (2014)" (published 104th ILC session (2015), adopted 2014).
[518] CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia."
[519] Kaitseväeteenistuse seadus (Military Service Act), RT I, 10.07.2012, 1.
[520] See also CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia," para. 487–88.

international military operation. Thus, conscription in armed forces follows all the requirements of the CRC Committee.

However, several questions relate to the voluntary organisation, the National Defence League,[521] which also has young members. According to the Estonian Defence League Act (DLA), an Estonian citizen of at least 18 years of age may be an active member of the Defence League. A junior member of the Defence League may be an Estonian citizen 7–18 years of age (art. 25 of the DLA). Pursuant to the DLA, youth organisations of the Defence League are structural units of the Defence League. It is unclear whether participation in this organisation would amount to voluntary enlistment to armed forces. In principle, Defence League is part of the Estonian defence system;[522] as it is possible to join the Defence League as a young member from the age of seven years, this might violate the requirements of the CRC. Here, the state report by Estonia brings out a cultural relativism argument and states:

> *In the course of the preparation of the act it was found that due to administrative and historical reasons it is necessary to define youth organisations as part of the structure of the Defence League.*[523]

Still, the DLA limits participation of children in military activities – children under 18 years of age cannot participate in hostilities as well as in other security activities (art. 25 (6)). It remains to be seen whether the CRC Committee regards participation by children in the Estonian Defence League as a violation of the Convention. It is also interesting to note that this is the only place in Estonian report where the relativist argument of tradition and history was used.

1.4 Definition of a 'child' in the Russian Federation

At the beginning of 2003, the population of the Russian Federation stood at 145,0 million persons. At the beginning of 2010, it totalled 141.9 million persons, a decline of 3,05 million persons (2.1%) compared to 2003. As of the beginning of 2010, there were 26 million children in the Russian Federation under 18 years of age, 83.3% of the figure for 2003, or a decline of 5.2 million persons, due primarily to a decrease in the number of children between 10 and 17 years of age. The number of children between 5 and 9 grew by 4,700

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[521] The Defence League is a voluntary national defence organisation operating under the Estonian Ministry of Defence. It is organised in accordance with military principles, possesses weapons and holds exercises of a military nature. Its work is regulated by the Kaitseliidu seadus (The Estonian Defence League Act), RT I, 20.03.2013, 1. See also for details CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia," para. 489.

[522] Art. 2 (2) of the DLA provides: *"(2) For the purposes of this Act the exercise of military nature is military training which is provided by the Defence League to its members for the performance of the duties of the Defence League. /.../"*

[523] CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia" paras 480–494.

(+ 0.1%), and the age group 0–4 increased by 1.5 million to 22.9% and stood at 8.0 million persons in 2009.[524]The Russian constitution grants special protection to the family and the child within the family (art. 38 of the Constitution) and includes a right to education (art. 43 of the Constitution). The importance of protecting children and in particular the obligation of the state to provide this protection has also been one of the recent talking-agendas of President Putin, who as an example stressed on 17 February 2014 that "*bearing in mind that, apart from the state, it is primarily the family that should be responsible for children's lives*". [525]

From the outset, Russian law "in the books" generally follows the pattern of the CRC and other international human rights instruments regarding the definition of a child as under current Russian Civil Code art. 21 the age of majority is 18 years[526]. Children between the ages of 14–18 years have limited legal capacity to enter into transactions[527]; minors over 16 can be declared as emancipated[528].

At the same time, there is little if any analysis done on the implementation of the rights of the child in the administrative decisions and judgments.[529] Tarusina for one admits that Russian Family Law is not effective and is in need of substantive reforms.[530]

1.4.1 Marriage

The minimum age for marriage in the Russian Federation is 18 years; with valid reasons, the local authorities may permit the marriage of individuals who have reached the age of 16[531]. In such a case, a person who has not attained the age of eighteen acquires full legal capacity from the time of marriage[532]. Curiously, art. 13 (3) allows for an even lower age limit: "*the procedure and conditions*

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[524] See further statistics in CRC Committee, "State Party Report: Consolidated Fourth and Fifth Report of the Russian Federation" paras 6–17; World Population Review. Available online: http://worldpopulationreview.com/countries/russia-population/ (accessed June 1, 2015).

[525] Putin, "State Council Presidium Meeting on Family, Motherhood and Childhood Policy."

[526] Federal'nyy zakon "Osnovy zakonodatel'stva Rossiyskoy Federatsii ob okhrane zdorov'ya grazhdan" (Fundamentals of the legislation of the Russian Federation on health care) (N 5487-1 1993), art. 24 (5).

[527] Semeynyy kodeks Rossiyskoy Federatsii (Family Code), N 223-ФЗ (N 223-ФЗ 1995). art. 26.

[528] *Ibid*. art. 27.

[529] See e.g., Natal'ya Novikova, "Zashchita Prav Detey Sredstvami Grazhdanskogo Protsessa," *Nauchnyy dialog*, Rossiya, Yekaterinburg, Obshchestvo s ogranichennoy otvetstvennost'yu "Tsentr nauchnykh i obrazovatel" nykh proyektov' (2014).

[530] Nadezhda Tarusina, "European Experience and National Traditions in Russian Family Law," *Russ. Law J.* 3, no. 2 (May 20, 2015): 83. 97

[531] Semeynyy kodeks Rossiyskoy Federatsii (Family Code). art. 13.

[532] *Ibid*. art. 21 (2).

under which the marriage as an exception, taking into account special circumstances may be allowed up to the age of sixteen, may be established...". Thus, there is no lowest limit for marriage, nor does it require judicial control. Such a law has been adopted e.g. in the Moscow region.[533]

Thus, Russian legislation does not follow the minimum standards recommended by the CRC – it is possible to adopt a law that sets the minimum age limit too low. There is at least one such law in the Moscow region, where no age limit is set. The decision to allow children to marry is given to the executive power and there is also no independent judicial control over the matter.

There are, however, recent alarming developments regarding child marriage, as Russian Ombudsman for Children's Rights has openly stated that in some regions of Russia "emancipation and sexual maturity happens earlier", thus supporting child marriage as culturally appropriate.[534] It remains to be seen whether he presented the official position of the Russian government. Such usage of traditional values argument is violating the ideals of number of international human rights treaties; furthermore, as it was accompanied with support to non-intervention into domestic and private affairs, this is clearly a recession from the post-modern values.

1.4.2 Sexual consent

Sexual relations by an adult with a child below the age of 16 years is a criminal offence[535]. The age limit is the same irrespective of the sex of the child or sexual orientation. Other crimes against minors are considered aggravating circumstances and involve more severe punishment.[536] Following criticism from the CRC, the punishment for these crimes has been increased. This age limit coincides with the federal age limit for marriage. These increased punishments were tested before the Constitutional Court in 2014; with reference among other instruments to the CRC, the Court found it justified and constitutional to have increased sanctions for sexual crimes committed against children younger than 12 years old.[537]

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[533] Zakon Moskovskoy oblasti "O poryadke i usloviyakh vstupleniya v brak na territorii Moskovskoy oblasti lits, ne dostigshikh vozrasta shestnadtsati let" (On procedure and conditions of marriage in the Moscow region), N 61/2008-OЗ (2008).

[534] See reports by Carl Schreck, "Russian Official Stirs Scandal With Underage Marriage And 'Shriveled' Women Remarks," *RadioFreeEurope/RadioLiberty*, May 14, 2015, Transmission section; and William Echols, "Traditional Values and Teenage Brides: Russia's Ombudsman for Children Goes off the Rails," *Russian Avos*, May 15, 2015, https://russianavos.wordpress.com/2015/05/15/.

[535] Ugolovnyy Kodeks Rossiyskoy Federatsii (Criminal Code of the Russian Federation), UK RF, N 63-FZ (1996), art. 134 (as amended by 28.12.2013 N380-FZ).

[536] E.g., rape of a minor is punishable by imprisonment of 8–15 years (art. 131 (3) of UK RF), sexual assault against a minor is punishable by 8–15 years (art. 132 (3) of UK RF).

[537] Opredeleniye Konstitutsionnogo Suda RF "Ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanina Bulygina Mikhaila Anatol'yevicha na narusheniye yego konstitutsionnykh prav

Legal regulation as such is in conformity with the CRC minimum requirements. Interestingly, Russia referred to the previous recommendations of the CRC Committee as a reason for reforms made to the age of sexual consent. Thus, Russia sees the recommendations in the Concluding Observations as binding, at least as soft law.[538]

There is a discrepancy between the age of sexual consent and the right to receive information relating to sexuality. Art. 14 of the Federal law "On Basic Guarantees of Child" protects the child from "*...information, propaganda and agitation injurious to his health, moral and spiritual development*".[539] It has to be noted that a child in relation to that law is defined as a person who is under 18 years of age (art. 1). This law among other things prohibits children "*from information that promotes unconventional sexual relationships*". This prohibition has effectively prohibited the dissemination of sexual education information to LGBT persons and thus makes a distinction on the grounds of sexuality. Dissemination of such information is an administrative offence and as such is punishable by a fine of up to 1 million rubbles.[540]

This amendment was adopted with the support of traditional values argumentation. These arguments were also used by the Constitutional Court when analysing the constitutionality of the regulation.[541]

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primechaniyem k stat'ye 131 Ugolovnogo kodeksa Rossiyskoy Federatsii i polozheniyami Federal'nogo zakona ot 29 fevralya 2012 goda N 14-FZ "O vnesenii izmeneniy v Ugolovnyy kodeks Rossiyskoy Federatsii i otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v tselyakh usileniya otvetstvennosti za prestupleniya seksual'nogo kharaktera, sovershennyye v otnoshenii nesovershennoletnikh" [2014] Case no N 2214-O (September 25, 2014).

[538] CRC Committee, "State Party Report: Consolidated Fourth and Fifth Report of the Russian Federation", paras 2, 20

[539] This amendment was adopted in 2013 by the law Federal'nyy zakon o vnesenii izmeneniy v stat'yu 5 federal'nogo zakona "o zashchite detey ot informatsii, prichinyayushchey vred ikh zdorov'yu i razvitiyu" i otdel'nyye zakonodatel'nyye akty rossiyskoy federatsii v tselyakh zashchity detey ot informatsii, propagandiruyushchey otritsaniye traditsionnykh semeynykh tsennostey (Federal Law on Amending Article 5 of the federal law "on the protection of children from information harmful to their health and development," and some legislative acts of the Russian Federation in order to protect children from information that promotes denial of traditional family values), N135-FZ (2013). This amendment has received strong criticism both from international bodies as well as from domestic NGO-s.

[540] *Ibid*. According to art. 3 under the promotion of non-traditional sexual relations among minors is understood the "dissemination of information aimed at developing unconventional juvenile sexual attitudes, the attractiveness of non-traditional sexual relations, distorted ideas about the social equivalence of traditional and non-traditional sexual relations, or the imposition of information on non-traditional sexual relations, causing interest in such relationships."

[541] The Constitutional Court found that this regulation is in conformity with the Russian Constitution and its international obligations. Po delu o proverke konstitutsionnosti chasti 1 stat'i 6.21 Kodeksa Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh v svyazi s zhaloboy grazhdan N.A. Alekseyeva, YA.N.Yevtushenko i D.A.Isakova [2014] Case no 24-П (September 23, 2014).

Russia did not provide any comments on this law during constructive dialogue with the CRC Committee although the question was posed in the list of issues also questioning among other things discrimination based on sexual orientation.[542]

The CRC Committee was, therefore, concerned at recent developments in the legislation of the state party prohibiting "propaganda of unconventional sexual relationships". The Committee recognized the need to protect children from harmful information as a legitimate aim. However, it saw as problematic the fact that this law encourages stigmatization of and discrimination against LGBTI persons, including children, and children of LGBTI families. The Committee was particularly concerned that vague definitions of propaganda leads to the targeting and ongoing persecution of the country's LGBTI community, including abuse and violence, in particular against underage LGBTI rights activists.[543]

The Committee did not link its comment to reports of coercive treatment of transsexual and homosexual persons, in particular children, and an attempt to diagnose transsexuality as a psychiatric disease, as well as lack of sexual health information for LGBTI children with the law, although a clear connection is observed by a number of international NGOs.

1.4.3 Employment

The minimum age at which children may be hired for work coincides with their age of completion of compulsory schooling and is 15 years. The Labour Code[544] sets the minimum age for work at 16 years[545]. However, a pupil who has reached 14 years of age may be hired for light work in their free time, with parental consent, provided that there is no risk of damage to the child's health and no disruption of education; the amount of time that may be worked is reduced for workers less than 18 years old; employment of workers less than 18 years old on heavy work, on work under harmful or hazardous conditions, work underground or work the performance of which may damage moral development is prohibited.[546]

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[542] CRC Committee, "List of Issues – Russian Federation CRC."

[543] CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)," sec. III. B.

[544] Trudovoy kodeks Rossiyskoy Federatsii (Labor Code of the Russian Federation) (N 197-ФЗ 2001); latest amendments Federal'nyy zakon "O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v svyazi s prinyatiyem Federal'nogo zakona" O spetsial'noy otsenke usloviy truda, N 421-FZ (2013).

[545] Amended by Federal'nyy zakon "O vnesenii izmeneniy v Federal'nyy zakon" O pravovom polozhenii inostrannykh grazhdan v Rossiyskoy Federatsii "i Trudovoy kodeks Rossiyskoy Federatsii," N 204-FZ (2013).

[546] Trudovoy kodeks Rossiyskoy Federatsii (Labor Code of the Russian Federation), art. 63.

Russia joined ILO Convention No. 138 on 3 May 1979 and ILO Convention No. 182 on 25 March 2003. The ILO Committee observed in 2013 that:

> *(It) noted the Government's statement that the illegal employment of minors and the violation of their labour rights were frequent occurrences in the informal economy. This involved minors who washed cars, engaged in trading and performed auxiliary work. The Committee also noted ..., that children, some as young as 8 and 9 years old, were engaged in economic activities such as collecting empty bottles and recycling paper, transporting goods, cleaning workplaces, looking after property, street trading and cleaning cars. /.../ Recalling that the Convention applies to all branches of economic activity and covers all types of employment or work, the Committee urged the Government to take the necessary measures to strengthen the capacity and expand the reach of the labour inspectorate to better monitor children working in the informal economy.*[547]

Thus, the ILO Committee requested the government to take the necessary measures to strengthen the capacity and expand the reach of the labour inspectorate to better monitor children carrying out economic activities without an employment relationship or in the informal economy.[548]

The CRC Committee noted in its last Concluding Observation that large numbers of children live and work on the streets, where they are vulnerable to abuse, including sexual abuse, and to other forms of exploitation to such an extent that regular school attendance is severely restricted.[549] This deficiency was not identified as a flaw of law; instead, it required other effective measures, in the opinion of the Committee.[550] Thus, minimum age requirements relating to labour seem to be in conformity with the requirements of the CRC, whereas implementation is not sufficient.

1.4.4 Voluntary enlistment and conscription into armed forces

Pursuant to article 34, paragraph 2, of the Federal Military Conscription and Military Service Act[551], citizens may enter into their first military service contract between the ages of 18 and 40. This rules out the possibility of voluntary recruitment into military service in the Russian Federation by citizens who have not attained the age of 18 years.

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[547] ILO Committee of Experts, "Observation (CEACR) on Minimum Age Convention (No. 138): Russian Federation (2013)" (published 103rd ILC session (2014), adopted 2013).

[548] *Ibid*.

[549] Similar concerns were raised by the Committee on Economic, Social and Cultural Rights in its 2011 Concluding Observations on the fifth periodic report of the Russian Federation submitted to it. CESCR Committee, "Concluding Observations: Russian Federation (fifth Report)" (E/C.12/RUS/CO/5, June 1, 2011).

[550] See the chapter on Economic exploitation, including child labour, CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)."

[551] Federal'nyy zakon "o voinskoy obyazannosti i voyennoy sluzhbe" (On Military Duty and Military Service), N 53-FZ (1998).

Russia ratified the OP on Children in Armed Conflict in 2008. When ratifying it, Russia made the following declaration:

> *The Russian Federation, pursuant to article 3, paragraph 2, of the Optional Protocol, declares that, in accordance with the legislation of the Russian Federation, citizens under the age of 18 may not be recruited for military service in the armed forces of the Russian Federation and a military service contract may not be concluded with them;*
>
> *In accordance with the legislation of the Russian Federation, citizens who have reached the age of 16 are entitled to admission to professional military educational institutions. Upon enrolment in these institutions they shall acquire the status of members of the military performing compulsory military service. The legislation of the Russian Federation guarantees that such citizens shall conclude military service contracts on reaching the age of 18, but not before they have completed the first year of education in these educational institutions.*[552]

The CRC Committee did not find anything to comment on in relation to conscription in armed forces. Thus, it can be concluded that the normative framework of the Russian Federation is in conformity with the CRC in relation to conscription in armed forces.

1.5 Conclusions

As shown above, all three countries have generally followed the recommendations of the CRC and have set the age of majority at 18 years. Similarly, all three countries grant older minors specific rights that take into account their level of development, such as the right to deal with minor transactions and the right to be heard in the cases relating to them. It can also be seen that states have applied these age limits as rules, and have established the required limits through legal acts.

There were notable differences relating to marriage. Furthermore, it was also an area where cultural values arguments were used. Marriage is generally reserved for adults, i.e., the marriageable age is 18, in all three countries. However, in all countries there are exceptions to the general rules and for a special reason and with permission from the authority (and/or the parents), it is possible to grant a person under 18 years of age a dispensation to marry. Statistics shows that these exceptions are used in all of the three countries and it affects more girls than boys; albeit there are no clear reasons for the existence and use of these exceptions.

The right to marry is strongly connected with the age of sexual consent. Finland and Russia have set the age of sexual consent at 16 years; the practice of Estonia deviates from that and the age of sexual consent is set at 14 years. There is no argumentation behind such a low age limit, although it could be

[552] See status of the OP in the UN Treaty collection: https://treaties.un.org (accessed June 1, 2015).

connected with a less paternalist approach from Estonian legislation, where liberal rights have gained central importance and protective measures are, thus, as limited as possible. Russia is on the other end of the liberal → paternalist scale and has through prohibition of dissemination of information on 'unconventional relationships' also limited sexual health information to children, especially children with LGBTI orientation. Russia has strongly used traditional values arguments in defending this prohibition.

Similar observation can be made regarding the age of work – set at 15 years in the cases of Finland and Estonia as provided by the CRC and ILO Convention No. 138, while in the Russian Federation it is set at 16 years. All three countries limit work-time for children attending school but there are discrepancies in the application of this requirement. In the case of the Russian Federation, the ILO supervisory committee noted that the government was not sufficiently efficient in guaranteeing that this provision is adhered to. In the case of Estonia, the ILO Committee requested further information on measures taken or envisaged to ensure that children who are not bound by an employment relationship, such as children performing work on a self-employed basis, unpaid work or work in the informal sector, benefit from the protection provided by the Convention.[553] Finnish practice was found to be in conformity by both the ComESCR as well as the ILO Committee. Estonian and Russian practices remain unclear as no adequate statistics is available on the number of children working in other than official labour relations.

