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## Exposé

Working title

„Analysis of facilitators and blockages in the transition from residential to family-based care for children with disabilities in Austria, Serbia and South Africa“

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## Context and state of research

It is estimated that approximately 5.5 million children are living in institutional settings such as orphanages, residential homes and group homes globally<sup>1</sup>. Although there is no single definition of institutional settings, the World Health Organisation appropriately described them as places where “residents are isolated from the broader community and/or compelled to live together; residents do not have sufficient control over their lives and over decisions which affect them; and the requirements of the organisation itself tend to take precedence over the residents' individualised needs”<sup>2</sup>. Theoretical considerations of the inadequacy of institutional care and other forms of care and treatment for persons with disabilities started approximately half a century ago with the development of the so-called “social model of disability”<sup>3</sup>, and monumental works of Erving Goffman<sup>4</sup> and Michel Foucault<sup>5</sup>. The social model recognized that disability becomes through the interaction of a person who has an impairment (physical, sensory, mental) with his / her surroundings, and that any form of segregation, such as institutional care, is a form of societal oppression<sup>6</sup>. Radical at the time of its beginnings, the social model served as a foundation on which the “human rights model of disability” was developed and codified through the process of drafting and the adoption of the Convention on the Rights of Persons with Disabilities (CRPD)<sup>7</sup>. On the other hand, the Convention on the Rights of the Child (CRC) is the most authoritative treaty concerning children’s rights and overlaps with the CRPD in regulating the rights of children with disabilities. These two treaties, as well as their treaty bodies and other UN human rights mechanisms and procedures, have introduced binding and non-binding standards, that have

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<sup>1</sup> Chris Desmond et al., "Prevalence and number of children living in institutional care: global, regional, and country estimates," *The Lancet Child & Adolescent Health* 4, no. 5 (2020).; Manfred Nowak, "UN Global Study on Children Deprived of Liberty," *Geneva: United Nations* (2019).

<sup>2</sup> *World Report on Disability*, World Health Organization and the World Bank, 2011. p. 305.

<sup>3</sup> Tom Shakespeare, "The social model of disability," *The disability studies reader 2* (2006).

<sup>4</sup> Erving Goffman, *Asylums: Essays on the social situation of mental patients and other inmates* (AldineTransaction, 1968).

<sup>5</sup> Michel Foucault, *The birth of the clinic* (Routledge, 2012); Michel Foucault, *Madness and civilization* (Routledge, 2003).

<sup>6</sup> Shakespeare, "The social model of disability."; Tom Shakespeare and Nicholas Watson, "The social model of disability: an outdated ideology?," in *Exploring theories and expanding methodologies: Where we are and where we need to go* (Emerald Group Publishing Limited, 2001); Tom Shakespeare and Nicholas Watson, "Defending the social model," *Disability & Society* 12, no. 2 (1997).

<sup>7</sup> Theresia Degener, "Disability in a Human Rights Context," *Laws* 5 (2016). See also: Anna Lawson and Angharad E Beckett, "The social and human rights models of disability: towards a complementarity thesis," *The International Journal of Human Rights* 25, no. 2 (2021).

marked institutions an inadequate form of care and the deinstitutionalisation (DI) necessary<sup>8</sup> in virtually all states parties. Arguably, the most notable non-binding standards are found in general comments of the United Nations Committee on the Rights of the Child (CRC Committee) and the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee), as well as the UN Human Rights Council (HRC) resolutions. The UN General Assembly adopted a resolution that promoted the prevention and “avoidance of necessary institutionalisation” and called for the elimination of institutions in 2009<sup>9</sup>, and again in 2019 further elaborating the right to family environment for children with disabilities and listing out alternatives to biological family<sup>10</sup>. The CRC Committee, in one of its general comments, called for a transformation of institutions for children with disabilities and for limiting the placement in institutions to the last resort<sup>11,12</sup>, while the CRPD Committee’s General Comment No. 5 asserted that institutions of any size, large or small, are not an adequate form of placement, and are particularly dangerous for children for whom there is no acceptable alternative to living in a family<sup>13</sup>.

In spite of some divergences, rather than conflicts<sup>14</sup>, between the CRC and the CRPD and the respective treaty bodies in regulating and approaching the issue of residential care, they agree that DI is a much-needed process everywhere. This discord is based on the CRC Committee’s conditional acceptance of the long-term residential care as a last resort measure, and when it is provided in small-size facilities, whilst the CRPD Committee strongly advocates for absolute abolishment of long-term residential care for all children. Although both bodies call for DI, such fragmentation of standards may have a negative impact on states’ readiness to implement the treaties, which will be explored in this study.

