The application of the United Nations Convention on the Rights of the Child by national courts

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Chapter 3: France[1]

3.1 Introduction

As discussed in Chapter 2, the direct application of international treaties is controversial but opens significant opportunities for their application by domestic courts. The study of French jurisprudence undertaken in this chapter is illustrative in this regard.[2]

Several reasons make France a good case study of the potential and the difficulties raised by the direct application of the CRC. First, a decision as to whether the Convention or its norms are directly applicable determines whether the CRC is given effect or not, considering that the courts rarely engage with it in other ways. Second, the vacillations of the French case law are useful for understanding the opportunities and problems raised by the direct application of the Convention. Moreover, with France having consistently come under scrutiny from the Committee on the Rights of the Child ('the Committee' or 'the CRC Committee') for its allegedly poor record of direct application of the CRC,[3] French jurisprudence draws attention to a tension between domestic and international visions of direct application. Lastly, in the absence of a consolidated children's rights statute, the Convention was the main reference point for the courts in relation to the rights of children.

The focus in this study is on the jurisprudence of the highest courts:[4] the Court of Cassation (the highest judicial court; hereafter 'the CC' or 'the Court')[5] and the Council of State (or Conseil d'État, hereafter 'the CE' or 'the Council'; the highest administrative court).[6] Although these courts do not issue binding precedents, they exercise judicial control over the application

[1] An initial version of this chapter has appeared as M Couzens 'France' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child*: *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 123.

[2] The CRC was ratified by France on 7 August 1990 (United Nations Treaty Collection *Status of Treaties: Convention on the Rights of the Child* (online)) and it came into force for France in October 1990 (Décret no 90-917 du 8 octobre 1990 portant publication de la convention relative aux droits de l'enfant, signée à New York le 26 janvier 1990 (1)). France made declarations to articles 6 and 40(2)(b)(v); and a reservation to article 30.

[3] CRC Committee *Concluding observations of the Committee on the Rights of the Child: France* (1994) para 12; *Concluding observations of the Committee on the Rights of the Child: France* (2009) paras 10-11; *Concluding observations on the fifth periodic report of France* (2016) para 7.

[4] The cases were accessed on *Legifrance* (https://www.legifrance.gouv.fr/), an official database of French law, which includes reported and unreported judgments. The cases will therefore be identified according to the identifications provided by *Legifrance* (the court, number of appeal, date). All translations from French into English belong to this researcher, except where indicated otherwise. The study covers reported and unreported cases to 1 November 2018.

[5] Many cases involving the CRC come from the First Civil Division (Civ 1), and occasionally from the Second Civil Division (Civ 2), Criminal Division (Crim) and the Social/Labour Division (Soc). Important cases are dealt with by a full court (the Assembly). For the structure and the functions of the Court, see the Court's website https://www.courdecassation.fr/cour_cassation_1/presentation_2845/).

[6] For the structure and the functions of the Council, see its website http://english.conseil-etat.fr/ ; J Rivero and J Waline *Droit Administrative* (2002) at 185.

of the law by lower courts. They also play a unifying role in terms of court practice, are the last judicial resort for the protection of human rights, and their judgments are scrutinised by supranational bodies.[7] Their jurisprudence is therefore emblematic for the judicial protection of human rights, including the rights of children.

The chapter is structured as follows: Part 3.2 provides an introduction to the direct application of human rights treaties in France, which is followed in parts 3.3 and 3.4 by presentations of the jurisprudence of the Court and Council respectively. Part 3.5 analyses the impact of the direct application of the CRC, followed in part 3.6 by a presentation of the factors that have influenced the direct application of the CRC. General conclusions are drawn in part 3.7.

3.2 The direct application of international human rights treaties in France and the CRC

France is a monist state,[8] where international treaties can be directly applied by courts. According to its 1958 Constitution,[9] international treaties have a supra-legislative but under-constitutional status.[10] This means that they prevail over acts of Parliament, including posterior acts,[11] but not over the Constitution. Direct effect of international treaties (arising from the monist approach) and their supremacy over statutes (arising from article 55 of the 1958 Constitution) are technically distinct, but the courts approach them as intrinsically linked.[12] As a consequence, a court can only give effect to the supremacy of treaty provisions that are of direct application.[13]

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[7] C Laurent-Boutot *La Cour de Cassation face aux traités internationaux protecteurs des droits de l'Homme* (Université de Limoges, Unpublished thesis 2006) at 34.

[8] A Pellet (2008) *Quelle place la Constitution de 1958 fait-elle au droit international?* (online); E Decaux 'Le régime du droit international en droit interne' 2010 (62) *Revue Internationale de Droit Comparé* 467 at 469; D Chauvaux and T Girardot 'Les clauses d'un traité international dépourvues d'effet direct ne peuvent être invoquées à l'encontre d'un acte réglementaire' 1997 *L'Actualité Juridique Droit Administratif* 435.

[9] The Constitution is a composite text, consisting of the Constitution of 1958 (of the Vth Republic), and the texts to which this refers, such as the Declaration of the Rights of Man and the Citizen of 1789, the Preamble of the 1946 Constitution and the 2004 Environment Charter (B Mathieu *Qu'est-ce que la Constitution?* (online).

[10] Decaux 2010 note 8 at 469; Rivero and Waline 2002 note 6 at 68-69. The reciprocity requirement in article 55 does not apply to human rights treaties (J Lachaume 'Droit international et juridiction judiciaire' 2009 (October) *Répertoire International Dalloz* para 126; F Latty 'Observations CE ass., 11 avr. 2012, n 322 326, GISTI et FAPIL' in A Pellet and A Miron *Les Grandes Decisions de la Jurisprudence Francaise de Droit International Public* (2015) 674 at 679).

[11] Decaux 2010 note 8 at 470 and 489; L Dubouis 'Droit international et juridiction administrative' 2006 (January) *Répertoire International Dalloz* para 3; Lachaume 2009 note 10 para 107.

[12] P Lagarde 'La convention de New York du 26 janvier 1990 sur les droits de l'enfant n'est pas directement applicable en droit interne' 1993 *Revue Critique de Droit International Privé* 449 para 1; Laurent-Boutot 2006 note 7 at 42 in relation to the practice of the CC.

[13] J Lachaume 'Jurisprudence française relative au droit international (année 1997)' 1998 (44) *Annuaire Français de Droit Internationa*l 663 paras 17, 95 and 127. Treaties not applied by courts remain supreme, in that they bind the Parliament (J Ancel 'La Cour de cassation et la Convention internationale relative aux droits de l'enfant' 2001 (205) *Jurnal du Droit des Jeunes* 20 at 21 (hereafter 'Ancel 2001a'); Decaux 2010 note 8 at 487; Laurent-Boutot 2006 note 7 at 35).

The direct application of international treaties and the enforcement of their supremacy over national laws fall within the jurisdiction of the courts. The Constitutional Council does not assess the compatibility of domestic statutes with international conventions.[14] Instead, it exercises a control of constitutionality[15] against a 'constitutional bloc' or *bloc de constitutionnalité*,[16] which contains domestic norms with constitutional value but not international treaties. French statutes are therefore subject to a constitutionality control exercised by the Constitutional Council, and a control of consistency with international treaties exercised by courts. The consequences of the two types of control differ. An unconstitutional provision cannot come into force or is invalidated, while a statutory norm inconsistent with an international treaty is set aside (i.e., not applied) in a specific dispute, sometimes in favour of the court applying the international norm.[17] In addition to being used for the control of statutes, international norms with direct effect[18] are also directly relied on to assess the lawfulness of administrative action/acts (individual or normative),[19] with the offending administrative action being deemed unlawful and invalidated.

The recognition of direct effect determines the domestic effectiveness of international treaties in that courts rarely use general international law for the purposes of interpreting national law.[20] French writers have stressed the nuanced domestic normativity of incorporated norms in an attempt to change the courts' intransigent position according to which the absence of direct effect of some norms meant no judicial effect for those norms.[21] Under the influence of EU

[14] Decaux 2010 note 8 at 469; Rivero and Waline 2002 note 6.

[15] *A priori* (raised by certain political office-bearers before the law comes into force; article 61 of the 1958 Constitution) or *a posteriori* (*question prioritaire de constitutionalité* ('QPC') raised by individuals in concrete disputes; article 61-1 of the 1958 Constitution, introduced in 23 July 2008 and effective March 2010). See V Constantinesco and S Pierré-Caps *Droit Constitutionnel Français* (2010) at 221 – 222, and, on the website of the Constitutional Council, *La question prioritaire de constitutionnalité*.

[16] These are 'norms of constitutional nature arising from a variety of sources' (Decaux 2010 note 8 at 478). In addition to the norms in note 9 above, these include fundamental principles of French law recognised by the Council. See Constantinesco and Pierré-Caps 2010 note 15 at 224; Decaux 2010 note 8 at 478.

[17] Decaux 2010 note 8 at 470; Lachaume 2009 note 10 para 111.

[18] CE, No. 163043, 23 April 1997 (known as *Groupe d'information et de soutien des travaielleurs immigré;* hereafter '*GISTI* 1997'). This is a contentious issue, and arguments have been made that to control the legality of normative acts, direct effect is not necessary (R Abraham 'Les effets juridiques, en droit interne, de la Convention de New York relative aux droits de l'enfant (Conclusions sur Conseil d'Etat, Section, 23 avril 1997, Groupe d'information et de soutien des travailleurs immigrés (GISTI))' 1997 *Revue Française de Droit Administratif* 585; G Dumortier 'L'effet direct des conventions internationales (Conclusions sur Conseil d'État, Assemblée, 11 avril 2012, Groupe d'information et de soutien des immigrés (GISTI) et Fédération des associations pour la promotion et l'insertion par le logement (FAPIL), n° 322326, Lebon) 2012 *Revue Française de Droit Administratif* 547; S Slama (2012) *Adoption de nouveaux critères de détermination de l'effet direct des normes internationales sans consacrer leur invocabilité systématique* para 4 (CREDOF; online).

[19] Rivero and Waline 2002 note 6 at 67.

[20] Interpretation in line with general international law is exceptional, 'ambiguous, even underground' (J Akandji-Kombé 'De l'invocabilité des sources européennes et internationales du droit social devant le juge interne après l'arrêt Gisti-FAPIL du Conseil d'État du 11 avril, n° 322326, au Lebon' 2012 *Droit Social* 1014). This is because, *inter alia*, unlike the EU law, general international law does not specifically require the use of conventions for the interpretation of national law (ibid); and that the Constitution endorses direct application of international treaties but not their use for interpretation purposes (ibid; E Lambert Abdelgawad and A Weber 'The Reception Process in France and Germany' in H Keller and A Stone Sweet (eds) *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 108 at 117). However, the courts seem to slowly develop this possibility (Laurent-Boutot 2006 note 7 at 42 and 44; Lambert Abdelgawad and Weber 2008 above; Latty 2015 note 10).

[21] The outcome of *GISTI* 1997 was that 'the provisions lacking direct effect are radically un-invocable before an administrative court' (Chauvaux and Girardot 1997 note 8).

law,[22] the concept of 'invocability' was developed as an umbrella-term for the normative capacity of international norms,[23] which may range from the 'maximum normativity'[24] of norms with direct effect to a more limited normativity recognised to norms lacking such.[25] Arguments for the recognition of a nuanced normativity for general international treaty provisions have, however, failed,[26] the courts continuing to give effect only to those international law provisions of direct application.

Despite its importance, the courts have largely lacked a systematic approach to the direct application of international treaties.[27] Nonetheless, a few general rules can be identified. Generally, the courts assess direct applicability on an article-by-article basis.[28] Further, in order to be applied directly, in addition to the formal requirements of ratification and publication of the treaty in an official gazette, two other criteria need to be satisfied.[29] The subjective criterion requires that the object of the norm is to create individual rights, and not to regulate exclusively the relationship between states. For this, courts consider the state intention, which they search in the wording of the relevant provisions,[30] and in other elements such as the object of the treaty or provision.[31] Courts have placed significant weight on the literal meaning of norms in establishing the intention of the states. Formulations requiring the state to take implementation measures have led to a denial of direct effect by judicial courts; while a precise norm which does not refer to an act of application has generally been recognised as having direct effect.[32] Up until 2012, and despite cogent criticism,[33] the Council placed significant reliance on the literal meaning of a provision (*élément rédactionnel*) to establish the states' intention: norms which are addressed to the states have been considered as creating obligations only between states and not as creating individual rights capable of direct domestic application.[34] The

[22] This technique is used in relation to European directives, which although not of direct application, produce certain legal effects, such as consistent interpretation, reparation, exclusion and substitution of domestic norms (Slama 2012 note 18 para 4).
[23] Abraham 1997 note 18; Akandji-Kombé 2012 note 20; Dumortier 2012 note 18.
[24] Dumortier 2012 note 18.
[25] Such limited normativity may consist of use for interpretation purposes or engagement of state responsibility for legislative activity (ibid); or to set aside national norms ('invocability of substitution') or to interpret them ('invocability of interpretation') (Akandji-Kombé 2012 note 20).
[26] See arguments by Abraham (1997 note 18) and Dumortier (2012 note 18).
[27] Latty 2015 note 10 at 676 (in 2012, the Council jurisprudence changed, as discussed below). The Court continues to lack a systematic approach (Cour de Cassation *Rapport Annuel 2013 'L'ordre public'* at 111 (online)).
[28] Laurent-Boutot 2006 note 7 at 45 (for exceptions see at 49).
[29] Some differences exist in how the courts conceptualise direct application, but the essence coincides. See Cour de Cassation (2009) 'Contributions de la première chamber civile de la Cour de cassation: L'application direct de la Convention de New York relative aux droits de l'enfant' in *Rapport Annuel 2009: Les personnes vulnérables dans la jurisprudence de la Cour de cassation* 81 at 83 and 84 (online)).
[30] See, for example, Ancel 2001a note 13 at 20; Cour de Cassation *Rapport Annuel 2009* note 29 at 83; Lachaume 2009 note 10 para 93.
[31] Ibid para 94; Cour de Cassation *Rapport Annuel 2009* note 29 at 84.
[32] Lachaume 2009 note 10 para 93.
[33] Abraham (1997 note 18) argued that the wording may be an indication of the absence of direct effect but not the determinant factor.
[34] According to Abraham (ibid), formulations associated with direct effect are 'states recognise' or 'states guarantee', as opposed to 'the states undertake to guarantee' or 'undertake to recognise'. See also Lagarde 1993 note 12 para 3.

unrestrained reign of this literal approach ended with *GISTI and FAPIL* 2012,[35] where it was decided that a norm addressed to the state is not automatically excluded from direct application, and that the normative value of a norm can only be established by analysing the wording and the possibility of its immediate application.[36]

The second criterion is the objective criterion which refers to the degree of normativity of the treaty or provision,[37] or the 'quality of the norm'.[38] It requires that a norm be sufficiently clear and precise or complete in order to regulate immediately a concrete dispute, without a need to take any further domestic measures.[39] This criterion leaves judges a significant level of discretion.[40]

The manner in which the courts engage with the two criteria and the reasons for them rejecting the direct application of certain international provisions are not always clear.[41] For example, the CE formally rejected the direct application of certain treaty provisions because they 'create obligations only between states', when in fact the direct effect was denied because the norm was considered incomplete.[42] Generally, there is a limited analysis of direct effect in judgments and the courts use stereotypical formulations to reject direct application.[43] Further, there is some 'circularity'[44] in the judicial reasoning concerning the application of the two criteria, and absence of legal predictability which results from the case-by-case and article-by-article approach to direct application.[45] The difficulties of navigating the jurisprudence on direct effect are augmented by the brevity of the two courts, especially of the CC. Historical, legal and

[35] CE, No. 323326, 12 April 2012 ('*GISTI and FAPIL')*. The two organisations challenged the lawfulness of a decree, which, in the implementation of a statute recognising the right to access state housing, introduced discriminatory requirements regarding the duration of residence in France and the type of residence permit. The decree was challenged for being contrary to article 6(1) of the International Labour Organisation (ILO) Convention 97 of 1 July 1949 concerning migrant workers, under which the state parties (including France) undertook not to discriminate between nationals and migrant workers residing legally in France.

[36] The Council applied this reasoning to decide that article 6(1) of the ILO Convention no 97 does not create obligations exclusively between states and does not require complementary measures to produce domestic effects.

[37] B Taxil 'Les critères de l'applicabilité directe des traités internationaux aux États-Unis et en France' 2007 (59) *Revue Internationale de Droit Comparé* 157 at 159.

[38] Laurent-Boutot 2006 note 7 at 40.

[39] Dumortier 2012 note 18. See also Decaux 2010 note 8; Taxil 2007 note 37.

[40] Ibid at 166.

