

# 9

## Incorporating the Convention in Norwegian Law

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**ABSTRACT** The UN Convention on the Rights of the Child 1989 (CRC) is incorporated in Norwegian law by the Human Rights Act. This chapter explores and analyse the legislative effect of this legal incorporation. It provides an overview of legislative amendments that the CRC has catalysed and cases in the Norwegian Supreme Court in which the CRC has been invoked. In several judgments, the CRC has been a central issue and the Court has divided over its interpretation. Drawing on the CRC committee's concluding observations, the chapter also reflects on contemporary challenges in the implementation of CRC in the Norwegian legal system.

**KEYWORDS** CRC | implementation | Human Rights Act | incorporation | judiciary | children's rights

### 9.1 INTRODUCTION

The UN Convention on the Rights of the Child 1989 (CRC) is incorporated in Norwegian law by a statutory provision giving the CRC the same status as other statutory regulation and with supremacy over concurring statutory provisions. The aim of this contribution is to explore and analyse the legislative effect of CRC in Norwegian law. Even though the legal position of the CRC may be considered to be strong, given that it is a valid source of domestic law with supremacy, this could be a rather formal position if the CRC is seldom invoked or subject to narrow interpretation. The two main bodies of this investigation are the legislator and the judiciary (the courts). It would of course also be beneficial to include the administrative branch to examine the implementation. However, doing justice to such an

examination would be challenging and the administrative implementation is also covered by many other contributions in this book.

This chapter will start with a short description of the history leading up to incorporation (Section 2) and the legal position prior to incorporation (Section 3). The main part (Section 4) will be an analysis of legislation and court decisions where the CRC has played a role (based on a review of 138 Supreme Court cases), and where the common question is which kind of impact that CRC has had, respectively on the legislator and the judiciary. The method will be a traditional legal approach – *de lege lata* – where the material will be analysed based on the relevant sources of law. Additionally, some reflections concerning current challenges will be made (Section 5) and a short conclusion will be offered (Section 6).

## 9.2 THE HISTORY TOWARDS INCORPORATION

Norway signed the 26 January 1990 and ratified the Convention 8 January 1991.<sup>1</sup> When the ratification passed the Parliament, the Government assumed that additional statutory amendments were unnecessary on the grounds that the current legislation was in conformity with the obligations under CRC (with the exception of the Norwegian reservation).<sup>2</sup>

Such a consideration is formally necessary as Norwegian law is based on a dualistic approach to public international law, including human rights treaties. International instruments as such are not automatically a part of domestic law, and have therefore to be integrated into the national legal order to be a relevant legal source (Rt. 1997 p. 580).<sup>3</sup> There are two main ways of integration, either in form of *incorporation* (the international treaty is partly or as a whole made part of Norwegian law through a legislative act which refers to the relevant instruments) or through *transformation* (the content of the international treaty is made part of Norwegian law through a legislative act which converts the relevant legal instruments into

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1. St.prp. No. 104 (1989–90). The ratification was made with approval by the Parliament.
  2. Norway made a reservation regarding the right to appeal in criminal cases (CRC Art. 40, para 2, b(v)), but this was withdrawn after a major criminal procedure reform in 1995 (Norway made a similar reservation under the International Covenant on Civil and Political Rights 1966 (CCPR)).
  3. 'Rt.' is the yearbook of judgments and decisions from the Norwegian Supreme Court. From 2015 and onwards, judgments and decisions are not printed but are referred to by their case number ('A' indicates that it is delivered by a panel of five justices and 'P' indicates that it is delivered by the full Supreme Court (twenty justices)). The working language of the Court is Norwegian but a selection of rulings is translated into English and a summary in English is available of all recent judgments, cf. <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/> (last retrieved 1 July 2018).

domestic law, e.g. by translating the relevant provisions and taking them into domestic legislation). Normally, both incorporation and transformation are made by an act of Parliament.

Even though an international instrument is not made part of Norwegian law through incorporation or transformation, it can still be a valid legal argument in domestic law. The principle of presumption is well established in case law. The core content of the principle is that even if international law is not implemented through incorporation or transformation; it is binding upon Norway as a state within international law. Domestic legislation should therefore be applied in a manner that is consistent with the international obligation, unless there is no leeway of discretion under the interpretation of the statutory provision.

In the 1990s, however, academics and NGO's increasingly claimed that the principle of presumption and part incorporation of human instruments (either the incorporation of specific instruments or general incorporation of human rights in particular fields) was insufficient for the effective protection of human rights. A law commission prepared an expert report (NOU 1993:18) and suggested a Constitutional provision in addition to a Human Right Act. The Norwegian constitution was amended, and section 110c was inserted. Its successor now states that the authorities of the State shall 'respect and ensure human rights' as they are expressed in the Constitution and in 'the treaties concerning human rights that are binding for Norway' (Section 92).<sup>4</sup>

As a direct consequence of the constitutional reform of former Section 110c, the Parliament passed the Human Rights Act (HRA) in 1999.<sup>5</sup> The Act originally incorporated three human rights instruments, The European Convention on Human Rights 1950 (ECHR), the UN Covenant on Civil and Political Rights 1966 (CCPR) and the UN Covenant on Economic Social and Cultural Rights 1966 (CESCR).<sup>6</sup> In addition to the incorporation, HRA states that the incorporated instruments shall have precedence over concurring statutory legislation. Although the Parliament at a later state can pass statutory provisions deviating from the incorporated instruments, this is more a theoretical possibility than a practical opening. Additionally, the human rights laid down in the Constitution have established a boundary for the legislator. It is suggested that HRA takes the form of a 'semi-constitutional' norm, although this term is contested. When it comes to the

4. The provision as such does not incorporate all international human rights instruments, see HR-2016-2554-P paras 64–71.

5. Act 1999-05-21-30 on human rights (Human Rights Act).

6. The CRC committee expressed concern that CRC was not intended to be included in HRA, see CRC/C/15/Add.23 paras 13–14.

application of HRA, the preparatory work emphasized that the incorporation was not only attached to the wording of the incorporated instruments, but also to their application through the respective supervisions body (this issue will be returned to later).

When HRA was debated in the Parliament, a majority of the committee had encouraged the Government to incorporate also the CRC and the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW). The Ministry later submitted a proposition for the inclusion of CRC – including the first two protocols – in HRA, and the Parliament passed the amendment of HRA in 2003 (see Bårdsen 2015, Sandberg 2014). At the same time the Parliament made several statutory amendments, most of them with the intention of strengthening children's right to be heard. CEDAW was first incorporated in the Equal Treatment Act of 2013, but without supremacy over concurring statutory legislation.<sup>7</sup> In 2009, CEDAW was included in HRA.

It would go beyond the scope of this chapter to give an introduction to the Norwegian legal system, but a few particularities can be mentioned (see Helland and Koch 2014). Despite the lack of a codified civil code, the Norwegian legal system is considered as a civil law system. The particularities of the judicial structures in the Nordic legal systems are so distinct and the Nordic legal systems may be regarded as a separate legal family. The point of departure when solving a legal matter will normally be the wording of the statutory provisions, where the preparatory works often will play a particularly important role in the interpretation. Norway has a general court system, with three instances with the Supreme Court as the superior body, deciding both civil and criminal cases, as well as all branches of administrative law. Rulings of the Supreme Court provide guidance to subsequent cases, and the case law concerning CRC will be analysed below.

After the incorporation some core principles of CRC were also made part of Norwegian constitutional law by the amendment of Section 104 into the constitution. The position of children's human rights was strengthened by a major revision in 2014 which is noted by appreciation by the CRC Committee.<sup>8</sup> According to Section 104, first paragraph, children have the right to respect for their 'human dignity'. Children have the 'rights to be heard in questions that concern them', and 'due weight shall be attached to their views in accordance with their age and development' (cf. CRC Article 12). Furthermore, according to Section 104, second paragraph, for actions and decisions that affect children, the 'best interests of the child' shall be a fundamental consideration (cf. CRC Article 3). According to

7. Act 2013-06-21-59 on equal treatment (Equal Treatment Act), repealed.

8. CRC/C/NOR/CO/5-6 para 3.

Section 104, third paragraph, children have ‘the right to protection of their personal integrity’. The authorities of the state shall ‘create conditions that facilitate the child’s development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family’. The rights guaranteed by Section 104 are inspired by CRC and the wording of CRC has been used as guidance when drafting several parts of the constitutional provision. Practice from the CRC Committee will therefore be of relevance also when interpreting Section 104 in the Constitution, cf. Rt. 2015 p. 93 para 64. Still, it is according to the Norwegian constitutional law up to the courts, and in particular the Supreme Court, to interpret, clarify and the develop the protection afforded by the constitutional provisions.