There were two topics where the practice of Estonia stood out as possibly problematic. These were the early age of sexual consent (14 years) in Estonia and the traditional values argument used by Estonia in relation to the National Defence League. Neither Finland nor Russia used this kind of argumentation in their reports or oral discussions. Instead, Russia was the only one to connect its activities in implementing the CRC with the previous recommendations of the CRC Committee, although it can be observed that Russia failed to answer a number of questions both in replies to the 'List of Issues'[554] as well as during the oral proceedings[555] where domestically it uses traditional values and cultural differences arguments.

The definition of a child is an area where the passiveness of the CRC Committee can be observed. The minimum core of this definition usually requires a particular result i.e., the adoption of appropriate legislation that includes said age limits. Thus, it is theoretically at least easy to analyse, whether national legal systems correspond to these requirements. In a way, adopting recommended age limits could be a good test-case. The CRC Committee has remained

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[553] ILO Committee of Experts, "Direct Request (CEACR) on Minimum Age Convention (No. 138): Estonia (2010)."

[554] CRC Committee, "Replies of the Russian Federation to the list of issues."

[555] See both CRC Committee, "Summary Records of the 1863 Meeting: Russian Federation CRC", and CRC Committee, "Summary Records of the 1864 Meeting: Russian Federation CRC" (CRC/C/SR.1864, January 30, 2014).

passive in the constructive dialogue with the three states. Despite discrepancies with the proposed minimum requirements, it still did not analyse in relation to these states whether the age limits are met and this section of the Concluding Observations was perfunctory.

There might be several explanations for this kind of passiveness; the approach of the CRC Committee might indicate that there is no obligatory minimum core in art. 1 or it is unclear. Alternatively, the CRC Committee might consider the discrepancies of these three states to be insignificant as there is no widespread practice of child marriage, for example. If the latter is true, then the CRC Committee is promoting double standards as it always brings out its concerns in relation to states that have a high number of child marriages or where some of these age limits are unreasonably high or low.[556]

2 Best interests of the child

The concept of the 'child's best interests' is a long-standing normative concept in international law.[557] It pre-dates the CRC and was already enshrined in the Declaration of the Rights of the Child (para. 2),[558] the Convention on the Elimination of All Forms of Discrimination against Women[559] as well as being present in the ECHR (mainly art. 8). It is also visible in the practice of the international courts such as the Human Rights Committee as well as the European Court of Human Rights.[560]

Due to its general and relative nature, the best interests of the child has been seen as a prime example for the theoretical debates on the nature of human rights.[561] Surprisingly, this question it did not receive much attention in the

[556] See e.g., CRC Committee, "Concluding Observations: Indonesia (third and fourth report)" (CRC/C/IDN/CO/3-4, July 10, 2014).

[557] For recent analysis of the right see John Eekelaar, "The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children," *The International Journal of Children's Rights* 23, No. 1 (March 28, 2015): 3–26.

[558] Declaration of the Rights of the Child, UN GA, Resolution 1386 (XIV).

[559] CEDAW, UN GA, 1249 UN Treaty Series 13 arts. 5 (b) and 16 1 (d).

[560] Kilkelly, "Best of Both Worlds for Children's Rights – Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child." For recent practice, see e.g., Berisha v. Switzerland, App. No. 948/12 (Eur. Ct. H.R., July 30, 2013) pt. 51. and Neulinger and Shuruk v. Switzerland, App. No. 41615/07 (ECHR, June 7, 2010) pt. 135.

[561] Neil MacCormick has used the best interests of a child as a test-right. See Neil MacCormick, *Legal Right and Social Democracy. Essays in Legal and Political Philosophy* (Oxford University Press, 1984) and Leif Wenar, "The Nature of Claim-Rights," *Ethics* 123, No. 2 (jaanuar 2013): 202–29.

drafting of the CRC.[562] However, it is a right where implementation could be and often is affected by cultural differences or traditions.[563]

As analysis shows, the national understanding of the best interests of the child has cultural connotations. Part of this problem could be the result of the unclear requirements of the CRC.

2.1 Minimum core of the best interests of the child

The CRC Committee has identified the "best interests of the child" encompassed in article 3 as one of the general principles of the Convention[564] and which is central for interpreting and implementing all the other rights of the child.[565] It is a dynamic and relatively indeterminate concept that in every instance of application requires an assessment of what is appropriate to the specific context. It also gives the child the right to have their best interests assessed and taken into account as "a primary consideration" in all actions or decisions that concern them in both public and private spheres.[566]

As will be shown, this is an example of a norm that should be substantively applied as a principle. Depending on the substance of the issue at hand, it generally has to be implemented in a more or less nature. At the same time, it also has to be applied as a rule that includes an obligation of result (e.g. inclusion of the principle in national legislation) and obligation of conduct (e.g. application of the principle in all the cases relating to children). As Eekelaar points out, best interests principle requires clear guidelines and legislation for the individual cases concerning a specific child; at the same time, it has to be applies as a principle in matters relating to children as a group.[567]

Inherent dangers are also connected to this concept – indeterminacy renders possible its erroneous application.[568] This manifests strongly in the context of

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[562] Freeman, Article 3, 25–27; and OHCHR, Legislative History of the Convention on the Rights of the Child, Vol. I, 335–48.

[563] See also the arguments of Freeman in connection to circumcision. Freeman, *Article 3*, 2.

[564] This has been reflected for example in the general instructions on submitting reports to the CRC Committee. CRC Committee, "Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports."

[565] CRC Committee, "General Comment No. 5," para. 12; and CRC Committee, "General Comment No. 12: The Right of the Child to Be Heard" (CRC/C/GC/12, July 20, 2009), para. 2. It has also been affirmed in recent practice of the General Assembly of the UN. UN GA, "Rights of the Child" (A/RES/65/197, March 30, 2011), para. 16.

[566] For extended analysis, see e.g., Freeman, Article 3.

[567] John Eekelaar, "The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children."

[568] As Freeman points out: "in upholding the standard, other principles and policies can exert an influence from behind the 'smokescreen' of the best interests principle. It can cloak prejudices, for example anti-gay sentiments. It can also be merely a selection of 'dominant meanings'", Freeman, Article 3, 2.

different traditions and cultures – different societies at different historical periods do not agree on what is in the best interests of a child.[569]

Article 3 (1) CRC reads as follows:

> *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.*

The Convention explicitly refers to the child's best interests in other provisions as well: separation from parents (art. 9); family reunification (art. 10); parental responsibilities (art. 18); deprivation of family environment and alternative care (art. 20); adoption (art. 21); separation from adults in detention (art. 37 (c)) and procedural guarantees, including presence of parents at court hearings for penal matters involving children in conflict with the law (art. 40 2 (b) 9). Reference to the child's best interests is also made in the Optional Protocol on the sale of children, child prostitution and child pornography and in the Optional Protocol on a communications procedure.

According to the CRC Committee, the concept of the child's best interests is aimed at ensuring, firstly, the full and effective enjoyment of all the rights recognized in the Convention, and, secondly, the holistic development of the child. The best interests of the child has potential to conflict with the interests of other members of the family; furthermore, it is unclear, who should have the right and/or obligation to determine the best interests of the child, and how much it has to take into account the view of the child. As an example, the CRC Committee has pointed out that *"an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."*[570]

Full application of the concept of the child's best interests requires development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote their human dignity. Hence, according to the CRC Committee, the best interests of the child comprises three intertwined components:[571]

1. A substantive right – this is a primary consideration when different interests are being considered; it is guaranteed that this right will be implemented whenever a decision is to be made concerning a child, a group of children or children in general. Article 3 (1) creates an intrinsic obligation for states, is directly applicable (self-executing) and can be invoked before a court.[572]

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569 *Ibid*., 27.

570 CRC Committee, "General Comment No. 14," para. 4.

571 *Ibid*., para. 6.

572 Besides national practice, this view is supported also by the practice of both of the HRC and the ECtHR. See e.g., HRC, "General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial" (CCPR/C/GC/32, 2007), para. 42; and Kilkelly, "Protecting Children's Rights under the ECHR."

2. A fundamental and interpretative legal principle – if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
3. A rule of procedure – when a decision affects a child or children, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. This also requires procedural guarantees such as justification of a decision or participation in proceedings.[573]

These requirements can also be taken as minimum core requirements. The CRC Committee has used the traditional tripartite division[574] of respect, protect and ensure to further open the meaning of these obligations:[575]

1. A child's best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in legislation, all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children.
2. All judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.
3. The interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concern or impact on a child.

The dividing line between what is best for children as a group and what is in the primary interest of an individual child is not clear from the CRC itself. The principle enshrined in article 3 relates to both contexts.[576] Nonetheless, the interests of an individual child cannot (necessarily) be understood *"as being the same as those of children in general";* art. 3 (1) requires that *"the best interests of a child must be assessed individually"*.

The CRC Committee emphasised in General Comment No. 14 that a range of issues has relevance when deciding what is in the best interests of the child in any concrete case. These considerations include but are not limited to (depending on the particular decision involved) the views of the child, preservation of the family environment and maintaining relations; the care, protection and safety of the child; a situation of vulnerability; the child's right to health; the child's right to education. Additionally, a number of procedural guarantees

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573 CRC Committee, "General Comment No. 14."

574 On tripartite division of obligations, see e.g., Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2014), 279–95.

575 CRC Committee, "General Comment No. 14" paras 14–16.

576 *Ibid*.

should be followed including the right of the child to express their own views; establishing the facts; decisions should be taken by qualified personnel including, when necessary, legal representation; and mechanisms to review decisions.

As an example, as to custody decisions the CRC Committee has stressed the importance of the best interests of the particular (individual) child, stating explicitly that it is contrary to these interests *"if the law automatically gives parental responsibilities to either or both parents"*.[577] Consequently, the dividing line between an understanding of the best interests principle in relation to children as a group and the individual child is unclear.

The best interests of the child is strongly reflected in the practice of the ECtHR in article 8 of the Convention (the right to family life). It has had paramount importance in extreme cases such as international child abduction[578] and application of the Hague Convention;[579] national and international adoption;[580] placement into care[581] and the like. As art. 8 relates to the private sphere, thus the ECtHR respects the margin of appreciation as much as possible and intervenes only in exceptional cases.[582] The court has consistently stressed in these cases that a broad consensus – including in international law – supports the idea that in all decisions concerning children, their best interests must be paramount.[583]

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577 *Ibid*., para. 67.

578 The ECtHR has stressed the need for a fair balance between the competing interests at stake – those of the child, of the parents, and of public order. The best interests of the child are the primary consideration and the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child". X v. Latvia, App. No. 27853/09 (Eur. Ct. H.R., November 26, 2013) [95–96].

579 Hague Convention, UN GA.

580 X and Others v. Austria, App. No. 19010/07 (Eur. Ct. H.R., February 19, 2013).

581 K. and T. v. Finland, App. No. 25702/94 (Eur. Ct. H.R., July 12, 2001).

582 The EctHR stated in Dmitriy Ryabov v. Russia, App. No. 33774/08 (Eur. Ct. H.R., August 1, 2013) [46]: "Undoubtedly, consideration of what is in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and contact issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their discretionary powers."

583 Kilkelly points out that the impact of the margin of appreciation is most pronounced in care cases where it is particularly apparent that the Court is unwilling to second guess the merits of a care order. The Court's task is to consider whether the reasons used to justify the measure in question were proportionate i.e., 'relevant and sufficient'. In practice, therefore, the margin of appreciation enjoyed by state authorities means that only in exceptional circumstances will the Court find that a care order does not meet these criteria. Ursula Kilkelly, "Children's Rights: A European Perspective," *Judicial Studies Institute Journal* 4, No. 2 (2004): 73.

Thus, the general minimum requirements in the application of the best interests of a child are:

1) The best interests principle is reflected in legislation as a primary consideration in all matters relating to a child or children.
2) The best interests of the child is included and analysed in all proceedings concerning a child as a guiding procedural principle. Every decision must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. In all decisions and proceedings connected to a child or children, the best interests of the child is analysed and is clearly visible in deliberations.

There are further specific requirements relating to the issue involved. The current research looks at implementation of the best interests of a child in two areas: placement into care and family reunification.

2.1.1 Placement into care

The CRC emphasises the importance of the family as a living-environment[584]. Thus, the presumption of the CRC is that living together with one's family is in the best interests of the child and there should be weighty reasons (such as harm to the child's health or development) for removal of the child from the family.

The ECtHR has treated art. 8 of the convention as one of the provisions where the margin of appreciation of states is wide. In the case of *Ryabov vs Russia*, however, the Court noted that taking into account the best interests of the child is one of the reasons that might require restriction on such a margin[585]. This is especially true when a child is placed into foster care or in the case of adoption[586].

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[584] The preamble to the CRC reads: "Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, ..."

[585] The ECtHR stated in Dmitriy Ryabov v. Russia [48]: "Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development." Similar argumentation has been used in a number of other cases concerning adoption of a child, paternity, foster case and other rights of a child. See, inter alia A.L. v. Poland, App. No. 28609/08 (Eur. Ct. H.R., February 18, 2014) [65–69]; Sommerfeld v. Germany, App. No. 31871/96 (Eur. Ct. H.R., August 7, 2003) [62]; Görgülü v. Germany, App. No. 74969/01 (Eur. Ct. H.R., February 26, 2004) [43].

[586] See also Ageyevy v Russia App no 7075/10 (18 April 2013) [124, 144–146]

As a general principle, when deciding upon the best interests of a child, the ECtHR takes into account, besides the reasoning of the parties, the fairness of the decision-making process[587] including the right to participate in the process.

The European Social Charter (revised) uses the concept of the best interests of the child in a number of its provisions including, for example, art. 17. The practice of the EComSR shows that any restriction or limitation of parents' custodial rights should be based on clear criteria laid down in legislation, and should not go beyond what is necessary for the protection and best interests of the child and the rehabilitation of the family.[588] This means, among other things, that the long term care of children outside their home should take place primarily in foster families suitable for their upbringing and only if necessary in institutions[589].

Children placed in institutions are entitled to the highest degree of satisfaction of their emotional needs and physical well-being as well as to special protection and assistance. Such institutions must provide conditions promoting all aspects of children's growth.[590]

Fundamental rights and freedoms such as the right to integrity, privacy, property and to meet with persons close to the child must be adequately guaranteed for children living in institutions and national law must provide a possibility to lodge an appeal against a decision to restrict parental rights, to take a child into public care or to restrict the right of access of the child's closest family. Furthermore, a procedure must exist for complaining about the care and treatment in institutions. Supervision of the child welfare system must be adequate, in particular the institutions involved.[591]

2.1.2 Family reunification

Family reunification has importance in several contexts: domestic separation of a child from the family; keeping the families of foreign nationals together in the cases of legal as well as illegal immigration; or expulsion of a family of foreign nationals or some family members from the country. In all of these cases, a child is especially vulnerable. The current research looks at general measures

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587 Sahin v. Germany, App. No. 30943/96 (Eur. Ct. H.R., July 8, 2003).

588 EComSR, "Conclusions XV-2, Statement of Interpretation: General Observation Regarding Article 17" (XV-2_Ob_V1-2/Ob/EN, December 31, 2001). The EComSR has emphasised that placement is an exceptional measure. In all circumstances, appropriate alternatives to placement should first be explored, taking into account the views and wishes expressed by the child, his or her parents and other members of the family. EComSR, "Conclusions 2011: General Introduction," January 2012, para. 9.

589 EComSR, "Conclusions XV-2, Statement of Interpretation: General Observation Regarding Article 17."

590 EComSR, "Conclusions 2005: Moldova," January 2006, 474.

591 EComSR, "Conclusions XV-2, Statement of Interpretation: General Observation Regarding Article 17"; and EComSR, "Conclusions 2005: Lithuania," January 2006, 370.

taken by the state to reunify the child with the family after some forced separation and the rights of non-citizens to protection of family life.

Haugli and Schinkareva point out that the most important task in relation to this principle is balancing it against other rights. Even if the best interests of a child is recognised and implemented in national legislation, it is acknowledged that other considerations may override the interests of the child. Hence, balancing individual interests and those of society becomes a challenge.[592]

It is questionable from the outset whether states also have to apply the principle of the best interests of the child in the context of refugees or persons to be deported. As Haugli and Schinkareva note, there was a discussion whether separation of children and parents, on the one hand, and deportation of the parent(s), on the other, could have been considered together, even before the CRC was adopted.[593] The view of the UN Working Group drafting the CRC, though not unanimously supported, was that art. 9[594] of the CRC is intended to apply in domestic situations, while art. 10[595] CRC is intended to apply to separations involving different countries.[596] Strictly speaking, there is reference to the best interests of the child only in connection with maintaining contact with parents. Nevertheless, when analysing international practice and national implementation of these provisions, it is important to pay attention to both arts 9 and 10 in conjunction with art. 3 as a general principle. The CRC Committee has noted:

> *When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.*[597]

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[592] Trude Haugli and Elena Shinkareva, "The Best Interests of the Child Versus Public Safety Interests: State Interference into Family Life And Separation of Parents and Children in Connection with Expulsion/Deportation in Norwegian and Russian Law," *International Journal of Law, Policy and the Family* 26, No. 3 (December 1, 2012): 351.

[593] *Ibid*., 354.

[594] Art 9 (1) reads: "*States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*"

[595] Art 10 (1) reads: "*In accordance with the obligation of states parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by states parties in a positive, humane and expeditious manner. states parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*"

[596] Hodgkin, Newell, and UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 125–26.

[597] CRC Committee, "General Comment No. 14," para. 66.

Regionally, art. 8 of the ECHR regulates the right to family life; ECtHR has developed the right and duty of the states to take all possible stems in order to keep the families together. Article 8 pays special attention to the rights of the child and their interests in variety of cases of separation from their family; and, as discussed above, the best interests of the child should be the decisive principle.[598] The ECtHR has stressed repeatedly that any decision restricting the family-life should be conducted with due diligence; the measures should pursued the legitimate aim of protecting the rights and freedoms of the child and his parents; the child's best interests and the family's particular situation have to be taken into account. Furthermore, states enjoy wide margin of appreciation in these cases as they are in the best position to analyse and evaluate the facts of the case and find a fair balance between the legitimate aims and the best interest of a child.[599]

As for Estonia and Finland, family reunification has been dealt with in the EU legislation – Council Directive 2003/86/EC[600] deals with the right to family reunification; Directive 2008/115/EC [601] regulates common standards and procedures in member states for returning illegally staying third-country nationals and regulations relating to the grant of international protection. Thus, it can be expected that the practice of Estonia and Finland grants children similar rights and protection.

Concluding from the above, the analysis of the minimum requirements of the best interests of a child is very general for the purposes of the current dissertation. States fulfil their minimum core obligations relating to art. 3 (1), when the principle is reflected in the relevant legislation and when it is a primary consideration of decisions. It has to be noted that other provisions of the CRC, as well as ECHR, might impose further obligations on the states. These obligations are not analysed here as they fall outside of the scope of the current dissertation.

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[598] See e.g., Wouter Vandenhole and Julie Ryngaert, "Mainstreaming Children's Rights in Migration Litigation: Muskhadzhiyeva and Others v. Belgium," in *Diversity and European Human Rights*, ed. Eva Brems (Cambridge: Cambridge University Press, 2012), 68–92.

[599] See e.g., Berisha v. Switzerland, App. No. 948/12 (Eur. Ct. H.R., July 30, 2013); or Osman v. Denmark, App. No. 38058/09 (Eur. Ct. H.R., June 14, 2011).

