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CHILDREN'S RIGHTS

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INTERNATIONAL CHILDREN'S RIGHTS

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Anikó RAISZ



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2024

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*The book honours the valuable contribution
of Professor Tadeusz Smoczynski to
the declaration of children's rights by drafting
the initial text of the United Nations
Convention on the Rights of the Child.*

Introduction

Márta BENYUSZ – Anikó RAISZ

‘Children are not the people of tomorrow, but people of today. They are entitled to be taken seriously. They have a right to be treated by adults with tenderness and respect, as equals. They should be allowed to grow into whoever they were meant to be – The unknown person inside each of them is the hope for the future.’
(Janusz KORCZAK)

Humankind’s image of children has developed gradually since ancient times. However, although the value and importance of childhood in one’s life has been underlined by many thinkers and authors different viewpoints throughout history, a deeper understanding of the significance of this initial period of human life facilitated by professional and organised scientific studies of children’s psychological development had its onset only at the beginning of the 20th century. In addition to the evolution of scientific research on children, the 20th century is also marked as a period of child rights movements¹ which resulted in the birth of the *United Nations Convention on the Rights of the Child* (hereinafter referred to as UNCRC), the very first international convention that considered children as rights holders and not objects of protection.

Before the UNCRC became the most widely ratified human rights treaty in the world,² children, just as most women and people with disabilities, were considered by most national legal systems as legally incompetent, and thus could not act and exercise rights on their own behalf. This showcases why it is not an overestimation to say that the 20th century was the “*Century of the Child*”.³ Paradoxically, the 20th century earned this title by being one of the darkest periods in human history and destroying the childhood of many generations; still, this situation also created a genuine need

1 The first international instrument enlisting and protecting children’s rights, the Geneva Declaration, was adopted on the basis of the initiation of Eglantyn Jebb in 1924, but it lost its legally binding nature by the dissolution of the League of Nations. Afterwards, in 1959, the Declaration on the Rights of the Child was adopted, however it was never a legally binding instrument to the state parties, and did not yet consider children as subjects with their own rights.

2 The UN Convention on the Rights of the Child is ratified by all state parties to the UN, except for the United States of America.

3 The 20th century was firstly called the Century of the Child by Ellen Key, a Swedish activist, and later on the appellation was strengthened by other scholars.

for a stronger appraisal of human dignity. The trauma of the First and Second World Wars pushed states to declare human rights⁴ and establish minimum standards that should never be violated again.

With the adoption of the UNCRC in 1989, children’s rights were also declared, strengthening the recognition by states of the necessity to provide special protection to children and the families that raise them. Obviously, children were already covered by the protection provided by to universal human rights, as children’s rights are also human rights. However, the special needs of children justify targeted attention, protection, and empowerment, as these are necessary to ensure the provision of appropriate circumstances for each child to grow up. Specifically, all children should have the opportunity to grow in an environment that provides full and harmonious development of their personality, in an atmosphere of happiness, love and understanding and prepares the child for an individual life in the society in the spirit of peace, dignity, tolerance, equality and solidarity.⁵ In light of this, the UNCRC created the notion of a “global child”, and declared children’s rights as necessities of a fruitful childhood by addressing their special needs. Besides creating the notion of the global child, the UNCRC also made it clear that it is in the children’s best interest to grow up in a loving family environment, and that it is the duty of the state to strengthen families and create circumstances that enable them to function well, preserve their autonomy, and raise children who understand the importance of family as the basic unit of society. The very wide ratification of the UNCRC made the notion of the global child even more alive and the idea of equal rights to all children of the world without discrimination (i.e. by taking their best interests as a paramount consideration) brought us all one step closer to fulfilling and securing the protection and empowerment of those who were and are at stake on the matter: the children of the world.

The UNCRC was adopted 35 years ago,⁶ but its full implementation has yet to reach the desired level. To achieve a thorough implementation, bring the promise of the notion of a global child to fruition in reality, and secure strong, supportive families for children, the 20th century – as the period in which the universal protection of children was created – must be followed by more centuries that place value in childhood and the rights of the child. At the same time, these following centuries should manage to avoid the paradox of the 20th century, where children’s lives and childhood were endangered and totalitarian regimes quietly destroyed families worldwide. Importantly, this shall not and cannot be done by adopting new human rights treaties on a universal level or by opening the existing treaties for amendments, but instead by committing to the real aims of the UNCRC. This means that the value of childhood

4 The Universal Declaration of Human Rights was adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, and was followed by the International Covenant on Economic, Social and Cultural Rights Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, and the International Covenant on Civil and Political Rights Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966.

5 See the preamble of the UNCRC.

6 The 35th anniversary of the adoption of the UNCRC is on 20 November 2024.

and children's rights shall be determined from the perspective of children and not from the point of view of adults, as this may help avoid relativising the rights of children both at the micro (family and school) and macro (national and international legislator) levels.

Thus, in order to effectively protect children and their childhood, it is essential to understand them in depth and to wear "child rights glasses" (i.e. consider topics from the perspective of children's rights) in everyday life. This is a perspective that should be considered by all professionals responsible for the creation and shaping of the legal framework that protects children, and by those that work in any aspect of child protection and empowerment. "Child rights glasses" is something that can be gained through interdisciplinary, child- and family-centred education. Importantly, the International and Comparative Children's Rights Master of Law (hereinafter referred to as ICCR LL.M) is a child- and family-centred, interdisciplinary programme that targets lawyers and aims to provide them with "child rights glasses". The current book, titled *International Children's Rights*, is part of a series of 11 books⁷ that outline the curriculum of the ICCR LL.M. This series of books aims to provide a holistic picture of the rights of children, and afford readers the following: cover human rights protection at both the universal and the regional levels; provide an understanding of children's social and personality development; provide information on children in conflict with the law; deliver knowledge of interdisciplinary and child-friendly communication; an overview of the national implementation of children's rights by private law and public law from the perspective of Central European countries; an overview of the child protection systems of these countries; an overview of the justice systems of these countries; cover the topic of religion and children's rights; describe the challenges that child protection and child rights-based approaches face in the digital age. Accordingly, the *International Children's Rights* book focuses on the notion of the global child, on international human rights law that covers the rights of the child, that is, the UNCRC and its Optional Protocols, and on the implementation and monitoring mechanisms that support these international instruments.⁸ This book comprises five parts.

7 The curriculum of the ICCR LL.M is based on an interdisciplinary and legal cross-border research comprising several countries (Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, etc.) and the following eleven books: *International Children's Rights*, *The Rights of the Child in Regional Human Rights Systems*, *Social and Personality Development in Childhood*, *The Rights of the Child in Private Law – Central-European Comparative Perspective*, *The Rights of the Child in Public Law – Central-European Comparative Perspective*, *Religion and Children's Right*, *Child Protection Systems – Central-European Comparative Perspective*, *Children in Digital Age – Central-European Comparative Perspective*, *Child-friendly Justice – Central-European Comparative Perspective*, *Interdisciplinary and Child-friendly Communication*, and *Children in Conflict with the Law*.

8 The editors of this book underline that the general universal human rights law framework is also part of the universal protection of children. Nonetheless, owing to great importance of the UNCRC and its Optional Protocols for the topic of children's rights, the general universal human rights law framework is not elaborated in detail in the current book, and is instead only mentioned.

1. Historical Background
2. The United Nations Convention on the Rights of the Child
3. The Optional Protocols to the United Nations Convention on the Rights of the Child
4. Implementation and Monitoring of the Rights of the Child on International and Local levels
5. Children and International Criminal Law

The *Historical Background* part of the book focuses on two core issues across two different chapters. First, it provides an overview of the development of the image of the child and the rights of the child from ancient times until the need for international protection and the idea of the UNCRC was born. Second, it provides an outline of the UNCRC's legislative history, starting from 1979, the International Year of the Child. Among the many important legislative steps, such as the debates on the definition of the child or the age limit for child soldiers, this chapter underlines the important role that Poland played in the initiation of the UNCRC. Specifically, it highlights how the “global child” notion of the UNCRC stemmed from thoughts of the Polish paediatrician Janusz Korczak, and how the initial text of the UNCRC was drafted by the recognised Polish family law professor, Prof. Tadeusz Smyczynki, whose very aim was to draft a child and family-centred document to support children's upbringing in a loving and caring family environment. The chapter also underlines the role of the Holy See – at that time led by Pope John Paul II – as a pioneer in the adoption and ratification of the UNCRC. After the signature and ratification of the CRC, Saint John Paul II acknowledged, during the World Summit of Children, the relevance of the “global child” notion introduced in the UNCRC by saying that ‘the International Convention on the Rights of the Child constitutes a statement of priorities and obligations which can serve as a reference point and stimulus for action on behalf of children everywhere (...)’, and emphasised the importance of children being upbrought in strong, loving families, as follows:

‘Children who are to learn to be supportive of their fellow man must learn the reality of mutually supportive relationships in the family itself, where there is profound respect for all human life, unborn as well as born, and where both mother and father jointly make responsible decisions regarding the exercise of their parenthood.’

The *United Nations Convention on the Rights of the Child* part of the book focuses on outlining how the UNCRC itself serves as the core legislative instrument for discussions on the rights of the child and for the work of the Committee on the Rights of the Child (i.e. the UN body responsible for monitoring the implementation of the CRC; hereinafter referred to as CRC Committee). The first chapter of this part covers the four core principles of the UNCRC, which are also acknowledged and emphasised by the CRC Committee and are presented herein: *non-discrimination*; *right to life*,

survival and development; best interests of the child; and genuine respect for children's views. Nevertheless, this first chapter, as well as ICCR LL.M, also considers one more principle, which is the *right to live in a loving and caring family environment.* The next three chapters cover the rights enshrined in the CRC by using the three “P” model, which divides the rights into the groups of protection, provision, and participation. There are other approaches on how to group the rights of the child besides the three P model, but the aim here was not to provide an exhaustive list of these approaches nor to enlist and analyse all the rights of the UNCRC one by one, but to show how the collaboration of these three elements contributes to the realisation of the UNCRC as a whole. These chapters rely on the legally binding text of the UNCRC and the General Comments issued by the CRC Committee. The General Comments are presented as soft-law instruments that aim to facilitate the implementation of the UNCRC at the international level but, unlike the provisions of the UNCRC, are not legally binding. The fifth chapter of this part is about the CRC Committee, elaborating on the organisation of the Committee, its role in the implementation and monitoring of the CRC, its rules of procedure and working methods, and the country reporting circle.

The *Optional Protocols to the United Nations Convention on the Rights of the Child* part encompasses three chapters, each of which deals with one of the Optional Protocols of the CRC. The first chapter deals with the *Optional Protocol on the sale of children, child prostitution and pornography*, the second with the *Optional Protocol on the involvement in children in armed conflict*, and the third with the *Optional Protocol on a communications procedure.* Among the Optional Protocols, the first two, similar to the UNCRC itself, have a very high ratification rate and thus can be treated as core instruments of the rights of the child in universal human rights law. However, the third Optional Protocol, which covers procedures that can be initiated with the CRC Committee in case of an infringement of children's rights in a state party whenever domestic remedy is exhausted, has been ratified by just a few state parties. The third chapter elaborates on the reasons behind the low ratification rate, as well as the pros and cons of its ratification.

The *Implementation and Monitoring of the Rights of the Child on International and Local Levels* part covers two topics. The first concerns the roles of civil society, as represented by non-governmental organisations, the United Nations Children's Fund (as also known as UNICEF), and national human rights institutions. Since the role of non-governmental organisations and of the United Nations Children's Fund is expressly provided in the text of the UNCRC, the chapter mainly elaborates on these articles when presenting the roles of these two institutions in the drafting and adoption of the UNCRC. Meanwhile, the role of national human rights institutions is described in detail in the General Comments of the CRC Committee, which recommends the establishment of specialised human rights institutions at the national level to facilitate the implementation and monitoring of children's rights. However, since the General Comments are not legally binding instruments, the state parties opted for many solutions to the recommendations, with some establishing specialised institutions and others strengthening children's rights representation in their general

human rights institution. The chapter also lists the reasons why a specialised national human rights institution included in the national legal system may be beneficial for the genuine implementation of the rights of the child. The second chapter addresses the sustainable development goals (hereinafter referred to as SDG) and children's rights, along with how the SDGs, as an agenda for 2030, are connected to human and in particular to children's rights.

The closing part of the book, Children and International Criminal Law, steps out of the narrow framework drawn by the UNCRC and its Optional Protocols to deal with children and international criminal law, presenting also the jurisprudence of the International Criminal Court regarding children.

This book is primarily addressed to students of the ICCR LL.M. However, it can be useful to lawyers who deal with children's rights in practice or theory, as well as to other professions that deal with children. The book in itself provides a picture of children's rights at the universal human rights level; nevertheless, in order to have a full picture of the rights of the child and to see the regional and national challenges of implementation as well as contemporary concerns regarding the rights of the child, the book needs to be read together with the other parts of the book series.

Part I
Historical Background

Special Protection of Human Rights of Children I: History of Children's Rights

Dubravka HRABAR

ABSTRACT

Humanity has survived thanks to children, although they have been neglected and considered somewhat less worthy than adults throughout human history. In the earliest times, as recorded by written history, they did not enjoy any rights, not even close to that of adults. Children had no rights with respect to their parents or any third person. Antiquity was quite cruel to them; however, with the rise of Christianity, they became protected (at least) from being killed (with impunity). In the Middle Ages, their use value for society was recognised, and the bourgeois revolutions of the time strengthened this recognition by increasingly exploiting children. The Industrial Revolution considered children a free labour force to be used for generating capital. However, such pressure on the survival of children gave rise to initial ideas on the need to protect children; this referred to not only the prohibition of pernicious forms of work and working hours, but also the provision of education for them. The 20th century can be termed the century of children's rights. The first international, often non-binding, documents (declarations, proclamations, conventions) and movements emerged in that century. In conjunction with the ideas of progressive individuals, they led to an era when it would be unthinkable for children to have no rights. The entire course of establishing legal protection for children at the global level was quite slow, yet extremely important since it obliged states to treat all children equally, and these obligations broadened and deepened over time – starting from the number and type of children's rights to the establishment of binding legal norms instead of simple principles that existed in the early beginnings. Legal analyses of the Geneva declarations and conventions are a good indicator of how the concept of children's rights slowly but surely progressed together with the consolidation of human rights and awareness of the dignity of human beings and children as a dependent and threatened category of human beings.

KEYWORDS

history of children's rights, Greek law, Roman law, the Enlightenment, Industrial Revolution, international documents

1. Children as a Value in Pre-Ancient Times

Children are the quintessence of the family, and the survival of the human race has always rested on their shoulders. The birth of children forms a family,¹ and their growth, development, and maturing enable the transfer of human knowledge and values from one generation to the next.

We can only speculate on the position of children in barbaric times since no written records exist about this period; thus, it may be assumed that care for children existed primarily for the sake of maintaining *Homo sapiens* and migrating hordes. A natural need thus prevailed to care for children, in the sense of ensuring their basic living conditions.² However, despite the fact that no family or future can be envisaged without children, their legal status remained unenviable for thousands of years, since many of them did not live long enough to reach adulthood owing to social reasons (poverty, food shortages, diseases, wars). Law, as a regulator of social relationships, is a reflection of the 'state of mind'; in other words, on a national level and in the course of history, the social values protected by law are clearly visible in the laws framed by a state.

The legal arrangement of the natural relations between parents and children, that is, the scope and extent of parental authority, the obligations of parents towards children, and the legal position of children in this relationship, is one of the clearest indicators the legal position of children. Analysing the legal position of children throughout history, especially in the family, can help answer the question of whether children, at a certain point in time, in a certain culture and geographical area, were considered worthy of protection. Independently of these personal, private relationships between parents and children, it may generally be concluded that the universal attitude of the state (regardless of its organisational form) towards children as legal subjects was negative in the course of history. What is astonishing is the circumstances under which humans lived one hundred thousand years ago, subsequently in antiquity, the Middle Ages, up to the modern age, and that some of them, although not many, managed to survive and bore the responsibility of continuing the human species on their shoulders. The course of history was slow and painstaking for children: from the Code of Hammurabi, where children were viewed as the property of

1 In this sense, the UN and European documents distinguish two human rights: the right to marry and the right to start a family. Marriage is a legal institution and a social relationship, forming the basis for building a family. Over the last decades, this includes extramarital and, at times, same-sex unions in the European legal area and some non-European countries. Nevertheless, worldwide, many countries continue to opt for traditional definitions and consider the child-parent relationship or a marriage between a man and a woman as the basis of family.

2 Hrabar, 1994, p. 25.

their parents and a means of retaliation,³ to the child with many rights recognising him as a legal subject.

Early legal sources are extremely rare; however, one should mention the Ten Commandments, one of which states: 'Honour your father and your mother, so that your days may be long in the land that the Lord your God is giving you',⁴ which influenced how children were subsequently treated⁵ in the sense of being dominated by parents, especially the father. Furthermore, it also states, 'Whoever strikes father or mother shall be put to death',⁶ and specifies the protection of orphans.⁷ The early sources speak in a clear normative way of the parent-child relationship, but the emphasis is on children's duty to respect their parents. The New Testament paints a much gentler picture through the call of Jesus Christ on the value of children.⁸

2. Antiquity

2.1. Children under Greek Law

In terms of the parent-child relationship, one can observe Greek legal history – albeit fragmented into separate city-states with their own legal orders – through two segments: the meaning of the concept of *filia* and paternal authority. *Filia*, of which Aristotle speaks in *Nicomachean Ethics*, is a cohesive factor of the family. In the parent-child relationship, it manifests as the love that parents have for their children as being a part of them.⁹ Therefore, care, feelings, attention, and gentleness towards children did exist in Antiquity, and one cannot state that attitudes towards children were wholly negative.¹⁰ Put simply, the perception of children as human beings was different, given the social relations and cultural patterns of the time. The ancient *filia* is an unconditional feeling of parental giving,¹¹ without expecting anything in return. This interpretation of the parent-child relationship, in which *filia* is a natural state inherent to man, is what we interpret today as the natural law doctrine. Aristotle, as a representative of this school in Antiquity, interpreted *filia* through

3 It reads: '... if one superior man kills the daughter of another superior man, the killer's daughter is executed in punishment'; cf. Harari, 2017, p. 126.; or (195) 'If a son strikes his father, his hands shall be hewn off'. Cf. <http://www.general-intelligence.com/library/hr.pdf>.

4 Bible, NRSVUE, Exodus, 20:12.

5 In Exodus, there is a reference to the Death of Firstborns (11:4-8), the Consecration of the Firstborns (13:11+), and the Firstborns (Luke 2:22-24), which allows one to conclude that firstborn (male) children were especially valuable and deemed worthy of being sacrificed to the Lord.

6 Bible, Exodus, 21:15.

7 Bible, Exodus: 'You shall not abuse any widow or orphan' (22:22).

8 'Let the children come to me; do not stop them, for it is to such as these that the kingdom of God belongs' (Mk, 10:14).

9 Despotopoulos, 1975, p. 72.

10 This is how Philippe Ariès interprets this relationship, 1960. Allegedly, according to Ariès, the concepts of child, youth, and adolescence were considered 'immutable and for ever and always' cf. Veerman, 1992, p. 3.

11 Cf. Hrabar, 1994, p. 17.

the ancestor-descendant relationship, emphasising maternal *filia* as proof of the irrational, since it does not cease even when the child does not care for the mother.¹² The Greek family was patriarchal and, according to available sources, man, as head of the family ‘ruled over his children like a king’.¹³

The second segment is the unconditional power that the father, as head of the family, wielded over his children in a way that he could dispose of the lives of his children. The man was the dominant being and the central figure of the family. Generally, children’s rights were inversely proportional to that of the father’s.¹⁴ The greater the powers of the father, the more unenviable the position of his child. Spartan customs allowed the father to abandon his sick, feeble, or female child to beasts and predators on Taygetus, a mountain in the Peloponnese, by throwing the child into the abyss.¹⁵

2.2. Children under Roman Law

Roman law left more written traces on legal relations within the family, including that of parent-child relationships. The development of private ownership influenced the creation of the patriarchal family with pronounced male domination, including that of the father over other family members. Thus, under Roman law, the father’s rights prevailed over his duties. The Roman *pater familias* possessed lifelong *patria potestas*, and in the early historical age, almost absolute power over his children and further offspring. The substance of that power reflected the legal relationship of the father with his own children.¹⁶

Within the framework of *patria potestas*, *pater familias* possessed *ius vitae ac necis*, *ius vendendi*, and *ius vindicandi*, legitimising his power over his children and third parties. *Ius vitae ac necis* (the right of life and death) was the father’s right to impose the harshest punishment on his child (killing). Over time, this right weakened,¹⁷ and to prevent its abuse, its exercise was subjected to the obligation to hear the family’s council (*consortium domesticum*) and subsequently, the censor’s remarks as well (*nota censoria*). This right was abolished *inter alia* on the grounds of humaneness in the Christian age (under Emperor Valentinian I in the 4th century). Thereafter, every killing of a child was considered murder.¹⁸ *Pater familias* further had the right to sell his children (*ius vendendi*) *trans Tiberim*, into slavery or to a fellow citizen. In the classical age, sale of children became scarcer and appeared as fictitious sale for adoption and emancipation purposes. The practice disappeared completely in the Christian era.¹⁹ *Ius vindicandi* was the father’s right to demand the surrender of his child from persons who would detain the child. A tool for claiming the child was a *vindicatio*

12 Cf. Despotopoulos, 1975, p. 81.

13 Graber, 1893, p. 25 refers to Aristotle.

14 Cf. Hrabar, 1994, p. 25.

15 Hrvatska enciklopedija, 2021, p. 601.

16 Horvat and Petrak, 2022, p. 90.

17 On the father’s power in Roman law cf. in more detail in: Wacke, 1980, pp. 205–210.

18 Horvat and Petrak, 2022, p. 91.

19 Ibid.

action, and in the classical period, this was *interdictum de liberis exhibendis et ducendis*, the legal institution that can still be encountered in present-day modern legislation.²⁰ In addition to these rights, *pater familias* agreement in principle was sought for the marriage of his child.

Children's rights did not exist under the Roman legal order, and children were considered persons *alieni iuris*; the Roman father exercised *patriam potestatem* in his interest, not in that of the children.²¹

3. The Middle Ages and Christian Thinkers

The early Middle Ages were characterised by the particularity of law according to tribal membership.²² German or Teutonic law (5th to 9th century) was under the strong influence of the patriarchate in following the previous order based on Roman law²³ and, in some cases, by religious determinants. For succession purposes, distinction was introduced between legitimate (*full-born*) and illegitimate children.²⁴

Commentators of medieval law, that is, feudal social and legal relations, point to rare legislative forms that were preceded by customary law linked to morality.²⁵ These are mainly collections of Teutonic law (*leges Barbarorum*), written in Latin with an abundance of Germanic elements, predominantly oriented towards criminal law, land relations, rural community, the position of the king, court proceedings, and, to a lesser extent, the family (more precisely marriage) and similar relationships.²⁶ There were absolutely no indications about the rights of children.

Feudalism, which developed subsequently and was influenced by the Roman Catholic Church and canon law, relied in the legal sense on many institutions of the Roman legal order, but prohibited infanticide, abortion, and child abandonment.²⁷ In that sense, one can consider this the legal beginnings of the child's right to life; however, such rights were certainly not guaranteed for the protection of children but only because murder was treated as a mortal sin. Another reason for the protection of

20 For example, the German BGB § 1632, the Croatian Family Act, art. 415.

21 Prokop, 1972, p. 12.

22 For example, Lex Romana Visigothorum (506 A.D.), Lex Visigothorum (642–653), Lex Burgundionum/Lex Gundobada (probably 483), Lex Salica (507–511), etc.; cf. Nuovissimo Digesto Italiano, Diritto intermedio, 1964, p. 875.

23 Cf. Prokop, 1972, p. 12.

24 Hrabar, 1994, p. 26. Under the customs and regulations of the time, the right of succession referred only in a few cases to female children; cf. Fischer, 1945, p. 37.

25 'Germanic peoples' – Encyclopaedia Britannica. Available at: <https://www.britannica.com/topic/Germanic-peoples> (Accessed: 23 March 2023)

26 Thus, for example, the Salic Law (Lex Salica) is hardly influenced by Roman law, and is primarily a penal and procedural code, containing a long list of fines (*compositio*) for various offences and crimes. It also includes, however, some civil-law enactments, among these a chapter declaring that daughters cannot inherit land; Available at: <https://www.britannica.com/topic/Salic-Law> (Accessed: 23 March 2023)

27 Canon law also governed issues of marriage, guardianship, and parent-child relationships.

children was non-religious (in the sense of their right to be born): they could become part of the workforce, and in this context, one encounters exploitative and authoritarian upbringing.²⁸

The Middle Ages are quite dark with respect to child-adult relationships, including child-parent relationships. Researchers²⁹ hold contrasting views on the position of children in that period. Philippe Ariès³⁰ claims that in the Middle Ages, children were treated like adults³¹ because of their generally short life span, whereas Patrick H. Hutton challenges the existence of a developmental connection between the mentality of children and adults.³² One may agree with Ariès that ‘children have gradually acquired more and more rights, received more enlightened rearing...’³³ Lloyd De Mause presents the so-called psychogenic theory of social change indicating that ‘the evolution of the parent-child relationship constitutes an independent source of historical change’.³⁴

One of the greatest philosophers and theologians of the Middle Ages, St. Thomas of Aquinas refers to the *Epistle to the Colossians* 3:20, constructing his analysis of the relationships between human beings through the relationship between the human being and God. In the *Epistle*, Paul the Apostle says: ‘Children, obey your parents in everything’. He interprets it as saying *inter alia*:

‘Wherefore servants are not bound to obey their masters, nor children their parents, in the question of contracting marriage or of remaining in the state of virginity or the like. But in matters concerning the disposal of actions and human affairs, a subject is bound to obey his superior within the sphere of his authority; a son his father in matters relating to the conduct of his life and the care of the household; and so forth.’

28 Thus, L. Stone, cited in Eekelaar, 1986, p. 161.

29 Ariès, Hutton, Wilson, Yudof, Stone, Dasberg, Le Roy Ladurie, and De Mause consider attitude towards childhood in psychological and sociological determinants. A legal status is only a consequence of such views on the child. Basically, this is a dispute over the issue of whether the historical development of the rights of the child is ‘characterised by inevitability and chronological continuity’ or whether this is a precipitate development.

30 Ph. Ariès, 1960, cited in Veerman, 1992, p. 4.

31 For example, in mid-12th-century Italy, Emperor Frederick Barbarossa formally guaranteed the rights and privileges of students – the right to education, freedom of opinion, speech, association. These were not classical children’s rights since this was a somewhat older, but still young, population. Cf. Angel, 1995, p. 3.

32 Ibid, p. 4. Scholars like Verhellen state that in Western history, ‘children did not exist as a “separate category”’; cited in Veerman, 1992, p. 10.

33 The same view is shared by Ph. E. Veerman. Another group of scholars share the idea that, over time, children had fewer and fewer rights categorising childhood as a separate status; cf. Veerman, 1992, pp. 5 and 8.

34 De Mause, cited in Veerman, 1992, p. 6.

He explains that the words 'in everything' refer to the field of the father's rights.³⁵ Consequently, the philosophical thought of Christian scholasticism of the 13th century rested on the father's domination over his children. Martin Luther denied parents' ownership of their children, saying that children belong to God.³⁶

4. The Enlightenment

The 1641 *Massachusetts Body of Liberties* is one of the first documents recognising children's rights. There is a recommendation in it for parents not to choose spouses for their children, not to be unnaturally severe with them, and that capital punishment for children who do not respect their parents must not be executed before the age of 17. Likewise, children are free to complain to the authorities for redress.³⁷

The Age of Enlightenment (17th and 18th centuries) in European cultural history was marked by different influences and interpretations of the world. It was opposed to the theocentric worldview; it relied on the freedom of the human being and their dignity and did not advocate subordination to authority.

Thus, in John Locke's thinking, one recognises 'the earliest attempt to constrain parental dominance', which denies the existence of parental right to dispose of the life and death of their children if they wish so, but endows children and adults with natural rights, which must be protected. Parents should prepare the child for freedom 'since it is God's will', as children are not the property of their parents, but of God.³⁸ Parents are obliged to '*preserve, nourish and educate their children*'.³⁹ However, Locke does not relinquish paternalism and children's obedience to their parents, regardless of the child's age. In his subsequent treaties, Locke introduces a developmental understanding of the child's nature with the objective of producing a rational man.⁴⁰ Locke distinguishes the mental capabilities of children from that of adults. From the position of the present day and considering age as interpreted by John Locke, we can see the beginnings of the child's right to express his/her views.

Another representative of the Enlightenment is Jean-Jacques Rousseau. Although his thoughts on children were sporadic, some authors claim that he advocates the preservation of the integrity of children in their growth and development and views childhood as a special place of innocence.⁴¹ Additionally, Rousseau says: 'The child

35 Question 104, Obedience, Article 5. Whether subjects are bound to obey their superiors in all things? Thomas of Aquinas. Available at: <https://www.newadvent.org/summa/3104.htm>, (Accessed: 19 April 2023). Cf. Toma Akvinski (2005) *Suma teologije*, Zagreb: Nakladni zavod Globus.

36 Freeman, 2020, p. 19.

37 Freeman, 2020, p. 19.

38 Ibid.

39 Ibid.

40 Ibid., p. 20.

41 Ibid., p. 21.

was to be dependent on things, rather than people, because things belong to nature and cannot corrupt, and people belong to society and are, as a result, corrupted'.⁴²

Sir William Blackstone was a respectable jurist in the Age of Enlightenment; he wrote in 1780 that parents are obliged to provide for, protect, and educate children. The first public pamphlet on children, titled *The Rights of Infants* (1797), was written by Thomas Spence. He emphasised protecting children from poverty and exploitation and advocated for the elimination of distinction between legitimate and illegitimate children.⁴³

The French Revolution almost completely silenced the exchange of ideas on children until the mid-19th century. In this most radical period, attempts were made to put legitimate and illegitimate children on an equal footing and to expand education. However, the Napoleonic Code (1804) halted these efforts, and they were ignored for the next fifty years.

In the mid-19th century, John Stuart Mill advocated for a broad guarantee for the liberties of the human being; however, he explicitly deprives children⁴⁴ of the principle of liberty, which aligned with the 'orthodox opinion of the mid-nineteenth century'.⁴⁵ At the same time, after the Paris Commune, attempts were made in France to establish a league for the protection of children's rights.

5. Child's Rights Movements in the 19th Century and Child Labour

In the area of children's rights, legal systems during the Bourgeois Revolution and the Industrial Revolution were characterised by only a formal equality of all subjects and ignored children.⁴⁶ The Industrial Revolution brought workload for a large number of children. Very few countries established rules for the minimum employment age of children, their healthcare, and night work.⁴⁷ Paternal authority continued to dominate the parent-child relationship, and smaller interventions concerned certain duties towards the person and property of the child. From the aspect of social view of children, they were then considered useful members of society, which was the underlying idea of the 'child-saving movement'. This was also the time when the first juvenile justice appeared. However, children continued to be a 'convenient focus for public ills'.⁴⁸ It is in this sense that one should understand Karl Marx's engagement towards prohibiting child labour and recognising children's right to education, which he interpreted as a 'genuine social right of citizenship, because the aim of education

42 Ibid.

43 Ibid. p. 22.

44 He equates children with 'backward nations', that is, barbarians, especially in his work *On Liberty*; cf. Siogvolk, cited in Freeman, 2020, p. 23. and Stanley, 2017, pp. 49–72.

