Great Expectations?

Some Thoughts on the Impact of Incorporation of the UN Convention on the Rights of the Child for Asylum-seeking Children in the Nordic Countries

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Abstract

In the Nordic countries children's rights generally hold a particularly high normative status. All Nordic countries except for Denmark have incorporated the key human rights treaty on children, the UN Convention on the Rights of the Child (the CRC), into the domestic legal order, giving the CRC status as domestic law. Drawing on wider literature to define a key set of “expectations on incorporation”, the article analyses the extent to which incorporation of the CRC in the domestic legal order of four out of five Nordic countries has had an impact on legal developments in the Nordics in the wake of the 2015 “refugee crisis”. It is suggested that in asylum law, where the risk of a conflict of interest between the individual and the State in many ways is obvious, there seems to be significant room for improvement when it comes to the actual impact of the CRC.

Keywords

incorporation – asylum – asylum-seeking children – children's rights – Convention on the Rights of the Child – human rights treaties – refugee children – implementation

1 Introduction

The large influx of asylum seekers and migrants in 2015/2016 put Nordic asylum systems under great strain and led to the introduction of migration laws and policies with a view to curbing the number of arrivals and strengthening migration control.¹ While the move towards increasingly restrictive migration policies was part of a gradual shift that had been developing over decades, the legislation and policies connected to the 2015/2016 “crisis” in many cases took the restrictive approach to a new level, with measures including reduced possibilities for protection, temporary residence permits, the discontinuation or severe limitation of access to humanitarian protection, and restrictions on family reunification.² While the restrictive policies affect all asylum seekers regardless of age, it has been pointed out that many of the recent legislative and other measures taken in the name of migration control have had particularly negative effects for asylum-seeking children.³

The restrictive measures and the ensuing discussion of their effects on asylum seekers of various categories must be seen in light of the Nordic countries’ reputation as being at the forefront of human rights protection, including the human rights of children.⁴ Children’s rights, particularly the “best interests” principle, hold a high normative status in the Nordic countries.⁵ All of the Nordic countries have ratified the main human rights treaty on children, the

1 See e.g. T. Gammeltoft-Hansen, ‘The Do-Gooders’ Dilemma: Scandinavian Asylum and Migration Policies in the Aftermath of 2015’ in A. de Bengy Puyvallée and K. Bjørkdahl (eds.), *Do-Gooders at the End of Aid: Scandinavian Humanitarianism in the 21st Century*, Cambridge University Press, Cambridge, 2021); R. Thorburn Stern, ‘Proportionate or Panicky? On Developments in Swedish and Nordic Asylum Law in Light of the 2015 “Refugee Crisis”’, in E. Karageorgiou and V. Stoyanova (eds.), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill/Nijhoff, Leiden, 2018) p. 233.

2 *Ibid.*

3 D. Hedlund, *Drawing the Limits: Unaccompanied Minors in Swedish Asylum Policy and Procedure* (PhD Thesis, Stockholm University, 2016); UNICEF, *Protected on Paper? An Analysis of Nordic Country Responses to Asylum-seeking Children* (UNICEF, Florence, 2018); H. Lidén, ‘Asylum’, in M. Langford, M. Skivenes and K. H. Søvig (eds.), *Children’s Rights in Norway: An Implementation Paradox?* (Universitetsforlaget, Oslo, 2019) p. 332; M. Garvik and M. Valenta, ‘Seeking Asylum in Scandinavia: A Comparative Analysis of Recent Restrictive Policy Responses Towards Unaccompanied Afghan Minors in Denmark, Sweden and Norway’, 9:15 *Comparative Migration Studies* (2021).

4 See e.g. H. Hagtvedt Vik, S.L.B. Jensen, L. Lindkvist and J. Strang, ‘Histories of Human Rights in the Nordic Countries’, 36:3 *Nordic Journal of Human Rights* (2018), pp. 189–201.

5 Cf. Garvik and Valenta, *supra* note 3.

UN Convention on the Rights of the Child⁶ (the CRC), as well as its two first Optional Protocols.⁷ (The third Optional Protocol,⁸ establishing an individual complaints procedure, has so far only been ratified by Denmark and Finland.)⁹ Article 4 of the CRC imposes a duty on State parties to undertake all appropriate measures, legal and non-legal, to implement the rights recognised in the treaty. As part of their efforts to fulfil the obligation set out by Article 4, all of the Nordic countries except Denmark have taken the step to make the CRC domestic law through incorporation.¹⁰

Yet, these efforts notwithstanding, over the years the Nordic countries have been criticised for shortcomings in safeguarding and implementing in practice the rights of migrant and asylum-seeking children, including in respect of the measures taken during and in the aftermath of the “refugee crisis”.¹¹ The restrictive measures and the critique directed towards them indicate that the child-rights approach of the CRC is increasingly challenged, despite the CRC having gained the status of domestic law in most of the Nordic countries. In particular, Nordic legislation and policies would seem to contradict the CRC’s “child first, migrant second” approach, demanding that migrant children should be treated first and foremost as children, and only secondarily as migrants.¹²

Two essential questions arise in this context: What, if anything, can be expected from the incorporation of an international human rights treaty into domestic law, in this case the CRC? How are treaty obligations met in a field

6 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

7 UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000 and UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001.

8 UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, 14 July 2011.

9 < treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4>, visited on 2 July 2021.

10 The meaning of ‘incorporation’ is discussed in section 2 *infra*.

11 Recent examples include the Human Rights Committee expressing serious concern regarding the implementation of the rights of asylum-seeking children in Finland (CCPR/C/FIN/CO/7, para. 33), and the European Court of Human Rights criticising Denmark in a judgment on family reunification (ECtHR, *M.A. v. Denmark*, Appl. No. 6697/18 [GC], 9 July 2021).

12 See e.g. UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para. 11.

like asylum law where the risk of a conflict of interest between the individual and the State is in many ways obvious?¹³

Against this backdrop, this article examines recent legislative developments in the Nordic countries in the field of asylum law during and following the “refugee crisis” in relation to what could be expected in a country which has incorporated the CRC into its domestic legal order. The intention is not to provide an exhaustive or in-depth empirical study, but rather to more generally analyse the effects of CRC incorporation in a field such as asylum law. To this end, the following section sets the scene by discussing the meaning of “incorporation” and based on the wider literature identifies a key set of expected outcomes of incorporation of human rights treaties in national legal systems. This is followed by an overview of the legal measures taken to incorporate the CRC in the Nordic countries in section 3. Denmark, the only Nordic country to date in which the CRC has not become domestic law through incorporation, is nevertheless included in the discussion as a useful comparison. Bringing the two previous sections together, the following section discusses recent developments in Nordic asylum law relevant to children in relation to the expected outcomes identified.¹⁴ The analysis suggests that while children’s rights and the CRC indeed may hold a high normative status in the Nordics, there seems to be significant room for improvement when it comes the actual impact of the CRC for the protection of the rights of asylum-seeking children in the region.

2 Incorporation: On Understandings and Expectations

2.1 What Do We Mean by Incorporation?

Implementation of international human rights treaties can be described as the realisation of international human rights through the ratifying State’s national legal and institutional system, involving all branches of government.¹⁵ In principle, international law does not regulate *how* human rights are to be implemented on the national level; it is more an obligation of

13 Cf. C. Dauvergne, ‘Irregular migration, state sovereignty and the rule of law’, in V. Chetail and C. Bauloz (eds.) *Research Handbook on International Law and Migration* (Edward Elgar, Cheltenham, 2014) p. 79 *et. seq.*

14 The focus on legislative developments is motivated by the fact that an analysis of the impact on case law would require an empirical study beyond this article’s scope.