[600] Council Directive on the right to family reunification, 2003/86/EC OJ L 251 , 03/10/2003 P. 0012 – 0018 (2003). See also Julien Hardy, "The Objective of Directive 2003/86 Is to Promote the Family Reunification of Third Country Nationals," *European Journal of Migration and Law* 14, No. 4 (January 1, 2012): 439–52.

[601] Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008/115/EC OJ L 348, 24.12.2008, pp 98–107.

2.2 Best interests in the Finnish legal system

Finnish law as well as practice uses the concept of the best interests of the child ("*lapsen etu*") as the core concept both in legislation as well as in court practice. The Child Welfare Act[602] lists the best interests of the child as a central principle and defines the concept of the best interests of the child at the legislative level. According to art. 4, when assessing a child's need for child welfare measures and carrying out such measures, the best interests of the child should be regarded as the primary consideration. The best interests of the child is also prominent in the Act on Child Custody and Right of Access[603] where the best interests of the child in art. 2 is strongly connected with the views and wishes of the child.[604] One of the most interesting provisions here is art. 34 (1) (3), according to which a child who is mature enough can veto execution of a return order.[605]

The CRC Committee did not find the current regulation sufficient – although there is a relevant reference in the Child Welfare Act, there is no comprehensive system for taking the best interests of the child into account in all possible matters relating to children.[606]

When assessing the best interests of the child, Finnish regulation requires the focus of attention on how various alternative measures and solutions would ensure the child balanced development and well-being, safeguarding their close relationships and their continuity, give the child understanding and affection as well as supervision and care according to their age and level of development, education according to their talents and wishes, a safe living environment, physical and psychological integrity, maturing towards independence and responsibility, a chance to participate and have a say in matters concerning themselves as well as taking into account the child's background in terms of mother tongue, culture and religion.[607]

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602 Child Welfare Act, 417/2007 English.

603 Act on Child Custody and Right of Access, 361/1983.

604 Supreme Court has stressed in numerous cases the need to take into account the views and opinions of the child. See e.g., KKO:2012:95, para. 9 in particular. Hanna Pajulammi has analysed the child's participation rights and concluded that Finnish legal system needs to be renewed in order to apply it more comprehensibly. Hanna Pajulammi, *Lapsi, oikeus ja osallisuus* (Helsinki: Talentum, 2014).

605 See also the argumentation in K. and T. v. Finland, App. No. 25702/94 (Eur. Ct. H.R., July 12, 2001).

606 CRC Committee, "Concluding Observations: Finland (fourth Report)," para. 27–28.

607 Virve-Maria de Godzinsky, "Lapsen etu ja osallisuus tahdonvastaisissa huostaanotoissa," in *Lapsioikeus murroksessa*, ed. Suvianna Hakalehto-Wainio and Liisa Nieminen (Helsinki: Lakimiesliiton Kustannus, 2013), 155–82. At the same time, the Ombudsman for Children finds that co-ordination between different stake-holders of the government still needs improvement. Lapsiasiavaltuutetun toimisto, *Harvojen yhteiskunta vai kaikkien kansakunta? Hallituskausi 2011–2015 lapsen oikeuksien näkökulmasta*, Lapsiasiavaltuutetun vuosikirja, 2015, 13.

Different societies have different obstacles for fulfilment of these ideals – the Finnish report on application of the CRC stated:

> *In Finland, both fathers and mothers tend to have full time jobs. Therefore, finding good solutions for combining work and family life is crucial for the fulfilment of the best interests of the child. The Government promotes combining work and family life in all decision making and encourages men to take advantage of the family leaves to which they are entitled. The development of the father-child relationship is often hampered for instance by the fact that fathers of small children tend to work overtime and do not take enough advantage of family leaves.*[608]

The best interests of the child also serves as a basis for plans on the organisation of child welfare services. Thus, as a principle, everyone connected with the upbringing of the child should support child welfare; the need for welfare and protection of the child should take into account the best interests of the child. What is in the best interests of the child depends on the particular facts of every case. Finnish child welfare stresses the importance of prevention – intervention to problems identified should happen at an early stage. Assessing the need for child welfare and a child protection programme must primarily take into account the child's best interests and various policy options and solutions should be directed towards it.[609]

The best interests of the child is clearly visible in the practice of different judicial and administrative bodies. As an example, one of the early precedents came from the Supreme Administrative Court when the Directorate of Immigration had served an expulsion order on four foreigners (mother A, father B and their two minor children) whereby they would be deported from Finland. As A suffered from a serious illness, the Supreme Administrative Court considered that her eviction would amount to degrading treatment. As A and B, with their minor children, formed a family, and these family ties had to be taken into account together with the relations between children and parents, the court applied the best interests of the child and the prohibition on separating a child from his or her parents against their will. Thus, the Supreme Administrative Court quashed the Directorate's decision to expel.[610]

Still, the Parliamentary Ombudsman has pointed out that implementation of the principle, for example, by the police needs further development so that it

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608 CRC Committee, "State Party Report: Fourth Report of Finland" (CRC/C/FIN/4, May 26, 2010), para. 123.

609 Art 4 of the Child Welfare Act proposes that the following criterion might be of importance: 1) balanced development and well-being, as well as a close and continuing relationships; 2) the ability to obtain understanding and affection, as well as the age and maturity of the supervision and care; 3) tendencies and wishes of education; 4) a safe nurturing environment and the physical and psychological integrity; 5) the independence and responsibility of growing up; 6) the ability to participate in and influence their own affairs, as well as 7) In linguistic, cultural and religious background taken into account.

610 04.02.1997/228 (KHO).

would take fully into account and implement the best interests of a child.[611] Research also shows that the Parliament does not consider the best interest of a child in all legislative recommendations relating to the rights of the child. The Ombudsman of Children's Rights often amends such recommendations with its own additional analysis.[612]

Using the best interests of the child in rhetoric is also a commonplace among administrative officials after adoption of the Child Welfare Act. As an example, the Parliamentary Ombudsman has repeatedly emphasised in his decisions that the authorities must consider and give precedence to the best interests of children. Examples include urging the police to pay attention to the best interests of a child when using coercive measures on a minor suspected of a drug offence.[613] On another occasion, the Ombudsman considered that the police had not taken into account the best interests of the child when a 13-year-old had been left at home alone for a night without giving him or his mother any information about the fact that his father had been taken to a mental hospital.[614] Numerous cases decided by the Parliamentary Ombudsman involve the best interests of the child, for example in connection to the right to property and the right to be heard,[615] taking into public care,[616] giving information about the address of a child to a parent who is prohibited visiting rights by the court.[617]

It is evident from these examples that the concept of the best interests of the child is deemed important in Finnish legislation and is applied in extreme cases such as custody cases or placing a child into care, reunification of families, and asylum-seekers. The best interests of the child is present in general child welfare instruments; all decision makers have to take it into consideration when dealing with matters relating to children. Thus, this general overview suggests that the minimum requirements of the CRC are fulfilled and that Finland not only applies the principle in its domestic law but it is also a central policy-making principle.

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611 Ombudsman noted: "*In his most recent decisions the Ombudsman has again drawn the attention of the police to taking the child's best interests into consideration and choosing the mildest means possible*". Parliamentary Ombudsman, Communitation to the CRC Committee on Consideration of reports submitted by States parties under Article 44 of the Convention, Fourth reports of States Parties due in 2008, Finland /CRC/C/FIN/4, (January 3, 2011).

612 For more recent analysis, see e.g., Lapsiasiavaltuutettu, lausunto LAPS/49/2013 (February 17, 2015) or lausunto LAPS/185/2014 (February 12, 2015).

613 Eduskunnan oikeusasiamies, "Päätös esitutkinnan edellytyksistä ym" (No. 3326/4/05, January 22, 2007).

614 Eduskunnan oikeusasiamies, "Poliisin ja lääkärin virheellinen menettely mielenterveys-potilaan toimittamisessa terveyskeskukseen tutkittavaksi" (No. 4745/4/11, January 9, 2014).

615 Eduskunnan oikeusasiamies, "Lapsen kuuleminen ulosottoasiassa" (No. 2393/4/05, August 31, 2007).

616 Eduskunnan oikeusasiamies, "Julkisuuslain mukainen menettely tiedon luovutuksessa ja huoltajan oikeus osallistua lasta koskevaan päätöksentekoon" (No. 1795/4/13, August 1, 2014).

617 Eduskunnan oikeusasiamies, "Turvakiellon alaisen osoitteen luovutus yhteishuoltajalle" (No. 4372/4/12, December 17, 2013).

However, as discussed below, implementation of these requirements does not fully meet the standards of the CRC. These problems might be connected to the structure of the Finnish legal system where there are no general codes; instead all areas are regulated by specific acts. Thus, the principle of the best interests of the child should be present in all of these legal acts.[618] The scope of the current research, however, does not allow a comprehensive test of this argument.

2.2.1 Placement into care

Placement into care has been an area where Finland has historically received criticism both from the CRC Committee as well as the ECtHR.[619] Art 4 (3) of the Child Welfare Act requires that in child welfare all participants act delicately and use primarily assistance in open care, unless the child's best interests require otherwise. When foster care is necessary in the interests of the child, it has to be arranged without delay. Foster care should be taken with the child in the interests of the objective of reunification of the family. Realisation of these goals has been problematic – in 2011 the CRC Committee found that the number of children in care was increasing.[620] This would show that the CRC prerequisite that the family environment is generally in the best interests of a child was not being followed by Finland.

Nevertheless, the Finnish courts have applied the best interests of the child in their practice – recent decisions of the High Administrative Court have taken into account the best interests of the child in decisions on placement of a child in foster care. As an example, in a number of its decisions the High Administrative Court has stressed the need to ensure that the child has a stable growing environment with close contacts to persons that are important to them. This is not necessarily primarily possible in public care, but rather placement in a foster family should be preferred.[621] The courts have stressed that the best

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618 Research shows that the legislator does not analyse rights of the child in all the cases relating to them. In 2012, the best interests of a child have been considered in mere 3% of the legislative initiatives. Outi Slant and Kati Rantala, Vaikutusten arviointi ja lainvalmistelun perustietoja vuoden 2012 hallituksen esityksissä., Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja 122 (Helsinki: Hakapaino OY, 2013), 50. Still, there are also positive examples. See e.g., HE 159/2012, HE 111/2012, from more recent practice e.g., HE 358/2014.

619 See e.g., K. and T. v. Finland, App. No. 25702/94 (Eur. Ct. H.R., July 12, 2001). For a theoretical overview, see e.g., Godzinsky, "Lapsen etu ja osallisuus tahdonvastaisissa huostaanotoissa."

620 CRC Committee, "Concluding Observations: Finland (fourth Report)", paras 33–34.

621 See e.g., judgment of the High Administrative Court 4.7.2006/1714, KHO:2006:42; or 19.09.2000/2302 case No. 4419/3/98 (KHO).

interests of the child also requires, among other things, stability in the living conditions of the child.[622]

Application of the best interests of the child in Finland has also been analysed by the European Court of Human Rights. The ECtHR connected taking into care with the requirement of family reunification in the case of *R. vs Finland*,[623] where the ECtHR stressed the need to take the best interests of the child into account in custodial cases and considered that on the facts of the case it raised the question whether the authorities actively sought to sever the ties between the applicant and his son, or at least failed to make genuine efforts towards uniting the family. Accordingly, this violated article 8 of the Convention.

In its concluding observations from 2011 the CRC Committee in general saw adoption of the Finnish Child Welfare Act as a positive sign and welcomed the fact that it includes the concept of the best interests of the child in the assessment of a child's need for welfare measures.[624] However, the Committee found that the principle has not been adequately understood or taken into account in all decisions affecting children. At the same time, the best interests of the child should be consistently applied in all legislative, administrative and judicial proceedings as well as all policies, programmes and projects relevant to and with an impact on children. It noted further that the legal reasoning of all judicial and administrative judgments and decisions should also be based on this principle.[625]

Thus, the CRC Committee found that Finland has no unified nationwide standards establishing the criteria for placement in alternative care, care planning and regular review of placement decisions, and that supervision and monitoring of alternative care facilities is insufficient. There are also problems with lack of support for biological families; in turn, that hinders reunification of these children with their biological families.[626]

Similar observations were made by the EComSR, which recommended that the long-term care of children outside their home should take place primarily in foster families suitable for their upbringing and only if necessary in institutions.[627]

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[622] See e.g., judgment of the High Administrative Court 27.12.2011/3737, KHO:2011:113 (KHO), or 9.12.2011/3496, KHO:2011:99 (KHO).

[623] R. v. Finland, App. No. 34141/96 (Eur. Ct. H.R., May 30, 2006). It has to be noted that this case took place before reform of the child welfare system and was one of the triggers for adoption of the 2007 law. The court had similar argumentation and also stressed the importance of the best interests of a child in the case of K.A. v. Finland, App. No. 27751/95 (Eur. Ct. H.R., January 14, 2003), and the case of *K. and T. v. Finland*.

[624] CRC Committee, "Concluding Observations: Finland (fourth Report)," para. 27.

[625] CRC Committee, "Concluding Observations: Finland (fourth Report)," paras 27–28.

[626] *Ibid*. paras 33–34.

[627] EComSR, "Conclusions 2011: Finland," 14. The committee asked what measures are taken to reduce institutionalisation of children and increase foster care in families. In the meantime it reserved its position on this point i.e., it did not conclude neither conformity nor non-conformity on the matter.

The EComSR further stressed that any restriction or limitation of parents' custodial rights should be based on criteria laid down in legislation, and should not go beyond what is necessary for the protection and best interests of the child and the rehabilitation of the family. As a principle, it should only be possible to take a child into custody in order to be placed outside their home if the measure is based on adequate and reasonable criteria laid down in legislation.[628]

It has to be noted, however, that recent practice in Finland shows a vast improvement – evaluation of the best interests of the child is a commonplace in the recent practice of the High Administrative Court[629] as well as that of the Supreme Court.[630] In recent years, there have been no cases concerning the best interests of the child in the ECtHR that have been initiated after the new Child Welfare Act came into force. Thus, it can be concluded that the principle of best interests is functioning in this area at least at a minimum level.

2.2.2 Family reunification

The second area where international monitoring scrutinizes the application of the best interests of the child concerns legal or illegal immigrants and family reunification. Family reunification is important both in cases of granting families residence permits or expulsion of foreigners as well as in cases of foster care. Art. 6 of the Aliens Act[631] requires that the best interests of the child be taken into account when making any decisions based on the Aliens Act. This is also the general practice of the Supreme Administrative Court.[632]

Thus, relating to family unification, the minimum requirements relating to the best interests of a child are present – the principle is sufficiently clearly and comprehensively present in the relevant legislation; it is also applied in the decision-making process.

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628 *Ibid*. The Committee asked what the criteria is for restrictions on custody or parental rights and the extent of such restrictions. It also asked what the procedural safeguards are to ensure that children are removed from their families only in exceptional circumstances. It further asked whether national law provides for a possibility to lodge an appeal against a decision to restrict parental rights, to take a child into public care or to restrict the right of access of the child's closest family.

629 See e.g., judgments of the High Administrative Court 22.5.2013/1747, KHO:2013:97 (KHO); 19.3.2014/803, KHO:2014:50 (KHO); 19.3.2014/804, KHO:2014:51 (KHO); or 27.12.2011/3737, KHO:2011:113 (KHO).

630 See e.g., judgment of the Supreme Court KKO:2012:11 [2012] in case no S2010/118 (January 30, 2012) on the right to know one`s parents; judgments of the Supreme Court KKO:2009:40 [2009] in case no S2008/149 (May 22, 2009) or KKO:2011:99 [2011] in case no S2010/304 (November 22, 2011) on the right to know the birth parents.

631 Ulkomaalaislaki (Aliens Act), 301/2004.

632 See e.g., judgments of the High Administrative Court No. 22.5.2013/1747, KHO: 2013:97; No. 25.3.2010/613, KHO:2010:17; No. 19.3.2014/803, KHO:2014:50.; No. 7.2.2014/316, KHO:2014:24; No. 9.10.2009/2454, KHO:2009:85; and No. 4.2.2013/414, KHO:2013:23.

2.3 Best interests in the Estonian legal system

According to art. 3 of the Child Protection Act,[633] the best interests of the child is the primary consideration and guiding principle at all times and in all cases. It has to be noted that the Estonian language version of the act uses the term '*lapse huvid'* i.e., the 'interests of the child'. The Estonian language version does not refer to 'best' interests. Estonian legislation is, thus, even vaguer than the CRC itself and does not reflect the requirement that every decision should look for a solution that is in the best interests of the child or children concerned.[634] Thus, the law does not fully comply with the requirements of the CRC. Curiously, the English translation of the Act corresponds to the wording of the CRC. This discrepancy has not been amended even in the new version of the CPA that will enter into force on 1 January 2016.[635]

The Family Act[636] requires that, in settling a dispute between the parents regarding a child, the court should determine the case according to the interests of the child (art. 123 (1)).[637] The Supreme Court has emphasised that the rights of a child should be under special scrutiny in all civil processes that concern them;[638] the Code of Civil Procedure (hereinafter CCP)[639] has established several procedural safeguards for the protection of these. They include, for example, the obligatory participation of the representative (art. 219 of the CCP); obligation of the court to take evidence on its own initiative (art. 230 (3) of the CCP); measures securing action (e.g. arts 378 (3) and 384 of the CCP); and obligation to reason rulings relating to adoption and guardianship (art. 478 (2) of the CCP). The practice of the Supreme Court confirms that the interests of the child have to be taken into account – as an example, the need to take into account the best interests of the child in custody cases[640] and in deciding the powers of decision of parents[641] have been emphasised.[642]

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633 Lastekaitse seadus (Child Protection Act), RT I, 13.12.2013, 12.

634 The CRC Committee noted as long ago as 2003 that the best interests of a child are not adequately reflected in Estonian legislation. CRC Committee, "Concluding Observations: Estonia (initial Report)," paras 21–22.

635 Lastekaitseseadus (Child Protection Act) (new), RT I, 06.12.2014, 1 (enters into force 1.01.2016). Art. 5 (3) refers similarly to the primacy of the interests of the child.

636 Perekonnaseadus (Family Law Act), RT I, 29.06.2014, 105.

637 It has to be reminded here that the best interest of a child is closely connected with the child's right to be heard in all the cases connected to them (art. 12 of the CRC). It is impossible to establish the best interests of an individual child in a concre case without hearing the position of the child.

638 CCSCd No. 3-2-1-18-13 (26 June 2013), para 17.

639 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure), RT I, 19.03.2015, 26.

640 See for an example of a custody decision during divorce proceedings CCSCd No. 3-2-1-13-07, (21 March 2007). Case No. 3-2-1-79-96 concerned the best interests of a child who had been living with her grandmother. CCSCd No. 3-2-1-79-96, (5 June 1996).