### 9.3 LEGAL EFFECTS OF CRC PRIOR TO INCORPORATION

Even before the inclusion in HRA, CRC had an impact on the Norwegian legal system. As stated before, the principle of presumption made CRC a valid argument in domestic law. An early example was the case in Rt. 2001 p. 1006 concerning the introduction of a new common curriculum on ‘Christianity, religion and philosophy’ in primary education. The Supreme Court found that the new curriculum was in conformity with the international human rights instruments, including the CRC. The CRC Committee commented on the curriculum in their concluding observations and held that it may be discriminatory. The Committee was ‘concerned notably by the process of providing for exemptions to those children and parents who do not wish to participate in parts of the teaching’.<sup>9</sup> The Committee recommended that Norway review the implementation of the new curriculum and consider an alternative exemption process. The curriculum was also brought before the supervision bodies under ECHR and UN CCPR, which both came to the conclusion that the curriculum was not in conformity with the two instruments.<sup>10</sup> Subsequently, the curriculum was reformed.

In some areas, international public law as such was partly incorporated through statutory provisions, stating that a particular law was limited by Norway’s international obligation. This can be found, for example, in the Immigration Act of 1988.<sup>11</sup> However, the impact of CRC was at first contested before it was accepted

9. CRC/C/15/Add.126 paras 26–27.

10. See ECtHR judgment 29 June 2007 *Folgerø and Others v Norway* (dissent nine to eight); United Nations Human Rights Committee’s views 3 November 2004 *Leirvåg and Others v Norway*.

11. Act 1988-06-24-64 on immigrants’ access to and residence in the country (Immigration Act), repealed.

that this instrument had the same supreme effect as other international obligations (Einarsen 1998).

The first example of the impact of CRC on the legislation was the Education Act of 1998.<sup>12</sup> Due to the recommendations made by the CRC Committee in Norway's first report,<sup>13</sup> the Education Act introduced a right to primary education also for children not residing lawfully in Norway (Section 2-1).<sup>14</sup> The wording establishes that the provision does not apply to secondary education. In this respect, there has been an interesting development after incorporation, which will be returned to later.

Another field where CRC has had significant impact, both before and after incorporation, is the provision of health services to irregular migrants and asylum seekers (Søvig 2011). The CRC Committee has expressed concern in the Concluding Observations to Norway,<sup>15</sup> and domestic authorities have made several references to CRC in preparations of regulations and issuing of guidelines.<sup>16</sup> Still, at some points irregular children are not entitled to the same level of health care as other children, which may not be in line with obligations under CRC (Jacobsen, Bendiksen and Søvig 2015).<sup>17</sup> In light of the restrictive policy towards irregular children, it is a paradox that Norway during the drafting of CRC Article 2 proposed that 'irrespective of the legality of their parents' stay' should be inserted as a forbidden ground of discrimination.<sup>18</sup>

#### 9.4 THE INCORPORATION OF CRC

As mentioned, through the HRA amendment in 2003, CRC was incorporated in Norwegian law. The potent effect of this incorporation is that supremacy is not only attached to the wording of the incorporated provisions, but also to their cur-

12. Act 1998-07-17-61 on primary and secondary education (Education Act).

13. See CRC/C/15/Add.23 para 12.

14. NOU 1995:18 p. 382; Ot.prp. No. 46 (1997–98) p. 26.

15. CRC/C/15/Add.23 para 12; CRC/C/15/Add.126 paras 20–21; CRC/C/15/Add.263 para 4; CRC/C/NOR/CO/5-6 para 24(c). See also recommendation from the ESCR Committee (E/C.12/1/Add.109) on the same issue.

16. See for example a circular (Q-11/2006 p. 16) where the Ministry after referring to CRC draws the conclusion that irregular children have the same access to health services as children legally residing in Norway. By contrast, see the opinion by the Ministry of Justice regarding some aspects of access to health care services for irregular children, opinion 17 July 2017, JDLOV-2015-4608.

17. See also the critique from the ESCR committee, E/C.12/NOR/CO/5 para 21.

18. HR/(XXXVII)/WG.1/WP.10; Legislative History (2007): Vol 1, p. 320.

rent interpretation through the relevant supervisory bodies. In the scholarly literature in the first years after incorporation the discussion principle of ‘self-execution’ was often focused on, but in recent years this aspect has hardly been addressed (although see the remarks from the minority in Rt. 2012 p. 2039, para 120).

When it comes to ECHR, the Norwegian Supreme Court has ruled that if practice from ECtHR is reasonable clear, then a domestic statutory provision must be set aside to achieve conformity with the rights enshrined in ECHR. There are numerous Supreme Court decisions in this field, and even the clarity formula has its limitation; the overall impression is that ECHR have had a significant impact on Norwegian jurisprudence.

Turning to CRC, the Ministry made a statement indicating that the courts should be reluctant to overrule the interpretations made by the legislator:

The Ministry presumes that Norwegian courts will be careful when overruling the legislator interpretations [of CRC], as long as the Norwegian statutory provisions builds on a cautious interpretation of the relevant provisions of the Convention. This will especially apply if it concerns provisions which are vague, if the statutory provision is built on value priorities, and the legislator has assessed the connotation to the Convention and has acknowledged that there is no conflict.<sup>19</sup>

This statement could be seen as an attempt to introduce a different standard compared with the approach made under ECHR. There are weighty reasons to be sceptical about dissimilar methods being adopted to the instruments incorporated under HRA, as this indicates that some conventions are more legally worthy and potent than others. Nevertheless, there are differences between ECHR and CRC, which may lead to nuances in the assessments, partly due to the lack of binding effect of practice from the CRC Committee. Analogies can be drawn here with the use of the ICCPR. The Norwegian Supreme Court has held that decisions under individual complaints under Protocol 1 of the ICCPR must be accorded significant weight (Rt. 2008 p. 1764).<sup>20</sup> There are similarities between ICCPR and the CRC. Both are incorporated through HRA and the decisions by the supervision bodies are not legally binding. There are also differences, since CRC until recently has not reviewed individual complaints and will not have this competence concerning

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19. Ot.prp. No. 45 (2002–03) p. 16, and almost the exact same wording on p. 26. Translated by this author.

20. See also Ot.prp. No. 3 (1998–99) p. 69–70.

Norway (see below). Still, it should be accentuated that the parliamentary committee emphasized that an overall aim with HRA is to ensure that Norwegian court decisions, to the possible largest extent, reflect the practice of the international supervision bodies, indicating that the legal status of the CRC Committee's practice is not decisive.<sup>21</sup>

After incorporation, there have been several cases for the Norwegian Supreme Court where the practice from the CRC Committee has been addressed. Special attention was paid to this topic in a case concerning application of stay on humanitarian reasons for an unaccompanied minor (Rt. 2009 p. 1261). A core issue in the case was the legal relevance and weight of General Comments, particularly General Comment no. 6 (2005) para 86 and the 'best interest of the child'. The majority of the court noted that General Comments are not formally binding but were willing to consider their application. However, the crucial point in this case was that the particular General Comment lacked clarity (para 44). The majority indicated in essence that General Comments from the committee could have a significant impact but only if they were sufficiently clear. Moreover, in a concurring opinion, one justice stated that in order to establish common standards, and to safeguard that the ensured rights also are enforceable, it was necessary to establish common frames for interpretation (paras. 85–93). Although not stated explicitly, this minority position paid more attention to the guidance given by the CRC Committee in General Comments than did the majority.

This minority position appeared to have gained acceptance a few years later. In Rt. 2015 p. 93, the first of a number of plenary judgments concerning long-term asylum children, the majority referred to the majority in Rt. 2009 p. 1261 when it concerns the relevance and weight of General Comments (Rt. 2012 p. 1985 para 136). A unanimous court stated that the relevant General Comment represent a natural point of departure for the interpretation of CRC (para 64).