[41] Dubouis 2006 note 11 para 40 criticizing the Council for failing to distinguish between how it employs the two criteria. Chauvaux and Girardot (1997 note 8) observed the Council's failure in *GISTI* 1997 to state its reasons for finding that articles 24, 26 and 27 of the CRC lack direct effect.

[42] Latty 2015 note 10 at 684. Abraham 1997 note 18 para III.A.2 argues that the Council of State rejected the direct application of articles 9, 12 and 14 of the CRC because of their lack of precision, although its judgment refers to these provisions as creating obligations only between states.

[43] Latty 2015 note 10 at 684.

[44] Dumortier 2012 note 18 (rather than being approached independently, the objective criterion is taken as proof of the subjective criterion, and *vice versa*).

[45] Latty 2015 note 10 at 684.

political reasons inform this approach to judgment writing,[46] which should not, however, be mistaken for simplistic reasoning or poorly informed courts.[47]

The effects of recognising direct effect to an international norm are potentially far-reaching. Such a norm can play various roles: it may cover a gap in the domestic law; it may set aside and substitute, in a concrete dispute, domestic norms found to be inconsistent with it; or it may be used to assess the lawfulness of administrative acts (individual or normative).[48]

These effects are of importance for the CRC. First, France gives limited recognition to child-specific rights in its Constitution, and a limited number of child-specific norms exist within the constitutional bloc. Paragraph 11 of the 1946 Preamble contains a commitment by the state to guarantee health services, material security, rest and leisure to children amongst others, while Paragraph 13 contains a commitment to guarantee equal access to education, professional training and culture to children and adults. In addition, the Constitutional Council has recognised constitutional status to the principle of a specialised system of juvenile justice,[49] and has interpreted Paragraph 10 of the 1946 Preamble to include the interest of the child in adoption.[50] Therefore, children's rights do not feature highly in the control of the constitutionality of statutes. The conventionality control of statutes against the CRC by courts may, however, compensate for this. Further, France lacks a consolidated children's rights statute, preferring sectoral legal reform in response to its CRC obligations. This creates potential for gaps in the law, which can be covered by giving direct effect to the CRC. Lastly, direct application has heightened importance in France, since the courts are slow to use general (as opposed to European) international treaties for interpretation purposes, as discussed above.

3.3 The direct application of the CRC by the Court of Cassation

The Court has had a troubled history of applying the CRC, moving from quiet acceptance to firm rejection, and then to selective direct application. The year 2005 was a turning point for the Court's jurisprudence, and it is used as a landmark for discussing the case law.

[46] M de S-O-l'E Lasser 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' 1994-1995 (104) *Yale Law Journal* 1325; B Louvel (2015) *Discours prononcé en ouverture des travaux de la commission de réflexion dédiés à la motivation* at 1 (online); Conseil d'État *Groupe de Travail sur la Redaction des Decisions de la Juridiction Administrative*: *Rapport 2012* at 10 (online).

[47] The published arguments of the *commissaire du government/commissaire public* or *conseilleurs*, who are members of the Council and the Court respectively, contain comprehensive legal arguments, with extensive references to international law, supranational (mainly ECtHR) case law, occasionally foreign law and judgments, and academic literature. It is exceptional, however, for the judgments to contain references to the courts' own case law or that of supranational courts.

[48] Rivero and Waline 2002 note 6 at 67.

[49] Decision 2002-461 DC, 29 August 2002 para 26. For more, see D Darsonville 'QPC du 21 septembre 2012: la poursuite de la désagrégation du droit pénal de mineurs' 2012 (4) *Constitutions: Droit Constitutionnel Appliqué* 609; C Lazerges 'Les limites de la constitutionnalisation du droit pénal des mineurs' 2008 (1) *Archives de Politique Criminelle* 5.

[50] Decision 2013-669 DC, 17 May 2013 para 53.

3.3.1 The pre-2005 position

After the entry into force of the CRC, the Court did not reject the Convention.[51] Lower courts embraced the CRC, and some set national norms aside and substituted them with the relevant CRC provisions.[52] However, several judgments in 1993 and 1994 firmly established the Court's pre-2005 approach. In *Lejeune*, the appellant argued that a lower court disregarded articles 1, 3, 9 and 12 of the CRC, by deciding what was in the best interests of the child without listening to the child directly, although the appellant raised concerns that the view expressed by the child during interviews with the psychologist has been influenced by the mother.[53] The First Civil Division decided that *the entire* CRC was not directly applicable because it created obligations only for the states and thus could not be invoked directly before national courts by individuals. Subsequently, the same division pointed out that 'it results from the text [of the CRC] itself that according to its article 4, its provisions create obligations only for the states, so that it cannot be invoked before the courts'.[54] In 1994, the Labour Division adopted this approach when quashing the decision of a court which set aside provisions of a national statute in favour of article 26 of the CRC.[55] The Criminal Division did not initially share this intransigence, continuing to use formulations indicative of a certain openness to an article-by-article approach to direct application.[56] As its decisions were less explicit, they were also less influential than those of the civil and social divisions.[57] In 1997, the Criminal Division rallied to the reasoning of the other divisions, dismissing an appeal in which a convicted minor argued that the relevant national statute was inconsistent with article 37 of the CRC because it allowed for his indefinite detention.[58] Therefore, by 1997, all the divisions of the Court rejected the direct application of the entire Convention, this being saluted by some as a display of a 'beautiful unanimity'.[59]

Some lower courts continued to apply the CRC but their lapses were sanctioned by the Court.[60] The Court itself did not use its article-4 based reasoning consistently, with both the First Civil

[51] Civ 1, No. 90-05026, 1991 (article 29(1) (a) not infringed upon); Crim, No. 90-87713, 1991 (dismissed because the CRC was only raised in appeal).
[52] Soc, No. 93-10891, 1994.
[53] Civ 1, No. 91-11310, 10 March 1993. Same reasoning in Civ 1, No. 91-17487, 1993; Civ 1, No. 91-18735, 1993.
[54] Civ 1, No. 91-18735, 1993 (in a residence dispute, the appellant argued that the court considered only the 'interest of the children' and not the '*best interests* of the child' as required by the CRC, breaching therefore articles 3, 9 and 12). Also, Civ 1, No. 94-05075, 1995.
[55] Soc, No. 93-10891, 1994. The statutory provisions established an age limit below 18 up to which children benefited from medical insurance paid for by the state, as dependents of their parents.
[56] Laurent-Boutot 2006 note 7 at 64 and 65.
[57] Ibid at 65. It was argued that legislation which criminalised persons who sought to prevent medical facilities from conducting terminations of pregnancy was contrary to articles 6, 8 and 9 of the CRC. The Criminal Section did not reject the reliance on the CRC because the treaty was not directly applicable; instead, it relied on France's interpretive declaration to the CRC, according to which ratification cannot constitute an obstacle to the application of termination of pregnancy laws (Crim, No. 95-85118, 1996; Crim, No. 96-80223, 1996; Crim, No. 96-80318, 1996; Crim, No. 96-82024, 1997; Crim, No. 97-83877, 1998).
[58] Crim, No. 97-82008, 1997.
[59] J Massip 'La cour de cassation et le caractere directement executoire en France de la Convention sur les droits de l'enfant (Cass. crim., 18 juin 1997)' 1998 (39) *Les Petites Affiches* 25.
[60] J Massip 'La Convention relative aux droits de l'enfant, qui ne crée des obligations qu'à la charge des Etats parties, n'est pas directement applicable en droit interne' 1993 *Recueil Dalloz* 361 fn 2; J Hauser 'Droits de l'enfant : il y a CIDE et CIDE !' 1994 *Revue Trimestrielle de Droit Civil* 581; J Rongé 'La Convention internationale relative aux droits de l'enfant: On avance ou on recule?' 2004 (10) *Journal du Droit des Jeunes* 9

Division[61] and the Criminal Division[62] occasionally departing from it, and raising hopes for change.[63] Some Court members supported a more permissive approach to direct application,[64] arguing that several aspects of the CRC indicate that it was intended to create individual rights;[65] and that article 4 suggests that domestic implementation measures are required only when 'necessary' and not when the CRC provisions can be given effect immediately.[66] Despite its formal rejection, the CRC influenced the CC as reflected in its use of the phrase 'the best interest of the child', which was not reflected at the time in the positive law.[67] Although the issue of the direct application was clearly controversial, the Assembly of the Court never clarified the issue,[68] maintaining the uncertainty about the role of the CRC in litigation.[69]

The Court was criticised for its departure from the customary, article-by-article approach to direct application,[70] and for ousting the direct application of the CRC for reasons not used in relation to other human rights conventions.[71] The Court rejected, however, criticism that it deprived the CRC of domestic effect, by drawing attention to legislative initiatives to give effect to the CRC domestically,[72] and to the Council of State's jurisdiction to ensure that the organs of the state complied with the CRC.[73] Some defended the simplicity and the certainty

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at 15 note 60; J Rosenczveig 'The Self-executing Character of the Children's Rights Convention in France' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 187; Lagarde 1993 note 12 para 7.

[61] For example, the application of article 2 was rejected because it was not relevant (Civ 1, No. 94-14858, 1996). See J Marguénaud 'De l'indifférence des juridictions judiciaires à l'égard de la Convention internationale relative aux droits de l'enfant' 1999 *Revue Trimestrielle de Droit Civil* 509; C Neirinck 'L'application de la Convention internationale de l'enfant à la découpe: à propos d'un revirement de jurisprudence' 2005 *Revue de Droit Sanitaire et Social* 814. Also, Civ 1, No. 98-22784, 2000.

[62] It decided that in applying the national law, the courts did not disregard articles 2 and 16 of the CRC (Crim, No. 98-84538, 1999) or article 3(1) (Crim, No. 00-84429, 2001) when they prohibited the foreign parents of children residing in France to remain in the country after completing their custodial sentence.

[63] With hindsight (and perhaps insight), these decisions are presented by the Court itself as a move toward accepting the direct application of the CRC (Cour de Cassation *Rapport Annuel 2009* note 29 at 85-86).

[64] Decaux 2010 note 8 at 498.

[65] Ancel 2001a note 13 at 21 (referring to the Preamble of the CRC). He also argued that although the majority of the CRC norms create obligations for the states, some recognize individual rights which can be applied directly (J Ancel (2001) 'La protection des droits de la personne dans la jurisprudence récente de la Cour de cassation' in Cour de Cassation *Rapport de la Cour de cassation 2000* ('Ancel 2001b') (online).

[66] Ancel 2001a note 13 at 21.

[67] Ancel 2001b note 65; J Ancel 'La Convention de New York relative aux droits de l'enfant devant la Cour de cassation' 2011 *Justice & Cassation* 13 at 19; Cour de Cassation *Rapport Annuel 2009* note 29 at 85-86; G Lebreton 'Le droit de l'enfant au respect de son "intérêt supérieur". Critique républicaine de la derive individualitste de droit civil français' 2003 (2) *Cahiers de la Recherche sur les Droits Fondamentaux* 77.

[68] Laurent-Boutot 2006 note 7 at 66, 132.

[69] Ibid at 132.

[70] B Bonnet 'Le Conseil d'Etat et la Convention internationale des droits de l'enfant à l'heure du bilan: De l'art du pragmatism' 2010 (17) *Dalloz* 1031; D Bureau 'De l'application directe en France de la Convention de New York du 26 janvier 1990 sur les droits de l'enfant' 2005 *Revue Critique de Droit International Privé* 679. More generally, F Dekeuwer-Défossez 'La convention relative aux droits de l'enfant, qui ne crée des obligations qu'à la charge des Etats parties, n'est pas directement applicable en droit interne' 1994 *Recueil Dalloz* 34; Rosenczveig 1996 note 60 at 190; Marguénaud 1999 note 61; Lagarde 1993 note 12.

[71] Dekeuwer-Défossez 1994 note 70; Lagarde 1993 note 12 para 6 and 7 (noting that the formulation of the Preamble to the European Convention on Human Rights and Fundamnental Freedoms, 1950/1953 ('the ECHR') and article 2(2) of the International Covenant on Civil and Political Rights, 1966/1976 ('the ICCPR') respectively did not prevent the Court of Cassation from giving direct effect to these treaties); Rongé 2004 note 60.

[72] At the time of *Lejeune*, the government announced legislative measures to implement the CRC (Laurent-Boutot 2006 note 7 at 58).

[73] Cour de Cassation *Rapport Annuel 2009* note 29 at 84; Ancel 2011 note 67 at 15.

of the position of the Court;[74] while others argued that the denial of direct application would not have a major impact considering that the French law largely complied with the CRC and that alternative legal means existed to achieve its objectives.[75]

The reasons for the Court's position blended legal and judicial policy reasons.[76] Article 4 constituted the main *legal* reason. The reference to implementation measures in this article was seen to reflect the intention of the parties to create obligations solely for the states, rather than individual rights enforceable domestically.[77] Massip, the presiding judge in *Lejeune*, went so far as to argue that the CRC is not drafted in normative terms.[78] Further support for this view was found in the formulation of other provisions,[79] many of them addressed to the states,[80] and enjoining them to 'guarantee', 'ensure', 'recognise' or 'respect' certain rights, or to take legislative measures.[81]

Another legal reason relied on to deny the direct applicability of the CRC was its monitoring mechanism.[82] The fact that the Committee on the Rights of the Child was only empowered to receive state reports documenting state *progress*, rather than individual communications to establish *violations* of the Convention, was taken as an implication that the CRC was not intended to have direct effect.[83] It was argued that a right to approach an international body is a clear indication of direct applicability,[84] and in its absence, 'it would be a paradox'[85] to apply the Convention directly in France if the Committee itself was not able to do something similar.

Although primary reliance in explaining the position of the Court was placed on the subjective criterion,[86] commentators noted that the CRC also fell short of the objective criterion. It was argued that the CRC norms are 'so general or even so vague that it cannot be seen how their violation can be invoked by individuals'[87] since a court 'cannot … make a decision referring

[74] Benhamou (cited by F Monéger 'La Convention des droits de l'enfant devant les juridictions administratives' 1996 *Revue de Droit Sanitaire et Social* 137).
[75] Dekeuwer-Défossez (1994 note 70), suggesting the optimum use of the existing national law, legal reform and the use of the ECHR to give effect to the CRC.
[76] The term *politique judiciaire* is used by Rongé 2004 note 60 at 15.
[77] Massip 1993 note 60; J Massip 'Lapplication par la cour de cassation de conventions internationales recentes relatives a l'enfance' 1995 (53) *Les Petites Affiches* 41.
[78] Ibid.
[79] It was argued that formulations such as states 'shall ensure', 'take all necessary measures', 'respect', 'recognise', 'assure', 'shall use their best efforts' were seen by the Court as reflecting state undertakings and not creating individual rights (B Vassallo 'La Convention des droits de l'enfant à la cour de cassation' 2010 (296) *Journal du Droits des Jeunes* 25 at 25. Also, Ancel 2011 note 67 at 14; Cour de Cassation *Rapport Annuel 2009* note 29 at 84.
[80] On this literal approach to the provisions of the CRC, see Dekewer-Défossez 1994 note 70.
[81] Massip 1995 note 77 part B. Partial support for this view in Ancel 2001a note 13 at 20.
[82] Massip 1995 note 77; Ancel 2001a note 13 at 20; Cour de Cassation *Rapport Annuel 2009* note 29 at 84.
[83] Massip 1993 note 60; Massip 1995 note 77.
[84] Dekeuwer-Défossez 1994 note 70.
[85] Ibid. It was argued that the absence (at the time) of an individual communication mechanism deprived the CRC of an important pressure tool for its direct application (C Sciotti-Lam *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2004) at 411.
[86] Sciotti-Lam noted that the *en bloc* denial of direct application excluded the application of the objective criterion (ibid at 444).
[87] Massip 1993 note 60. For concerns about the vagueness and lack of precision of many CRC norms, see also Ancel 2001a note 13 at 20; Ancel 2011 note 67 at 14.

exclusively to the New York Convention as its justification'.[88] Even supporters of the CRC argued that its wording is 'too imprecise', and is riddled with gaps which make it difficult for it to act as an 'operational norm'.[89] Also, 'because of the imprecision and generality of its wording, [the CRC] may inspire a reading' which discourages direct application.[90]