641 See e.g., CCSCr No. 3-2-1-91-14 (5 November 2014).

642 See further e.g., CCP arts 558 (1) and (3), and art. 563 (6).

There are several instances when it is the obligation of a specific person to see that the best interests of the child are protected. Estonian legislation places great importance on the guardianship authority, which may participate in the proceedings either by their own initiative or at the request of the court.[643] According to the Juvenile Sanctions Act,[644] a child has the right to a representative who protects their interests before the juvenile committee. The opinion of specialists is also required in all court cases involving minors, and a social worker monitors compliance with this requirement.[645] This opinion should be guided by the best interests of the child. As a rule, courts have to appoint a representative to children in a number of family matters, including adoption and placement into care.[646]

Also the Estonian report of 2014 connected the best interests of the child with the obligation to hear the opinion of a child.[647] It correctly saw the obligation to hear the child as part of the wider goal of protecting the best interests of the child and found it to be reflected in Estonian legislation and practice as well. As an example, art. 151 of the Family Law Act requires that for the adoption of a child who is at least 10 years old, decisions cannot be made without the child's consent. It is also a more general principle supported by procedural law.

As discussed above, what precisely is in the best interests of a child depends on the facts of the particular case and this view develops throughout the procedure where the interests and needs of the child are evaluated. Courts in Estonia have found the following general principles to be in the best interests of the child:[648]

- the best interests of the child limit the interests of the parents[649];

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643 A guardianship authority also represents the child's interests in the case of settlement of disputes outside a court of law. A guardianship authority is the local authority of the child's place of residence. Its task is to guarantee that the child's interests are put first.

644 Alaealise mõjutusvahendite seadus (Juvenile Sanctions Act), RT I 1998, 17, 264.

645 Lastekaitse seadus (Child Protection Act), RT I, 13.12.2013, 12 art. 35 (2).

646 Art. 219 of the CCP.

647 CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia," 42–44.

648 See also analysis of the court-practice relating to guardianship by Maarja Lillsaar, "Ühise hooldusõiguse lõpetamine ja hooldusõiguse üleandmine. Kohtupraktika analüüs" (Riigikohus, õigusteabe osakond, May 2013).

649 Ruling of Tartu Circuit Court in case No. 2-08-89161 (June 27, 2011). See further on evaluation of the best interests of the child in custody disputes Kristel Siimula-Saar and Maarja Lillsaar, "Vanematevahelised vaidlused hooldusõiguse ja suhtlusõiguse kindlaksmääramisel – kes on võitja, kes kaotaja?," *RiTo* 30 (2014); or Kati Valma, "*Lapse parima huvi väljaselgitamine tsiviilkohtumenetluses vanematevahelistes hooldusõiguse vaidlustes*" (MA thesis, Tallinn University, 2012). The Supreme Court has noted that interests of a child might conflict with the interests of both parents. SC *en banc* decision No. 3-2-1-4-13 (December 17, 2013), para. 36.

- the natural environment for growing is a family and therefore, the rights of the child include the right to parents and the right to care from parents[650];
- stability and continuation of relations are in the best interests of the child[651];
- siblings should be raised together[652].

The ECtHR has touched upon application of the best interests of a child in Estonia and the need to take into account the interests and needs of the child with utmost care and diligence in the case of *Kiisa vs Estonia*[653]. It also discussed the best interests of the child in the case of *Vronchenko v. Estonia*[654] and found that the procedural rights of the applicant during criminal proceedings were violated as he did not have the possibility to question the child, based on whose evidence he was convicted of sexual abuse of the child. The court found that although the national courts acted with the aim of protecting the best interests of the child and, therefore, the applicant was not able to question her during criminal proceedings, the best interests of the child was not duly balanced against the procedural rights of the applicant as he was not given enough alternative possibilities to question the victim. Therefore, the ECtHR found a violation of arts 6 (1) and 6 (3) of ECHR.

Even when legislation seems to reflect at least to some extent the best interests of the child, research conducted in 2012 by Praxis has shown that while the general opinion supports listening to the opinion of the child, actually taking it into account is not considered relevant.[655] Adults and children supported the need to listen to the interest and opinion of the child, although adults think that this is not necessarily something that has to be taken into account.

The best interests of the child has been referred to in the practice of the Supreme Court;[656] nevertheless, it has not been sufficiently interpreted nor has

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650 Ruling of Harju County Court in case No. 2-12-17667 (October 9, 2012). See also Kerly Espenberg et al., *Vanema hooldusõiguse määramise uuring lõppraport*, Võrguteavik, (Tartu: Tartu Ülikooli sotsiaalteaduslike rakendusuuringute keskus RAKE, 2013).

651 Ruling of Tartu County Court in Case No. 2-12-27663 (December 21, 2012).

652 Decision of Harju County Court in case No. 2-11-14383 (March 9, 2011).

653 Application Kiisa v. Estonia, App. No. 16587/10, 34304/11 (Eur. Ct. H.R., March 13, 2014) para. 64. The ECtHR considered that the civil proceedings in the alimony case were too lengthy taking into account also the fact that the subject matter required specific diligence.

654 Vronchenko v. Estonia, App. No. 59632/09 (Eur. Ct. H.R.).

655 Karu et al., Lapse õiguste ja vanemluse monitooring. Laste ja täiskasvanute küsitluse kokkuvõte, 17–24.

656 The Supreme Court referred to the interests of the child as a guiding procedural principle. CCSCr No. 3-2-1-91-14, (5 November 2014), para. 16. The court has pointed out that co-operation between the parents is in the interests of the child and, thus, it is the role of the courts to do the utmost that the parents agree in custody (guardianship) matters. CCSCr No. 3-2-1-113-14, (5 November 2014), para. 25.

its substance within the Estonian legal system been analysed by the Court.[657] The lower courts are using the concept in some of their practice as a guiding principle; research shows that this analysis of the court is often not clearly substantiated and seems to depend on the awareness of particular judges.[658]

In general, the principle of the best interests of the child is present in Estonian legislation, both in the material and the procedural laws. It is, however, an undefined legal concept that is incorrectly transposed in the legislation, and the courts apply it formally and seldom motivate its application substantively.

2.3.1 Placement into care

Separation of a child from the family is at the legislative level clearly dependent on the best interests of the child – it should be that the best living environment for the child is the family. Art. 25 of the Social Welfare Act (hereinafter SWA)[659] regulates the separation of a child from the family and requires that the separation should be "in the interest" of the child.

Separation of a child from their family and deprivation of custody over a person in full is additionally governed by the Family Law Act. Article 135 of the FLA sets conditions for the separation of a child from the family and deprivation of full custody. A court may separate a child from the parents only if damage to the interests of the child cannot be prevented by other supporting measures applied in the relationship between the parents and the child.[660] The decision to remove a child from the family has to be taken by the court – a court may deprive a parent of the right of custody of a person in full only if other measures have not yielded any results or if there is reason to presume that application of the measures is not sufficient to prevent danger (FLA art. 134 *et seq*); the rural municipality or city government is included in the proceedings as legal guardian (art. 135 (3) of the FLA). If leaving a child in their family endangers the health or life of the child, a rural municipal government or city government may separate the child from the family before a court ruling is made. In such cases, the rural municipal government or city government should

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657 The Supreme Court *en banc* had the oportunity to discuss the best interest of a child in connection to enforcement of custody decisions. It mentioned the complexity of the situation, but failed to discuss the substance of the rights of the child. SC en banc, case No. 3-2-1-4-13.

658 This has also been confirmed by the research on custody disputes by Espenberg et al., *Vanema hooldusõiguse määramise uuring. Lõppraport.* 87–88. There are also some positive examples. See e.g., decision of Tallinn Circuit Court in case No. 3-13-1412/127 (12 September 2014).

659 Sotsiaalhoolekande seadus (Social Welfare Act), RT I, 13.12.2014, 44.

660 Art 134 (3) of the Perekonnaseadus (Family Law Act), RT I, 29.06.2014, 105. FLA sees the following measures as possible alternatives: making decisions arising from the right of custody in lieu of a parent, issue of warnings and precepts, imposition of prohibitions, and requiring the parents to observe the instructions of an agency specified by the court. See e.g., the argumentation of the Supreme Court in case CCSCr No. 3-2-1-132-11, (20 December 2011).

promptly apply to a court to restrict parental rights with respect to the child (art. 135 (4) of the FLA).

Removal of a child includes procedural safeguards which ensure that children are removed from their families only in exceptional circumstances.[661] The best interests of the child further requires that national law provides the possibility to lodge an appeal against a decision to restrict parental rights, to take a child into public care or to restrict the right of access to the child's closest family.[662] The best interests of the child has also been stressed by the Supreme Court in a number of custody cases. As an example, the Supreme Court has stressed that when it receives information about a child in need, it has to start proceedings on its own initiative.[663]

According to observations by the EComSR, despite the doubling of funding allocated to foster care, the numbers of children in social welfare institutions (substitute homes) have not improved: there are still more children in institutions (1,261 in 2010) than in foster families (523).[664] Statistics shows that in the years 2010–2011 approximately 450 children were annually separated from their families. Out of these children approximately 1/3 were placed into a substitute home, 1/3 were placed into substitute care, and 1/5 were returned to their families;[665] in 2012 there were 309 children who were placed into substitutive care (410 children were separated from their families). Statistics also show that the number of children returning to their families from public care is low.[666] Thus, placement into care in the Estonian context generally means placing a child in some institution. This practice, in general, is not in the best interests of a child as living in a family environment is in their best interests.

The EComSR has stated that any restriction or limitation on parents' custodial rights should be based on criteria laid down in legislation, and should not go beyond what is necessary for the protection and best interests of the child and the rehabilitation of the family. The Committee has held that it should only be possible to take a child into custody in order to be placed outside their home if such a measure is based on adequate and reasonable criteria laid down in

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661 New CPA includes more detailed regulation concerning a child in need of assistance and child in danger and relevant evaluation criterion. Lastekaitseseadus (Child Protection Act) (new), RT I, 06.12.2014, 1 (2016), e.g., arts 30–33.

662 See also the argumentation of the Supreme Court in case CCSCr No. 3-2-1-98-11, (23 November 2011).

663 See e.g., CCSCr No. 3-2-1-35-12, (4 April 2012); and CCSCr No. 3-2-1-132-11, (20 December 2011).

664 EComSR, "Conclusions 2011: Estonia," January 2012, 20.

665 See the statistics in CRC Committee, "State Party Report: Second, Third and Fourth Report of Estonia." annex, table 10, p. 126.

666 Vabariigi Valitsus, "Lastekaitseseaduse eelnõu seletuskiri," December 27, 2013, 3. In 2011 the percentage of children who left public care and returned to their biological families was 12%, while in 2012 the percentage was 16%.

legislation.[667] These requirements are met in the case of Estonia, as there are both substantive limits enlisted in the FLA arts 134–135; as discussed above, there are also procedural safeguards available in CCP.

As such a vast number of children are living in institutions, the best interests of the child also has relevance for evaluating the living conditions in these institutions as well as all the protective measures granted for children living in institutions. In its observations, the EComSR was critical of the way that public care institutions were supervised, including the methodology of these visits and child participation.[668] The same problem was pointed out by the Chancellor of Justice in its overview of 2012:

> *State supervision over the quality of the substitute home service is performed by county governors. However, the quality of their work is rather uneven. For example, county governors have interpreted differently the legally prescribed requirements for the substitute home service... which leads to a different application of the law in substitute homes in different counties. Shortcomings could also be observed in the preliminary and follow-up supervision performed by county governors.*[669]

In Estonia, the functions of the independent supervisory institution on the rights of children (i.e., Ombudsman for Children) has been performed by the Chancellor of Justice since 19 March 2011.[670] He noted, in particular, that:

> *The state has made considerable investments for creating the necessary living conditions for children... Children and young people are mostly satisfied with their life in substitute homes and the main daily needs of children are generally met. Nevertheless, on several occasions the Chancellor found recurring and systematic shortcomings in terms of the guarantee of the fundamental rights of children... The main problems relate to the creation of family-like conditions for children in substitute homes.*[671]

He found that as the best growing environment for the child is the family, substitute care should be organized, if possible, in family-like conditions in public care. This is even more important as more children are living in institutions in comparison with foster children in guardianship families.[672]

Thus, Estonian legislation relating to placement into care includes the requirement of the best interests of the child. Similarly, court practice

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667 EComSR, "Conclusions XV-2, Statement of Interpretation: General Observation Regarding Article 17", p. 29.

668 EComSR, "Conclusions 2011: Estonia," 20.

669 Chancellor of Justice as Ombudsman for Children, "2012 Overview of the Chancellor of Justice Activities," 2013, 22–23.

670 See the Õiguskantsleri seadus (Chancellor of Justice Act), RT I, 03.07.2013, 10, art. 1 (8).

671 Chancellor of Justice as Ombudsman for Children, "2012 Overview of the Chancellor of Justice Activities," 20.

672 *Ibid*., 20–21.

occasionally analyses the best interests of the child; however, systematic and substantive implementation of the best interests principle is still problematic.

2.3.2 Family reunification

As discussed above, if a child is separated due to a limitation on a parent's custodial rights, the opinions and wishes of the child will be heard and annexed to the documentation concerning the separation. The opinions of the child will be heard and documented by the social services department. A child separated from one or both parents has the right to maintain personal relations and contact with both parents and close relatives, except if such relations harm the child.[673] The Supreme Court has stressed that cases concerning custody and/or family unification issues are of such importance that the courts have to decide if the best interests of the child requires starting civil proceedings even when there is no such basis in civil procedure law.[674]

A child whose parents reside in different states has the right to direct contact and personal relations with both parents. For the purpose of family reunification, the child or their parents have the right freely to leave the state or enter Estonia pursuant to the established procedure.[675]

A parent living apart from a child has the right of access to the child. A parent with whom a child resides may not hinder the other parent's access to the child. Recent changes in the Code of Civil Procedure stress the need to try, as early as possible and at each stage of the proceedings, to direct the participants towards settling the matter by agreement. The court should hear the participants as early as possible and draw their attention to the possibility to seek the assistance of a family counsellor and, above all, for forming a common position on taking care of and assuming responsibility for the child.[676] Since July 2014, the FLA also emphasises that it is possible to restore a parent's custody if the restoration of the parent's right of custody corresponds to the interests of the child (art. 123^1 of the FLA). This regulation might, in principle, violate the rights of the parents; however, within the framework of the current research, this regulation fulfils the best interests of the child criteria.

The Social Welfare Act regulates the substitute home service provided for children.[677] Article 25 (3) of the Act requires that sisters and brothers originating from one family are kept together upon separation from their home

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673 Lastekaitse seadus (Child Protection Act), RT I, 13.12.2013, 12, arts 27–28. The Supreme Court has e.g., decides that removal of a child from a foster home could violate the best interests of the child. CCSCr No. 3-2-1-132-11, (20 December 2011), para. 19.

674 *Ibid*., paras 16–19.

675 Lastekaitse seadus (Child Protection Act), 30.

676 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure), RT I 2005, 26, 197 (2006), art. 561.

677 Chapter 3 division 10 of the Sotsiaalhoolekande seadus (Social Welfare Act), RT I, 13.12.2014, 44.

and family unless this is contrary to the interests of the children. A child who is separated from their home and family has the right to receive information about their origin, the reasons for separation, and issues pertaining to their future and if a circumstance that initiated the separation ceases to exist, the child should be assisted in returning to their home and family. It is the obligation of the guardianship authority to provide assistance to a family from whom a child has been taken in order to help establish the prerequisite conditions for the child to return to the family.

According to the Imprisonment Act[678] the aim of communication with a prisoner is to promote contacts with their family, relatives and other close people and to avoid disruption of the social contacts of the prisoner (art. 23 of the VangS). A detainee has the right to meetings with family members, relatives and close people (art. 25 on long-term visits and art. 32 on prison leave) and the right of correspondence and telephone calls under the control of the administration. A mother detained in a female prison and a child up to three years of age are given the possibility to live together; it has to be ensured that the ties of a mother with a child over three years of age are sustained unless this disturbs the normal raising of the child or has a negative influence on the child.[679] No statistics is available on to what extent these requirements are fulfilled in reality. The need to protect family life even in prison has also been stressed by the Supreme Court,[680] which found that disruption of a long-term visit of a child is an intense violation of rights of the detainee as well as those of the child.

A second area of concern is unification of families either in Estonia or abroad. According to art. 115 of the Aliens Act[681] the following persons are not subject to the immigration quota: the spouse of an Estonian citizen and of an alien who resides in Estonia on the basis of a residence permit to whom a residence permit is issued to settle with the spouse; a minor and adult child, parent and grandparent and a ward of an Estonian citizen and of an alien who resides in Estonia on the basis of a residence permit to whom a residence permit is issued to settle with a close relative. As a general rule, according to the Aliens Act, a temporary residence permit may be issued to an alien for the purpose of settling with their spouse, if the latter is of Estonian nationality and resides in Estonia permanently or an alien who has resided in Estonia for at least two years and the spouses share close economic ties and a psychological relationship, the family is stable and the marriage is not one of convenience. A number of additional conditions must be met in order for the reunification of spouses or close relatives to take place: the sponsor must have a permanent legal income or

678 Vangistusseadus (Imprisonment Act), RT I, 19.03.2015, 31.

679 *Ibid*., art. 54. Current legislation stresses the importance of maintaining family ties between mothers and children; this approach is questionable as the CRC gives importance to the relations of a child with both parents (art. 9 (3) of the CRC).

680 See e.g., ALCSCr No. 3-3-1-11-12, (16 May 2012), paras 14–17.

681 Välismaalaste seadus (Aliens Act), RT I, 23.03.2015, 7.

the joint permanent legal income of the two spouses must ensure that the family is maintained in Estonia; the family member must have insurance coverage guaranteeing any costs related to medical treatment as a result of illness or injury during the period of validity of the residence permit; and the family must have a registered residence and an actual dwelling in Estonia.

Following transposition of the EU Directive 2003/86/EC[682] the Aliens Act requires a residence permit for at least two years for those migrant workers who are not citizens of member states of the European Union or citizens of the European Economic Area (art. 137 of the Aliens Act).[683] With respect to the directive, it should be noted that it is more favourable than the European Social Charter (revised) (cf. art. 3 (4) ESC(rev)) and that it does not affect the possibility for the member states to adopt or maintain more favourable provisions (cf. art. 3 (5) of the ESC(rev)).

With this in mind, the EComSR has stated that *"States may require a certain length of residence of migrant workers before their family can join them. A period of a year is acceptable under the Charter*".[684] In this respect, the EComSR concluded in 2011 that Estonia's two-year residence requirement is excessive, and therefore it is not in conformity with the ESC (revised).[685] Moreover, the EComSR has noted on the sufficient income requirement that *"[t]he level of means required by States to bring in the family or certain family members should not be so restrictive as to prevent any family reunion*".[686] The EComSR has also analysed the requirement of sufficient housing and found that it should not be so restrictive as to prevent any family reunion."[687]

On 4 June 2012 the ECtHR made an admissibility decision in the case of *M.R. and L.R. v. Estonia*[688] where the applicants were a mother and her daughter, whose father was seeking her return to Italy under the Hague Convention of 25 October 1980. The applicants had not returned to Italy after a trip to Estonia. The ECtHR had requested the Estonian Government, under Rule 39 (interim measures) of its Rules of Court, not to return the child while the proceedings were pending before it. In view of the urgency, the Court examined the case in less than three months. The Court declared the application inadmissible and

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682 Council Directive on the right to family reunification, 2003/86/EC OJ L 251, 03/10/2003 P. 0012 – 0018 (2003).