However, a more restricted approach is accentuated in the plenary judgment concerning internal placement as alternative to asylum (Rt. 2015 p. 1388). After citing General Comment No. 12 (2009) para 21, the majority stated that this passage was to be regarded as a viewpoint concerning in which direction the legal development should take place. It was then added that the viewpoint of the CRC Committee lacked support in the wording of the Convention (para 154). Nonetheless, the minority had a different approach. They began by reiterating the rationale for taking General Comments into account: that they are based on the Committee's accumulated experience and the special role that the Committee has as super-

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21. *Innst. O. 51* (1998–99) p. 6.



vision body under CRC (para 272). The minority also referred to the judgment in Rt. 2009 p. 1261 (para 44), which was cited with approval by the majority in Rt. 2012 p. 1985 (para 136) and where it was emphasized that the relevance and weight of General Comments would vary, particularly depending on the clarity of the statement.

This examination of the case law of the Supreme Court regarding the role of General Comments from the CRC Committee in Norwegian law reveals that there are different viewpoints within the Supreme Court. Still, General Comments play a major role when the Court is interpreting the Convention. The most comprehensive decision on this matter is Rt. 2009 p. 1261. The shades between the two factions may be due to the wording of the relevant General Comment, in which the wording was rather far-reaching. In General Comments No. 6, para 86, the CRC Committee introduces a division between rights and interests, and in which the latter (as immigration considerations) were not considered relevant to the limitation of children's rights. The element of reluctance by the majority may be caused by an assessment of the content of the given part of the relevant General Comment, which was considered to be too expansive and without a firm grounding in the wording of the Convention, even though this is not explicitly stated in the judgment.

The previous case law all concerns General Comments of the CRC Committee. But the Committee also issues Concluding Observations amongst other documents. A common feature nevertheless is that all these resolutions are not formally binding upon the member states. Moreover, in contrast to ECHR and CCPR, the CRC Committee has until now only addressed CRC on a rather general level. The introduction of the third Optional Protocol regarding a communication procedure has added a new component in the legal reasoning. Norway has not ratified the protocol, partly because the Government were concerned that the political leeway would be diminished by a dynamic interpretation by the supervision bodies.<sup>22</sup> However, Norway has been encouraged by the CRC Committee to ratify the optional protocol.<sup>23</sup> Still, cases concerning other states may be of interest, and they will be relevant even though the communications are not legally binding (in line with individual complaints under CCPR, cf. Rt. 2008 p. 1764).

To sum up the current legal situation in Norway, the impact of the CRC will depend on a number of factors, but the lack of formal binding of practice from the CRC Committee has only limited bearing. The crucial point is the clarity of the legal situation under CRC. An overall assessment must be made. The starting

22. Meld. St. 39 (2015–16), cf. Innst. 161 S (2016–17).

23. CRC/C/NOR/CO/5-6 para 38.

point is the wording of the relevant provisions of the Conventions, supplemented by relevant viewpoints expressed in General Comments, Concluding Observation and other opinions stated by the CRC Committee. However, there is interplay between the domestic and international level. If the legislator has introduced a statutory provision and in the preparatory work has thoroughly analysed the situation under CRC, then the statutory provision will normally be applied according to its wording, as long as there is some leeway under CRC. If there is no room for national discretion or application, the provision of CRC will have supremacy over domestic statutory legislation according to HRA. It should also be added that the CRC in this respect is a moving object. The Committee has committed itself to a dynamic approach, viewing the CRC as a living instrument. Consequently, despite being in compliance with CRC when the preparatory work to the provisions was made, Norway may at a later stage be considered to be in conflict with its CRC obligations – or face questions marks over certain aspects of compliance. The Supreme Court will have to take recent development under the CRC into account.

## 9.5 THE EFFECT OF THE INCORPORATION

### 9.5.1 LEGISLATION

The incorporation of the CRC has implications for all branches of the Government. For the *legislator*, it is still possible to introduce a statutory provision that deviates from the obligations under CRC, since the latter is not on a constitutional level. However, such a legislative approach is unlikely due to the political standing of the CRC.

One of the early examples of the impact of the CRC on the legislation was the provision concerning the protection of children in the planning process of buildings. The Planning and Buildings Act of 1985 contained from the beginning a clause on the object and purpose, stating that to secure safe upbringing for children was an aim of the planning process.<sup>24</sup> When the Act was amended in 1993, a referral was made to the CRC and the obligations under Article 3 were emphasized.<sup>25</sup> The new legislation states that ‘due regard’ should be made ‘for the environment in which children and youth grow up’ (Section 1-1, fifth paragraph).

Another example is education for irregular children. As mentioned above, the Education Act explicitly states that also irregular children are entitled to primary education, and this entitlement was introduced due to the recommendations made

24. Act 1985-06-17-77 on planning and buildings (Planning and Buildings Act), repealed.

25. Amendment 11 June 1993 No. 85, cf. Ot.prp. No. 59 (1992–93) pp. 85–86.

by the CRC Committee in Norway's first report. The question then arose as to whether irregular children also have a right to secondary education. With reference to the CRC, the Ministry of Justice expressed the opinion that also this group was entitled to secondary education.<sup>26</sup> The legislator recently clarified the legal situation and it is now explicitly stated in the legislation that legal stay is a condition for secondary education, cf. the Education Act Section 3-1, last paragraph (amendment 20 June 2015 No 54). Notably, in the preparatory works, the Ministry stated that the CRC does not contain a clear legal obligation to provide secondary education to irregular children,<sup>27</sup> although the ECSR committee has expressed concern about the restrictions on *asylum-seeking children* and their right to access secondary education.<sup>28</sup> This example indicates that the legislator may be willing to let other societal interests, namely a strict immigration policy, play a decisive role even if children's rights are at stake. In this particular case, the Government emphasized that the CRC does not contain an explicit provision concerning the right to secondary education and it was difficult to conclude with sufficient certainty the legal obligations under the CRC. However, the General Comment concerning treatment of unaccompanied and separated children outside their country of origin was not taken into account. This addresses a specific group but many of the statements would apply to all refugee children. According to the CRC Committee every unaccompanied and separated child, irrespective of status, shall have "full access to education in the country".<sup>29</sup> Interestingly, the issue was not addressed by the CRC Committee in their latest Concluding Observations to Norway,<sup>30</sup> despite the fact that the Government in their report stated that the right to education for children aged 16–18 lapses in the event of a final rejection of their application for a residence permit.<sup>31</sup>

A redundant issue in Norwegian immigration policy has been the care of unaccompanied asylum seekers. Such immigrants under the age of 15 years old are under the responsibility by the child protection service.<sup>32</sup> They live in care centres until they are settled in a municipality or leave the country. Unaccompanied asylum seekers between the age of 15 and 18 are under the responsibility of the immigration authorities and live in reception centres. The King in Council also has the

26. Statement 24 November 2010, JDLOV-2010-8029.

27. Prop. 68 L (2013–14) p. 15.

28. E/C.12/1/Add.109 paras 22 and 43.

29. General Comment No. 6 (2005) para 41.

30. CRC/C/NOR/CO/5-6.

31. CRC/C/NOR/5-6 para 245.

32. Act 1992-07-17-100 on child welfare, Chapter 5A (Children's Welfare Act).

competence to decide whether children over 15 should be accommodated in care centres. This was originally not done due to the associated costs with such an amendment. In their Concluding Observations in 2010, the CRC Committee recommended to Norway that they expand the responsibility of the Child Welfare Services to include children aged 15, 16 and 17.<sup>33</sup> Since then the number of minor asylum seekers increased significantly in 2015, which the Government used as an explanation for still not extending the coverage.<sup>34</sup> In the latest Concluding Observations to Norway the CRC Committee recommended Norway to '[e]nsure that unaccompanied children in all municipalities, including those above 15, receive good quality care'.<sup>35</sup> The latest remark by the CRC Committee is clearly softer, permitted the state discretion as long as the care is of 'good quality'. It could be regarded as an example of a dialogue between the state party and the CRC Committee where the viewpoints of the committee are adjusted due to factual development.