Judicial policy reasons were important, and may have tipped the balance in favour of denying the CRC direct application. Thus, the pronouncements on direct application made in *Lejeune* were not necessary on the facts, because the child was listened to by both social workers and doctors, which *prima facie* satisfied the requirements of article 12 of the CRC.[91] Although the Court could have decided that the CRC was not breached,[92] it opted for a 'decision in principle'[93] rejecting the direct application of the entire CRC. The Court used this opportunity to curtail the multiplication of judicial views regarding the direct application of the CRC,[94] and to address concerns related to the potentially destabilising effect of the CRC[95] when used by courts too eager to set aside national law in favour of a direct application of the CRC.[96] It also intended to deter 'artificial litigation encouraged by the terms often vague and less precise of the Convention,'[97] and to prevent the development of a case-by-case approach to direct application, which would threaten legal certainty.[98] Reluctance to engage with socio-economic rights may have been a contributing factor,[99] as were the concerns about the potential tensions between the rights of the child and public order issues such as illegal immigration, fake marriages and other fraudulent means to gain residence in France.[100] In the face of such concerns, the formulation of article 4 provided a convenient *legal* cover. The denial of direct effect was seen as 'a deliberate strategic choice in relation to article 4 of the CRC',[101] a taking of 'refuge in a form of ostracism tainted by legal nationalism'[102] and a distortion of the application of established legal principles which governed the application of international

[88] Massip 1993 note 60.
[89] Dekeuwer-Défossez 1994 note 70.
[90] Neirinck 2005 note 61. Also, F Boulanger 'Applicabilité directe de la Convention de New York et intérêt supérieur de l'enfant' 2006 *Recueil Dalloz* 554.
[91] Massip 1993 note 60; Massip 1995 note 77.
[92] Dekeuwer-Défossez 1994 note 70.
[93] Massip 1995 note 77; Dekeuwer-Défossez 1994 note 70.
[94] Ibid.
[95] Concerns were raised, for example, about the potential of the CRC to 'complicate' the relationship between parents and children and the role of judges (Laurent-Boutot 2006 note 7 at 58; also, P Bonfils and A Gouttenoire *Droit des Mineurs* (2008)); the possibility that the Convention would be manipulated in the interest of adults, and the multiplication of appeals (Sciotti-Lam 2004 note 85 at 411-412).
[96] For example, during 1991-1992, relying directly on the CRC, some courts allowed children to intervene in the divorce of their parents; and judges admitted applications by children who refused to join their parents to religious shrines (Rosenczveig 1996 note 60 at 194).
[97] Massip 1995 note 77 part B.
[98] Ibid part B.
[99] Laurent-Boutot 2006 note 7 at 59-60.
[100] Hauser 1994 note 60.
[101] E Claes and A Vandaele 'L'effet direct des traités internationaux: Une analyse en droit positif et en théorie du droit axée sur les droits de l'homme' 2001 (34) *Revue Belge de Droit International* 411 at 449. Similarly, Sciotti-Lam 2004 note 85 at 411.
[102] Bonnet 2010 note 70.

conventions in the national legal order.[103] The Court clearly left it to the legislature to bring the law in line with the Convention.[104]

3.3.2 The 2005 decisions

In May 2005, the Court changed its approach. In two decisions rendered on the same day, the Court *de facto* applied the 'two stars'[105] of the CRC, articles 3 and 12, without, however, explicitly declaring that they have direct effect. In a first case, the CC decided that by not considering the request of a child to be listened to in an appeal against a residence decision, the court breached articles 3(1) and 12(2) of the CRC, read together with the relevant provisions of the Civil code and the Code of civil procedure.[106] A second case concerned a child born to a lesbian couple through artificial insemination. After the separation of the couple, one of the partners changed her sex, and recognised (the paternity of) the child, but this was challenged by the biological mother for being contrary to the biological reality. The court of appeal agreed, but recognised visitation rights to the transsexual parent. The Court decided that in granting visitation rights, the court of appeal considered the best interests of the child in article 3(1) of the CRC and thus 'has justified its decision in law'.[107]

In June 2005, the Court explicitly declared that article 3(1) was of direct application. It was argued that by ordering the immediate return of a child to the country of habitual residence, the lower court violated, *inter alia*, article 3(1) of the CRC. This was so because the severe impact of her uprooting from the environment in which she was already integrated constituted the exception to immediate return in article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980. The Court decided that in assessing the risk of danger to the child, article 3(1) of the CRC, which was of direct application, required that the best interests of the child be given a primary importance; the lower court did so when it decided on the return of the child.[108]

The Court abandoned therefore its position in *Lejeune* and embarked on an article-by-article approach to direct application. The decisions inspired mixed reactions. They were described as a 'spectacular U-turn'[109] or a result of a gradual change;[110] or a 'balanced evolution' unlikely to revolutionise the law considering the limited number of provisions recognised as being of

[103] Ibid; Bureau 2005 note 70; F Monéger 'Enfant (droits de l')' 2006 (January) *Répertoire International Dalloz* 1.
[104] Bonnet 2010 note 70. Some judges argued that it is the duty of the state to harmonise its laws with the CRC, and not of the courts to inquire into the consistency between the two (Massip 1993 note 60). Refusal to apply the CRC directly may have been a deliberate move to expose France to international responsibility for its failure to adapt its laws (Sciotti-Lam 2004 note 85 at 412). The 'technique' had been used before by the Court in the context of the ECHR (Laurent-Boutot 2006 note 7 at 215).
[105] A Gouttenoire 'L'application de la Convention internationale des droits de l'enfant' 2012 (50) *Les Petites Affiches* 17.
[106] Civ 1, No. 02-20613, 18 May 2005.
[107] Civ 1, No. 02-16336, 18 May 2005.
[108] Civ 1, No. 04-16942, 14 June 2005. Similarly, Civ 1, No. 08-18126, 2009.
[109] P Courbé 'L'application directe de la Convention des Nations unies sur les droits de l'enfants' 2006 *Recueil Dalloz* 1487.
[110] Reflected in decisions in which the Court did not use an article-4 based reasoning. See Laurent-Boutot 2006 note 7 at 66-67.

direct application.[111] There were also reservations about the direct effect of article 3(1) of the CRC and its use to challenge norms of general application.[112] But the Court was rather cautious. It applied article 12(2), for example, when the reformed legislation largely implemented this provision.[113] This prompted some commentators to argue that direct application had little more than a symbolic value since it did not lead to additional protection,[114] or that it was a 'sacrifice to the fashion of international norm'[115] since the CRC simply reinforced existing statutory obligations. [116]

Although the application of the CRC did not provide additional protection to that provided under the national law, these decisions were significant. In May 2005, the Court invoked the CRC *ex officio*,[117] showing its determination to break with its previous position.[118] These decisions legitimised the judicial use of the concept of the 'best interests of the child', as opposed to the 'interest of the child' recognised in French statutes.[119] Further, they paved the way for the CRC to be given effect as a supra-legislative norm, and for further development of the direct application of the Convention.

The change in the Court's position was brought about by a combination of legal, social and political factors.[120] The Court changed its view in relation to the meaning of article 4 of the CRC, accepting that this article did not characterise the legal nature of *all* CRC provisions,[121] and that while some provisions create obligations just between states, others create individual rights, which are not dependent on legislative intervention.[122] The monitoring mechanism of the CRC, unchanged at the time,[123] ceased to be mentioned as an obstacle to the direct application, illustrating the vulnerability of the argument in the first place. Despite the unanimous judgments, not all judges supported the *Lejeune* reasoning. This can be seen in

[111] Neirinck 2005 note 61.
[112] Bureau 2005 note 70; Bonfils and Gouttenoire 2008 note 95.
[113] Law 93-22 of 8 January 1993 introduced into the Civil code article 388-1, which read with articles 338-1 and 338-2 of the Code of civil procedure provided that a competent child may request to be listened to at any stage during the procedures (including for the first time in appeal), and that a decision not to listen to the child must be specifically motivated by the court. These domestic provisions were relied on by the Court in one of its 18 May 2005 judgments, along articles 3 and 12 of the CRC.
[114] F Dekeuwer-Défossez 'La Convention internationale des droits de l'enfant: quelles répercussions en droit français?' 2006 (5) *Cahiers de la Recherche sur les Droits Fondamentaux* 39 at 42.
[115] J Hauser 'La référence à la Convention internationale des droits de l'enfant (CIDE) fait recette à la Cour de cassation mais est-elle nécessaire?' 2006 *Revue Trimestrielle de Droit Civil* 101.
[116] Ibid.
[117] Ancel 2011 note 67 at 19; Bureau 2005 note 70; Vassallo 2010 note 79.
[118] The Court refers to the May 2005 decisions as 'decisions of principle' (*Rapport Annuel* note 29 at 86).
[119] Ancel 2011 note 67; Dekeuwer-Défossez 2006 note 114 at 42; Lebreton 2003 note 67 at 80. French legislation post-CRC generally uses the phrase 'interest of the child' rather than the 'best interests of the child' (for exceptions, see article L752-2 of the Code de l'entrée et du séjour des étrangers et du droit d'asile and article L 221-1.6 of the Code de l'action sociale et des familles). Nonetheless, judicial courts continue to oscillate between the two phrases (Cour de Cassation *Rapport Annuel 2009* note 29 at 87 and 91; Vassallo 2010 note 79 at 29).
[120] Courbé 2006 note 109.
[121] Bureau 2005 note 70.
[122] Ibid; Ancel 2001a note 13 and 2001b note 65.
[123] In 2016, France ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011). To date (March 2019), the Committee dealt with one communication against France, which it rejected as inadmissible because the violations complained of occurred prior to the Protocol coming into force for France (7 April 2016) (*S.C.S v France*, 25 January 2018).

judgments where the CC did not rely on article 4 arguments or in extra-judicial writing of some judges.[124] The absence of dissenting opinions in French judgments[125] prevented the ventilation of viewpoints more supportive of the direct application, which in the end prevailed once the presidency of the First Civil Division had changed.[126]

The Court may have also been receptive to the robust academic criticism and an increasingly rights-oriented society.[127] The experience of the Council of State might have allayed fears that the French law will be thrown into disarray if the CRC is directly applied,[128] encouraging the Court to end the major divergence between their approaches:[129]

> the First Civil Division has adopted this [the Council's] analysis, harmonising therefore its jurisprudence with that of the Council of State, so as to give the treaty its full value: that of an international text, with a value superior to internal law, which imposes on the judicial judges – the same as on the administration – to give priority to the best interests of the child.[130]

The evolution of human rights jurisprudence, generally, made it difficult for the Court to continue denying the direct application of the CRC. The Court applied other treaties directly;[131] the best interests of the child had penetrated the ECtHR jurisprudence,[132] and the ECtHR gave judgments against France, in which the CRC played a role.[133] Finally, the lower courts occasionally 'rebelled' against the view of the Court[134] signalling the time for change.

3.3.3 After 2005

After the 2005 decisions, the Court of Cassation engaged more freely with the CRC although the number of provisions applied directly has remained low. The quasi-totality of its jurisprudence concerns article 3(1),[135] and it only rarely deals with other provisions.[136] For example, legal provisions allowing children born out of wedlock to take the surname of one of the parents, but not their united surnames, were found not to be contrary to article 8 of the CRC as long as the child possesses a civil status consistent with the law and reflecting the

[124] Especially, Ancel.
[125] Dissenting opinions are a 'quasi-taboo' and a 'profoundly foreign' tool for the French judiciary (J Ancel (2005) *Les opinions dissidents Cycle de conférences annuelles sur les méthodes de jugement* (online)).
[126] Laurent-Boutot talks about the influence of Jean-Pierre Ancel, the presiding judge of the First Civil Division, on the May 2005 decisions (2006 note 7 at 68-69).
[127] Courbé 2006 note 109.
[128] Ibid.
[129] Bureau 2005 note 70. However, the two courts continue to differ on some issues relating to the application of the CRC (Courbé 2006 note 109).
[130] Cour de Cassation (2006) *Rapport Annuel 2005: L'innovation technologique* at 416 (online).
[131] Courbé 2006 note 109. Lachaume notes that most ECHR and ICCPR norms have been recognised direct effect, despite 'not all being of great precision' (2009 note 10 para 96).
[132] Boulanger 2006 note 90. For example, the advocate general supported the direct application of article 3(1) of the CRC by relying on the use of this article by the ECtHR (Laurent-Boutot 2006 note 7 at 71-72). It was also argued that the use of the best interests of the child by the ECtHR has enhanced the influence of the CRC on the French law (Dekeuwer-Défossez 2006 note 114 at 40).
[133] Rongé 2004 note 60 at 15.
[134] Ancel 2001a note 13 at 21; Rongé 2004 note 60 at 15.
[135] Vassallo 2010 note 79 at 27. The dominance of article 3(1) is acknowledged by the Court itself (*Rapport Annuel 2009* note 29 at 85).
[136] See, for example, the table referred to in Le Defenseur des Droits *Effet Direct de la Convention Internationale relative aux Droits de l'Enfant dans l'Ordre Juridique Français* (cases up to 2015) (online).

relationship with the parent whose surname he/she carries.[137] In 2007, the Court refused to order the return of a child to Morocco, despite the unlawful removal of the child by the mother. It decided that the interest of the child is better served by maintaining the child in France because the return to Morocco would expose the child to a total and abrupt separation from the mother at the instance of the father (who had exercised his parental rights in bad faith), which would be contrary to article 9(3) of the CRC.[138]

In a 2006 case the Court invoked the CRC *ex officio*[139] and applied article 7(1) directly.[140] By recognising the child born prior to his birth *sous X*,[141] the father established the filiation with his son from the moment of the child's birth. Article 7(1) of the CRC gave the child the right to know the parent who recognised him and to be raised by him, although this right was not provided in the French law.[142]

Socio-economic rights are generally avoided by the Court. In several cases it was argued that contrary to articles 3(1), 24(1) and 26 of the CRC, child grants were denied to legal migrants whose children joined them without following the family reunification procedures set by the French law, because the legality of children's entry into France could not be proved by producing the special medical certificate issued by the relevant authorities.[143] The Assembly of the Court decided that making the grant conditional upon the presentation of the special medical certificate had an

> objective character justified by the necessity within a democratic state to control the influx of children, [and] did not constitute a disproportionate interference with the right to family life guaranteed by articles 8 and 14 of the ECHR, and did not disregard the dispositions of article 3-1 of the Convention on the Rights of the Child.[144]

Notably, the Court carefully avoided declaring the compatibility of the law with the socio-economic rights provisions, limiting itself to an assessment against article 3(1).

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[137] Civ 1, No. 08-18871, 2010. In another decision, the CC stated that the right to preserve one's identity does not prevent all name changes (Civ 1, Nos 07-16067 and 07-18811, 2008).
[138] Civ 1, No. 06-12687, 2007.
[139] Vassallo 2010 note 79 at 33
[140] Bonfils and Gouttenoire 2008 note 95.
[141] The mother decided to give birth anonymously.
[142] Civ 1, No. 05-11285, 7 April 2006 (known as the *Benjamin* case). The Court also engaged with article 7(1) in Civ 1, No. 10-19028, 2011, where a mother entrusted her new-born baby for adoption, with the child not having the filiation established in relation to any of the parents. During the adoption process, the biological parents recognised the child. The recognition was set aside by the courts, and then appealed by the father who argued that the adoption would create an insurmountable obstacle for the child to know her father and build a relationship with him, which was contrary to article 7(1) of the CRC. The Court found that article 7(1) was not breached and that by the time the adoption process started, sufficient time has passed for the parents to have recognised the child prior to that point. It added that it would be contrary to the best interests of the child to deprive her of a stable family, while waiting for the hypothetical recognition of the child by the biological parents.
[143] See Rapport de Mmes Coutou et Vassallo Conseillers référendaires, Avis de la Cour de cassation 8 October 2007, *Bulletin d'information* 2008 No. 674, 12; Rapport de Mme Monéger Conseiller rapporteur (Pourvoi no 09-69.052 *Bulletin d'information* 2011 No. 747, 20) (online).
[144] Ass, No. 09-69052, 3 June 2011; Ass, No. 09-71.352, 3 June 2011 (the latter decision rendered exclusively on articles 8 and 14 of the ECHR); Ass, No. 11-17520, 5 April 2013. The position of the Court was later endorsed by the ECtHR in *Okitaloshima Okonda Osungu c France* and *Selpa Lokongo c France*, 1 October 2015, Applications Nos 76860/11 et 51354/1.

To conclude, after more than a decade of rejecting the direct application of the CRC, the Court of Cassation is cautiously engaging with the Convention. Although the number of provisions directly applied is limited, the jurisprudence is clearly developing.

3.4 The direct application of the CRC by the Council of State

The Council of State applied the CRC directly on an article-by-article basis from the outset. However, its case law is peppered with inconsistencies and uncertainties,[145] as illustrated by its jurisprudence on articles 7, 9, 10, 12 and 16. All of these articles were at some point denied direct effect for a reason which became the hallmark of the CE's engagement with many CRC norms:[146] that they create obligations between states rather than individual rights which can be applied directly.[147] Sometimes, these articles are now applied directly by the CE (as shown below) without an explanation being provided for the change in perspective.