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<sup>8</sup> UN General Assembly, Guidelines for the Alternative Care of Children, 64 session, 24 February 2010, A/RES/64/142, para. 23. UN Committee on the Rights of the Child, General Comment No. 9: The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, para. 47. UN Committee on the Rights of Persons with Disabilities, General Comment No. 5: Living Independently and being included in the community, 27 October 2017, CRPD/C/GC/5, para. 12 & 16. UN Committee on the Rights of Persons with Disabilities, General Comment No. 6: Equality and non-discrimination, 26 April 2018, CRPD/C/GC/6, para. 38 & 57.

<sup>9</sup> Human Rights Council, Guidelines for the Alternative Care of Children, A/HRC/RES/11/7, 2009. ¶ 132.

<sup>10</sup> Human Rights Council, Rights of the child : empowering children with disabilities for the enjoyment of their human rights, including through inclusive education, A/HRC/RES/40/14, 2019. ¶ 16.

<sup>11</sup> Committee on the Rights of the Child, General comment no. 9 (2006), The rights of children with disabilities, CRC/C/GC/9, 2006. ¶ 47.

<sup>12</sup> Eric Rosenthal, "The right of all children to grow up with a family under international law: implications for placement in orphanages, residential care, and group homes," *Buff. Hum. Rts. L. Rev.* 25 (2018).

<sup>13</sup> Committee on the Rights of Persons with Disabilities, General comment no. 5 (2017) on living independently and being included in the community, CRPD/C/GC/5, 2017. ¶ 16(c).

<sup>14</sup> C Wilfred Jenks, "The conflict of law-making treaties," *Brit. YB Int'l L.* 30 (1953). p. 425.

The abovementioned developments in the international human rights law were informed by a large number of studies from disciplines such as psychology and childhood development<sup>15</sup>, still, the evidence of harm was often obtained through human rights monitoring and made available publicly by NGOs and media<sup>16</sup>. Today, the institutional care of children is seen to increase the risks of violation of many civil, economic, social and cultural rights and human rights principles, such as the right to be free from torture, inhuman and degrading treatment, the right to personal liberty<sup>17</sup>, the right to a highest attainable level of health, the right to education, the right to full and harmonious development of a child, the right to live in a family environment<sup>18</sup>, the respect for evolving capacities of children with disabilities, the non-discrimination, full and effective participation and inclusion in society, etc<sup>19</sup>. Therefore, a failure to deinstitutionalise children with disabilities is the failure of states to comply not only with the CRC and the CRPD, but with different norms of other core international human rights treaties too.

Recent studies have attempted to uncover the magnitude of this problem and rendered significant quantitative data across a large number of countries<sup>20</sup>. After an initial analysis of these studies, an overwhelming impression is that large numbers of children with disabilities are still institutionalised in almost all countries that were included in the studies, regardless of the countries' type of legal tradition, current and historical type of political regime, population, regional affiliation<sup>21</sup>, participation in the regional human rights mechanisms, etc. In one study,

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<sup>15</sup> Mary Dozier et al., "Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association," *Am J Orthopsychiatry* 84 (2014); M. H. van IJzendoorn et al., "Institutionalisation and deinstitutionalisation of children 1: a systematic and integrative review of evidence regarding effects on development," *Lancet Psychiatry* 7, no. 8 (Aug 2020); Marinus H. van IJzendoorn et al., "Children in Institutional Care: Delayed Development and Resilience," *Monographs of the Society for Research in Child Development* 76, no. 4 (2011).

<sup>16</sup> For example: Dragana Ćirić Milovanović, *The Hidden and Forgotten : Segregation and neglect of children and adults with disabilities in Serbia*: MDRI-S, 2013; Human Rights Watch, *It is My Dream to Leave This Place : Children with Disabilities in Serbian institutions*: Human Rights Watch, 2016.

<sup>17</sup> Human Rights Committee, General comment no. 35 : Article 9, Liberty and security of person : Human Rights Committee, CCPR/C/GC/35, 2014. ¶ 5 & 62.

<sup>18</sup> Rosenthal, "The right of all children to grow up with a family under international law: implications for placement in orphanages, residential care, and group homes."

<sup>19</sup> Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, A/HRC/28/68, 2015. ¶ 16; Human Rights Council, Rights of persons with disabilities : report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/40/54, 2019. 16(c)

<sup>20</sup> Desmond et al., "Prevalence and number of children living in institutional care: global, regional, and country estimates." Nowak, "UN Global Study on Children Deprived of Liberty."