15 See e.g. G. Staberock, ‘Human Rights, Domestic Implementation’, in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, para. 2, <opil-ouplaw-com.ezproxy.its.uu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1734>, visited on 21 August 2021; K. McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’, 23:3 *The International Journal of Human Rights* (2019) pp. 425–441 (428).

result.¹⁶ This reflects the approach to the relationship between international and domestic law generally taken in international law: the choice on how to give effect to international law on the domestic level remains with the state.¹⁷ While a State cannot invoke national law as justification for its failure to perform a treaty (as stated in Article 27 of the Vienna Convention on the Law of Treaties, VCLT), the VCLT does not dictate the means of implementing the treaty obligations on the national level, but only prescribes that a treaty is binding upon its parties and that the treaty must be performed in good faith (Article 26 VCLT). In other words, while the State is the primary duty-bearer responsible for the domestic implementation of its international human rights treaty obligations, the means of accomplishing compliance with these obligations in the individual State party is up to the State to decide, a decision guided by its national legal traditions and position on the relationship between international and national law.¹⁸ The leading theories on this relationship traditionally have been monism and dualism. While there are different interpretations of these concepts it can generally be said that in monist countries the international and national legal orders constitute a single legal system, and ratified international treaties become part of the national legal order without the need for transposition by means of national legal instruments.¹⁹ In countries with a dualist legal tradition international and national law are viewed as separate systems. Consequently, the domestic legal system appears self-contained, separate from both international law as well as from other domestic legal orders, which means that some kind of legislation is required for an international treaty to be transformed into domestic law.²⁰ While the value of the monism/dualism dichotomy as an explanatory model for the relationship between international

16 M. Scheinin, 'International Human Rights Law' in D. Paterson and A. Södersten (eds.), *A Companion to European Union Law and International Law* (John Wiley and Sons, Inc. London, 2016), p. 446.

17 See A. Nollkaemper, 'The effects of treaties in domestic law', in C.J. Tams, A. Tzanakopoulos and A. Zimmermann (eds.), *Research Handbook on the Law of Treaties* (Edward Elgar Publishing Ltd, Cheltenham 2014); J. Klabbers, *International Law* (3rd ed., Cambridge University Press, Cambridge, 2021) pp. 323–327.

18 See e.g. D. Shelton, 'Introduction', in D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, Oxford, 2011), *passim*; Nollkaemper, *supra* note 17.

19 Shelton, *supra* note 18, pp. 2–5. See also e.g. M. A. Waters, 'Creeping Monism: The Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties' 107:3 *Columbia Law Review* (2007) pp. 628–705.

20 *Ibid.* Verdier and Versteeg describes the role of the legislature in a dualist system as a gatekeeper, "shaping the interpretation of treaties and circumscribing their scope of application and available remedies through implementing legislation". P-H. Verdier and M. Versteeg, 'Modes of domestic incorporation of international law', in W. Sandholtz and C.A. Whytock (eds.) *Research Handbook on the Politics of International Law* (Edward Elgar Publishing Ltd., Cheltenham, 2017) p. 159.

and domestic law has been much questioned in theoretical debate, states nevertheless seem to continue to explain their approach through these concepts.²¹

In practice, one would, however, be hard-pressed to find a country that strictly adheres to either monism or dualism, with most States embracing elements of both approaches.²² States may also take a monist approach with regard to customary international law but a dualist approach with regard to treaty law.²³

A key aspect of the discussion on how human rights treaties are given domestic effect concerns how a treaty once ratified becomes part of domestic law and the effects this might have in terms of legal status of the treaty, justiciability and enforcement. Incorporation on the national level in some form is crucial, since without it ratified treaties risk becoming “dead letters”, that is, they are formally binding on the State but have little impact in practice.²⁴ The literature, however, suggest different understandings of the concept of incorporation. The broader view of incorporation points to a variety of processes and pathways (legislative and others) through which States internalise human rights treaties and absorb international human rights norms into their domestic systems.²⁵ A more narrow view approaches incorporation as a process of legal implementation focused on ensuring application and enforceability of treaties in national law and legal recognition of treaty obligations at the domestic level.²⁶

21 See e.g. J.E. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, Oxford, 2007; Nollkaemper, *supra* note 17, pp. 141–142; Verdier and Versteeg, *supra* note 20, pp. 171–174 and the recent overview presented in T. Ingadottir, *The Relationship Between International and National Law. Revisiting Concepts of Dualism and Monism* (doctoral dissertation, Faculty of Law, University of Helsinki, 2022), pp. 29–52.

22 Cf. e.g. the discussion in Shelton, *supra* note 18, drawing on a number of national case studies. , Klabbers, *supra* note 17 pp. 323–339; Ingadottir, *supra* note 21.

23 See T. Ginsburg, S. Chernykh and Z. Elkins, ‘Commitment and Diffusion: How and Why National Constitutions Incorporate International Law’, 2008:1 *University of Illinois Law Review* (2008) p. 201.

24 McCall-Smith, *supra* note 15.

25 Cf. e.g. R. Goodman and D. Jinks, ‘Measuring the effects of human rights treaties’, 14:1 *European Journal of International Law* (2003) p. 171; P. Alston and R. Goodman, *International Human Rights* (Oxford University Press, Oxford, 2013) p. 1047; P. Hunt, ‘Configuring the UN Human Rights System in the “Era of Implementation”: Mainland and Archipelago’, 39:3 *Human Rights Quarterly* (2017) pp. 489–538 (495); K. Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission, Edinburgh, 2018); J. Fraser, ‘Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law’, 23:6 *The International Journal of Human Rights* (2019) pp. 974–992.

26 Cf. e.g. C. Heyns and F. Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’, 23:3 *Human Rights Quarterly* (2001), pp. 483–535; Shelton, *supra* note 18;

There are different techniques by which treaty obligations are recognised as domestic law in the aforementioned narrow sense. Two core approaches or doctrines have been identified in the literature. As a rule, in States labelled as monist, the doctrine of *automatic incorporation* is applied, referring to how States adopt or recognise a rule (often constitutional, unwritten or written) of domestic law authorising “all or particular rules of international law to be part of domestic law, without there being a need for implementing legislation”.²⁷ “Automatic”, Mendez explains, refers to “the fact that this ... status is usually acquired upon the entry into force of the treaty for the relevant State”.²⁸ In terms of the hierarchical status of automatically incorporated treaties, there is considerable variation.²⁹ The main alternative approach to making international law part of applicable law on the domestic level, applied in States labelled as dualist, is *transformation*; i.e. the process in which a treaty is turned into domestic law through an act of legislation.³⁰ This can be done, for example, by attaching the treaty or selected treaty provisions to an act of legislation declaring that the treaty is to have the force of law, or having the treaty form the text of the law itself, or even be reformulated.³¹ Where a treaty becomes part of domestic law by transformation (when it is incorporated into the domestic legal order) it retains the hierarchical status of the incorporating legislation.³²

Treaty monitoring bodies such as the Human Rights Committee, the ICE-S-CR Committee and the UN Committee on the Rights of the Child (CRC Committee) recognise that the way in which a treaty is given effect in the domestic order is dependent on the domestic constitutional structure of the

Staberock, *supra* note 15; A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, Oxford, 2011); Nollkaemper, *supra* note 17; Venice Commission, European Commission for Democracy through Law, *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts* (Council of Europe, Strasbourg, 2014); McCall-Smith, *supra* note 15, p. 428.

27 See e.g. Nollkaemper, *supra* note 26, pp. 73–81, *cf. also* M. Mendez, *The Legal Effects of EU Agreements* (Oxford University Press, Oxford, 2013) pp. 17–21; D.T. Björgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edwards Elgar, Cheltenham, 2015) pp. 55–88.

28 Mendez, *supra* note 27, p. 17.

29 *Ibid.*, p. 19.

30 Nollkaemper, *supra* note 26, pp. 73–81; Mendez, *supra* note 27, pp. 17–21. Klabbers refers to the first option as “in-blanc incorporation”; Klabbers, *supra* note 17, p. 332.

31 Sloss, in an analysis of dualist States, holds that for treaties obligating States to protect individual rights, in particular if they are not already protected by pre-existing domestic law, legislative incorporation is particularly important. D. Sloss, ‘Treaty Enforcement in Domestic Courts. A Comparative Analysis’, in D. Sloss (ed.) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, Cambridge, 2009) p. 17.

32 On the direct effect of international obligations, see e.g. Nollkaemper, *supra* note 26, pp. 118–138.

State party. Nevertheless, these bodies have expressed themselves firmly in favour of incorporation of treaties into domestic law, rendering the treaties part of the national legal system with the aim to facilitate full realisation of rights, inviting States which have not yet done so to incorporate the treaties into the domestic legal order.³³ Among them the CRC Committee has gone the furthest, not only recommending State parties to incorporate the CRC but also, in contrast to the ICESCR Committee and the Human Rights Committee, providing a definition of what it means by incorporation, namely that “the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice”.³⁴

Against this background, and while taking into account that there may be advantages to more generally applying a broad notion of incorporation in terms of providing a more multifaceted understanding of what incorporation of a treaty on the domestic level might entail, for the purposes of this article I employ the narrow definition of incorporation. By incorporation I mean that a State party makes a ratified treaty part of the domestic legal order through an act of legislation that gives said treaty formal status as domestic law and

33 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, paras. 4–6; UN Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, paras. 19–20; Human Rights Committee (HRC), *General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paras. 13, 15.