Some examples illustrate how the CE has applied the above articles when it eventually decided to give them direct effect. A decision to deport a foreign national, married with a French resident with whom he had four children, and whose family reunification application was rejected, did not violate article 7(1) because there were no obstacles to the applicant taking his family overseas, where children could be brought up by both parents.[148] However, a violation of article 7(1) (read with article 3(1)) would occur if the deportation of a parent resulted in the interruption of affective ties between the child and the other parent, who was unable to leave France because he was imprisoned.[149] A refusal of a short-term visa to a child did not constitute a violation of articles 9 and 3(1) since the child's French resident father could visit his son overseas.[150] Together with article 3(1) (and the Preamble of the 1946 Constitution and article 8 of the ECHR), article 9 could justify granting a permission to reside in France to the parents

[145] Some refer to the 'confusion, even incoherence' of the Council's jurisprudence (R Errera (2005) *L'application de la Convention Internationale relative aux Droits de l'Enfant et l'Incidence de la Convention Europeenne des Droits de l'Homme sur les Droits de l'Enfant* at 7 (online).
[146] For further discussion, Sciotti-Lam 2004 note 85 at 401.
[147] Articles 7 and 9 'create obligations only between states and do not create rights for their subjects' (CE, No. 181137, 1997; CE, No. 238724, 2003), or article 9 created obligations only between states (CE, No. 143866, 1994; No. 265003, 2004). In a challenge to the deportation of a family with two children born in France, the Council decided that articles 2, 4, 8, 9, 10 and 28 create obligations only between states, and cannot be applied directly (CE, No. 173470, 1997). However, article 9 was tacitly applied when the Council rejected as unfounded the allegations that it (and article 19) would be violated by the deportation of the applicant's family to Mali, where the children would be allegedly exposed to various risks (FGM, poor nutrition and sanitation) (CE, No. 136601, 1993). In 1995, the Council implicitly applied article 16 (CE, No. 141083, 10 March 1995 (known as *Demirpence*), and in 1999, it assessed the consistency between certain provisions of the Civil code regarding the exercise of parental authority over children born outside marriage, and articles 3(1) and 16 (CE, No. 191232, 1999). In 2002, however, in an appeal against a decision to deport a foreign national whose spouse was residing regularly in France with the couple's child, the Council, decided that article 16, together with articles 7 and 9, creates obligations only between states, and cannot be applied directly (CE, No. 214664, 2002).
[148] CE, No. 247587, 2004.
[149] CE, No. 300721, 2009. Interestingly, when not applied with article 3(1), article 7 was subsequently denied direct application because together with article 8 of the CRC, they create obligations exclusively between states. (CE, No. 364895, 2013). Notably, this is the last case in which the Council relied on this reasoning in relation to the CRC.
[150] CE, No. 326046, 2010.

of girls granted refugee status because of their risk of FGM in their country of origin, although the parents themselves could not be recognised as refugees.[151]

While initially it refused to apply article 10 directly,[152] the Council applied it implicitly when it decided that it could not be invoked by a French resident whose siblings were not authorised to join her in France, because this article applies only between ascendants and descendants, and in relation to leaving and returning to one's country of origin.[153] Article 12(2) was explicitly declared of direct application in an immigration appeal in which it was objected that a child herself had not been listened to by authorities. The appeal was rejected because the view of the child was conveyed to the authorities by the child's grandmother.[154] In 2004, the Council decided that the deportation of an illegal migrant and his separation from his children residing regularly in France did not constitute a violation of article 16, because it was not an *arbitrary* interference with the children's private and family life.[155]

Other articles have generated a more consistent jurisprudence. In *Cinar*,[156] the Council recognised the direct effect of article 3(1), an article which now dominates its jurisprudence. The case concerned a Turkish mother residing lawfully in France who brought with her, illegally, her 4-year-old son. She applied for the child to be granted a residence permit, but the application was rejected because the law required that applications for family reunification be made from abroad.[157] The mother appealed relying exclusively on the ECHR and CRC. The *commissaire du government* Rony Abraham supported the direct application of article 3(1), which he considered the only well-founded reason for the appeal.[158] Abraham argued that article 3(1) was of direct application because no additional measure was needed for its application. Also, its general nature and propensity to multiple interpretations did not prevent its application by administrative judges, who were accustomed to dealing with the application of general norms, such as general legal principles.[159] Thus, despite the illegal entry of the child into France, a separation from the mother, even temporarily, in the circumstances of the case (unknown father and no family members able to care for the child in Turkey), was contrary to article 3(1) of the CRC.[160] The administrative decision was invalidated and national law set aside in favour of a direct application of article 3(1).[161]

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[151] CE, No. 368676, 2013.
[152] CE, No. 254401, 2004; CE, No. 274139, 2005.
[153] CE, No. 155096, 1998; similarly, CE, No. 238724, 2003. On the vacillations of the jurisprudence on article 10, see also Errera 2005 note 145 at 7.
[154] CE, No. 291561, 2008.
[155] CE No. 265003, 2004. Article 16, in conjunction with article 3(1), was also used to assess the lawfulness of a decree regarding the creation of a database with personal data (including of children below the age of 13) aimed at preventing threats to the public security (CE, No. 332886, 2013; CE, No. 389815, 2015).
[156] CE, No. 161364, 22 September 1997 (known as *Cinar*).
[157] M Reydellet 'La convention des droits de l'enfant n'est pas un traité "hors-jeu" (Conseil d'Etat, 22 septembre 1997) Mlle Cinar (req. no 161364; Conclusions Abraham)' 1998 (11) *Les Petites Affiches* 17.
[158] Ibid. As explained by Abraham, the French law allowed the administration to reject the application if the applicant was already in France.
[159] Reydellet 1998 note 157.
[160] The applicable law at the time did not contain a provision entitling the administration to give primary consideration to the best interests of the child in deciding reunification applications, an effect achieved through the application of article 3(1).
[161] Reydellet 1998 note 157.

Challenges to extradition and detention conditions saw the Council apply article 37. It decided that articles 37(b) and (c) do not prohibit the extradition of a minor, as long as it takes place, as required by the French law, to a country that has special legal provisions concerning child offenders.[162] A decree which provided that detention centres for immigrant families in process of being deported need to be specially equipped and contain child-specific materials was not contrary to articles 3(1) and 37 CRC because it was not intended to encourage the use of detention of minors other than as a last resort, but rather to establish the standards for such detention.[163] In 2008, the Council invalidated a ministerial decree which permitted the use of solitary confinement for children, noting that articles 3(1) and 37 require

> the adaptation of a detention regime of minors in all its aspects in order to respond to their age and impose on the administrative authority an obligation to give a primary consideration to the best interest of children in all the decisions which concern them.[164]

As the decree did not offer sufficient guarantees of a special treatment for children, the Council invalidated its provisions to the extent of their applicability to children.

More recently, the Council applied articles seldom engaged with by courts. In 2011, it decided that there was no violation of article 13 by a media regulator which prohibited a television station from broadcasting an anonymous interview with a child offender whose mother explicitly opposed the broadcasting.[165] Article 32 was raised in a challenge to two decrees which permitted derogations from the existing prohibition of employment of young workers in dangerous environments, and the authorisation of children aged 15-18 to work in asbestos-contaminated environments during their professional training.[166] The government justified the derogations through the absence of skilled work in relevant industries (i.e., repairs and restoration of old buildings). Although it found the decrees partly unlawful on domestic law grounds,[167] the Council pronounced that they were not inconsistent with articles 32(1) and (2)(b) of the CRC, because these articles permitted the authorisation of employers to train workers aged 15-18 in environments where the asbestos concentration was below a dangerous level.[168]

[162] CE, No. 220271, 2001 (known as *Nezdulkins*).
[163] CE, No. 282275, 2006. But see the vulnerability of the Council's position under articles 3 and 5 of the ECHR in *Popov v France* (Application No. 39472/07 and 39474/07; 19 January 2012) and *A.B and others v France* (Application No. 11593/12; 12 July 2016).
[164] CE, No. 293785, 31 October 2008 (known as the *Section Francaise de l'Observatoire International des Prisons*).
[165] CE, No. 334289, 2011. The Council also found that there was no disproportionate interference with article 10 of the ECHR.
[166] CE, No. 373968, 2015.
[167] CE, No. 373968, 2015 para 11.
[168] CE, No. 373968, 2015 para 13.

A significant number of provisions were, however, declared as not having direct effect. These provisions include article 2;[169] article 3(2);[170] article 3(3);[171] article 4;[172] article 5;[173] article 6;[174] article 8;[175] article 11;[176] and articles 24(1), 26(1) and 27(1).[177] A few examples illustrate the approach of the Council. The Council rejected the application of articles 12(1) and (2) and 14(1) as creating only obligations between states in a challenge to the refusal of a minister to abrogate a decree concerning the delivery of medical care to a child against the wishes of the parents.[178] In a challenge against a decision to deport the married mother of two children born in France, it held that article 18(1) creates only obligations between states without creating individual rights.[179] In 2011, an appellant disputed his obligation to pay additional tax, arguing that no consideration was given to the fact that he contributed to the upbringing of three children living in Pakistan. As the Pakistani law prohibited adoption, he was unable to adopt the children and thus establish the legal filiation on which the fiscal law conditioned the tax rebate. The Council stated that articles 2, 3(2), 3(3), 5, 19, 20 and 27 do not have direct effect and cannot be invoked directly before the courts.[180] The Council went on to find that article 3(1) was not disregarded by the provisions of the fiscal code which established the category of children considered to be under the charge of a person demanding a tax rebate. In 2007, the Council decided that the exclusion of a child from a French language school in Morocco for the non-payment of fees could not be challenged against article 28 which proclaims free primary education, because the article creates only obligations between states.[181] In 2001, in relation to the refusal of residence permit to a child's aunt, the Council decided that articles 2, 9, 20 and 29 did not produce effects in relation to individuals, and that article 3(1) was not disregarded when the authorities established that the presence of the applicant was not a necessity for the child and his family.[182]

[169] CE, No. 262670, 2004 (articles 2 and 9 create only obligations between states). In other decisions, the direct application was rejected for other reasons: CE, No. 320321, 2011 (it has no direct effect, together with 3(2), 3(3), 5, 19, 20 and 27); CE, No. 323758, 2010 (insufficient information to establish whether the claim was well-founded); CE, No. 359223, 2014, para 7 (article 2(2) not 'useful' in that it does not have direct effect).
[170] CE, No. 291561, 2008; CE, No. 293785, 2008.
[171] CE, No. 293785, 2008; CE, No. 320321, 2011 (below).
[172] CE, No. 176205, 1997.
[173] CE, No. 320321, 2011.
[174] CE, No. 170098, 1997; CE, No. 220588, 2002 (articles 4, 6 and 9 create only obligations between states). However, in 2001 the Council found that a decision to authorise the commercialisation of an oral contraceptive was not contrary to article 6 CRC (and article 2 of the ECHR and article 6 of the ICCPR) (CE, No. 216521, 2001).
[175] CE, No. 173470, 1997 (articles 2, 4, 8, 9, 10 and 28 create obligations between states); CE, No. 155096, 1998; CE, No. 364895, 2013.
[176] The CE decided that articles 7, 10 and 11 did not apply to the deportation of an applicant married to a French resident and the mother of his child (CE, No. 150167, 1996).
[177] CE, No. 163043, 23 April 1997 (*GISTI* 1997). Also CE, No. 204784, 2000 (articles 26 and 27; found that article 3(1) was not disregarded when considering the whole legal framework); CE, No. 253365, 2004 (article 24); CE, No. 320321, 2011 (article 27).
[178] CE, No. 140872, 1996. Later, the CE decided that article 12(2) can be applied directly.
[179] CE, No. 240001, 2002.
[180] CE, No. 320321, 2011. In an earlier decision, the Council found the allegations in relation to article 19 unfounded (CE, No. 136601, 1993).
[181] CE, No. 297871, 2007.
[182] CE, No. 213745, 2001.

Many of the decisions in which the direct application of CRC was rejected relied on the CE's pre-2012 view that articles addressed to the states do not create individual rights but obligations between states. This reasoning has been used by the Council overwhelmingly in relation to the CRC,[183] and especially in relation to article 9, but also in relation to articles 2, 4, 6, 7, 8, 10, 12, 14, 16, 18, 28 and 29. It is clear that this reasoning was stretched beyond articles addressed primarily to states,[184] suggesting that the reason for the denial of direct effect may rather be the perceived lack of completeness of some CRC norms. Clarity is difficult to obtain considering that the Council's formal reasons do not always match its substantive reasoning.[185] Thus, some of the provisions not recognised as having direct effect because of lack of completeness have also been denied direct application because they allegedly created obligations only between states.[186]

The literal approach that enabled a simplistic discarding of some CRC provisions has lost its grip on the administrative jurisprudence. Following *GISTI and FAPIL* 2012 the Council can no longer dismiss the direct application of CRC norms based solely on a criterion to which many of its norms were vulnerable. This ought to make the Council engage more carefully with the content of the norms, and assess their precision and clarity. The dominance of article 3(1) may permit the Council to avoid doing so, but some changes in its reasoning can be noticed. Post-*GISTI and FAPIL*, it used the mentioned literal approach in only one decision.[187] Further, it assessed the lawfulness of two decrees against article 32, which is overtly addressed to the states,[188] and then, in a challenge to the implementation norms of the statute which recognised same-sex marriages, it pointed out that articles 21 and 22 of the CRC (also addressed to states) do not require that marriage and adoption be reserved for heterosexual couples.[189]

The Council relies on the CRC to assess the lawfulness of normative administrative acts and the consistency of legislation with the Convention (the *conventionalité*). Cases in which inconsistency with the CRC is established do not abound, and they concern primarily article 3(1). However, they are significant because they assert the legal status of the CRC as a supra-legislative instrument. As seen above, in *Cinar*, the Council set aside national legal provisions in favour of a direct application of article 3(1). In the 2006 *L'Association Aides*,[190] it declared incompatible with the CRC a statute and its implementing decrees that made access to state medical care by illegal immigrants dependent on a period of three months uninterrupted residence in France. Thus, before fulfilling the residence requirement, children residing in France illegally could only access emergency medical care. The Council decided that this

[183] Of the 96 cases which used the formula 'créent seulement des obligations entre Etats' ('exact phrase' search on *Legifrance*; 1 August 2016) between 7 September 1990 and 1 August 2016, only seven (7) relate to other international treaties, and of those only one refers to another human rights treaty (the Convention on the Elimination of All Forms of Discrimination Against Women).
[184] Articles 7, 14 and 16, for example.
[185] Abraham 1997 note 18.
[186] Articles 2 and 8, for example.
[187] CE, No. 364895, 2013 (in relation to articles 7 and 8). By comparison, this reasoning was used by the Council prior to *GISTI and FAPIL* 2012 in 107 judgments (*Legifrance* search 14 November 2018).
[188] CE, No. 373968, 2015.
[189] CE, No. 370459, 2015 para 14.
[190] CE, No. 285576, 2006.

limitation of access to health care disregarded articles 1 and 3(1) of the CRC, which require the state not to limit children's access to medical services necessary to protect their health.[191] More recently, the Council articulated its expectation that lower courts do not automatically apply a national statute, and instead enquire first into its compatibility with article 3(1) of the CRC. Thus, the Council criticised an appeal court for concluding that article 3(1) was not breached by the administrative authority that simply gave effect to a statutory rule,[192] and decided that by 'not assessing if the *law itself* [my emphasis] was compatible with these stipulations [article 3(1)], the court committed an error in law'.[193]

Although in many decisions the Council disposed of the CRC-related issues by simply finding the compatibility of national norms with the Convention, its recent jurisprudence shows that it expects more. In 2014, the *Observatoire* invoked articles 3(1) and 37(c) to challenge the legality of a decree which abrogated statutory provisions requiring that the family of an incarcerated child and child offender protection services be immediately informed of the detention, and that a timely visit be paid to the child by the probation services.[194] The Council decided that the abrogation decree did not disregard the mentioned articles, but that these directly applicable CRC provisions must be applied in the individual decisions made by the prison authorities.[195] Consequently, the direct application of the above provisions may lead, in individual cases, to the immediate notification of the family and protection services of the taking into detention of a child, and timely visits of the child by the above.