<sup>21</sup> With an exception of North America which has the lowest prevalence of institutionalisation. See more: Desmond et al., "Prevalence and number of children living in institutional care: global, regional, and country estimates."

authors found that high-income countries had the largest, whilst the low-income countries had the lowest prevalence of institutionalisation<sup>22</sup>.

The discord between states' willingness to ratify on one side, and the readiness and ability to comply with international human rights treaties on the other, has been well documented and explored for different human rights instruments and states parties<sup>23</sup>. Still, there is a noticeable lack of academic studies in regard to the mechanisms of compliance of states parties to the CRC and the CRPD, and more specifically on the issue of children with disabilities in residential care<sup>24</sup>. Those are some of reasons why Lawson called for conducting multi-disciplinary studies to detect "facilitators and blockages" when implementing the CRPD in domestic contexts<sup>25</sup>. Several studies on the impact of CRPD on courts' practices have been published, although none of them have captured cases involving institutionalised children with disabilities<sup>26</sup>. A recent article from Rosenthal explores "the right to grow up in a family" under the international law, focusing on children with disabilities and asserting that the CRPD provides higher standards for the protection of rights of children with disabilities than the CRC, attributing this to the evolving nature of international human rights law<sup>27</sup>. Mladenov and Petri wrote a critique about DI processes in post-socialist countries, focusing on the "re-institutionalisation" practices reflected in the substitution of large, traditional institutions for smaller residential care that replicates old culture<sup>28</sup>. A large number of academic and advocacy-oriented studies have been done on the topic of implementation of children's rights, some of them focusing on the impacts of strategic litigation on the right to education, access to justice, child labour, etc., still hardly any legal studies focused on the rights of children with disabilities and the problems of institutionalisation. Recently, the Lancet published several important articles on institutionalisation and DI of disabled and non-disabled

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<sup>22</sup> Ibid.

<sup>23</sup> A. Hathaway Oona, "Why Do Countries Commit to Human Rights Treaties?," *The Journal of conflict resolution* 51 (2007); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York, 2009); Powell Emilia Justyna and K. Staton Jeffrey, "Domestic Judicial Institutions and Human Rights Treaty Violation," *International studies quarterly* 53 (2009).

<sup>24</sup> Christopher McCrudden, "Human rights theory and comparative international law scholarship," (2018). p. 8 - 9.

<sup>25</sup> Anna Lawson, "Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?," *Journal of Law and Society* 47, no. 4 (2020).

<sup>26</sup> Lisa Waddington and Anna Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, ed. Anna Lawson and Lisa Waddington (Oxford, 2018).

<sup>27</sup> Rosenthal, "The right of all children to grow up with a family under international law: implications for placement in orphanages, residential care, and group homes."

<sup>28</sup> Teodor Mladenov and Gabor Petri, "Critique of deinstitutionalisation in postsocialist Central and Eastern Europe," *Disability & Society* 35, no. 8 (2020).

children, by a group of authors who were commissioned by the Lumos Foundation, an NGO that works on childcare reforms in central and eastern Europe<sup>29</sup>. Countless NGOs' publications have been published about the DI processes in Central and Eastern Europe in the past 20 years, setting this topic predominantly in the sphere of non-governmental organisations' advocacy. Some of these publications are human rights monitoring reports, alternative reports to the UN treaty bodies, policy and position papers, etc. Other NGOs' publications analysed DI practices such as those written by the European Expert Group, and therefore are valuable sources of information about DI in Europe for purposes of this research<sup>30</sup>. Apart from statistical data on children, Unicef provides reports and analyses of DI around the world which will be a frequent point of reference in this study.

### Austria, Serbia and South Africa

After careful consideration, Austria, Serbia and South Africa stand out as countries whose examination will produce illuminating findings, and will make a meaningful contribution to the understanding of the problems uncovered in the UN Global Study on Children Deprived of Liberty<sup>31</sup>. A two-phased approach of country selection was applied<sup>32</sup>, namely, the collection of secondary quantitative data on countries concerning the children with disabilities in institutions was conducted to identify those with contrasting numbers of institutionalised children and different shares of children with disabilities among the population of all children in institutions. Secondary sources, particularly the UN Global Study<sup>33</sup>, as well as a recent study on the prevalence of institutionalisation of children<sup>34</sup>, together with a UNICEF Transmonee database<sup>35</sup>, were used. In the next phase the following set of inclusion criteria was set: a) ratification of both the CRC and

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<sup>29</sup> Desmond et al., "Prevalence and number of children living in institutional care: global, regional, and country estimates."; van IJzendoorn et al., "Institutionalisation and deinstitutionalisation of children 1: a systematic and integrative review of evidence regarding effects on development."