34 UN Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para. 20. It may be noted that in the child-rights discourse, both implementation and incorporation of the CRC have been much discussed, leading to the emergence of a taxonomy referring to different subcategories of incorporation. The subcategories applied are: direct incorporation (which can be either full or partial, and found on either the constitutional or the statutory level); indirect incorporation (where a treaty is given some effect on the national level through another legal instrument); and sectoral/partial/piecemeal incorporation (where relevant treaty provisions are transposed into relevant national sectoral laws). In a recent analysis of the scholarly literature on CRC incorporation, it is suggested that while the CRC literature draws on the wider literature on incorporation to some extent, the typology that has emerged to describe modes of incorporation in application to the CRC in some respects departs from more formal accounts of incorporation of human rights treaties and international law generally, and from general human rights discourse, which may make comparative and conceptual analysis complicated. S. Hoffman and R. Thorburn Stern, ‘Incorporation of the UN Convention on the Rights of the Child in National Law’, 28:1 *International Journal of Children’s Rights* (2020) pp. 133–156.

ensures its justiciability in the sense that treaty provisions can be applied by national authorities, invoked in courts and form the basis of judicial decisions.

2.2 (Great) Expectations of Incorporation

Given this understanding of incorporation, what expectations might one then have of its effects? There seems to be widespread agreement in the literature that incorporation (of some kind) is crucial for effective implementation of human rights treaties.³⁵ It has also been argued that incorporation of a treaty into domestic law is particularly relevant in dualist systems given that it is a requirement for the treaty provisions to be invoked in courts, as opposed to monist systems where the ratified treaty automatically becomes part of the domestic legal order.³⁶ Some of the literature also suggests that the hierarchical status (constitutional/semi-constitutional/regular statute) of the treaty in the domestic legal order, once incorporated, may play a role in its impact on the national level, regardless of whether the system is predominantly monist or dualist.³⁷ It might be argued that the answer to the question above will always be situational and hence determined by the category/categories of rights protected by the treaty, the category/categories of people the treaty addresses, or the particular conditions for incorporation established by each national legal system. Yet, a few common “expectations” in terms of the benefits of incorporation may nonetheless be identified based on both relevant literature and statements by the treaty monitoring bodies themselves. The enumeration below is not intended to be exhaustive but rather sets out a number of typical examples of what incorporation may entail.

One expected outcome of incorporation is that it will strengthen the status of the treaty in domestic law, which in turn will have the effect that the treaty is applied more often in judicial decision making, that it is used as a tool of interpretation for other domestic legislation, and that it will contribute to law reform, including having an impact on the drafting of new legislation.³⁸

35 Cf. S. Meili, ‘Do Human Rights Treaties Help Asylum-Seekers: Lessons from the United Kingdom’, 48:1 *Vanderbilt Journal of Transnational Law* (2015) pp. 123–178; McCall-Smith, *supra* note 15.

36 See e.g. M. Versteeg, ‘Law versus Norms: The Impact of Human-Rights Treaties on National Bills of Rights’, 17:1 *Journal of Institutional and Theoretical Economics* (2015) pp. 87–111.

37 Cf. e.g. W. Sandholtz, ‘Treaties, Constitutions, Courts, and Human Rights’ 11:1 *Journal of Human Rights* (2012) pp. 17–32; Versteeg *supra* note 36; P-H. Verdier and M. Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’, 109:3 *American Journal of International Law* (2015) pp. 514–533.

38 Cf. e.g. Sandholtz *supra* note 37; S. Adamo, ‘Protecting International Civil Rights in a National Context: Danish Law and Its Discontents’, 85:2 *Nordic Journal of International Law* (2016) pp. 119–145; U. Kilkelly, ‘The UN convention on the rights of the child: incremental

A second expectation concerns applicability and justiciability: incorporation may be expected to have the effect that treaty provisions can be invoked in domestic courts and applied by government institutions, which facilitates the enforceability of the rights established by the treaty.³⁹

Thirdly, turning a human rights treaty into domestic law may increase awareness among rights holders and other stakeholders both of the rights as such and of the State's legally binding obligations to implement these rights, and contribute to making rights more visible in law and policy making.⁴⁰

The three "expectations" enumerated here certainly can be seen as variations on the theme of the overarching expectation on incorporation shared by several treaty monitoring bodies, namely that incorporation will contribute to and facilitate the effective implementation and realisation in practice of the rights included in the treaty.⁴¹ However, breaking this overarching goal down further may be useful for identifying different effects of incorporation and how they may be interrelated.

3 Incorporation of the CRC in the Nordics

All the Nordic countries with the exception of Denmark have, as already mentioned, incorporated the CRC into their domestic legal systems, thereby giving it status as domestic law. Yet, the manner in which this has been carried out varies across the countries. A common denominator, given the shared dualist

and transformative approaches to legal implementation', 23:3 *The International Journal of Human Rights* (2019) pp. 323–337; Hoffman and Thorburn Stern, *supra* note 34.

39 See e.g. Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, Cambridge, 2009); Nollkaemper, *supra* note 26; O.K. Fauchald and A. Nollkaemper, *The practice of international and national courts and the (de-) fragmentation of international law* (Hart Publishing, Oxford and Portland, 2012); Sandholtz, *supra* note 39; Sheinin, *supra* note 16; Meili, *supra* note 35; S. El Boudouhi, 'The National Judge as an Ordinary Judge of International Law? Invocability of Treaty Law in National Courts', 28:2 *Leiden Journal of International Law* (2015) pp. 283–301; A. Diver and J. Miller, *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer, Dordrecht, 2016); A. Edgar and R. Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law', 19:1 *Melbourne Journal of International Law* (2018) pp. 24–51.

40 See e.g. L. Lundy, U. Kilkelly and B. Byrne, *The UN Convention on the Rights of the Child: A Comparative Study of Legal Implementation in 12 Countries* (UNICEF-UK, London, 2012); A. Daly, Y. McDermott-Rees and J. Curtis, *Enhancing the Status of UN Treaty Rights in Domestic Settings* (Equality and Human Rights Commission, Manchester, 2019).

41 See CCPR/C/21/Rev.1/Add.13, paras. 13, 15, E/C.12/1998/24, paras. 4–6; CRC/GC/2003/5, paras. 19–20.

tradition, is that incorporation requires an Act of Parliament. This section provides an overview of the current state of affairs.

Finland incorporated the CRC in 1991, upon ratification. The CRC ranks at the level of ordinary statute in Finnish legal hierarchy.⁴² The 2000 Finnish Constitution requires for government authorities to guarantee constitutional and international human rights (which includes those established in the CRC).⁴³ The Constitution establishes the child as an individual rights holder and in some form includes all CRC general principles – the prohibition of discrimination, the right to life and development and the right to be heard and have one's views taken into account – with the exception of the best interests principle.⁴⁴ It has been argued that during the first decade after ratification and incorporation, incorporation had a limited effect on children's rights in Finland due to both economic recession and a lack of discussion of children's rights in politics as well as academia.⁴⁵ Nonetheless, much progress was made on strategic implementation, including on the legislative level, in later years.⁴⁶ Vamstad notes, however, that while one might have expected the CRC to have a stronger standing in Finland compared to its Nordic neighbours where incorporation occurred more recently, it would be hard to conclude that this is the case.⁴⁷

Iceland ratified the CRC in 1992. In 1995 the chapter on human rights in the Icelandic Constitution was revised with the aim to adapt the Constitution to international instruments, including the CRC.⁴⁸ One of the provisions brought about by the reform was a special provision on children establishing an obligation for the State to ensure children the protection and care necessary for their well-being.⁴⁹ The CRC also had various impacts on statutory legislation,

42 FördrS 59 and 60/1991.

43 Constitution of Finland 11.6.1999/731 Chapter 2 Section 22.

44 S. Hakalehto, 'Constitutional Protection of Children's Rights in Finland', in T. Haugli, A. Nylund, R. Sigurdson and L.R.L. Bendiksen (eds.), *Children's Constitutional Rights in the Nordic Countries* (Brill/Nijhoff, Leiden, 2019) p. 61.