A drawback of the Council's position is that the lawfulness of administrative acts and the consistency of laws with the CRC are only assessed in relation to those articles recognised as having direct effect. This position was established in *GISTI* 1997.[196] The applicants requested the invalidation of a decree that made access to social security conditional on proof of legal residence. The applicants invoked, amongst others, articles 24(1), 26(1) and 27(1) of the CRC. The Council refused to apply these articles, indicating that they do not produce effects regarding individuals and therefore cannot be invoked for the invalidation of a decision concerning individuals or of a decision of general application.[197] The Council disagreed with the *commissaire du government* Abraham, who sought to make a distinction between challenges to individual decisions, in which norms ought to be of direct application, and challenges against norms of general application, where the control norm need not be of direct

[191] This was significant considering that the Constitutional Council declared the statute consistent with paragraph 11 of the Preamble to the 1946 Constitution and the equality principle (paras 14-20 of Décision No. 2003-488 DC du 29 décembre 2003 Loi de finances rectificative pour 2003).
[192] The issue concerned access to certain welfare payments by migrants residing legally in France but not meeting certain length-of-stay criteria.
[193] CE, No. 375887, 2015.
[194] CE, No. 369766, 2014.
[195] CE, No. 369766, 2014 para 10.
[196] See also Gouttenoire 2012 note 105. According to Slama (2012 note 18), *GISTI* 1997 and *Cinar* have established the view of the Council with regard to the direct application and that since then the CE has constantly blocked the invocation of norms without direct effect before the courts.
[197] Abraham (1997 note 18) argued that they are not of direct application because they require implementation measures. Chauvaux and Girardot (1997 note 8) pointed out, however, that although articles 24 and 26 might not be sufficient by themselves as they rest on the state organizing a medical and social security system, such system already existed in France.

application.[198] The Abraham position received substantial support.[199] It was argued that in the control of domestic norms what is necessary is for the treaty norm to have a sufficient degree of normativity to allow it to serve as a 'reference norm'.[200] Nonetheless, in *GISTI and FAPIL* 2012 the Council reiterated its earlier view and its determination to exclude norms not recognised as having direct effect from the Council's adjudicatory function.[201] This is significant considering that its jurisprudence, like that of the Court of Cassation, focuses on the direct application of the CRC, which is only exceptionally used as an interpretation aid.[202] For example, the Council refused to invalidate a ministerial decree for reasons of its inconsistency with the CRC, but interpreted it in the light of article 3(1) to imply an obligation for prison authorities who take disciplinary measures against juvenile offenders to inform the children's guardians and allow them to arrange representation for the child.[203]

To conclude, the Council has been 'extremely cautious'[204] in its direct application of the CRC, but its jurisprudence is increasingly diverse, and recent developments raise hopes for a positive evolution.

3.5 An assessment of the impact of the direct application of the CRC in France

3.5.1 Introduction

As seen above, both courts engage with the CRC primarily from the perspective of direct effect. In the cases consulted for this study, the Convention is rarely used for interpretation purposes,[205] and lacks therefore an alternative outlet to produce domestic effects.[206] While both courts apply the CRC directly, their jurisprudence contains inconsistencies and sharp turns which are hardly explained. The direct application reasoning is cryptic (especially for a foreign researcher) and lacks detail, making the jurisprudence difficult to navigate. It is not always clear how the courts engage with the direct effect criteria. While reference to the subjective criterion is made by the courts, a transparent engagement with the objective criterion is lacking.

[198] Abraham 1997 note 18.
[199] Chauvaux and Girardot 1997 note 8; Gouttenoire 2012 note 105; Dumortier 2012 note 18.
[200] For instance, Dumortier (ibid) points out that in the control of norms the judge only verifies the compliance of a decree or law with a treaty, and if necessary, invalidates or discards the offending norm.
[201] Latty 2015 note 10 at 681.
[202] CE, No. 349624, 2011.
[203] CE, No. 253973, 30 July 2003 **(***Section française de l'Observatoire international des prisons)*.
[204] Rongé 2004 note 60 at 14. Errera (2005 note 145 at 4) talks about a 'restrictive' approach.
[205] Examples are Civ 1, No. 11-28424, 2013; CE, No. 253973, 2003.
[206] The CRC norms not recognised direct effect are sometimes used for interpretation purposes in other jurisdictions (M Limbeek and M Bruning 'The Netherlands: Two Decades of the CRC in Dutch Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 89 at 95).

There is an underlining concern about the lack of clarity and precision or completeness of the CRC,[207] but what justifies this concern is not explained.

To assess the impact of the direct application of the CRC, the paragraphs below evaluate the extent of recognition of direct effect and its legal consequences. Inevitably given its dominance, much of the assessment is made in relation to the article 3(1) case law.

3.5.2 Scope

Overall, only a few CRC provisions have been recognised as having direct effect (article 1, 3, 7, 8, 9, 10, 12(2), 13, 16, 20 and 21, 32) and there is no perfect overlap between provisions applied directly by the two courts. The domination of article 3(1)[208] has created a 'comfort zone' for the courts and litigants but has removed the incentive to wrestle with the direct application of other articles. Although protection-oriented provisions are most popular, autonomy-oriented rights (articles 13, 16) have started to be applied. The limited number of directly applied articles is partially compensated for by the increasing diversity of legal issues in relation to which the CRC is raised such as abduction;[209] taxation;[210] parenthood and homosexuality;[211] use of sport performance-enhancing drugs;[212] departure of children to Syria to join Islamic State militants;[213] legal aid fees;[214] the choice of name;[215] termination of employment for privately-hired child minders;[216] extradition of child offenders[217] or of primary caregivers;[218] and the regulation of hazardous work.[219]

At a first glance, the ascendancy of article 3(1) is surprising considering that it is the 'most explosive'[220] CRC provision, is not formulated as a typical directly applicable norm,[221] and is not exemplary in its precision. Despite possible concerns, this article has become so influential that it lends its legal clout to other norms, with positive effects for their application. Thus, at times, article 3(1) has absorbed the substance of norms denied direct effect,[222] including socio-

[207] Abraham 1997 note 18; Ancel 2001a note 13 at 21; Massip 1993 note 60; Vassallo 2010 note 79. In its *Rapport* 2009 at 84, the Court of Cassation comments that many CRC provisions do not recognise 'precise and determined rights' because they are 'very general, even vague'.
[208] A search on the *Legifrance* website (on 12 June 2016), using the exact phrases employed by the Court of Cassation and Council of State to refer to the CRC indicates the following: the Council referred to the CRC in 403 decisions, of which only 62 did not concern article 3(1); the Court referred to the CRC in 167 cases, and only 58 did not refer to article 3(1). While this is not an infallible quantitative account, it is indicative of the dominance of article 3(1) in the two courts' case law.
[209] Civ 1, No. 16-20858, 2016.
[210] CE, No. 320321, 2011 (see discussion accompanying note 180 above).
[211] CE, No. 370459, 2015.
[212] CE, No. 363376, 2013.
[213] CE, No. 386817, 2015 (article 3(1) did not create an obligation for the state to impose a general rule requiring that French minors have the written authorization of their parents in order to be allowed to leave France).
[214] CE, No. 370989, 2016 (article 3 invoked).
[215] Civ 1, No. 10-27512 11-19963, 2012 (naming a child after a cartoon character – 'Titeuf', which is close in pronunciation with 'Little Egg' – was not in the child's interests).
[216] Soc, No. 13-17603, 2015.
[217] *Nezdulkins* discussed in text accompanying note 162.
[218] CE, No. 385927, 2015 para 6 (discussed below in text accompanying note 282).
[219] See discussion accompanying note 166 above.
[220] Courbé 2006 note 109.
[221] Bureau 2005 note 70.
[222] Prior to accepting the direct application of articles 9 and 10, the Council applied article 3(1) to protect the relationship between children and parents in immigration matters (F Monéger 'Le Conseil d'Etat met en avant

economic rights;[223] and at other times, when considered together with some CRC norms, it resulted in their direct application despite such articles not being recognised as having direct effect on their own.[224] That the norm is not addressed to the states but rather to its institutions, including the courts,[225] may have suited the literal approach taken by the courts, and, in turn, facilitated the recognition of its direct effect. Other contributing factors may have been the generality and flexibility of the provision;[226] the fact that it did not require implementation measures;[227] and the familiarity of the courts with the concept of the 'interest of the child'.[228] While controversy remains in terms of the role and value of article 3(1),[229] these concerns have not deterred the development of a comprehensive and increasingly diverse jurisprudence.

3.5.3 The legal consequences of the direct application of the CRC in France

Despite some scepticism regarding the impact of direct application of the CRC in France,[230] the CRC has left its mark on the jurisprudence.

3.5.3.1 The 'high-end' impact of direct application

Far-reaching consequences of a norm being recognised as having direct effect include providing the legal reasons for the decision, covering gaps in the national law, and dislocating (with or without substitution) conflicting domestic norms (statutes or normative administrative acts).

Although not very frequently, there have been cases where the CRC was the sole reason for a decision, and resulted in children benefiting from legal protection beyond that recognised in the national law. In *Benjamin*, the right to know one's parents (article 7(1)) was recognised for children despite not being explicitly provided for in the French law. Article 9(3) served as the sole justification for the refusal to order the return of a child unlawfully removed from the

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l'intérêt supérieur de l'enfant contenu dans la Convention des Nations Unies sur les droits de l'enfant' 1998 (3) *Revue de Droit Sanitaire et Social* 174).

[223] In *L'Association Aides*, the Council formally applied article 3(1) but gave effect to the substance of article 24, which it previously declared as not having direct effect (L Gay 'L'affirmation d'un droit aux soins du mineur étranger ou l'inconventionnalité partielle d'une loi jugée conforme à la Constitution' 2006 (11) *Revue de Droit Sanitaire et Social* 1047). Recently, the Court of Cassation assessed the conformity with article 3(1) of the CRC of certain statutory provisions, although the values sought to be protected related to articles 26 and 27 of the CRC (see discussion in part 3.3.3 above).

[224] Articles to which the Council denied recognition of direct effect when applied independently (articles 7, 9 and 16) were so applied when invoked together with article 3(1) (see part 3.4 above).

[225] Rongé 2004 note 60 at 14; P Bordry 'Le Conseil d'État français et la Convention internationale relative aux droits de l'enfant' 2001 (205) *Journal du Droit des Jeunes* 16 at 19.

[226] Neirinck 2005 note 61; Schwartz refers to article 3 as formulating a principle and 'not an obligation for the State. It is therefore this principle which is of direct application' (R Schwartz 'La jurisprudence du Conseil d'État et les droits de l'enfant' 2010 (296) *Journal du Droit des Jeunes* 37 at 38 fn omitted).

[227] Abraham 1997 note 18; Reydellet 1998 note 157.

[228] See, M Gobert (2006) *Le droit de la famille dans la jurisprudence de la Court de cassation* (online); Lebreton 2003 note 67; Hauser 2006 note 115.

[229] F Dekeuwer-Défossez 'L'effectivité de la CIDE: rapport de synthèse' 2010 (200) *Les Petites Affiches* 35; P Verdier 'Pour on finir avec l'interest de l'enfant' 2008 (280) *Journal du Droit des Jeunes* 34; Bonfils and Gouttenoire 2008 note 95; Gobert 2006 note 228; Lebreton 2003 note 67; Vassallo 2010 note 79. The Court of Cassation itself questioned the reliance on article 3(1) when the interest of the child is mentioned in relevant domestic texts, but it concludes that its usage emphasises the centrality of the concept for the decision-maker (*Rapport Annuel 2009* note 29 at 90).

[230] Cour de Cassation *Rapport Annuel 2009* note 29 at 92; Hauser 2006 note 115; Schwartz 2010 note 226 at 39; Vassallo 2010 note 70 at 33.

country of habitual residence.[231] Article 3(1) was used to justify individual exceptions from the application of laws which may otherwise disproportionately affect some children. For example, children born overseas through surrogacy to French parents, could be issued with French travel documents, because, although surrogacy is contrary to French public order, the administration has an obligation to give a primary consideration to the best interests of children.[232] Children placed in kafala (called '*makfoul*') can benefit from the family reunification procedure, despite not falling within the category of children allowed by statute to apply for it,[233] if the denial of reunification would constitute an excessive interference with private and family life of the *kafil* (kafala carers) and a violation of article 3(1).[234] The *makfouls* living with their *kafils* in France can be issued with French travel documents, despite the law not explicitly providing for this possibility, if it is established that denying such documents would breach article 3(1) of the CRC.[235]

The Court of Cassation is less inclined to go beyond the letter of the law. Unlike the Council it has not extended to the *makfoul*s benefits not explicitly bestowed upon them by the law. Thus, it set aside a decision which, based on articles 3(1) CRC and articles 8 and 14 of the ECHR, ordered the state to pay a *kafil* the child benefit reserved by statutes for adoptive parents or persons who received a child for the purposes of adoption.[236] Also, the Court has been unwilling to recognise the filiation between French commissioning parents and children born thorough surrogacy overseas, as discussed below.

The supra-legislative status of the CRC often materialises in the legality control of individual administrative decisions. For example, a deportation decision consistent with article 8 of the ECHR was not implemented, in the light of article 3(1) of the CRC, because the applicant gave birth after the deportation was decided, and the new-born was under the care of a French resident.[237] Further, because it is presumed to be in the best interests of the child to live with the person who has parental authority, French administration cannot generally refuse to grant residence to a child, without breaching article 3(1), by claiming that it is in the child's interest to remain with his biological parents in the country of origin.[238] Nonetheless, it is not always in the best interests of children placed in notarial *kafala*[239] to live with the *kafil* in France, and the courts have to decide whether a refusal to grant a long term visa breaches article 3(1).[240]

[231] Civ 1, No. 06-12687, 2007.
[232] CE, No. 348778, 2011; CE, No. 401924, 2016 (issues of nationality and filiation are acknowledged to be under the jurisdiction of judicial courts).
[233] For exceptions, see Rapport de Mme Guyon-Renard Conseiller rapporteur Avis 17 December 2012 *Bulletin d'information* No. 777 of 1 March 2013, 7.
[234] CE, No. 249369, 2004; CE, No. 220434, 2004. Also, Monéger 2006 note 103.
[235] CE, No. 351906, 2012.
[236] Civ 2, No. 08-15571, 2009. Also, Vassallo 2010 note 79 at 27.
[237] CE, No. 274713, 2006.
[238] CE, No. 305031, 2009. However, the visa can be refused if it is not in the interest of the child to join the *kafil* for other reasons, such as his/her resources or living conditions (CE, No. 337091, 2010). For more, see Rapport de Mme Guyon-Renard 2012 note 233.
[239] This is different from judicial *kafala.* Children placed in notarial *kafala* in Morocco are not orphans nor are their biological parents unable to care for them.
[240] CE, No. 330211, 2013 para 4.

In rare cases, the direct application of the CRC has led to the setting aside (non-application) of national law and the invalidation of normative administrative acts. The courts are reluctant to declare statutes incompatible with the CRC;[241] and although, in principle, they are willing to evaluate national law against the CRC, cases in which incompatibility is found are rare. They all involved article 3(1) and come from the Council; the Court has never made a finding of inconsistency with the CRC.[242] Thus, in *Cinar*, national law was set aside in favour of the direct application of article 3(1). In *L'Association Aides,* domestic law was declared inconsistent with article 3(1), resulting in the partial invalidation of the implementation decrees. This partial invalidation of a decree also occurred in *L'Observatoire* 2008, in relation to articles 3(1) and 37 applied together. Recently, however, the CE indicated its expectation that, when relevant, administrative courts assess the compatibility of the applicable statute with article 3(1).[243] The Court of Cassation formally assesses statutes against the CRC, including article 3(1),[244] but it prefers its application when this article is complementary to the national law rather than in conflict with it.[245]

The limited number of incompatibility findings raises concerns about the courts' readiness to assume that national law complies with the CRC, and/or their potentially problematic interpretation of the CRC. For example, when it decided that article 12(2) was not breached, the Council noted that the child had conveyed her views through her grandmother and that listening to the child directly would not have changed the outcome because the child's views were not determinant.[246] But the Council did not enquire into the effectiveness of listening to the child through a representative; and showed a misunderstanding of article 12, which does not make the views of a child determinant of the outcome. Further, when the Council applied article 13, it gave no attention to what appears to have been a tension between a teenager's consent to the broadcasting of an interview and his mother's opposition to it.[247] The Court endorsed the refusal of a lower court to listen to the child because the request for a hearing was not made by the child herself, but gave no consideration to difficulties in accessing the court for a child caught in an acrimonious family dispute.[248]

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[241] Judges have generally struggled with the novel institutions of direct effect and the supremacy of international law, the power to 'apply and give priority to international law' having provoked a 'considerable upheaval' for the courts (G Canivet (2006) *Vision prospective de la Cour de cassation*, Paper presented at the *Conference a L'Academie des sciences morales et politique* at 6. Also, Decaux 2010 note 8 at 468.

[242] Ancel 2011 note 67; Gouttenoire 2012 note 105 at 18; Monéger *Report 2011* note 143. Nonetheless, the Court may draw attention to the need for legal reform (Cour de Cassation (2015) *Rapport Annuel 2014 Le temps dans la jurisprudence de la Cour de cassation* at 79-80, where it suggested that the legislature ensures the consistency of legislation concerning child benefits for legal migrants with international and European law).

[243] CE, No. 375887, 2015 para 10.