683 A recent study on the possibilities of misusing this right has been conducted by Veronika Kaska and Sisekaitseakadeemia, Perekonna taasühinemise õiguse kuritarvitamine: fiktiivabielud ja põlvnemise kohta valeandmete esitamine Euroopa Liidus ja Eestis – misuse of the right to family reunification: marriages of convenience and false declarations of parenthood in the European Union, Euroopa rändevõrgustik (The European migration network) 2012, 7 (Tallinn: Sisekaitseakadeemia, 2012).

684 EComSR, "Conclusions 2011: General Introduction", interpretation of art. 19 (6), para. 9.

685 EComSR, "Conclusions 2011: Estonia," 26.

686 European Committee of Social Rights, Conclusions XIII-1, Netherlands

687 European Committee of Social Rights, Conclusions IV, Norway

688 M.R. and L.R. v. Estonia (admissibility), App. No. 13420/12 (Eur. Ct. H.R.). Application No. 13420/12.

found that the Estonian authorities, in rejecting the mother's arguments to the effect that she was unable to return to Italy, had not overstepped their margin of appreciation. Nor was there anything to suggest that their decision to order the child's return had been arbitrary or that the authorities had failed in their obligation to strike a fair balance between the competing interests at stake.

Concluding from the above, Estonia has the necessary legislation more or less in place. There is still a lack of substantive and clear practice where the meaning and requirements of the best interests of the child are analysed. It has been recommended even more generally that the Estonian Family Law Act, as well as procedural guarantees relating to family law matters, need updating.[689] Current research confirms this need. It would be very interesting to see whether the CRC Committee would also bring out the discrepancy of the Estonian wording.

2.4 Best interests in the Russian legal system

The principle of the best interests of the child and the obligation to take into consideration the interests of the child in all issues involving children has been, to certain extent, legislated in central Russian legal acts such as the Fundamentals of Health-Care Legislation,[690] the Education Act,[691] the Federal Act on Guardianship and Custody[692] and the Federal Act on Basic Guarantees of Children's Rights.[693] These acts, however, do not refer to the "best interests of the child" but to the "legitimate interest of a child" ("*законных интересов ребенка*"). Limiting the best interests of the child to 'legitimate interests' reveals the unwillingness of Russia to allow a full scale of interests to be considered.

In its Concluding Observations from 2014, the CRC Committee noted with concern that the legislation implements the principle of the best interests of the child incorrectly and refers to the "legitimate interests of the child" which is not equivalent to "the best interests of the child" in scope.[694] Similar concerns were raised by the alternative report from the NGOs, in which they agreed that the legal acts of Russia included necessary protective measures; on the other hand,

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689 Triin Göttig and Triin Uusen-Nacke, "Vanema õigused ja kohustused lapse suhtes," in *Kohtute aastaraamat 2013* (Eesti Vabariigi Riigikohus, 2014), 55–61.

690 Federal'nyy zakon "Ob osnovakh okhrany zdorov'ya grazhdan v Rossiyskoy Federatsii" (Fundamentals of Health-Care), N 323-FZ (2011). This law does not protect the best interests of the child in particular but requires the parties to take into consideration the best interest of the patient.

691 Federal'nyy zakon Rossiyskoy Federatsii "Ob obrazovanii v Rossiyskoy Federatsii" (Education Act), N 273-FZ (2012).

692 Federal'nyy zakon "Ob opeke i popechitel'stve" (Federal Act on Guardianship), N 48-FZ (2014).

693 Federal'nyy zakon ob osnovnykh garantiyakh prav rebenka, N124-FZ, (Federal Act on Basic Guarantees of Children's Rights), N124-FZ (1998).

694 CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)," para. 26.

it was observed that implementation practice was lacking, nor were there any legal mechanisms to enforce this principle:

> *The terminology such as the "best interests of the child" or "child developmental needs" are not legally defined in Russian laws. The Child protection state entities (tutorship and guardianship bodies) assess primary children's needs as general physical safety, and do not assess emotional and psychological needs such as attachments or contact and do not take these into account in making their decisions.*[695]

Implementation of the principle is merely formal and concentrates on the physical well-being of the child – the CRC Committee has noted that the State entities for child protection (tutorship and guardianship bodies) assess only the general physical safety of children and do not assess their emotional and psychological needs.[696] Whether this issue is redressed by the Federal law on the Foundations of Social Services[697] remains to be seen. The NGO alternative report was quite optimistic on the matter as the non-governmental sector had been involved in its drafting process:

> *This Draft-Law hopefully will resolve the /.../ problems of the Russian social system. In particular it regulates provision of social services at the place of living (it is specially stated that social services to families with disabled children are free of charge) according to individual programs and in the form of case-management, and it incorporates the mechanisms of competition of different providers (including NGOs) of social services who realize the individual programs. Also mechanisms are supposed for independent monitoring and assessment of the quality of services the result of which will be taken into account in decision making on the choice of provider of services – which hopefully will stimulate the increase of quality and better work of the whole social system.*[698]

The best interests of the child should be included in all laws, decisions and policies relating to children. The court practice of the highest courts shows that the principle is applied infrequently and randomly; however, on a positive note, during the last two years, the number of such references has increased substantially. Nevertheless, the available case-law has not fully discussed the

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695 Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 9–10.

696 CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)," para. 26.

697 Federal'nyy zakon Rossiyskoy Federatsii ot 28 dekabrya 2013 g. N 442-FZ, "Ob osnovakh sotsial'nogo obsluzhivaniya grazhdan v Rossiyskoy Federatsii" (Federal law on the Foundations of Social Services), No. 442-FZ (2013).

698 Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 10.

substance of the principle.[699] Cases of the Supreme Court have discussed, for example, parental rights and the interest of a child in having access to both parents;[700] limiting custodial rights of the parents;[701] place of residence of a child; and subsistence.[702]

One of the issues discussed during oral sessions of the constructive dialogue concerned the application of the best interests of the child in the "National Strategy of Actions in the Interest of Children 2012–2017".[703] This strategy was opposed by the national traditional values movement as being dangerous for the preservation of the family. The CRC Committee noted with concern in its Concluding Observations that the ongoing "anti-juvenile" campaign reportedly prioritizes the interests of parents over the interests of their children.[704] The same was noted by the alternative report.[705] President Putin stated in his speech to the Congress of Russian Parents that he understood the need to be conservative in family matters and take further account of "Russian family traditions".[706]

Social services for children are provided at social services institutions for families and children. Statistics shows growth in institutional support for children's rights – there are more people providing different services to children

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699 As an example, the Supreme Court has referred to the best interests of the child in connection with the curfew for children in the Decision of the Supreme Court from 2 November 2011. Opredeleniye Verkhovnogo Suda RF O chastichnoy otmene resheniya Arkhangel'skogo oblastnogo suda ot 25.08.2011 i chastichnom udovletvorenii zayavleniya o priznanii nedeystvuyushchimi otdel'nykh polozheniy Zakona Arkhangel'skoy oblasti ot 15.12.2009 N 113-9-OZ "Ob otdel'nykh merakh po zashchite nravstvennosti i zdorov'ya detey v Arkhangel'skoy oblasti" i Zakona Arkhangel'skoy oblasti ot 03.06.2003 N 172-22-OZ "Ob administrativnykh pravonarusheniyakh", (2011) N 1-G11-26.

700 Opredeleniye Verkhovnogo Suda RF ot 28.10.2014, (2014) N 57-KG14-7; Opredeleniye Verkhovnogo Suda RF ot 29.10.2013, (2013) N 49-KG13-7.

701 Opredeleniye Konstitutsionnogo Suda RF "Ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanki Sobolevoy Niny Aleksandrovny na narusheniye konstitutsionnykh prav yeye nesovershennoletnego syna Zaytseva Nikity Dmitriyevicha punktami 1 i 5 stat'i 429 i punktom 4 stat'i 445 Grazhdanskogo kodeksa Rossiyskoy Federatsii". [2010] Case no N 945-O-O (July 15, 2010).

702 Opredeleniye Verkhovnogo Suda RF ot 01.10.2013, (2013) N 2-КГ13-3; Opredeleniye Verkhovnogo Suda RF ot 17.09.2013, (2013) N 18-KG13-85.

703 President Putin approved this plan on 1 June 2012 by presidential decree No. 761. Ukaz Prezidenta RF N 761 "O Natsional'noy strategii deystviy v interesakh detey na 2012–2017 gody" (2012). Meetings of the Coordinating Council on the implementation of the National Strategy for Action for Children, available online: http://state.kremlin.ru/council/36/, (accessed June 1, 2015).

704 CRC Committee, "State Party Report: Consolidated Fourth and Fifth Report of the Russian Federation," para. 26 (a).

705 Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 13–14, 18, 24.

706 President of the Russian Federation speaks at the Congress held in Moscow by Russian parents. Prezident Rossii, "Vladimir Putin Vystupil Na Prokhodyashchem v Moskve S"yezde Roditeley Rossii" (September 2, 2013), http://kremlin.ru/events/president/news/17469 (accessed May 24, 2015).

as well as supporting or protecting their rights.[707] These social services should, in accordance with art. 6 of the Federal Act on the Foundations of Social Services, be provided on the basis of common state standards. However, practice throughout the country is still diverse. According to the state report, national standards fix, e.g., the main types of social services for families and children, their quality, terms and definitions, classification of social service facilities, types of social service institutions available, and monitoring the quality of such services.[708]

The NGOs alternative report did not see development of the social services system in the context of the best interests of the child as positive and found three central flaws to the social services system:[709]

1. Social work is not organized by way of planned and targeted case management and is not directed to providing services at the residence of citizens and families (i.e., at home). As a rule, a difficult life situation of the family is resolved as a rule by taking a child from the home to shelters and social institutions for the disabled, and boarding schools, or to substitute families.
2. Social work is monopolized by state departments and their centres.[710]
3. There are no federal minimal standards of social services and their quality. The disparity between regions is vast, and accordingly, the Federal Act of

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[707] CRC Committee, "State Party Report: Consolidated Fourth and Fifth Report of the Russian Federation," para. 183.

[708] *Ibid*., para. 184 *et seq*.

[709] Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 10. Similar observations have been made in the critical social media. See e.g. Sandra Dillon, "Russia and the Child's Best Interests," *Children's Rights and Social Orphans*, June 28, 2010, http://allthesocialorphans.wordpress.com/2010/06/28/russia-and-the-childs-best-interests/ (accessed March 17, 2014).

[710] Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 7–8. According to the report, de-institutionalization had a big drawback in 2008 when the Federal Act no 48 on Tutorship and Guardianship was adopted on 24 April 2008. Use of "patronat family care" supported the individual needs of children and families. As a result, practically all inmates of institutions, including children with disabilities, HIV/AIDS infected children, teenagers etc. were placed with well trained and supported foster families and thus, almost 95% of all children were brought up in new families or re-turned home. After adoption of the 2008 law, this system was abolished and as a result all such centers have been closed down or become ordinary orphanages again. Furthermore, in 2012 the 'Dima Yakovlev Act' was adopted which put a ban on US adoption from Russia. Federal'nyy zakon "O merakh vozdeystviya na lits, prichastnykh k narusheniyam osnovopolagayushchikh prav i svobod cheloveka, prav i svobod grazhdan Rossiyskoy Federatsii" (Federal Law on measures against persons involved in violations of fundamental human rights and freedoms, rights and freedoms of citizens of the Russian Federation), N 272-FZ (2012).

August 2004[711] made it impossible to establish federal standards and rules in providing social services.

A similar observation was made by the CRC Committee, which noted that the obligation to take into consideration the interests of the child in all initiatives involving children has been set out in its legislation. However, the Committee was concerned that *"The child protection state entities (Tutorship and Guardianship bodies) assess only the general physical safety of children and do not assess their emotional and psychological needs"*.[712]

Concluding from the above, most legal acts dealing with the rights of the child do include the specific version of the best interests of the child principle whereby all decisions have to take into consideration the "legitimate interests of the child". As noted by the CRC Committee, this is not in full conformity with the wording of the CRC. There are further substantive deficiencies in the implementation of the best interests of the child principle – the CRC Committee recommended further that Russia should strengthen its efforts to ensure that the best interests of the child is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in all policies, programmes and projects relevant to and with an impact on children; to develop procedures and criteria to provide guidance to all relevant persons in authority for determining the best interests of the child in every area and for giving them due weight as a primary consideration. Such procedures and criteria should be disseminated to the public, including religious leaders, courts of law, administrative authorities and legislative bodies.[713]

2.4.1 Placement into care

As discussed above, under Russian legislation, parents have the primary responsibility for the upbringing and development of their children. They have equal rights and obligations *vis-à-vis* their children, and they must provide for their under-aged children and look after their health and physical, intellectual, psychological, spiritual and moral development. These obligations are enforced through administrative sanctions, and it is unclear whether the best interest of a child is a primary consideration in these decisions.

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[711] Federal'nyy zakon "O vnesenii izmeneniy v zakonodatel'nyye akty Rossiyskoy Federatsii i priznanii utrativshimi silu nekotorykh zakonodatel'nykh aktov Rossiyskoy Federatsii v svyazi s prinyatiyem federal'nykh zakonov "O vnesenii izmeneniy i dopolneniy v Federal'nyy zakon "Ob obshchikh printsipakh organizatsii zakonodatel'nykh (predstavitel'nykh) i ispolnitel'nykh organov gosudarstvennoy vlasti sub"yektov Rossiyskoy Federatsii" i "Ob obshchikh printsipakh organizatsii mestnogo samoupravleniya v Rossiyskoy Federatsii", N 122-FZ (2004).

[712] CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)," para. 26.

[713] *Ibid*., 27.

In accordance with art. 5^{35} of the Code of Administrative Offences,[714] a warning may be issued or an administrative fine imposed on parents or other legal representatives of minors for non-fulfilment or improper fulfilment of their responsibility for providing for, bringing up, educating and protecting the rights and interests of minors. Furthermore, pursuant to art. 69 of the Family Code,[715] a parent or parents may be deprived of parental rights for evasion of parental responsibilities. These grounds include e.g. wilful refusal to make maintenance payments, refusal to remove a child from a maternity clinic or ward or other medical centre, educational establishment, social protection institution or other similar facility, abuse of parental rights, cruel treatment (including physical or psychological violence) and offences against a child's sexual inviolability. A parent or parents may also be deprived of their parental rights if they are chronic alcoholics or drug addicts or if they have made a premeditated attack on the life or health of their children or spouse. These provisions were tested in the Constitutional Court in a case where the parental rights of a mother were limited due to non-attendance at school.[716]

Article 69 of the Family Code allows a court, in the interests of the child, order a child's removal from the parent or parents without depriving them of or restricting their parental authority. Such a measure is usually taken in cases which it is dangerous for a child to remain with the parents for reasons beyond their control (such as a psychological disorder or chronic illness, a concurrence of difficult circumstances) and also if there are insufficient grounds for deprivation of parental rights. If the parent or parents do not alter their behaviour, the tutorship and guardianship authorities are required, on the expiry of a six-month period from the day of issuance of a court order restricting the parents' rights, to initiate proceedings for deprivation of these rights. In the interests of the child, they may initiate proceedings for deprivation of parental rights on the expiry of that period. Thus, parental rights can be limited as a kind of punishment.

The state report on the application of the CRC shows that limitation of parental rights is large scale. According to the report, "c*ompared to 2003, the number of petitions approved for deprivation of parental rights rose by 19.5 percent and totalled 63,100 cases (50,800 cases in 2003). The number of such cases has been declining since 2007."*[717] From 2007 to 2009 the number of

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[714] Kodeks RF ob administrativnykh pravonarusheniyakh (Code of Administrative Offences), N 195-FZ. (2001).

[715] Semeynyy kodeks Rossiyskoy Federatsii (Family Code), N 223-ФЗ (N 223-ФЗ 1995). For analysis of the Russian Family Code, see e.g., Nadezhda Tarusina, "European Experience and National Traditions in Russian Family Law," *Russian Law Journal* 3, No. 2 (May 20, 2015): 97–108.

[716] Opredeleniye Konstitutsionnogo Suda "Ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanki Borodiy Yeleny Nikolayevny na narusheniye yeye konstitutsionnykh prav i konstitutsionnykh prav yeye nesovershennoletnego syna polozheniyami statey 69 i 71 Semeynogo kodeksa Rossiyskoy Federatsii" [2006] Case no N 476-O (November 16, 2006).

[717] CRC Committee, "State Party Report: Consolidated Fourth and Fifth Report of the Russian Federation," para. 102.

foster families rose from 22,200 to 40,500, and the number of children deprived of parental care who have been placed in such families grew from 38,600 to 68,000.[718] The alternative report of the NGOs to the CRC Committee paints another picture and states:

> *From the total huge numbers of institutionalized children only 25% are children officially acknowledged as orphans (80% from this 25% are social orphans with their parents alive but deprived of their parental rights by the Courts). 75% of inmates of Russian children's institutions are so called "parental inmates" given by their parents under care of the State "temporarily", as is permitted by article 155-1 of the Family Code of the Russian Federation. Most of this 75% are so called "children with limited possibilities of health" (or children with special needs and disabilities); however plenty of children are voluntarily given by their parents to State institutions because of poverty, impossible living conditions, or by socially vulnerable parents (alcoholics etc.) who were 'advised' by the authorities to write their Request on temporary placement of a child under care of the State and who are asked to revise this Request annually.*[719]

Questions concerning periodic review of placement and all other aspects of guardianship have been regulated since 2008 by the Federal Act on Tutorship and Guardianship[720]. This law underwent significant changes in 2013. Ms. Winter noted during oral session No. 1863 of the CRC Committee that, *"A new law on tutorship and guardianship make it harder to move children from institutions to alternative forms of care."*[721] This view was also emphasised by the alternative report, *"background of popularity of this ["Anti-juvenile"] campaign lies in the wider population's fear of losing their children since they see the everyday destruction of families under pretext of protection of children's rights by the tutorship and guardianship bodies and by subsequent deprivation of parental rights by Court Decisions.*"[722]

The CRC Committee noted in relation to that issue: "*the State entities for child protection (tutorship and guardianship bodies) assess only the general physical safety of children and do not assess their emotional and psychological needs"*. [723] This assessment was not as strong as reform proposal by the Coalition of NGOs, in whose estimation development of social orphanhood

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[718] *Ibid*., 116.

[719] Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 12.

[720] Federal'nyy zakon "Ob opeke i popechitel'stve" (Federal Act on Guardianship), N 48-FZ (2014).

[721] CRC Committee, "Summary Records of the 1863 Meeting: Russian Federation CRC," para. 14.

[722] Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 24.

[723] CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)," para. 26.

prevents work directed at the preservation of the biological family. Preservation of families requires a priority radical reform of the tutorship and guardianship bodies which currently work as mere executors of the decisions without their own discretionary powers.[724] Instead, the CRC Committee opted to give a general recommendation for improvement of administrative bodies.