45 Freeman, 2020, p. 23.

46 Hrabar, 2016, p. 21.

47 Angel, 1995, p. 5.

48 Freeman, 2020, p. 24.

during childhood is to shape the future of adulthood'.⁴⁹ However, Marx opposed a complete ban of child labour and advocated 'restrictions with regard to working hours and compulsory education'.⁵⁰

Nineteenth-century civil codes evolved towards greater protection of children and, to some extent, recognition of equal care of the father and the mother under the name of parental authority.⁵¹ Legislative authorities increasingly allowed courts to intervene in cases of impaired relationships within the family.⁵²

Among the many apologists for children's rights was Janusz Korczak,⁵³ a Pole recognised as an 'icon of children's rights',⁵⁴ who was polyvalent in the protection of children. He (a) emphasised the need for children to be loved and respected; (b) created a model of the first modern declaration on children; (c) established a children's parliament and elaborated on the concept of children's courts, and (d) published children's newspapers. He believed that children are integral human beings from the outset, rather than some sort of 'preparation' for adulthood. He deemed important the child's right to accept love and the right to respect, thereby establishing, in his own way, modern views on children's psychology and their growth and development. He advocated gentle paternalism (the so-called liberal paternalism) through the obligation of adults (parents) to teach, guide, train, restrain, temper, correct, admonish, prevent, impose, and combat children.⁵⁵ His ideas on children's rights align completely with present-day views on children as, among the child's rights, he recognised 'the right to respect, the right to live in the present ... the right to be him or herself, the right to make mistakes, the right to be taken seriously, the right to resist educational influence that conflicts with his or her own beliefs'.⁵⁶

It is little known in scientific literature that the Declaration on the Rights of the Child (1918) was adopted after the October Revolution as a response to the Czarist pattern of children's education; however, the Declaration was never enforced as it was completely crushed in the Stalin era. The Declaration contained 17 principles: children were asserted as persons with their rights; ownership of children by parents, state, or society was denied. The Declaration announced the participatory right of children in making decisions that affect them 'being thus a precursor' of the right of the child to express views (as formulated by art. 12 of the United Nations Convention on Rights of a Child, UNCRC).⁵⁷

49 Marshall, cited in Freeman, 2020, p. 24.

50 Vinković, 2008, p. 35.

51 Hrabar, 2012, pp. 13–30.

52 Bainham, 2005, p. 9.

53 For him and his work cf. more Veerman, 1992, pp. 93–105.

54 His real name was Henryk Goldszmit (1878–1942); he was a paediatrician, teacher, writer, and publicist. He was unknown until recently because he wrote in Polish. He perished in the Nazi camp Treblinka where he was brought together with children; cf. Freeman, 2020, p. 27.

55 Freeman, 2020, p. 28.

56 Freeman, 1992, p. 4.

57 Freeman, 2020, p. 30.

Child labour is one of the forms of exploitation of children because of their subordinate position.⁵⁸ Until the beginning of the Industrial Revolution in the 18th century, child labour was not recognised as undesirable or harmful. Moreover, the view of cultural anthropology, anthropology, and sociology on the status of children indicates that the child ‘had the role of a helper in a community, or in the family in which it lived’.⁵⁹ Feudal societies were agrarian, and therefore, child labour was focused on helping in farm work and preparing for future independent work in adulthood.⁶⁰

Capitalism strives to raise capital, and the issue of child labour imposes itself increasingly in the social sense. Certainly, this disproportion between the goal (capital accumulation) and means (child labour) raises the issue of the role of children and the need for their protection from exploitation. Children were engaged in the work process due to poverty, which was the principal cause of child labour, and ‘a clear link between child labour and forced labour’ can be observed.⁶¹ Children worked for a major part of the day (at times 12 and 16 hours) as a cheap labour force in manufacturing. The Industrial Revolution had a growing need for labour force, making children ideal workers ‘whether it be as producers in developing states or as economic dependants in industrialised societies’.⁶² In the second half of the 19th century, the first pieces of legislation offering selective protection for children between the ages of 9 and 16⁶³ were introduced in Prussia, Denmark, Germany, Italy, the Netherlands, and Belgium; this protection did not include younger children. It was probably the unscrupulousness of engaging children in labour (from the age of 6 upwards), especially in hard physical work in factories and mines in inhumane conditions with no pay or minimum wages, that gave rise to thoughts about the future of a society that exhausts children beyond all limits. Social reforms implemented in Great Britain through a number of legislative acts also included child labour, improvement of their living conditions, and a ban on night work and employing children under the age of 9.⁶⁴ Although the process of protecting children from exploitation was long and slow, changes were the result of the negative implications of child labour and better social awareness.⁶⁵ The 19th century in Great Britain was marked by legislative acts aimed at revising working and age conditions for children’s work and conflicts with employers who wanted to exploit the workforce to the maximum.⁶⁶ The fight against child labour

58 Van Buuren, 1995, p. 262.

59 Vinković, 2008, p. 23.

60 Ibid., p. 24.

61 Grgurev, 2016, p. 100.

62 Van Buuren, 1995, p. 262.

63 Grgurev, 2016, p. 102.

64 Vinković, 2008, p. 25, establishes a connection between the consequences of the Industrial Revolution and the adoption of protective labour laws.

65 Vinković, 2008, p. 26.

66 This is the so-called first Factory Act of 1802, followed by the Factories Acts of 1833, 1844, and 1878, the 1834 Poor Law, the 1903 Employment of Children Act, and the 1904 Prevention of Cruelty to Children Act. A number of different commissions examined child labour; for more, cf. Vinković, 2008, p. 28.

was marked by advocacy for children's education that necessarily resulted in a reduction of children in the workforce.

In France, prior to the Industrial Revolution, children's work in the family community was taken for granted, and in 1813, child labour under the age of 9 in mines was prohibited. Child labour was incompatible with education. Therefore, attempts were made, though unsuccessfully, to prevent child labour by passing several education laws (in 1833, 1840).⁶⁷ A special Child Labour Law (1841) regulated child labour differently with respect to age and working hours. It could be noted that even the laws that followed this strove, although with little success, to improve the legal status of working children 'as a sign of protective state intervention in the context of the development of a liberal order'.⁶⁸ These laws covered working children in the industry, however, not those in factories; night work, work with toxic chemicals, and work in mines was prohibited. In France, legal regulation of child labour was connected to the right to the education of children, decreasing birth rates, and high rates of child mortality.⁶⁹

In the United States of America, in the state of Massachusetts, child labour was banned by a law in 1837; however, with the transition to factory labour, an increasing number of families, including their children, agreed to work in factories for wages, regardless of great inequalities. Children, like women, were a cheap labour force. Towards the end of the 19th century, workers' trade unions began to engage themselves on behalf of child labourers employed in hard physical and dangerous jobs, and whose numbers were growing.⁷⁰ Great strides were made in the early 20th century, when the minimum age for work in factories was set at 14. A special committee was established to draft a law (the 1916 Keating-Owen Act), which limited work to eight hours. A long-standing conflict between the North and South was reflected in the disagreement on child labour, which was advocated by representatives of the South. The ensuing years were marked by judgements of federal courts and the Supreme Court in favour of the unconstitutionality of similar acts. Then, in 1941, the Supreme Court ruled that the Fair Labour Standards Act complied with the Constitution of the United States.⁷¹

The International Labour Organization (ILO) has been focused on child labour since its inception. In 1919, the first two conventions were adopted (no. 5 on minimum age of children for employment in industry, no. 6 on night work of young persons in industry), which were followed by more conventions.⁷² Relatively recent conventions that are important for child labour are no. 138 (1973) Minimum Age Convention, and

67 Cf Vinković, 2008, p. 29.

68 Ibid., p. 30.

69 Ibid., p. 31.

70 Ibid., p. 32.

71 Ibid., p. 33.

72 Convention no. 7 on the minimum age of admission of children to jobs at sea, Convention no. 10 on the minimum age of admission of children to jobs in agriculture, and other conventions (nos. 16, 33, 58, 59, 60, 77, 78, 112, 123) governing individual other sectors.

no. 182 (1999) Worst Forms of Child Labour Convention. Although this Convention was not signed or was signed with a great delay by states with a high rate of child labour, it is significant because it established a link between the completion of compulsory education and the minimum age for employment, and created fundamental working standards (the so-called *fundamental convention*) for all the ILO member states regardless of whether the states ratified it.⁷³

6. The 20th Century

In the normative sense, the 20th century is the century of children. Many states adopted documents on children's rights that are less known to the professional public, thereby contributing to the idea of the need to establish comprehensive global protection of children through the recognition of child-specific rights and their protection.⁷⁴

The horrors of World War I left its mark on many children. In 1919, Eglantyne Jebb,⁷⁵ an Englishwoman, founded *Save the Children Fund* to help starving children in Germany and Austria. The financial success of the Fund encouraged her to launch an international children's movement, and thus, under the auspices of the British *Save the Children Fund*, the Swedish *Rädda Barnen*⁷⁶ and the *International Committee of Red Cross*, the *International Save the Children Union*, was established in Geneva in 1920. Subsequent years saw the activities of the Fund focused on the problem of hunger in Greece and Soviet Russia. Jebb realised that children need special rights, and thus, at a Fund meeting in Geneva, she submitted a brief document that proclaimed (some) rights of children and the duties of the international community. This document was adopted by the League of Nations in 1924 under the title *Declaration of the Rights of the Child*. Jebb focused on the principle of universality, whereby all children are entitled to their rights, regardless of nationality, race, religion, etc.

Disputes over child labour were prominent in the analysis of the status of children. One can claim that exploitation of children through their work was the driving force behind the fight for a better status and other rights of children. Following World War II, the issue of child labour was mentioned in Art. 10 Para. 3 of the *International Covenant on Economic, Social and Cultural Rights* (1966), which provided protection of children and youth from economic and social exploitation, and stated that

73 Grgurev, 2016, p. 103.

74 The USA was very active in the field. Thus, we note the *Children's Charter* by the US President H. Hoover (1930), the *Children's Charter in Wartime* (1942), the *Declaration of Opportunities for Children* (1942), the *Children's Bill of Rights of the New York State Youth Commission* (1949), the *Japanese Children's Charter* (1951), the *Arab Charter of the Rights of the Arab Child* (1983), the *Declaration of the Rights of the Child in Israel* (1989), the *Declaration of the Rights of Mozambican Children* (1979), the *Charter on the Rights and Welfare of the African Child* (1990); cf. Veerman, 1992, pp. 231–273. The same author refers to other so-called ideological declarations.

75 For Jebb's biography cf. Veerman, 1992, pp. 88–91.

76 It was founded in 1919 by Ellen Palmstjerna together with Elin Wägner, Gerda Marcus, and Anna Kleman.

individual types of child labour (e.g. jobs that are contrary to morality, health, or are life-threatening or harmful for normal development) should be punishable by law. States are also required to prescribe the minimum age under which paid child labour is prohibited.

7. The Geneva Declaration of the Right of the Child (1924)

In the early 20th century, recognition of children's rights was unsystematic and modest. International protection of children existed merely as indirect protection – when it is provided to 'persons', which implies children as well.⁷⁷ The first acts of international law devoted to the child were conventions on the prohibition of trade in women and children (1904 and 1910).⁷⁸

Ideas about children's rights matured over time, and along the way, ideas and engagement of individuals (cf. *supra*) and social circumstances became crucial.⁷⁹ In this sense, the need for the protection of children through their rights was partial and focused mainly on those problems that children encountered at the time in concrete societies. The declarations of the rights of children were a reaction to social circumstances and, as a rule, they highlighted the principles related to child well-being⁸⁰ and did not constitute rights that would belong to children. They served as guidelines for public policies.

The Geneva Declaration of the Rights of the Child was adopted within the League of Nations in 1924,⁸¹ soon after World War I left many child casualties in its wake. The Declaration makes more references to the duties of society towards children rather than towards the latter's rights, and emphasises 'the child's material rights'.⁸² The introduction reads: *'mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all consideration of race, nationality or creed'*. The call, considering the dependence of children, explicitly addressed adults, and this was emphasised in subsequent international documents. The beginning of what would later be called 'the best interests of the child', or the child's well-being and equality of all children of the world, was evident. The expression 'the best humanity

77 For example, the Geneva Slavery Convention (1926), treaties on the rules of warfare, such as the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), which aimed at the protection of all human beings without difference, including children, cf. Andrassy, 1976, p. 596.

78 Cf. Hrabar, 1994, p. 29.

79 Especially war and postwar, economic crises such as poverty, hunger, etc.

80 Veerman, 1992, p. 153.

81 For the steps that preceded its creation, especially as a result of efforts of Eglantyne Jebb, cf. Veerman, 1992, p. 155. The Declaration was originally adopted within the framework of Save the Children International Union, signed by all its members, and then, seven months later, adopted by the Assembly of the League of Nations and its 50 member states.

82 Freeman, 1992, p. 4.

can give' implies 'summarising those needs of children that must be met at any cost even during the times of serious economic pressures'.⁸³

In just five articles, emphasis is laid on circumstances that can be translated into today's legal language: the right to development,⁸⁴ the right to survival, health, resocialisation, and rehabilitation and substitute care,⁸⁵ the right to protection from economic exploitation and restricted work conditions,⁸⁶ and the right to upbringing and all-round development.⁸⁷ The fifth principle ('the child must be raised in the consciousness that its talents must be devoted to the service of its fellow-men') is considered the most important and far-reaching principle since it reflects the system of values and norms.⁸⁸ Principle no. 3 is also interesting, giving precedence to a child in distress (when giving aid). It can be interpreted in the sense that children must always be *first*, and must take precedence.⁸⁹ It is possible, though not explicitly mentioned, that this principle includes refugee children and children of members of minorities, war-affected children, children with disability, sick children, and children in need of social security. Commentators of the Declaration at the time commented on the social conditions in which children live and believed, for example, that economic exploitation may also refer to prostitution and that education implies development of talents/capabilities, etc.

8. UN Declaration on the Rights of the Child (1959)

The Declaration on the Rights of the Child proclaimed by the UN General Assembly Resolution no. 1386 (XIV) is a step further in offering a more comprehensive protection of children and their rights and a revision of the wording of the slightly obsolete Geneva Declaration,⁹⁰ considering the changes that ensued in terms of healthcare for children and the understanding of the child's well-being.⁹¹ For the first time, the Declaration proclaims freedoms and rights of children for the sake of achieving both their interests and those of society. In its ten principles, the Declaration directs states towards desirable conduct,⁹² since this is after all a non-binding document.⁹³

83 Veerman, 1992, p. 157.

84 Mentioned in the sense of 'the means requisite for its normal development, both materially and spiritually'.

85 Mentioned as 'the child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured'.

86 'The child must be put in a position to earn a livelihood and must be protected against every form of exploitation'.

87 '... its talent must be devoted to the service of its fellow men'.

88 Veerman, 1992, p. 159.

89 *Ibid.*, p. 158.

90 For proceedings preceding the adoption of the final wording cf. Veerman, 1992, p. 161.

91 *Ibid.*, p. 161.

92 Hrabar, 1994, p. 31.

93 Therefore, these are principles, not articles. Cf. *Ibid.*, p. 31 and Veerman, 1992, p. 168.

Its text consists of a Preamble and ten principles, which were the subject of negotiations and marked by certain controversies,⁹⁴ and in the end, by compromises. Principles can be grouped into three sets.⁹⁵

Principle no. 1 refers to the ban on discrimination of the child on any basis, and does not refer to rights, but rather to the universality of other rights contained in other principles.⁹⁶ Principle no. 2 combines several aspects or elements as we know them in more recent international documents on children: special protection, possibility of physical, mental, moral, spiritual, and social development in freedom and dignity, and the best interest of the child as the paramount consideration. Protection meant here is unspecified, and therefore must include protection from physical and personality attacks.⁹⁷

Principle no. 3 refers to the right to name and nationality. Discussions showed the diversity emerging from different cultures when it comes to name-giving (and surname); however, much greater discussion was on acquiring citizenship considering different national principles.⁹⁸ Nevertheless, with the principle so formulated, the intention was to transfer the responsibility for acquiring nationality to the child's representatives, since the child itself cannot apply to the competent bodies.⁹⁹

Principle no. 4 deals with the child's social security, implying healthcare, protection of the mother and the child, special pre-natal and post-natal care, nutrition, housing, recreation, and medical services. In fact, even today, poor and rich countries differ with regard to how much of their resources they can allocate to children. Principle no. 5 provides for special treatment, education, and care for children who are physically, mentally, or socially handicapped.

Principle no. 6 focuses on the full and harmonious development of the child's personality that presupposes 'love and understanding' in the care and responsibility of parents, moral and material security, and the closeness of a mother for younger children.¹⁰⁰ Reference is made to the state's duty to care for children without a family and for those without adequate support, as well as support to maintain children in families with more children.

Principle no. 7 comprises rights to education, playing, and recreation. Education should be free and compulsory in the elementary stages with the aim of promoting the child's culture and development of the child's abilities, individuality, and moral and

94 During the drafting, disputes arose over different understandings of the child as an individual or as 'child of the State', the latter being advocated by the delegates of China and the USSR, diminishing the role of the family and parents as primary educators; cf. Veerman, 1992, p. 168.

95 Thus, Hrabar, 1994, p. 31; and Veerman, 1992, who distinguishes the so-called conservative mode and adaptive mode of four different subsystems: social, personal, cultural, and physical; cf. p. 180.

96 Veerman, 1992, p. 170.

97 Ibid.

98 Acquisition of nationality by *ius soli* or *ius sanguinis*.

99 Veerman, 1992, p. 171.

100 It specifies: 'a child of tender years shall not, save in exceptional circumstances, be separated from his mother'.

social responsibility in order to become a useful member of society. It also mentions the best interests of the child as the guiding principle in the treatment of the child by its parents and later by educators. Critics, and they were plenty when the Declaration was drafted and in the period thereafter, considered this principle quite vague.¹⁰¹

Principle no. 8 refers to children as persons who ‘in all circumstances shall be among the first to receive protection and relief’. This does not exclude, for example, persons with disabilities or pregnant women, and the principle is applicable to cases of natural disasters and armed conflicts.

Principle no. 9 merges several situations in which children must be protected: in cases of their neglect, cruelty towards them and their exploitation, any form of trade, employment below the minimum age, and harmful effects on the child’s health or education or doing things contrary to the child’s physical, mental, or moral development.

Principle no. 10, the final one, refers to protection and prohibition of racial, religious, and other forms of discrimination. The child should be raised in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in consciousness of his devotion to the service of his fellowmen. As in defining other principles, in this case too, certain disagreements due to the lack of precision of the norm were noted.¹⁰²

This Declaration attempted to bring to light everything that is necessary for the proper growth and development of children and focused on the universal protection of children. Therefore, its basic feature is recognition of children’s rights as a special category of human rights.¹⁰³

101 Thus, Veerman, 1992, has doubts about the meaning of the words ‘general culture’ and ‘in the best interest of the child’; cf. p. 177.

102 For example, with reference to difficulties in defining how to implement education in the field of human rights, tolerance, peace, and development and how to interpret the duty to protect the child when certain practices give rise to discrimination.

103 Hrabar, 1994, p. 32; 1989, p. 871.

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Special Protection of Human Rights of Children II.: Legislative History of the UN Convention on the Rights of the Child

Sandra O. SAMARDŽIĆ

ABSTRACT

It took a long journey to recognise and regulate children's rights institutionally. Today, numerous organisations are promoting measures that exclusively regulate the position of children; that is, acts which indirectly affect children's rights. The intent of these acts is not uniform in terms of whether they are legally binding or not, and neither is their relevance, however, it is certain that once this process has been initiated, the manner in which children and their positions will be perceived will become permanently set. Regarding family law, that is, child law, the most significant act to be passed was the adoption of the UN Convention on the Rights of the Child in 1989.¹ The Convention stems from years of research. The early stages of the work on a document dealing with children's rights were prompted by advances in perceiving children as separate individuals, and by the accelerated consolidation of the International Human Rights Law.² In the 34th session of the UN Commission on Human Rights in 1978, the degree to which children suffered during armed conflicts and other forms of aggression was specifically stressed, along with the need to protect them and their position. In the same session, the Polish delegation submitted a draft proposal for the Convention on the Rights of the Child (Polish draft), which was based on the 1959 United Nations Declaration on the Rights of the Child. Shortly afterwards, a working group was formed that dealt with the proposals submitted by various States or organisations. More than ten years would pass before the working group submitted the final draft (although the initial plan was that the Convention be adopted in 1979), which was first adopted by the UN Human Rights Commission and the Economic and Social Council. Thereafter, it was submitted to the UN General Assembly for adoption, where it was adopted by acclamation.³ The Convention on the Rights of the Child represents a unified and coordinated document, whereas the rights proclaimed in the Convention represent a synthesis of efforts to ensure the child's best possible quality of life. Although the final regulation of children's rights and its attempt to improve the overall position of children are undeniably motivated by a noble idea, it was certainly not easy to implement it.

1 Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_44_25.pdf.

2 Detrick, Doek and Cantwell, 1992, p. 19.

3 Janoff, 2004, p. 170.

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KEYWORDS

children's rights, convention, children's rights history

1. Development of the Idea of the Convention on the Rights of the Child

In the not-too-distant past, one man believed that children had the same rights as adults and that they should be treated that way. This man dedicated his life to children who had no one but him. Although some people believed that the life of that grown man could outweigh the lives of children, he demonstrated what it meant to have a heart and to see children for who they really are - beings who represent the future and foster hope for a better world. Although he went by the name Janusz Korczak, his birthname was Henryk Goldszmit. He was born in Warsaw on 22 July 1878 or 1879. He was a doctor, educator, writer, thinker, and for many children, a protector, faith and hope for a better tomorrow. Korczak became a legend when he chose to die alongside Jewish children who were sent from the orphanage to the Treblinka death camp. Although he refused to be spared and chose to share the destiny of the children he cared for, the magnitude of this man resides in the 40 years of life and work dedicated to education and care for the children, so immense that it must never be forgotten. Today, the world is indebted to Korczak for the inestimable value of discussions on children's rights. His work and achievements occurred before and after WWI, and this period may be considered pivotal in the development of education and of essential importance for children in general. At this time, education and care for children began to play a vital role in creating a better society.⁴ Most of the educational traditions that are considered innovative and "alternative" today, were developed during this period.⁵ Korczak completed his medical studies at the University of Warsaw and worked as a doctor at Barson and Bauman Children's Hospital between 1905 and 1912. Subsequently, Korczak was offered the position of orphanage director at the Orphanage for Jewish Children, *Dom Sierot*, where he lived until the end of his life. In addition, he helped to find the Nasz Dom Orphanage for Polish children in 1919. Both institutions relied on systems that were largely based on the development of the children residing there and their social lives. Korczak focused on child psychology and pedagogy, but his findings remain important guidelines to this day. His primary belief, unconventional and ahead of the time in which he lived, was that children deserve the same respect as adults. Thus, he believed that children and adults must become equal and thus be treated equally.

4 Hartman, 2009, p. 13.

5 Ibid.

‘Children are not the people of tomorrow but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect.’

Korczak’s pedagogical ideas and thoughts on children’s rights are most clearly explained in his most important publication *The Child’s Right to Respect*. The book was first published in 1928, by when Korczak had a sixteen-year experience in running the orphanage. However, in this book, unlike in *Rules of Life* or *How to Love a Child*, he does not refer that much to practice, but to indisputable principles and values, commanding, or better say, demanding that a child has the right to respect. Asserting that children are equal to adults, he emphasised that there are ‘no children – there are only people’, and as such, they have the same civic, societal, and cultural rights.

Even during that era, Korczak fought passionately for children’s rights and believed that it was necessary to implement the Convention. The Geneva Declaration, adopted by the League of Nations in 1924, was disappointing.

‘The lawmakers of Geneva confused obligations and rights. The tone of the Declaration is one of persuasion, not of insistence: it is an appeal to goodwill, a request for kindness.’⁶

For Korczak, children’s rights were mandatory immediately and not in some speculative future. He stressed the need to respect all rights of children, including the right to receive love and respect.⁷ In the honour of his 100th birth anniversary, UNESCO deemed 1978/79 “the Year of Korczak”. This overlapped with the United Nations’ proclamation of the International Year of the Child. Korczak’s impact on the adoption of the Convention on the Rights of the Child was undeniable and by no means insignificant. His ideas and teachings were highly advanced, although some of his ideas appear to be ahead of their time, even today.

‘The Convention on the Rights of the Child owes much to Poland. The Convention’s vision of the child as a subject of rights is inspired by the writings, work and life of Janus Korczak, a Polish paediatrician, educator and writer who reminded the world that children are not people to be, but people of today with rights and dignity, conscience, feelings, reason and opinions. It was Poland that on the occasion of the International Year of the Child (1979) proposed the drafting of the UN Convention, which was led by Polish lawyer Adam Lopatka.’⁸

The idea of creating the Convention on the Rights of the Child was the next logical step in a direction that had begun a few decades earlier. The adoption of the Declaration on the Rights of the Child led to the need to issue another international document on children’s rights that would define them more precisely and oblige countries to

6 Korczak, p. 34.

7 He particularly elaborated on this idea in his texts: *How to Love a Child* and *The Child’s Right to Respect*. The first one was written during First World War and the second in the 1920s.

8 The Special Representative of the Secretary General on violence against children Marta Santos Pais on the commemoration of the 25th Anniversary of the UN Convention on the Rights of the Child in Warsaw, Poland, November 2014. Available at: <https://violenceagainstchildren.un.org/news/poland-and-convention-rights-child-celebrating-vision-janus-korczak-put-child-dignity-first>.

respect those rights.⁹ Almost all member States of the Warsaw Pact criticised the mild tone of the original version of the Declaration and called for another document which underlined the paramount importance of the state.¹⁰ In its report, Hungary expressed its concern about the Draft Declaration, ‘the value of the Declaration will greatly diminish as it is to be feared that its contents will remain only desires, and will not give birth to world-wide, actual protection of the rights of children’.¹¹ Israel made a similar point stating that ‘the operative part of the proposed General Assembly Resolution should contain (at least) a voeu for conventions to be drafted defining more precisely the obligations to be undertaken by States towards children, both nationally and internationally’.¹² However, Poland insisted that the only adequate solution would be to adopt a binding document—that is, a convention.¹³ However, the countries did not see the need to adopt the Convention on the Rights of the Child. This was expected, as several countries were not in the position to guarantee children even the basic right, which is the right to life.¹⁴

The Holy See also supported active work in the field of children’s rights.¹⁵ In his address at the 34th session of the General Assembly of the United Nations, his Holiness Pope John Paul II pointed out that there is no better future for the children of this world but one in which respect for human rights becomes a reality.¹⁶ He further explained in his address in 1984, ‘Concern for the child is concern for that *better future*’. As it was pointed out later, the Church always believed that assisting and investing in the development of children was nothing more than investing in a better future. On the occasion of the Synod of Bishops held in the Vatican in 1980, the Holy See issued a Charter of the Rights of the Family and presented it to the international community. The document was issued to indicate the areas where the rights of a family were not respected and express the immense trust and faith of the Church in the institution of family, ‘*which is the natural community of life and love*’.

The first important step was taken more than 15 years after the adoption of the Declaration, when the UN General Assembly, at its 106th session, on 21 December 1976 unanimously adopted the resolution deeming 1979 the International Year of the Child (IYC) to mark the twentieth anniversary of the Declaration of the United Nations.¹⁷

‘*Convinced* that an international year of the child could serve to encourage all countries to review their programmes for the promotion of the well-being of children

9 Balcerek, 2015, pp. 184 – 195.

10 Lindkvist, 2019, p. 214.

11 Draft Declaration of the Rights of the Child: Comments by Governments, January 12, 1959, E/CN.4/780 (1959), 8, Available at: <https://digitallibrary.un.org/record/639167?ln=ar>.

12 Ibid., p. 9.

13 Ibid., pp. 17-18.

14 Hanyś, 2015, p. 186.

15 Ioannis Pauli PP. II, 1979, Available at: https://www.vatican.va/content/john-paul-ii/en/speeches/1984/april/documents/hf_jp-ii_spe_19840426_unicef.html.

16 Ibid.

17 UN General Assembly, Question of a Convention on the Rights of the Child, 20 December 1978, A/RES/33/166, Available at: <https://www.refworld.org/docid/3b00f1764.html>.

and to mobilize support for national and local action programmes according to each country's conditions, needs and priorities ... Aware that, for an international year of the child to be effective, adequate preparation and the widespread support of Governments, non-governmental organization[s] and the public will be required.'

Accordingly, the general goals were defined as those pursued by the IYC. In this regard, among other things, creating conditions and environments where the special needs of children would be considered essential, and those in power to make decisions should lead the way on this matter. The same resolution calls for governments to improve the position of children, specifically the most vulnerable.

Although today, the International Year of the Child is considered as a milestone towards the final adoption of the text of the Convention itself, its importance is far greater. Notwithstanding their initial opposition to the idea of creating a Convention on the Rights of the Child¹⁸ following the declaration, many countries revoked their opposition, and the idea of the rights of the child finally acquired importance in international politics.¹⁹ Examining and analysing the International Year of the Child is important as it offers insights into differences in attitudes and views on the Convention on the Rights of the Child among member countries at that time. The ICY was first declared to centralise the need and awareness of promoting children's well-being.²⁰ Certain questions regarding children had been completely unaddressed up until that moment, whereas the scale of some other problems had not been evident.

Curiously, at the time the IYC was declared, no one recognised the possibility of any form of international cooperation which could ultimately result in adopting the Convention, a legally binding document dealing with children's rights. Many refrained from using the term *rights* and opted for the concept of the *needs* of the child. Even within the UN Human Rights Commission, the idea of a new Convention on the Human Rights of the Child was not seen as something plausible.²¹ Even more surprising was Poland's proposal of the Convention in 1978, in the manner of the IYC, to ensure a legally binding character for the principles contained in the 1959 Declaration. The idea was to adopt the final text of the Convention by the end of 1979, which would assign meaning to the entire idea of declaring an IYC.²² By proposing the Convention, Poland aimed to shape the way the world perceives children as subjects of their own rights. Its endeavour was to implement the pedagogical idea of Korczak, which was largely successful.²³

18 Bueren, 1998, p. 13.

19 Holzscheiter, 2010, pp. 151–152.

20 Black, 1986, p. 360.

21 Lindkvist, 2019 p. 205.

22 Letter from Eugeniusz Wyzner to the Director of the UN Division of Human Rights, January 18, 1978. UN Doc. E/CN.4/1284 (1978).

23 Hanyś, 2015, p. 189.

2. Warsaw Conference on the Legal Protection of the Rights of the Child

The declaration of the International Year of the Child prompted the International Commission of Jurists (the organisation with headquarters in Geneva) to contact the International Association of Democratic Lawyers of Eastern Europe in an attempt to mitigate differences among these countries. This was the first time any steps towards cooperation of any type between these two legal associations had been undertaken. Consequently, in January 1979, the Warsaw Conference on the Legal Protection of the Rights of the Child was held at the Palace of Culture and Science in Warsaw, with the participation of the Polish Association of Jurists. The number of Eastern European participating countries was approximately equal to that of Western European countries. In addition to the aforementioned participants, the Conference was attended by many distinguished lawyers as well as representatives of the UN Secretariat for the International Year of the Child, the UN Division of Human Rights and the UN High Commissioner for Refugees.

The Conference resulted in two resolutions: Resolution in Support of the Adoption of the International Convention on the Rights of The Child and Resolution in Support of the Implementation of the United Nations Declaration on the Preparation of Societies for Life in Peace.

In the first resolution, the participants confirmed ‘that mankind should always give of its best to every child’, and in this manner, every child should be provided with the conditions to grow and develop fully, while love, understanding and a sense of safety should be recognised as essential to this process. Moreover, the participants highlighted the duty of adults to protect children in every way possible – above all, from “neglect, cruelty and exploitation”. Child protection represents “supreme moral imperative of society” and to make it real, it was necessary to give these norms ‘the status of norms under international law in the form of an international Convention on the Rights of the Child’.²⁴

At the final plenary session of the Conference, participants from 19 countries in Eastern and Western Europe unanimously agreed on several fundamental principles. Specifically, it was determined that the state was responsible for providing support for the family; therefore, ensuring rights for children, in that regard, it needed to establish clear requirements that parents must comply with. Additionally, ‘the right of the child to be consulted about its welfare whenever the child is in a position to express such opinions’ must be respected by both the state and parents. The participants viewed sectors such as education, healthcare, recreation, and child labour as

24 Resolution in Support of The Adoption of an International Convention on The Rights of The Child, taken from: Legislative History of the Convention on the Rights of the Child, Volume I, Office of the United Nations, High Commissioner for Human Rights, United Nations New York and Geneva, 2007, p. 51.

particularly important and hence decided to include more detailed conclusions on the aforementioned children's rights in the Statement of Principles on the Legal Protection of the Rights of the Child.

3. The Beginning of the Work on the Convention

On 17 January 1978, the permanent representative of Poland to the United Nations Office at Geneva sent a letter at the behest of his government, addressed to the Director of the Division of Human Rights, proposing that the item "The Question of the Rights of the Child" be included in the agenda at the 34th session of the Commission on Human Rights.²⁵ As stated in the explanatory memorandum, the Government of the Polish People's Republic viewed the principles of the Declaration on the Rights of the Child as essential to improving children's rights worldwide and establishing different forms of international cooperation in this sphere. Additionally, the Government of the Polish People's Republic believed that 20 years after the adoption of the aforementioned Declaration, the conditions were created to undertake further steps in the direction of adopting a legally binding document, that is, the Convention.