<sup>30</sup> Jan Šiška and Julie Beadle-Brown, *Report on the transition from institutional care to community-based services 27 EU member states. Research report for the European Expert Group on Transition from Institutional to Community-based Care.*, 2020.

<sup>31</sup> Nowak, "UN Global Study on Children Deprived of Liberty."

<sup>32</sup> Robert K. Yin, *Case study research and applications : design and methods*, Sixth edition. ed. (Los Angeles: SAGE, 2018). p. 146.

<sup>33</sup> Nowak, "UN Global Study on Children Deprived of Liberty."

<sup>34</sup> van IJzendoorn et al., "Institutionalisation and deinstitutionalisation of children 1: a systematic and integrative review of evidence regarding effects on development."

<sup>35</sup> Unicef Innocenti Research Centre, "Transformative Monitoring for Enhanced Equity (TransMonEE)", 2021, <http://transmonee.org/database/>.

the CRPD; b) existence of concluding observations by the CRC and the CRPD committees on the implementation of treaties in states parties; c) existence of institutional care for children in the past and/ or present (some countries have never developed a system of institutional care, due to underdeveloped social care systems, and as such are not eligible for an inquiry on DI); d) availability of data, and/or existence of national mechanisms to access data on childcare; e) each country is situated in a different world region to ensure a wider scope of the study, as a form of a follow-up on the UN Global Study on Children Deprived of Liberty.

Amongst the selected countries a high level of diversity exists concerning their social care and legal systems, historical and present political and economic systems, levels of human development and inequality, as well as different practices of institutionalisation. All three states are parties to the CRC and the CRPD and the committees to both treaties have published reports containing observations and recommendations to the states on the progress in the implementation of these treaties<sup>36</sup>. The examination of these countries should contribute to the understanding of how the CRC and the CRPD norms concerning DI of children with disabilities are implemented, and what are the main blockages and facilitators of these processes in different legal, political and social contexts.

Austria is a high-income<sup>37</sup> EU member state, with a very high development index<sup>38</sup> and stable democratic governance since the Second World War. It is a member of the Council of Europe, legally subject to the European Convention on Human Rights<sup>39</sup>, and the Revised European Social Charter<sup>40</sup>. Serbia is a post-socialist, upper-middle income<sup>41</sup> country with a very high human development index<sup>42</sup>, and it is a state candidate for EU membership. It has often been categorized as a democracy in transition from a socialist, one-party dictatorship that dissolved during the 1990s in a series of armed conflicts, which makes it a post-conflict country too. Serbia is a member of the Council of Europe and party to the Revised European Social Charter. One generation beyond

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<sup>36</sup> *Concluding observations on the combined fifth and sixth periodic reports of Austria*, Committee on the Rights of the Child, CRC/C/AUT/CO/5-6, 2020. & *Concluding observations on the combined second and third periodic reports of Serbia*, Committee on the Rights of the Child, CRC/C/SRB/CO/2-3, 2017. & *Concluding observations on the second periodic report of South Africa*, Committee on the Rights of the Child, CRC/C/ZAF/CO/2\*, 2016.

<sup>37</sup> The World Bank Group, "World Bank Open Data", 2021, <https://data.worldbank.org/>.

<sup>38</sup> United Nations Development Programme, "Human Development Report 2020 : The Next Frontier Human Development and the Anthropocene," (2020).

<sup>39</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

<sup>40</sup> Council of Europe, The European Social Charter (revised), 1996.

<sup>41</sup> "World Bank Open Data", 2021.

<sup>42</sup> Programme, "Human Development Report 2020 : The Next Frontier Human Development and the Anthropocene."

the Apartheid, South Africa is an upper-middle income country<sup>43</sup>, a member of the African Union, party to the African Charter on Human and Peoples' Rights<sup>44</sup> and the African Charter on the Rights and Welfare of the Child<sup>45</sup>, with a high human development<sup>46</sup>, and some of the world's highest levels of inequality<sup>47</sup>. All three states have ratified both the CRC and the CRPD, and the Optional Protocol to the CRPD<sup>48</sup> on a communications procedure.