An example of the interplay between the judiciary and the legislator is the subsequent statutory amendments in the aftermath of the judgment in Rt. 2005 p. 1567. A stepfather was convicted after having given the children physical punishment, but in a side remark the Supreme Court stated that light corporal punishment would not amount to a criminal offence. This remark was highly debated in scholarly literature, and afterwards the CRC Committee also issued their General Comment No. 8 (2006) stating that CRC requires the removal of any provisions that allow some degree of violence against children (paras 31 and 33). The legislator amended the Children's Act of 1981, clarifying that any use of violence was prohibited.<sup>36</sup> In the preparatory works CRC Article 19 is in particular emphasized.<sup>37</sup>

## 9.5.2 COURTS

### *Selection of cases*

For the judiciary, the CRC has been one of several sources of law coming from abroad, in line with ECHR and CCPR. All instruments incorporated through HRA are superior to statutory provisions. If the statutory provision is in conflict with the incorporated instruments the latter shall prevail. The core issue before the courts will be cases where the legal situation under the incorporated instruments is in

33. CRC/C/NOR/CO/4 para 52(e).

34. CRC/C/NOR/5-6 paras 290–7.

35. CRC/C/NOR/CO/5-6 para 32(g). See also CCPR/C/NOR/CO/7 para 31.

36. Act 1981-04-08-7 regarding children (Children's Act).

37. Ot.prp. No. 104 (2008–09) pp. 26–27.

some way uncertain and calls for an interpretation. As discussed earlier, the crux of the matter will be whether the legal obligation under the incorporated instruments is sufficiently clear to invoke the supremacy clause under the HRA.

In this section, a large selection of such cases regarding the CRC will be analysed. Since the CRC was a relevant legal source also prior to incorporation, some cases before 2003 will be included as well, even though the HRA and its supremacy clause was then not an issue. Since 1993 and up to 1 July 2018, there have been 132 cases before the Norwegian Supreme Court where the CRC either has been included in the parties' submissions or in the rulings by the Court. The cases are divided into sub-categories in order to avoid a chronological presentation. Such an approach and the different sub-categories will always be a subject of discussion but are inevitable to obtain an overview.

Before turning to the case analysis, one preliminary reflection is to be presented. Many of the cases where the CRC has been highlighted concern topics where traditional Norwegian law lacks a special provision parallel to what is included in the CRC. This should not be a surprise. Where Norwegian statutory provisions already regulate issues reflecting the same content as the CRC, the traditional legal material (wording of the provision, preparatory work, etc.) will be the starting point. Normally, the CRC will have been taken into account when drafting the legislation and is therefore already integrated. The CRC will normally only be called upon if there is a possibility of discrepancy between the statutory provisions and the CRC.

### ***Best interest of the child (CRC Article 3)***

The best interest of the child has been a recognized principle in Norwegian law since it was first introduced in the Children's Act 1981, and the principle is expressed in several statutory provisions (adoption, child care etc.). However, the best interest of the child was not a general rule in Norwegian law before the CRC was included in the HRA. As an example, before the new Immigration Act of 2008,<sup>38</sup> there was no specific provision stating that the best interest of the child should be a primary consideration in immigration cases. Most of the cases where references to Article 3 of the CRC are made are from the field of immigration. Historically, this could be explained by the lack of a provision in the Immigration Act stating that the 'best interest of the child' is a primary consideration. However, even after such a provision was included, there have been several cases within the

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38. Act 2008-05-15-35 on immigrants' access and residency in the country (Immigrant Act).

field. This can be understood as the result of the rather strict immigration regime, where the interests of individual may receive less weight than in other fields.

An illustrative case is Rt. 2009 p. 534. The question was whether expulsion was a disproportionate measure towards the aliens' children (aged six and seven). Both factions within the Court referred to the CRC Article 3 but came to different conclusions. The majority (three judges) of the Court found that expulsion was in conformity with Norway's human rights obligations, while the minority (two judges) paid more attention to the practice of the CRC Committee. The case was brought before the European Court of Human Rights (ECtHR), which held that there had been a violation of ECHR Article 8.<sup>39</sup> In this decision, ECtHR took the CRC into consideration when applying ECHR Article 8, and the case illustrates how the CRC gains increased legal force when joined by other instruments in a form of interplay and interaction.

As already mentioned, the statement by the CRC Committee regarding unaccompanied minors that 'non-rights-based arguments such as, those relating to general migration control, cannot override best interests' considerations' (General Comment No. 6 (2005) para 85) has attracted attention, together with General Comment No. 14 (2013) concerning the 'right of the child to have his or her best interests taken as a primary consideration'.

Rt. 2012 p. 1985 concerned long term staying children who lived in Norway together with their family. After their asylum application was rejected, they applied for a stay on humanitarian grounds. The majority of the Supreme Court took as a departure point the relevant statutory provisions and the preparatory work attached to it, as well as subsequent development as evinced in documents from the Government and Parliament (para 134). According to the majority the overall assessment of the domestic legal material showed that the 'best interests of the child' should be of considerable weight in applying the Immigration Act. There should be taken into account the relationship to Norway developed while the child's stay was irregular (the time between after the rejection of the asylum application and the decision on stay on humanitarian grounds). However, the 'best interests of the child' had to be weighed against other interests, in particular immigration considerations. The latter could be so compelling that they were to be given priority over the 'best interests of the child' and such a viewpoint was seen to be expressed by the legislator in the preparatory work. The majority added that the weightier the 'best interests of the child' were, the less room was to be given to other considerations. The applicants in the case held that the CRC Article 3

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39. ECtHR judgment 28 June 2011 *Nunez v Norway*.

required a more authoritative role for the ‘best interest of the child’ than what could be deducted from the national legislative material. The majority did not agree with this position. It held that the wording of the CRC Article 3 requires that the ‘best interests of the child’ should be a paramount consideration, but that it should not necessarily be the only and in not all cases the decisive consideration. In this respect, the majority both referred to earlier case law of the Supreme Court (inter alia Rt. 2009 p. 1261) as well as to the preparatory work of the CRC.<sup>40</sup> The applicants had in particular emphasized the role of General Comment No. 6 (2005) (and also invoked General Comment No. 5), which pays attention to the division between concerns of general interests and right-based arguments. The majority stressed that the actual case involved children living with their families, either in Norway or in their country of origin, which meant that we were outside the scope of General Comment No. 6 (2005). As a last point, the majority also paid attention to the latest CRC concluding observation concerning Norway. The Committee had expressed its concern that the principle of primary consideration of the best interests of the child is not yet applied in all areas affecting children, such as immigration cases.<sup>41</sup> Furthermore, the Committee had recommended that Norway ensure that the best interest of the child and his/her affiliation to Norway is a primary consideration whenever decisions about the child’s future are under consideration. According to the majority the recommendations of the Committee could not be regarded as giving children a more preferable position than what was given in domestic legislation. It was not a reason to interpret the statements from the Committee that immigration considerations should always be outmanoeuvred by the ‘best interests of the child’.

The minority came to another conclusion. It took the same legal point of departure as the majority, but the order of appearance was different. The minority cited first CRC Article 3 before turning to the domestic provisions and stating that these were implementing CRC. This nuance may be a question of writing style, but it could also indicate that the minority was more willing to let Article 3 be the leading legal source. Referring to Rt. 2010 p. 1313 (a criminal case, cf. below), the minority held that the ‘best interests of the child’ should not be given absolute priority (para 187). However, the ‘best interests of the child’ should not merely be a consideration taken into account in an overall assessment. The balancing norm in CRC Article 3 requires that what all in all circumstances best serves the interests of the child should be particularly addressed and be in the foreground of the assessment; it should be ‘primary’. However, other legitimate and weighty rea-

40. Second reading (1988–89) para 121.

41. CRC/C/NOR/CO/4 paras 22 and 52.

sons could lead to other solutions than those that are in the 'best interests of the child'. The core content of the balancing norm was a requirement of relevance and proportionality when overriding the 'best interests' of the child. According to the minority, immigration considerations were undoubtedly relevant. However, the essential element of the CRC Article 3 requires that it should be difficult for immigration concerns to override the 'best interests of the child'. The 'best interests of the child' could not be disregarded by assessing that an expulsion would be justifiable in the sense that the child would not be exposed to unreasonable risk or deficiencies in the everyday care. Also, in such circumstances, to select a solution not in line with the child's interests must be anchored in sufficient overriding requirements. This is particularly important when the child is rooted in the country of stay by language, culture and social and personal ties. On this point, the minority also referred to the viewpoints of the ECtHR.<sup>42</sup> Children will often be affected by their parents' unreasonable, unjustifiable or illegal choices. In immigration cases, it is an obvious risk that parents are using children in order to obtain a more preferable position for themselves. Still, the minority stressed that the CRC provides children with a separate and independent legal position. Children can therefore not be identified with the wrongdoings of their parents. The minority also cited an opinion made by a parliament committee, which in the views of the minority was in line with the balancing norm inherent in the CRC Article 3.