This should be based entirely on the principles of the Declaration on the Rights of the Child. Poland's proposal was approved and the Commission on Human Rights included the question of the Convention on the Rights of the Child in its agenda.

The proposal submitted by Poland in 1978 was largely based on the Declaration on the Rights of the Child, considering that the Declaration was approved by many countries. Considering the opportunity to submit this type of proposal, Poland realised that the initiative in regulating issues in the sphere of human rights did not necessarily need to come from Western countries. The proposal was first submitted to the Commission on Human Rights, which passed Resolution 20 (XXXIV) on 8 March 1978²⁶ asking the Secretary-General to invite Member States, competent specialised agencies, regional intergovernmental organisations, and non-governmental organisations to offer their opinions, observations and suggestions for the draft Convention on the Rights of the Child. In compliance with Resolution 20(XXXIV), the Secretary-General forwarded the Draft Convention to the Member States, competent specialised agencies, regional intergovernmental organisations and non-governmental organisations, and asked them to submit their opinions by 31 October 1978. The feedback varied. Although a number of States enthusiastically welcomed the idea of adopting the Convention and sent messages of support, certain criticisms and objections were also

25 E/CN.4/1284, Letter dated 78/01/17 from the Permanent Representative of Poland to the United Nations Office at Geneva addressed to the Director of the Division of Human Rights. Available at: <https://digitallibrary.un.org/record/556715?ln=en>.

26 E/1978/34; Commission on Human Rights Report on the Thirty-Fourth Session (6 February-10 March 1978) Economic and Social Council Official Records, 1978 Supplement No. 4 United Nations New York, 1978, p. 122., Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G78/077/09/PDF/G7807709.pdf?OpenElement>.

launched, which can be classified into three categories. First, there were those who believed it would not be viable to adopt the Convention in such a short period of time as they believed it would be altogether wrong, since a serious task as this required a much longer period. Different views on when it was realistically possible to adopt the Convention resulted from profound ideological discrepancies in the perception of children's rights. Some representatives, such as those of the United Kingdom of Great Britain and Northern Ireland, proposed that the adoption of the Convention be postponed to consider the results of all the activities planned for 1979 regarding the International Year of the Child. A number of delegations emphasised that the provisions of the Declaration on the Rights of the Child were not applicable; that is, they cannot be included in the text of the future Convention, as the Convention was created 20 years ago, and hence the current conditions and problems differed considerably from those in the past. Poland was adamant that the 1959 Declaration on the Rights of the Child was sufficient; thus, it did not insist on introducing new rights but rather a framework which would ensure that the existing rights of the Declaration would become legally binding.²⁷ Another type of objections was aimed at the very content of the draft, or the fact that it mostly contained economic, social and cultural rights (the rights considered by most governments as not rights at all, but merely "good social policy"²⁸), whereas some other important rights were left out, such as, the rights of children recruited and used in armed conflicts and the rights of minority children. Furthermore, there were objections to how the provisions were formulated as they were not clear or sufficiently specific. Finally, the designated mechanism for monitoring the implementation of the Convention was also criticised; that is, submitting reports solely to the Economic and Social Council was considered as radically insufficient.

Simultaneously, objections were raised to the precision of the wording, and it was demanded that the provisions contained in the text of the Convention be clear and unambiguous. As the President of Sweden pointed out: "The 1959 Declaration contains certain general statements which do not have their proper place in the operative part of a convention which, being an agreement between States, should lay down concrete, mutual obligations."²⁹ However, certain delegations, such as Mauritius, Morocco, Bulgaria, Byelorussian Soviet Socialist Republic and Hungary expressed firm beliefs that the draft presented by the delegation of Poland was a good and solid basis for the drafting of the convention and that by 'the early adoption of a convention on the rights of the child Member States may concretely demonstrate their sincere endeavor for wide and universal guarantee of human rights'.³⁰ In addition to general suggestions, representatives of the countries took this opportunity to communicate

27 E/CN.4/1324, Question of a Convention on the Rights of the Child: Report of the Secretary-General, Geneva: UN, 27 Dec. 1978. Available at: <https://digitallibrary.un.org/record/6629?ln=en>, pp. 15-16.

28 Cohen, 1989, p. 1449.

29 E/CN.4/1324, 1978, p. 16.

30 Ibid., p. 13.

their ideas and opinions on specific rights which the draft did not contain—rights they believed needed to be incorporated into the text of the Convention. Thus, Barbados requested that the right to life be more precisely defined, that is, ‘How far should this right go? Does the child include an unborn child or a fetus?’ The same question was posed by Portugal and many other States as well, which was one of the most delicate topics brought up during the course of work on the text of the Convention. The Federal Republic of Germany insisted on a solution to the question of ‘the protection of adopted children and children who are brought up by foster-parents’, while the German Democratic Republic stressed the need to formulate ‘principles on equality and non-discrimination in respect of children born out of wedlock’. There were several questions raised by the representatives of certain countries and proposed to be included in the Convention, such as the question of children in occupied territories, children under the apartheid regime, racial discrimination, abuse of children, age of criminal responsibility for children, child labour, children’s right to religious education, the right of children to consultation in matters affecting their well-being, and many others. Furthermore, a considerable number of representatives suggested that it was necessary to focus on the status of children in developing countries suffering from poverty, hunger and malnutrition.

The different views of different countries with respect to the given idea stemmed from the international political environment of the time. At the time of the IYC proclamation, on the political scene, the Cold War was being waged, which led to diametrically opposed Eastern and Western Bloc countries. Therefore, it is not surprising that Poland’s proposal was at that time interpreted as “the Eastern bloc initiative”,³¹ which diminished their chances of approval right from the beginning. Although the Convention in its essence was a document which represented a humane endeavour in the first place and the work on the Convention on the Rights of the Child by its definition can only be non-political and as such it is there to unite, not divide, during the work on it, the rivalry between two ideological and political blocs appeared to be more powerful than the development of common values.³²

Despite substantial criticism by member States, the UN General Assembly made its best efforts to adopt the Convention during the International Year of the Child. Nevertheless, considering that no agreement was reached among the States either on the text of the Convention or when the Convention may be adopted, the Commission on Human Rights decided to form a working group comprising representatives of member States tasked with further work on the Convention, aiming to create a new draft. The working group comprised representatives from twenty-three countries, including the United States, Great Britain and the former Union of Soviet Socialist Republics (USSR).³³

31 Cohen, 2006, pp. 186-187.

32 Hanyś, 2015, p. 190.

33 Ibid., p. 188.

4. The Working Group

In 1979,³⁴ working group meetings were held on five occasions when various suggestions were made. After the first year of meetings, on 5 October 1979 Poland submitted a revised text of the Convention (contained in document E/CN.4/1349), which the working group used as its basic working document to build on their further work.

At the beginning of their work, between 1979 and 1980, meetings were held infrequently, and the working group had only a limited number of hours for discussions. These sessions were held simultaneously with the Commission's meetings and open working groups convened by the Commission. This in itself impeded the work on the Convention. In 1981, the Commission on Human Rights allowed the working group to hold sessions several days before the Commission's session and approved the continuation of their work, even during the session. Later, the working group was granted consent by the Commission to hold one-week or, in the final stages, two-week meetings prior to the Commission's session, which considerably facilitated and advanced the work. In addition to these infrequent meetings, attendance was initially poor, revealing that most States did not consider the Convention as an urgent matter. Notably, the antagonism between the East and West at that time hampered collaboration. Western countries often opposed the proposals simply on the grounds that they came from the East, as the proposal of the Convention came from Poland.

African and Asian countries which were not sufficiently or prominently engaged in the activities of the working group, were always concerned that the Convention may overlook the problems they were facing. As it was pointed out, many important organizations were not included in the project during the first years, while simultaneously, the representatives of some of the non-governmental organizations did not wholeheartedly embrace the idea of creating the Convention. The delegates of the Holy See had a relatively positive attitude towards the concept of the Convention. In addition to the discord between the States that approved the draft and those that objected to it, it was rather unusual that certain organisations made no statement, took no position, or expressed no attitude on the given issue, and probably the most peculiar thing was the passive attitude of UNICEF.³⁵

The situation assumed a different turn in the 1980s when interest in work on the Convention began to increase. Not only the UNICEF, but also the less developed countries, along with the Islamic States, joined the work of the group which paved the

34 The open-ended working group held meetings on 14, 20, 21, 22 and 26 February and 2 March 1979., E/CN.4/L.1468, Report of the Working Group, Geneva, UN, 12 Mar. 1979, Available at: <https://digitallibrary.un.org/record/6759>.

35 One of the possible reasons why UNICEF acted in such a manner is that this organisation had to steer away from rights that would be conflicted with the competences and mandate of UNICEF whose chief task was to address the needs of children in developing countries. In the end, UNICEF was actively involved in the work on the drafting of the Convention, particularly in the period from 1985/86, helping to ensure public interest in the given project. Lindkvist, 2015, p. 218

way for equal participation of countries from different parts of the world. Initially, the non-governmental organisations appeared rather indifferent to the matter, however, as they realised that no significant contribution to the work could be made on their end, in 1983, they decided to organise an ad hoc NGO supported by the Defense for Children International. This was the first joint effort of human rights organisations and organisations that help children. The ad hoc NGO was an informal association of approximately 30 international non-governmental organizations that are in consultative status with the UN Economic and Social Council. The collaboration between this group and government delegations during the drafting of the Convention represents a unique model for drafting international legislation, which had a powerful impact on the work and the final text of the Convention. As mentioned previously, James Grant, the Executive Director of UNICEF, had been included in the process of finalising the draft since 1986 and thereby additionally contributed to the quality of the overall work. The involvement of international organisations, such as the International Labour Organization, United Nations Educational, Scientific and Cultural Organisation (UNESCO), World Health Organization (WHO), and International Committee of the Red Cross (ICRC), became more prominent.

Interestingly, all decisions were made by consensus, which had its advantages and disadvantages. Although this decision-making process slowed down the work pace, every issue was thoroughly debated until all participants were satisfied with how the text was framed. This facilitated the process of future work, as no additional discussion or debate was required once the question of the Convention was brought before the General Assembly. Aiming to complete the work of the Convention by the 30th anniversary of the Declaration (and the 10th anniversary of the IYC), an alliance of non-governmental organisations and various UN bodies began to pursue this goal under a plan known as “Target 1989”.³⁶ Their joint efforts enabled them to obtain an additional week for drafting during the 1988 session of the Commission.

When the working group was attempting to agree on the text of the Convention, two treaties on fundamental freedoms had already been adopted to regulate different rights: the right to association; the right to religious freedom; and the right to seek, receive, and impart information. Not one provision of these documents limited these rights to adults. Thus, the fundamental freedoms guaranteed by the treaties were also applicable to children, but no awareness of this existed in people’s minds, therefore it was of crucial importance that these rights, that is, freedoms, were finally included in the text of the Convention. Additionally, work on unifying children’s rights helped raise awareness of the necessity of adopting a document of this type. Hence, inspired by the work of the Convention on the Rights of the Child, numerous regional conferences were held during 1988, in addition to those of the working group. In that respect, in Senegal the West African seminar on the draft convention occurred, on the occasion of which, “*Declaration of Dakar*”, was adopted ‘which stressed the need to take account of the cultural values of Africa’. In addition, *the Latin American Meeting*

36 Cohen, 1989, p. 1448.

in support of the draft convention on the rights of the child was held in Buenos Aires in September-October 1988,³⁷ and the Seminar on the Rights of the Child was held in Alexandria (Egypt) in November 1988, where certain recommendations were made and sent to the working group.³⁸ In addition, the Portugal's representative reported that Portuguese-speaking countries met in Lisbon under the auspices of UNICEF to study a draft Convention on the Rights of the Child, while the representative of Rättna Barnen International reported on the Seminar on the Convention on the Rights of the Child held in Stockholm in October 1988, organised by the Swedish National Committee of UNICEF and Rättna Barnen. Overall, work on the Convention took a long time. As pointed out, in the working group, consensus was required on all issues, which significantly slowed the work. The final text of the Convention was adopted after 11 years of collaboration and joint effort. During this period, numerous proposals by many countries were debated; although it was impossible to incorporate all the suggestions in the text of the Convention, it was of significant use to discuss all the issues considered relevant to the status of children. Some of these issues were delicate in nature, and thus required an extensive period to reach a final agreement. Probably the most difficult to agree on was the question of whether life began at birth, conception, or at some other point. Furthermore, the question of when childhood ends was also brought up. Considering that the question of life and when it began caused major dilemmas (much like it does today) and hindered the process of reaching a consensus, this question remained unsolved in the final version of the Convention. As far as the end of childhood is concerned, the Convention clearly defines it as ending at the age of 18 years, which was adopted by most legal systems. Agreement on the age of attaining adulthood was relatively easy to reach, whereas the beginning point of childhood and questions of whether protection should be provided for children even before their birth were left out. Thus, the issue of protecting an unborn child was not included as an integral part of the Convention on the Rights of the Child, either in Article 1 or Article 6. However, the Preamble of the Convention cited the Declaration on the Rights of the Child, where it is stated that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*', based on which it may be concluded that the Convention provides protection for both a born and an unborn child. However, the advocates of the "before and after birth" wording, claimed that such a phrase was sufficiently neutral, as it does not deem the right to life to be absolute and beginning at conception.³⁹ Interestingly, this phrase was only incorporated into the text of the Convention shortly before work on the Convention was completed. In 1980, the representative of the Holy See, as agreed with other delegations, proposed a change to be made to the fifth paragraph by citing the Declaration of the Rights of the Child and

37 Legislative History of the Convention on the Rights of the Child, Vol. I, 2007, p. 197.

38 Ibid., p. 198.

39 Question of a Convention on the Rights of the Child, Report of the Working Group, E/CN.4/L.1542, Geneva, UN, 10.3.1980., §11, Available at: http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-L_1542.pdf?null.

using the words – “before and after birth”.⁴⁰ As the Observer of the Holy See pointed out ‘a child and its life existed from the moment of conception...’ and ‘human life shall absolutely be respected and protected from the moment of conception’.⁴¹ However, other delegations opposed this amendment, stating that the stance of the preamble should be neutral on matters such as pregnancy termination. The Holy See and other countries, such as Malta, Senegal and Ireland, succeeded in their efforts, and this formulation, taken from the Declaration, according to which protection is provided for children even before their birth, was incorporated into the Preamble of the Convention. The disagreements about the aforementioned issue, as well as the fears on behalf of the representatives of the High Contracting Parties, were all related to matters of pregnancy termination. Thus, member States were not ready to accept any type of phrasing which would include unborn children as well, fearing it may indirectly refer to the termination of pregnancy, which at that time was allowed in many countries. However, in the Preamble ‘special care and protection, including the respective legal protection both before and after birth’, does not imply the obligation to recognise the right to life for an unborn child, the way it was pointed out at the time of adopting the Convention. Its significance is mostly seen in its support for the existing practice of implementing measures to protect the foetus. Thus, simply the fact that there are laws in the national legal systems regulating the issue of pregnancy termination speaks in favour of the understanding that the foetus is not entirely deprived of legal protection. Considering the intricate differences in opinions on this matter, the working group strived for a solution that could be adopted by each member state of the Convention. Another factor that influenced finalising the decision was the attitude of the *Legal Counsel* that was sent the request by the representative of the United Kingdom for clarifying whether the Chair of the working group could incorporate into the *travaux préparatoires* the following formulation - ‘in adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties’.

The *Legal Counsel* first remarked that introducing such a formulation would be most unusual, as this would mean that a text contained in the *travaux préparatoires* actually served to deprive the preamble of its standard purpose, which was to explain the purpose of the document more thoroughly. In this regard, it is unclear what type of conclusions States can make. However, as stated in this response, there does not exist ‘a prohibition in law or practice from making an interpretative statement; in the negative sense, intended here as part of the *travaux préparatoires*’.

Thus, in the final text of the Convention, the determination of the (legal) beginning of childhood is up to each national legislator, leading to an unusual epilogue to this question. Thus, Article 1 of the Convention does not regulate the question of when the right to life begins to be protected and guaranteed; the text of the Preamble

40 Legislative History of the Convention on the Rights of the Child, Vol. I, 2007, p. 285.

41 E/CN.4/1988/28, Report of the Working Group on a Draft Convention on the Rights of the Child, Geneva, UN, 6 Apr. 1988, p. 7, Available at: <https://digitallibrary.un.org/record/160660>.

States that protection is necessary even before birth, while preparatory work, in a way, negates the text of the Preamble.

There were vast differences among countries in terms of their traditions, cultures, religions and so on, and these differences were difficult to reconcile. Similarly, it was precisely because of the differences in how they understood religion in a particular state that they strongly opposed Article 14 of the Convention.⁴² Thus, the representative of Yemen declared that ‘Under the laws of Yemen, a Muslim child must retain his or her Muslim religion’,⁴³ whereas the representative of Iraq alleged that ‘his delegation had reservations about Article 14 (1) of the convention, since freedom of religion was incompatible with Islamic law and Iraqi legislation’.⁴⁴ However, the representative of Jordan declared the ‘Article 14 of the Convention to mean that the child had the freedom to practice his or her religion, not to change it’, according to the interpretation of her delegation. It is clear that formulating provisions to meet the needs and adhere to the attitudes of all States is practically impossible. However, the text of the Convention represents a broad consensus on what obligations the family, society and the international community should have towards children. Another important aspect is that the Convention managed to set international norms, in a way that ‘Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child’. The Convention was the result of a compromise born out of mutual understanding.

As the work on the Convention was rather time-consuming, some of the initial proposals were adjusted in the final version as the circumstances changed over ten years. For instance, the provision of the revised Polish proposal related to adoption was initially intended to facilitate the adoption of children. However, over the course of years, considerable problems were detected; that is, there were certain illegal activities during adoption procedures in the case of both international adoption and adoption within one State. In this regard, the issue of adoption now required that priorities change – instead of facilitating the process of adoption as much as possible – now it was insisted that, first and foremost, adoption unfolds in the best interest of a child.

One of the most significant problems that certain States attempted to draw attention to during the working group’s entire work was the inequality between developed and developing countries. Thus, the representatives of Senegal pointed out on several occasions that if the Convention had universality as its goal, then it was necessary to consider the actual state of developing countries and the real possibility for them to apply the Convention practically. The delegation of Senegal fittingly asked ‘what

42 It is noteworthy that neither the first Polish draft nor the views received, addressed the issues raised in Article 14 of the Convention. This issue was discussed by the working group in 1983 and the text was adopted in 1984.

43 A/C.3/44/SR.44, Summary record of the 44th meeting: 3rd Committee, held on Wednesday, 15 November 1989, New York, General Assembly, 44th session, New York, UN, 4 Dec. 1989, p. 16. <https://digitallibrary.un.org/record/83689?ln=en>.

44 Ibid.

was the significance of the right to leisure to a starving and sick child?⁴⁵ The working group had to consider and affirm the right to life as well as the right to health and nutritional care.

In addition, there was a non-governmental organisation which drew attention to the document (E/CN.4/NGO/230),⁴⁶ which, among many other issues, dealt with scientific and technological development, that is, the procedure, which was successfully conducted, which may have an impact on children's rights. The first baby to be born through in vitro fertilisation was born in Great Britain in 1978. As it was stated in the aforementioned document, the assisted reproduction 'raises many legal, demographic, biological, medical and psychological issues affecting human rights'. Considering this, the International Humanist and Ethical Union pointed out 'that it might be timely for the Commission to consider examining this technical advance that is both near to the frontiers of science and involves the rights of the child'.

Finally, another delicate issue that required time and effort to build consensus was the minimum legal age for participation in armed conflict. It was extremely difficult to build consensus, as many States were in favour of prohibiting children entirely from being recruited and used in armed conflicts; thus, they argued that the minimum legal age for recruitment and use of children in hostilities be 18 years. In this regard, a few countries argued that Article 38(3), referring to the protection of children in the event of armed conflict, did not fully reflect their concerns and hence was not in accordance with the protection provided by International Humanitarian Law. Many countries welcomed the efforts initially made by Angola, Austria, India, Mozambique and Nordic countries to increase the minimum legal age for participation in armed conflicts. Clearly, it is beyond comprehension that the same article which stipulated the upper age limit of childhood as 18 years also allowed children aged 15 years to participate in armed conflicts. Although the alleged age was in compliance with Protocols I and II of 1977 to the Geneva Conventions, many countries believed that the Convention on the Rights of the Child was supposed to be used as a means of taking more impactful steps and initiatives towards bringing an end to the forced recruitment and use of children as soldiers and that it 'should offer children better protection than that offered by existing instruments and should be interpreted as a reinforcement of existing standards'. However, although the final text of the Convention retained 15 years as the age limit, the working group Chair referred to the provision of Article 41, implying that nothing in the Convention should affect any provision of either National or International Law that establishes higher standards than those defined in the Convention; thus, the application of this article itself will lead to improved and strengthened child protection systems in such situations.

45 E/CN.4/1985/SR.53/Add.1, Summary record of the 53rd meeting (2nd part), held at the Palais des Nations, Geneva, on Tuesday, 12 March 1985: Commission on Human Rights, 41st session, Geneva, UN, 26.4.1985, Available at: <https://digitallibrary.un.org/record/86894?ln=en>, p. 27.

46 E/CN.4/NGO/230, Written statement submitted by the International Humanist and Ethical Union, a non-governmental organization in consultative status (roster), Geneva, UN, 12. 2. 1979. Available at: <https://digitallibrary.un.org/record/6779?ln=en>.

After the last draft of the Convention was completed—the working group decided that the draft should have a second reading and thus was referred to the governments of all UN member States and international organisations for further scrutiny so that everyone would become acquainted with it and share their thoughts on the text of the Convention before it was officially adopted.

5. The Adoption of the Convention on the Rights of the Child

While working on the Convention, the delegates of several States referred to the opinions of the organisations that worked on the protection of children and young people in the countries represented by the delegates. Sweden was one such example. As the work on the draft was nearing completion, a group of children entered the conference room where the working group held a meeting and handed over the petition on a poster, one meter wide and a few meters long, signed by more than twelve thousand children. The petition supported the Convention, and particularly Sweden's proposal to prohibit the recruitment of children in armed conflicts, that is, the use of children in hostilities. On several occasions, students from Canada listened to debates of the working group. Furthermore, the representatives of several French children and youth organisations indicated active interest in the draft of the Convention. An hour after the UN General Assembly had adopted the Convention on the Rights of the Child, thousands of children from worldwide gathered at the UN headquarters in New York for celebrations.⁴⁷ Although initially it appeared that the draft of the Convention was designed to consider the best interests of children living under normal conditions, the final text of the Convention contained provisions aimed at helping children in extremely difficult circumstances. In this regard, they were not forgotten, and protection was guaranteed to children living in conflict zones, children without parental care and children who were victims of abuse. The Convention represents a balance or compromise between the countries of the West and East, North and South, and as such, it considers the interests of children in developed countries, as well as of those in developing countries. Moreover, the Convention aims to develop children through adequate access to information, education, play, and free cultural activities as well as through the right to freedom of thought, conscience and religion. Finally, the Convention aims to ensure that a wide range of children's rights are respected while simultaneously recognising and valuing differences in different systems.⁴⁸ Interestingly, even those countries that did not participate in creating other international human

47 Introduction by Adam Lopatka, Chairman/Rapporteur of the Working Group on a draft Convention on the Rights of the Child, *Legislative History of the Convention on the Rights of the Child*, Vol. I., 2007.

48 The Secretary-General, Mr. Perez De Cuellar in: A/44/PV.61, Provisional verbatim record of the 61st meeting, held at Headquarters, New York, on Monday, 20 November 1989: General Assembly, 44th session, New York, UN, 28 Nov. 1989, pp. 9-10.

rights instruments, participated in the work on the Convention, which confirms the universal ratification of the Convention.

The Assembly's Convention has far-reaching implications. This is the first document to recognise that a child is an independent individual⁴⁹ and not simply a member of a family or group.⁵⁰ In addition, the Convention is equally aware of civil and political rights, and economic, social and cultural rights. Although it is difficult to ascertain whether some rights outweigh others, one of the most important provisions is that it obliges member States to respect all rights contained in the Convention without any discrimination. Ultimately, the Convention allows for the situations where children are the main protagonist, such as adoption, custody, the right to personal identity, but also many others.

The Convention on the Rights of the Child is unique among the documents regulating human rights. The day the Convention was signed the record was set for the number of signatory countries, although the Convention itself came into force six months later, which is faster than any other signed document that has come into force.⁵¹ The most interesting aspect which makes the Convention on the Rights of the Child unique is that it was ratified by 191 countries. To date, this remains the only document regulating human rights that has had many ratifications in such a short period. Seven years after it was opened for signature, the only countries that did not ratify it were Somalia and the United States.⁵² Although it was impossible to meet the requests and adopt the proposals of each country, a solution was achieved by adopting two optional protocols for the Convention. Those countries that believed it was necessary to provide a higher level of protection to children acceded to the optional protocols adopted within the Human Rights Commission: the Optional Protocols on the involvement of children in armed conflict (adopted by the General Assembly on 25 May 2000; came into force on 12 February 2002); on the sale of children, child prostitution and child pornography (adopted by the General Assembly on 25 May 2000; came into force on 18 January 2002) and on a communications procedure (adopted by the General Assembly on 19 December 2000; came into force on 14 April 2014).

49 Norway, A/C.3/44/SR.37, Summary record of the 37th meeting: 3rd Committee, held on Thursday, 9 October 1989, New York, General Assembly, 44th session, New York, UN, 15. 11. 1988, Available at: <https://digitallibrary.un.org/record/83697?ln=en>, p. 5.

50 Finland, A/C.3/44/SR.38, Summary record of the, 38th meeting: 3rd Committee, held on Friday, 10 November 1989, New York, General Assembly, 44th session, New York, UN, 20. 11. 1989, Available at: <https://digitallibrary.un.org/record/83696?ln=en>, p. 5.

51 Cohen and Kilbourne, 1998, p. 634.

52 Somalia took an important step in 2015 by becoming the 196th country to ratify the Convention on the Rights of the Child.

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Part II
The United Nations Convention
on the Rights of the Child

Principles of the UN Convention on the Rights of the Child

Agnieszka WEDEŁ-DOMARADZKA

ABSTRACT

This study focuses on the principles of the UN Convention on the Rights of the Child, which are regarded as interpretative principles concerning the rest of the Convention's text. This means that states bound by the provisions of the Convention are obliged to consider them when applying legislation concerning specific facts related to the situation of children. The body of the study includes an analysis of the principles of non-discrimination, considering the best interests of the child, the right to survival and development, considering the view of the child, and related to the realisation of the right to be raised in a loving (in principle, own) family. The last principle is not directly contained in the body of the articulated Convention, but can be found in its preamble, which must also be considered as a determinant part of the interpretation of the provisions. The analysis of the individual principles focuses on the elements of their contents, and the development and safeguarding of their implementation by the other rights and obligations of the Convention incumbent on both parents and state parties. The paper concludes with assertions on ways to secure the optimal implementation of these principles.

KEYWORDS

children, Convention on the Rights of the Child, best interests of the child, nondiscrimination, survival and development of the child, view of the child, child's rights

1. Introduction

The United Nations (UN) Convention on the Rights of the Child (hereinafter CRC or the Convention) is one of the most fundamental instruments for protecting children's rights. The CRC was adopted at the United Nations General Assembly in 1989 as the result of 11 years of work on the Convention, which was initiated in 1978 by Poland¹ and was positively received by the international community. This positive attitude was primarily due to the need to regulate the issue of children's rights differently from

1 See: Wedeł-Domaradzka, 2018, pp. 441–452; Hanyś, 2015, pp. 184–195.

Agnieszka WEDEŁ-DOMARADZKA (2024) 'Principles of the UN Convention on the Rights of the Child'. In: Márta BENYUSZ – Anikó RAISZ (eds.) *International Children's Rights*. pp. 63–89. Miskolc–Budapest, Central European Academic Publishing.
https://doi.org/10.71009/2024.mbar.icr_3

how it had previously been regulated, and differently from how it was practiced in the interwar period,² when the regulation of children's rights was based mainly on soft law standards. The explanatory memorandum of the CRC emphasised the importance of the 1959 Declaration of the Rights of the Child, and indicated a need for consistent measures to protect children's rights.³ This resulted in a document comprising three parts and fifty-four articles.⁴ The Convention's most essential principles are set out in Arts. 2, 3, 6, and 12, and relate respectively to the following:

- the general principle of nondiscrimination against children and how they exercise their rights;
- the obligation to consider the best interests of the child in all actions taken by public or private entities for the benefit of children;
- the right to conditions of life and development appropriate to the child;
- the views of the child, by age and maturity, in all actions taken concerning children.

To date, three Optional Protocols have also been developed for the Convention, as follows: the Optional Protocol to the Convention on the Rights of the Child on sale of children, child prostitution and child pornography;⁵ the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict;⁶ the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.⁷ A particular area for improvement of these documents are the numerous reservations⁸ regarding the Convention. What is valuable, however, is that they are being gradually phased out and the standards created by the existence of additional protocols increase the scope of the protection of children's rights.

The Convention is a document developed and used universally and is vital to regional human rights protection systems. These systems, with their own safeguards and protection mechanisms, make intensive use of the provisions of the CRC when adjudicating cases involving violations of children's rights. One of the more prominent

2 Moody, 2015, pp. 16–17.

3 Explanatory Memorandum, 18 January 1978 r. in: Legislative History of the Convention on the Rights of the Child, E/CN.4/1284, pp. 31–32.

4 Convention on the Rights of the Child, New York, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; depositary notifications C.N.147. 1993.TREATIES - 5 of 15 May 1993 [amendments to Art. 43 (2)]1; C.N.322. 1995.TREATIES-7 of 7 November 1995 [amendment to Art. 43 (2)], (hereinafter CRC).

5 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000, United Nations, Treaty Series, vol. 2171, p. 227.

6 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25 May 2000, United Nations, Treaty Series, vol. 2173, p. 222.

7 Optional Protocol to the Convention on the Rights of the Child on a communications procedure, New York, 19 December 2011, United Nations, Treaty Series, vol. 2983, p. 135.

8 Schulz, 1999, pp. 111 and 132.

Convention provisions used in this jurisprudential practice⁹ are the principles that the Convention provides, particularly the principle of considering the child's best interests. Moreover, the provisions of the Convention have become determinants of many legal solutions at the level of national law.¹⁰

The scope of the CRC has been limited to children, who are defined as every human being below the age of 18 years.¹¹ The age of children is adopted by the Convention as the ultimate limit of protection, but may be modified by the regulations of national legislation, which may presuppose earlier rules regarding the attainment of majority. Importantly, the proposed definition of the child has been controversial from the outset, particularly about the need (or lack thereof) to extend protection to children in the prenatal period.¹² In the end, it was decided not to explicitly specify the initial period of protection, thus allowing individual states to regulate this issue at the national legislation level. However, the issue of age does not affect the perception of children's rights; they are not, according to Korczak, treated as individuals who will become human beings, but as human beings with their rights.¹³

2. Nondiscrimination

The first principle enshrined in the CRC is the principle of nondiscrimination, albeit its definition in the Convention requires further development. For a fuller understanding of the nature of discrimination, we must reference its conceptualisation under the Covenant on Civil and Political Rights, which indicates that discrimination:

'should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing

9 The European Court of Human Rights referred to this principle, for example, in the following cases: *Nazarenko v. Russia*, application no. 39438/13, judgement of 16 July 2015, §63–68. Available at: <https://hudoc.echr.coe.int/eng?i=001-156084>; *Nunez v. Norway*, application no. 55597/09, judgement of 28 June 2011, §84. Available at: <https://hudoc.echr.coe.int/eng?i=001-105415>; *Nuutinen v. Finland*, application no. 32842/96, judgement of 27 June 2000, § 104; 124–136. Available at: <https://hudoc.echr.coe.int/eng?i=001-58736>; *X v. Latvia*, application no. 27853/09, judgement of 26 November 2013, §95–102. Available at: <https://hudoc.echr.coe.int/eng?i=001-138992>; *Neulinger and Shuruk v. Switzerland*, application no. 41615/07, judgement of 8 January 2009, 2011, §49–52. Available at: <https://hudoc.echr.coe.int/eng?i=001-99817>.