The alternative report drew attention to the fact that child protection bodies do not have a duty to fulfil 'periodic reviews of placements' which means that they are responsible only for formal control over these placements. In fact, such control is indeed quite formal and covers assessments only of some general things such as actual accommodation, food and sanitary conditions. The most dramatic is the absence of any reviews of placement of children with institutions.[725]

The best interests of a child would need regular review and family unification should also be considered due to the fact that the conditions in the institutions are questionable at best. According to the alternative report, existing tools for supervision of observation of rights of inmates of children's institutions are insufficient. As an example, in February 2013 the Investigation Committee of the Russian Federation revealed that in one orphanage in Siberia the older inmates raped the younger ones regardless of gender, and this system of active hetero- and homosexual abuse existed over 10 years.[726] Similar problems were observed by the CRC Committee, though in more diplomatic terms:

> *The placement of children in institutions is not reviewed regularly. The child protection (guardianship) bodies are responsible only for formal monitoring of such placements, merely assessing accommodation, food and sanitary conditions; /…/ Children in care institutions are subjected to abuse, including sexual abuse, and no assistance is given to the child victims of that abuse; Children in care institutions who misbehave are often punished with psychiatric hospitalization and treatment.*[727]

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[724] Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 20.

[725] CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)," 13.

[726] Coalition of Russian NGOs, "Russian NGOs' 'Alternative Report – 2013', Comments to the 'Consolidated Fourth and Fifth Periodic Report of the Russian Federation on the Implementation of the Provisions of the Convention on the Rights of the Child,'" 13. For an alternative view, see the story from Tim Whewell and BBC News, "Russia: Are Efforts to Help Thousands of 'Abandoned' Children Being Resisted?," *BBC News* (April 2, 2013), http://www.bbc.com/news/world-europe-21994332 (accessed May 25, 2015). See also Svetlana Osadchuk, "Russian Orphans | Arts and Ideas," *The Moscow Times* (n.d.), http://www.themoscowtimes.com/arts_n_ideas/article/russian-orphans/362861.html (accessed May 25, 2015).

[727] CRC Committee, "Concluding Observations: Russian Federation (combined Fourth and Fifth Report)," 39.

The reunification of families is also lacking; rather, the trend is towards the separation of families. Some groups have been especially targeted, such as Roma. The CRC Committee noted:

> *The Committee is seriously concerned about the widespread practice of children being forcibly separated from their parents in the application of articles 69 and 73 of the Family Code, and the lack of support and assistance to reunite families. The Committee is also concerned that Roma mothers are often separated from their children immediately upon discharge from the hospital after birth because they lack the necessary documentation and that the children are returned only for a large sum of money that most Roma cannot afford. Furthermore, the Committee is concerned that children who are forcibly separated from their parents are then placed in care institutions and/or put up for adoption.*[728]

Adoption would be a measure that would remedy some of the above-mentioned problems. Recent developments in Russia seem also to hinder this process. Under the Family Code, adoption is considered a priority form of placement for children who have remained without parental care (art. 123 *et seq*). According to the state report, a considerable number of children with disabilities have been adopted by Russian families. However, the number of children with disabilities adopted is nevertheless insufficient, owing to the persistent stigmatization of these children in society. Furthermore, the requirement that a child should be refused by at least five Russian families before an intercountry adoption can be considered reduces the possibility of such an adoption for children with disabilities. The Dima Yakovlev Federal Act[729] of 28 December 2012, which bans adoptions from the Russian Federation to the United States of America, has eliminated the prospect of adoption for a considerable number of children, in particular children with disabilities in care institutions.

Concluding from the above, Russian legislation and practice do not guarantee the best interests of the child in placement into care. This is an area where cultural arguments, though not explicitly stated, seem to have a great influence on the matter. During the Soviet era, there was no trust in the capabilities of the family. The same can be observed now – placement in institutions is seen as a suitable move for orphaned or misbehaving children. There is no attempt to substantially decrease the number of children in institutions even if a number of practical problems are connected to these.

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728 *Ibid*., para. 41.

729 Federal'nyy zakon "O merakh vozdeystviya na lits, prichastnykh k narusheniyam osnovopolagayushchikh prav i svobod cheloveka, prav i svobod grazhdan Rossiyskoy Federatsii" (Federal Law on measures against persons involved in violations of fundamental human rights and freedoms, rights and freedoms of citizens of the Russian Federation), N 272-FZ (2012).

2.4.2 Family reunification

Departure from and entry to the Russian Federation by Russian citizens, including minors, is regulated by Federal Act No. 114 of 15 August 1996 (amended 12.12.2013) on the Procedure for Departure from and Entry to the Russian Federation[730]. There is also more detailed co-operation between the Russian Federation and CIS countries concerning the return of minors to their country of permanent residence, signed in Chisinau on 7 October 2002[731]. According to the report, in 2009 the social protection authorities of the constituent entities returned 125 minors to their permanent place of residence after establishing their identity. Sufficient information is unavailable as to the true statistics on this issue.[732]

The Constitutional Court has pointed to the need to take account of arts 9 and 10 of the CRC, according to which statements by children or their parents to request entry to a state party to the Convention for the purpose of family reunification are to be considered as positive, humane and expeditious;[733] as well as addressing the need for deportation of a foreign citizen or their temporary residence in the Russian Federation in case of HIV infection.[734]

Concluding from the above, serious limitations are connected to implementation of the best interests of the child in cases of family reunification after a child has been in an institution; this is especially problematic as the number of "social orphans" is vast. Mistrust towards the family means that leaving children to institutions is seen as a sufficiently good solution for the child.

Russia has limited the definition of the best interest of a child and reserves itself a right to decide, what interests of the child are legitimate. Furthermore, practice of Russia is inconsistent – on the one hand, it refers to the traditional value of the family, on the other, the legislation allows easy limitation of parental rights; a vast number of children in the orphanages are 'social orphans.'

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730 Federal'nyy zakon "O poryadke vyyezda iz Rossiyskoy Federatsii i v"yezda v Rossiyskuyu Federatsiyu", N 114-FZ (1996).

731 Federal'nyy zakon "O ratifikatsii Soglasheniya o sotrudnichestve gosudarstv – uchastnikov Sodruzhestva Nezavisimykh Gosudarstv v voprosakh vozvrashcheniya nesovershennoletnikh v gosudarstva ikh postoyannogo prozhivaniya," N 81-FZ (2006).

732 CRC Committee, "State Party Report: Consolidated Fourth and Fifth Report of the Russian Federation," para. 41.

733 Po zhalobe grazhdanina Respubliki Moldova KH. na narusheniye yego konstitutsionnykh prav polozheniyami chastey tret'yey, chetvertoy i sed'moy stat'i 25.10 Federal'nogo zakona «O poryadke vyyezda iz Rossiyskoy Federatsii i v"yezda v Rossiyskuyu Federatsiyu» [2013] Case No. 902-O/2013 (April 6, 2013).

734 Po zhalobe grazhdanina Ukrainy KH. na narusheniye yego konstitutsionnykh prav punktom 2 stat'i 11 Federal'nogo zakona «O preduprezhdenii rasprostraneniya v Rossiyskoy Federatsii zabolevaniya, vyzyvayemogo virusom immunodefitsita cheloveka (VICH-infektsii)», punktom 13 stat'i 7 i punktom 13 stat'i 9 Federal'nogo zakona «O pravovom polozhenii inostrannykh grazhdan v Rossiyskoy Federatsii» [2006] Case No. 155-O/2006 (May 12, 2006).

2.5 Conclusion

Formal requirements of the best interests of the child are more or less present in all three states, although the definition of the legal interest of a child as provided in Estonian and Russian legislation does not comply with the minimum requirements of art. 3 (1).

As was shown, implementation of the principle varies considerably among the three states. While Finnish practice shows that the best interests of the child is and can be analysed in every case concerning decisions by the child, still there are specific areas where this right is not protected to the fullest extent possible (e.g. taking into public care), the fact that the best interests of the child is an issue before the domestic courts show that at least potentially parties are aware of the principle, and there is the possibility of true application of it.

Estonian legislation is currently going through the developments whereby the best interests of the child will be incorporated more strongly to the decision-making process. The practice of the courts shows that understanding the substance and meaning of the best interests of the child is an issue that has gained more attention in court proceedings. The meaning and scope of the principle, as well as its relation to the rights of the parents, is, however, not clarified sufficiently in Estonian court practice nor is there substantive analysis on the way this principle is used in administrative proceedings. There is also the insufficient practice of reviewing removal decisions; the decisions taken are often viewed as final. This is not in compliance with the evolving capacities of the child; both the family circumstances as well as the best interests might change in time.

Russian legislation includes the principle of the interests of the child in its relevant legal acts. The wording of this principle is not in accordance with the requirements of the CRC. Using the concept of 'legitimate interests' gives the state a possibility to define, what interests of a child are legitimate. This does not follow the position of the CRC that is open to the full amplitude of different interests.

Furthermore, practical application of the principle is formal and limited; and therefore, the principle has practical meaning mainly in family disputes over custody. Even when the highest courts support the application of this principle in the domestic legal system, regulating the traditionally private sphere has received strong opposition. There is also more emphasis in current Russian rhetoric on the need to protect the family so that the relationship of rights and protection of the family vis-à-vis the best interests of the child remain unclear. In hard cases, however, concerning taking into care and removal of parental rights, practice shows no substantive consideration of the best interests of a particular child and the authorities routinely take children into public care without substantive analysis of other possible measures.

Both of the test cases – placement into care and family reunification – show that both Estonia and Russia have difficulties in taking into account the time factor and support the family reunification. Supporting the reunification of the

family requires by the sides of legislative measures also policy instruments (e.g. education, dissemination of information, etc.) Removal of a child or separation of a child from the family seems to be a one-way motion that does not take the reunification as a substantive and positive alternative. As the best interest of a child is not re-evaluated, Estonia and Russia violate the minimum core of this principle.

CRC Committee was strong in its criticism of the Russian report and indicated that practical application of the legislative requirements is the real test case and shows whether the legislation is in compliance with the CRC. It remains to be seen whether the similarly strong criticism is also taken in relation to Estonia.

The best interest of a child was also a right where Russia domestically uses traditional values argument. As it was not used during the constructive dialogue, the CRC Committee did not have to evaluate the general admissibility of these arguments. However, it noted that the Russian definition of the best interests of a child is not in compliance with the CRC.

It has to be noted that the General Comment No. 14 on the best interests principle gives states sufficient guidance on the practical implementation requirements. Moreover, the concluding observations of the CRC Committee were also detailed enough to point out the national enforcement deficiencies. This is, at the same time, an area where some type of follow-up mechanism would help to clarify both the requirements and criticism of the Committee and might have a positive effect on the state practice.

CONCLUDING OBSERVATIONS

National implementation of international human rights treaties depends on the substance these norms are seen to have as well as the national relevance of those norms. The central research question of the dissertation asks whether significant differences occur in the national implementation of the minimum core of these – purportedly universal – rights and what factors might cause differences. The main hypothesis of the work was that even in such a universally recognized document as the CRC the universality claim does not hold true for the understanding and, furthermore, that the interpretation and practical application of the minimum core of rights in Estonia, Finland, and Russia differs considerably. Research shows that there are considerable differences in the implementation practice of both the definition of a child and the best interests of the child of these states; the primary factors in these differences vary.

The current dissertation started with the proposal that a difference exists in the way states implement international human rights, and these differences are dependent on a number of theoretical approaches to international law. First, it was proposed that this difference might come from the monist-dualist distinction, whereby monist countries would be more inclined to apply international law directly while dualist states would refrain from doing so. Analysis showed no real difference in national attitudes or the application of international human rights treaties connected to these underlying theories. In hard cases, the selection of the monist approach did not mean that direct implementation of international treaties was seen as a suitable solution. Nor did it mean that the legislator or national courts were in fact applying human rights treaties. Thus, the central hypothesis of the first chapter was confirmed – the three states all consider international human rights as part of their national legal system; and, they all deem practice of the international supervisory bodies as binding.

Finland, as a dualist country, applies international human rights norms very similarly to monist countries. The reason behind this could be that Finland is no longer a true dualist country, or, alternatively, that it is not a dualist country in relation to international human rights treaties, or even more strictly, it is not a dualist country in relation to the CRC. At the same time, both Russia and Estonia have so many structural and societal problems that even if the legislator and the courts were willing to apply international human rights standards, the practical possibilities of the state would not allow for that. Thus, it rather seems that every legal system will also attempt to maintain its distinct character and the main source of its legitimacy, in particular, popular sovereignty, as well as the protection of human and citizens' rights.

All three countries have used the CRC in their legislative practice as a reason for changing the national law; the CRC has been applied directly in the national courts of all three states. Finnish practice is comparatively more limited. The reasons for this are rather dependent on legal culture and tradition whereby the

courts are not deemed to be an appropriate place for resolving policy issues. It is first and foremost the obligation of the legislator to adopt national legal norms that correspond to their international obligations and implement them in national law.

The monist states of Estonia and Russia have been quite open to both international legal norms as well as international practice. The Estonian courts when applying basic rights, have often sought support from international legal obligations and refer to both international treaty norms as well as to international practice. A similar approach was observed in relation to the Russian legal system. Even in controversial cases, the Constitutional Court has at least mentioned the international obligations of Russia as also justifying the findings of the Court. However, these references were quite vague in character while, in a number of cases, there was even no reference to concrete norms or treaties.

To use the language of Simmons, different costs influence the behaviour of these states[735] – the differences observed might be a result of the difference in the level of development of these states. Russia has not finished its transition to democracy (it is even unclear whether it is still on this path); the costs of full implementation of international human rights obligations are, therefore, still very high for Russia. This is also apparent from the practice of the CRC Committee, which showed serious structural problems in the application of the CRC.

Although limited resources are available also in Estonia, Estonia nevertheless has completed its transition to democracy and has for more than 20 years followed liberalism as a political concept. This means that there is a lack of full implementation of social rights; at the same time, the analysis shows that some practices or beliefs have remained from Soviet baggage.

The second hypothesis of the research was that states apply international human rights differently because of their specific value system and/or cultural traditions. This hypothesis proved to be true – national implementation of international obligations was dependent on the constitutional or societal values of the countries. Both Estonia and Russia used the "tradition" argument in their implementation of international human rights; Finland did not use similar arguments in relation to the rights central to the current research. However, it still mentions 'traditions' to justify certain legislative policy decisions or the absence of certain legal acts – e.g. *"self-regulation has long traditions in the Finnish mass media, and it has been considered to be suitable for monitoring the contents of the Internet and mobile phones as well."*[736] Russia did not use the traditional values argument openly; nevertheless, its national legislation, as well as the domestic rhetoric of its leaders, uses the traditional values argument.

Research also showed deficiencies in the supervisory practice of the CRC Committee. As an example, the definition of the child was not analysed closely

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735 Simmons, Mobilizing for Human Rights, 64–77.

736 CRC Committee, "State Party Report: Fourth Report of Finland," para. 171.

and, thus, questionable regulations of the states e.g. in child marriage were not analysed. This gives the impression of double standards and hints that child marriage could not be a problem for a Western state.

Based on the aforementioned analysis, it might be assumed that the question of the general supremacy of international human rights is moot; rather, we might have to take a new and pragmatic approach toward the relationship between international law and domestic law that focuses on specific solutions instead of general and formal hierarchies. This is a point where constructive dialogue with the CRC Committee could be of utmost importance. Clarification of the margins given to states and of minimum standards would help both states as well as the Committee itself to see whether the practice of the state has gone too far and is effectively hindering the protections granted to children.

Much of the debate presented in chapter 1.2 on the universality and relativity of international human rights law and pluralist legal orders is characterised by polarised presumptions that disregard the complexity and variety of local situations. One has to recognise that cultural differences are significant and real to people; there exists the complexity of the relationship between law and culture and the fact that culture is a dynamic process, which is socially and politically contested.[737] The current research shows that even though these differences might be quite fundamental (e.g. the attitude toward LGBTI children), they do not necessarily hinder protection of all the rights in the CRC.

People are bearers of both culture and rights, and the recognition of rights should not imply the rejection of culture. On this basis, the current thesis rejects the view that universalism and cultural relativism are alternatives between which one must choose once and for all. Instead, it suggests that much can be learned from how a local understanding of justice sees universal general principles of human rights in their own contexts. The protective and even discriminatory stance of Russia toward certain rights has stressed paternalist and protective measures and, thus, it could be presumed that it effectively combats some of the true problems of child rights such as sexual violence against children. Too paternalist an approach could mean that the rights of the family and the best interests of the child are unnecessarily limited, but too liberal an approach also poses threats. When the sexual consent limit is set too low, as is the case in Estonia, the need to protect children from sexual violence could be disregarded.

These three states are all from Europe. They have long accepted their international human rights obligations and the rights of children, particularly since the creation of the CRC in 1991. Thus, the CRC Committee has already had the chance to analyse the practice of these states in over four to five cycles and, as was shown, the practice of the Committee were generally accepted by the states, at least as soft law.

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737 International Council on Human Rights Policy, *When Legal Worlds Overlap*, v.

One of the most important outcomes relates to the standards and conclusions of the CRC Committee itself. Analysis of the practices of the CRC Committee in relation to these states reveals that the Committee has, by way of its supervisory practice and drawing upon it in its General Comments, formulated certain issues as norms or at least strong suggestions. It does not treat all of these requirements as minimum standards; at least, it does not draw member states' attention to these requirements. This was especially obvious in relation to the definition of a child and the age limits.

Adopting a new law would be the easiest measure available to the state. This is especially so in cases such as child marriage where the potential number of children influenced is small, and the issue could be resolved simply by adopting a law. At the same time, it would be an easy task for the Committee to analyse conformity with this requirement and, when necessary, conclude whether national legislation needs improvement or not. It is curious because child marriage is connected with cultural practices that are possibly very harmful. Thus, in order to guarantee that this requirement is taken seriously, there should not be differential treatment of states by the Committee, and such practices should also be prohibited in states where child marriage is not connected so clearly with harmful cultural practices such as planned marriages or polygamy. These issues should be a priority even if the capacity and resources of the Committee are limited, and the Committee must decide where to invest its time.

On the basis of the current research, it can be concluded that the CRC Committee generally follows the core minimum standards approach, even if it does not clearly define these standards in its General Comments or Concluding Observations. Through its recommendations and issues of concern, the Committee hints at the required minimum; in the best-case scenarion, it defines minimums in its General Comments. At the same time, it is not formally the obligation of the Committee to find out whether a state is in violation of the CRC (i.e., to 'name and shame'). Its main obligation is to assist states with constructive dialogue and guarantee gradual improvement in the protection of the rights of the children.

Coming back to the main question of the dissertation, it has to be concluded that the universality ideal of international human rights is not realised. Estonia, Finland, and Russia substantiate and apply the minimum requirements of the CRC differently. The CRC Committee has not been strong enough in pointing out these discrepancies; thus, it has to be questioned whether the CRC Committee itself sees analysed rights as the minimum core requirements. All the three sates used some cultural or traditional values arguments; accepting them in matters that do not interfere with the minimum core of rights could help to advance the implementation of international human rights norms. Here, I concur with Lenzerinis' observation:

> *when human rights are rationalized according to the terms of reference proper to a given culture – i.e. are attributed a meaning which is culturally intelligible in the light of the intellectual patterns of the community (of course, without altering*

> *their purpose) — their goal, content, and role are better understood by the members of society. As a result of this process, human rights are empathized by the society and incorporated within its cultural substrate, in the sense that they are assimilated by the community and felt as natural components of their everyday life.*[738]

Integrating culture and national values into human rights 'talk' could help to strengthen protection of international human rights; it is paramount for the substantive implementation of human rights to internalise them for the receptor,[739] and the minimum core approach seems to be the most appropriate tool for it. At the same time, this internalisation should not distort the meaning of international human rights grounded in positive law. It is still unrealistic or utopian to expect that the internalisation of human rights would circumvent national values and constitutional requirements. Thus, through reporting as well as judicial control, international cooperation should, therefore, be balanced with constitutional values; rather, international supervision should aim at accommodating different legal systems while accepting and preserving their distinctness as much as possible. This kind of dialogue, however, would pre-suppose open engagement between international human rights and national legal systems. Other UN human rights bodies have opted for using follow-up mechanisms to support the work of the treaty bodies. This is definitely an instrument that could complement the existing reporting system.