This judgment of the Supreme Court, Rt. 2012 p. 1985, is voluminous and in this short recapitulation it is difficult to offer a fair presentation of the viewpoints of the majority and minority. This task is particularly challenging since the two factions are writing opinions that are rather independent from each other and, to a lesser extent than usual, address the points where the viewpoints differ. It should also be emphasized that the factions have different viewpoints when it comes to the domestic legal material (cf. the minority's use of material from the Parliament committee), as well as regarding other international material (cf. the minority's use of the *Butt* judgment from the ECtHR). Still, the judgment clearly indicates divisions within the Court when it comes to the CRC and the balancing of the 'best interests of the child' and immigration considerations.

Rt. 2015 p. 93 (*Maria-judgment*) concerns the expulsion of a woman of Kenyan origin, who was living in Norway together with her daughter (four years old when the judgment of the Supreme Court was given). The daughter was a Norwegian citizen and could therefore not be expelled. Her father was not able to take care of her. The alternatives were either that she accompanied her mother to Kenya where

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42. Cf. ECtHR judgment 4 December 2012 *Butt v Norway*.



she would live under poor conditions or to stay in Norway and be separated from her mother and placed under foster care. From an administrative law perspective, the judgment is interesting since the Supreme Court held that the decision affected the child to such an extent that she should be considered as a party in the immigration procedure. This illustrates that children to a larger extent than previously are considered as independent subjects. Turning to the immigration issue, the legal landscape had changed since the 2012 judgments. The Norwegian Constitution had been amended and now also guarantees the ‘best interests of the child’, cf. Section 104. The justice writing the judgment in Rt. 2015 p. 93 was the same judge as the justice writing the dissent for the minority in Rt. 2012 p. 1985. In the interpretation of Section 104, he also took into account General Comment No. 14 (2013) on ‘the right of the child to have his or her best interests taken as a primary consideration’. Section 104 was shaped with CRC as a pattern (para 64), and the preparatory work indicated that such an approach was made in order to make use of the practice of international supervision bodies. The judgment (para 65) refers to Rt. 2012 p. 1985 and the viewpoint of the majority that the ‘best interest of the child’ is not the only consideration, and not necessarily decisive. With referral to the CRC Committee the judgment then continues to emphasize that the ‘best interest of the child’ is of considerable weight and should not merely be a consideration taken into account in an overall assessment. The ‘best interests of the child’ should be the starting point, be addressed in particular and be in the foreground. This may very well be an extract of the CRC Committee’s approach, but the words are also rather similar to those used by the same judge when formulating the viewpoints of the minority in Rt. 2012 p. 1985.<sup>43</sup> The Supreme Court came to the conclusion that the decision to expel the mother was a disproportionate measure. She had given false information regarding her identity and birth date, but this was of minor character. An expulsion would be an unreasonable burden for her daughter who in this case was an innocent party.

Rt. 2015 p. 155 concerns extradition to Rwanda for war crimes. The person concerned had been living in Norway for twenty years and had three children who were all born in Norway. The Supreme Court paid particular attention to case law from the ECtHR which did not entitle the accused to be brought for trial in a particular jurisdiction and that extradition could only be denied in ‘exceptional circumstances’. Turning to the CRC, the Court held that the threshold for giving the interests of the child priority must be very high in cases involving serious crimes (para 67). In the proportionality assessment, it must be taken into account that the

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43. Cf. also Rt. 2015 p. 155 para 61.

alleged crime was particularly grave and that the international cooperation on war crimes and a fair trial required that the criminal case was held in the country where the wrongdoings had taken place. The case in Rt. 2015 p. 155 is of particular interest read of light of Rt. 2015 p. 93. Both cases concern the balance between the 'best interests of the child' and other societal considerations, and a decisive element is the severity of the interests of the society.

Rt. 2015 p. 1388 is also a plenary case and concerns rejection of an asylum application and stay on humanitarian grounds due to the possibility of internal flight. According to the relevant provisions, an asylum application could be rejected if the person concerned would have effective protection in other parts of the country of origin than the area that he or she had fled from, if it is not unreasonable to seek protection in these parts of the country (which in the specific case was the Kabul region of Afghanistan). The family consisted of parents and two children, aged six and two years when the decision was taken by the Immigration Board. Several issues were at stake, and the aspects concerning the child's right to be heard will be addressed below. The majority took as a starting position that according to domestic sources there should not be made an assessment of the living conditions in Kabul compared with the situation in Norway, even if the case involved children (although if such a comparison was relevant under the assessment of stay on humanitarian grounds). Such an approach would lead to a situation where the right to asylum would be different for families with children, which would not be in conformity with the UN Refugee Convention. The CRC could not lead to another conclusion, and the majority emphasized that CRC Article 22 did not state that there should be a different assessment than under the UN Refugee Convention. The majority found that the family neither should be granted stay on humanitarian reasons. The minority came to the same conclusion regarding the question on asylum but had a different view regarding stay on humanitarian grounds. The core in this respect was that the reasoning given by the Immigration Board was insufficient, and in this assessment the CRC Article 3 played a vital role. The minority referred to General Comment No. 14 (2013) and the Committee's requirements concerning the rule of procedure. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases (para 6). The minority held that even the practice from the Committee is not binding, they are of considerable weight and emphasized that the ECtHR often refers to the General Comments by the CRC Committee.

### ***Deprivation of liberty (CRC Article 37)***

Another important category of the cases before the Supreme Court has concerned deprivation of liberty of minors. CRC Article 37 contains provisions both regarding conditions for detention and regarding the procedure. Protection against deprivation of liberty can also be found in ECHR Article 5 and CCPR Article 9, which both applies to all persons, notwithstanding age. Article 37 of the CRC has explicit provisions for children and states that detention is to be used only as a measure of last resort and for the shortest appropriate period of time (litra b) and that child detainees should be separated from adults unless it is considered in the child's best interest not to do so (litra c). The Supreme Court has used the CRC Article 37 as an argument in favour of the child both in cases concerning selection means of sentencing (imprisonment or community sentence) and on custody. A case for illustration can be Rt. 2010 p. 1313. The person concerned had committed robbery and attempt at robbery at the age of 17 years and four months. For adults, such acts will normally attract a sentence of imprisonment for more than one year. Under considerable doubt, a unanimous Court ordered 430 hours of community services. The Supreme Court made references to both the CRC Article 37 and General Comment No. 10 (2007). Another illuminating case is Rt. 2013 p. 776 which concerned attempted rape. The convicted boy was 17 years and three months old when the crime took place. The majority gave a partly unconditional prison sentence, while one judge found that community service would be an appropriate punishment. Even though the offender was convicted to a prison sentence, the possibility for community service for such a crime would have been unlikely ten years ago.

In the field of sentencing for young offenders there has been an interplay between the legislator and the judiciary. The Parliament has referred to and indirectly encouraged the development of milder sentencing of convicted minors.<sup>44</sup>

### ***Protection of children as an argument for criminalization (of adults)***

In some cases, CRC has been used as an argument to interpret the criminal responsibility to the largest possible extent (within the border of rule of law) in order to give children the best potential protection from acts committed by adults. One such case concerned the previous criminal responsibility for persons having a sexual relationship with children less than 14 years of age. The provision stated that the perpetrator could not be heard with the argument that he was in good faith of

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44. See Prop. 135 L (2010–11) pp. 97 and 100, cf. references hereto in Rt. 2013 s. 67 paras 14–15.

the child's age. According to the Supreme Court (Rt. 2005 p. 833) this provision contradicted ECHR Article 6 and the presumption of innocence. The Court was not convinced by the prosecutor's argument that CRC Article 34 required objective criminal responsibility, and the Supreme Court stated that children would be offered sufficient protection even without the strict criminal liability. The CRC was also used as an argument in the case in Rt. 2005 p. 1567 concerning corporal punishment (referred above). The Court stated the CRC Committee found that even light corporal punishment was incompatible with CRC.