[244] For example, according to the Court, the provision of the Civil code which prevents the adoption of *kafala* children by their *kafils* does not disregard the best interests of the child (despite the negative consequences of not being adoptable) because, *inter alia*, article 20 CRC mentions *kafala* as a measure which operates in the child's best interests (Civ 1, No. 09-10439, 2010; Civ 1, No. 08-11033, 2009; Guyon-Renard *Report* 2012 note 233). The possibility of norm control against article 3(1) of the CRC was indirectly accepted when the Court found that such control needs to be exercised in contentious cases and not in its advisory jurisdiction (Civ 1, No. 17-70039, 2018).

[245] Article 3(1) is often applied, for example, in association with national norms that refer to the interest of the child (Vassallo 2010 note 79 at 33).

[246] CE, No. 291561, 2008.

[247] CE, No. 334289, 2011.

[248] Civ 1, No. 16-18379, 2007.

Another concern is that, with the dominance of article 3(1), the limited number of inconsistency findings may reflect an anxiety about the suitability of this article to serve as a standard to evaluate legal norms.[249] It is not clear, for example, when the application of article 3(1) could lead to a dislocation of statutory provisions that are clear and precise.[250] With the Constitution not entrenching the best interests, the anxiety is perhaps compounded by the absence of expertise in the abstract application of this article. Nonetheless, these difficulties do not alleviate judges' legal obligation to assess the quality of domestic norms against article 3(1).[251]

Domestic political and legal complexities may be at stake in some cases, rather than CRC-related difficulties. For example, challenges to the regressive social assistance legislation of 2005/2006 required the Court to reverse the effects of legislation enacted specifically to overturn the previous jurisprudence of the Court, which maximised access to family benefits for legal migrants.[252] Further, setting aside the conflict norm which prevented the adoption of *makfouls* by *kafils* raised concerns about diplomatic relations with the children's country of origin, which may see such rulings as defying their judicial system, or may even raise concerns about the interests of children themselves.[253]

However, not all cases place the national law and the CRC on an antagonistic footing, and there is often complementarity between them, which may secure additional legal benefits for children.[254]

3.5.3.2 The jurisprudential added value[255] of the direct application of the CRC

In a context of legal reform and potentially overlapping legal instruments, the value of the direct application of the CRC has been questioned.[256] Despite some scepticism, the application of the CRC has had a positive impact. For example, the direct application of the CRC enabled the courts to diverge from the jurisprudence of the Constitutional Council, which does not engage with the CRC,[257] and secure better outcomes for children. Thus, while the legal

[249] Concerns were raised about using a tool designed for application to individual cases in the abstract control of legislation (Bonfils and Gouttenoire 2008 note 95; L Khaïat 'La défense des droits de l'enfant, un combat inachevé' 2010 (296) *Journal du Droit des Jeunes* 20 at 23); or about placing the interest of the child above the law (A Gouttenoire 'Le domaine de l'article 3-1 de la CIDE: la mise en oeuvre du principe de primauté de l'intérêt supérieur de l'enfant' 2010 (200) *Les Petites Affiches* 24) and creating a lack of legal security (Bonfils and Gouttenoire 2008 note 95).

[250] Cour de Cassation *Rapport Annuel 2009* note 29 at 92. Defending its strict adherence to domestic law, the Court stated that 'it respects the texts voted by the legislator' (ibid at 93). See also Gouttenoire 2010 note 249; Monéger *Report 2011* note 143.

[251] Gouttenoire 2010 note 249.

[252] The position of the Court was that access to benefits was not conditional on the child going through the reunification procedure, and was sufficient for the *parents* to prove their legal residence in France. See Coutou and Vassallo *Report 2007* note 143; Observations de M Maynial Premier avocat general, *Bulletin d'information*, No. 674 of 15 Jan 2008, 33.

[253] Observations de M Jean Avocat general (Avis CC 17 December 2012) *Bulletin d'information* No. 777 of 1 March 2013, 31.

[254] For example, in *Nezdulkins*, the standards of protection in article 37(b) and (c) were enriched by the application of the national law.

[255] See Chapter 1 (text accompanying fn 98) where the term added value is discussed.

[256] Cour de Cassation *Rapport Annuel 2009* note 29 at 92; Schwartz 2010 note 226; Vassallo 2010 note 79.

[257] Recently, the CRC was invoked in a challenge to the constitutionality of changes to the divorce legislation, but the Council decided that the CRC had no effect before the Council (Décision No. 2016-739 DC Loi de modernisation de la justice du XXIe siècle para 53).

framework for *accouchement sous X*[258] has been endorsed by the Constitutional Council in as far as preserving the anonymity of the mother, the Court of Cassation relied on article 7 of the CRC to give the child the possibility to know his/her father.[259] Also, while the Constitutional Council found the provisions of the law concerning access to medical care by illegal migrants consistent with the Constitution, the Council of State found them incompatible with article 3(1) of the CRC.[260] Occasionally, the direct application led to the protection of rights not recognised by national statutes[261] and the CRC has served as an independent standard to assess official conduct, including legal norms.[262] Reliance on article 3(1) of the CRC, applied independently of article 8 of the ECHR, allowed the CC to prioritise the interests of children when they collided with those of their parents;[263] and the application of articles 3(1) and 12(2) led to the appointment of a legal representative for a child when the statutory conditions required for such appointment were not met.[264]

The direct application of the CRC may achieve what the Constitution and statutes have failed to do: mainstream the rights of children in *all* decisions in matters concerning them. This is most visible in the article 3(1) jurisprudence, which is now applied across jurisdictions and a wide variety of legal issues. Illustrative of this process is the penetration of the best interests of the child in the administrative jurisprudence, which hardly operated with the concept of the 'interest of the child' prior to the recognition of direct application to article 3(1) CRC.[265]

Two features of the best interests jurisprudence further reflect the added value by the direct application of article 3(1): the centrality and independence of children's interests and the application of the best interests of the child to matters affecting children indirectly.

A. Asserting children's independent and special legal position

Article 3(1) asserts the centrality of children's interests and the special nature of such interests, the courts having to enquire into the children's best interests and justify their solution in relation to these. Thus, the choice of language of instruction cannot be based solely on the interest of the father to preserve his relationship with the children, and without considering what is in the best interests of the children themselves;[266] a residence decision based on grounds without link

[258] A practice according to which the mother can require that her giving birth and identity be kept secret, and that her child be put up for adoption. The mother has two possibilities: not to disclose her name (anonymous birth); or to disclose her name to the institution provided by the law, requesting that her name be kept secret and be disclosed only to the child upon reaching the age of 18 (secret birth). For more, see F Vasseur-Lambry 'Les message troublants du juge de la filiation: L'accouchement sous X en question' 2012 (137) *Les Pettites Affiches* 13; *Odièvre v France* (Application No. 42326/98, 13 February 2003) ('*Odièvre')* paras 15- 18.
[259] *Benjamin*.
[260] *L'Association Aides.*
[261] *Benjamin*.
[262] *L'Association Aides; L'Observatoire* 2008.
[263] Civ 1, No. 16-20858, 2016; Civ 1 No. 17-11840, 2017 (in cases of child abduction, the Court used article 3(1) to assess whether the requirements of an exception from the Hague Convention rule of immediate return to the country of residence may be met).
[264] Civ 1, No. 03-17912, 2005. See Boulanger 2006 note 90 at 4.
[265] A brief quantitative account is illustrative. An 'exact phrase' search on *Legifrance* for the period 1 January 1960-22 September 1997 on 'l'intérêt de l'enfant' produced 5 results (no result was obtained for 'l'intérêt supérieur de l'enfant'); for the period 22 September 1997 (the date of the *Cinar* decision) -16 July 2016, 443 results were obtained for 'l'intérêt supérieur de l'enfant' and 78 for 'l'intérêt de l'enfant'
[266] Civ 1, No. 02-18360, 2005.

to the best interests of the child and without investigating the latter cannot be upheld;[267] and a court cannot refuse to order the return of the child unlawfully removed from the country of habitual residence by relying on the difficulties potentially faced by the mother.[268] Similarly, the Court decided that a lower court wrongly found that the child abducted from the country of residence was not integrated in France by relying on aspects concerning the child's mother rather than the child (the mother not working, not speaking French and being an asylum seeker); by ordering the immediate return of the child in these circumstances, the lower court breached article 3(1) of the CRC (and the Hague Convention).[269] A refusal to issue French travel documents to a *makfoul*, which rested on the automatic presumption that it is in the child's interest to reside in France with the person exercising parental authority, could not be upheld in the absence of an enquiry into the interest of the child to visit his biological family.[270]

Asserting the independence of children's legal position in the name of article 3(1), the Council avoided visiting on children the negative consequences of the illicit behaviour of their parents in cases concerning family reunification,[271] deportation,[272] issuing of travel documents to children born through surrogacy,[273] and the case of parents subjected to anti-terrorism measures. Thus, an order severely restricting the freedom of movement of a mother, the sole primary caregiver of three young children (aged 6, 4 and 2), suspected of having supported persons involved in terrorist activities, was found to violate articles 3(1) of the CRC and 8 of the ECHR, because it excessively affected the functioning of the family unit and was a serious interference with children's best interests.[274] The Court has been less inclined to make best interests 'concessions' in the face of the illegality of parental conduct. It refused, for example, to recognise the filiation of children resulting from surrogacy in relation to the commissioning parents, even when one of the parents was the biological parent,[275] or to recognise filiation established through fraud.[276]

Legal norms (statutes or implementing norms) must consider and make provision for the special needs of children. In *L'Association Aides* and *L'Observatoire* 2008 the CE invalidated decrees *only* to the extent of their application to children, because of the failure to take into consideration their special needs. Conversely, decrees regarding the collection and storage of personal data for public security purposes that differentiated between children and adults, did not breach articles 3(1) and 16.[277] Children's special legal position is also asserted in those

[267] Such as the late recognition of paternity, the father's permission that the child be taken abroad for longer periods of time and the mother not preventing the development of a relationship between the father and the child (Civ 1, No. 06-17869, 2007). See also Cour de Cassation *Rapport Annuel 2009* note 29 at 90.
[268] Civ 1, No. 11-28424, 2013.
[269] Civ 1, No. 17-11927, 2017.
[270] CE, No. 351906, 2012.
[271] *Cinar*.
[272] CE, No. 274713, 2006.
[273] CE, No. 348778, 2011.
[274] CE, No. 395622, 2016. The order required the mother to report three times a day to a police station in a different town. She did not have a car and relied on public transport. The order had to be amended by the minister.
[275] Civ 1, No. 09-66486, 2011; Civ 1 No. 09-17130, 2011; Civ 1 No. 12-18315, 2013 discussed in part 3.6.2.
[276] I.e., a birth certificate obtained fraudulently (Civ 1, No. 09-68399, 2010).
[277] The type of data, its collection and the duration of preservation differed for children (CE, No. 332886, 2013 paras 21 and 26).

cases where the CE applied article 3(1) in order to introduce some flexibility into the application of laws which may disproportionately affect some children.[278]

B. The application of the best interests of the child to matters which concern children indirectly

This is a recent phenomenon which stretches the application of article 3(1) beyond matters which *involve* children directly, to those which *affect* them. After initially maintaining that the scope of article 3(1) does not extend to the extradition of a parent, because 'the extradition is not, in itself, a measure which concerns the children',[279] the Council admitted that the refusal to grant a residence permit followed by a deportation order against the parent of an ill child, constituted a decision concerning the child, which required the authorities to give a primary consideration to his best interests.[280] Article 3(1) therefore 'is not applicable only to decisions whose object is to address the personal situation of minor children but also to those decisions which can affect them in a manner sufficiently direct and certain'.[281] Thus, an extradition decree against the father of a severely disabled child, who relied on the father for his daily care, was a decision which called for the consideration of article 3(1).[282] The best interests of the child could not, however, prevent the extradition if this was justified by reasons of public order.[283]

The Court of Cassation has been more reluctant to apply article 3(1) in matters concerning children indirectly. Article 3(1) was unsuccessfully invoked in the sentencing of parents[284] or against the confiscation of family home from accused convicted of drug trafficking.[285] Reliance on article 8 of the ECHR (rather than article 3(1) of the CRC) led to the Court's refusal to execute a European arrest mandate issued for a sentence of 4 months imprisonment for offences committed 10 years earlier by the father and the sole carer of a 5 year old child.[286] Nonetheless, the Court considered article 3(1) in an appeal against the prohibition to remain in France lodged by a father who argued that this would prevent him from developing a relationship with his child; however, it endorsed the balance struck by the appeal court between the interests of the child, public safety and the interests of the victim.[287]

The outcomes favourable to children obtained in some cases where article 3(1) was applied would have been difficult to obtain otherwise. It was argued that article 8(1) of the ECHR has

[278] *Kafala* and family reunification (CE, No. 249369, 2004; CE, No. 220434, 2004; see text corresponding to note 234 above) and issuing of travel documents respectively (CE, No. 351906, 2012; see note 235 and corresponding text); issuing of travel documents to children born through surrogacy abroad (CE, No. 348778, 2011; note 232 and corresponding text); and family and social services visits to arrested children (CE, No. 369766, 2014; note 194 and corresponding text).
[279] CE, No. 317125, 2009.
[280] CE, No. 359359, 2014.
[281] CE, No. 359359**,** 2014 para 1.
[282] CE, No. 385927, 2015 para 6.
[283] CE, No. 385927, 2015 paras 6 and 7.
[284] Crim, No. 09-83032, 2010 (a plastic surgeon argued that articles 8 of the ECHR and 3(1) of the CRC were breached by the sentencing court which sentenced him to a custodial sentence for causing bodily harm to his patients).
[285] Crim, No. 10-87811, 2011. Similar wording in Crim, No. 09-81239, 2009 (4 minor children); Crim, No. 09-81710, 2009 (appellants caring for a severely disabled child).
[286] Crim, No. 10-86237, 2010.
[287] Crim, No. 09-83351, 2009.

an absorbent effect on article 3(1) of the CRC, and that decisions are rendered on article 3(1) when the parties 'forget' to invoke article 8 of the ECHR.[288] While some overlap may exist, it should not be automatically assumed. For instance, in *L'Association Aides* or *L'Observatoire* 2008 article 8 of the ECHR would have been irrelevant as the matters did not concern family or private life. In matters concerning the issuing of French travel documents to *makfouls*, article 8 of the ECHR has little relevance considering that children's actual family life is with the *kafil*, rather than with their biological family overseas whose visitation they wanted facilitated by obtaining French travel documents. In cases of child abduction, articles 3(1) and 9(3) of the CRC were useful to establish whether the Court had to apply an exception from the immediate return of a child to the country of residence.

One of the difficulties in discerning the impact of the direct application of the CRC is the complex legal context in which it takes place. Widespread legal reform and the multitude of relevant (national and international) legal sources have sometimes relegated the Convention to a secondary or 'complementary role'[289] often in relation to article 8 of the ECHR. Two observations are necessary. First, there may be an expectation that for a norm to be considered as being directly applied, it has to generate by itself a specific legal outcome. Unlike cases in other jurisdictions,[290] the French jurisprudence contains cases in which CRC provisions applied independently delivered legal outcomes.[291] Further, directly applicable norms rarely operate independently as they need some supporting national law;[292] and a norm may be applied directly and determine the outcome even when it is not the sole legal provision applied by the court.[293] Consider the decisions on travel documents and family reunification of *kafala* children. It is clear that article 3(1) was the legal reason relied on by the Council to extend the benefits of the existing law to these children. Nonetheless, technically, article 3(1) did not operate independently, in that the benefits so recognised to *kafala* children were pre-established by the legislation. To deny that in these cases article 3(1) was applied directly simply because its application does not satisfy a purist view of direct application is unrealistic and obscures the full impact of the CRC.

Second, and in terms of the CRC being marginalised in favour of other legal instruments, the principle of subsidiarity provides a legitimate justification for applying the national law first. Article 41 of the CRC also provides that national or international standards offering superior protection should be applied with priority. But an abstract evaluation of legal standards is not

[288] Schwartz 2010 note 226 at 40.
[289] Schwartz (ibid at 39), in relation to articles 3(1) of the CRC and 8 of the ECHR; Vassallo (2010 note 79 at 33) notes the pairing of article 3(1), 7(1) and 12(2) with statutes that refer to the interest of the child, filiation and the child's right to be heard.
[290] M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851.
[291] See part 3.5.3.1 above.
[292] A Nollkaemper 'The Duality of Direct Effect of International Law' 2014 (25) *The European Journal of International Law* 105.
[293] It may therefore be difficult to find cases in which the CRC provides *stricto senso* the 'rule of decision' – the criterion used by Sloss to assess whether a treaty has been directly applied (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* (2009) 1 at 11). It may be more realistic therefore to assess direct effect in relation to the degree of influence a treaty has had on the decision.

the only factor influencing the choice of norms. Possibly, treaties that are 'if not more radical, at least easier to use'[294] may be preferred by courts to the detriment of the CRC. This suggests that it is not necessarily the alleged legal inferiority of the CRC, caused by its flaws, that might have generated the Convention's judicial misfortune – it may rather be its jurisprudential under-development. It suffices to say here that safeguarding the role of the CRC in adjudication in a context characterised by norm inflation, rests on courts distancing themselves from automatic assumptions in relation to the compatibility or overlap between the CRC, national law and international law respectively.