Although expressing a few commitments to ensure independent living and inclusion in the community for persons with disabilities<sup>49</sup>, which according to the CRPD Committee should encompass the realization of the life in the family for children with disabilities<sup>50</sup>, Austria doesn't have any strategic documents focused specifically on DI or children with disabilities<sup>51</sup>. According to a non-governmental organisation working in Austria<sup>52</sup>, 8000 disabled and non-disabled children were in some kind of residential care at the end of 2017, which suggests an overall very high rate of institutionalisation of children in this EU country, however according to Beadle-Brown, the country reported that the DI of children is nearly finished<sup>53</sup>. Such contrasting claims are most probably a consequence of the difference in defining institutional care, which will be duly addressed in the study. On the other hand, both South Africa and Serbia have fairly low rates of institutionalisation of children as reported in the UN Global Study<sup>54</sup>, however they have very different shares of children with disabilities among the population of all children in institutions (20,2% and 77% respectively)<sup>55</sup>. What causes such contrasting levels of institutionalisation of children with disabilities and what determines different paths to DI that these countries take, are some of the questions that will be addressed in this study.

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<sup>43</sup> "World Bank Open Data", 2021.

<sup>44</sup> African Union, African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 1986.

<sup>45</sup> Organization of African Unity, African Charter on the Rights and Welfare of the Child, CAB/LEG/153/Rev. 2, 1999.

<sup>46</sup> Programme, "Human Development Report 2020 : The Next Frontier Human Development and the Anthropocene."

<sup>47</sup> "World Bank Open Data", 2021.

<sup>48</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, Doc.A/61/611, UNTS vol. 2518, 283. 2006.

<sup>49</sup> Beadle-Brown, *Report on the transition from institutional care to community-based services 27 EU member states. Research report for the European Expert Group on Transition from Institutional to Community-based Care.* p. 17.

<sup>50</sup> CRPD/C/GC/5, 2017.

<sup>51</sup> Petra Fliieger and Ursula Naue, The Academic Network of European Disability Experts (ANED), *Country report on Living independently and being included in the community - Austria*, 2019. p. 4.

<sup>52</sup> FICE Austria, *2018 Country fact sheet - Austria: Opening Doors for Europe's Children*, 2018.

<sup>53</sup> Beadle-Brown, *Report on the transition from institutional care to community-based services 27 EU member states. Research report for the European Expert Group on Transition from Institutional to Community-based Care.* p. 17.

<sup>54</sup> Nowak, "UN Global Study on Children Deprived of Liberty." p. 503.

<sup>55</sup> *Ibid.* p. 190.

Comparison of different paths and outcomes of DI in Austria's and Serbia's civil law systems, and South Africa's simple mix of civil and common law tradition<sup>56</sup>, will generate a valuable interrogation of the domestication of international human rights standards, as well as the conceptualization and implementation of the DI processes in different legal traditions. The meaningful comparability of the chosen countries' legal systems is warranted, not only by the common international human rights framework, but also by the existence of a common denominator contained in the "factual situation" that domestic legal systems are supposed to solve<sup>57</sup>. This factual situation is the institutionalisation of children with disabilities.

All three states have received external funding in the past to reform or improve alternative care for children and adults with and without disabilities. Austria has used the European Structural and Investment Funds to support the development of care for persons with disabilities, and was challenged by national and international advocacy organisations for "misuse" of funds, for which these organisations complained to the European Commission for infringement of the European Union Law<sup>58</sup>. Serbia receives large amounts of the European Union's funds, mainly through the Instrument for Pre-accession Assistance, and some of those were used in the process of the alternative care reform in the past and present<sup>59</sup>. Similarly, South Africa has heavily relied on international aid to improve childcare, and thus the external funding is another important subject of exploration concerning its role and impact on DI in these countries.

The proficiency in Serbian and English language, and the increasing understanding and command of the German language will allow me to communicate directly with stakeholders as well as to effectively examine statutory law, case law, policy documents and other literature in all three countries. The Global Campus of Human Rights and the Vienna Forum for Democracy and Human Rights have kindly put their resources at disposal for the implementation of this research and offered expert assistance. Living in Vienna and closely cooperating with the aforementioned organisations will significantly contribute to the examination of the case of children with disabilities in Austria. Moreover, depending on the international travel regulations during the

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<sup>56</sup> Esin Örüçü, "What is a mixed legal system: exclusion or expansion," *J. Comp. L.* 3 (2008). p. 34-52.

<sup>57</sup> Esin Örüçü, "Methodological aspects of comparative law," *Eur. JL Reform* 8 (2006). p. 36

<sup>58</sup> Independent Living Austria and European Network on Independent Living - Complaint to the European Commission for Infringement of the EU law, 20.4.2021., [https://enil.eu/wp-content/uploads/2021/04/FINAL-Austria\\_2nd-complaint.pdf](https://enil.eu/wp-content/uploads/2021/04/FINAL-Austria_2nd-complaint.pdf).