### ***Deprivation of liberty of parents***

Another sub-category within the field of criminal law has been criminal sanctions against adults with children that would be affected by imprisonment. These cases could also be located under the 'best interest of the child'. An illustrative case is Rt. 2011 p. 1744. A mother with sole care of a five-year-old child had been convicted of keeping 95 kilos of cannabis in her apartment. Normally, such an act would have resulted in five years of imprisonment, although the length in her case would be reduced to two years due to her immediate declaration of guilt. The majority (three judges) of the Supreme Court came, under doubt, to the conclusion that community service was a reasonable sentence due to the combination of the defendant's responsibility to care for her daughter and her confession and cooperation with the police. As a legal basis for this approach, reference to CRC Article 3 was made. It was stated that an implication of this provision was that care responsibility for children should have impact on the sentencing. The minority (two judges) held that it was not ruled out that family care could be made possible during imprisonment. Regarding the balancing of the best interest of the child and general deterrence, the minority emphasized that children under the age of 18 were significant consumers of cannabis, with its well-known harmful effects, such that children's rights also pointed to the need for a custodial sentence.

### ***Child's right to participation***

The child's right to be heard is one of the four main principles of CRC (see also Chapter 10 of this book).<sup>45</sup> One debated case in Norway concerned the involvement of children in custody disputes (Rt. 2004 p. 811). The core question was whether the courts could omit to hear the child (then aged 11) in a case concerning

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45. First presented in General Comment No. 1 (2001) para 6. See also General Comment No. 5 (2003) para 12; General Comment No. 12 (2009) para 2.

access for the father, when this case was brought to the courts immediately after the custody dispute (where the child was heard). The High Court had not heard the child, and the Supreme Court found that this approach was in conformity with CRC Article 12, since the latter had to be interpreted in the light of Article 3. The decision was criticized (Smith 2004: 223–231). Although it is understandable that the Supreme Court wanted to protect the child from the disputes between her parents, the child will sooner or later be aware of the court case. It can therefore be claimed that participation through the courts, and with assistance of skilled personnel, will be a better option than the inevitable involvement that will take place through the parents.

Although the Supreme Court has held that the child's right to participation is an important principle, there may be some reluctance to include children in ongoing disputes.

In Rt. 2009 p. 1261, the main issue was whether CRC Article 3 should have consequences for minor unaccompanied asylum seekers that sought the right to stay in Norway, where a continued stay would be in the child's best interest. The Supreme Court examined the drafting history of the provision and the alteration from 'the paramount consideration' to 'a primary consideration' and paid also attention to General Comment No. 6 (2005), para. 86. The Supreme Court found that the best alternative would be to return the child to the country of origin and to live with his grandparents, but the child was not heard prior to the hearing in the Supreme Court.

Although this approach can be explained by the fact that the Supreme Court should only decide upon the validity of the decision of the Immigration Board, and not make a full assessment of the case, it's questionable whether it is possible to decide on the best interest of the child without an updated involvement of the child (Bendiksen and Haugli 2010: 60–80).<sup>46</sup>

The case in Rt. 2015 p. 1388 concerning internal flight (referred above) also included a dispute regarding the child's right to be heard. When the Immigration Board tried the case, the oldest child was only a few days from being six years old. The Immigration Board turned down a motion to let the child express its views during the hearing. The majority of the Supreme Court referred to General Comment No. 12 (2009) para 21, that wherever possible the child should be heard directly in any proceedings. The majority found that this was merely a statement from the Committee on how the legal situation should be developed, which was not rooted in the wording of the Convention (Rt. 2015 p. 1388 para 154). The

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46. The remark of the CRC Committee in the Concluding Observation to Norway must also be read in the light of the aforementioned decision (CRC/C/NOR/CO/4 paras 22–3).

majority also referred to General Comment. No. 12 (2009) and emphasized that the CRC Committee in this respect had stated that the concept of the child's best interest is flexible and adaptable. The minority came to the conclusion that it was a procedural error that the child had not been heard. Of particular interest in the actual case was the Committee's statement that there is not conflict between the best interests of the child (Article 3) and the child's right to be heard (Article 12) and that the two provisions are complementary to each other (General Comment No. 12 (2009) para 74). The minority emphasized that the CRC Committee has stressed that the right to be heard is without age limitations.<sup>47</sup> The minority further cited the CRC Committee's statement that state parties 'should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity'.<sup>48</sup> By not hearing the child, the Chair of the Immigration Board had anticipated the views of the child and deprived the child the possibility to enlighten the case and the child's possibility to enforce a fundamental procedural right. According to the minority such an approach was not in conformity with a core element of Article 12.

Rt. 2014 p. 530 concerns the appointment of a lawyer to represent the child in a child protection case where the child was entitled to its own lawyer. The High Court had appointed a lawyer according to the preferences expressed by the parents. The Supreme Court's appeals committee stated that it was a procedural error that the child's wishes to appoint a specific lawyer was not taken into account.

The case in Rt. 2012 p. 2039 could also be placed under this heading of participation, although it is a form of special right to participation. The case concerned *inter alia* whether the court could issue a declaratory judgment (in the conclusion) that there had been a violation of the CRC. The majority emphasized that there was not a complaint mechanism (at that time) under the CRC and found that it should not be given a declaratory judgment. The minority came to a different conclusion and underlined that such a possibility was important to give satisfactory protection of the guarantees given in the CRC (with a possible exception for provisions of economic, social and cultural character that had to have a supplementary domestic legal foundation).

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47. Rt. 2015 p. 1388 para 291, with reference to General Comment No. 12 (2009) para 21.

48. Rt. 2015 p. 1388 para 291, with reference to General Comment No. 12 (2009) para 20.

### *Reflections*

Of the 132 cases where the CRC is either used as part of the rulings of the Supreme Court or as a basis for the parties' submissions, the child was a formal party (either as plaintiff, intervenor or indicted in criminal cases) in 46 cases. Most of the latter were criminal cases. When adults are speaking on behalf of the children, either as parents (then in conflict with each other or with public authorities) or as public officials (then acting on behalf of the society), there is a risk that the argumentation is flavored by the interest of the adults. On the other hand, it should be emphasized that an effective implementation of CRC implies that adults can act on behalf of children, and without necessarily including the child in the legal proceedings as parties. Still, there is a risk that the way of reasoning is influenced by the adult's own interests, especially if the courts are not aware of the danger attached to using the CRC as some kind of legal shield.

Compared with other incorporated human rights instruments, ECHR is referred to by the Supreme Court or in the parties' submissions in 1472 cases, CCPR in 362 cases, CESCR in 9 cases and CEDAW in 3 cases. Seen by the numbers the CRC is not being called upon most frequently but is still more used in legal argumentation than CEDAW and CESCR. An interesting feature is that the CRC is more and more called upon, and of the 132 cases 49 are from the last five and a half years (2013 to July 2018). This indicates that the courts and their actors are becoming gradually more aware of the CRC. One should be reluctant to draw conclusions based on the figures, but some reflections may still be relevant. The CRC came into the HRA after both ECHR and CCPR and the high number of ECHR cases is most likely due to the fact that ECtHR through its practice has developed a comprehensive level of protection, but the widespread knowledge by lawyers and judges probably also has an impact. Additionally, many of the cases where ECHR is used as legal argument are from the field of criminal law, where children seldom occur as charged with a criminal offence. It should also be added that in many situations the child's legal protection can be offered both under ECHR and CRC, and in such situation an investigation of the scope of the CRC can be unnecessary if ECHR offers the same or better protection (see also below on interplay between the instruments). Subsequently, the CRC will especially be called upon in situations where it gives a legal protection of the child beyond that of other human rights instruments. For example, there are few cases concerning child protection where the CRC are invoked since the ECHR in this field may be considered to offer a more detailed protection (for both children and parents).