45 L. Haikkola and A. Rissotto, 'Legislation, policy and participatory structures as opportunities for children's participation? a comparison of in Finland and Italy', 17:4, *Children, Youth and Environments* (2007) pp. 352–387.

46 J. Vamstad, *Fördelar och nackdelar med att inkorporera barnkonventionen – en jämförande studie av internationella erfarenheter* Ersta Sköndal Högskola, Arbetsrapportserie, nr 91 (2016), pp. 14–18. See also UN Committee on the Rights of the Child (CRC), *State Party Report: Finland*, CRC/C/FIN/5–6 (2019).

47 Vamstad, *supra* note 46, p. 18.

48 Constitutional Act No 97/1995.

49 Constitution of Iceland, Section 76.3. See also H. Friðriksdóttir, 'Protection of Children's Rights in the Icelandic Constitution', in T. Haugli, A. Nylund, R. Sigurdson and L.R.L.

including the 2002 Child Protection Act and the 2003 Act in Respect of Children.⁵⁰ In 2013, Iceland incorporated the CRC as a whole into domestic law.⁵¹ The CRC, like the European Convention on Human Rights (ECHR), ranks at the level of regular statute within the Icelandic legal hierarchy. The Act on Respect of Children was amended in 2013 to incorporate the four general principles of the CRC, emphasising that the best interests of the child shall take precedence when decisions concerning children are made.⁵² In the preparatory works of the Act it is noted that all legislative provisions concerning children are based in some way on the fundamental principles and are to be interpreted accordingly, serving as guidelines in all legislative areas concerning children.⁵³ In its 2020 report to the CRC Committee, the Icelandic government emphasised that while incorporation is important for the implementation of the CRC, implementation remains “an on-going process and it is important to regularly follow up on whether the CRC is observed in practice”.⁵⁴

Norway ratified the CRC in 1991. Norway is perhaps the Nordic country in which the CRC has achieved the highest standing and had the most visible impact on legislation and jurisprudence. The Norwegian Constitution states that “the state governing bodies shall respect and safeguard human rights as stipulated in this Constitution and in the treaties on human rights which are binding on Norway” (author’s translation).⁵⁵ In 2003, the Human Rights Act⁵⁶ was amended to include the CRC and the Optional Protocols.⁵⁷ The purpose of the Human Rights Act is to strengthen the standing of human rights in Norwegian law.⁵⁸ The treaties it covers are subordinate to the Norwegian Constitution but prevail over other legislation in the event of conflict.⁵⁹

Bendiksen (eds.), *Children's Constitutional Rights in the Nordic Countries* (Brill/Nijhoff, Leiden, 2019) p. 83.

50 See Björgvinsson, *supra* note 27, p. 72 and H. Friðriksdóttir, ‘Incorporating the CRC in Iceland’ in L. Lundy, U. Kilkelly and B. Byrne (eds.) *Incorporating the UN Convention on the Rights of the Child in National Law* (Intersentia, 2021), p. 293.

51 On the effects of incorporation of the CRC in Iceland generally, see Friðriksdóttir, *supra* note 50, *passim*.

52 UN Committee on the Rights of the Child (CRC), *State Party Report: Iceland* CRC/C/ISL/5–6 para. 53. See also Friðriksdóttir, *supra* note 50, p. 294.

53 CRC/C/ISL/5–6, para. 45.

54 *Ibid.*, para. 7.

55 Constitution of Norway, LOV-1814-05-17, Section 92.

56 LOV-1999-05-21-30 (Menneskerettsloven). The other human rights treaties covered by the law are the ECHR, the ICCPR, the ICESCR and CEDAW.

57 Ikrafttr. av lov 2003:86 (innarb. barnekonvensjon).

58 Menneskerettsloven Section 2.

59 Menneskerettsloven Section 3; see also K. Sandberg, ‘Incorporating the CRC in Norway’, in L. Lundy, U. Kilkelly and B. Byrne (eds.) *Incorporating the UN Convention on the Rights of the Child in National Law* (Intersentia, 2021), p. 236. Sandberg describes the CRC as having semi-constitutional status in Norwegian law.

Incorporation also has the effect of attaching supremacy to the interpretation of incorporated provisions through relevant treaty bodies, thus giving significant weight to, in the case of the CRC, CRC Committee general comments and other statements.⁶⁰ Following incorporation of the CRC, the Norwegian Constitution was amended in 2014 to include certain core principles of the CRC in its Section 104. These core principles include the child's right to respect for her dignity, the right to be heard and have one's views taken into account, the principle of best interests of the child, the right to personal integrity and the right to development.⁶¹ The amendments to Section 104 are considered to have strengthened the position of children's rights in Norway.⁶² CRC provisions, most prominently Article 3.1 and Article 12, are also reflected in statutory law, including in the Norwegian Aliens Act. In a recent study analysing the legal effects of incorporation of the CRC in Norway, Søvig finds that incorporation has had visible effects in both legislation and national jurisprudence, and further argues that the CRC has had a substantial impact on Norwegian legal thinking, although the impact may vary between different legal fields.⁶³

Sweden ratified the CRC in 1990 and is the most recent of the Nordic countries to have incorporated the CRC into national law (2020). Incorporation at this point had been on the political agenda for more than a decade.⁶⁴ Those in favour of incorporation drew on the Norwegian experience to argue that it would strengthen the position of children's rights on the national level and help realise them in practice.⁶⁵ While recognising that some of the general principles of the CRC had already been included in Swedish legislation in several fields (mainly the best interests principle in Article 3.1 and the child's right to be heard in Article 12) by amendments to existing legislation, and that the Instrument of Government (one of the four fundamental laws that together form the Swedish Constitution) was amended in 2010 to include a reference to

60 K.H. Søvig, 'Incorporating the Convention in Norwegian Law', in M. Langford, M. Skivenes and K.H. Søvig (eds.), *Children's Rights in Norway: An Implementation Paradox?* (Universitetsforlaget, Oslo, 2019) pp. 274–275.

61 Søvig, *supra* note 60, pp. 272–273. Section 104 is inspired by the CRC, including its four general principles: Art. 2 (on discrimination), Art. 3 (on the best interests of the child), Art. 6 (on the right to life and development) and Art. 12 (on the child's right to be heard).

62 *Ibid.*

63 Søvig, *supra* note 60, p. 292.

64 See e.g. P. Leviner, 'Barnkonventionen som svensk lag: en diskussion om utmaningar och möjligheter för att förverkliga barns rättigheter', 2 *Förvaltningsrättslig tidskrift* (2018) pp. 287–311.

65 *Ibid.*

the rights of the child in its introductory paragraph, it was argued that more action was needed for the effective realisation of children's rights in Sweden.⁶⁶

Arguments against incorporation focused on the perceived incompatibility of the CRC as an international human rights treaty with Swedish legal tradition (in the sense that the CRC is too vague and difficult to interpret for it to be suitable to be invocable in Swedish courts), and that the tried and tested combination of transformation of the CRC – reformulating CRC provisions and adding them through revisions and amendments to existing Swedish law – and consistent interpretation was sufficient.⁶⁷ Asylum law was one of the fields in which incorporation was expected to have significant effects.

After considerable debate the incorporation law was adopted by the Swedish Parliament in 2018 and entered into force in 2020, the CRC thereby becoming the second human rights treaty to be incorporated into Swedish law. A significant difference between the CRC and the ECHR (the first human rights treaty to be incorporated into Swedish law) is that the CRC does not have the same semi-constitutional status as the ECHR but remains on equal footing with other statutory legislation, including the Aliens Act.⁶⁸ In the case of a conflict of norms, general rules of interpretation apply. The weight accorded to the CRC in individual cases is thus for the court or administrative authority to decide, a state of affairs that has been criticised for allowing children's rights to be trumped by other interests, such as those of parents or the State, regardless of the CRC's incorporated status.⁶⁹ It remains to be seen whether and how such conflicts will be handled since, at the time of writing, few precedents referring to the CRC have been issued.⁷⁰ As

66 Instrument of Government (1974:152) Chapter 1, Section 1, subsection 5.

67 On consistent interpretation, which in Sweden often is referred to as 'treaty-conform interpretation', see e.g. Nollkaemper, *supra* note 26, pp. 139–165.