<sup>59</sup> Delegation of the European Union to Serbia, "Support of the European Union to Persons with Mental Problems (Podrška Evropske unije osobama sa mentalnim problemima)," 2015, accessed 08.06.2021., 2021, <https://europa.rs/podrška-evropske-unije-osobama-sa-mentalnim-problemima/>.

pandemic, I will spend a semester at the University of Pretoria and the Centre for Human Rights in Pretoria, working under the supervision of experts in the rights of children, which should facilitate the collection of data and the understanding of the local context. An already developed network of contacts in the Serbian social care system, child-rights and disability-rights oriented NGOs, the Ministry for Social Affairs, the Republic Institute for Social Protection, the Ombudsperson, mass media and other stakeholders will enable efficient data collection and dissemination of research findings in Serbia.

## Theory and methodology

Central question:

What are the blockages and facilitators in the process of DI of children with disabilities in Austria, Serbia and South Africa?

Subsidiary questions:

1. What are the international legal standards on DI of children with disabilities and how divergences between the treaties can be resolved?
2. How statutory laws have incorporated the relevant CRC and CRPD norms?
3. How public policy frameworks have addressed the DI of children with disabilities?
4. How external funding has been used for DI of CWD?
5. What are other significant factors that have had an impact on DI of children with disabilities?

This research will focus on three important mechanisms for compliance with the CRC and CRPD - legal enforcement, public policies and international economic assistance. Therefore, the study will primarily explore the following aspects: public policies, statutory laws, domestic judiciary, and the characteristics of external funding in the respective countries, to look for blockages and facilitators in the implementation of the relevant CRC and CRPD standards.

The central research question has a socio-legal character, since it seeks to answer how the law interacts with society and how it affects a particular social problem. The basis of the comparison is a specific social goal that is similar across the studied countries<sup>60</sup> – the DI of children with

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<sup>60</sup> Konrad Zweigert et al., *Introduction to comparative law*. as cited in Petra Mahy, "The functional approach in comparative socio-legal research". *International Journal of Law in Context* 12, no. 4 (2016).

disabilities, and it holds that different legal regimes can address the same issue in different ways with the intent of reaching similar outcomes<sup>61</sup>. The lack of comprehensive comparative socio-legal research theories calls for a combination of different approaches to this study. Arguably, this study can be situated in the realm of interdisciplinary, empirical, functionalist comparative law, as it is not focused on doctrine but the effects and consequences that rules bring<sup>62</sup>, holds that the legal and non-legal institutions are comparable when they fulfill similar functions in different systems<sup>63</sup>, and further it takes in account other non-legal factors that influence the social problem giving them equal weight<sup>64</sup>. Also, the research corresponds to instrumentalism by holding an assumption that laws are made to solve certain similar social problems in different societies, and as such their comparison can help to understand which solutions solve the similar social problem more efficiently<sup>65</sup>. This research goes beyond the instrumentalism, by taking into account non-legal determiners of a similar social problem across the compared countries<sup>66</sup>. Throughout the research, a combination of inductive and deductive strategies will be applied to answer the research questions<sup>67</sup>.

The Domestic politics theory of compliance<sup>68</sup>, developed by Beth Simmons, and writings by Oona Hathaway on states' compliance to international human rights treaties<sup>69</sup> are informing the theoretical propositions of this study. In her book "Mobilizing for Human Rights"<sup>70</sup>, Simmons, combining quantitative and qualitative methods, provided rich explanations for decisive mechanisms of compliance being domestic mechanisms, rather than coming from external, international actors and processes. Hathaway, on the other hand, places domestic legal enforcement as a primary determinant of state compliance, and emphasizes the importance of what she calls "collateral consequences" that can be domestic and transnational, but always out of the

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<sup>61</sup> Ralf Michaels, "The functional method of comparative law," in *The Oxford Handbook in Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford University Press, 2006).

<sup>62</sup> Ibid. 347-348.

<sup>63</sup> Ibid.

<sup>64</sup> Reza Banakar, "Power, culture and method in comparative law," *International journal of law in context* 5 (2009).

<sup>65</sup> Michaels, "The functional method of comparative law." p. 356

<sup>66</sup> Ibid. p. 357. Banakar, "Power, culture and method in comparative law."

<sup>67</sup> Alexander L George and Andrew Bennett, *Case studies and theory development in the social sciences* (mit Press, 2005). p. 299.

<sup>68</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*. p. 125.