10 Sutherland and Macfarlane, 2016, pp. 7 and 8.

11 Art. 1 of the CRC.

12 Łopatka, Introduction by Adam Łopatka, Chairman/Rapporteur of the Working Group on a draft convention on the rights of the child, E/CN.4/L.1366, w: Legislative History of the Convention on the Rights of the Child, p. xli.

13 Doek, 2007, p. 62.

the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹⁴

Specifically, it is Art. 2 of the CRC that enshrines the principle of nondiscrimination, as follows:

- ‘1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.’¹⁵

According to this article, states parties to the Convention shall ensure that every child within the jurisdiction of that state enjoys the rights contained in the Convention without discrimination. The principle contained in Art. 2 of the CRC indicates that such discrimination shall not occur based on the child’s or his/her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth, or other status. Thus, the drafters of the Convention chose to indicate the most common grounds for possible discrimination, but did not provide an exhaustive catalogue to allow for the possible elimination of discrimination that would take place based on another criterion.

The second part of Art. 2 of the CRC also indicates the obligation of the signatory state to provide protection against all forms of discrimination or punishment based on the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members. In analysing these provisions, it is necessary to remember that the Convention does not require that children be always treated identically under all circumstances.¹⁶ The situations of differential treatment of children are perfectly permissible, but are based on the situations envisaged in the CRC. These situations must be ‘consistent with the evolving capacities of the child’¹⁷ and in ‘accordance with the age and maturity of the child’.¹⁸

The Convention also allows for considering children with special needs or status. On this topic, reference is made to children permanently or temporarily deprived of

14 UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 10 November 1989. Available at: <https://www.refworld.org/docid/453883fa8.html> (Accessed: July 29, 2023)

15 Art. 2 of the CRC.

16 Mower, 1997, p. 25.

17 Art. 5 of the CRC.

18 Art. 12 of the CRC.

their family environment, who will be entitled to special protection and assistance from the state,¹⁹ and to children with disabilities, whom the State should take special care of and:

‘shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.’²⁰

Concerning the elements identified as possibly discriminatory in the Convention, Art. 2 firstly refers to the race of the child or of the child’s parents or guardians. The possibility of racial discrimination should be interpreted broadly and should not be limited to race as a biological category; accordingly, the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination can be applied as a subsidiary interpretation.²¹ Art. 1 of the Convention states that racial discrimination means:

‘(...) any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

As can be seen, the CRC prohibits discriminatory actions concerning race-related elements – including skin colour (mentioned separately in the CRC) and the notions of “ethnic origin” (mentioned in the enumeration of discriminatory behaviours) and “social origin” – in applying its provisions. As indicated by a United Nations Educational, Scientific and Cultural Organization²² research, one’s racial and ethnic origin may be associated with restricted access to health services in some countries.²³

The second element identified as possibly discriminatory is sex, with the term “sex” again implying a construct tending more toward the biological²⁴ than the social side, the latter for which the term “gender” would be more appropriate. Examples of discriminatory actions based on “sex” could be depriving or limiting educational

19 Art. 20 of the CRC.

20 Art. 23 of the CRC.

21 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195. Available at: <https://www.refworld.org/docid/3ae6b3940.html> (Accessed: July 30, 2023).

22 United Nations Children’s Fund, Rights denied: The impact of discrimination on children, UNICEF, New York, November 2022, p. 6.

23 Victora et al., 2020, pp. E352–E361.

24 Abramson, 2008, p. 107.

opportunities for one of the sexes (usually girls).²⁵ A third element identified as possibly discriminatory is language. This aspect is closely linked to the already presented “ethnic origin” and citizenship, with language discrimination possibly occurring primarily in educational contexts, such as by limiting or hindering the language teaching of national or ethnic minorities.²⁶

A fourth element identified as possibly discriminatory is religion and religious aspects, with which ethnicity is commonly associated. However, unlike race and sex, these factors are not biologically determined.²⁷ The possibility of religious discrimination covers professing or not professing a particular religion and expressing or not expressing the behavioural characteristics of a given religion. Examples of discrimination situations associated with religion include the school year’s organisation, which is usually subordinated to the dominant religion.²⁸ However, in such cases, as the practice of the regional human rights system²⁹ shows, a child’s interest in the right to education outweighs the beliefs of his/her parents. There is also the issue of discrimination stemming from religious symbols or clothing items and their use thereof. Some people may consider the state’s secular rules in public institutions discriminatory.³⁰ The issue of religious discrimination is linked to the guarantees provided by Art. 14 CRC, according to which state parties shall, first, ‘respect the right of the child to freedom of thought, conscience and religion’ and, second, ‘respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child’.³¹

A fifth element identified as possibly discriminatory is political belief or opinion. Still, the relevance of this discriminatory criterion is marginal, especially in the

25 Shaheed, Special Rapporteur on the right to education, The world is failing 130 million girls denied education: UN experts, 23 January 2023. Available at: <https://www.ohchr.org/en/press-releases/2023/01/world-failing-130-million-girls-denied-education-un-experts> (Accessed: July 30, 2023).

26 Recommendation CM/Rec(2009)4 of the Committee of Ministers to member states on the education of Roma and Travellers in Europe (adopted by the Committee of Ministers on 17 June 2009 at the 1061st meeting of the Ministers’ Deputies).

Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805b0a1c (Accessed: July 30, 2023). Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe adopted by the Committee of Ministers on 3 February 2000, at the 696th meeting of the Ministers’ Deputies).

Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2e91 (Accessed: July 30, 2023).

27 Abramson, 2008, p. 110.

28 Langlaude, 2009, Available at: <https://pureadmin.qub.ac.uk/ws/portalfiles/portal/675491/Briefing+for+CRIN+June+2009+children+and+religious+discrimination.pdf> (Accessed: July 30, 2023).

29 European Court of Human Rights, 27 April 1999, *Martins Casimiro and Cerveira Ferreira v. Luxembourg* (dec.) no. 44888/98.

30 An example may be the French solutions introduced in 2004, which prevented children from wearing clothes or symbols associated with or manifesting a specific religion at school.

31 Art. 14 of the CRC.

context of political opinions. One topic that such element may concern is children on the brink of adulthood, that is, reaching the age at which they can partake in elections. Individual states can determine this age, which varies between 16 and 18 years in Europe, but if the age limit is applied to all children on the same basis and to the same extent in a given country, it cannot be considered discriminatory.

A sixth element identified as possibly discriminatory is property. In this context, it may not be so much a question of the property owned by the child, but rather, and more broadly, of the whole material situation of the child and his/her family. In this respect, discrimination may be related to the availability of certain elements necessary for the life and functioning of a family (e.g. such as housing), which a family, especially one with many children, can rent.

Much space of the CRC is devoted to general topics about the universal child protection system, and a seventh element identified as possibly discriminatory refers to topics pertaining to disability. Importantly, the CRC was the first binding document to explicitly mention disability as a cause of discrimination, with the document also defining people with disabilities as follows: ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.³² Accordingly, the document obliges signatory states to ensure that the rights contained in the Convention are respected and guaranteed without discrimination on the grounds of disability³³ in all of its forms (i.e. physical and intellectual).

Now, regarding the Convention on the Rights of Persons with Disabilities,³⁴ it devotes its Art. 7 to children, describing that state parties are to ensure that children with disabilities enjoy all human rights and freedoms on an equal basis with other children, and that their best interests are always a primary consideration. It also posits that states should ensure freedom of expression and consider the views in accordance with the age and maturity of children. As indicated by the Committee on the Rights of Persons with Disabilities General Comment No. 6,³⁵ children with disabilities often experience intersectional discrimination, which stems from being a child and subject to the previously indicated possible forms of disability and related discrimination. It is also the state parties’ obligation to safeguard children’s opportunities to inform, consult, and right to have a say in any decision-making process related to children with disabilities. There is also the need for state parties to engage in the de-institutionalisation of measures associated with opportunities for children with disabilities to live in a family environment (natural or alternative),

32 Art. 1, UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution, adopted by the General Assembly, 24 January 2007, A/RES/61/106. Available at: <https://www.refworld.org/docid/45f973632.html> (Accessed: July 29, 2023).

33 Art. 2 of the CRC.

34 Art. 7 of the Convention on the Rights of Persons with Disabilities.

35 General Comment No. 6 on equality and non-discrimination 26 April 2018, CRPD/C/GC/6. Available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination> (Accessed: July 30, 2023).

in the creation of opportunities for children with disabilities to live in such environment, and to more widely consider children's disabilities in state policies.

The issue of disability was also the source for the creation of the Committee on the Rights of the Child's General Comment No. 9,³⁶ which is dedicated to exploring solutions for issues about children with disabilities addressed in the Convention. In addition to improving on the apparent prohibition of discrimination under Art. 2 of the CRC, it elaborates on the provisions of Art. 23 for the protection of the interests of these children. According to the General Comment, it is of utmost importance to ensure the inclusion of children with disabilities in society in such a way as to promote their independence and secure their access to education, training, healthcare services, convalescence, preparation for employment, and recreation. It also emphasises the importance of state support – which should be part of a permanent and consistently implemented state policy instead of incidental policy initiatives – being provided not only to children with disabilities but also to their parents or caregivers.

The eighth and last element identified as possibly discriminatory is birth, and it is rather complex. The prohibition of discrimination in this area is the result of historical and cultural backgrounds related to class or caste, and it is certainly not a criterion related to birth in or out of wedlock, as Art. 2 (2) of the CRC describes.³⁷

3. Best interests of the child

The second principle enshrined in the CRC is the consideration of the child's best interests. It is described in Art. 3 as follows:

1. '1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.'³⁸

36 UN Committee on the Rights of the Child, General Comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9. Available at: <https://www.refworld.org/docid/461b93f72.html> (Accessed: July 29, 2023).

37 Abramson, 2008, p. 106.

38 Art. 3 of the CRC.

Art. 3 (1) warrants further inspection because it constitutes, as the Committee on the Rights of the Child has pointed out, ‘one of the four general principles of the Convention for interpreting and implementing all the rights of the child’.³⁹ According to the opinion of this same Committee, the “best interests of the child” should be considered along three conceptual dimensions.⁴⁰ First, a substantive law dimension, as the child’s best interests should be assessed and treated as paramount whenever a confluence of the child’s interests and those of other actors is considered. Second, an interpretation of the law dimension, in that when interpreting a provision containing the best interests of the child, the child’s best interests should be regarded as a fundamental principle, and the interpretation that best safeguards those interests must be chosen. Third, a procedural law dimension, as the child’s best interests must be applied (as a procedural rule) in the decision-making process, and considered in the reasons for a decision, concerning the child.

The principle of the “best interests of the child” is also referred to in other respects in the CRC and its additional protocols. Direct references are found in the following: Art. 9 of the CRC, which deals with maintaining contact with both parents, except when this would be contrary to the best interests of the child; Art. 18, which deals with parental responsibilities and the fact that they should take into account the best interests of the child when exercising them; Art. 20, which allows for the child to be deprived of his/her family environment if that is in the best interest of the child, albeit this should be accompanied with appropriate protection and assistance; Art. 21, which tackles with considering the best interests of the child, which are understood as paramount, in adoption procedures; Art. 37 (c), which relates to standards for the deprivation of liberty of the child; Art. 40, para. 2 (b), which provides an appropriate standard for dealing with cases where children have come into conflict with the law. The number of references shown here to the principle of the best interests of the child may explain why it is one of the most studied principles among those present in the CRC.⁴¹

References to the child’s best interests can also be found in the preamble and the provision relating to the protection of victims of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and

39 UN Committee on the Rights of the Child, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5. Available at: <https://www.refworld.org/docid/4538834f11.html> (Accessed: July 29, 2023), para. 12. UN Committee on the Rights of the Child, General Comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12. Available at: <https://www.refworld.org/docid/4ae562c52.html> (Accessed: July 30, 2023), para. 2.

40 UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), 29 May 2013, CRC /C/GC/14, p. 4. Available at: <https://www.refworld.org/docid/51a84b5e4.html> (Accessed: July 29, 2023).

41 See: Wieruszewski, 2024; Detrick, 1999; Ruggiero, 2022; Freeman, 2007; Tobin, 2019.

child pornography.⁴² A standard of conduct consistent with the child’s best interests is also provided for in the preamble and in the provisions of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.⁴³ These are to be guided by the Committee on the Rights of the Child during its proceedings. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict⁴⁴ mentions the principle of the child’s best interests only in the preamble, indicating that it should be considered in all actions involving children.

Moreover, the concept of the “best interests of the child” has accompanied documents dedicated to children’s rights since the beginning of their creation, with an early example containing related topics being the Geneva Declaration of 1924. This Declaration indicates that the population ‘owes to the Child the best that it has to give’.⁴⁵ Further development took place in the 1959 Declaration of the Rights of the Child,⁴⁶ wherein Principle 7⁴⁷ indicates that the best interests of the child should be the primary concern and guideline for proceeding to safeguard the child’s best interests vis-à-vis the child’s education, and that it is the parents who should secure its implementation. In the end, it seems that the abovementioned definition of the “best interests of the child” provided in Art. 3 deviates from the original proposal of the concept, mainly owing to the expansion of the catalogue of actors obliged to consider the best interests of the child in their actions, and owing to the focus on making these actors emphasise the person of the child, which is also reflected in the application of Art. 3.⁴⁸

In discussing the principle of the best interests of the child, there is value in identifying the elements that constitute it. The General Comment draws attention to the term “all actions”, which should be understood broadly, not only as “actions” but also as ‘acts, conduct, proposals, services, procedures and other measures’,⁴⁹ and possibly other kinds of action.⁵⁰ Furthermore, an analysis of the contents of Art. 3 brings to the fore the issue that the actions taken are to concern “children”, with the term “children” here referring to the concept of “child” as defined in the CRC (i.e. the actions

42 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

43 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

44 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

45 Freeman, 2010, p. 213.

46 Declaration on the Rights of the Child, proclaimed by the General Assembly, resolution 1386 (XIV), A/RES/14/1386, 20 November 1959, available at: <https://www.ohchr.org/en/resources/educators/human-rights-education-training/1-declaration-rights-child-1959> (Accessed: July 29, 2023).

47 The best interests of the child will be the basic concern and guidelines for legal guardians towards the education of a child; both parents have primary responsibility under the Declaration on the Rights of the Child.

48 Chen Wei, 2002, pp. 45–49; Chen Wei, 2008, pp. 51–64.

49 UN Committee on the Rights of the Child, General Comment No. 14 (2013), p. 7.

50 Freeman, 2007, p. 45.

should concern persons under the age of 18). At the same time, M. Freeman suggests a broad approach to understanding the description of “concerning children”, in that it should not only be a question of the child’s specific situation but also of those decisions that will affect children in the future, such as regulations and actions taken on global warming, cloning, or pre-implantation genetic diagnosis.⁵¹ As far as the public or private institutions that are supposed to take action about children’s interests are concerned, their scope should also be as broad as possible (i.e. those that work for and whose actions have an impact on children), and even if Art. 3 does not mention parents, their obligation under Art. 18⁵² should be borne in mind.

Over the years, there have been no decisions to include other elements to the concept of the “best interests of the child”. However, attempts have been made to define additional elements that should be considered, without forgetting the openness and possibility of revision. According to John Eekelaar, the concept of best interests of the child should include the following:

““basic” interests (to physical, emotional and intellectual care); their “developmental” interests (that their potential should be developed so that they enter adulthood as far as possible without disadvantage) and their “autonomy” interests (the freedom to choose a life-style of their own).⁵³

It remains that the flexible approach (i.e. without a legal definition) may offer a better guarantee to safeguard children’s interests. Possible actions that cannot be considered as in the child’s “best interests” can be deduced from the reports of states and the comments on these reports presented by the Committee on the Rights of The Child.⁵⁴

About how a primary consideration is to be understood, the issue of primary consideration does not mean “the primary consideration”, in that “best interests do not have absolute priority”.⁵⁵ It is still a strong position that the “best interests of the child” refers to needs that must be considered in light of the child’s particular situation, namely his/her dependence, lack of maturity, legal situation, and difficulty in asserting his/her rights.⁵⁶

51 Freeman, 2007, p. 46.

52 UN Committee on the Rights of the Child, General Comment No. 14 (2013), p. 8.

53 Eekelaar, 1992, p. 231.

54 Freeman, 2007, pp. 51–60.

55 Freeman, 2007, p. 61; Detrick, 1999, p. 91.

56 UN Committee on the Rights of the Child, General Comment No. 14 (2013), p. 10.

4. The right to survival and development

Art. 6 of the CRC describes the principles of the right to life⁵⁷ and the right to survival along with adequate living and development conditions. Art. 6 is relatively brief and includes the following indications: ‘1. State Parties recognise that every child has an inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.’⁵⁸ The right to life is a fundamental right of the individual contained in basic human rights instruments, and is a right without which the others contained in the Convention would not exist.⁵⁹ This regulation originated in Principle 2 of the UN Declaration of the Rights of the Child of 1959, which indicates the following:

‘The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.’⁶⁰

The aspect of the right to life is the only right in the Convention described as “inherent”,⁶¹ indicating that the right to life cannot be derogated from and must be recognised as *jus cogens* in international law.⁶² This is especially important because many legal solutions protect children from the loss of life. Regulations protecting children during armed conflicts or regulations not permitting the death penalty for children, even in legal systems where this penalty has been retained, serve as examples of these legal solutions.⁶³ Concerning armed conflict, humanitarian law,

57 It is a right guaranteed by most human rights documents: Art. 3 of the Universal Declaration of Human Rights, Art. 6 of the International Covenant on Civil and Political Rights, Art. 10 of the International Convention on the Rights of Persons with Disabilities, Art. 2 of the European Convention on Human Rights, Art. 4 of the American Convention on Human Rights, Art. 4 of the African Commission on Human and Peoples’ Rights.

58 Art. 6 of the CRC.

59 Nowak, 2005, p. 1.

60 UN General Assembly, Declaration on the Rights of the Child, 1959.

61 Nowak, 2005, p. 17.

62 Nowak, 2005, p. 18.

63 Art. 37 of the CRC lit., and Art. 6 para. 5 of the UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Available at: <https://www.refworld.org/docid/3ae6b3aa0.html> (Accessed: July 29, 2023).

at least in principle, explicitly protects civilians,⁶⁴ but describes it permissible to kill combatants. Therefore, to ensure the complete protection of children, involving them in activities related to armed conflict should be considered unacceptable.⁶⁵

Furthermore, considering the analysis of the right to life in the context of Art. 1 of the CRC, the point in time at which this right is protected depends on the legal system of the concerned state. It is also in this context that states have made reservations about the Convention and made interpretative declarations.⁶⁶ States agreed that the solution adopted, on the one hand, does not exclude the possibility of introducing regulations permitting abortion; on the other hand, it does not prevent the adoption of legislative solutions protecting the life of the child from the moment of conception or a particular stage of development. During work on the text of the Convention, states were also careful not to return to the previously established rule of not defining the initial period of protection. This could be seen, for example, in the context of the debate on combining the right to life with the right to survival.⁶⁷

Art. 6 para. 1 of the CRC obligates states to act on children in particularly vulnerable situations, including children with disabilities, any form of sickness, victims of violence, at risk of becoming victims of “honour killings”, victims of female genital mutilation, or children from groups at risk of exclusion (e.g. those economically disadvantaged, or from groups not tolerated by the local community, such as those with albinism and/or children resulting from rape during armed conflict). The actions associated with these vulnerable situations should trigger an immediate state response and widely organised initiatives towards prevention, inclusion, and support awareness campaigns.⁶⁸ A separate group in Europe that is now being increasingly identified as being at risk of life-threatening and lower standards of survival and

64 Art. 27 of the International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287. Available at: <https://www.refworld.org/docid/3ae6b36d2.html>; Art. 51 of the International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3. Available at: <https://www.refworld.org/docid/3ae6b36b4.html> (Accessed: July 29, 2023).

65 Art. 38 of the CRC, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000, (mainly Art. 2). Art. 8 para. 2 lit. e no. VII of the UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6. Available at: <https://www.refworld.org/docid/3ae6b3a84.html> (Accessed: July 29, 2023), although in this case a limit of 15 years is indicated, with states encouraged to raise it.

66 Nowak, 2005, pp. 27–28.

67 Alston, 1990, p. 164.

68 Suggestions contained, inter alia, in the UN Committee on the Rights of the Child, General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4. Available at: <https://www.refworld.org/docid/4538834f0.html> (Accessed: July 29, 2023).

development are also child migrants.⁶⁹ In the case of a large influx of migrants, the risk to children is rooted in their lack of registration and lack of “visibility” in the legal system.⁷⁰

Concerning survival and development, this right should be considered a natural consequence of the previously created standards of protection of the child’s rights. The guidelines contained in Art. 6 para. 2 of the CRC are quite general, allowing states to adapt its fulfilment to their economic possibilities, development level, culture, and traditions. However, a minimum standard is required, for which Art. 27 of the CRC can provide guidance, as it indicates the need for states to provide ‘a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’, and the ‘need to provide material assistance and support programmes, particularly about nutrition, clothing and housing’. Under the provisions of Art. 27, the child’s parents or guardians also have the responsibility for their survival and development and are obliged to secure, albeit within their final capacity, the living conditions necessary for their children’s development.

In the CRC, in addition to Art. 6, the right to life and the right to survival and development are also developed within other provisions that protect the child’s rights.⁷¹ For instance, the contents contained in Art. 6 are referred to in the following articles of the CRC: Art. 5, which obliges states to respect the rights and responsibilities of parents and guardians to secure, according to their will, the best development of the child; Art. 18, which refers to the responsibility of parents for the upbringing and development of the child; Art. 23 (3), which emphasises the need for the integration, support, and development of the child with disabilities; Art. 24 which deals with the right to health and standards of treatment; Art. 26, which deals with social security; Art. 27 which deals with a standard of living adequate for the child’s physical, mental, spiritual, moral, and social development; Arts. 28 and 29, which address the right to education and provide for the most comprehensive and possible development of personality, talents, and mental and physical abilities; Art. 31, which guarantees children the right to rest and leisure, as well as such play and recreation as is appropriate to their age; Art. 39, which provides for all assistance and social rehabilitation of children who have been victims of torture or any other form of cruel, inhuman, or degrading treatment or punishment, and of armed conflicts.

69 Paras. 76–77, UN Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20. Available at: <https://www.refworld.org/docid/589dad3d4.html> (Accessed: July 29, 2023).

70 See: Wedeł-Domaradzka, 2022.

71 Schmahl, 2021, p. 127.

5. The view of the child

The principle of the child's right to be heard is outlined in Art. 12 of the CRC, as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁷

The provisions under this article are unique in the context of human rights regulation. This is because, on the one hand, we must bear in mind that children have relatively little autonomy and are dependent on their parents or guardians in most situations; on the other hand, we must consider that the entire CRC is an expression of their subjectivity regulated by law.⁷² From the regulations contained in Art. 12, para. 1, it follows that it is the state's responsibility to ensure that a child who is capable of forming his/her own views can express those views freely. This guarantee is unique compared to other rights because we are dealing with a child, who does not yet have full adult autonomy, but at the same time is the subject of rights. Importantly, Art. 12 of the CRC gives way for the interpretation that it is more related to the "participation" of the child, through the exchange of information and dialogue, in decisions that affect him/her.⁷³

Securing freedom of expression for a child regarding his/her views requires that appropriate conditions be created to enable him/her to do so, such that these views can be considered to having been formed and expressed freely. Among the basic requirements that must be met by the state to ensure the implementation of this right, it is indicated that all processes in which a child is heard and participate must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe, sensitive to risk, and accountable.⁷⁴ It is also important to stress that the expression of a child's views is a right, not an obligation, implying that a child's wish and decision to not express his/her views should be respected, and thus that the child should not be coerced into expressing them even if he/she is known to have them. Moreover, it is necessary to provide an appropriate and safe place and manner for the child to express his/her views, and ensure that the

72 UN Committee on the Rights of the Child, General Comment No. 12 (2009), p. 5.

73 UN Committee on the Rights of the Child, General Comment No. 12 (2009), p. 5.

74 UN Committee on the Rights of the Child, General Comment No. 12 (2009), pp. 29–31.

child is only asked to express own views on difficult or even traumatic matters to the necessary extent.⁷⁵

A child's right to express own views extends to all matters that affect the child, albeit the scope of these matters is not indicated in the CRC, which seems appropriate, as it may be evolutionary; for example, at the time of drafting the CRC legislation, the issues of assisted procreation were frequently brought up while the right to know one's identity (in the context of ancestry) was somewhat incidentally discussed, whereas nowadays the latter is more frequently discussed, and thus the child will have the right to express opinions on the matter.

As is clear from General Comment No. 12, how views are expressed may be arbitrary and should be appropriate to the age and maturity of the child,⁷⁶ but such expression should not be limited by any age censorship.⁷⁷ Instead, the assessment of how well a child can form his/her own opinions should be based on the ability to form opinions in a way that is "reasonable and independent".⁷⁸ Therefore, questions about age and maturity can be assessed when listening to the child/children group express own views. Of course, it is easier to assess a child's age and maturity when the group to which the child belongs is a component of a permanent structure, such as a family, a class of schoolchildren, or inhabitants of a particular neighbourhood.⁷⁹ An example is the requirement for observing, in the adoption proceedings of young children, the child's reaction to contact with prospective adoptive parents. Attention should also be paid to the need to provide appropriate conditions for children in vulnerable situations to express their views. It is also pointed out that the child should be allowed to formulate his or her views from an early age, but in an age-appropriate way of communication that will not necessarily be verbal. The child must have complete knowledge and understanding of the topic on which he or she would be expected to express oneself or own views. It is also critical to provide children who may have difficulty expressing their views with an appropriate means of communication, and to facilitate the expression of views by minority, indigenous, and migrant children. Reference is also made to the need to protect the child from the consequences of a lack of prudence in exercising the right to express own views. This may be the case when very young children express themselves or when statements are made by child victims of crime, sexual abuse, violence, and/or other forms of maltreatment.⁸⁰

The second paragraph of Art. 12 clarifies the right to express own views in the context of speaking out during judicial and administrative proceedings concerning

75 Schmahl, 2021, pp. 201–202.

76 UN Committee on the Rights of the Child, General Comment No. 12 (2009), p. 9.

77 *Y.B. and N.S. v. Belgium*, application no. 12/2017, UN Committee on the Rights of the Child, 27 September 2018. Available at: <https://www.refworld.org/cases,CRC,5c5ab7494.html> (Accessed: July 29, 2023), pt. 8.7.

78 UN Committee on the Rights of the Child, General Comment No. 12 (2009), p. 13.

79 UN Committee on the Rights of the Child, General Comment No. 12 (2009), p. 7.

80 UN Committee on the Rights of the Child, General Comment No. 12 (2009), pp. 9–10.

the child. The approach to being heard in proceedings should be understood broadly and includes, for example:

‘separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, healthcare, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies.⁸¹ [...] decisions about children’s education, health, environment, living conditions, or protection.’⁸²

The realisation of the right guaranteed in this part of the CRC also requires the conduct of proceedings in such a way that enables children to understand their views. The child can present his or her views directly or even through a representative or relevant authority, with the state’s internal rules determining the procedures and rules of representation. Still, these procedures and rules should include regulations on for whom representation is to be established, in what situations, and by whom, and these regulations must be guided by the child’s best interests. Examples include rules limiting the representation of a parent or legal representative in situations where the decisions of judicial and administrative authorities concern matters involving a conflict of interest between the child and the parent(s) or legal representative. It is also essential to ensure that those involved in proceedings covering children have appropriate standards of preparation; for example, having clear standards for interviewing children and qualified staff engaged in the preparation and conduct of the interviews. Those representing children in migration procedures should also receive appropriate training, particularly in language. The right to be heard and to have the support of parents or legal representatives as part of the hearing is also ensured in an individual complaint procedure before the CRC Committee.⁸³

The requirements related to the child’s view are also linked to other provisions of the CRC. First, the regulation in Art. 13 alludes to guaranteeing children’s freedom of expression. Second, Art. 23 para. 1 contains the obligation of states to ensure the active participation in society of children with disabilities, which includes aspects of the right to express one’s views. Third, Art. 31 contains a guarantee to ensure the child’s right to leisure and free time and to participate freely in cultural and artistic life.

The last provision pertaining to freedom of expression is the regulation dedicated to criminal proceedings, mainly covering information on the charges against the child and the guarantee that the child can, alone or with a representative, prepare and present a defence.

81 UN Committee on the Rights of the Child, General Comment No. 12 (2009), p.11.

82 UN Committee on the Rights of the Child, General Comment No. 12 (2009), p.11.

83 Art. 5, UN Human Rights Council, Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

6. Right to be raised in a loving (in principle own) family

The right to be raised in a loving family environment can be regarded to be pervasive in the CRC and to constitute its “spirit”. Although this principle is not expressed in the articulated part of the Convention, it is included in the preamble. The status of the CRC preamble is no different from that of the preambles of other international agreements and, therefore, has no direct effect. However, preambles have an important interpretative role vis-à-vis the other provisions contained in the article.⁸⁴

Specifically, the preamble makes two references to the importance of the family environment. First, the family is described as the basic unit of society, the natural environment in which a child should be raised, and as a source of protection and well-being. Thus, it is necessary to provide the family with adequate support and protection, as only as a result of such support will the family be able to perform its duties fully. Second, it is emphasised that children can fully and harmoniously develop their personality in the family environment, and that the latter should guarantee that children live in a family atmosphere characterised by happiness, love, and understanding.

The provisions of the preamble are referred to in several regulations of the body of the articulated Convention. The first of these references can already be found in Art. 3 of the CRC on the principle of the best interests of the child; its para. 2 indicates that states acting in the best interests of the child shall simultaneously consider the rights and duties of the child’s parents, legal guardians, or other persons responsible for the child, as well as describes that parents are the first in place and are particularly important to the child’s life. In addition, a child’s enjoyment of the rights contained in the CRC⁸⁵ has been made conditional on state parties’ respect for parents’ responsibilities, rights, and duties, in that parents are those responsible for their child, for ensuring the development of the child’s capacities, and for providing advice on exercising the rights granted by the provisions of the Convention. This approach also applies to the rights to freedom of thought, conscience, and religion.⁸⁶

The child also has the right to have his/her family relationships⁸⁷ respected, to grow up in a family environment, and to assurances of non-separation from own parents – except in situations where such separation is required in light of the child’s best interests. Where such parent–child separation affects both or one of the parents, it is the state’s responsibility to ensure personal and direct contact, and these contacts must also be guaranteed when the child and parent(s) resides in different states.⁸⁸ Safeguarding high standards of family relations also prevents arbitrary or

84 Art. 31 of the 1969 Vienna Convention on the Law of Treaties.

85 Art. 5 of the CRC.

86 Art. of the 14 CRC.

87 Art. of the 8 CRC.

88 Art. of the 10 CRC.

unlawful interference in family life.⁸⁹ The right to be raised in a loving family is also safeguarded by a regulation stating that states recognise the principle that parents ‘have common responsibilities for the upbringing and development of the child’,⁹⁰ and are entitled to appropriate assistance from the state. However, states hold the right to intervene if a child experiences physical or psychological violence, harm or neglect, maltreatment, exploitation, or sexual abuse.⁹¹

A part of the Convention’s provisions also safeguards the child’s rights in an adoption situation.⁹² Adoption is a unique situation for a child, as he/she is moving from one family environment (the natural family) in which he/she does not have his/her rights adequately secured to another environment where he/she can have own rights adequately addressed. In this respect, and owing to the existence of various tragic experiences associated with child adoption, the state must ensure that the new family environment is appropriately chosen. Thus, appropriate institutional measures must be in place to secure adequate adoptive parent selection procedures and the consent of all involved stakeholders, including, as far as possible, that of the child. This regulation is part of the preamble’s demand that the child grows up in an ‘atmosphere of happiness, love, and understanding’. Furthermore, these regulations supporting the adequacy of the child’s family environment are also applicable to refugee children,⁹³ who must receive, along with their accompanying families, appropriate support.