68 On the ECHR, see the Instrument of Government, Chapter 2 Section 19.

69 See e.g. A. Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalisation of Children's Rights', 3:1 *Journal of Human Rights Practice* (2011) pp. 49–70; A. Lundberg and J. Lind, 'Technologies of Displacement and Children's Right to Asylum in Sweden', 18:2 *Human Rights Review* (2017) pp. 189–208.

70 R. Thorburn Stern, 'Incorporating the CRC in Sweden', in L. Lundy, U. Kilkelly and B. Byrne (eds.) *Incorporating the UN Convention on the Rights of the Child in National Law* (Intersentia, 2021), pp. 205–229. An interesting example is a 2020 case (MIG 2020:24) from the Migration Court of Appeal (the final instance in migration cases) on compassionate grounds for children. In the judgment the Court made clear that while the CRC does not in itself create a right to a residence permit, it requires for a proportionality test to be carried out when assessing the effects of denying a child the right to stay in Sweden, thus emphasising the weight to be accorded to the CRC in the implementation of the Aliens Act given its status as national law. The Migration Court of Appeal, however, underscored the exceptional nature of the circumstances in this particular case, implying that in other cases concerning children, the weighing of interests might have a different outcome. See also MIG 2021:18, also on compassionate grounds and the child's best interests.

regards the compatibility of Swedish legislation generally with the CRC, a recent government inquiry concluded that Swedish law, with some exceptions, is consistent with the CRC.⁷¹

Denmark, finally, ratified the CRC in 1991. Denmark is the odd one out among the Nordic countries, being the only country not to have incorporated the CRC. The only human rights treaty so far incorporated into Danish law is the ECHR, which was made part of the domestic legal order in 1992.⁷² The incorporation of human rights treaties other than the ECHR, however, certainly has been discussed in Denmark. In 2001, a committee established by the Ministry of Justice recommended incorporating core treaties such as the ICCPR and CAT into Danish law.⁷³ The recommendation was not followed. More recently, an expert committee (also established by the Ministry of Justice) tasked with reviewing Denmark's compliance with its human rights obligations in 2014 submitted a report *not* recommending the incorporation of several of the human rights treaties ratified by Denmark, including the CRC.⁷⁴ One reason for the hesitant approach towards incorporation was the concern that it would lead to a displacement of competence from the Parliament and the government to the courts.⁷⁵

The CRC Committee has repeatedly expressed concern regarding the legal status of the CRC in Denmark and has recommended that Denmark "take measures to explicitly and fully incorporate all provisions of the Convention and its Optional Protocols into its national legislation in order to promote their application by the courts and administrative decision-making bodies".⁷⁶ The recommendation by the CRC Committee should be seen in light of concerns about the implementation of the CRC for all children in the country, without discrimination, and what is described as the weak role played by the CRC in Denmark.⁷⁷ It may be noted in this context that the Danish Constitution does not include specific rules about children's rights, with the exception of

71 SOU 2020:63 Barnkonventionen och svensk rätt.

72 On the effects, see e.g. J. Christoffersen and M. Rask Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights', 80:3 *Nordic Journal of International Law* (2011) pp. 257–277; J. Christoffersen, 'Implementation of International Human Rights Decisions in Denmark', in S. Kadelbach *et al.* (eds.), *Judging International Human Rights* (Springer, Dordrecht, 2019).

73 See Adamo, *supra* note 38, p. 129.

74 Ministry of Justice report no 1546 /2014 *betænkning om inkorporering m.v inden for menneskeretssområdet* (incorporation etc at the area of human rights). Six out of fifteen committee member recommended incorporation of a majority of the treaties discussed.

75 See Adamo, *supra* note 38, p. 131.

76 UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of Denmark*, CRC/C/DNK/CO/5, 26 October 2017, para. 6.

77 Lundy *et al.*, *supra* note 40.

the right to receive primary education.⁷⁸ It is interesting to note that the arguments pro and contra incorporation in Denmark have been quite similar to those being aired in the Swedish incorporation debate, but that the outcomes of the discussions have been different.⁷⁹

As shown in this section, the CRC has been part of the domestic legal order in Finland and Norway for a long time, while Iceland and Sweden have followed in their footsteps more recently. In terms of the legal standing of the CRC, Norway has gone the furthest – the CRC prevailing over other legislation in case of conflict – while in Finland, Iceland and Sweden, the CRC has the status of ordinary law. The impact of the incorporation of the CRC on, for example, the drafting of new legislation seems to vary between the countries. In the following section, we turn our attention to the child rights perspective in Nordic asylum law.

4 Recent Developments in Nordic Asylum Law Concerning Children

As already mentioned, the “refugee crisis” of 2015/2016 led to the introduction of numerous restrictive migration laws and policies in the Nordic countries. This section provides an overview of key recent developments in Nordic asylum law concerning children. Beginning with *Finland*, the Finnish 2004 Aliens Act has been revised several times from 2016 onwards in response to the increased influx of asylum seekers.⁸⁰ Revisions include introducing temporary residence permits as a main rule, placing limitations on family reunification and reducing the protection grounds to only those required by Finland’s obligations following international law and EU law: refugee status and subsidiary protection.⁸¹ Humanitarian protection was discontinued in 2016.⁸²

The 2004 Aliens Act mentions children on several occasions. Decision-making regarding children based on the Act is to take the best interests of the

78 For a discussion see C. Adolphsen, ‘Constitutional Rights for Danish Children’, in T. Haugli, A. Nylund, R. Sigurdson and L.R.L. Bendiksen (eds.), *Children’s Constitutional Rights in the Nordic Countries* (Brill/Nijhoff, Leiden, 2019) pp. 120–130.

79 Cf. Leviner, *supra* note 64; Ministry of Justice report no 1546 /2014 *betänkning om inkorporering m.v inden for menneskeretsområdet* (incorporation etc at the area of human rights).

80 E. Pirjatanniemi, I. Lilja, M. Helminen, K. Vainio, O. Lepola and A. Alvesalo-Kuusi, *Kansainvälistä suojelua hakeneiden tilanne on heikentynyt*, policy brief 2021:4.

81 Finnish Aliens Act (301/2004) Chapter 6, Section 87 and Chapter 6, Section 88.

82 Grounds for humanitarian protection were previously found in Chapter 6, Section 88a and included environmental disasters, armed conflict and serious human rights situations. This provision was repealed following L 29.4.2016/33.

child into consideration as well as circumstances attributed to a child's health and development.⁸³ As a general rule, children over the age of 12 should be heard in the proceedings; younger children can also be heard, depending on the child's maturity.⁸⁴ The definition of "persecution" in the Aliens Act for the purpose of refugee status specifically mentions "actions against children".⁸⁵ A residence permit may be granted on compassionate grounds, if it would be "manifestly unreasonable" not to do so, a provision applicable to children as well as to adults.⁸⁶

A recent study of the revisions and amendments to and application of the Aliens Act between 2015 and 2019 asserts that the amendments have aimed at making the asylum process more efficient rather than strengthening the right to seek asylum and the rights of asylum seekers, including children.⁸⁷ It also argues that changes introduced in order to protect children have only partly counteracted the negative effects of the general amendments in the Aliens Act on unaccompanied as well as accompanied children.⁸⁸ Other studies also point to gaps in implementing the child-rights perspective in Finnish asylum law and practice. Examples include that the right to participation for asylum-seeking children is limited,⁸⁹ that anyone refusing to go through an age-assessment process is automatically considered an adult,⁹⁰ and that the Finnish Supreme Administrative Court in cases concerning non-citizen children, asylum seekers in particular, more so than in other types of cases, seeks to strike a balance between the child's interests and society's interests.⁹¹ Finland was also recently severely criticised by the CRC Committee for its lack of a child-sensitive interpretation of the *non-refoulement* principle and the failure of domestic authorities to adequately assess the claimant's best interests.⁹² Moreover, the Human Rights Committee in its 2021 concluding observations

83 Aliens Act Chapter 1, Section 6.

84 See also Aliens Act Chapter 6, Section 97a.

85 Aliens Act Chapter 6, Section 87a, subsection 6.

86 Aliens Act Chapter 4, Section 52.

87 Pirjatanniemi *et al.*, *supra* note 80. See also CRC/C/FIN/5–6, *supra* note 46, para. 295; UNICEF, *supra* note 3.

88 Pirjatanniemi *et al.*, *supra* note 80.

89 M. Kaukko, 'The CRC of Unaccompanied Asylum Seekers in Finland', 25:1 *International Journal of Children's Rights* (2017) pp. 140–164.