A final observation needs to be made. The impact of direct application was evaluated primarily from the perspective of concrete legal outcomes (individual remedies, invalidation of administrative action, setting aside of legislation). There is, however, a more subtle effect which may be overlooked or too easily dismissed as paying lip-service to the CRC simply because it does not deliver concrete legal outcomes. By consistently referring to the CRC, even without generating far-reaching legal consequences, the courts acknowledge the importance of conceptualising child-related issues within the framework of the Convention and have increased the visibility of children's interests and rights in adjudication. This is not to be neglected when children's rights are underdeveloped by comparison with other rights. Arguably, in this context, successful and unsuccessful applications, good judgments and bad judgments, direct application or its rejection, all contribute to negotiating the meaning of the CRC in France.

3.6 Factors with impact on the direct application of the CRC

3.6.1 CRC-related factors

Two CRC-related factors are explicitly acknowledged in judgments: article 4 (by the Court of Cassation) and some norms being addressed to the states (by the Council of State). They constituted formal obstacles to the direct application of the CRC by courts, but were abandoned in 2005 and 2012 respectively. This did not lead to a significant increase in the number of norms recognised as having direct effect or a complete distancing from the initial views held by the courts.[295] Although the CRC has been criticised for want of clarity and precision, this criticism remains itself opaque. After 2005, the Court has not explicitly denied direct application to specific CRC provisions,[296] and it is unclear what norms it considers not to have direct effect and the reasons therefore.[297] The over-reliance on article 3(1) may have kept the

[294] Schwartz (2010 note 226 at 39-40) mentions that as an administrative judge, he applies more frequently and with more ease article 8 of the ECHR than article 3(1) of the CRC.
[295] The Court stated that although some articles have been recognised direct effect, most create obligations only between states (Cour de Cassation *Rapport Annuel 2005* note 130 at 416). Also, Schwartz 2010 note 226 at 37-38; Vassallo 2010 note 79 at 25.
[296] Monéger *Report* 2011 note 143.
[297] The Court may even ignore the CRC arguments raised, as done in Crim, No. 05-86947, 2006 (article 6 invoked to extend the definition of 'homicide' to include the unborn child) and Ass, No.13-28369, 25 June 2014 (argued that article 14(1) was not of direct application and did not impose an obligation of laicity on the crèche where the applicant, a Muslim woman wishing to wear a veil, worked). The Court may have been reluctant to engage with the CRC because it was raised to support adult rather than children's interests.

courts in a comfort zone, and thus reluctant to explore more seriously the direct application of other norms.

3.6.2 CRC-independent factors

Despite views that the CRC 'contains the seeds of its own non-application',[298] the direct application does not depend exclusively on the Convention strengths and weaknesses,[299] as shown below.

3.6.2.1 The factual and legal context

Many cases, especially those decided by the Council, deal with immigration issues, which may explain its reserved attitude toward the CRC.[300] The marginal relevance and the 'bulk' invocation of the CRC have discouraged the application of the Convention in some cases,[301] while seeking 'a reasonable application to a concrete situation' has resulted in a norm being considered 'sufficiently complete'[302] to be applied.

In 1994 it was feared that the direct application of article 7 of the CRC would result in an 'absence of legal security'[303] by automatically creating joint parental authority for the exercise of which no domestic rules existed to guide its application. Nonetheless, in 2006 this article was directly applied by the Court with no hesitation in a different legal context in the *Benjamin* case. Some judges also estimated *in abstracto* that article 9 lacked direct effect because it created obligations for the states,[304] but this article was then applied directly or recognised as potentially having direct effect in concrete disputes.[305]

The remedy sought may also influence the decision to apply the CRC directly. Thus, the control of conformity with the Convention and legality control involves a more abstract application of the CRC, for which the standard of completeness may be less stringent, while settling a dispute concerning individual rights requires a norm with a higher precision. For example, while articles 21 and 22 were used by the Council to assess the lawfulness of the implementation norms of a statute recognising homosexual marriages,[306] it is unlikely that the Court would have relied on these articles to approve adoptions by homosexual couples if this had not yet been recognised by domestic law. Further, in an abstract challenge to the decree allowing for the administrative detention of children with their parents for the purposes of deportation, launched by two NGOs, the Council found that the decree was not contrary to articles 3(1) and 37 of the CRC.[307] Nonetheless, when the concrete conditions of detention of children were exposed in *Popov v France*, the ECtHR found a violation of international standards in relation

[298] Khaïat 2010 note 249 at 22.
[299] The reluctance to apply the ECHR directly was abandoned only in response to ECtHR jurisprudence (Lambert Abdelgawad and Weber 2008 note 20 at 139-140).
[300] Rongé 2004 note 60 at 10
[301] For example, in *GISTI and FAPIL* 2012, article 3(1) was raised amongst others to challenge the legality of a decree. Dumortier (2012 note 18) dismissed its relevance, arguing that it was just a part of a 'litany' of norms invoked by the applicants.
[302] Taxil 2007 note 37 at 166.
[303] Dekeuwer-Défossez 1994 note 70.
[304] Ancel 2001a note 13 at 20; Schwartz 2010 note 226 at 38.
[305] Civ 1, No. 06-12687, 2007 (see part 3.3.3); CE, No. 368676, 2013 (see part 3.4).
[306] CE, No. 370459, 2015.
[307] CE, No. 282275, 2006.

to the detention of minors, which was not adapted to their needs as children.[308] Although the last example refers to different courts and legal standards, it illustrates that direct application may depend on what is sought by litigants in concrete cases.

International norms which do not frontally conflict with national law,[309] and 'principles … [that] are sufficiently general and flexible so that they do not challenge profoundly the domestic law (as it is the case with article 3(1))'[310] have been recognised as having direct effect. Norms to which national law has already given effect to;[311] or those that 'converge' with national law,[312] even when they do not perfectly satisfy the direct application criteria, are also easier to recognise as having direct effect. For example, although article 12(2) is indirectly addressed to the state,[313] the CC recognised its direct effect once legal reform gave it domestic effect.[314] Further, article 3 is not formulated as a right, and it is addressed to state institutions,[315] but the concept of the 'interest of the child' was already present in the French law and judges were familiar with it. It was also a flexible concept which could be applied in a flexible manner, avoiding direct conflict with national law.[316]

3.6.2.2 Opportunity considerations

Judicial policy rather than legal reasons has at times determined the courts' decisions on direct application. Thus, the CC rejected the direct application of the CRC *en bloc* influenced by the 'political-legal controversy'[317] concerning its direct effect. When it reversed that position in 2005, the relevant cases did not strictly require it, and other factors were at play, such as the desire to harmonise its approach with that of the Council of State. The Council accepted the direct application of article 12(2) in a case where this made no difference to the outcome.[318] The differential treatment applied to CRC norms whose substance was already protected in treaties recognised as having direct effect suggests that the caution of the Council was of a 'judicial policy' rather than of a strictly legal nature.[319] The decision in *GISTI* 1997 was influenced by 'considerations of opportunity' indicative of a 'choice of judicial policy',[320] which, despite cogent arguments to the contrary, remained strong in 2012.[321]

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[308] The ECtHR even referred to articles 2, 3 and 37(b) and (c) of the CRC, articles which the Council decided were not breached by the domestic decree (*Popov v France* paras 52, 90, 91).
[309] Boulanger 2006 note 90 at 7. *Benjamin*, for example, article 7 of the CRC did not explicitly come into conflict with a specific domestic norm, because the French law did not recognise the rights in the above article.
[310] Neirinck 2005 note 61.
[311] Ibid referring to article 12(2) decision in May 2005.
[312] Latty 2015 note 10 at 694.
[313] Courbé 2006 note 109; see also view expressed by Ancel (2001a note 13 at 20) that article 12 is amongst those not directly applicable.
[314] Rongé 2004 note 60.
[315] Courbé 2006 note 109; the converse argument was also made (Bordry 2001 note 225).
[316] See especially the jurisprudence of the Council in cases such as *Cinar*, the *kafala* and surrogacy decisions.
[317] Bonnet 2010 note 70.
[318] CE, No. 291561, 2008.
[319] Rongé 2004 note 60 at 15
[320] Amongst such considerations, Chauvaux and Girardot (1997 note 8) mention keeping the use of international law simple, by avoiding a distinction between direct effect and invocability, a dramatic increase in international documents invocable before courts, a potential overlap with the jurisdiction of the Constitutional Council; and the simplistic assimilation of international instruments with national laws.
[321] Dumortier 2012 note 18; Slama 2012 note 18 para 4; Latty 2015 note 10 at 682.

3.6.2.3 Multiple jurisdictions and the interaction with supra-national courts

The lack of uniformity between the positions of the Court and the Council is one of the puzzling aspects of the French jurisprudence. It created confusion amongst litigants,[322] legal insecurity, and an abandonment of the CRC in favour of more successful legal instruments.[323] But even after May 2005 differences continue to exist. For example, after 2005, the Court has not excluded, as a matter of principle, the direct effect of any article,[324] while up to *GISTI and FAPIL* 2012 the Council did deny, in principle, the direct application of norms addressed to the states. In terms of specific provisions, the Council rejected for some time the direct application of articles 7, 8, 9 and 12(2), all being at the time applied by the Court.

The courts' different jurisdiction explains to a certain extent their divergence.[325] The Court resolves disputes between individuals or concerning individual rights.[326] It relies on norms which are able to clarify the rights of parties and provide solutions to unfolding disputes.[327] Setting aside provisions of national statutes is only viable if the international norm (or other existing norms) can be substituted for them and thus provide a solution to the dispute. By contrast, the Council controls, amongst other things, the legality of various types of norms against international conventions (an 'objective control of legality'[328]), for which it is sufficient for the norm to have *some* constraining power,[329] which need not be the maximum normative power conferred by the direct effect.[330] Thus, while the administrative norm may be invalidated by the Council, it is the task of the issuing body to decide how to bring its conduct in line with the CRC.[331] Separation of powers implications raised by the control of norms exercised by the two courts are different: the Court assesses the conformity with treaties only of statutes, potentially opposing the CRC to the will of the democratically elected legislature; while the Council also controls the legality of norms emanating from the administration or the executive. Nonetheless, while some explanations exist for the different approaches, there can be no justification for the incoherence which has dominated the courts' reasons: at different points, the Court or the Council reasoned that the Convention or certain articles thereof created exclusively international obligations, while the other Court gave them domestic effect.

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[322] Monéger 1996 note 74; Laurent-Boutot 2006 note 7.
[323] Ibid.
[324] Monéger *Report* 2011 note 143.
[325] As put by Bordry, the Court of Cassation 'has to choose between two norms and apply the chosen one to the case at hand, while the Council of State decides the legality of a law or of a decision' (2001 note 225 at 17). The terminology may be telling. When rejecting direct effect, the Court of Cassation reasoned that the CRC created 'obligations *for* the state' while the Council of State reasoned that certain articles create 'only obligations *between* states' (my emphasis). It is possible that to avoid the application of the CRC, it was sufficient for the Court to say that the Convention creates state obligations (international or national), which were outside its jurisdiction. The Council, however, deals with the lawfulness of state conduct; so, to avoid the direct application of the CRC, it was not sufficient for it to say that the Convention creates obligations for the state (and its organs). The obligations created by the CRC had therefore to be 'pushed' into the international sphere, and the reasoning adapted.
[326] Laurent-Boutot 2006 note 7 at 122.
[327] Akandji-Kombé 2012 note 20 part III.B.2.
[328] Dumortier 2012 note 18; Laurent-Boutot (2006 note 7 at 121) referring to administrative courts exercising a legality control of norms with opposability *erga omnes* (*contentieux objectif*), in which the main objective is not the protection of individual interest (although this may be a by-product), but rather of the general interest.
[329] Akandji-Kombé 2012 note 20 part III.B.2; Dumortier 2012 note 18.
[330] Dumortier 2012 note 18.
[331] Bordry 2001 note 225 at 17. Also, Akandji-Kombé 2012 note 20 part III.B.2.

The shifts in the jurisprudence of both supreme courts raise the question of the mutual influence of their jurisprudence. There are examples which suggest that this may occur, but also examples in which the courts do not pursue a harmonisation of their jurisprudence. Thus, the significant shift in the Court's jurisprudence in May 2005 was influenced by the Council, as acknowledged by the Court.[332] The Council eventually accepted the direct application of articles 12(2), 7(1) and 9(3), which were already applied directly by the Court. On the other side, the Council continued its reliance on the literal criterion even if this was not explicitly embraced by the Court. In relation to specific articles, the Council still refuses to apply article 8 directly although the Court does so; and the two courts take different approaches to the application of article 3(1) in surrogacy cases or in matters affecting children indirectly. What is certain, however, is that the courts are aware of each other's jurisprudence, and in the light of *GISTI and FAPIL* 2012, which is said to reflect the common position of the courts,[333] some harmonization may occur in the future.

The jurisprudential context with impact on the direct application of the Convention is wider. Although some institutions dealing with child-related issues engage with the CRC while others do not, their jurisprudence creates a legal context in which the CRC inevitably operates. The Constitutional Council, the ECtHR and the ECJ may therefore shape the direct application of the CRC.

The Constitutional Council does not apply the CRC, which is not a part of the 'constitutionality bloc', but makes binding[334] or persuasive[335] decisions, with relevance for courts' engagement with the Convention. It was criticised for its deferent attitude to the Parliament in certain child-related matters,[336] and for its less cogent reasons in family matters when compared to other legal issues.[337] In other child-related matters, the Council has endorsed the constitutionality of legislation potentially problematic from a CRC perspective, such as regressive changes to the juvenile justice legislation;[338] legislation making it impossible for same-sex partners to adopt each other's children prior to the legalisation of same-sex marriages;[339] legal framework

[332] Cour de Cassation *Rapport Annuel 2005* note 130 at 416.
[333] Akandji-Kombé 2012 note 20. On a potential dialogue between the two courts, see Cour de Cassation (2015) *Conseil d'Etat: rencontre à la Cour de cassation* and (2014) *Lancement des travaux de groupes de reflexion visant à développer les relations institutionnelles de la Cour* (both online).
[334] For general info, see A Gouttenoire 'Cohérence des contrôles de conventionnalité et de constitutionnalité en matière de droit des personnes et de la famille' 2013 (2) *Les Nouveaux Cahiers du Conseil Constitutionnel* 63.
[335] R de Gouttes *Le dialogue des juges,* Paper presented at the Colloque du Cinquantenaire du Conseil Constitutionnel, 3 November 2008 (online).
[336] For example, it considered *accouchement sous X* and adoption by homosexual couples to be 'questions of society' best left to the legislature (F Chénedé and P Deumier 'L'oeuvre du Parlement, la part du Conseil constitutionnel en droit des personnes et de la famille' 2013 (39) *Nouveaux Cahiers du Conseil Constitutionnel* (online journal)).
[337] J Hauser 'Le Conseil constitutionnel et le droit de la famille' 2004 *Cahiers du Conseil Constitutionnel* 16.
[338] For example, the introduction of minimum sentencing for child offenders and adult sentences for juveniles in certain situations (Decision 2007-554 DC, 9 August 2007); the creation of correctional tribunals for children, whose panels include only one judge specialised in juvenile matters (Decision 2011-635 DC, 4 August 2011). Decision 2011-147 QPC, 8 July 2011 (cumulating the instruction and adjudication by judges dealing with juvenile offenders was considered to breach the impartiality principle) and Decision 2012-272 QPC, 21 September 2012 (fast-track procedure for the prosecution of juvenile offenders considered constitutional despite the risk that insufficient information about the child could be collected).
[339] Decision 2010-39 QPC, 6 October 2010.

applicable to accouchement *sous X*;[340] or stricter requirements for accessing child benefits for the children of legal migrants.[341] These decisions removed certain incentives for the administrative and judicial courts to question the conformity of domestic law with the Convention, considering that the latter has a lower domestic status than that of the Constitution.