<sup>69</sup> Oona A. Hathaway, "Why Do Countries Commit to Human Rights Treaties?," *Journal of Conflict Resolution* 51, no. 4 (2007); Oona A. Hathaway, "The cost of commitment," *Stanford Law Review* (Article), 2003/05//, 2003, Gale.

<sup>70</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*.

scope of a treaty at stake<sup>71</sup>. These consequences, according to Hathaway, come from the reaction of domestic and transnational actors and can take many forms of which the international economic assistance (IEA) is an important one. The named studies, and many others that address the issue of domestic compliance to the human rights treaties, didn't include the CRPD and more precisely the DI of children with disabilities, for which the financial costs of implementation may be higher than some civil and political rights. Reasons for this exclusion probably lie in the fact that the CRPD is the most recent human rights treaty and that the DI process is a relatively new process for countries of central and eastern Europe, commonly dating back to the first decade of the 2000s. If the researcher encounters other significant determiners for DI in respective countries during the course of the research their further examination will be duly considered.

## Methods

### a. Comparative international human rights law

The first phase of the research entails a comparison of the CRC and the CRPD standards on the DI of children with disabilities. The comparative international human rights law method<sup>72</sup> will be applied to answer a preceding question: "What are the international legal standards on DI of children with disabilities?". The comparison will be conducted under the normative framework of the Vienna Convention on the Law of Treaties (VCLT), since it provides formal means to treat such fragmentations<sup>73</sup>. It comprises a horizontal comparison<sup>74</sup> of the CRC and the CRPD and their treaty bodies' interpretations of the right to life in a family environment and the approaches to the residential care of children. It seeks to give answers to the meaning of the relevant CRPD and CRC norms, and thus will have a consequence on the understanding of how the studied countries transpose the respective norms into their legislations. Sources for this comparison are primarily the CRC and CRPD treaties, VCLT, Charter of the United Nations, *travaux préparatoires* to the CRC and the CRPD, CRC and CRPD Committees' Concluding observations to state parties' reports, the two Committees' General Comments, statements and Views, UN special procedures'

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<sup>71</sup> Hathaway, "Why Do Countries Commit to Human Rights Treaties?." p. 592.

<sup>72</sup> Samantha Besson, "Comparative Law and Human Rights," in *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford University Press, 2019). p. 1228.

<sup>73</sup> Martti Koskenniemi, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law: report of the study group of the International Law Commission," (2014).

<sup>74</sup> Besson, "Comparative Law and Human Rights." p.1228.

works, as well as relevant UNGA resolutions<sup>75</sup>. Important secondary sources will be scholarly literature on the conflict between treaties such as those written by Martti Koskenniemi<sup>76</sup> and C Wilfred Jenks<sup>77</sup>.

The regional human rights mechanisms' decisions and opinions will be subject to a systematic review to identify and explore the use of relevant CRC and CRPD norms. A content analysis of decisions and opinions where those norms are interpreted, cited or otherwise used in any form will be undertaken. The Court of Justice of the European Union (CJEU), the European Court of Human Rights, the European Social Committee, the African Court of Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child are judicial, quasi-judicial and supervisory bodies of interest for this analysis. Recently, a comprehensive study by Lisa Waddington about the impact of the CRPD on the CJEU<sup>78</sup> was published, and as such will be a valuable secondary source in this phase. The review will be done by searching publicly available databases<sup>79</sup> of the abovementioned bodies.

#### b. Case studies methods

A possibility to mix legal research and empirical research methods, as well as the depth in which the interplay of the named factors will be explored, the phenomenon's contemporariness as well as the fact that the researcher has no control over the context, all called for the use of case studies as a research design of choice<sup>80</sup>. The case study allows for exploration of the functioning of the law in interaction with other determinants, and is adequate for data triangulation through the use

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<sup>75</sup> Anthea Roberts and Sandesh Sivakumaran, "The Theory and Reality of the Sources of International Law," in *International Law* (Oxford: Oxford University Press, 2018). p. 25.

<sup>76</sup> Koskenniemi, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law: report of the study group of the International Law Commission."; Martti Koskenniemi, "The politics of international law—20 years later," *European Journal of International Law* 20, no. 1 (2009); Martti Koskenniemi and Päivi Leino, "Fragmentation of international law? Postmodern anxieties," *Leiden Journal of International Law* 15, no. 3 (2002).

<sup>77</sup> Jenks, "The conflict of law-making treaties."

<sup>78</sup> Lisa Waddington, "The European Union," in *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, ed. Lisa Waddington and Anna Lawson (Oxford University Press, 2018).