90 UNICEF, *supra* note 3, p. 40.

91 M. Sormunen, 'In All Actions concerning Children', 24:1 *International Journal of Children's Rights* (2016) pp. 155–184.

92 UN Committee on the Rights of the Child, *A.B. v. Finland* Communication No. 51/2018, CRC/C/86/D/51/2018, 5 February 2021.

on Finland expresses concern regarding the rights of asylum-seeking children, urging Finland to “step up its efforts to reinforce the rights of children entering the country, particularly unaccompanied children, taking into account the need to respect their best interests”.⁹³

Iceland, like its Nordic neighbours, experienced an increase in asylum seekers in 2015–2016, although on a slightly smaller scale.⁹⁴ A large majority of the applications, many of them submitted by people from the Balkan countries, were denied.⁹⁵ In 2017, the 2016 Act on Foreign Nationals⁹⁶ entered into force with the aim to strengthen the rights-based perspective in Icelandic asylum law.⁹⁷ The Act establishes that an alien seeking asylum can be granted status as a refugee in Iceland either based on criteria reflecting Article 1A(2) of the Refugee Convention or for reasons of subsidiary protection.⁹⁸ There is also a possibility to be granted a residence permit on humanitarian grounds.⁹⁹ The child-rights perspective is reflected in the Act on Foreign Nationals in procedural as well as substantial provisions, and several of its provisions clearly draw on the language of the CRC general principles.¹⁰⁰ It is also specifically stated that the best interests principle should guide the interpretation of the Act in issues regarding minors.¹⁰¹

The rights-based approach conveyed by the Act, however, does not necessarily mean that Icelandic asylum policy is generous *per se*: drawing on the strict implementation of Dublin rules and the safe country concept, as well as the low recognition rates, Tryggvadóttir and Skaptadóttir instead describe Icelandic asylum policy and practice as “strict and exclusionary”.¹⁰² In its most recent report to the CRC Committee, the Icelandic government acknowledged

93 UN Human Rights Committee (HRC), *Concluding observations on the seventh periodic report of Finland*, CCPR/C/FIN/CO/7, 1 April 2021, para. 33.

94 A. Karlsdóttir, G. Norlén, L. Rispling and L. Randall (eds.), *State of the Nordic Region 2018: Immigration and Integration Edition* (Nordic Council of Ministers, Copenhagen, 2018) p. 22.

95 *Ibid.*

96 Act on Foreign Nationals 80/2016.

97 CRC/C/ISL/5–6, *supra* note 52, para. 120.

98 Act on Foreign Nationals Article 37.1–2; *see also* Article 38.

99 Act on Foreign Nationals Article 74.

100 Act on Foreign Nationals Article 10 and Article 25.

101 Act on Foreign Nationals Article 10 (rules on general procedures), Article 24.1 (applications for international protection), Article 25.3 (special needs and status of applicants of international protection), Article 28 (asylum interview), Article 31 (safeguarding minors’ interests), Article 37.5 (assessment of claims for international protection made by minors). *See also* CRC/C/ISL/5–6, *supra* note 56, para. 202.

102 H. Tryggvadóttir and U. D. Skaptadóttir, ‘Borders, Boundaries, and Exclusion in the Icelandic Asylum System’, 34:2 *Refugee* (2018), p. 18.

that the aim for the best interests principle to be a guiding light when handling issues regarding children seeking asylum “has not been achieved in practice and [...] the independent rights of children are not adequately secured”.¹⁰³ In the same report, the Icelandic government, without going into detail, acknowledged that even though the Act on Foreign Nationals was intended to strengthen the status of non-citizen children in Iceland, further efforts are required to ensure the rights and interests of children seeking international protection in Iceland, a conclusion supported by a 2018 UNICEF study on children seeking asylum in the Nordics.¹⁰⁴

Norway also introduced new regulations that sought to deter asylum seekers after the increase in migration flows in 2015–2016.¹⁰⁵ These measures included increased border control, increased use of temporary permits, including for unaccompanied minors,¹⁰⁶ increased focus on the cessation and revocation of protection status, and the abolition of a proportionality test regarding the internal flight alternative.¹⁰⁷ Gammeltoft-Hansen notes that while Norway to a large extent mimicked the restrictive measures taken by Denmark and Sweden around the same time, Norway went even further in the area of asylum, introducing the possibility of denying asylum seekers at the borders of other Scandinavian countries and those arriving from Russia.¹⁰⁸

The 2008 Norwegian Immigration Act stipulates that a person seeking international protection can be granted asylum as a refugee if she or he either qualifies as a refugee under the definition provided in Article 1A(2) of the Refugee Convention or is at risk of being subject to the death penalty, torture or other inhuman or degrading treatment in the country of origin.¹⁰⁹ If a person is denied asylum, the migration authorities are to assess whether the applicant may be eligible for a residence permit on humanitarian grounds.¹¹⁰ §3 of the Act stipulates that it “shall be applied in accordance with international provisions by which Norway is bound when these are intended to strengthen

¹⁰³ CRC/C/ISL/5–6, *supra* note 52, para. 202.

¹⁰⁴ *Ibid.*

¹⁰⁵ J.-P. Brekke and A. Staver, ‘The renationalisation of migration policies in times of crisis: the case of Norway’, 44:13 *Journal of Ethnic and Migration Studies* (2018) p. 21–63.

¹⁰⁶ Garvik and Valenta, *supra* note 3.

¹⁰⁷ See e.g. J. Schultz, *The Internal Flight Alternative in Norway: The Law and Practise with Respect to Afghan Families and Unaccompanied Asylum-seeking Children* (UNHCR, 2017); J.-P. Brekke, J. Vedsted-Hansen and R. Thorburn Stern, *Temporary asylum and cessation of refugee status in Scandinavia. Policies, Practices and dilemmas*, EMN Norway Occasional Paper (EMN Norway, 2020); T. Gammeltoft-Hansen, *supra* note 1.

¹⁰⁸ Gammeltoft-Hansen, *supra* note 1.

¹⁰⁹ Immigration Act LOV-2008-05-15-35 §28.

¹¹⁰ Immigration Act §38.

the position of the individual”, a statement which could be interpreted as a clearly stated aim to emphasise a rights-based approach and the need to take Norway’s international obligations into account. There are several provisions in the Immigration Act relating specifically to children. In the assessment of protection needs, claims made by a minor must be interpreted in a child-sensitive manner.¹¹¹ The Act is also clear that persecution may include acts of a child-specific nature.¹¹² The child’s right to be heard in the proceedings is furthermore clearly stipulated by §81 of the Immigration Act, which explicitly references Article 12 of the CRC on the right to be heard. In contrast with the assessment of protection claims, the assessment of humanitarian grounds expressly allows for the interests of the child to be balanced against the need for migration control, a balancing act that has been much debated.¹¹³ In this assessment the best interests of the child are to be a primary consideration.¹¹⁴

Sweden for many years had a reputation for having a generous asylum policy. In response to the large influx of asylum seekers in late 2015 however, Sweden made a policy U-turn, introducing measures that effectively transformed its migration and asylum policy into one of the most restrictive in the EU.¹¹⁵ The main measures introduced at this point included border controls, effectively limiting access to the right to seek asylum in Sweden, and a temporary law¹¹⁶ introducing measures such as making temporary residence permits the new main rule, restricting access to family reunification, limiting protection grounds to those required as a minimum under international law and EU law and minimising the possibilities of granting residence permits on compassionate grounds. The Temporary Law, which was to be applied instead of the 2005 Swedish Aliens Act, in all relevant matters, entered into force in June 2016 to apply until July 2019.¹¹⁷ In 2018, the Temporary Law was prolonged until July 2021.¹¹⁸

¹¹¹ Immigration Act §28.

¹¹² Immigration Act §29 subsection 2f. Lidén holds that this means that “the legal threshold to obtaining asylum based on refugee status is thus lower for children than for adults” as circumstances that may not qualify adults for asylum would be enough to do so for children. Lidén, *supra* note 3, p. 336; *see also* pp. 339–341.

¹¹³ Lidén, *supra* note 3, p. 344.

¹¹⁴ Immigration Act §38; *see also* Lidén, *supra* note 3, p. 343.

¹¹⁵ B. Parusel, ‘The Swedish U-turn on Asylum and its Consequences’, in W. Hilz and D. Saracino (eds.), *Nordic Perspectives on the European Asylum System. The Cases of Sweden and Finland* (Tectum, 2017), pp. 63–84.