Support should also be provided for children with disabilities. In particular, these children must be provided with access to all relevant aspects of everyday life, which may in turn require the state to support the child’s family environment in terms of securing access to education, training, healthcare services, rehabilitation services, preparation for employment, and recreational opportunities.⁹⁴ Children should be provided with high standards of healthcare, and considering that children are heavily dependent on their mother’s situation during pre- and post-birth situations, mothers should also be supported with appropriate healthcare.⁹⁵ There is also a general call in the Convention for the state to support parents in their duty to provide their children with living conditions necessary for their development. State actions should include providing material assistance and developing assistance programmes, particularly concerning food, clothing, and housing. The conditions must also be provided for the fulfilment of the obligation to contribute to the child’s maintenance by the parents, both when the parents are in one country and when one or both reside abroad.⁹⁶

89 Art. of the 16 CRC.

90 Art. of the 18 CRC.

91 Art. 19 of the CRC.

92 Art. 21 of the CRC.

93 Art. 22 of the CRC.

94 Art. 23 of the CRC.

95 Art. 24 of the CRC.

96 Art. 27 of the CRC.

7. Conclusions

The CRC, as the most widely ratified international agreement in the world, has significantly shaped the standards for respecting, safeguarding, realising, and regulating children's rights at the national level. An essential element of these activities is the interpretative principles of the Convention, which are discussed above and serve to indicate the most important elements – from the perspective of the implementation of the rights of the child – and provide clear guidelines to ensure the highest standard of implementation of the rights of the child contained in the CRC. As M. Nowak points out:

‘serves the purpose of highlighting to States the fundamental values underlying the Convention, of ensuring a common philosophical approach to the broad spectrum of areas addressed by the Convention, and of defining decisive criteria to assess the progress made in the implementation of a children's rights approach.’⁹⁷

Like other international agreements, the Convention requires state parties to amend their own legal systems to safeguard the realisation of children's rights as much as possible. Actions taken within national systems include national plans and policies, the implementation of which is intended to raise the standards for realising children's rights. As a rule, these are “soft” instruments, but this does not mean that they cannot result in legislative changes or, just as importantly, practical changes (e.g. whether in parental behaviour or the actions of state bodies). It is also the task of the state to collect data and prepare statistics covering activities related to the observation of children's rights, the violations of these rights, and the consequences of such violations. It should also be remembered that states must secure adequate budgetary resources to realise children's rights, which is especially important for families in difficult situations and for children who are permanently or temporarily deprived of their family environment and require institutional care.

The verification of these state activities is carried out by the states through reports on the implementation of the Convention, which include in their structure (i.e. both in the initial and periodic reports⁹⁸) precise references of such implementation.

97 Nowak, 2005, p. 17.

98 Committee on the Rights of the Child General Guidelines regarding the form and the content of the initial reports to be submitted by the States Parties under Art. 44 paragraph 1 (a) of the Convention, 30 October 1991, CRC/C/5. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G91/181/71/IMG/G9118171.pdf> (Accessed: July 29, 2023). OpenElement, Committee on the Rights of the Child Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under Art. 44, para. 1 (b) of the Convention on the Rights of the Child, CRC/C/58/Rev. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/040/49/PDF/G1504049.pdf?OpenElement> (Accessed: July 29, 2023).

In addition, the CRC Committee regularly issues General Comments that deal with specific spheres of protection (or the principles themselves) and are intended to help states bring their domestic law in line with Convention standards, while securing evident respect for the traditions, cultures, and legal orders of the states. The verification activities also include the mechanism initiated by the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure,⁹⁹ which allows the submission of notifications of violations to the Convention. This mechanism fits into the general principles of the complaint mechanisms known in the UN system and shares its advantages and disadvantages. Regarding advantages, it is open to anyone who suffers a violation in any of the states that ratified the Optional Protocol, guaranteeing individual access to international justice, provided that domestic remedies have been exhausted. The existence of the Protocol is also a guarantee of the strengthening of the protective framework for children's rights, allowing for international scrutiny of what takes place in national systems and, more broadly, for the objectives of the CRC. The image dimension of the ratification of the Optional Protocol is also significant, as accession to the Protocol indicates that the concerned state wishes to be transparent about respecting children's rights.

Regarding the disadvantages of the existence of the control system envisaged by the Third Optional Protocol, there is the complexity of the availability of the control measures provided. This is because its availability requires going through national protection systems and significant knowledge of the international system, including of one of the official languages of the Committee's work. It has also been noted that the efficiency of these procedures is weaker than that of regional systems. In addition, while the Optional Protocol allows addressing individual or interstate communications, it does not include a system for enforcement, and once an issue is identified, the Committee merely transmits its recommendations to the state for the elimination of the violations and/or for redress. Additionally, as is often the case in international systems, there are concerns about using this mechanism and its conduct for political purposes, which are only sometimes consistent with ensuring respect for children's rights. There is also the situation that not all states uncritically accept the interference of international bodies, especially when they create a universal standard that does not consider national specificities.

For the time being, the Optional Protocol is an act enjoying fewer ratifications than the CRC.¹⁰⁰ The CRC Committee has so far had the opportunity to consider almost 100 cases under this procedure, of which it has been able to reach substantive decisions in almost half of them. In some cases, the Committee also referred to the principles laid down in the CRC, with the vast majority of cases containing references

99 UN Human Rights Council, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

100 As of 27 July 2024, there are 52 ratifications.

to Art. 3 of the CRC,¹⁰¹ but there are also some cases covering violations of a wider range of rights contained in the Convention.¹⁰² However, given its transparency and importance in popularising standards, efforts should be made to bind more countries to this Protocol.

101 For example: *I.A.M. v. Denmark*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 3/2016, on 25 January 2018, CRC/C/77/D/3/2016; *S.B. v. Luxembourg*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 138/2021 on 8 May 2023, CRC/C/93/D/138/2021; *B.J. and P.J. v. Czech Republic*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 139/2021 on 15 May 2023, CRC/C/93/D/139/2021.

102 For example, *J.A.B. v. Spain*, Views adopted by the Committee under Art. 10 of the Optional Protocol, concerning communication No. 22/2017 on 31 May 2019, CRC/C/81/D/22/2017; *Z.S. and A.S. v. Switzerland*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 74/2019 on 10 February 2022, CRC/C/89/D/74/2019; *Camila v. Peru*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 136/2021 on 15 May 2023, CRC/C/93/D/136/2021.

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UN Convention on the Rights of the Child: Protection

Wojciech LIS

ABSTRACT

The child requires to be surrounded by protection by adults, whose duty it is to create an optimal environment for the child to live and develop. These actions serve to realize the welfare of the child, which is a fundamental objective of the provisions of the Convention on the Rights of the Child and other normative acts. The protection of the child's well-being is served by the rights of the child, which emphasize the child's subjectivity as a result of being human. A person's age cannot be a discriminatory criterion in the exercise of freedoms and rights. The best interests of the child guide the interpretation of provisions and the application of the law. At the international level, the Committee on the Rights of the Child plays a special role in this regard, and presents its views on the protection of children's rights through its general comments on the provisions of the CRC. The main purpose of the paper is to try to identify child protection options through the lens of general comments containing the position of the Committee on the Rights of the Child on how to understand the provisions on the protection of the child from all forms of violence and the obligations of states parties to the CRC in implementing its provisions in the practice of national authorities.

KEYWORDS

child protection, children's rights, general comments, violence against, the child, risks of the digital world, preventive action

1. Introduction

Children's rights are part of human rights and, as such, are covered by the protection inherent to every human being. In addition, they were collected under a normative act of international law dedicated exclusively to the protection of children's rights, the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989.¹ The Convention represents the greatest achievement of the international community in the protection of children's rights, as it provides an axiological and normative basis for action on behalf of children at global, regional,

1 Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, Dz. U. 1991, No. 120, item 526, hereinafter: CRC.

Wojciech LIS (2024) 'UN Convention on the Rights of the Child: Protection'. In: Márta BENYUSZ – Anikó RAISZ (eds.) *International Children's Rights*. pp. 91–118. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.mbar.icr_4

national and local levels. It contains a comprehensive, although not exhaustive, catalogue of children's rights. It comprises a preamble that sets out general principles and 54 articles arranged in three parts. The first part comprises 41 articles dealing with the State's obligation to realise the rights of children. Part Two, Articles 42–45, deal with the ways in which the State's obligations to realise children's rights can be enforced and monitored. Part Three, Articles 46–54, sets out the principles for accession to the CRC. The catalogue of children's rights is based on the premise that the child is an autonomous subject, however, owing to his or her physical and mental immaturity, requires special care and legal protection; as a human being, he or she requires respect for his or her identity, dignity and privacy; the best environment for the upbringing of the child is the family; and the State is to support the family, but not to replace it in its functions. Complementing the provisions of the CRC are the Optional Protocols, which broaden the scope of protection: the Optional Protocol on the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on 25 May 2000, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted in New York on 25 May 2000, and Optional Protocol to the Convention on the Rights of the Child on communications procedure, adopted in New York on 19 December 2011, which sets out a procedure for submitting notifications (individual complaints), that is, creating a mechanism for asserting the rights guaranteed by the CRC. Undoubtedly, owing to their age, lack of life experience and knowledge, as well as inability to make informed life decisions, children find themselves at a considerable disadvantage vis-à-vis adult persons and should, therefore, be provided with special protection.

The adoption of the CRC is a significant achievement for Poland in the field of the international protection of children's rights, as it was the Polish government delegation that proposed to the UN Commission on Human Rights the enactment of a relevant convention and submitted a relevant draft on 7 February 1978 which formed the basis for further work on agreeing with the final version of the document. Professor Tadeusz Smyczynski prepared a draft of the CRC, commissioned by the Ministry of Foreign Affairs. In turn, Professor Adam Łopatka was the chairman of the working group established by the UN Commission on Human Rights to draft the final version of the draft CRC.

The concept of a child is fundamental in determining the scope of protection. The most commonly invoked criterion for defining the concept of a child is the age criterion, which delimits childhood. According to Article 1 of the CRC, a child is any human being under the age of 18 years, unless he or she attains the age of majority earlier in accordance with the law relating to the child. This means that upon reaching the age of 18 years, a person loses the status of a child and becomes an adult. The Convention does not distinguish between the intermediate periods between childhood and adulthood, such as infancy and adolescence. However, it is noteworthy that the age of children that the CRC has adopted as the ultimate limit of protection may be modified by national law, which may allow for an earlier age of majority. The

content of the provision in Article 1 of the CRC was meant to be a compromise between those who demanded an explicit formulation that one is a child from conception and the representatives of those States who defended the legality of abortion. However, the failure to specify the lower limit at which a human being would be considered a child has led some States to lodge reservations. This issue led to the assumption in the work on the CRC that it would be left to States Parties to fully and precisely define the moment that can be considered the beginning of childhood, and consequently, the moment that should be considered the beginning of human life.²

The definition of a child adopted in the CRC has been controversial from the outset, particularly with regard to the need (or lack thereof) to extend protection to children who are conceived, that is, those who are in the prenatal period of life. Human life is a continuum characterised by a certain process, initiated at conception, involving successive stages of development up to birth, and then linked to the stages of infancy, childhood, youth, adulthood and old age until death.³ Ultimately, it was decided not to indicate the initial period of protection, thus leaving it up to individual States to regulate this issue at the national legislative level. This implies that it is left to the States Parties to the CRC to decide on the humanity of the child during the prenatal period (in a juridical sense). Considering this issue from the perspective of the conceived child, the current state of affairs is the worst possible. This leads to *de facto* differentiation in the rights of conceived children because of the existing differences in the legislation of different States. In extreme situations, this can even lead to a negation of the right to life under conditions which, in another state, would not provide any grounds for this. The absence of an unequivocally conclusive, binding provision on this issue at the level of international law, which directly and explicitly protects human beings from the moment of conception, constitutes an important legal lacuna which, in view of its evident interests, should be filled as soon as possible.⁴

The protection of the rights of the child guaranteed by the CRC is ensured by the Committee on the Rights of the Child, which monitors how States Parties fulfil the obligations assumed as a result of their ratification of the document. However, it is neither an international tribunal nor a body with the power to issue legally binding rulings, which significantly weakens its position as a guarantor in protecting children's rights under the CRC. It comprises 18 independent experts from various countries worldwide elected by 196 States which have ratified the CRC. States Parties are obliged to report to the Committee every five years. The Committee receives additional information from various sources. Based on this, the Committee holds a dialogue with a delegation from the country and subsequently produces concluding observations with recommendations. A certain form of influence on States Parties is the general comments, through which the Committee on the Rights of the Child seeks

2 Smoczyński, 1999, p. 40.

3 More extensively: Lis, 2022, p. 200 et seq.

4 Jaros, 2015, pp. 56-57.

to guide States Parties as to how to understand the provisions of the CRC and motivate them to adopt measures to implement them in national legislation.

The condition for a normal life and development of a child is freedom from fear and all forms of violence, both from adults and other children. This study aims to indicate the possibility of protecting children's rights through the prism of general comments denoting the position of the Committee on the Rights of the Child regarding the provisions for protecting the child from violence, to provide the reader with a legal understanding of children's right to protection against maltreatment in their homes and by caretakers, and the obligations of States Parties in implementing this right in practice and policy.

The starting point for presenting the position of the Committee on the Rights of the Child on the issue of violence against the child is the selected provisions of the CRC, which refer to the various manifestations of child abuse; these are Article 19, indicating the need to protect the child from all forms of physical or mental violence, harm or neglect or ill-treatment or exploitation, including sexual exploitation; Article 32, on the protection of the child from economic exploitation; Article 34, providing protection from all forms of sexual exploitation and abuse; and Article 36, which extends to child protection from all other forms of exploitation. They give rise to obligations to adopt measures to implement the content of these provisions in the practical operation of States Parties, ensuring that every child has a space free from any form of harm. General comments are used to interpret the provisions, most notably General comment No. 13 (2011): The right of the child to freedom from all forms of violence of 18 April 2011,⁵ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices of 8 May 2019,⁶ General comment No. 21 (2017) on children in street situations of 21 June 2017,⁷ and General comment No. 25 (2021) on children's rights in relations to the digital environment of 2 March 2021,⁸ the key findings of which will be used to outline the resulting CRC standard for the protection of the child from all forms of violence.

5 General comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, Available at: <https://www.refworld.org/docid/4e6da4922.html> (Accessed: 30 August 2023).

6 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, 8 May 2019, Available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/joint-general-recommendation-no-31-committee> (Accessed: August 30, 2023).

7 General comment No. 21 (2017) on children in street situations, 21 June 2017, Available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-21-2017-children-street> (Accessed: August 30, 2023).

8 General comment No. 25 (2021) on children's rights in relations to the digital environment, 2 March 2021, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation> (Accessed: 30 August 2023).

2. Legal nature of general comments

The Convention on the Rights of the Child often uses general clauses and evaluative phrases that leave States Parties free to interpret. Consequently, the same provisions are understood differently, and therefore, the scope of children's rights under the CRC varies from one State Party to another. A tool to counter such practices are the general comments, through which the Committee on the Rights of the Child presents its understanding of the provisions of the CRC, which are de facto interpretations of the legal norms contained therein. This is because there are obstacles to understanding human rights, which undoubtedly include the rights of the child,⁹ both at a practical and theoretical level. General comments are used to clarify the norms relating to children's rights and to comment on issues that are of particular relevance to specific provisions of the CRC relating to these rights and, consequently, to clarify the obligations of States Parties with regard to children's rights. The Committee's activity in harmonising the understanding of children's rights serves to universalise them, which is undoubtedly a commendable activity. Consequently, children's rights under the CRC are uniformly understood, and the scope of their protection is approximated by all States Parties. Nevertheless, despite the process of universalisation of human rights, a uniform understanding will never be achieved. Consistency in this issue is reduced to mere verbal garb and various statements. Underlying this differentiated understanding of human rights are different social philosophies, conceptions of freedom, equality, the State and its role in the realisation of human rights.¹⁰

General comments aim to monitor respect for children's rights worldwide. The issue of monitoring includes the reports of States Parties to which the Committee refers in its reports. The Committee's monitoring activities include responding to problems involving violations of children's rights at several different levels. In connection with its monitoring, the Committee, based on its analyses of the submitted reports and the conclusions drawn from them, produces general comments of universal value.¹¹ To date, the Committee has produced 25 general comments on various issues contained in the provisions of the CRC and Optional Protocols. Consecutively, these commentaries concern: General comment No. 1 (2001) – the objectives of education; No. 2 (2002) – the role of independent national human rights institutions in the protection and promotion of children's rights; No. 3 (2003) – HIV/AIDS in the context of children's rights; No. 4 (2003) – adolescent health and development during adolescence; No. 5 (2005) – general actions to implement the CRC; No. 6 (2005) – the treatment of unaccompanied and separated children residing outside their country of origin; No. 7 (2005) – the implementation of children's rights during early childhood;

9 The child is simultaneously the subject of general human rights standards and the standards contained in the CRC.

10 Jasionek, 2004, p. 12.

11 Stadniczeńko, 2019, p. 121.

No. 8 (2006) – the child’s right to protection from corporal punishment, cruel or degrading forms of punishment; No. 9 (2006) – the rights of children with disabilities; No. 10 (2007) – the rights of children in the juvenile justice system; No. 11 (2009) – children of indigenous peoples and their rights under the CRC; No. 12 (2009) – the child’s right to express his or her own views; No. 13 (2011) – the child’s right to freedom from all forms of violence; No. 14 (2013) – the right of the child to have his or her best interests safeguarded as a paramount consideration; No. 15 (2013) – the right of the child to the highest possible standard of health care; No. 16 (2013) – the impact of the business sector on the rights of the child; No. 17 (2013) – the right of the child to rest, leisure, play, recreational activities, cultural life and the arts; No. 18 (2014) – harmful practices (issued jointly with General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women); No. 19 (2016) – public funding for the realisation of children’s rights; No. 20 (2016) – realisation of children’s rights in adolescence; No. 21 (2017) – children in street situations; No. 22 (2017) – general principles on children’s rights in the context of international migration; No. 23 (2017) – State obligations on children’s rights in the context of international migration in countries of origin, transit, destination and return; No. 24 – children’s rights in the justice system; and No. 25 – children’s rights in the digital environment.

Although the Committee’s ability to interpret the understanding of the provisions of the CRC, which determines the concrete actions of States Parties for protecting children’s rights by contributing to their realisation in practice, is an activity that serves the child, the legal nature of general comments is controversial. The CRC does not provide for the Committee’s authority to express its position in the form of general comments, which means that such an activity is beyond its competence. According to the wording of Article 44(4) of the CRC, the Committee’s powers are reduced to the possibility of requesting from States Parties ‘further information relating to the implementation of the Convention’ and, based on Article 45(d) of the CRC, ‘to make suggestions and general recommendations’. It does not appear from the wording of Articles 44 and 45 of the CRC that the Committee has acquired the competence to interfere in the internal affairs of States Parties and to issue legally binding decisions or interpret legislation in the form of general comments. States Parties to the CRC have not granted it such a power. If it had been the will of the States Parties to the CRC to grant the Committee such a power, it would have been expressed by an appropriate provision, as was the case with the European Court of Human Rights established under the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. However, States Parties opted not to include a provision in the CRC granting the Committee similar powers. *Ultra vires* interpretations of the provisions of the CRC undermine the principle of *pacta sunt servanda*, a fundamental condition of which is the consent of States Parties to be bound by a particular agreement expressed with full knowledge of the content of the obligations arising therefrom. Recognising the right of the Committee to issue binding interpretations of the provisions of the CRC would *de facto* lead to granting the monitoring body the right to change its content and meaning without the consent of the States Parties.

The Committee cannot create new rights and obligations that do not directly flow from the provisions of the CRC. Despite this, the rules of the procedure adopted by the Committee explicitly mention *general comments* as one of the means of its disposal in Paragraph 77. It follows that the Committee has single-handedly created a new tool for its activities without having any legitimacy to do so. The Committee cannot grant itself powers that have not been conferred on it by the signatory States of the CRC, and cannot create them *ex nihil*. Moreover, the Committee cannot gain title to them by the mere fact of even exercising them for a long time.¹²

Therefore, because the right to issue general comments is not derived from the CRC, the interpretations of its provisions and the Committee's recommendations expressed therein do not have the character of binding legal decisions; rather, they have the character of non-binding legal opinions. However, they are not entirely devoid of meaning. Opinions, such as the law, are ways of thinking, arguing, and persuading. The law is not only determined by the intention of the legislator as expressed in the law but is also shaped by what lawyers say and write about it. In some sense, the law is the product of lawyers.¹³ Opinions combine the elements of reporting, history, logical deduction, and persuasion, weaving all of these elements into a single narrative. Recipients are persuaded by this narrative if they are in contact with an easily accessible normative perspective directed at themselves and their communities. An opinion has to make sense of the law as something we do together, which means it has to make sense considering everything we believe in. This is what convinces us when we opt a particular version of the narrative that we believe to be the only one. Important facts constitute the context in which the law is seen. A given issue often entails conflict in the relevant context, the best example being attitudes toward abortion - do we see it in the context of infanticide or reproductive freedom? Work on context often occurs through analogy, which is the dominant form of legal argument.¹⁴

General comments, such as legal opinions, can affect the legal systems of States Parties in at least two ways. First, they can be tools for reinforcing the pressure exerted by national or international NGOs on governments, which may even lead to legislative changes at the national level. Second, they are often invoked by actors in international law who, unlike monitoring bodies, have the power to make legally binding decisions and oblige States to adopt certain measures.¹⁵ General comments are used to pressure States Parties that have ratified and implemented the CRC to implement certain legislative measures, either to align their domestic law with the opinions presented by the Committee or to change their practice in the direction set by these opinions. It should be noted that such opinions are always marked by a degree of subjectivity, as they express not only the knowledge of the members of a given body, but also the way they perceive the world and value phenomena through the prism of their

12 Dorosinski, 2016 (Accessed: August 30, 2023).

13 More extensively: Zirk-Sadowski, 2002, pp. 7-19.

14 Kahn, 2016, p. 117.

15 Dorosinski, 2016 (Accessed: August 30, 2023).

own convictions determined by worldviews, religion, customs and the environment. For law, does not function in isolation from reality in an axiological vacuum, but always in some context. Understanding the law always involves the evocation of sense, belief, and knowledge that do not come from the text itself subjected to analysis. Therefore, solving legal problems by drawing up a legal opinion is similar to judging the circumstances of specific cases by applying laws.¹⁶ Consequently, in general commentaries, the expressions used in CRC provisions are those using semantic rules that are modified by axiological assumptions. In particular, this applies to the interpretation of indefinite terms, such as the welfare of the child, moral norms, the child, or the safeguarding of the best interests of the child, as well as controversial terms arising from doctrinal disagreements or autonomous concepts.¹⁷

Considering the above, it should be stressed that the general comments could only be considered binding on the condition that States Parties confirm (acknowledge) the way in which the Committee on the Rights of the Child has interpreted the legislation and consequently aligned their actions with the resulting guidelines.

3. Protection of the child against violence considering General comment No. 13

The protection of the child from violence is guaranteed by Article 19 of the CRC:

‘1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms¹⁸ of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.’

Article 19 CRC is the core provision for addressing and eliminating all forms of violence against children.

16 Leszczyński, 2015, pp. 5 and 7.

17 Stadniczeńko, 2019, p. 346.

18 The term ‘all forms’ indicates that there are no exceptions, which is considered necessary because even the slightest possibility of any form of acceptable maltreatment will be misused easily. Whether all instances of maltreatment should be prosecuted is another matter. Sandberg, 2018, p. 19.

For comments on how to interpret Article 19, see General comment No. 13. The comments aim to guide States Parties in their efforts to understand their obligations under Article 19 and outline necessary measures. Furthermore, it aims to overcome isolated, fragmented and reactive initiatives to address child caregiving and protection; promote a holistic approach to implementing Article 19 based on the Convention's overall perspective on securing children's rights; and provide States Parties and other stakeholders with a basis from which to develop a coordinating framework for eliminating maltreatment. In stressing these objectives, the Committee demonstrates the necessity for States Parties to develop an 'integrated, cohesive, interdisciplinary and coordinated' child protection system¹⁹.

According to the Committee, any form of violence against a child is evil—an action that violates the child's dignity. Safeguarding and promoting the child's fundamental right to respect his or her dignity and physical and psychological integrity by preventing all forms of violence is important for promoting the entire set of rights contained in the CRC. The Committee highlighted that children who have not experienced violence are less likely to engage in violent behaviour, both in childhood and adulthood, which adds to the argument that effective implementation of Article 19 of the CRC is the key to preventing all forms of violence. In this context, how far one should go to protect family unity if the child is at risk. In the preventive stage, before maltreatment escalates, retaining family unity is the clear starting point and chief rule. However, at a certain point it may be necessary to break family unity by removing the child or, as it may be, the perpetrator from the home. The separation of a child from its parents is generally not desirable. Where prosecution leads to a parent being sentenced to prison, it may not be in the best interests of the child. Therefore, the primary aim of the investigation should be to stop violence through support and education rather than punishing parents. Prosecution authorities need training to conduct assessments of children's best interests in such situations. Children's best interests should be the primary consideration when deciding on measures to protect him or her. Therefore, the well-being of the child is not defined in normative acts, which means that the burden of determining its meaning lies each time on the entity applying the law. The court is obliged to account for children's well-being during courtroom proceedings. At times, strict adherence to the letter of the law proves insufficient, as the rights of the child must also be considered. Children must not be forced to bear the negative consequences of overly casuistic or imperfectly worded regulations. Hence, judicial discretion ought to be considered in terms of categories such as experience and maturity, as well as values such as objectivism, impartiality, and guardianship over the rule of law, which further emphasises the key role of the judge in determining and shaping the child's situation.¹⁹

Violence has been defined as the exploitation of one's advantages over a child and encompasses all forms of physical and psychological violence, harm or abuse, neglect

19 Order of the Supreme Court of 24 November 2016, II CA 1/16, LEX nr 2216088.

or negligent treatment, maltreatment or exploitation, including sexual exploitation. This has particular resonance in the context of Article 34 of the CRC:

‘States Parties undertake to protect children from all forms of sexual exploitation and abuse. In order to achieve these objectives, States Parties shall, in particular, take all appropriate national, bilateral and multilateral steps to counter: a) the inducement or coercion of a child to engage in any illicit sexual activity; b) the use of children in prostitution or other illicit sexual practices; c) the use of children in pornographic performances and materials.’

The devastating impact of violence on children has health, developmental and behavioural consequences. Health consequences include fatal injuries, non-fatal injuries (which can lead to disability); physical health problems (including developmental difficulties, later lung, heart and kidney disease and sexually transmitted infections); mental defects (affecting academic and work performance); mental and emotional consequences (feelings of rejection and abandonment, disrupted sense of attachment, trauma, fear, anxiety, insecurity, insecurity and lack of self-esteem); mental health problems (such as anxiety and depressive tendencies, hallucinations, memory difficulties and suicide attempts) and propensity for risky behaviour (related to the use of stimulants and early sexual initiation). Developmental and behavioural consequences (such as truancy, aggression, antisocial behaviour, self-destructive behaviour, and destructive interpersonal relationships) can lead to relationship breakdown, removal from school, and conflict with the law, among others. Experiences of violence increase the risk of further feelings of being victimised and the accumulation of violent experiences, including intimate relationship with a partner in which violence is present.

Considering these serious consequences, both individually and socially, there can be no condonation of violence against children in any form, thereby ruling out the possibility that certain forms of violence are legally and/or socially acceptable. This also applies to minor chastisements. One form of violence is neglect or negligent treatment, which means failure to provide physical and mental needs, protection from danger or medical care, birth registration and other services when those responsible for the care of children have the means, knowledge and access to these services. Neglect includes but is not limited to physical neglect (inadequate care, including that resulting from lack of attention, failure to provide the child with basic needs, including adequate food, shelter, clothing and basic medical care); mental and emotional neglect (lack of emotional support and love, chronic lack of attention to the child, failure to notice signs and signals sent by the child, exposure to partner violence, use of alcohol and drugs); neglect of the child’s physical and mental health (primarily as a result of denial of needed medical care); educational neglect (failure to comply with the law requiring the provision of education to the child by attending school or similar institutions); or child abandonment.

Psychological violence is characterised as mental maltreatment, psychological, verbal and emotional abuse or neglect concerning the satisfaction of a child’s needs.

Psychological abuse is defined as any form of sustained harmful interaction with the child, for example, making the child believe that he or she is worthless, unloved, unwanted, threatened or that he or she is only needed to meet the needs of others; threatening, terrorising and intimidating; exploiting and bribing; pushing away and rejecting; isolating, ignoring and favouring; non-repetition of emotional responses; neglect of mental health, medical and educational needs; insulting, name-calling, humiliating, insulting, mocking and hurting a child's feelings; exposure to domestic violence; condemnation to isolation, placement in solitary confinement or in degrading and derogatory conditions of confinement; and pervasive cyberbullying. Physical violence refers to all corporal punishment and other forms of torture, cruel, inhumane or degrading treatment or punishment, and physical abuse or shaking as a means of symbolic acceptance into a group by adults or other children. Corporal punishment amounts to the use of physical force to inflict pain or cause discomfort, regardless of the severity. It includes various forms, primarily hitting the child with hand or an instrument; kicking, shaking or throwing the child; scratching, pinching, pulling hair or rubbing ears; forcing the child to remain in an uncomfortable position; setting fire to the child, burning or forcing the child to eat.

The following have been recognised as sexual exploitation and abuse: soliciting and forcing a child to engage in unlawful or psychologically harmful sexual activities; using a child for sexual exploitation for financial gain; using a child in sexually explicit audio-video material; child prostitution; sexual slavery; child trafficking (within and between States); selling children for sexual purposes; and forced marriage. Sexual activities between children are not considered sexual exploitation if their age exceeds the threshold set by the State Party as permissible for engaging in sexual activities.

All forms of advocacy and episodes of violence, particularly by mass media, are unacceptable, leading to the creation of a schematic and stereotypical image of children, primarily excluded, functioning on the margins of social life, and often portrayed as violent or committing crimes. This determines the approach to the development of State strategies, based primarily on the use of punishment, including violence, as a means of responding to alleged or actual offences caused by children.

Poverty makes it difficult for parents to care for their children properly. It entails challenges in providing children with basic necessities, such as food, clothing and shelter, and may also lead to various forms of parental behaviour that are detrimental to children. Parents may have to leave to find work in other parts of the country or abroad, leaving behind their children without proper care. Instead, they stay at home, and stressful situations may lead to emotional neglect of the children and even physical violence or other forms of abusive behaviour. Thus, poverty reduction strategies, including financial and social support for families at risk as well as housing and employment policies, are important social policy measures to prevent violence against at-risk children. Therefore, Article 19 Paragraph 2 requests that States Parties establish social programmes to provide the necessary support for the child and for those who care for the child.

Violations of children's rights may be committed not only by parents and guardians, but also by State authorities at any level who may harm them, directly or indirectly, by failing to take effective measures to implement their obligations under the CRC. Such omissions primarily include the failure to adopt or review a child protection system; inadequate implementation of laws or other regulations relating to children; insufficient provision of material, technical, and human resources for the protection of children's rights; and inability to identify, prevent and respond to violence against children. The lack of adequate tools for monitoring, assessing, and evaluating the progress and effects of efforts to eradicate violence against children is another omission. In taking action for children, the right to freedom from violence can also be violated by performing duties that do not consider the child's best interests, opinions and developmental goals.

States Parties have an obligation to make every possible effort in the legislative, administrative, social and educational fields to protect children from all forms of physical or mental violence, harm or neglect or ill-treatment or exploitation, including sexual exploitation. Commitment refers to the broad range of actions that must be taken to effectively address and respond efficiently to all forms of violence. The development and implementation of an integrated, coherent, interdisciplinary and coordinated system for protecting the rights of the child, encompassing a diverse catalogue of actions for the benefit of the child, is part of this objective. States Parties are obliged to prohibit, prevent and respond to all forms of violence. Legislative solutions are to formulate child-friendly legislation and the promotion/implementation of measures related to its application aimed at eliminating all forms of violence against children. Administrative actions should reflect the responsibility for developing strategies, programmes, monitoring and overseeing the systems required to ensure that children are protected from all forms of violence. Social actions should reflect a commitment to protect children's rights and provide basic and targeted services to individual recipients. Educational activities address the issue of attitudes, traditions, customs and behaviours that tolerate and promote violence against children; encourage open discussion of violence; and involve the media and the public. They should also support the child's life skills, knowledge and right to expression, and develop skills to establish and maintain good contact with children.

A system for protecting the rights of children should be based on a holistic approach, considering the child's physical, mental, spiritual, moral, psychological and social development. The creation of such a system requires providing comprehensive and integrated actions aimed at establishing social programmes to meet the needs of the child and to support those who have custody of the child, and other forms of preventive interventions to identify, inform, initiate and conduct relevant proceedings before law enforcement authorities and, where necessary, court intervention. Such interventions must consider the social, cultural traditions and legal system of the concerned country.