In many of the cases where the CRC is involved, there is interplay between different incorporated human rights instruments. In many fields, there is an overlap

of protection of the individuals, for example in cases involving expulsion, where the interference both has an impact on the family life (ECHR Article 8) as well on the best interest of the child (CRC Article 3). When assessing the human rights protection, the supervisory bodies will pay attention to other relevant instruments. In cases involving expulsion, ECtHR has for example used CRC Article as a legal source, and CRC Article 3 and the practice from the CRC Committee have influenced the protection under ECHR Article 8.

All the cases referred to above are judgments where there are explicit references to the CRC. Of interest are also cases where the CRC has not been called upon, while the Convention still may be said to have an influence of the legal reasoning of the Supreme Court. A case that can illustrate this impact is Rt. 2009 p. 411. The case related to the High Court's decision upon admission in a case regarding public care. The appeal board of the Supreme Courts selected an interpretation of the statutory provision that was in accordance with the strengthening of the rights of the child expressed through amendments of the Children's Welfare Act Section 6-3 on the legal standing of children. CRC article 12 is not mentioned, but the latter has had impact on the legal construction of Section 6-3, and it can be said that the CRC in this case came in silently into the case by the back door. It can also be claimed that the CRC in recent years has also had an impact on the way of legal reasoning in cases concerning children. There has been an increasing awareness of the need to grant children legal protection and the CRC has in many cases been the formal legal platform for such an approach. This development can in particular be seen to take place in cases concerning immigrants (either the child itself or its parents). One may say that there has been a development not only in the legal surface, but as well in the underlying legal culture on how the legal system approaches and understands cases involving children.

Despite an ongoing development where children's rights, as they are expressed in the CRC and interpreted by the Committee, have gained increased attention, one may claim that what is taken place is only a shift in legal argumentation, and not an alteration on how cases are solved. The 'litmus test' will be whether the outcome of a case would be the same even if the CRC was disregarded as a legal source. Such a test is impossible, and one must therefore make an assessment made on assumption. For my own part, I will claim that the CRC has had a real impact on Norwegian legal thinking, although some of the developments that have taken place could have occurred even without the CRC being incorporated in the legislation through HRA. Still, the impact of the CRC may vary between different legal fields. In criminal law CRC has been one factor leading to more lenient punishment of minor offenders. In immigration law CRC has also had an impact and



has led to more child-centric assessment. However, we have had three plenary cases in the recent five years (Rt. 2012 p. 1985, Rt. 2012 p. 2039 and Rt. 2015 p. 1388). In all of these cases the Supreme Court was divided, and the judgments reveal that there are different viewpoints on the impact of the CRC and in particular the weighing of the child's interest with the general interest in upholding a restrictive immigration policy.

## 9.6 CURRENT CHALLENGES

It is also useful to look ahead to see areas where Norway may face future challenges with the extent of incorporation within Norwegian law. A good starting point for discussing current challenges can be the CRC Committee's latest Concluding Observations to Norway, although not all contemporary issues may not be addressed by the Committee. Additionally, the CRC is a living instrument and one of the obligations of legal scholars is also to try to discover forthcoming issues. It is also a task to discuss and critically analyse the approach made by the CRC Committee.

A recurring issue in the Committee's remarks to Norway has been on access to welfare services and the differences in this respect between different municipalities. Also in the latest Concluding Observations to Norway this topic was addressed.<sup>49</sup> The issue is complex, partly because the municipalities are separate entities within in the state, where the principle of local self-government applies. Therefore, the welfare services must not be of the exact same level in all municipalities, but there must be an overall minimum standard. The newly introduced reform of the child protection services aims to improve the quality of services to children (cf. amendment 16 June 2017 No. 46, not yet in force). Still, there seem to be substantial differences between municipalities, both when it comes to services and coercive measures within child protection.<sup>50</sup> The CRC Committee has recommended that the Government should allocate earmarked funds to local authorities instead of block grants, to ensure that funds intended for the implementation of child rights are adequately used for their intended purpose.<sup>51</sup> Earmarking is a domestically sensitive instrument since it gives the municipalities less leeway,

49. See CRC/C/NOR/CO/5-6 para 6(c), cf. also para 23(f). For previous recommendations, see CRC/C/15/Add. 23 para 24; CRC/C/15/Add. 126 paras 15 and 17; CRC/C/15/Add. 263 para 15; CRC/C/NOR/CO/4 paras 38–39.

50. On the latter, see CRC/C/NOR/CO/5-6, para 21(a)ii.

51. CRC/C/NOR/CO/5-6, para 6(d).

and it will be interesting to see if, and how, this recommendation will be implemented.

One of the explanations for the unequal access is that the Children's Welfare Act until recently has not been considered to provide children with individual legal rights, but merely states an obligation to the municipalities to provide services to children. Financial support to family members being home to take care of family members is still not an individual entitlement, and the Health and Care Services Act of 2011 limits the responsibility for the municipality to make a decision, without requiring a certain level of services.<sup>52</sup> A major target group for this provision is parents of handicapped children. In contrast, there is a range of other welfare provisions granting individual legal rights to the citizens, like the Patients' Rights Act of 1999,<sup>53</sup> the Health and Care Services Act, and the National Insurance Act of 1997.<sup>54</sup> In this perspective, the lack of individual rights in the Children's Welfare Act was a rare exception, and many voices have been raised to alter the regulation. An independent expert group suggested that access to Child Care should be an individual legal right,<sup>55</sup> and the committee drafting a new Child Care Act has also taken this viewpoint.<sup>56</sup> One of the driving forces in the legal argumentation has been the CRC. Although legal provisions alone cannot secure access to welfare services for children in practice, the current legislation was insufficient and gave a wrong signal on which groups that should be given priority. The Children's Welfare Act was recently amended, and it is now stated that children are entitled to services (Section 1-5).<sup>57</sup>

When the bCRC was ratified, the Ministry had suggested making a reservation regarding separation of children and adults in prisons, cf. CRC Article 37 c).<sup>58</sup> The Parliament opposed such a reservation, mainly because the Swedish Parliament had turned down a similar reservation. The background is partly that Norway in many areas is sparsely populated, with large travel distances between the different prison locations. Additionally, the number of children in prison is low. The Government emphasized that if Norway were to comply with both the principle of the

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52. Act 2011-06-24-30 on municipal health and care services etc. (Health and Care Services Act).

53. Act 1999-07-02-63 on patients' and users' rights (Patients' Rights Act).

54. Act 1997-02-28-19 on national insurance (National Insurance Act).

55. NOU 2012:5 pp. 149–151.

56. NOU 2016:16 pp. 67–81.

57. Prop. 169 L (2016–17).

58. Since this reservation was not made, it is remarking that Norway still has made a reservation under CCPR Article 10 second paragraph (b) and third paragraph 'with regard to the obligation to keep accused juvenile persons and juvenile offenders segregated from adults'. See the CRC Committee's call for withdrawal, cf. CRC/C/NOR/CO/5-6 para 35(b).

separation of adult and juvenile prisoners and the principle of proximity, one would risk that the few juvenile prisoners would be completely isolated.<sup>59</sup> Separate juvenile units for juvenile prisoners have now been established in a trial project and young people who are detained in ordinary facilities receive special follow-up by the prison staff to prevent harmful effects of imprisonment. Despite the Government's arguments of being in a situation of conflict between two obligations, the Committee recommended that where detention is unavoidable, the Government should 'ensure that the children are not detained together with adults, both in pre-trial detention and after being sentenced, and in line with its previous recommendations'.<sup>60</sup> This issue has been addressed by Linda Gröning and Hilde Svrljuga Sætre in Chapter 5 in this book, and I will not pursue the topic here.