The approaches of the Constitutional Council and the courts to common matters may differ, potentially creating tensions between the constitutional and ordinary jurisprudence. For the time being, relying on the CRC, courts have sometimes distanced themselves from the views of the Constitutional Council and delivered child-focused decisions by using gaps in the constitutional jurisprudence,[342] and by appropriating the application of article 3(1) of the CRC,[343] which, in the view of this researcher, remains the domain of the courts. The view that a 2013 decision by the Constitutional Council 'has raised the notion of the best interests of the child to constitutional level'[344] is not subscribed to here. First, in its decision, the Council refers to the domestic formulation of the concept – the 'interest of the child' – and not to the 'best interests of the child'.[345] Second, paragraph 10 of the Preamble to the 1946 Constitution, which in the interpretation of the Council includes that adoption must be in the interest of the child, is limited to the protection of the individual in a family context. It reads: '[t]he Nation shall provide the individual and the family with the conditions necessary to their development'. Combined with the limited ambit of the decision, this seems to confine the recognition of a constitutional value to the interest of the child to the adoption context (or at most in family-related issues). A constitutional status for the best interests of the child in *all* matters concerning or affecting children is still to be recognised.

The jurisprudence of the ECJ and the ECtHR together with the indirect pressure of their more effective implementation mechanisms,[346] have had an impact[347] on the direct application of international treaties, including the CRC. In 2011, for example, the full Court of Cassation

[340] Decision 2012-248 QPC, 16 May 2012.
[341] Decision 2005-528 DC, 15 December 2005, asserts the entitlement of the legislature to impose restrictions on the access to child benefits based on the method of entry of the child into France (especially paras 16-18). The Committee, however, recommended that '[a]llocations to families should not be subject to the modalities of entry of the child onto the territory of France' (*Concluding Observations: France* 2004 para 47).
[342] The Constitutional Council jurisprudence covered only the legal position in relation to the mother of the children born *sous X*. This permitted the Court in *Benjamin* to rely on the CRC and address the legal position in relation to the fathers of these children.
[343] Gay (2006 note 223) remarked that when assessing the constitutionality of legislation which was found to be inconsistent with the CRC by the Council in *L'Association Aides*, at no time did the Constitutional Council give independent attention to children as a distinct group affected by the law. It is reminded here that the recognition of a special treatment to children was the essence of the reasoning of the Council in that case.
[344] Decision 2013-669 DC, 17 May 2013. Position expressed by the Défenceur des Droits (2015) *Report by the Defender of Rights to the United Nations Committee on the Rights of Children* at 7 (online), and commended by the Committee on the Rights of the Child (*Concluding observations on the fifth periodic report of France* 2016 para 25).
[345] Decision 2013-669 DC, 17 May 2013 para 53.
[346] C Nivard 'L'effet direct de la Charte sociale européenne devant les juridictions suprêmes françaises' 2012 (28) *Revue des Droits et Libertés Fondamentaux* (online); Dubouis 2006 note 11 para 5.
[347] It is rare to find references to case law (national or international) in the judgments of the two courts (see, nonetheless, reference to ECJ judgments in Ass., No. 11-17520, 2013; Ass., No. 11-18947, 2013). The influence of the reasoning of the ECtHR and ECJ is deduced from a corroboration of the reasoning of the courts, outcome of the decisions and reports presented by reporting judges, *commissaires public* and general advocates (and sometimes the published arguments of the parties).

declared that state members are bound by the decisions of the ECtHR, regardless of whether the state has amended its legislation or not.[348] There is concern about adverse decisions from the European courts,[349] and an 'interest' by the courts and the state to avoid decisions against France.[350] There are in-built political, legal and administrative mechanisms that assess the compatibility of proposed legislation with the ECHR and its jurisprudence.[351] These strong institutional safeguards are not replicated in the CRC context.[352] As mentioned in part 3.2, concerns about ECtHR judgments against France have contributed to the jurisprudential shift of the Court of Cassation in 2005, and continue to shape the jurisprudence of the Court.[353] The Court eventually applied article 3(1) influenced by the ECtHR jurisprudence which integrated this standard.[354] The Council is equally astute to the European jurisprudence. The reasoning in *GISTI and FAPIL* 2012 is 'manifestly' influenced by the practice of the ECJ,[355] which 'nourishes and is a useful reference point regarding this common notion [direct application]'.[356] Notably, the Committee is absent from this 'influential block',[357] despite its repeated recommendations for a more extensive direct application of the CRC in France.

The operation of the CRC at the intersection of multiple jurisdictions and legal standards can be illustrated with the jurisprudence on *accouchement sous X* and surrogacy.

Children born *sous X* have no filiation established with their mother and her family. This raises concerns under article 7 of the CRC (the child's right to know one's parents), and the Committee found it to be contrary to the rights of children.[358] The ECtHR, however, decided that the practice falls within the state's margin of appreciation and that the law provided sufficient guarantees that upon reaching majority, a child can access information regarding his/her filiation.[359] In a challenge to the constitutionality of the legislative framework for births *soux X*, the Constitutional Council decided that

[348] Ass., No. 10-17049, 2011.
[349] Dubouis 2006 note 11 para 5.
[350] Lambert Abdelgawad and Weber 2008 note 20 at 129-130. See, for example, the extensive references to the jurisprudence of the ECtHR in a recent report of the Court, dedicated to the role of judges in a globalised world (Cour de Cassation (2018) *Étude Annuelle 2017: Le juge et la mondialisation dans la jurisprudence de la Cour de cassation* (online)).
[351] Article 8 of the Loi organique no 2009-403 du 15 avril 2009 relative à l'application des articles 34-1, 39 et 44 de la Constitution requires an impact assessment of bills, amongst others, in relation to European law, but not in relation to the CRC. Further, Lambert Abdelgawad and Weber (2008 note 20 at 154-155) mentioning dissemination of information about the ECtHR jurisprudence, teaching, and scholarship.
[352] On the absence of mechanisms to assess legislative initiatives against the CRC, see Defender of Rights 2015 note 344 at 7.
[353] Advocate general Maynial (2008 note 252 at 38) was explicit that the Court had to anticipate the position of the ECtHR, if it was to avoid later censure.
[354] Laurent-Boutot 2006 note 7 at 71-72.
[355] Slama 2012 note 18. Also, Latty 2015 note 10 at 685.
[356] Dumortier 2012 note 18; Taxil 2007 note 37 at 165.
[357] Occasionally, however, reports presented to the courts by judges may refer to its work (Coutou and Vassallo *Reports* 2007 note 143). The Committee and its output are not mentioned in the Court's *Étude Annuelle 2017*. A search on *Legifrance* (13 November 2018) shows that the Court and the Council have never considered the Committee's views in its judgments. Both courts have, however, considered the views of the Human Rights Committee against France, deciding that they are not binding on the state (CE, No. 239559, 2003; CC, No. 14REV017, 2015).
[358] *Concluding observations: France* 2009 para 43.
[359] *Odièvre* para 49.

> the legislator intended to avoid pregnancies and births susceptible of creating a danger for the health of both the mother and the child, and to prevent infanticide or child abandonment; [the legislator] also pursued the constitutional objective to protect [their] health[360]

and struck therefore a correct balance between the interests of the mother and those of the child.[361] However, using a gap in the law (which did not address the situation of the fathers whose children were born *sous X*) and applying article 7(1) of the CRC, the Court gave recognition to the filiation of a child with the father who recognised his child before the child's birth, while maintaining the maternal filiation unknown.

Children born through surrogacy to French (commissioning) parents overseas have faced difficulties (in terms of obtaining travel documents, registration of birth in France, recognition of filiation with the French commissioning parents, and nationality) as a result of surrogacy agreements being considered void under the French law.[362] Until 2015, the Court refused to allow the registration of birth documents issued in countries where surrogacy is permitted and to recognise the filiation of children with the commissioning parents.[363] The Court reasoned in a first phase that the refusal to transcribe the foreign birth documents did not violate article 3(1) because the children had the filiation established according to the foreign law and were not prevented from living with the commissioning parents in France;[364] in the second phase it decided that article 3(1) of the CRC (and article 8 of the ECHR) cannot be usefully invoked to recognise legal effects of surrogacy agreements which were fraudulently concluded against the French law.[365] By referring to the *l'etat du droit positif*[366] (or, 'the existing positive law') to justify its position, the Court deferred to the legislature, and refused to assess the law against article 3(1) or to engage in an *in concreto* application of article 3(1), as done by the Council of State.[367] A full Court changed its position but only as a result of the ECtHR judgments in *Menesson v France*[368] and *Labassée v France*.[369] It then decided (narrowly following the above judgments) that the birth certificate of a child born through surrogacy overseas and connected biologically to a French national and recognised by him is to be transcribed in the French civil registers, if there is no suspicion that the act is irregular. A refusal to register regular foreign documents would constitute a violation of article 8 of the ECHR.[370] In 2017, the Court decided that denying the adoption of a child born through surrogacy by the spouses of the commissioning parent, despite the legal conditions for adoption being met, amounted to a

[360] Decision 2012-248 QPC, 16 May 2012 para 6.
[361] Decision 2012-248 QPC, 16 May 2012 para 8.
[362] According to article 16-7 read with article 16-9 Civil code, all surrogacy agreements are void for being contrary to the public order.
[363] For further discussion, see A Gouttenoire 'Surrogacy agreements: at last, the primacy of the child's interests' 2015 (1) *Montesquieu Law Review* 103 at 106.
[364] Civ 1, No. 09-66486, 2011; Civ 1 No. 09-17130, 2011. See B Weiss-Gout 'Trois décisions, une même deception' 2011 (146) *Gazette du Palais* 7.
[365] Civ 1 No. 12-18315, 2013.
[366] Civ 1 No. 09-66486, 2011; Civ 1, No. 10-19053, 2011; Civ 1, No. 12-18315, 2013.
[367] Gouttenoire 2012 note 105.
[368] Application no. 65192/11, 26 June 2014.
[369] Application no. 65941/11, 26 June 2014. See comments by Gouttenoire 2015 note 363 and F Chénedé 'Les arrêts Mennesson et Labassée ou l'instrumentalisation des droits de l'homme' 2014 *Recueil Dalloz* 1797.
[370] Ass., No. 14-21.323, 2015 and No. 15-50002, 2015.

violation of article 3 of the CRC and article 8 of the ECHR.[371] In 2018, the Full Court sent a request for an advisory opinion to the ECtHR, in which it asked whether the refusal to register the foreign birth document, which indicated as the mother of the child the commissioning mother went beyond France's margin of appreciation in relation to article 8 of the ECHR; and whether the possibility of adoption by the commissioning mother satisfied the requirements of the same article.[372]

The operation of the CRC at the intersection of different court jurisdictions and legal orders has consequences for the CRC. The Constitutional Council and the ECtHR do not apply the CRC directly and do not assess the compatibility of national laws with the CRC. The monopoly over the direct application of the CRC therefore allows the Court of Cassation and the Council of State to have a distinctive jurisprudential voice regarding the rights of children, and to extract maximum normative returns from the application of the Convention. At times, the courts defended their privileged position in relation to the application of the CRC. They made clear that the interpretation and application of the CRC is under their jurisdiction, and not that of the Constitutional Council,[373] a position readily agreed with by the latter.[374] In 2015, when it changed its jurisprudence on surrogacy, the Court did so by applying article 8 of the ECHR only, although in the past it utilised article 3(1) in its reasoning in surrogacy cases. While this may be just an oversight, it may also be a careful defence of one's turf: while it deferred to the view of the ECtHR in terms of article 8 of the ECHR, it held on to its view on article 3(1) of the CRC.

A second positive aspect is that the interaction with multiple jurisdictions reveals the multiple normative facets of the CRC. In the light of their distinct jurisdiction, different courts have different opportunities to give effect to the CRC. For example, the application of the CRC by the Court did not give *makfouls* the opportunity to be adopted by *kafils*, but the Council application of article 3(1) resulted in them being entitled to access social grants and French travel documents.[375] Further, while the Court resisted recognising the filiation between French commissioning parents and children born through surrogacy overseas, the Council applied article 3(1) so as to allow children to obtain the documents necessary to join the commissioning parents in France.[376]

There is, however, a negative side to this interaction – the jurisprudence of other relevant institutions may circumscribe the potential benefits of the CRC. This is reflected especially in the position on births *sous X*, where the convergence of jurisprudence from the Court of Cassation, the Constitutional Council and the ECtHR maintained a practice problematic from a children's rights perspective. Similar effects have arisen from the convergence of the CC and ECtHR practice in relation to denial of access to social grants to children who joined their

[371] Civ 1, No. 16-16455, 2017.
[372] Ass., No. 10-19053, 2018.
[373] In 2012, the Court refused to send to the Constitutional Council a QPC in which it was argued that certain statutory provisions were contrary to article 3(1), reasoning that the mentioned article 'was not part of the rights and freedoms guaranteed by the Constitution' (Soc, No. 11-40090, 2012).
[374] Decision 2013-669, 17 May 2013 para 57.
[375] See discussion in part 3.4.
[376] Ibid.

parents to France without following the procedure of family reunification.[377] In both matters, the Committee found the domestic law and practice inconsistent with the CRC, but its position has not been considered.

3.7 Conclusion

Direct application has been central for the judicial effect of the CRC in France and has led to much controversy. The courts justified their reluctance through various features of the Convention – its reference to further implementation measures, its creating only obligations between states rather than individual rights, and the absence of precision of its norms. With the courts accumulating a better understanding of the Convention and its articulation with domestic law, these reasons have either been abandoned or given less importance. Although the number of provisions directly applied remains limited, courts now apply the CRC frequently to a great variety of legal issues in both private and public law.

The impact of the application of the CRC is mixed. In the absence of an extensive constitutional protection for children's rights and a consolidated children's rights statute, the supra-legislative status of the CRC and its vocation to be applied directly have raised hopes about the impact of the Convention. 'High-end' returns of direct application – providing benefits beyond those provided by domestic law and sanctioning inconsistent domestic norms – are seldom obtained. The impact of direct application is marked by the dominance of article 3(1). Its general wording has allowed the courts to consider under its umbrella the substance of rights unlikely to be otherwise directly applied by the courts. At the same time, it created a 'comfort zone' for the courts, allowing them to avoid deciding on the direct application of other CRC provisions.

Despite potential concerns, the CRC has added value to the judicial protection of children's rights by enabling the courts to make child-focused decisions not justifiable under other legal instruments. The Convention has made the rights and interests of children more visible in judicial decisions, and it prompted courts and parties to conceptualise legal issues in a manner that considers them. This may explain perhaps the focus on article 3(1), which the courts have come to approach as *the* provision which legally justifies considering the rights of children and giving them a special legal treatment. Not all judgments reflect a meaningful engagement with the CRC. Symbolic, or superficial (if one is to use a negative term), application shows a desire to integrate the CRC in judicial reasoning, preserving therefore the judicial habit of relying on the Convention.

The factors that influence the direct application of the CRC are not easy to identify because of the brevity of judgments.[378] The narrow approach to direct application and the absence of another normative outlet for the CRC (such as its use for statutory interpretation purposes) have

[377] See note 144 and accompanying text.
[378] Some judges expressed concern about the transparency and accessibility of their judgments (P Deumier (2015) *Repenser la motivation des arrêts de la Cour de cassation? Raisons, identification, réalisation* (online); Ancel 2005 note 125; Canivet 2006 note 241 at 10; Louvel 2015 note 46), the preservation of their relevance as human rights protectors (Louvel 2015 note 46) and as participants in the global legal discourse (Deumier 2015 above).

limited the impact of the Convention. Questions have been raised about the CRC containing 'the seeds of its own non-application',[379] such as its reference to implementation measures in article 4, the alleged lack of precision and clarity of its provisions, or many of its provisions being addressed to the states. However, these CRC-related factors have either been abandoned or have decreased in importance, or are insufficiently explained by the courts to constitute a persuasive explanation for the limited direct application. One should therefore be cautious to burden the CRC with full responsibility for its non-application. This study shows that factors outside the CRC have a bearing on its direct application. Context (legal and factual), judicial policy/opportunity considerations and the interaction with the jurisprudence of other institutions are functionally ambivalent factors that can either facilitate or hinder the direct application of the CRC.

The French jurisprudence has been dynamic and its trajectory has been influenced by courts gradually acquiring a better understanding of the Convention and factors outside the CRC. So far, the evolution of the case law has been in a positive direction. The ratification by France of the Optional Protocol on individual communications in 2016[380] may assist this positive trend. France may have to confront the international consequences of its courts denying direct effect to many CRC provisions. Findings of violation of Convention rights by the Committee may stimulate legal reform or may encourage the courts to be more receptive to the CRC standards and the position of the Committee. The courts may need to be aware of the Committee's views and anticipate its position, should they wish to avoid a finding of violation against France. Exposure to the Committee's views may present the courts with an alternative (persuasive)[381] discourse to that currently tapped into (i.e. the jurisprudence of the ECtHR, ECJ, Constitutional Council), and open opportunities for further development in the courts' application of the CRC.

[379] Khaïat 2010 note 249 at 22.
[380] Note 123.
[381] Both courts discussed here have indicated that they do not consider the views of the Human Rights Committee binding, and it will likely have the same position in relation to the CRC Committee (note 357).