The protection of the child must begin with prevention, that is, proactive prevention and explicit prohibition of all forms of violence. The primary way to protect

children from all forms of violence is by preventing its occurrence. Therefore, States Parties should take all necessary measures to ensure that adults are responsible for the care, direction and upbringing of children and respect and protect their rights. Prevention includes health and other measures to promote a respectful, non-violent upbringing of the child and to address the root causes of violence that lie with the child, family, perpetrator, community, public and non-public institutions and society. Another type of prevention involves educational measures to change attitudes in society toward children and their upbringing, to violence in general and more specifically to violence and other harmful behaviours towards children. They should address the attitudes, traditions, customs and behavioural practices which condone and promote violence against children. In particular, awareness campaigns should be conducted to promote positive child-rearing and combat negative societal attitudes. Parents and other caregivers should be educated regarding this. Prevention endeavours do not absolve States Parties' obligation to respond promptly to all forms of violence. To develop effective prevention initiatives, it is necessary to identify risk factors for individuals or groups of children and their caregivers and to recognise the signs of violence to intervene as promptly as possible when it occurs. This requires all those who come into contact with children to be aware of the possible risk factors and forms of violence, to be able to recognise and assess them, and to know and be prepared to take appropriate steps, including providing immediate protection. States should develop safe, well-publicised, confidential and accessible support mechanisms for children, their representatives and others to report violence against children, including the use of 24-hour toll-free hotlines and other ICTs. The Committee further states that reporting should be required at least by professionals working directly with children. The obligation to report should cover instances of violence, as well as suspicion or risk of its use.

Moreover, States Parties should ensure that all incidents, suspicions and risks of violence can be reported (reported). Considering this, States Parties should develop universally accessible and confidential mechanisms to support children, their caregivers or bystanders to report violence against children. The investigation of reports must be conducted by qualified persons who are knowledgeable and appropriately trained in their assigned tasks, with an approach that is sensitive and respectful of the child and his or her rights. Therefore, establishing reporting mechanisms entails the need to provide training and support for personnel who receive the information on how to act upon it in a meaningful manner. Once a child's experience of violence has been diagnosed, various types of medical, psychological, specialist and legal services and support may be required.

The overriding objective in making decisions concerning a child should be to ensure effective protection and unimpeded development in the spirit of the child's best interests, whereas any intervention should be as minimally intrusive as possible and tailored to the circumstances of the individual case. Considering this, the Committee recommended that: 1) children and their parents should be informed in a timely and appropriate manner by the justice system or other legitimate authorities

of their rights and options for action; 2) child victims of violence should be treated in a friendly and sensitive manner throughout the process, considering their personal circumstances, needs, age, gender, disability, degree of maturity, and with full respect for their physical, mental and moral integrity; 3) the involvement of the justice system should be preventive where possible, which involves promoting positive behaviour and prohibiting negative behaviour; and 4) the principle of speedy proceedings should be applied in all proceedings involving child victims, respecting the rule of law and a fair trial. The intervention of the judiciary should be part of a coordinated and integrated cross-sectoral approach, supporting and facilitating other qualified persons to work with children, parents, caregivers and entire communities and improve access to the full range of services related to the care and protection of children. Considering the specificity of cases involving children, specialised juvenile and family courts and criminal procedures tailored to children who are victims of violence should be established. All those working with and for children and dealing with such cases should receive interdisciplinary training on the rights and needs of children from different age groups and procedures involved.

The provisions of Article 19 should be interpreted in the context of other provisions of the CRC, primarily Articles 2–6 and Article 12. In the context of Article 2 of the CRC, States Parties should implement measures to ensure the right of every child is protected from all forms of violence without any discrimination based on race, colour, gender, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or status. As guaranteed in Article 3 of the CRC, the best interests of the child are served by preventing all forms of violence and promoting positive parenting, considering the need to implement prevention as an overarching principle in the framework action, coordinated at the national level, and investing in human, financial and technical resources to implement an integrated system of support and protection that considers the rights of the child. The right of children to have their best interests considered a priority in all actions affecting them is central to all decision-making. This requires each child to be treated as an individual, and is highly relevant to the child protection system. Protection from all forms of violence must be understood not only in the sense of the child's right to life and survival but also in the sense of the child's development, which must be interpreted in accordance with the overall goal of child protection (Article 6 CRC). Crucial to the protection of the child from violence is the child's involvement, therefore, the child's views must be considered with due seriousness as a mandatory element in the process of protecting the child's rights (Article 12 CRC). Children's empowerment and participation under Article 12 are crucial aspects of preventing violence prevention. In turn, Article 4 obliges States Parties to adopt appropriate measures to implement all the rights contained in the CRC, which is essential for its proper understanding. Simultaneously, the right to protection from all forms of violence includes civil rights and freedom. To make this a reality, States Parties must adopt all possible measures to fully implement children's rights, particularly focusing on the most excluded groups. The implementation of Article 19 of the CRC requires recognition of the overarching

role of parents, legal guardians and community members in the care and protection of children and the prevention of violence. This approach is in accordance with Article 5 of the CRC, which promotes respect for the responsibilities, rights and duties of a child's guardians to provide adequate guidance in a manner consistent with the child's developing capacities in exercising the rights.

There is no one-size-fits-all model for the prevention of violence, which means that each State is obliged to apply to its own needs, determined by local conditions and capacities, to create and improve a coordinating programme to combat violence against children. The elements to be introduced into such a programme are: a child rights approach, consideration of the gender dimension of violence against children, prevention, the overarching role of the family in childcare and protection strategies, opposition to violence and the promotion of protective factors (such as a stable family, caring parenting), risk factors (drug abuse in the family, mental health problems, poverty, unemployment), situations that are potentially dangerous for children (such as being in alternative care, mental disorders, living on the street, disability), allocation of budgetary resources, coordination mechanisms, and accountability (understood as the fulfilment by States Parties of their commitments). Coordination programmes to combat violence against children are intended to provide a common frame of reference and communication mechanisms between ministries, the State and members of civil society at all levels, with regard to the implementation of adequate measures to protect the child.

Programmes and actions must be relevant and effective. States Parties' resource constraints cannot justify their inability to take action to protect their children. The primary source of funding for child protection activities should be State budget resources.

The need for regional and international cross-border cooperation aimed at protecting children beyond the borders of one country, addressing cross-border problems—child trafficking, sexual exploitation, illegal adoptions, organ trafficking, armed conflicts, natural disasters, and their consequences—which require specific legislation, strategies, programmes and partnerships, was noted.

4. Protecting the child from harmful practices considering Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices

Gender- and age-based violence are addressed in Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices. It addresses harmful practices that are often associated with serious forms of violence or are themselves forms of violence against women and children. Among the

most widespread are female genital mutilation, child mutilation, forced marriage,²⁰ child marriage, polygamy, crimes committed in defence of honour and out of a desire to preserve dowry, neglect of girls, extreme dietary restrictions, virginity testing and related practices, tying up, inflicting wounds that cause scarring, marking with stigma/tribal marks, corporal punishment, stoning, violent initiation, widowhood practices, accusations of witchcraft, infanticide and incest, body modifications conducted for the sake of beauty or marriageability of girls and women (such as fattening, isolation, the use of labial discs and neck lengthening with semen rings) or for the sake of protecting girls from early pregnancy or from sexual harassment and violence (for example, breast ironing). In addition, many women and children are increasingly undergoing medical and/or plastic surgery to conform to societal norms about the body rather than for medical or health reasons. These behaviours fall within the normative context of Article 37 of the CRC, which guarantees protection against torture, cruel, inhuman or degrading treatment or punishment. Such harmful practices not only cause physical and mental suffering, but also strike human dignity and the integrity of the individual, damage health, and impede or prevent the exercise of human rights. The causes of harmful practices are multidimensional and primarily determined by gender and age discrimination.

States Parties are obligated to implement a comprehensive strategy to counter harmful practices, a mechanism to monitor efforts to protect women and children, and the free realisation of their rights. Implementing these strategies should involve a wide range of actors, including independent national human rights institutions, health, education and law enforcement professionals, civil society representatives, and those involved in such practices. The collection, analysis, dissemination and use of data related to these practices are essential for ensuring effective policies, developing appropriate strategies, formulating actions, assessing the impact and monitoring progress in eliminating harmful practices. The availability of these data allows examining current trends and enables establishing appropriate links between policies and the implementation of adopted strategies by state and non-state actors, and enables modifying according to changing attitudes and behaviours considered harmful practices.

Those providing services to women and children, particularly medical personnel and teachers, are predisposed to identifying actual or potential victims of harmful practices. However, owing to the duty of confidentiality, the right to report the occurrence of a harmful practice or the possibility of its occurrence is limited. Therefore, it is necessary to amend the law such that it obliges them to report such incidents.

The Committees recommend that States Parties adopt or amend laws to effectively combat harmful practices, leading to their eventual elimination. National laws should be aligned with standards under the Convention on the Elimination of All Forms of

20 It is particularly cruel to be forced to marry a rapist who, as a result of marrying the victim, with the consent of the victim's family, not only avoids punishment but also gains power over his victim.

Discrimination against Women and the CRC and other international human rights standards, which should take precedence over customary, traditional or religious laws that permit, tolerate or recommend harmful practices, particularly in countries with multiple coexisting legal systems. Legislation that tolerates, permits or leads to harmful practices should be repealed immediately. Women and children who are victims of harmful practices must be provided free access to justice, including the removal of legal and factual barriers to initiating appropriate proceedings such as limitation periods, the ability to hold perpetrators and those who assist or tolerate such practices.

Prevention is the first step in combating harmful practices. This can be most effectively achieved through a rights-based approach to changing social and cultural norms; empowering women and girls; building the capacity of those who come into regular contact with victims, potential victims and perpetrators of harmful practices; and raising awareness of the causes and consequences of harmful practices, including through dialogue with all those involved.

States Parties have the responsibility to challenge and change patriarchal ideologies and structures that impede women from fully exercising their human rights. To overcome the social exclusion and poverty experienced by many women and girls, which increase their vulnerability to exploitation, harmful practices and other forms of gender-based violence, they should be equipped with the skills and competencies necessary to claim their rights, including making autonomous and informed decisions and choices about their own lives. Education plays a significant role in the assertion of rights. There is a clear correlation between low levels of education for women and girls and the incidence of harmful practices. This determines the obligation to provide access to universal, free and compulsory primary education to ensure regular attendance, discourage dropouts, eliminate existing gender disparities, and promote access for most marginalised girls, including those living in remote and rural communities. The completion of primary and secondary education contributes to the prevention of child marriage and teenage pregnancy, lower rates of infant and maternal mortality and morbidity, preparing women and girls to better, more consciously exercise their right to freedom from violence, and increasing opportunities for effective participation in all spheres of life. States Parties should implement measures to increase enrolment and ensure the continuation of secondary education, including ensuring that students complete primary school; abolishing tuition fees for primary and secondary education; promoting equal access to secondary education, including technical-vocational education; and making secondary education compulsory. Information on human rights, including women's and children's rights, gender equality and self-awareness should be included in the curricula. Moreover, States Parties should contribute to the elimination of gender stereotypes, supporting the idea that schools provide age-appropriate information on sexual health and reproductive rights, including, inter alia, responsible sexual behaviour, HIV prevention, protection from violence and harmful practices.

The Committees recommend that States Parties ensure that all those who have regular contact with victims and potential victims are provided with information on harmful practices and applicable human rights norms and standards as well as on how to prevent, identify and respond to incidents of harmful practices, including mitigating the negative effects on victims and helping them access assistance. Further, it is necessary to provide training to all law enforcement personnel, particularly judicial staff, on laws prohibiting harmful practices, the rights of women and children, their roles in prosecuting the perpetrators of harmful practices and protecting victims.

Knowledge is the means of counteracting harmful practices; hence, there is a need for broad information campaigns to raise public awareness as part of larger strategies to eliminate harmful practices. In this context, mass media can play a significant role. Social and mainstream media can be important partners in raising awareness of the need to respect children's rights and eliminate harmful practices, including government initiatives to organise debates or talk shows, prepare and screen documentaries and develop educational programmes for radio and television. Further, the internet and social media can be valuable tools for providing and exchanging information and providing a space for dialogue, which should involve all those interested in counteracting harmful practices.

National protection systems need to be child-friendly, gender-sensitive and adequately resourced to provide all the necessary services to protect women and girls who are at risk of violence, including girls fleeing genital mutilation, forced marriage, and falling victims to honour crimes. To make it easier to access help, a 24-hour toll-free helpline should be established to enable victims to report harmful practices that are accessible and known throughout the country. Adequate safety and security measures should be provided to victims, including temporary shelters or specialised services provided in shelters for victims of violence. Moreover, psychosocial support is required to provide treatment for victims' psychological trauma, which may include posttraumatic stress disorder, anxiety, and/or depression. Strengthening efforts to combat harmful practices should include programmes that contribute to harnessing the capacity of judges, lawyers, prosecutors and all those interested in the law prohibiting discrimination based on gender or age and applying it in a manner consistent with the provisions of the CRC.

5. Child protection in street situations considering General comment No. 21

General comment No. 13 is universal in that it applies to all forms of violence against a child regardless of the situation in which the child is placed. The dangers of harming

a child in street situations²¹ is dedicated to General comment No. 21 (2017) on children in street situations. The concept of children in street situations covers two groups of children: the first includes children who live and/or work on the streets on their own, with their peers, or with their families; the second includes a much broader population of children who are strongly connected to the public space (the street), for whom the street plays a key role in their daily life and functions as their identifying, identity-defining element. This group includes children who periodically live and/or work on the streets, and children who do not live or work on the streets but regularly accompany their peers, siblings or families in street situations (on the streets). Children in street situations are not a homogeneous group; their diversity depends on many factors, such as age, gender, ethnicity, nationality, disability, and sexual orientation, which translate into different experiences, risks and needs.

Street situations include being in public places, which are open spaces – streets, markets, parks, squares, buses, and train stations – where children spend a significant amount of time and where their life activities are concentrated. Children in street situations in public spaces work, spend their leisure time, establish relationships, find shelters and sleep, cook, wash, but also use various types of harmful substances and engage in casual sexual activities. It is important to stress that children may engage in such activities voluntarily because of a lack of choice, out of compulsion or under the influence of violence from other children or adults. Street situations are a primary source of danger for children, facilitating the possibility of child abuse, either through violence or by taking advantage of their coercive positions.

This type of situation is addressed in Article 32 of the CRC, where

‘1. States Parties recognise the right of the child to be protected from economic exploitation, from performing work, which may be hazardous or which may interfere with the child’s education, or which may be harmful to the child’s health or physical, mental, spiritual, moral or social development. 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the provisions of this article. To this end, bearing in mind the pertinent provisions of other international instruments, States Parties shall in particular: a) establish a minimum age level or levels for applying for employment; b) make appropriate provision for the duration and conditions of employment; c) establish appropriate penalties or other sanctions to ensure the effective application of the present article.’

This is complemented by Article 36 of the CRC, which is subsidiary to other provisions on the exploitation of the child, according to which ‘States Parties shall defend the child against all other forms of exploitation in any aspect prejudicial to the child’s

21 In the past, terms such as street children, children on the street, runaway children, discarded children, children living and/or working on the street, homeless children or street-bound children have been used to refer to children in street situations.

welfare.’ This open-ended formulation of exploitation offers the possibility of an interpretation that protects a child’s welfare in any risky situation, including street situations.

To fulfil their obligations under the CRC, States Parties should develop comprehensive, long-term strategies and support initiatives targeting children in street situations to find alternatives to those provided by the street. These strategies should be based on a holistic approach to children’s rights to ensure all-round development. The first step should be to gather information about such children to decide how best to protect their rights. Countries should adopt a cross-sectoral approach to understand how policies in one area, such as finance, affect policies in another, such as education, which in turn determine the situation of children living on the street.

The Committee called on States Parties to introduce legislation regarding the protection of children in street situations, referring to the protection of children’s rights, and to immediately remove laws that directly or indirectly discriminate against children growing up on the street, their parents or families; abolish laws that allow the arbitrary removal of children and their families from the streets or other public spaces; abolish the criminalisation of crimes committed by children, such as begging, curfew violations, vagrancy, running away from home, which are disproportionate to the gravity of the acts; abolish the criminalisation of crimes of children who have been victims of commercial sexual exploitation and moral crimes such as extramarital sex.

National child protection systems must assume direct outreach to children in street situations and consider the specific services they need. The effectiveness of such initiatives depends on understanding the local context and individualised needs of children in street situations. The most important task for States Parties is to implement measures to ensure that children in street situations have access to basic services, such as health and education, as well as justice, culture, sports and information, which condition the process of normal life and proper development.

All provisions of the CRC and the Optional Protocols are interrelated, indivisible, mutually conditional, and complementary, which means they must be read in corpore. Children in street situations are primarily addressed by: (1) articles of overarching importance to the child rights approach – Article 2 (on non-discrimination²²), Article 3(1) (on safeguarding the best interests of the child), Article 6 (on the right to life, survival and development), Article 12 (on the right to be heard), Article 4 (on appropriate measures aimed at implementing the rights recognised in the CRC), Article 5 (on direction and guidance consistent with the developing capacities of the child); (2) articles on civil liberties and rights – Article 15 (on the right to association and peaceful assembly), Articles 7 and 8 (on birth registration and the right to identity), Articles 13 and 17 (on freedom of expression and access to information), Article 16 (on

22 The right to non-discrimination does not simply result in prohibiting all forms of discrimination, but also requires appropriate proactive measures to effectively ensure that all children have an equal opportunity to exercise their rights under the CRC.

privacy, honour and reputation); (3) articles on family environment and alternative care - Article 20 (on the right to special protection and assistance for children deprived of a family environment), Article 9 (on separation from parents), Articles 3(3) and 25 (concerning compliance with standards by institutions, services and other entities responsible for the care or protection of children, as well as periodic inspections in medical institutions), Article 18 (concerning parental responsibility); (4) Article 27 concerning an adequate standard of living; (5) articles concerning disability and health - Article 23 (concerning children with disabilities), Articles 24 and 33 (concerning health and the abuse of drugs and other harmful psychoactive substances); (6) articles concerning educational, recreational and cultural activities - Article 28 (on the right to education), Article 29 (on the purposes of education), Article 31 (on the right to rest, play and leisure); (7) articles on violence against children and special protective measures - Articles 19 and 39 (on freedom from all forms of violence), Articles 34-36 (on sexual exploitation, trafficking and other exploitation), Article 32 (on child labour), Articles 37 and 40 (on juvenile justice) and Article 38 (on the involvement of children in armed conflict).

The Committee called on States Parties to strengthen international engagement, cooperation, and mutual assistance in the prevention and protection of children in street situations. Such cooperation should include the identifying problems, sharing rights-based practices that have proven effective, research, procedures, monitoring and capacity building. This requires the involvement of States Parties, as well as United Nations bodies and agencies, regional organisations, civil society, children, the private sector and professional groups. Only the consolidation of efforts can result in getting children out of street situations or ensuring that their rights are respected when they choose to remain on the street.

6. Protecting the child from the dangers of the digital world considering General comment No. 25

The progress of civilisation associated with the development of digital technologies and communication techniques – apart from its undoubtedly positive aspects – has become a source of many risks, including protecting children from all forms of violence. General comment No. 25 (2021) on children’s rights in relation to the digital environment serve to minimise the negative impact of digital technologies and communication techniques on children’s lives. The digital environment can contain hurtful information based on gender stereotypes, discrimination, racism, pornography, violence, exploitation, misinformative content and information that encourages children to engage in illegal or harmful activities. The digital environment can introduce new forms of violence against children, fostering situations in which they experience violence and/or are forced to harm themselves or others.

Guiding principles in determining the measures necessary to protect the child and guarantee the fulfilment of the child’s rights in the digital environment are 4

principles: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child. States Parties should ensure that in all actions related to the provision, regulation, design, management and use of the digital environment for the child, the child's best interests are prioritised, which include, *inter alia*, the right to seek, obtain and impart information and protection from harm. When protecting children from the dangers of the digital world, the role of parents is irreplaceable. Therefore, States Parties should support parents and guardians in acquiring digital literacy and knowledge of the risks they generate to support children in making responsible use of the opportunities they present and to ensure that their rights are realised.

The possibility of realising children's rights and their protection in the digital environment requires a wide range of legislative, administrative and other measures, including preventive measures that are adequate and up-to-date to the existing risks. States Parties should implement measures to protect children from risks, including cyber-aggression, digital sexual exploitation, and online abuse; ensure the prosecution of such crimes; and provide remedies and support for child victims. They should also respond promptly to the needs of disadvantaged or vulnerable children by providing child-friendly information translated into minority languages, where necessary. The development of legislation, policy and practice should be underpinned by permanently collected and updated data and research findings to understand the impact of the digital environment on children's lives and development, assess its effects on the realisation of their rights, and evaluate the effectiveness of State interventions.

Measures to ensure that effective child protection mechanisms are in place in the digital environment must consider respect for the other rights of the child in all places where they have access to the opportunities provided by digital technologies and communication techniques, that is, in the home, educational establishments, internet cafés, youth cultural centres, libraries and health and foster care settings.

States Parties should designate a state body with the authority to coordinate policies, guidelines and programmes related to the protection of children's rights implemented by various central government bodies and at different levels of government. Moreover, they should ensure that the reference terms for national human rights institutions cover children's rights in the digital environment. Where independent oversight bodies exist to monitor activities related to the digital environment, national human rights institutions should work closely with them to effectively exercise their powers relating to children's rights. Authorities with supervisory powers related to children's rights, particularly those with jurisdiction over health and safety, data protection and consumer rights, education, advertising and marketing, should ensure that complaints can be lodged, dealt with expeditiously, and that appropriate remedies are available in the event of violations or breaches of children's rights in the digital environment.

Awareness is a prerequisite for the realisation and protection of children's rights. Considering this, States Parties should disseminate information and conduct public campaigns on children's rights in the digital environment, with a particular

focus on activities that directly or indirectly affect children. They should create an enabling environment for educational programmes for children, parents, caregivers, the general public, and policymakers raising awareness of children's rights in the context of the opportunities and risks associated with digital products and services. Such programmes should include information on how children can use digital products and services, develop their digital skills and abilities, protect their privacy and prevent victimisation, recognise children who have been harmed and respond appropriately.

States Parties should engage as wide a range of actors as possible to do so and work with civil society, involving various community groups and NGOs working in the field of children's rights, as well as those dealing with the digital environment, in the development, implementation, monitoring and evaluation of laws, policies, plans and programmes on children's rights.

It is particularly important to ensure that businesses comply with their obligations to prevent the use of the digital environment in ways that lead to or contribute to the violation or abuse of children's rights. States Parties should require all businesses that affect children's rights in the digital environment to implement regulatory frameworks, industry codes, and service regulations that meet the highest standards of ethics, privacy and security in the design, engineering, development, operation, distribution and marketing of their products and services. In addition, States Parties should introduce, monitor and enforce legislation to prevent violations of the right to protection from violence and prosecute, try and remedy violations that occur in the digital environment.

The interests of businesses must not prevail over those of the children. Therefore, States Parties should legally prohibit the profiling and targeting of personalised content to children for commercial purposes based on a digital record of their actual or presumed characteristics, including group or aggregate data, targeting personalised content on an associative basis, or profiling based on presumed interests. Activities that use neuromarketing, emotional analysis, immersive/native advertising and advertising in virtual and augmented reality environments to promote products, applications and services should be prohibited when interacting with children. States Parties should ensure that automated information search and filtering, including recommendation systems, do not structure content in a manner that gives preference to paid commercial or politically motivated content over children's free choice or at the expense of the right to information.

States Parties should ensure that appropriate and effective judicial and non-judicial mechanisms to protect children's rights against violations in the digital environment are widely known and available to all children and their representatives. Mechanisms for filing lawsuits, complaints and notifications should be free of charge, secure, confidential, flexible, child-friendly, and accessible in forms adapted for people with special needs. In addition, States Parties should also ensure that collective complaints can be filed, including bringing class action lawsuits and initiating legal proceedings in cases of public interest, as well as obtaining legal or other appropriate assistance

for children whose rights have been violated in or through the digital environment. Considering the above, law enforcement officers, prosecutors and judges should receive specialised training in the area of child rights violations related specifically to the digital environment.

A digital environment creates a space for virtual freedom. Considering this, States Parties should provide children with information and training opportunities to effectively exercise their right to express their thoughts, opinions and political views, in particular, to safely create and share digital content while respecting the rights and dignity of others and without violating laws, including those on incitement to hatred and violence. When expressing political and other views in the digital environment, children may face criticism, hostility, threats or punishment. States Parties should protect children from cyberaggression, threats, censorship, data breaches and digital surveillance. Moreover, they should also ensure that children are not punished for their religion or beliefs expressed in the digital environment.

States Parties should implement legislative, administrative and other measures to ensure that the privacy of the child is respected and protected by all organisations and in all environments that process their data. Activities involving automated data processing, profiling, behavioural targeting, mandatory identity verification requiring data, information filtering and mass surveillance are routine practices in digital space. These types of activities can lead to arbitrary or unlawful interference with a child's right to privacy and, consequently, can have negative effects on children that persist into later stages of their lives. States Parties should ensure that children and their parents or guardians can easily access stored data; rectify inaccurate or outdated data; and delete data held by public authorities, individuals or other entities, unlawfully or unnecessarily. It is the responsibility of States Parties to inform children, parents, guardians and the public about the importance of a child's right to privacy and how their own practices may threaten this right.

The role of parents in their children's upbringing, including the responsible use of digital technologies and communication techniques, is highlighted, which poses challenges for updating their knowledge and acquiring or improving digital competence. States Parties should ensure that parents and caregivers, in developing the knowledge, capacities and skills necessary to help their children interact with the digital environment, have opportunities to acquire digital literacy, learn how technology can work for the rights of the child, recognise disadvantaged children, and respond appropriately. As part of the support and guidance provided to parents and caregivers in the digital environment, States Parties should also promote awareness among parents and caregivers of the need to respect children's growing autonomy and protect their privacy, aligned with their developing capacities.

Sexual behaviour is particularly dangerous in the digital environment, primarily because of the ease of contact and information transfer. Sex offenders may use digital technologies to solicit children for sexual purposes and engage in the online sexual exploitation of children through, inter alia, live video streaming, the production and distribution of sexually related materials and sexual extortion. States Parties should

protect children from sexual exploitation and other forms of sexual exploitation and ensure the protection of their rights with regard to digital work and related earning opportunities. Simultaneously, sexually oriented materials prepared by the children themselves, which they possess and/or share with their own consent, and solely for their own use, should not be criminalised. Furthermore, child-friendly channels should be created to allow children to safely seek advice and assistance regarding self-created sexual content.

The sexual violence present in the digital environment has already been highlighted by the Committee on the Rights of the Child in its General comment No. 13 (2011), indicating the sexual exploitation of children through the depiction of audio and video images of children made available primarily on the Internet and to the process of producing, creating, permitting the taking, distributing, showing, possessing or advertising of immoral photographs, images, and videos depicting children in an abusive manner. Further, the Committee highlighted that children: 1) as recipients of information, they may be exposed to potentially or realistically harmful advertising, spam, sponsored material, personal information and content of a violent, violent, hate-filled, stereotyped, racist, pornographic, unwanted and/or misleading nature; 2) as subjects, they may be taunted, harassed or stalked, and/or coerced, tricked or encouraged to meet strangers offline, to engage in sexual activities and/or to provide information of a personal nature; 3) as participants, they may engage in taunting and harassment of others, play games that negatively affect their mental development, create and download inappropriate sexually-oriented material, provide misleading information and advice and/or download illegal material, gamble, hack computers, extort money and/or engage in terrorism.

To counter such dangers, States Parties should ensure that digital literacy is taught in schools as part of the core curriculum, commencing at the pre-school level. Curricula should include knowledge and skills to safely use a wide range of digital tools and resources, as well as critical literacy, guidance on how to find trustworthy sources of information, how to recognise misinformation and other forms of biased or false content, including sexual and reproductive health issues, human rights, including children's rights in the digital environment, and available forms of support and remedies. It is extremely important to disseminate knowledge to children about the possible negative effects of exposure to content, contact, behaviour, and contractual risks, including cyber aggression, trafficking, sexual exploitation and abuse, and other forms of violence, as well as coping strategies to reduce harm, protect their own and others' personal data, and build children's social and emotional skills and resilience to all types of harm.

States Parties should ensure that children have safe, private and beneficial access to the digital environment, and protect them from violence, exploitation and abuse.

7. Summary

Children's rights are not derived from any concept or theory of education, nor are they a political or worldview concept. They are part of human rights, and only some of these rights are exercised by children as they mature and according to their capacity to discern and assess their situation. This means that they accrue to the child from the beginning of his or her existence –that is, from the moment of conception. The most important factor is the right to life, which conditions the enjoyment of all others. Hence, any action against human life from the moment of conception constitutes the most brutal form of violence against a child and leads to his or her annihilation.

This observation is particularly relevant considering the content of the general comments cited above, in which the Committee on the Rights of the Child encourages States Parties to adopt a holistic approach to guarantee the right of the child to be protected from all forms of violence. Of particular relevance are the sections of the general comments that refer to human sexuality, obliging States Parties to implement educational measures to prevent unplanned teenage pregnancies and provide special care when they become pregnant. Related to this is the need to take action to equalise the status of women/girls and men/boys. Therefore, it is not without reason that an important part of the general comments refers to women and girls, emphasising the need for States Parties to adopt measures to overcome gender and age discrimination.

Thus, from the content of the general comments relating to the protection of children from all forms of violence in the broadest sense emerges a concern to ensure optimum living and developmental conditions for children, which is dictated by concern for children and the functioning of society as a whole. Accordingly, the Committee on the Rights of the Child points to new sources of danger generated by digital technologies, recommending that measures be implemented to bring order to virtual reality and subject it to tighter institutionalised control aimed at eliminating or at least reducing the possibility of children being harmed by digital technologies and communication techniques.

The recommendations arising from general comments must be viewed considering local conditions and the capacities of States Parties. Although the desire to ensure the protection of children from violence is not subject to any contestation, the manner in which this objective is pursued requires a particularly balanced action on the part of States Parties. In doing so, the cultural diversity that determines the identity of peoples and nations must not be destroyed in favour of cultural colonisation.

Although the provisions of the CRC are general in nature, their application in practice requires that the individual situation of the child be considered and that it is in his or her best interests. Knowledge of CRC should be disseminated to the public and children, and all those working with or for children need training on how

to implement CRC, including the best interests and how to have conversations with children.

To disseminate the concept of the rights of the child, the Committee on the Rights of the Child requests States Parties to disseminate the content of the recommendations arising from the general comments by all possible means, including the use of digital technologies. It aims to reach the widest possible audience - parliaments, governments, public administrations, parents and guardians, specialised organisations, local communities, the private sector, civil society, and above all, children. Such training should be conducted regularly as an ongoing process and not as a one-off event. Training must cover child rights and their practical applications. Professionals and others should be able to guide parents and other caregivers on positive parenting and the importance of avoiding maltreatment during upbringing. Adults who are in contact with a child should be able to recognise possible issues from the child's behaviour or what the child says, without the child explicitly asking for help. This is highly relevant for school and preschool teachers who meet the child every day, as well as health professionals, social workers, and police, but also for adults in the family or neighbourhood who meet the child in an informal setting. Identification requires that all who come into contact with children are aware of the risk factors and indicators of all forms of violence, have received guidance on how to interpret such indicators, and have the necessary knowledge, willingness and ability to take appropriate action for the benefit of children.

To make this a reality, it is recommended to translate the content of the commentaries into foreign languages, sign language, Braille and adapt them for easy reading for children with disabilities and children with limited literacy. This requires making the content of commentaries available in a child-friendly version, organising workshops and seminars, and training all professionals working with and for children.

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UN Convention on the Rights of the Child: Provision

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ABSTRACT

The study outlines the guarantees laid down in the CRC to secure the children's right to have access to certain resources and services necessary for their proper growth and development, such as the right to healthcare and education, the right to benefit from social security, as well as the right to rest and leisure, which are commonly referred to as the 'Provision Rights'. The complex nature of a child's developmental needs implies that the realisation of these rights cannot occur in isolation from protecting the rights of the family. Parents bear the primary responsibility for the upbringing and development of the child, whereas the State's responsibility is of a subsidiary nature, expressed primarily in measures to ensure that the child's needs and all-round development, which parents are unable to provide, are fulfilled.