<sup>79</sup> Council of Europe, "HUDOC database to the caselaw of the Court, the European Commission of Human Rights and the Committee of Ministers", <https://hudoc.echr.coe.int/>. European Union, "EUR-Lex : Acces to European Union Law", <https://eur-lex.europa.eu/collection/eu-law/eu-case-law.html>. African Committee of Experts on the Rights and Welfare of the Child, "African Child Rights Cases", <https://national-cases.acerwc.africa/>; African Court of Human and People's Rights, "AFCHPR cases", <https://www.african-court.org/cpmt/>.

<sup>80</sup> Yin, *Case study research and applications : design and methods*. p. 43-55.

of different sources and methods<sup>81</sup>. Three, single-case studies, followed by a cross-case analysis<sup>82</sup> adopting an analytic-linear strategy, as described by Robert Yin<sup>83</sup>. This will be followed by a cross-case analysis to assess and build explanations for existing similarities and differences in DI amongst the three countries.

The comparative international-domestic human rights law<sup>84</sup> will be the first method that will be applied in these case studies. The aim is to answer how the relevant international standards of the CRC and the CRPD are transposed into selected countries' domestic legislation, recognizing that international human rights treaties are specified domestically and can be found in a variety of general domestic legal acts. The approach to this analysis will be descriptive and evaluative<sup>85</sup>.

A systematic review of domestic courts' cases will be undertaken with the purpose of finding and analysing any cases regarding disabled and non-disabled children and institutional care, that could have influenced the DI process. Inclusion and exclusion criteria for the review will be set before commencing the research, according to the methodological standards, and available databases searched. The analysis will primarily look into superior domestic courts, and in the lack of such cases the lower courts will be examined. An added-value of domestic courts' analysis will be an exploration of their interpretations of the relevant CRC and CRPD norms, which will use to inform the background comparative international human rights law analysis<sup>86</sup>. In this way, a two-directional connection between the international comparative human rights law analysis and case studies is created, and thus a higher level of consistency between the two phases of the research achieved.

The analysis of foreign aid will start by mapping relevant transnational actors who have provided financial means aimed at childcare reform to the studied countries. Governmental documents, non-governmental organisations' and intergovernmental organisations publications and academic literature will be reviewed to understand characteristics and assess the impact of the external funding on DI processes.

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<sup>81</sup> Ibid. p. 49.

<sup>82</sup> Ibid. p. 244.

<sup>83</sup> Ibid. p. 285.

<sup>84</sup> Besson, "Comparative Law and Human Rights." p. 1229.

<sup>85</sup> Eliav Lieblich, "How to Do Research in International Law? A Basic Guide for Beginners," *A Basic Guide for Beginners (October 4, 2020)* 62 (2020).

<sup>86</sup> McCrudden, "Human rights theory and comparative international law scholarship." p. 15.

In-depth, semi-structured, individual interviews will be conducted in the first phase of the study, to gain insights about national processes that are otherwise hard to obtain. Representative organisations of persons with disabilities are recognised in the CRPD as subjects who need to be involved in “the implementation of legislation and policies to implement the present Convention”<sup>87</sup>, monitoring<sup>88</sup>, and be partners to the states in the international cooperation<sup>89</sup>. Therefore, these organisations, also commonly referred to as disabled people’s organisations (DPOs), are assumed to be well-positioned and informed regarding the legal harmonization and the implementation of the CRPD, as well as child-rights national and international organisations. Therefore, in-depth, semi-structured interviews will be conducted with five representatives of these organisations in each country, based on participant’s free and informed consent, following the European General Data Protection Regulation rules, and upon approval of the Ethics Committee of the University of Vienna. The data analysis will be done according to a pre-designed coding scheme using software for qualitative research.

This will be followed by a cross-case analysis with the intent to explore potential cross-case patterns or replications. The cross-case analysis will help to assess replications and patterns in blockages and facilitators of DI of children with disabilities in these countries. The analysis will treat cases as a whole, maintaining their integrity contained primarily in their national contexts<sup>90</sup>.

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<sup>87</sup> Convention on the Rights of Persons with Disabilities, UNTS vol. 2515, Art. 4 (3).

<sup>88</sup> Convention on the Rights of Persons with Disabilities, UNTS vol. 2515, 3, Art. 33 (3)

<sup>89</sup> Convention on the Rights of Persons with Disabilities, UNTS vol. 2515, 3, Art. 32 (1)

<sup>90</sup> Yin, *Case study research and applications : design and methods*. p. 245-246.

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