The selection of states in the research was limited and, thus, the current observations might prove wrong in relation to other states and other rights. The states of the current study have formally accepted the universality of the international rights of the child. However, certain topics opened the door for relativist or subsidiarity arguments. It is still hard to conclude whether these interpretations were fully outside the margins of the CRC. It would be interesting to see whether the function of the CRC Committee in the individual complaints procedure would bring more clarity to this debate and whether the minimum standards deriving from the CRC would be substantiated unambiguously.

I am of opinion that if minimum core universal harmonization is the ideal of the CRC, it is the task of the CRC Committee to use uniform minimum standards and, when necessary, to complement them with progressive realisation goals. Without a clear indication from the CRC Committee, the states have no reason to step out from the comfort zone and apply these minimum requirements.

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738 Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014), 217–18.

739 The receptor approach has been developed in Tom Zwart, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach," *Hum. Rts. Q.* 34 (2012): 546.

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SUMMARY IN ESTONIAN

Universaalsed inimõigused siseriiklikus kontekstis: lapse õiguste rakendamine Eestis, Soomes ja Venemaal

Iga õiguskorra aluspõhja või ka taustsüsteemi moodustavad väärtused. Siseriiklikes õiguskordades tulenevad need väärtused tihti traditsioonist, kultuurist ja tavadest ning neid väljendatakse näiteks põhiseaduste preambulites. Rahvusvahelise õiguse puhul on olukord keerulisem – rahvusvaheline õigus põhineb riikide vabatahtlikel kokkulepetel ning üldiselt on selle alusväärtuseks olnud vastastikkus. Pärast II maailmasõda on rahvusvahelise õiguse paradigma muutunud ning nüüdisaegse rahvusvahelise õiguse alusväärtuseks peetakse tihti just rahvusvahelisi inimõiguseid.

Rahvusvahelises inimõiguste teoorias leitakse niisiis, et suveräänsus ei ole enam üksinda rahvusvahelise süsteemi keskne väärtus, vaid sellele on ÜRO põhikirja vastuvõtmisega lisandunud uued väärtused.[1] Samas on rahvusvaheline õigus endiselt riigikeskne süsteem, kus puuduvad praktilised hoovad riikide sisuliseks kontrollimiseks.[2]

Riikide motivatsioon erinevate inimõiguste lepingutega ühinemiseks varieerub. Simmons analüüsis liitumiste põhjuseid ja leiab, et kuigi erinevad riigid loodavad selliste lepingutega ühinemisest saada erinevat kasu, toob liitumine alati kaasa mingi positiivse[3] arengu riigis.[4] Samas on inimõiguste süsteemi sisulise edu eeldus see, et riigid võtavad need normid praktiliste poliitiliste juhistena kasutusse ning viivad riigis neile toetudes läbi vajalikud muudatused.[5]Seega sõltub inimõiguste rakendamine lõppastmes siiski riigi erinevatest valikutest ning tegelikust rakenduspraktikast.

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1 ÜRO põhikirja artikli 1 järgi on ÜRO eesmärgid "*3. Arendada rahvusvahelist koostööd majandusliku, sotsiaalse, kultuurilise ja humanitaarse iseloomuga rahvusvaheliste probleemide lahendamisel ning lugupidamise kasvatamisel ja süvendamisel inimõiguste ja kõigile mõeldud põhivabaduste vastu, tegemata vahet rassi, soo, keele ja usundi alusel."* Ühinenud Rahvaste Organisatsiooni põhikiri ning Rahvusvahelise Kohtu statuut, jõustunud 17.09.1991, RT II 1996, 24, 95.

2 On mitmeid autoreid, kes leiavad, et postmodernistlik rahvusvaheline õigus ei ole enam riigikeskne ja suveräänsust austav süsteem, vaid rahvusvaheline õigus on liikunud riigi kontrolli alt ära. Vt. nt. Janne Nijman ja André Nollkaemper, "Beyond the Divide," *New Perspectives on the Divide Between National and International Law*, toim. Janne E. Nijman ja André Nollkaemper (Oxford University Press, 2007), 341–360.

3 Positiivse arengu all on mh silmas peetud üksikisikute õiguste tugevamat kaitset.

4 Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 77–80. Simmons leiab, et riigid ootavad lepingutega ühinemisest mingit kasu. On selliseid riike, kelle jaoks inimõiguste parem tagamine ongi see loodetav kasu. Samas on ka nn valepositiivseid riike, kes ei jaga lepingu sisulisi väärtuseid ja liituvad lepinguga seetõttu, et nad saavad sellest mingit muud kasu – positiivset reklaami, investeeringuid vmt.

5 Vt lähemalt *Ibid*., ptk. 4.

Doktoritöö eesmärk, meetod ja teoreetiline taust

Käesoleva doktoritöö eesmärk on analüüsida valitud lapse õigustele antud tõlgendust ja rakenduspraktikat kolmes näiteriigis: Eestis, Soomes ja Venemaal ning leida, kas teoorias universaalsete õiguste rakenduspraktikate vahel esineb olulisi erinevusi. Kui sellised erinevused on olemas, siis üritatakse töös välja tuua nende põhjused. Töö hüpotees on, et isegi nii universaalselt toetatud lepingu kui ÜRO lapse õiguste konventsiooni[6] puhul ei ole võimalik rääkida normide universaalsusest, kuna riikide poolt lepingu normidele antud tähendus ning tõlgenduspraktikad on väga erinevad ning seega ei ole võimalik tagada lepingus sisalduvaid õiguseid näiteriikides ühetaoliselt. Rakenduspraktika taustal ning selle analüüsimiseks ja selgitamiseks kasutatakse käesolevas doktoritöös kahte teoreetilist käsitlust.

Esmalt omab tähtsust see, milline on rahvusvaheliste inimõiguste lepingute siseriiklik positsioon. Siinkohal on riikidel traditsiooniliselt kaks valikut – monism ja dualism. Käesoleva analüüsi näiteriikidest on formaalses mõttes monistlikud Eesti ja Venemaa ning dualistlik riik on Soome. Monistlikes riikides muutuvad lepingud kohe pärast jõustumist siseriikliku õiguse osaks ning seega peaks monistlikel riikidel olema vähem võimalusi lepingutes sisalduvaid norme rikkuda. Dualistlikes riikides on lepingu siseriiklikuks rakendamiseks vajalik täiendavate õigusaktide vastuvõtmine. Inimõiguste lepingute puhul on siseriikliku mõju üheks näitajaks see, kas lepingutele on võimalik siseriiklikus kohtumenetluses tugineda. Euroopa inimõiguste ja põhivabaduste konventsiooni raames on lepingu mõju debatt ära peetud ning kõik liikmesriigid, olenemata oma valitud koolkonnast, peavad tagama üksikisikutele konventsioonis sisalduvate õiguste osas kaebeõiguse. Teiste rahvusvaheliste inimõiguste lepingute puhul, millel ei ole taolist tugevat järelevalvesüsteemi, ei ole olukord nii selge – ÜRO egiidi all vastu võetud inimõiguste lepingute täitmist analüüsivad vastavad komiteed. Nende hinnangute ja tõlgenduspraktika tähendus ja mõju liikmesriikide õiguskordadele on oluliselt vähem selge ning tõenäoliselt saab sellist praktikat parimal juhul pidada mittesiduvaks õiguseks („*soft law*“).

Teiseks sõltub rahvusvaheliste inimõiguste lepingute rakendamine lepingute siseriiklikust tõlgendamisest, see omakorda aga sellest, kas ja mil moel tõlgendavad ja jagavad riigid lepingute taustal olevat väärtussüsteemi. Siinkohal on olulised järgmised teoreetilised seisukohad: inimõiguste universaalsus, relatiivsus ja minimaalne sisu.[7] Inimõiguste universaalsus on olnud rahvusvahelise inimõiguste kogukonna peavoolu keskne arusaam.[8] Samas on Inimõiguste Nõukogus nn traditsiooniliste väärtuste toetajate häältega vastu võetud kolm

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6 RT II 1996, 16, 56.

7 Minimaalse sisu (i.k. „*minimum core*“) järgi on igal rahvusvahelisel inimõigusel oma minimaalne sisu ning riigi rakenduspraktika ei tohiks sellest allapoole langeda.

8 Vt nt World Conference on Human Rights and United Nations, “Vienna Declaration and Programme of Action.”

erinevat traditsioonilisi väärtuseid toetavat resolutsiooni[9] ning nende järgi on inimõiguste rakendamisel oluline tunnustada ning austada ka liikmesriikide kultuurilist tausta.

Ka siseriikliku rakenduspraktika analüüsil on kaks mõõdet.[10] Esmalt näitab analüüs, kuidas Lapse õiguste komitee (LÕK komitee) analüüsib riikide raporteid. Komitee kasutab riikidele üldsuuniste andmiseks üldkommentaare ning sealt on võimalik leida üksikute õiguste nn minimaalset tuuma. Võib eeldada, et riikide raportite analüüsimisel rakendab LÕK komitee neid minimaalseid standardeid, mis peaksid olema kõigis LÕKi liimesriikides universaalselt rakendatavad.[11] Teiseks näitab analüüs liikmesriikide rakendamiseetikat – millise tähtsuse on liikmesriigid andnud LÕKile ja LÕK komitee praktikale. Siinjuures võib oluline olla ka see, kas liikmesriik peab LÕK komitee poolt välja toodut siduvaks. Kohustuste olemust aitavad selgeks teha erinevad kohustuste liigitused. Siinse analüüsi jaoks olid ennekõike olulised printsiibi ja õigusreegli eristamine ja kohtustuste kolmikjaotus (i.k. „*respect, protect, fulfill*"). Järelevalve komitee praktika siseriikliku mõju analüüsimisel oli abi ka nn pehme õiguse käsitlusest.

Kuigi käesoleva doktoritöö näiteriikide arv on väike, on nende pinnalt võimalik siiski leida, milline on riigi argumentatsioon lepingute mittejärgmise puhul. Nii on töö selgelt kvalitatiivse iseloomuga. Töö teoreetiline osa pakub välja, et riikide rakenduspraktika erinevus võib tuleneda monismi/dualismi valikust ning sellest, kuidas nähakse inimõiguste rolli, sisu ning nende piiratust filosoofilises plaanis.

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[9] Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind," October 12, 2009; Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind," April 8, 2011; and Human Rights Council, "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practices," October 9, 2012.

[10] Sarnaseid inimõiguste rakenduspraktika võrdlevaid analüüse on tehtud mitmeid, kuid enamasti keskenduvad sellised analüüsid mõnele kitsale õigusele ning ühele riigile. Samuti ei ole olemasolevad tööd üldiselt keskendunud lapse õiguste konventsioonile. Näiteks on aga Mikkola 2008. aastal võrdlevalt uurinud valitud lapse õiguste rakendamist Soomes ja Venemaal. Virge Mikkola, *Lastensuojelu Euroopassa ja Venäjällä*, (Helsinki: Helsingin yliopiston koulutus- ja kehittämiskeskus Palmenia, 2008). Heyns ja Viljonen analüüsisid 2002. aastal kuue peamise inimõiguste lepingu formaalset rakendamist. Christof H. Heyns and Frans Viljoen, eds., *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague [etc.]: Kluwer Law International, 2002). McGrogan on analüüsinud inimõiguste rakendamist Aasias universaalsuse-kultuurilise relativismi argumendi kontekstis. David McGrogan, "Cultural Values and Human Rights: A Matter of Interpretation" (University of Liverpool, 2012).

[11] Käesolevas töös leitakse, et komitee praktika taustal on üleüldise harmoniseerimise idee. Vt nt CRC Committee, "General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)" (CRC/C/GC/14, May 19, 2013).

Käesolevas töös kasutatakse analüüsis kolme näiteriiki – Soomet, Eestit ja Venemaad. Neil kolmel riigil on ajalooline ühisosa, samas on need riigid ka väga erinevad. Kultuuriliste ja ajalooliste käsitluste põrkumine ühelt poolt ning teisalt ühtsete inimõiguste mõju pakub uurimiseks huvitavat materjali. Kolm naaberriiki kuuluvad Euroopa õigusruumi ning neil on mitmesaja-aastane ühine ajalugu Vene keisririigi koosseisus. Samas on kolmel riigil ka palju erinevusi – erinev usk, erinev ajalookäsitus ning erinevad riiklikud alusväärtused. Riigid erinevad ka oma ühiskondliku arengu poolest – Soome saab näidata pikaaegset stabiilset riiklikku arengut, Venemaa ja Eesti alustasid 20 aastat tagasi üleminekut kommunistlikust režiimist demokraatiasse. Kõik need asjaolud teevad võrdleva analüüsi huvitavaks ning võimaldavad analüüsida inimõiguste taga peituvaid väärtuseid.

Näiteriikide lähenemine laste õigustele on samuti olnud erinev. Soome on läbi aegade rõhutanud lapse õiguste olulisust ning seda on peetud riigiks, kes austab ja kaitseb LÕKis sätestatud lapse õiguseid.[12] Eesti õigussüsteem on rahvusvahelistele inimõigustele olnud suhteliselt avatud. Samal ajal on suur osa normidest jäänud formaalseteks käitumisjuhisteks ning praktikas on need jäänud sisuliselt rakendamata. Laste õiguste rakendamine on samuti näidanud, et kuigi lapse õiguseid peetakse teoreetiliselt olulisteks, prevaleerivad täiskasvanute arvamused oluliselt rohkem ning laste seisukohale kaalu ei anta.[13] Venemaa on viimastel aastatel rõhutanud laste õiguste tagamise vajalikkust ennekõike perekonna institutsiooni kaudu.[14]

Näiteriikide valikut toetab ka nende kuulumine ühtsesse regionaalsesse õigusruumi – lisaks LÕKile on kõik kolm riiki Euroopa inimõiguste ja põhivabaduste kaitse konventsiooni osalisriigid[15] ning tunnustavad Euroopa Inimõiguste Kohtu jurisdiktsiooni, lisaks on nad ühinenud ka Euroopa täiendatud ja parandatud sotsiaalhartaga.[16]

Töös analüüsitavad sisulised õigused on lapse õiguste üldprintsiibid – lapse definitsioon (LÕK art. 1) ning lapse parim huvi (LÕK art. 3 lg 1, „*best interests of a child*“). LÕK komitee on sisustanud nende sätete minimaalse sisu oma üldkommentaaridega ning töös analüüsitakse, kas riikide regulatsioonid vastavad

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[12] Vt nt Jasper Krommendijk, “Finnish Exceptionalism at Play? The Effectiveness of the Recommendations of UN Human Rights Treaty Bodies in Finland,” *Nordic Journal of Human Rights* 32, No. 1 (2014): 18–43.

[13] Marre Karu *et al*. *Laste ja täiskasvanute küsitluse kokkuvõte* (Poliitikauuringute Keskus Praxis, 2012).

[14] Vladimir V. Putin, “State Council Presidium Meeting on Family, Motherhood and Childhood Policy,” February 17, 2014, http://eng.kremlin.ru/news/6687.

[15] ECHR, Council of Europe, CETS No. 5.

[16] ESC (Revised), Council of Europe, CETS No 163. Euroopa sotsiaalsete õiguste komitee leidis kollektiivkaebuses *International Federation of Human Rights Leagues (FIDH) v. France,* (asi nr 14/2003) 5. septembri 2003. a. otsuse p-s 36 järgmist: “*Article 17 of the Charter is further directly inspired by the United Nations Convention on the Rights of the Child. It protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance*.”

nendele standarditele. Siinjuures on suureks abiks LÕK komiteele esitatud riikide raportid ning nende pinnalt riikidele antud soovitused. Siseriiklikust õigusest on töös piirdutud näiteriikide seadusandluse (Venemaa puhul vaadeldakse föderaalset regulatsiooni) ning riigi kõrgemate kohtute praktika analüüsiga.

Uuritav valdkond asub rahvusvahelise avaliku õiguse ning konstitutsiooniõiguse piirimail – inimõiguste siseriiklik rakendamine on oluline mõlemale valdkonnale. Töö keskne uurimismeetod on võrdlev meetod. See aitab analüüsida nii rahvusvahelist normiloomet kui ka siseriiklikku rakenduspraktikat. Kuna töö keskendub kehtivale õigusele, kasutatakse ka analüütilist meetodit ja üldiseid õigusdogmaatika meetodeid.

Töö on jagatud kaheks suureks peatükiks. Esimene peatükk avab töö teoreetilise tausta ning üldise õigusraamistiku. Töö teoreetilise tausta juures vaadeldakse kahte teooriate kompleksi. Monism või dualism annavad aimu sellest, milline on rahvusvahelise lepingu siseriiklik mõju. Eelduslikult on monistlikud riigid rahvusvaheliste lepingute ning rahvusvaheliste järelevalveinstitutsioonide rakenduspraktika suhtes avatumad kui dualistlikud riigid. Teiseks vaadeldakse inimõiguste lepingute enda teoreetilist tausta, analüüsitakse nende universaalsuse ja relatiivsuse väiteid ning normides siduvaid kohustusi. Oluline on ka see, milline on kultuuril või traditsioonilistel väärtustel põhineva argumentatsiooni teoreetiline lubatavus. Esimese peatüki kolmas osa annab ülevaate lapse õiguste rahvusvahelisõiguslikust raamistikust – lapse õiguste konventsioonist ning asjakohasest Euroopa nõukogu regulatsioonist.

Esimese peatüki neljas osa vaatleb rahvusvahelise õiguse positsiooni näitriikide konstitutsiooniõiguses. Analüüsitakse nende õiguskordade alusväärtuseid ning rahvusvaheliste lepingute ja järelevalvepraktika rolli. Sisulisteks allikateks on siin põhiseadused, seadusandlikud aktid ning kõrgemate kohtute otsused. Selgub, et kuigi Soome on formaalselt dualistlik riik, on rahvusvaheliste inimõiguste roll tema õiguskorras monistlikele riikidele väga sarnane. Analüüs näitab, et kõik kolm riiki viitavad rahvusvahelistele inimõigustele nii oma õiguses kui ka rakenduspraktikas. Kui Soome ja Venemaa puhul on need viited suhteliselt formaalsed, siis Eesti Riigikohus rakendab inimõiguseid sisuliste argumentidena.

Teine peatükk keskendub lapse õiguste ja LÕKi siseriikliku praktika analüüsile. Esmalt defineeritakse asjakohaste põhimõtete minimaalne sisu ning seejärel analüüsitakse, kuidas on liikmesriigid neid põhimõtteid oma siseriiklikus praktikas mõistnud ning sisustanud. Selle pinnalt on võimalik hinnata rakenduspraktika vastavust rahvusvahelistele nõuetele ning seda, kuivõrd järjekindel on LÕK komitee riikide raportite hindamisel olnud ja millised argumendid on sellises debatis lubatavad. Lähemalt analüüsitakse lapse definitsiooni ning sellega seotud valitud vanusepiiranguid.