KEYWORDS

Provision Rights, child's right to healthcare, child's right to education, child's right to social security

1. Introduction

According to Article 1 of the Convention on the Rights of the Child,¹ a child is any human being up to the age of 18 years, unless he or she attains the age of majority earlier in accordance with the law relating to the child. A child has legal subjectivity and is not the property of anyone. He or she holds all freedoms and rights guaranteed by the CRC, which he or she can gradually exercise in accordance with his or her developmental capacity. Simultaneously, as a dependent person, he requires special care and legal protection, as well as respect for his identity, dignity and privacy, as he is unable to take care of himself. The younger he is, the easier it is to harm him, as he is weak, vulnerable, innocent and naive.

The CRC considers children as human beings who are emotionally immature and physically weak, requiring harmonious formation in the spirit of peace, dignity, tolerance, freedom, equality and solidarity, in which they should be assisted by adults,

1 Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, Dz.U., 1991, No. 120, item 526.

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with particular emphasis on family members, particularly parents, who bear responsibility for the child. This weakness, during the period of growth, is transformed into a strength for society, as the child, owing to the interactions undertaken, should become fully prepared for life in society as a uniquely shaped individual. Therefore, childhood is an important period in a person's life: the formation of personality, assimilation of a value system, and attitudes towards others. Simultaneously, they are the hope of the future. Janusz Korczak rightly observed that 'without childhood, all life is crippled'.² Children deserve special care and assistance in all areas of human life. This actualises the obligation to be guided in all actions taken by parents and other persons, including teachers and public authorities, by concern for the best interests of the child, and not solely by the indiscriminate satisfaction of the child's needs. Moreover, concern for the best interests of the child provides for the State's obligation to safeguard the child's health and educational needs.

This chapter outlines several guarantees laid down in the CRC to secure the children's right to have access to certain resources and services necessary for their proper growth and development, such as the child's right to healthcare, the right to education, the right to benefit from social security, as well as the child's right to rest and leisure, which are commonly referred to as the 'Provision Rights' within the '3Ps' division of the CRC (Provision, Protection and Participation).

2. Child's right to healthcare

In terms of concern for the child's health, the CRC, in Article 24, commits to taking steps towards:

- (a) Reduction in infant and child mortality;
- (b) Ensuring the provision of necessary assistance and healthcare to all children, with a particular focus on the development of primary healthcare;
- (c) Combating disease and malnutrition, including within the framework of primary health care, by using readily available techniques and providing adequate nutritious food and drinking water, considering the danger and risk of environmental pollution;
- (d) Ensuring that mothers receive appropriate health care during the pre- and post-natal periods;
- (e) Ensuring that all sections of society, particularly parents and children, are informed and have access to education and are supported in using basic knowledge on child health and feeding, the benefits of breastfeeding, hygiene and environmental health conditions, and accident prevention.

Antenatal care, such as care during childbirth and the first years of a child's life, is crucial for the optimal development of the child in the later stages of life and has an

2 Korczak, 1998, p. 121.

impact on his or her later adult life. The perinatal care services provided to a woman during pregnancy and the perinatal period, as well as the care of the newborn, are primarily aimed at ensuring good health of the mother and baby, with medical interventions, including but not limited to caesarean sections, being minimised. Perinatal care must be based on practices with proven effectiveness and should consider the principles of maternal and newborn health safety. Continuous improvements in perinatal care standards are driven by the need to take effective action to reduce the incidence of maternal morbidity and mortality, mortality rates (perinatal, neonatal and infant), and lower rates of preterm births and low-birthweight babies.

Antenatal education is an integral part of the effective care provided to pregnant women, as the physical and intellectual development of the child and adult depends on healthy pregnancy and delivery.³ Antenatal education should promote behaviour that reduces the risk of pregnancy complications and foetal and neonatal malformations and prepares both parents for parenthood.⁴ Thus, it contributes to the parents' well-being. Among the many functions performed by birth schools, birth psychoprophylaxis is considered the most important and primary one. In addition, these schools have educational, therapeutic and supportive functions.⁵ Although pregnancy and childbirth are natural processes, they are unfortunately not free of danger, which can be remedied provided they are recognised early. Furthermore, activities conducted as part of antenatal education can effectively prevent problems during the postnatal period, such as emotional disturbances of the woman, which affect not only her health, but also the life and health of her child, as well as the relationships and functioning of all family members.⁶ Moreover, the health education of parents should be considered in preparation for the proper care of their child, which translates into proper psychophysical development and a reduction in the prevalence of infectious childhood diseases or civilisation diseases such as dental caries and obesity, which have become some of the primary public health challenges in many countries worldwide.⁷

Important in the field of perinatal and developmental care is the implementation of health services for the youngest children in the form of patronage visits or balance examinations. This is an important aspect of healthcare, as a patronage visit or doctor's appointment is often the only opportunity for a professional from outside the family to observe the child, assess the child's health, and develop a relationship with the caregivers. Negligence in this respect represents a missed opportunity to protect children, not only in terms of medical aspects, but also in terms of potential harm.⁸ Thus, it is important to develop an approach that is sensitive to the needs of

3 Sadowska et al., 2013, pp. 39 et seq.

4 Puszczalowska-Lizis, Mokrzycka and Jandziś, 2016, pp. 264 et seq.

5 Ibid., pp. 264 et seq.

6 Wojdyła et al., 2019, p. 197.

7 Kędzior, et al., 2017, pp. 41 et seq.

8 Szredzińska, 2022, p. 132.

children at different periods of their lives and provide quality services in a manner that minimises fear, anxiety and suffering for children and their families.

The issue of adolescent motherhood deserves further attention. Considering the high rate of adolescent pregnancies worldwide and the increased risk of mortality and morbidity for both young women and newborns, adolescent women should be guaranteed access to health services that address specific reproductive needs, such as sex education and family planning.⁹ No girl should be deprived of childhood, education, health or aspirations. Unfortunately, becoming pregnant during early adolescence deprives women of many associated rights.¹⁰ Hence, youth-friendly health services require health professionals to be open, sensitive and confidential. Therefore, it is important to introduce legal solutions to implement programmes that promote the health and development of young people and adequately prepare them for adulthood. According to the Committee on the Rights of the Child, attention should be paid to the creation of child- and adolescent-friendly websites that allow children to safely seek age-appropriate and trustworthy advice and assistance regarding puberty and sexuality.¹¹

Information on children's health should be communicated to their parents. However, promoting health protection and proper development of adolescents also involves respecting young people's rights to the privacy and confidentiality of information, including information on health advice. This involves the obligation to respect medical confidentiality, particularly regarding adolescents' sexual and reproductive health. Medical confidentiality aims to protect the patient and information concerning him or her. The information that a patient provides to medical professionals most often falls into the category of sensitive, intimate information, which no one normally brags about. The patient lets the doctor provide intimate details of his or her life because he or she knows that without this information, he or she is unable to receive proper and effective healthcare. Simultaneously, they should be confident that they can share all important (intimate, sensitive) information that concerns them in the belief that the doctor will not disclose it to anyone.

Minor patients should also be provided the opportunity to express their opinions on the proposed medical interventions, which should be preceded by information on his or her state of health. Unfortunately, in practice, information on the state of health of teenage patients is often provided only to his or her parents. Hence, it is not surprising that minor patients, when expressing their position on this issue, report that they want 'to be taken seriously as patients who have something to say about their own health'.¹²

9 In more details: Podgórnjak et al., 2014, pp. 61-65.

10 Kempieńska, 2017, p. 23.

11 Committee on the Rights of the Child, General Comment No. 25 on the rights of the child in the digital environment, United Nations CRC/C/GC/25, Available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation> (Accessed: 3 April 2024).

12 Sadowski, Jemiołek and Sadowska, 2017, p. 32.

Adolescents should have the right to deny the presence of a relative during medical appointments. Intimacy is a special sphere in everyone's life, regardless of age, which is why adolescents may be uncomfortable with parental or guardian involvement in healthcare provision. The role of the parent is to ensure that the wishes of the minor patient are respected and that those providing the health service do not abuse their superiority.

Considering their children's developmental potential, parents should nurture, protect and help them in the process of growth and development. Today, adolescents are maturing in a world whose stability has been shattered by pandemics, wars, and their consequences. The instability of the outside world strongly imprints on the fragile psyche of adolescent girls and boys. Many young people fail to adapt to change, experience confusion or struggle with anxiety and depression.¹³ Particularly during the pandemic, there has been a decline in the mental condition of young people, the effects of which continue. Instead of the vitality characteristic of a period of intense development, many young people now experience a lack of energy, lowered motivation, and fear of the future, which is exacerbated by the instability of the modern world. Low mental health and weakened motivation to develop translate into measurable developmental and educational losses. Among young people characterised by particularly high vulnerability, this indicates a significant increase in depression and suicide attempts.¹⁴ The latter is an indicator of the mental condition of children and young people. According to research by the Dajemy Dzieciom Siłę Foundation, the highest number of suicide attempts resulting in death among children aged 10-19 years occurred in Germany and Poland.¹⁵ Suicide is the predominant cause of death among children aged 10-19 years.¹⁶

A major problem in child and adolescent psychiatric care is a lack of preventive measures. This is most often related to the insufficient availability of specialists in child psychiatry and insufficient numbers of psychologists and psychotherapists. Nevertheless, mental health protection for children and adolescents should be multifaceted and should not be reduced to interventions by psychiatrists alone. Preventive measures for mental health disorders should be implemented for parents and children, including school programmes aimed at strengthening social skills and helping them cope with difficult situations. Protecting the mental health of children and adolescents is crucial for providing them a good start in adulthood. Mental health problems noticed or diagnosed too late can lead to developmental delays and mental disorders or constitute a barrier to the child's proper development and educational, social or professional opportunities.¹⁷

It is noteworthy that children and young people experience excessive stress, particularly at school. Undoubtedly, school is the second environment after the family

13 Kolendo and Wronka, 2021, pp. 158 et seq.

14 Grzelak and Żyro, 2023, p. 44 et seq.

15 Szredzińska, 2022, p. 147.

16 Ibid., p. 131.

17 Ibid., p. 154.

home, and is supposed to provide conditions for the proper psycho-physical development of the child. The stress inherent in the educational process is a necessary means of motivation. However, in excess, it leads to the development of serious behavioural disorders in pupils, which makes it difficult to achieve the objectives of didactic and educational processes. The proportion of children and adolescents experiencing severe school-related stress has increased significantly in recent years. According to data from the latest 2018 Health Behaviour in School-age Children survey, more than two-fifths of the students surveyed experienced high or very high levels of school stress, an increase of 9% from the 2014 survey and 19% from the 2010 edition.¹⁸ School stress is often linked to emphasis placed on academic achievement. For example, early childhood education is increasingly focused on achieving learning goals and formal learning, but at the expense of play; curricula and school-hour schedules often do not consider the need to provide time for play, recreation and leisure; extracurricular activities and homework take time away from children's freely selected activities; children are required or pressured to participate in youth organisations that they have not selected themselves. Hence, it is important to focus on an individual approach to the child and provide the right environment for multifaceted (academic, cultural and social) development.

3. Child's right to education

Linked to a child's right to maximum development is the right to education, as recognised in Article 28 of the CRC. According to the wording of this provision,

1. States Parties recognise the right of the child to education and, with a view to the progressive realisation of this right on the basis of equal opportunities, in particular:
 - a) make primary education compulsory and free for all;
 - b) support the development of various forms of secondary education, both general and vocational, make them accessible to every child and take appropriate steps, such as introducing free education and providing financial assistance where necessary;
 - c) by all appropriate means make higher education accessible to all on an ability basis;
 - d) make school and career information and guidance available to all children;
 - e) take steps to ensure regular school attendance and reduce dropout rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the human dignity of the child and with this Convention.
3. States Parties shall promote and develop international cooperation in the field of education, in particular with a view to contributing to the eradication

18 Ibid., p. 139.

of ignorance and illiteracy in the world and facilitating access to scientific and technological knowledge and modern methods of instruction. In this regard, particular consideration shall be given to the needs of developing countries’.

Considering the above, the right to education is considered not as much as an obligation but as a need and, consequently, an obligation on the part of the State to provide conditions for the child’s comprehensive development (scientific, cultural and social) and education. To realise the right to education, the Convention places an obligation on States Parties to make primary education compulsory and free for all, to promote the development of various forms of secondary education, both general and vocational, to make it accessible to every child and to adopt appropriate measures, such as introducing free education and providing financial assistance where necessary, to adopt measures to ensure regular school attendance and to reduce the dropout rate. States Parties, in accordance with the provisions of the Convention, also adopt all appropriate measures to ensure that school discipline is implemented in accordance with the human dignity of the child and in conformity with the Convention, as well as to promote and develop international cooperation in the field of education, in particular, to contribute to the eradication of ignorance and illiteracy in the world and to facilitate access to scientific and technological knowledge and modern teaching methods, particularly focusing on the needs of developing countries.

The provision of Article 28 should be read in conjunction with Article 29 of the CRC, which provides that:

1. States Parties agree that the child’s education shall be directed towards:
 - a) to develop to the fullest possible extent the child’s personality, talents and mental and physical abilities;
 - b) Developing in the child a respect for human rights and fundamental freedoms and for the principles contained in the Charter of the United Nations;
 - c) developing in the child a respect for his or her parents, his or her cultural identity, language and values, for the national values of the country in which the child lives, the child’s country of origin and for other cultures;
 - d) Preparing the child for an appropriate life in a free society, in a spirit of understanding, peace, tolerance, gender equality and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - e) developing in the child a respect for the environment.
2. Nothing in this Article or in Article 28 shall be interpreted in such a way as to prejudice the freedom of individuals or collective bodies to establish and operate educational establishments, subject to the observance of the principles expressed in paragraph 1 of this Article and the requirements

that education in such establishments conform to minimum standards to be determined by the State concerned’.

Thus, Article 29 of the CRC not only adds a qualitative dimension to the right to education that reflects the rights and innate dignity of the child but also emphasises that education should be characterised by being child-centred, child-friendly and recognising the rights of the child. The essence of education is to equip the child with life skills aimed at self-empowerment by developing his/her knowledge and other abilities, such as dignity, self-esteem and self-confidence, while recognising that each child has unique characteristics, interests, abilities and learning needs. In this context, education should be understood broadly, not only as a process of learning at home or in educational institutions, but also as enabling the child to develop his or her personality, abilities and talents through life experiences and full participation in society. Teaching should aim to ensure that every child learns essential life skills and that no child leaves education without acquiring the skills to face the challenges of future adult life. The acquisition of basic skills should not be limited to literacy and numeracy alone, but should also include the ability to make prudent decisions, resolve conflicts, and develop healthy lifestyles, good social relationships and responsibility, critical thinking skills, creativity and other skills that will equip children with the tools they need to achieve the goals they set for themselves in later life. States Parties should respect the child’s developing capacities as a fundamental principle, conditioning actions taken from the perspective of the child’s gradual process of acquiring competence, understanding and agency. The digital environment in which children can move independently from the supervision of parents and caregivers is significant. Simultaneously, access to digital education should occur based on equal, free and safe access both at school and at home. No child should be excluded from using digital technology. This is based on the right not to be discriminated against on the grounds of gender, disability, socio-economic status, ethnic or national origin, language or any other grounds.¹⁹

The child will not lose his/her human rights when he/she enters school. Thus, education must occur in a manner that respects children’s innate dignity and enables them to express themselves freely and participate actively in school life. Schools should create a humanistic atmosphere and allow children to develop individually, according to their abilities. Teaching should be child-friendly, inspiring and motivating. Above all, it must occur in a manner that prohibits violence at school. Punishment conflicts with respect for the child’s innate dignity and strict limits of school discipline. It must not be forgotten that the punishment of minors does not refer only to physical punishment; they can be punished with words, facial expressions, and gestures. Therefore, proper and effective social campaigns aimed at shaping the moral awareness of society in this respect are important. Changing people’s

19 Committee on the Rights of the Child, General Comment No. 25 on the rights of the child in the digital environment.

attitudes is the basis for eliminating punishment in its various forms. People with greater knowledge of violence against children, in its broadest sense, can react more promptly to alarming signals. Most importantly, it is accepted that attitudes towards disciplining children can change. Effective tools here are not only legal prohibitions, but also social education aimed at considering children as individuals who deserve equal treatment.

The CRC aims to remove all discrimination in the realisation of the right to education and recognises as a principle the equal treatment of all children regardless of race, colour, gender, religion, nationality, social origin, material situation or birth. Discriminatory behaviour excludes an individual or group because of a characteristic it possesses that differs from those commonly prevailing. Discrimination violates a child's dignity as a human being and can undermine or even completely destroy a child's ability to benefit from receiving an education. Another extreme example is gender discrimination, which can be reflected in a gender-inconsistent curriculum and an unsafe or hostile environment that discourages girls from being active in the learning process. Therefore, both girls and boys should be educated without any form of discrimination. Thus, the aim should be to provide teaching that promotes understanding and respect, a conscious activity that improves knowledge and skills, influences attitudes towards countering discrimination and bias-motivated violence, and promotes equality and diversity.²⁰

Influenced by diagnosed threats, schools should modify their educational activities to shape prosocial attitudes, respect norms, and build students' sense of security. The implementation of these goals resonates with anti-discrimination measures. Appropriate preparation of teachers and educators in this area is also important. Teacher training centres should take responsibility for this process. Thus, first, it is necessary to recognise the inequalities operating in the school and to unmask exclusionary behaviour. Second, anti-discrimination prevention activities should not only be aimed at students, but also at teachers, parents and caregivers. The most important aspect is a series of educational classes that raise awareness of specific problems. In small groups, teachers and educators, in the process of interaction, cooperation, mutual help, rivalry, conflict solving, and antagonism, make the assumptions of anti-discrimination education real. Shaping attitudes and behaviours may concern areas such as indicating ways of recognising and naming one's own and others' needs and emotions, inclusion and empowerment of all persons belonging to a given community, and developing knowledge of the mechanisms of exclusion (i.e. the creation and maintenance of stereotypes, the formation of prejudices, and the phenomenon of discrimination); the development of knowledge on communication to foster communication and build a support system in conflict situations; and the teaching of universal values, which include respect for the dignity of each person and ensuring the well-being of individuals and groups.²¹ Once again, it must be emphasised that the

20 In more details: Gawlicz, Rudnicki and Starnawski, 2015.

21 Rola, 2020, p. 28.

dignity of the child comprises everything that determines his or her uniqueness and vulnerability. Therefore, there is no universal one-size-fits-all measure of a child's sense of dignity that can guide adults in dealing with their children. A child's dignity is a subjective feeling, and injuries are subjective assessments. It takes considerable sensitivity and empathy in teacher conduct to ensure that a child's dignity is not violated.

Considering the above, discrimination based on any bodily dysfunction is unacceptable. Children with disabilities must be guaranteed equal access to education by refraining from introducing legal regulations that restrict such access and by eliminating various types of architectural, IT, digital, economic and mental barriers. The latter generally concerns the reactions and attitudes of the social environment towards people with disabilities. Despite changes in cultural evolution, incompatibility between people continues to be a cause of contention, leading to isolation and marginalisation, making the process of social inclusion and, thus, the adaptation of people with disabilities, much slower and more difficult. People with disabilities, including students, are confronted with such barriers every day in the streets, shops, and many other public places. The most common reasons for these barriers are considered to be economic, but also the lack of human imagination to empathise with a blind or deaf person, who often does not have the opportunity to express his or her views, thoughts or feelings because of these barriers. Thus, they cannot fully realise and express themselves. Therefore, it is important to provide such children with access to information and the ability to communicate (also by means of information and communication technologies and systems) to contribute to their independence and participation in society. The comprehensive assistance provided to a child with disabilities aims at his/her full integration into society and, on a personal level, at his/her all-round development. This is all the more important, as children with disabilities are most often subjected to violence and prejudice because of their disability, which pushes them to the margins of social life. Decisions are often made without considering their opinions. Often, it is only through contact with peers that children realise that despite their disabilities, they are no different from others. The children then learn from and help each other. Isolating the two groups of children from each other has a negative effect on the perception of disability as something inferior, triggering aggression towards and humiliation by the weaker person. In turn, fear is aroused by an isolated person, which can lead to a withdrawal from social life. However, children with disabilities are not deprived of learning skills. They feel the need to make friends, experience love, and start a family. They have a right to their own lives, choices, and mistakes. They have the right to freedom and protection from problems. The need for love, safety, security, attachment, belonging and individualisation is common to all children, regardless of their physical or intellectual ability.

This implies the recognition of the right of a child with disabilities to special care and the provision of support to the child's caregivers in their upbringing should be a matter of priority in every State's policy. Children with disabilities receive the best care and upbringing in their family environment provided that the family has

adequate support. Family support includes education and pedagogy of the family and siblings not only about the disability and its causes but also about the specific physical and psychological requirements of each child; psychological support that considers the stresses and difficulties experienced by families of children with disabilities, teaching the common language used by the family to communicate (for example, sign language to improve communication with a deaf person); and material support in the form of allowances, as well as consumer goods and needed equipment such as furniture and mobility devices, which are considered essential for a child with a disability to lead a reasonably normal independent life and fully integrate into the family and society. In this context, support should also be extended to children whose caregivers experience disabilities. For example, a child living with a parent with a disability should receive support that fully protects his or her rights and allows him or her to live with his or her parent as long as it is in his or her best interests to do so. Support services should include various forms of out-of-family care such as in-home caregiver support, volunteers, and physical therapists helping with the child or parents with a disability. Such services enable parents to find employment, reduce stress, and sustain healthy family environments.²²

Every child has the right to receive quality knowledge, which requires a focus on the quality of teaching and learning processes, teaching materials, and teaching performance. It is important to conduct an ongoing evaluation that considers the opinions of all actors involved in the learning process, including children in or out of school, teachers, student council presidents, and parents. Children should have the right to express their own views and opinions to learn to participate in society and be effective advocates for their own rights, both individually and as a group.²³ It is crucial that children, parents and teachers have a real impact on educational decisions. The CRC emphasises respect for the rights and responsibilities of parents, who must guide and advise the child appropriately in the exercise of his or her rights and ensure that a family environment based on love, care, respect and understanding is created to foster the child's development. State authorities, in turn, have the task of assisting parents in their parenting responsibilities, including supporting them through education, to strengthen their understanding of their role in educating young people and preparing them to function in society.

4. Child's right to rest and leisure

Education is usually identified as preparing the child for future work and adapting to adult life, in which he or she should be able to find a balance between responsibility and pleasure. Therefore, inherent in education is the development of a leisure style by

²² Jaros and Michalak, 2015a, p. 541.

²³ Committee on the Rights of the Child, General Comment No. 25 on the rights of the child in the digital environment.

ensuring that the child realises his or her right to rest, participate in age-appropriate play and leisure activities, and participate unhindered in cultural and artistic life. Play is one of the most characteristic features of early childhood in which children use and try out acquired abilities to develop creativity, imagination, self-confidence, independence, and cognitive and emotional skills. Play and recreation contribute to children's abilities to negotiate, make decisions, and resolve conflicts in a peer group; they learn to build their own positions in the world. Clearly, it should be adapted to the age of the child to determine the amount of time allocated to recreation; the nature of the places, spaces and facilities available; the form of stimulation and differentiation; the degree of supervision required; and the involvement of adults to ensure children's safety. As children become older, their needs and desires change, and they gradually move away from places designed for play to places that provide them with opportunities to develop a social life and spend time with their peers or by themselves. Over time, they will increasingly explore opportunities to engage in riskier activities and challenges. These experiences are essential for the development of both children and young people. Young people often seek places where they can meet their peers, discover increasing independence, and enter adulthood. This is an important dimension in developing a sense of identity and belonging.²⁴

In addition, resting from learning and other daily responsibilities is as important for a child's optimal health and well-being as nutrition, healthcare, or a roof over one's head. A lack of rest deprives children of energy and motivation, and thus, the physical and mental capacity to participate meaningfully in society or to learn. Depriving a child of leisure opportunities can have irreversible physical and psychological consequences on their development, health and well-being. Further, children need leisure time, understood as time and space free from obligations, entertainment or stimuli that will not be planned by adults and which they can spend as actively or passively as they wish.²⁵

The right to rest, leisure and play is enjoyed by all children equally, regardless of gender and degree of intellectual or physical ability. The basic functions of leisure time are creativity, perception, recreation, and socialisation. Therefore, it can be said to be a boon—a time in which every child's personality can be developed and shaped. Therefore, States Parties should ensure a balance between the promotion of educational and cultural opportunities for children and recreational alternatives in the locations where children live. This is particularly important during early childhood, when children acquire motor coordination, social skills and emotional intelligence, primarily through play involving physical movement and direct interaction with peers. For older children, play and recreation involving physical activity, team games and other outdoor recreational activities can provide health benefits and shape

24 Jaros and Michalak, 2015b, p. 770.

25 Ibid., p. 767.

their functional and social skills.²⁶ Therefore, it is important to prepare children to spend their leisure time rationally from an early age as many preferences and habits are being formed. Preparing children to use their leisure time wisely depends largely on the family in which the child is raised. Family, as a circle of environment, has a significant influence on the development of all areas of a child's life. Parents' contact with their children should not be limited to helping with lessons or creating special educational situations. The parent should look for forms of contact with the child, such as playing together, sports and physical activities, DIY, and reading books and magazines, which should develop the child's creativity and shape his/her personality. Parents should provide leisure activities for their child in such a way that they 'compensate for the disadvantages of the school-age child's lifestyle, mainly sedentary posture. Outdoor physical activities and walks are important here. The child's need for sleep is also important here. It is important to ensure that the child sleeps around 11 hours and that nothing disturbs his sleep'.²⁷ Currently, the most common way children spend their leisure time is watching television programmes and playing computer games, followed by playing with friends. A small percentage of children spend their leisure time developing their personal interests. According to the children, digital technologies are indispensable in their present and future lives because they can access worldwide information, pursue interpersonal relationships, and have fun and joy.²⁸ In such a case, where the media plays a significant role in relaxation and leisure time, it is important that parents, when spending time with their children, make the most of it to express and share their emotions with their children, be open to their children's suggestions, observe their children and learn from their play together, go out of the house, and spend time together.²⁹ This is all the more important as the digital environment plays an increasingly important role in most aspects of children's lives, including situations of crisis, creating the risk of abuse, and violation of their rights. Content from the web can be unreliable, introducing chaos and misinformation. However, they are full of aggression, brutality, and erotic content, which can lead to sexual exploitation and abuse, bullying, and the promotion and encouragement of suicide or life-threatening activities. Therefore, it is important to care for the relationships between children and parents and within peer groups. Thus, States Parties should pay particular attention to the risks associated with the use of digital technologies by children, particularly in the first years of their lives, when relationships with parents are crucial in shaping the child's cognitive, emotional and social development. Therefore, parents, teachers, and educators should receive training and practical guidance on the appropriate use of digital devices considering the results of research on the effects of digital technology on child development, particularly during

26 Committee on the Rights of the Child, General Comment No. 25 on the rights of the child in the digital environment.

27 Stadniczeńko, 2015, p. 194.

28 Committee on the Rights of the Child, General Comment No. 25 on the rights of the child in the digital environment.

29 Ibid., p. 196.

early childhood and adolescence. Such training programmes should also include information on how to protect children's privacy and prevent victimisation, and how to recognise a child victim of online or offline harm and respond appropriately.³⁰

5. Child's right to social security

The chief tenets of the CRC are based on the principles of the child's subjectivity, the best interests of the child, the child's welfare, respect for rights, parental responsibility, and the state's assistance in securing adequate living conditions.³¹ The CRC also explicitly formulated, for the first time, the right of children to benefit from social security. According to Article 26 of the CRC,

'1. States Parties shall recognise the right of every child to benefit from a system of social security, including social insurance, and shall take the necessary steps to achieve the full realisation of this right in accordance with their domestic law. 2. Wherever possible, the above benefits should be secured taking into account the resources and living conditions of the child and those responsible for his or her maintenance, as well as any other circumstances relating to the application of the implementation of the benefits claimed by or on behalf of the child'.

Thus, the parties undertook to safeguard the rights of each child to benefit from the social security system, considering the resources and living conditions of the child and those responsible for his or her maintenance, as well as any other circumstances related to the implementation of benefits. In doing so, it is noteworthy that Article 27 of the CRC places the responsibility for safeguarding the child on the child's parents or guardians within their capacity, conditions and financial resources. Paragraph 2 states that the parents or other persons responsible for the child bear the primary responsibility for securing, within their capacity, the living conditions necessary for the child's development. Certainly, the provision of an adequate standard of living for the child should be tailored to the child's individual needs and abilities, consistent with the child's comprehensive, harmonious and full development. Simultaneously, the CRC obliges to enforce those who are obliged to support the child to provide adequate support and living standards. A child's well-being is a product of the environment created by his or her family, into which he or she is born and in which he or she grows. Growing up in relative poverty threatens a child's physical and psychological well-being, social integration and self-esteem, and limits his or her prospects for education and development. Moreover, it endangers the child's life and health and

30 Committee on the Rights of the Child, General Comment No. 24, paragraph 22 and General Comment No. 20, paragraphs 9-11, United Nations 2016.

31 Czyż, 1996, p. 346.

compromises the quality of life. Hence, it is important to provide material assistance and other support programmes to children and families to ensure their standards and quality of life. This regulation is an expression of the principle of subsidiarity consisting in the primacy of family responsibilities over public³² and the limited possibilities for children to perform legal acts, which, however, does not diminish their subjectivity.

The satisfaction of a child's basic needs must not depend on the wealth of his or her guardians, in which case Article 27 Paragraph 3 of the CRC obliges States to adopt appropriate measures to support the fulfilment of this right by those responsible for the child to provide material assistance and other assistance programmes. Among the forms of this assistance, in addition to social assistance in the form of appropriate material benefits, one can point to programmes of family support and counselling, family therapy, and professional activation of parents. However, the provision sets limits for public assistance, which are the resources available to the State and national conditions.

6. Summary

The analysis presented here is only a sign of issues concerning a child and his/her rights. However, it demonstrates that the child has the right to dignity, respect, and protection of his or her health, comprehensive development, leisure, and security of basic needs, considering the best interests and welfare of the child. The complex nature of a child's developmental needs and the risks that exist against them mean that the realisation of these rights cannot occur in isolation from the protection of the rights of the family, which is the best environment for the development and upbringing of the child. By their nature, parents have the widest access to their children and generally enjoy their authority. They bear the primary responsibility for the upbringing and development of the child and the best interests of the child are of the greatest concern. States Parties are to provide appropriate assistance and support to parents and guardians for them to fulfil their child-rearing responsibilities. The State's responsibility here is of a subsidiary nature, expressed primarily in measures to ensure that the child's needs and all-round development, which parents are unable to provide, are fulfilled. These include healthcare, schooling, securing social rights, assisting parents in discharging their duties towards their children, and supervising the proper execution of these duties.

32 Siejka, 2018, p. 111.

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UN Convention on the Rights of the Child: Participation

Ivan ŠIMOVIĆ

ABSTRACT

This chapter examines children’s participation rights as fundamental civil and political rights intended for children as sole holders, as envisaged by the Convention on the Rights of the Child. The contemporary perspective is that participation rights encompass the pivotal right of the child to express his or her views freely in all matters that affect him or her (Article 12) and other significant participation rights, such as the right to freedom of expression (Article 13), the right to freedom of thought, conscience and religion (Article 14), and the right to free association and peaceful assembly (Article 15). These rights are considered to be crucial for the “visibility” of the child and his or her respect as an active subject, not a passive object of law, because they contribute to proper participation of the child in his or her political, economic, social and cultural environment. This chapter thoroughly examines the scope, content, relevance and function of children’s procedural rights in theory and practice. It explains the interconnection and interdependence of these rights in their realisation, as well as the way the Convention imposes obligations on States Parties to respect, protect and promote these rights. This chapter aims to outline how States Parties to the Convention should create the national legal framework necessary to facilitate children’s effective enjoyment of all their participation rights, enabling them to participate in the decision-making process in all matters that affect them, considering their evolving capacities and the principle of the primary protection of their best interests.