¹¹⁶ Lag (SFS 2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

¹¹⁷ Utlänningslag SFS 2005:716.

¹¹⁸ In 2018, certain changes were made allowing for family reunification under certain circumstances for individuals granted complementary protection, something that had been extremely limited in the first version of the Act.

The child-rights perspective is visible in the Aliens Act only to a limited extent. The Aliens Act explicitly refers to the best interests-principle (Chapter 1, Section 10) and the child's right to be heard (Chapter 1, Section 11), both drawing heavily on Article 3.1 and Article 12 of the CRC respectively without explicitly referring to the treaty. The right to be heard is subject to certain limitations: a child must be heard in the assessment of questions of permits under the Act when he or she will be affected by a decision in the case unless this is inappropriate, a condition criticised by the CRC Committee.¹¹⁹ The extent to which these general provisions are implemented in practice has been severely questioned in several studies, for example by Lundberg and Lind who argue that in the asylum process children's individual asylum claims are disregarded and their best interests negated, thereby displacing children's rights.¹²⁰ Neither the provision on refugee status nor the provision on alternative protection grounds mention children explicitly; however, children are referred to in the provision on compassionate grounds.¹²¹

In the 2016 Temporary Law, a child-rights perspective was basically absent, something for which the law has been much criticised. Matters did not improve much from a child-rights perspective when in June 2021, after prolonged political debate, the Swedish Parliament adopted a package of changes and amendments to the Aliens Act with the effect of making Swedish asylum law considerably more restrictive than what was the case before 2016.¹²² The amendments and changes to the Aliens Act basically made the restrictive measures introduced by the Temporary Law (which at this point could not be prolonged further) permanent, including making temporary residence permits the new the main rule, and limitations on access to family reunification.¹²³ Also this time the child-rights perspective is more or less invisible, with some exceptions, the most important exception being that the threshold of application of compassionate grounds for children has been reset to its pre-2016 level, which is lower than that for adults.¹²⁴ The 2021 changes and

119 UN Committee on the Rights of the Child (CRC), *Concluding observations on the fifth periodic report of Sweden*, CRC/C/SWE/CO/5, 6 March 2015, para. 20.

120 Lundberg and Lind, *supra* note 69, see also D. Hedlund, 'Constructions of Credibility in Decisions Concerning Unaccompanied Minors', 13:2 *International Journal of Migration, Health and Social Care* (2017) pp. 157–172.

121 Cf. the Aliens Act, Chapter 4, Section 1 and 2 (on international protection) and Chapter 5 Section 6 on compassionate grounds.

122 Prop. (Government Bill) 2020/21:191 Ändringar i utlänningslagen.

123 Cf. Aliens Act, Chapter 5, Section 3 and 3 a (on family reunification).

124 Cf. Prop. 2020/21:191 and Kompletterande promemoria till betänkandet En långsiktigt hållbar migrationspolitik (SOU 2020:54).

amendments to the Aliens Act have been criticised since, given the CRC's new status as national law, they do not sufficiently take into account the CRC and the obligations it entails.¹²⁵

Denmark, finally, is the Nordic country which in recent years has gone the furthest in introducing strict migration policies in what Gammeltoft-Hansen has described as a deliberate attempt to “rebrand” Denmark from being a country with a liberal asylum policy to one in which asylum seekers are not welcome.¹²⁶ While Denmark over several years had introduced policies and measures aimed at deterring asylum seekers from choosing the country as a destination State, these efforts intensified in the wake of the 2015 “refugee crisis”. Measures taken include reducing the duration of residence permits based on international protection, increasing the number of detention grounds, limiting access to family reunification, opening up for cessation of protection status and revocation of residence permits on a larger scale than before, reducing social benefits for refugees and, most recently, adopting legislation allowing for outsourcing the asylum process to other countries.¹²⁷ With the 2019 “paradigm shift”, it was made clear that international protection in Denmark (refugee status, subsidiary protection status or temporary protection status; Aliens Act §7, 1–3) is temporary and that protection needs are to be regularly reviewed; residence permits are to be withdrawn if possible.¹²⁸

The Danish Aliens Act does not specifically require for protection claims made by a minor to be interpreted in a child-sensitive manner. While there are several provisions in the Aliens Act referring to children, it nevertheless has been held that the child-rights perspective in the asylum process is limited,

¹²⁵ See e.g. comments by Barnombudsmannen (the Children's Ombudsman) <www.barnombudsmannen.se/barnombudsmannen/vart-arbete/nya-remissvar/2020/12/betankandet-en-langsiktigt-hallbar-migrationspolitik-sou-202054-samt-kompletterande-promemoria-till-betankandet/>, visited on 15 August 2021; BRIS <via.tt.se/pressmeddelande/forslag-om-ny-utlanningslag-urholkar-barnets-manskliga-rattigheter?publisherId=1239792&releaseId=3298792>, visited on 15 August 2021, and UNICEF Sweden <blog.unicef.se/category/barnkonventionen-2/>, visited on 16 September 2021.

¹²⁶ T. Gammeltoft-Hansen, *supra* note 1.

¹²⁷ *Ibid.* See also T. Gammeltoft-Hansen, ‘Refugee Policy as “Negative Nation Branding”: The Case of Denmark and the Nordics’, in K. Fischer and H. Mourtizen (eds.), *Danish Foreign Policy Yearbook* (Danish Institute for International Studies, Copenhagen, 2017); UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the Proposal for amendments to the Danish Alien Act (Introduction of the possibility to transfer asylum-seekers for adjudication of asylum claims and accommodation in third countries)*, 8 March 2021.

¹²⁸ N. Feith Tan, ‘The End of Protection: The Danish “Paradigm Shift” and the Law of Cessation’, 90:1 *Nordic Journal of International Law* (2021) pp. 60–85.

particularly in relation to accompanied children who are considered parts of their parents' case, not as individual applicants.¹²⁹ That said, the Aliens Act does contain special rules that apply to children who are seen as particularly vulnerable and therefore in need of additional grounds for residence permits.¹³⁰

Reflecting on the effects of the developments in Danish asylum policy over the past decade, it seems that while the increasingly restrictive asylum policies in general target all asylum seekers irrespective of age, many of the measures have been particularly bad for children and that for unaccompanied minors, the policy changes have been especially harsh.¹³¹ Regarding implementation of the CRC specifically, the CRC Committee in its most recent (2017) Concluding Observations on Denmark expressed serious concerns about the gaps in protection of the rights of asylum-seeking children in Denmark, examples including inadequacies in the best interests assessment in the asylum procedure, not all children being heard in the asylum process, the use of detention in deportation cases and restrictions on family reunification.¹³² The CRC Committee also in recent jurisprudence has commented on the lack of weight accorded to the best interests of the child in Danish deportation cases.¹³³

¹²⁹ UNICEF, *supra* note 3, p. 32.

¹³⁰ Cf. <drc.ngo/da/vores-arbejde/tydelser-og-losninger/asyl-og-repatriering/det-danske-asyssystem/uledsagede-mindreare/> (visited on 30 August 2021) and the Danish Aliens Act § 9 c, which refers to the best interests-principle.

¹³¹ UNICEF, *supra* note 3. Cf. also K. Vitus and H. Lidén, 'The Status of the Asylum-seeking Child in Norway and Denmark: Comparing Discourses, Politics and Practices', 23:1 *Journal of Refugee Studies* (2010) pp. 62–81.

¹³² UN Committee on the Rights of the Child, CRC/C/DNK/CO/5 paras. 39–40. The European Court of Human Rights in the Grand Chamber judgment in *M.A. v. Denmark* (application no. 6697/18, 9 July 2021) held that the Danish rules on family reunification for individuals with temporary protection status were too restrictive and that the authorities had failed to strike a fair balance between the needs of the applicant individually and the interests of the state.

¹³³ UN Committee on the Rights of the Child, *Concluding observations on the 5th periodic report of Denmark*, CRC/C/DNK/CO/5 26 October 2017; UN Committee on the Rights of the Child, *I.A.M. (on behalf of K.Y.M.) v. Denmark*, Communication No. 3/2016, CRC/C/77/D/3/2016, 25 January 2018, UN Committee on the Rights of the Child, Communication 31/2017: *W.M.C. v. Denmark*, Communication No. 31/2017, CRC/C/85/D/31/2017, 15 October 2020. See also UN Human Rights Committee (HRC), *Muneer Ahmed Hussein v. Denmark*, CCPR/C/112/D/2243/2013, 26 November 2014; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *R.S.A.A. et al. v. Denmark*, No. 86/2015, 15 July 2019.