Rahvusvaheliste inimõiguste lepingute ja lapse õiguste positsioon näiteriikides

Töö esimene alahüpotees oli see, et riikide valmisolek rahvusvaheliste inimõiguste rakendamiseks võib tuleneda sellest, kas tegemist on monistliku või dualistliku riigiga. Analüüs näitas, et sisulist mõju analüüsitud riikide praktikale valitud teooriast ei tulnud. Keerulistel juhtudel ei rakendanud monistlikud riigid lepingutes sätestatut otse, samuti ei tähenda monistlikkus seda, et riigi seadusandja ja kohtud rakendaksid probleemsetes küsimustes inimõiguseid otse. Dualistlik riik Soome rakendas endale võetud lepingulisi kohustusi väga sarnaselt monistlikele näiteriikidele. Töös nenditakse, et erinevuse puudumine võib tuleneda sellest, et Soomet ei saa inimõiguste lepingute valdkonnas enam puhtalt dualistlikuks riigiks pidada. Samal ajal on Venemaal ja Eestil väga palju erinevaid ühiskondlikke probleeme, mistõttu ei ole pidev otsene inimõiguste rakendamine võimalik.

Kõik kolm näiteriiki on üldiselt LÕKi oma seadusandlikus- ja kohtupraktikas rakendanud. Soome kohtupraktika on siin aga veidi piiratum. Selle põhjus võib olla õiguskultuurist tulenev asjaolu – Soomes ei peeta kohtuid poliitikaküsimuste lahendamise kohaks ning ennekõike peab seadusandja tagama selle, et LÕK jõuab siseriiklikesse õigusnormidesse. Monistlikud Eesti ja Venemaa on inimõiguste osas suhteliselt vastuvõtlikumad ning lepingute normidele viidatakse kohtupraktikas tihti. Eesti kohtud otsivad rahvusvahelisest praktikast oma järeldustele tuge ning viitavad üldiselt nii lepingute normidele kui ka kohtupraktikale. LÕKi rakenduspraktikale siiski ei viidata ning ka LÕKile viitamist on kohtupraktikas suhteliselt vähe. Vene kõrgemate kohtute praktika on sarnane – Venemaa Konstitutsioonikohus on isegi vastuolulistes kaasustes vähemalt viidanud rahvusvaheliste inimõiguste lepingute sätetele; sellised viited on tavaliselt vägagi üldised ning võib ka juhtuda, et kohtuotsuses leitu ei vasta sisuliselt LÕKis sätestatule.

Lapse definitsioon

Lapse definitsioon on lapse õiguste rakendamise üldine lähtekoht, LÕK artikkel 1 ei anna siinjuures väga täpset juhist:

> *Käesolevas konventsioonis mõistetakse lapse all iga alla 18 aastast inimolendit, kui lapse suhtes kohaldatava seaduse põhjal ei loeta teda varem täisealiseks.*

Seega on LÕK komitee oma praktikas täpsustanud, keda täpselt tuleb mingitel juhtudel lapseks pidada. Selline definitsioon sõltub vaadeldavast valdkonnast, üldpiiriks on siiski 18 eluaastat. Doktoritöös vaadeldi nelja valdkonda, kus lapse definitsioon on oluline ning kus LÕK komitee on riikidele andnud soovituslikud minimaalsed alampiirid – õigus abielluda (soovitatavalt 18 eluaastat, minimaalselt 16 eluaastat), legaalse seksuaalsuhte vanus (soovituslikult 16 eluaastat), töötamise alampiir (15 eluaastat) ning relvajõududesse värbamise vanus (18 eluaastat).

Analüüs näitab, et üldiselt järgivad näiteriigid soovituslikku 18 eluaasta piiri ning laiendavad sellest vanusest noorematele lastele vajaliku kaitse, samas on ka olulisi erinevusi. Kõigis kolmes riigis andsid õigusaktid võimaluse abiellumisiga alandada. Erisusi oli riikide vahel küll selles osas, kas vanemate nõusolek oli asja otsustamisel määrav. Riikidel puudusid ka selged põhjendused, miks peaks alla 18-aastaste abiellumist lubama. Eriliselt paistis siin välja Venemaa, kus föderatsiooni subjektidel on endil õigus vastav iga defineerida ning siin on subjektide praktika erinev.

Abiellumisiga on otseselt seotud sugulise läbikäimise lubatavusega. Soomes ja Venemaal on vastav iga 16, Eestis aga 14. Eesti praktika hälbib siin oluliselt euroopalikust tavast ning ei ole selge, miks selline vanusepiir on sätestatud. Töös pakutakse välja, et sellise madala vanusepiiri taga on Eesti üldiselt liberaalne maailmavaade. Venemaa paistab siin kurioosselt välja pigem paternalistliku riigina. Kui lubatud seksuaalse läbikäimise iga on 16, siis LGBT valdkonna seksuaalhariduse andmine on Venemaal piiratud 18 eluaastaga. Käärid nende kahe vanuse vahel toovad kaasa mitmeid praktilisi probleeme ning ebaproportsionaalselt võib olla piiratud neisse vähemusgruppidesse kuuluvate laste õigus terviseharidusele. Märkimisväärne on ka, et Venemaa kasutas siinjuures tugevalt ka traditsiooniliste väärtuste argumenti.

Sarnase tähepaneku võib teha tööea osas. Üldiselt on see enamikus Euroopa riikides seatud 15 eluaastale kooskõlas ILO konventsiooniga nr 138, Venemaal on vastav iga 16. Kõik vaadeldud riigid piiravad õigusaktides kooliealiste laste osalemist tööturul, küll on erinev nende nõuete praktiline elluviimine. Probleeme on lepinguvälise tööga ning tasuta tööga. Lisaks on nii Venemaal kui ka Eestis tõsine probleem koolist välja langenud lastega ning nende mitteametliku töötamise ja selle kontrollimisega. Soome eristus siin selgelt positiivse näitena.

Sõjaväkke värbamise praktika oli näiteriikides LÕKis sätestatuga üldiselt kooskõlas. Erisusena tuleb välja tuua Eesti, kus laste kaasamine sõjaliste eesmärkidega Kaitseliidu allorganisatsioonide tegevusse võib olla problemaatiline. See oli ka ainus valdkond, kus Eesti kasutas ühiskondliku tava argumenti.

Lapse parim huvi

Lapse parima huvi arvesse võtmine iga last puudutava otsuse juures on teine üldpõhimõte, mille järgmist töös analüüsiti. LÕK artikkel 3 lg 1 on sõnastatud järgmiselt:

> *Igasugustes lapsi puudutavates ettevõtmistes riiklike või erasotsiaalhoolekandeasutuste, kohtute, täidesaatvate või seadusandlike organite poolt tuleb esikohale seada lapse huvid.*[17]

[17] Tuleb märkida, et konventsiooni eestikeelne termin ei ole täpne – autentsed tekstid räägivad "lapse parimast huvist" ("*best interest of a child*"). See on töö autori hinnangul sisuliselt erinev lihtsalt lapse huvidest. Parim huvi sunnib otsustajat välja selgitama lapse kõik erinevad huvid ning siis hindama kogumis, mis on lapse jaoks konkreetsel juhul parim lahendus.

Seega peab lapse parim huvi asjakohastes õigusaktides olema nimetatud ning selle põhimõtte valguses tuleb asjakohaseid väärtuseid ning õiguseid igal konkreetsel juhul tõlgendada ning ka rakendada. Oluline on siinkohal märkida, et spetsiifilised õigused võivad täiendavalt reguleerida seda, mis on lapse parimates huvides. Seega on ka näiteks valitud õiguste – hooldusõiguse piiramise ning perekonna taasühinemise – puhul võimalik, et teistest LÕK sätetest tulenevad täpsemad nõuded. Lapse parima huvi tagamise nõude täitmiseks piisab aga, kui eeltoodud miinimumnõuded on täidetud.

Vaadeldud riikides oli probleeme juba lapse parima huvi mõistega. Eesti õigusaktid kasutavad terminit „lapse huvid“[18] ning Venemaa õigusaktid räägivad „lapse seaduslikest huvidest“[19]. Soomes sarnaseid terminoloogilisi probleeme ei olnud.

Varieeruv on ka printsiibi sisuline rakendamine. Soome praktika näitab, et lapse parimat huvi üritatakse igas last puudutavas asjas analüüsida ning leida, siiski on ka valdkondi, kus kiputakse liialt järgima tavapärast praktikat (nt vanemate hooldusõiguse piiramise või asenduskodusse paigutamise puhul), selmet analüüsida konkreetse lapse olukorda ning tema parimaid huve. Samas asjaolu, et lapse parima huviga kohtumenetluses siiski tegeldakse, näitab, et praktika arengusuund on õige.

Eesti lastekaitseseadus läbis 2015. aastal sisulise uuenduskuuri ning alates 2016. aastast peaks oluliselt paranema lapse õiguste sisuline tagatus.[20] Samas ei ole ka uues seaduses lapse parima huvi põhimõte selgemini sätestatud (vt nt §-d 2 ja 5). Lapse parima huvi väljaselgitamise vajadust on Eesti kohtud mõistnud ning sellele pööratakse lapsi puudutavates menetlustes varasemast suuremat tähelepanu. Samas ei ole näiteks lapse parima huvi väljaselgitamise nõudeid ning selle põhimõtte suhet teistesse põhiõigustesse kohtupraktikas veel avatud.

Vene õiguskorras ning eriti õiguspraktikas ei ole lapse parima huvi põhimõttel sellist tähendust nagu sellele on antud LÕKis. Vene õiguskorras sisalduv „lapse seaduslike huvide“ põhimõte võimaldab riigil otsustada, millised huvid on lubatud ja millised mitte. Piiratud on ka selle põhimõtte rakendamine siseriiklikes kohtutes. Lapse parima huviga arvestamist ohustab veel Venemaa viimaste aastate retoorika perekonna kaitseks, kus perekonna ning vanemate õigused on lapse õiguste ning huvide ees seatud prioriteetseteks.[21] Samal ajal hakkab silma see, et vanemate hooldusõigust piiratakse Venemaal lihtsalt ning laste paigutamine hoolekandeasutustesse on ebaproportsionaalselt sage praktika

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[18] Vt nt lastekaitse seaduse § 3, RT I, 13.12.2013, 12, § 3 ja perekonnaseaduse § 123, RT I, 27.06.2012, 12.

[19] Nt Federal'nyy zakon Rossiyskoy Federatsii "Ob obrazovanii v Rossiyskoy Federatsii" (Education Act), N 273-FZ (2012).

[20] Uus lastekaitseseadus, RT I, 06.12.2014, 1.

[21] President Vladimir Putin kinnitas vajadust olla perekonda puudutavates küsimustes konservatiivne näiteks Venemaa lapsevanemate kongressil. Prezident Rossii, "Vladimir Putin Vystupil Na Prokhodyashchem v Moskve S"yezde Roditeley Rossii" (2.09.2013), http://kremlin.ru/events/president/news/17469 (külastatud 24.05.2015).

(sh on seal ka palju „sotsiaalseid" orbusid) ning perekondade taasühinemist tuleb ette suhteliselt vähe.

Kokkuvõtteks

Kasutades Simmonsi sõnu, on LÕKiga ühinemine toonud vaadeldud riikidele kaasa erinevaid ühiskondlikke kulusid.[22] Analüüsitud riikide praktika erineb tihti sisuliselt ning oluliselt LÕK standarditest, kõik riigid viitavad oma siseriiklikus praktikas konventsioonile, kuid seda tehakse valikuliselt.

Soome õiguskord oli vaadeldud riikidest LÕKis sätestatuga kõige paremini kooskõlas. Samas on ebaselge, kas õiguseid tagatakse kõigile lastele ühetaoliselt ning kuivõrd on igapäevane praktika nende nõuetega kooskõlas. Lisaks tegi uurimise keerulisemaks ka see, et Soome kõrgemad kohtud ei anna tihti seadustes sätestatule põhjalikku tõlgendust.

On selge, et Venemaa ei ole tänaseks jõudnud veel üleminekuajast välja (on tegelikult ebaselgegi, kas ta enam demokratiseerumise teel on); seega on LÕKi täitmine Venemaa jaoks väga kulukas ja eeldab nii õiguskorras kui ka õiguspraktikas struktuurseid ning sisulisi muudatusi. Venemaa oli analüüsi põhjal ka selline näiteriik, kes kasutab siseriiklikus praktikas tihti traditsiooniliste väärtuste argumente. Samas LÕK komitee ees avalikult traditsiooniliste väärtuste argumenti välja ei toodud.

Eesti on tänaseks demokraatlik riik, kes hakkab selgelt silma oma liberaalse suhtumisega õigustesse ning sh ka laste õigustesse. Selle hiljutiseks näiteks on ka valimisea langetamine kohalike omavalitsuste valimisel.[23] Liigne liberaalsus võib aga ohustada laste õiguste tagamist ning võib juhtuda, et lapsi ei kaitsta võimalike ohtude eest piisavalt.

Erinevused riikide rakenduspraktikas ei olnud aga otseselt seotud sellega, milline oli siseriikliku ja rahvusvahelise õiguse suhetsumine. Seega ei ole monismi ja dualismi teooriate praktilist väärtust.

Töö teine hüpotees oli, et erineva rakenduspraktika taustal on erinevad ka väärtussüsteemid. Analüüs näitas, et tihti oli olemas seos LÕK sätete mittejärgimise ning traditsiooniliste väärtuste retoorika kasutamise vahel. Enamgi veel, LÕKi siseriiklik rakenduspraktika sõltus ka ühiskonna ning õiguskorra väärtustest. Nii Venemaa kui ka Eesti kasutasid sellistel juhtudel traditsiooni argumenti. Soome kasutas traditsiooni õigustavat argumenti aga vaid selleks, et põhjendada, miks mingeid küsimusi ei ole Soomes vaja õigusaktidesse otsesõnu kirjutada.[24]

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[22] Simmons, Mobilizing for Human Rights, 64–77.

[23] Vt nt M. Oll ja news.err.ee, "Voting age lowered to 16 in local elections", 06.06.2015, (29 mai, 2015).

[24] CRC Committee, "State Party Report: Fourth Report of Finland," para. 171. Näiteks rõhutas Soome seal järgmist: "*self-regulation has long traditions in the Finnish mass media, and it has been considered to be suitable for monitoring the contents of the Internet and mobile phones as well.*"

Seda, miks riigid LÕK komitee poolt välja toodud miinimumstandardeid ei järgi, võib põhjustada ka standardite endi hägusus. Selleks, et ka käesoleva töö tarvis välja tuua erinevate valdkondade miinimumnõuded, tuli analüüsida päris mitmeid LÕK komitee dokumente, kust vajalike standardite leidmine oli keerukas. Standardite täpsem ja selgem väljatoomine nii üldkommentaarides kui ka konstruktiivses dialoogis ning järeldustes aitaks riikidel paremini mõista, millistele kohustustele tuleb siseriiklikult rõhku panna. Siin oli üks negatiivne näide abiellumise iga. LÕK komitee ei ole oma praktikas käesoleva töö näiteriikide puhul olemasolevat probleemset regulatsiooni ning praktikat välja toonud ega ka kritiseerinud.

Analüüs näitas aga ka seda, et töö teoreetilises pooles välja toodud käsitlused inimõiguste universaalsusest ja relatiivsusest ei selgita riikide praktika erinevuse tegelikke põhjuseid. Veelgi enam – need teooriad eeldavad, et riik järgib järjekindlalt ühte neist polariseerunud lähenemisviisidest. Tegelik praktika on mitmekülgsem ning tuleb tunnistada, et õiguskorras tehtud valikuid mõjutab lai kompleks väärtuseid. Kultuuril ja traditsioonil põhinevad argumendid on sisuliselt olulised kõigile näiteriikidele ning näiteriikide puhul on õiguse ja kultuuriliste väärtuste omavaheline suhe kompleksne.

Käesoleva doktoritöö põhjal võib väita, et sellised polariseerunud käsitused ei ole enam ajakohased, kuna riik ei vali poliitilisi otsuseid tehes kas universaalsuse või relativismi poolt. Tihti on vähemalt laste õiguste valdkonnas küsimus pigem selles, kuivõrd kaitset vajavateks lapsi peetakse. Näiteriikidest kasutas Venemaa vägagi paternalistlikku lähenemist lastesse ning kippus seega range regulatsiooniga pigem pöörama tähelepanu laste kaitsmise vajadusele. Skaala teises otsas oli Eesti oma vastuolulise ja pigem liberaalse käsitusega lapsest, kellele tuleb anda juba nooremas eas võimalust rohkem vastutada (samas ka näiteks raskeid tagajärgi taluda).

Töö üks olulisemaid järeldusi puudutas ka LÕK komitee praktikat. Komitee on oma praktika põhjal välja töötanud temaatilisi üldkommentaare, samas on mitmed küsimused selles praktikas jäänud väga üldsõnaliseks ning on palju valdkondi, kus selged standardid puuduvad. Lisaks valib komitee teemasid, millest erinevate riikidega rääkida ning kõiki välja toodud miinimume ei käsitleta samaväärsetena. Kõige selgemini ilmnes see vanusepiirangute seadmisel. LÕKiga kooskõlas olevate õigusaktide vastuvõtmine võiks olla ju riikide poolt võetav esmane meede ning selliste regulatsioonide olemasolu on komiteel ka kõige kergem hinnata.

Tööst tuleneb, et ennekõike sõltub inimõiguste tagamine sellest, kuivõrd omased on vastavad õigused vaadeldavale õiguskorrale ning kuivõrd neid on võimalik olemasolevate tavade ja praktikatega seostada.[25] Kultuur ja siseriiklikud väärtused võivad inimõiguste vastuvõtmisele pigem kaasa aidata. Selleks

[25] Siin nõustun Federico Lenzeriniga. *The Culturalization of Human Rights Law* (Oxford University Press, 2014), 217–18.

tuleks neid aga näha õiguskorrale omastena.[26] Leian, et minimaalse sisu põhimõtte kasutamine on selleks vägagi sobiv vahend.

Käesolevas töös oli riikide hulk piiratud ning seega ei pruugi spetsiifilisi õiguseid puudutavad järeldused olla üldkehtivad. Samas on käesoleva analüüsi näiteriigid üldiselt aktsepteerinud lapse õiguste universaalsust. On aga ka küsimusi, kus riikide praktika on erinev ning keeruline on hinnata, kas riikide poolt välja toodud traditsioonile tuginevad argumendid olid alati vastuolus LÕKiga. On huvitav näha, kas siia toob mingit selgust LÕKi lisaprotokolliga loodud individuaalsete kaebuste süsteem. Lisaks on töö autori arvates inimõiguste universaalsusväite realiseerumise võti LÕK komitee käes, kes saaks selgema normiloome ning järelevalvepraktika kaudu riike paremini suunata. Hetkel on komitee praktika aga erinevate riikide osas väga erineva detailsusastmega.

[26] Tom Zwart, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach," *Hum. Rts. Q.* 34 (2012): 546.

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Teaduslikud publikatsioonid

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