Another field of law where the CRC Committee repeatedly has expressed concerns to Norway is within immigration law. The Committee has previously addressed the decision-making process in immigrations cases as too lengthy.<sup>61</sup> In the recent Concluding Observation the committee recommended that Norway 'establish clear criteria regarding the best interests of the child for all those authorities that have to take decisions affecting children',<sup>62</sup> which clearly is intended to apply also in the immigration cases. The committee also recommended that Norway increase its efforts to 'strengthen compliance in practice with the child's right to be heard, particularly with regard to children who are more vulnerable to exclusion in this regard such as ... migrant, asylum-seeking and refugee children'.<sup>63</sup> Furthermore, the committee recommended that Norway 'strengthen the implementation of the child's right to be heard in asylum and expulsion procedures affecting children, particularly with respect to younger children, and ensure that children are given the possibility to be heard individually in all instances in all cases affecting them'.<sup>64</sup> Even though the two latest recommendation are explicitly targeting asylum cases, they are not directly criticizing the approach by the majority of the Supreme Court in the recent immigration cases presented above. A Concluding Observation should be just that – an observation and not a decision of an individual case – but it would have been of interest if the CRC Committee in their recommendation went into a dialogue with the Supreme Court and gave some guidance for forthcoming cases. Still, a form of critique – indirectly addressed to

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59. CRC/C/NOR/5-6 para 337.

60. CRC/C/NOR/CO/5-6 para 35(b), cf. CRC/C/NOR/CO/4 para 58.

61. CRC/C/NOR/CO/4 paras 51–52.

62. CRC/C/NOR/CO/5-6 para 13(a).

63. CRC/C/NOR/CO/5-6 para 14(a).

64. CRC/C/NOR/CO/5-6 para 14(c).

the Supreme Court – may be found in the recommendation to Norway to under ‘no circumstances deport children and their families back to countries where there is a risk of irreparable harm for the children’.<sup>65</sup>

The CRC Committee has in its previous reports expressed concern ‘at the number of children who have been removed from their families and live in foster homes or other institutions’.<sup>66</sup> In the Concluding observations to Norway in 2010 the Committee was concerned ‘that despite extensive assistance at home, the number of children removed from family care has increased’.<sup>67</sup> The committee was here too focused on the figures which by themselves do not tell if intervention was necessary to protect children.<sup>68</sup> In the recent Concluding Observation the committee is more nuanced. Amongst the issues highlighted by the committee is that out of home placements should be a measure of last resort and to ensure that siblings are not separated when placed in alternative care. Currently, several cases against Norway concerning various compulsory measures within child protection are pending before the ECtHR. If the conclusion will be that Norway has violated the human rights of the applicants (mainly parents), substantial reforms may be needed, but so far, the ECtHR has found that the interventions have been in conformity with the right to family life.<sup>69</sup> For a more in-depth analysis on this issue, see the contribution of Asgeir Falch-Eriksen and Marit Skivenes in Chapter 3 of this book.

The Committee has also paid attention to adolescents with Attention Deficit Hyperactivity Disorder (ADHD). In its Concluding Observation in 2010 it recommended that Norway ‘carefully examine the phenomenon of over-prescription of psycho-stimulants to children’ and to take ‘initiatives to provide children diagnosed with ADHD ... with access to a wide range of psychological, educational and social measures and treatments’.<sup>70</sup> In this statement by the committee takes the over-prescription is taken as a fact, without any references to research or other

65. CRC/C/NOR/CO/5-6 para 32(d).

66. CRC/C/15/Add.263 paras 23–24.

67. CRC/C/NOR/CO/4 para 34.

68. In this respect, it’s interesting that the committee has made an almost exact critique of Sweden (CRC/C/SWE/CO/4 paras 34–35), despite the fact that the numbers there on coercive measures are significantly lower than in Norway). See also expressed concern on the same topic regarding Denmark, CRC/C/DNK/CO/3 paras 33–34.

69. See ECtHR judgments 11 October 2016 *J.M.N. and C.H. v Norway*; 11 October 2016 *T.S. and J.J. v Norway*; 4 April 2017 *I.D. v Norway*; 7 September 2017 *M.L. v Norway*; 30 November 2017 *Strand Lobben and others v Norway* (the case is referred to the Grand Chamber); 26 April 2018 *Mohamed Hasan v Norway*; 6 September 2018 *Jansen v Norway*. The latter concluded that Norway had violated the applicants right to family life.

70. CRC/C/NOR/CO/4 para 43.

sources. The approach is a bit more nuanced in the latest Concluding Observation. Norway is recommended to improve ‘the diagnosis of mental health problems among children, ensure that the initial diagnosis with ADHD is re-assessed’, and ‘that appropriate non-medical, scientifically based psychiatric counselling and specialist support for children ... is given priority over the prescription of drugs in addressing ADHD and other behavioural specificities’.<sup>71</sup> Parents and children should also be ‘informed about the negative side effects of treatments with psycho-stimulants and provided with information on non-medical treatments’. It is welcomed that the CRC Committee addresses issues that are important for children, even though they are of a different nature than the classical legal one. However, this is a challenging task that demands insights in fields beyond legal education. Even though many of the members of the CRC Committee have a background from other disciplines, recommendations should be based on well-established knowledge and research. It seems like that there has been a development in the viewpoints of the committee and the latest recommendation is drafted in a bit more cautious language and more concentrated on the legal issues (measure of last resort, etc.). Such a precautious approach may in the long run be in the best interests of the children concerned.

A last topic to be addressed here is the child’s right to privacy under CRC Article 16. Modern forms of media have facilitated new legal challenges. The right to self-determination is as such not guaranteed under CRC. The committee is careful not to establish norms of self-determination, although some signs of development in this respect can be traced under the umbrella of the child’s right to be heard.<sup>72</sup> When it comes to new forms of media a noteworthy characteristic is the swift spreading of information to a large audience. If children are exposed, either by themselves, their relatives or their friends, it can be difficult to erase the information. Therefore, there can be a need to protect children from exposure, typically when it comes to pictures. However, such restrictions must be weighed against the principle of the child’s evolving capacity to determine for themselves. Additionally, there can be a necessity to protect children from exposure by their parents, but this can more easily be accomplished within the system of CRC, although the rights of the parents can be protected under other instruments (inter alia ECHR article 8). In Norway there have been discussions on both the issues mentioned above. When it comes to self-exposure the issue has been whether adolescents can publish picture with little or no clothes, without parental consent, and age limits in this respect (and the web site editors’ responsibility to validate the age of the

71. CRC/C/NOR/CO/5-6 para 26(c).

72. See General Comment No. 12 (2009).

adolescents). Regarding parental publishing the issue has been whether parents can submit videos to sites like 'YouTube' in cases of taking children into public care (where the actual takeover has been filmed by the parents and where the children involved can be identified). In both cases, the CRC has been called upon to protect the children involved, and it will be welcomed if the CRC Committee in the future address these kinds of issues.

For most children, Norway is a good country to grow up in (cf. Chapter 1). The recent recommendations by the CRC Committee demonstrate that there are still deficits in the protection of children's rights, and there may be additional blind spots not revealed by the committee. However, the overall impression is that the development is moving in the right direction in order to strengthen the protection of children, and the CRC has been one of the driving forces in this improvement. Even though the CRC is indeed important, it functions in an interplay with other legal sources, both national and internationally. The CRC Committee plays a crucial role. In order to fulfil its task, the Committee has a difficult assignment. It shall challenge domestic legislation and practices, but the recommendations have to be based on sound reasoning where the committee also listens to the explanations and argumentation by the respondent state. It may seem desirable to have a dynamic committee that moves like a high-speed train, but in the long run, a slower development may be more suitable.

## 9.7 CONCLUSIONS

How would the legal situation of children have been in Norway if we imagine that the CRC had not been incorporated? The counterfactual approach is impossible to answer but it still could be fruitful to consider the alternative. Even though the CRC has not been incorporated, it would still be a relevant source in legal reasoning, but the incorporation gives the CRC a more potent legal standing – as we also see in the following chapter.

As discussed above, it has both affected the legislator and the judiciary, sometimes also in an interplay (e.g. concerning sentencing of minors). The CRC has probably not only influenced the results in terms of the content of the legislation and outcome of court cases but also the manner of legal reasoning. Still, in some areas there are different viewpoints on how children's rights should be weighed against other societal values, in particular in the fields of immigration. The many plenary cases with dissenting opinions indicate that this division is found even amongst the members of the Supreme Court.

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