5 On the Fulfilment of Expectations

So, given the findings presented above, can it be said that the recent developments in Nordic asylum law affecting children chimes well with what can be expected from countries that have incorporated the CRC? Based on the overviews presented in previous sections on measures taken to incorporate the CRC in four of the five Nordic countries and of recent legislative developments compared with the small set of “expectations” suggested above, the answer is, perhaps not surprisingly, both yes and no. The groundwork is done: the CRC has been made part of the domestic legal order, either on the level of ordinary statutory regulation (Finland, Iceland, Sweden) or as ordinary statutory regulation with supremacy over concurring statutory provisions (Norway). References to the CRC, to CRC provisions (usually one or several of the CRC general principles) or to children’s rights more generally are included in all four constitutions (in Iceland and Sweden, however, this took place prior to incorporation). In all four countries, the CRC may be invoked in courts, applied by national authorities, and form the basis of judicial decisions. In Norway, where the CRC has a high legal standing, recent studies suggest that the incorporation of the CRC has had the effect of children’s rights gaining increased attention in the courts and also that the underlying legal culture on how the system understands cases involving children has changed.¹³⁴ Yet, in Iceland, despite the CRC having been part of the domestic legal order for almost a decade, children’s rights are still to be mainstreamed in the courts.¹³⁵ It may be difficult to measure with any certainty whether incorporation of the CRC has increased awareness among stakeholders, children included, of the legally binding obligations of the State towards children created by the CRC. Studies, however, indicate that the incorporation process as well as incorporation as such has helped to create greater awareness on a societal and political level of children’s rights and of what is required for the effective implementation of these rights.¹³⁶ In other words, incorporation helps push children’s rights up the political and societal agenda. The value of the incorporation process as such has been emphasised with specific reference to the CRC. Lundy *et al.* point to its “fundamental awareness-raising value” and the message it sends

¹³⁴ Søvig, *supra* note 60, p. 292.

¹³⁵ See Friðriksdóttir, *supra* note 50.

¹³⁶ See e.g. R. Thorburn Stern, ‘Much Ado about Nothing? The Road to the Incorporation of the UN Convention on the Rights of the Child in Sweden’, 27:2 *International Journal of Children’s Rights* (2019) pp. 266–305; Friðriksdóttir, *supra* note 50, pp. 300–301.

about the importance of the rights protected by the treaty, both individually and as part of a comprehensive human rights culture.¹³⁷

Turning to asylum law, recent developments in particular, the impact of incorporation is less clear. References to children's rights are to varying extent included in the Aliens Acts of all four countries, although the extent to which these provisions are accorded weight in individual cases equally vary.¹³⁸ In the case of Sweden, however, the provisions in the Aliens Act drawing most obviously on the CRC (Chapter 1, Section 10 on the best interests of the child and Chapter 1, Section 11 on the child's right to be heard) were included prior to incorporation of the CRC in Swedish law. The limited impact that these provisions have had thus far in Swedish asylum cases was used as an argument in favour of incorporation.¹³⁹ In the Swedish 2016 Temporary Law, also drafted before incorporation, the child-rights perspective is conspicuous by its absence. The entry into force of the incorporation law in 2020, however, did not lead to any dramatic changes: the near complete absence of a child-rights perspective in the 2021 amendments and revisions of the Aliens Act indicates that so far, the effects of incorporation in strengthening the child's status as a rights holder in Swedish asylum law are limited.

In contrast, the 2016 Icelandic Act on Foreigners has a clear focus on the child-rights perspective, which is linked to the incorporation of the CRC into Icelandic law a few years earlier.¹⁴⁰ In the case of Norway, Søvig asserts that incorporation of the CRC has led to a more child-centric perspective in Norwegian migration law, even though this does not mean that it is not challenged, including in the courts.¹⁴¹ Lidén is more sceptical and holds that although Norway has made considerable progress in ensuring the rights of asylum-seeking children, including emphasising the need to adopt a child-rights approach when assessing asylum claims, the regulations introduced in response to the increased influx of asylum seekers have put the commitment to implementing a child-rights perspective in the asylum process into question.¹⁴² In Finland, where the CRC has been part of domestic law for decades, the child rights perspective indeed is visible in the Aliens Act, but at the same time Pirjatanniemi *et al.* show that it seems to have taken a backseat in relation

¹³⁷ Lundy *et al.*, *supra* note 40, p. 4.

¹³⁸ Cf. e.g. Lundberg and Lind, *supra* note 69; Søvig, *supra* note 60.

¹³⁹ See e.g. Prop. (Government Bill) 2017/18:186 Inkomporering av FN's konvention om barnets rättigheter, pp. 68–69.

¹⁴⁰ See Friðriksdóttir, *supra* note 50, p. 295.

¹⁴¹ Søvig, *supra* note 60, pp. 292–293.

¹⁴² Lidén, *supra* note 3, p. 354; see also UNICEF, *supra* note 3.

to the restrictive measures introduced in recent years in response to the “refugee crisis”.¹⁴³

While more in-depth studies than the present overview are required to give a full picture of the effects of CRC incorporation for legislative developments in Nordic asylum law concerning children, the impression is that in general its impact has been quite limited. This is despite the formal legal standing of the CRC in national law and the associated expectations that the CRC and the child-rights perspective would have an influence on the drafting of new legislation. One issue in this context is the weight accorded to the CRC in the event of conflict with other legislation. While it has been suggested in the literature that the higher the standing of the treaty in the domestic legal hierarchy the more impact it is likely to have, it could on the other hand be argued that, as Sandberg notes regarding Norway, when strong political concerns point in another direction, the impact in practice of incorporation may be curbed even though the treaty has a high formal status.¹⁴⁴ Meili, in a study on the impact of human rights treaties in individual asylum cases in the UK context, points to the negative effects of an anti-immigration political discourse for the weight accorded to asylum seeker’s rights.¹⁴⁵ One thought here is that in times of (perceived) crisis, migration control becomes the superior goal, and when balancing the interests of the individual, including those of children or other vulnerable groups, with the interest of the State in such a situation, the latter prevails.¹⁴⁶

On the other hand, it is impossible to know what kind of legislation would have been drafted in Finland, Norway and Sweden had the CRC not been incorporated. Perhaps some indication can be given by looking to Denmark, which is the most extreme of the Nordics both in terms of the restrictiveness of the measures introduced to curb migration and in terms of the lack of a child-rights perspective in asylum law. On face value, the Danish case might suggest that other Nordic countries would have adopted even more restrictive legislation had they not had the “straitjacket” of the CRC as national law to deal with. Speaking against this, however, is the Swedish example and the fact that Sweden not only adopted very restrictive legislation on asylum in 2016 and

¹⁴³ Pirjatanniemi *et al.*, *supra* note 80.

¹⁴⁴ On the status of the treaty, *cf. e.g.* Sandholtz, *supra* note 37; Versteeg, *supra* note 36; Verdier and Versteeg, *supra* note 37. On Norway, see Sandberg, *supra* note 59, pp. 244–245 and Lidén, *supra* note 3.

¹⁴⁵ Meili, *supra* note 35.

¹⁴⁶ *Cf.* the contributions in E. Karageorgiou and V. Stoyanova (eds.), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill/Nijhoff, Leiden, 2018).

2018, when the CRC was not incorporated into national law, but also in 2021, *after* incorporation. Also in this case, the state's interest in migration control weighed heavier than the interests of the child.

6 Conclusions

The analysis presented above suggests that legal incorporation indeed matters, both in terms of adding to the legal toolbox to implement children's rights and increasing the visibility and awareness of children's rights in the domestic context. The field of asylum law, however, highlights that the extent to which legal incorporation matters is crucially dependent on the legal and political context in which the incorporated treaty is to be implemented and that political concerns emphasising other interests than those of rights holders, in this case, asylum-seeking children, may curb the impact of incorporation. In sum, although the legal framework may be in place, there is still room for significant improvement regarding the impact in practice of the CRC for asylum-seeking children in the Nordic region. Such improvement is, however, largely dependent on the political will to accord children's rights weight in practice as well as on paper.

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