KEYWORDS

children’s participation rights, the right to express views freely, the right to freedom of expression, the right to freedom of thought, conscience and religion, the right to free association and peaceful assembly, Committee on the Rights of the Child

1. Introduction

Children’s rights are a special form of human rights that are directed by their application to every child below the age of the majority, that is, 18 years (Article 1 of the UN Convention on the Rights of the Child (CRC)). An essential feature of children’s rights is that they are intended for children as sole holders, belong to them without restrictions and cover all areas of their lives. Accordingly, children have participation rights which can be viewed as the rights of minor members of society (civil rights)

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that reflect their position as subjects of law and legal relations, and the need to respect their human dignity.¹ Thus, a child who is capable of forming his or her own views has the right to express those views freely in all matters that affect him or her (Article 12 CRC); the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all types and in all forms (Article 13 CRC); the right to freedom of thought, conscience and religion (Article 14 CRC); and the right to free association and peaceful assembly (Article 15 CRC). These rights regulate children's relationships with family members and, more broadly, with all individuals and institutions with whom they come into contact. The Convention has the greatest influence on the legal formation of children's participation rights. Without understanding the provisions of the Convention, one cannot properly interpret the system of children's rights.

A child's right to express his or her own views freely in all matters that affect him or her is a fundamental principle on which the Convention is based and is considered a crucial right for the "visibility" of the child and his or her respect as an active subject, not a passive object of law.^{2,3} Certainly, Articles following Article 12 – Articles 13, 14, and 15 CRC (expression, thought, conscience, religion, association, peaceful assembly) – are as significant because they point beyond children's participation rights towards their right and capability of altering relationships, effecting changes in decisions (whether they are made by their parents, legal representatives or competent judicial or administrative authorities), and shifting social assumptions and constraints.⁴ Despite their unquestionable importance, children's participation rights are of a relative nature, as they can be limited if there are justified and for legal reasons, such as the age and maturity of the child (in the case of Article 12 CRC), respect for the rights, reputations, or freedoms of others, as well as the protection of

1 Hrabar et al., 2021, pp. 192-196 and 201.; Zermatten, 2010, pp. 483-484 and 493; Committee on the Rights of the Child (2003), General comment No. 5 (2003) – General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003, paras. 21. and 66.

2 Child's right to be informed and to express his or her views is also regulated within Council of Europe's and European union's legal sources – European Convention on the Exercise of Children's Rights (ECECR), European Treaty Series No. 160, Art. 1. para. 2, Art. 3 and Art. 6; Charter of Fundamental Rights of the European union (Charter), Official Journal of the European Communities, 2000/C 364/01., Art. 24 para. 1.

3 The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950, European Treaty Series No. 5. – ECHR) does not contain a separate article on children's participation rights. Nevertheless, the ECHR represents an important source for these rights owing to the unique position of the European Court of Human Rights (ECtHR) and its interpretations of procedural requirements deriving from Article 6 and Article 8 through its case law – *Case C v. Croatia*, Appl. No. 80117/17, 3 October 2020, paras. 73, 76-78 and 81-82; *Case M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, paras. 129, 171, 181 and 184-187; *Case of N. Ts. and Others v. Georgia*, App. No. 71776/12, 2 February 2016, paras. 72, 78, 80 and 84; *Case M.K. v. Greece*, App. No. 51312/16, 1 February 2018, paras. 74 and 91; *Case E.S. v. Romania and Bulgaria*, App. No. 60281/11, 19 July 2016, paras. 59; See also: Bruning and Mol, 2021, pp. 15. and 17-18; Daly, 2011, p. 441.

4 Freeman, 2020, pp. 38, 45-46, 310 and 314; Hanna, 2023, pp. 43-44.

national security, public order, health and morals (in cases of Articles 13, 14, and 15 CRC). Notwithstanding the possible limitations of these rights, the obligation of the States Parties to respect and ensure the rights set forth in the Convention for each child within their jurisdiction should not be called into question (Article 2 Paragraph 1 CRC). Therefore, the CRC obliges States Parties to publicise the principles and provisions of the Convention to adults and children (Article 42 CRC) and to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention (Article 4 CRC).⁵ To examine the progress made by the State Parties in achieving the realisation of the obligations undertaken in the Convention, the CRC established a special body with a monitoring role – the Committee on the Rights of the Child (Articles 43 and 44 CRC). With these provisions, the State Parties agreed to the control of the United Nations bodies regarding the respect of children’s rights in their territory.⁶

Guided by the aforementioned general provisions of the CRC, it can be concluded that children’s participation rights and other children’s rights prescribed by the Convention, can be realised only within an individual State Party and with the active help of the State in question in the process of realising the rights prescribed (Article 4 and Article 42 CRC).⁷ Moreover, the role of parents or other persons legally responsible for the child in that process is indispensable (Article 5 and Article 18 Paragraphs 1 and 2 CRC).⁸ In doing so, the role of parents in ensuring appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention should always be interpreted through the prism of evolving capacities of the child (Article 5 in connection with Article 14 Paragraph 2 CRC) to achieve a balance between the rights of the child and the rights, duties and responsibilities of his or her parents, which are not absolute in relation to the child.⁹ Thus, parental rights over children are limited, not only by the concept of evolving capacities of the child, but also by the requirement that direction and guidance be “appropriate” (Article 5 CRC), and by the requirement that parents when exercising their parental responsibilities act in the best interests

5 General comment No. 5 (2003), par. 1-2. and 66-70.

6 Hrabar, 1991, p. 25; Khazova and Dawit Mezmur, 2019, p. 306.

7 General comment No. 5 (2003), par. 19-20; Freeman, 2020, pp. 220-221. Freeman also suggests that enforceability of children’s rights at domestic level partly depends on whether or not the CRC enjoys the status of national law, that is, whether the provisions of the Convention are incorporated into domestic family law.

8 Freeman, 2020, pp. 8, 241-242 and 390; Khazova and Dawit Mezmur, 2019, pp. 314-315; Aras Kramar et al., 2015, p. 32; Alinčić, 1990, pp. 58-59.

9 The Committee on the Rights of the Child emphasises that ‘the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities. ... the more experienced the child is ... the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on equal footing’. Committee on the Rights of the Child (2009). General comment No. 12 (2009) – The right of the child to be heard, CRC/C/GC/12, 1 July 2009, par. 84.

of the child (Article 3 CRC).¹⁰ The principle of the best interests of the child offers an answer to the question of the criteria, method and meaning of the comprehensive protection of children’s procedural and other rights prescribed by the Convention.¹¹

2. The right of the child to express his or her views freely in all matters that affect him or her – Article 12 CRC

2.1. General principle of the CRC

Article 12 is the pivotal provision in the Convention, as it prescribes the child’s right to express his or her views in all matters affecting him or her and has due weight-age attached to these in accordance with the age and maturity of the child. It provides children “a voice”, recognizing the dangers of “wrapping them in silence”.¹² Consequently, this has significantly contributed to the child’s active role in society, particularly within the family.¹³

The Committee on the Rights of the Child pointed to Article 12 as a “fundamental value” of the Convention, being not only a right itself but also one of the four general principles for the interpretation and implementation of all other rights. As a general principle, it is linked to other general principles of the Convention, such as the right to non-discrimination (Article 2), the protection of the best interest of the child as the primary consideration (Article 3), and the right to life, survival and development (Article 6).¹⁴ Some studies conducted to ascertain the influence of the Convention on national legal systems imply that Article 12 is the most incorporated provision after Article 3.¹⁵

2.2. Interconnection and interdependence with Articles 13 and 17 of the CRC

Family law theory often accentuates that the child has the right to be informed and obtain advice before deciding to exercise the right to express his or her views on all matters that affect him or her (particularly in judicial and administrative proceedings). This is because the effective implementation of Article 12 relies on State obligations under Article 13, considering that the child’s right to freedom of expression includes the right to impart information and ideas of all types through mass media (in connection with Article 17).¹⁶ The Committee on the Rights of the Child confirms that fulfilment of the child’s right to information, consistent with Articles 13 and 17,

10 Khazova and Dawit Mezmur, 2019, p. 315; Vučković-Šahović et al., 2012, p. 160; Zermatten, 2010, p. 488.

11 Hrabar, 1991, p. 29; Aras Kramar et al., 2015, p. 18; Zermatten, 2010, p. 493.

12 Freeman, 2020, pp. 38, 121, 283 and 310; Taylor et al., 2021, pp. 3-4.

13 Khazova and Dawit Mezmur, 2019, p. 313.

14 General comment No. 5 (2003), paras. 12 and 22; General comment No. 12 (2009), paras. 2, 17 and 68.

15 Daly and Rap, 2019, p. 300.

16 Hanna, 2023, p. 46.; Lundy, Tobin and Parkes, 2019, p. 410; Aras Kramar et al., 2015, p. 16.; Majstorović, 2017, p. 57.

is ‘a crucial prerequisite for the effective realization of the child’s right to be heard’.¹⁷ Those responsible for hearing the child must ensure that the child is provided with complete, accessible, and age-appropriate information about the ‘right to express her or his views in all matters affecting the child and about the impact that his or her expressed views will have on the outcome’, this being the basis for the child’s clarified decisions.¹⁸ Feedback on how their participation has influenced the outcome is a guarantee that their views were not heard only as a formality.¹⁹

2.3. Interconnection and interdependence with Article 3 of the CRC

The standpoint of family law theory is that if the child’s opinion is not established because he or she was not provided the opportunity to express his or her views (considerations, thoughts, wishes), then the child cannot be protected, as it will be impossible to determine what is in the child’s best interest and how to protect it.²⁰ Thus, to protect the best interest of the child as the primary consideration is ‘a mirage without knowledge of the child’s perspective’.²¹ Hence, the Committee on the Rights of the Child suggests a strong link between the right of the child to express his or her views freely in all matters that affect him or her (Article 12) and the principle of primary protection of the best interests of the child (Article 3). In this regard, the Committee concludes that:

‘there is no tension between Articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children’.²²

Article 3 cannot be appropriately applied if the obligations derived from Article 12 are not respected, making the proper exercise of the child’s right to express his or her views a precondition for the correct assessment and protection of the child’s best interests. Similarly, Article 3 reinforces the functionality of Article 12 and facilitates children’s participatory role in the decision-making process regarding matters that

17 General comment No. 12 (2009), paras. 68, 80 and 82; Interconnection and interdependence of the child’s right to be informed and obtain advice before eventually deciding to express his or her views is even better displayed in the ECECR (Art. 3 and Art. 6), bearing in mind that the Convention in question applies only to family proceedings before a judicial or administrative authority (Art. 1 para. 3 and 4; Art. 2 para.1a).

18 General comment No. 12 (2009), paras. 25, 41, 48 and 134a)

19 Bruning and Mol, 2021, p. 36 and 38.

20 Zermatten, 2010, p. 496; Khazova and Dawit Mezmur, 2019, p. 313-314; Khazova, 2016, pp. 29-30.

21 Freeman, 2020, p. 231.

22 General comment No. 12 (2009), par. 74; Committee on the Rights of the Child (2013). General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, 29 May 2013, par. 43.

affect them.²³ Zermatten rightly concludes that ‘Article 3 needs Article 12 just as Article 12 serves the interests of Article 3’.²⁴

2.4. Right of the child, not an obligation

Another legal standpoint emphasised in family law theory is that expressing views is the right of the child, not his or her obligation.²⁵ This implies that children ‘should never be coerced into expressing views against their wishes’ because this would turn their right into a duty and nothing of the sort is intended.²⁶ Furthermore, ‘children should be informed that they can cease involvement at any stage’ because they have the right to opt out of the decision-making process, for example, if the child does not understand relevant facts of the proceeding, if the child is not capable of expressing his or her views, if establishing the views of the child represents danger for the development, upbringing, and health of the child or if the child is exposed to conflict of loyalty or high amount of stress or manipulation (by parents, household members or third persons).²⁷ The jurisprudence of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU)²⁸ is in accordance with this standpoint of the Committee on the Rights of the Child.

2.5. Analysis of Article 12 CRC

The full text of Article 12 reads:

‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

‘State Parties shall assure’

Article 12 prescribes that State Parties “shall assure” the right of the child to express their view, and thus imposes a clear obligation on States Parties to undertake

23 General comment No. 12 (2009), par. 74; General comment No. 14 (2013), paras. 43 and 53.

24 Zermatten, 2010, p. 497.

25 Freeman, 2020, p. 390; Bruning and Mol, 2021, p. 15.; Majstorović, 2017, p. 58.; Aras Kramar et al., 2015, p. 32.; Lucić, 2017, p. 396.

26 General comment No. 12 (2009), paras. 132 and 134b.

27 Ibid.; Freeman, 2020, pp. 126-127.

28 ECtHR, *Case of Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, App. No. 23298/ 12, 11 October 2016, par. 36.; CJEU, Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010, par. 64.

appropriate measures for the child to exercise this right and participate in the decision-making process on matters that affect him or her.²⁹

‘to the child who is capable of forming his or her own views’

The right of the child to be informed and to express his or her views in all matters affecting him or her implies that using an individual (case-by-case) analysis it is ascertained that the child has sufficient understanding and is capable of forming his or her own views ‘in a reasonable and independent manner’.³⁰ The Committee on the Rights of the Child stipulates that State Parties should not interpret this provision as a limitation, ‘but rather as an obligation to assess the capacity of the child to form an autonomous opinion to the greatest extent possible’.³¹ A child should be presumed to have the capacity to form a view, meaning that it is not necessary for the child to first prove his or her capacity. This right of the child ‘has no age threshold’ and in addition to that ‘non-verbal communication should be recognised as expressing a view just as verbal communication’.³² The child does not need to have ‘comprehensive knowledge’ of all aspects of the matter to be considered capable of forming his or her own views. His or her sufficient understanding will be adequate.³³ This is of utmost importance, because if a child is deemed incompetent, his or her opportunity to participate is reduced or can even be used to

‘the right to express those views freely’

Children should be able to express their views “freely”, without being unduly influenced or pressurised.³⁴ Clearly, there exists considerable danger of manipulation in the area of procedural rights, particularly in consultations with children who are being provided information and assistance to clarify their views and express them appropriately. Unfortunately, depending on who has consulted the child, and when and how, ‘the will and the views of the child can be created and hence manipulated’, often by those who should be first in line to protect their rights and interests – parents, legal guardians or other persons legally responsible for the child.³⁵ Therefore, the Committee on the Rights of the Child underlines States Parties obligation to ensure an appropriate ‘environment in which the child feels respected and secure when freely expressing her or his opinion’.³⁶ Relying on this standpoint, family law theory concludes that hearing a child in an appropriate environment without undue influence or pressure is a precondition that must be fulfilled by competent authorities

29 General comment No. 12 (2009), paras. 16. and 19.; Bruning and Mol, 2021, p. 15.

30 Majstorović, 2017, p. 57; General comment No. 12 (2009), par. 44.

31 General comment No. 12 (2009), par. 20.

32 Freeman, 2020, p. 180; Hanna, 2023, p. 46; Bruning and Mol, 2021, pp. 29 and 34; Lundy, Tobin and Parkes, 2019, p. 449; Mol, 2019, pp. 84-85.

33 Freeman, 2020, p. 180; Bruning and Mol, 2021, p. 29; General comment No. 12 (2009), par. 21.

34 Freeman, 2020, p. 180; General comment No. 12 (2009), par. 22.

35 Majstorović, 2017, p. 57; Lundy, Tobin and Parkes, 2019, p. 424; General comment No. 12 (2009), paras. 25 and 132.

36 General comment No. 12 (2009), paras. 23, 34, 43 and 132.

(those responsible for hearing the child) to obtain an authentic opinion of the child deprived of any external influences.³⁷ One should not forget that ‘the child has the right to express her or his own views and not the views of others’³⁸

‘in all matters affecting the child’

‘the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child’.

Both paragraphs of Article 12 provide a broad scope of application related to all matters and proceedings affecting children. Paragraph 1 prescribes that the child has the right to express their views in ‘all matters affecting the child’. The Committee on the Rights of the Child emphasises that this ‘condition has to be respected and understood broadly’. This allows the child to express their views ‘if the matter under consideration is affecting them and they are capable of expressing their own views with regard to this matter’, covering even issues not explicitly mentioned in the Convention.³⁹ Such a wide interpretation of matters affecting the child contributes to the child’s more active role in the social processes of their daily lives at home, and within their community and society.^{40, 41}

Paragraph 2 prescribes the opportunity of the child to express their views ‘in any judicial and administrative proceedings affecting the child’, regardless of whether such proceedings were initiated by the child or by other persons. The Committee explains that this implies ‘all relevant judicial proceedings affecting the child, without limitation’. In this regard the Committee mentions as an example, family law proceedings such as the separation of parents, custody, care, and adoption, and proceedings relating to other areas of law – civil, criminal, misdemeanour, social welfare, and asylum law.⁴² Regarding administrative proceedings affecting the child the Committee mentions, as an example, decisions about children’s education, health, environment, living conditions, protection, status in the juvenile justice system or their

37 Freeman, 2020, pp. 181, 231-232 and 390; Bruning and Mol, 2021, pp. 33-34; Majstorović, 2017, p. 57, 65 and 67.; Aras Kramar et al., 2015, pp. 25 and 27.

38 General comment No. 12 (2009), par. 22; General comment No. 5 (2003), par. 12.

39 General comment No. 12 (2009), paras. 26-27; Lundy, Tobin and Parkes rightly conclude that Article 12 Paragraph 1 extends to all matters where the child is the specific and exclusive subject of concern, as well as to matters where the impact on a child is incidental and remote. See: Lundy, Tobin and Parkes, 2019, pp. 408-409.

40 General comment No. 12 (2009), par. 12; General comment No. 5 (2003), paras. 12. and 57; General comment No. 14 (2013), par. 86; Freeman, 2020, p. 180. and 182-183; Bruning and Mol, 2021, p. 19; Khazova and Dawit Mezmur, 2019, pp. 313; Mol, 2019, p. 76.

41 Lundy, Tobin, and Parkes make reference to Committee’s outline of several contexts which involve matters that typically affect a child or a group of children, such as: the family, alternative care, health care, education and school, play, recreation, sports and cultural activities, the workplace, situations of violence, development of prevention strategies, immigration and asylum proceedings, emergency situations and (inter)national settings. See: Lundy, Tobin and Parkes, 2019, p. 410.

42 General comment No. 12 (2009), paras. 32-33.

asylum status.⁴³ Further, it notes that both judicial and administrative proceedings may involve alternative dispute mechanisms such as mediation and arbitration^{44, 45}

‘the views of the child being given due weight in accordance with the age and maturity of the child’.

Children’s right to freely express their views should be considered in accordance with two cumulative conditions: age and maturity. This brings to the forefront the concept of children’s evolving capacities. The ‘right to express one’s views in a way grows with the child’, meaning, as the child ages and matures the weightage of his or her views on the decision-making process increases.⁴⁶ The Committee on the Rights of the Child reiterates that ‘children’s level of understanding is not uniformly linked to their biological age’.⁴⁷ Thus, age can only be an indicator of a child’s presumed level of understanding, and must be considered together with maturity, which must be assessed on an individual (case-by-case) basis.⁴⁸ When both of these conditions are fulfilled and ‘the child is capable of forming his or her own views in a reasonable and independent manner’, the decision maker must: a) seriously consider the views of the child as a factor in the decision-making process; and b) inform the child of the outcome of the process and explain how their views have been considered.⁴⁹ Similar to the Committee on the Rights of the Child, the jurisprudence of the ECtHR also accentuates age and maturity as relevant conditions regarding whether a child should be heard and how much weightage should be accorded to the expressed views⁵⁰

‘the child shall in particular be provided the opportunity to be heard ... either directly, or through a representative or an appropriate body’.

Article 12 Paragraph 2 provides the child with the opportunity to be heard in any judicial and administrative proceedings affecting him or her ‘either directly, or through a representative or an appropriate body’. The Committee on the Rights of the Child confirms that this provision ensures that a child has the choice of how to be heard

43 General comment No. 12 (2009), paras. 32 and 67.

44 General comment No. 12 (2009), par. 32.

45 Lundy, Tobin and Parkes conclude that Article 12 Paragraph 2 applies ‘to the diverse range of formalized decision-making proceedings concerning children irrespective of a) the subject matter, b) the status of the decision maker, c) the form of the proceedings, and d) whether the child initiates the proceedings, or they are initiated by others’. See: Lundy, Tobin, and Parkes, 2019, p. 421.

46 Majstorović, 2017, p. 57; Lundy, Tobin and Parkes, 2019, pp. 411-412.

47 General comment No. 12 (2009), par. 29.

48 Lundy, Tobin and Parkes, 2019, p. 411; Bruning and Mol, 2021, pp. 29-30.; General comment No. 12 (2009), paras. 29, 44 and 52.; General comment No. 14 (2013), par. 44.

49 General comment No. 12 (2009), paras. 30, 44-45 and 85; General comment No. 5 (2003), paras. 12 and 57.

50 Bruning and Mol, 2021, pp. 31; See: *Case C v. Croatia*, App. No. 80117/17, 3 October 2020, paras. 73 and 78; *Case M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, paras. 184-185; *Case Gobec v. Slovenia*, App. No. 7233/04, 3 October 2013, par. 133; *Case Plaza v. Poland*, App. No. 18830/07, 25 January 2011, par. 71.

if he or she has opted to be heard in a proceeding. Notwithstanding three options available to the child, the Committee recommends that, ‘whenever possible, the child must be given the opportunity to be directly heard’ by the authority conducting the proceeding.⁵¹ Family law theory concurs with the Committee’s standpoint.⁵²

However, the Committee underlines that such direct representation should occur ‘whenever possible’, implying that this may not always be possible for a number of reasons. In such cases, the right to be heard indirectly through a representative or appropriate body ensures that the views of the child are adequately transmitted to the authority conducting the proceedings.⁵³ The Committee points to the scope of persons who can be representatives of the child: parents, lawyers, or other persons (e.g. social workers, teachers, and siblings).⁵⁴ Although the provision of Article 12 Paragraph 2 does not explicitly require that the representative must be “appropriate”, the position of the family law theory is that such a qualification must be implied if the child’s right to representation is to be effective.⁵⁵ For the representative to be considered “appropriate”, the Committee states that there must be an absence of any conflict of interests between the child and the representative.⁵⁶ Similar to this standpoint of the Committee is the jurisprudence of the ECtHR,⁵⁷ and the position of family law theory.⁵⁸

In proceedings (civil, penal or administrative) in which the interests of the child conflict with those of the parents as his or her most common legal representatives, or in cases where there is a risk of such a conflict, hearing the child via a parent(s) risks an infringement of the child’s right to be heard because there is reason to believe that the views of the child are not going to be transmitted correctly to the decision maker. In such situations, the child must be appointed as an objective and impartial representative (guardian *ad litem*).⁵⁹ The appointment of such a representative should prevent the flawed representation of the child, ensure adequate transmission of the views of the child to the decision-maker, and consequently ensure recognition and

51 General comment No. 12 (2009), par. 35.

52 Lundy, Tobin and Parkes 2019, p. 424; Bruning and Mol, 2021, p. 21 and 39.

53 Lundy, Tobin and Parkes, 2019, p. 424.

54 General comment No. 12 (2009), par. 36.

55 Lundy, Tobin and Parkes, 2019, p. 427.

56 General comment No. 12 (2009), par. 36; General comment No. 14 (2013), par. 90.

57 *Case of N.Ts. and Others v. Georgia*, App. No. 71776/12, 2 February 2016, par. 55; *Case of T.A. and Others v. the Republic of Moldova*, App. No. 25450/20, 30 November 2021, par. 33.

58 Lundy, Tobin and Parkes, 2019, p. 427; Mol, 2019, p. 70; Bruning and Mol, 2021, p. 22; Freeman, 2020, pp. 231-232; Aras Kramar et al., 2015, p. 33; Lucić, 2017, pp. 396-397.

59 General comment No. 12 (2009), par. 36; General comment No. 14 (2013), paras. 90 and 96.

protection of the best interests of the child and not the interests of other persons (parent(s), institutions, bodies, or the representative)⁶⁰

‘in a manner consistent with the procedural rules of national law’.

Hearing the child in judicial or administrative proceedings through a representative must be ‘in a manner consistent with the procedural rules of national law’. The Committee on the Rights of the Child states that ‘this clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right’.⁶¹ Contrarily, state parties are encouraged to create domestic procedural rules to facilitate children’s effective enjoyment of their right to participate in judicial and administrative proceedings which affect them.⁶²

3. The right of the child to freedom of expression – Article 13 CRC

‘The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.’

Although children’s participation rights are mostly associated with Article 12, they are also embedded in the right to freedom of expression (Article 13), freedom of thought, conscience and religion (Article 14), and freedom of association (Article 15).⁶³ Particularly relevant is a child’s right to freedom of expression (Article 13), a classic civil and political right found in many global and regional human rights treaties.⁶⁴ The scope of this right is broad, and traditionally, discussions related to freedom of expression have focused on issues such as freedom of information, freedom of the

60 General comment No. 12 (2009), par. 37; General comment No. 14 (2013), paras. 90 and 96; Lundy, Tobin and Parkes, 2019, pp. 427-428; Mol, 2019, pp. 70 and 76; Bruning and Mol, 2021, pp. 21-28; Freeman accentuates that there has been vigorous, even heated, debate within academic literature over the role of the representative, posing a question should he or she represent the child’s best interests or advocate for the child’s wishes as a lawyer does when representing an adult? Freeman concludes that the widespread assumption is that the representative’s role is to present the child’s best interests. See: Freeman, 2020, pp. 226-227.

61 General comment No. 12 (2009), par. 38.

62 Lundy, Tobin and Parkes, 2019, p. 431.

63 Freeman, 2020, pp. 38, 45-46, 310 and 314; Hanna, 2023, pp. 43-44; Hrabar et al., 2021, p. 201; Alinčić, 1990, p. 59.

64 For example, Article 10 of the ECHR, prescribes that “everyone” has the right to freedom of expression. Almost identical provision is contained in Article 19 Paragraph 2 of the International Covenant on Civil and Political Rights (UN General Assembly resolution 2200A (XXI), 1966 – ICCPR), as well as in Article 11 of the Charter of Fundamental Rights of the European Union (Charter). The family law theory is clear that all children have always been entitled to this right because they have always been included in term “everyone”. See: Tobin and Parkes, 2019, p. 437; Freeman, 2020, p. 185.

press, censorship, defamation, and hate speech. Family law theory criticises the fact that the application of this right to children has been largely omitted, and points to the absence of a thorough examination of the relevance of this right to issues that are significant for children's personal identity, education, and development. In this context, such issues encompass whether this right entitles a child to obtain access to information concerning his or her adoption or medically assisted procreation, to obtain records about time spent in foster care, to obtain information about sexual and reproductive health, to challenge the requirement to wear a school uniform, or to restrict political comments within a school magazine.⁶⁵

The right of the child to freedom of expression is often confused with the child's right to express his or her views freely in all matters that affect him or her (Article 12) because each performs a distinct yet complementary function.⁶⁶ The right to freedom of expression 'relates to the right to hold and express opinions, and to seek and receive information through any media'.⁶⁷ Furthermore, Article 13 places a negative obligation on States Parties to refrain from interference in the expression of children's views or access to information, meaning that children have the right not to be restricted by States Parties in the opinions they hold and express.⁶⁸ However, Article 12 places a positive obligation on States Parties to create a legal framework necessary to facilitate children's effective enjoyment of their right to participate in the decision-making process in all matters affecting them, as well as to accord due weightage to their views. Therefore,

'although Article 12 involves an active obligation to facilitate the expression of views and to give them due weight, Article 13 places a negative obligation on the state and state authorities to refrain from interference in the expression of a children's views'.⁶⁹

As such, Article 13 allows children to express themselves through a medium and subject of their choice, but also allows for the possibility that this expression does not need to be connected with or dependent on the decision-making process, as in Article 12.⁷⁰

Article 13 is closely related to Article 17 which deals with a child's relationship with mass media. The right of the child to freedom of expression includes the freedom to seek, receive and impart information. One way to receive information and material in a range of contexts is through mass media, access to which State Parties are obliged to ensure for the child (Article 17). Nevertheless, the Convention places a duty on States

65 Tobin and Parkes, 2019, p. 437-438., 440 and 443.

66 General comment No. 12 (2009), paras. 68. and 81; Tobin and Parkes, 2019, p. 438; Hanna, 2023, p. 46.

67 General comment No. 12 (2009), par. 81.

68 Ibid.

69 Hanna, 2023, p. 46; Tobin and Parkes, 2019, pp. 438-439 and 444.

70 Hanna, 2023, pp. 47-48; Tobin and Parkes, 2019, p. 440 and 447-448.

Parties to encourage the development of appropriate guidelines for the protection of children from information and material that could harm their well-being and thus indirectly protect the child from an injurious way of realising the right to freedom of expression (Article 17e) in connection with Article 13).⁷¹ Thus, the provision of Article 3 of the Convention should be used as a tool for rectifying all actions (whether of the child, parent(s), persons legally responsible for the child or the State) that would ultimately oppose the best interests of the child, notwithstanding that these actions are, at first glance, directed towards the realisation of the child's right to freedom to access information as a part of the right to freedom of expression.

Article 13 is also related to Articles 28 and 29 which, among other things, outline the types of information and material which must be provided to children as part of their education.⁷² This further demonstrates that the rights of the child prescribed by the Convention are interconnected and interdependent in their realisation. The child's right to education and freedom of expression are inseparably linked to the role of the parents, who should ensure appropriate direction and guidance in the exercise of those rights by the child (Article 13 and Article 29 Paragraph 1, Subparagraph c) in connection with Article 5). Some authors believe that the role of parents in the education of a child should manifest as their responsibility to enable the child's full intellectual development, which certainly presupposes freedom of expression, access to information and ideas of all types, and respect for the child's views on all matters that affect him or her (Articles 28 and 29 in connection with Articles 12 and 13, as well as Article 5).⁷³

'The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.'

Article 13 Paragraph 2 prescribes the preconditions under which interference with the child's right to freedom of expression is justified, pointing again to the conclusion that children's participation rights are of a relative nature as they can be subject to limitations. The Convention allows a child's right to freedom of expression to be limited, provided the limitation satisfies three preconditions: a) it must be provided by law; b) it must pursue a legitimate aim (e.g. respect of the rights or reputations of others, protection of national security, public order, public health, or morals); and c) it must be necessary in a democratic society, meaning it must conform to the principle of proportionality (e.g. be the least intrusive possible limitation).⁷⁴ Further, the Convention allows parents and other persons legally responsible for the child to

71 Hrabar, 1991, p. 109; Freeman, 2020, p. 185; Tobin and Parkes, 2019, pp. 439, 443 and 445.

72 Tobin and Parkes, 2019, pp. 439, 443 and 445.

73 Hrabar, 1991, p. 109; Alinčić, 1990, p. 59; Tobin and Parkes, 2019, p. 439.

74 Tobin and Parkes, 2019, pp. 440-441, 443, 445, 451, 455, 457, 458 and 460.

restrict the child's right to freedom of expression where the restriction is necessary to protect the child from harm and secure his or her best interests (Article 13 in connection to Article 5). This is because the Convention provides parents with a wide level of discretion in their assessment of how to provide appropriate direction and guidance to their child in exercising their right to freedom of expression, considering the child's evolving capacities.⁷⁵ The extent and meaning of possible limitations to the child's right to freedom of expression have not yet been analysed in detail by the Committee on the Rights of the Child. So far, the Committee has only made general remarks about its concerns regarding the possible limitations to this child's right.

4. The right of the child to freedom of thought, conscience and religion – Article 14 CRC

'States Parties shall respect the right of the child to freedom of thought, conscience and religion.'

Although Article 12 is the pivotal provision for children's participation rights, it is also enshrined in the right to freedom of thought, conscience and religion (Article 14), and freedom of association (Article 15).⁷⁶ The Convention provides children with a fundamental civil and political right to freedom of thought, conscience and religion which includes the right to manifest beliefs,⁷⁷ simultaneously imposing an obligation on the States Parties to respect, protect and promote this right (Article 14 Paragraph 1 in connection with Article 2 Paragraph 1).⁷⁸ Freeman underlines that 'there is no right which illustrates better the inherent dignity of man than freedom of thought, conscience and religion'.⁷⁹

Similar human rights for adults and children can be found in other important global and regional human rights treaties such as the ICCPR (Article 18), ECHR (Article 9), and Charter (Article 10).⁸⁰ When comparing the provisions of Article 14 of the CRC with those of Article 18 of the ICCPR, Article 9 of the ECHR, and Article 11 of the Charter, one difference is evident. The Convention does not determine the content of

75 Ibid., p. 440-441, 455 and 458.

76 Hanna, 2023, pp. 43-44.; Freeman, 2020, pp. 38, 45-46, 310 and 314; Hrabar et al. 2021, p. 201; Alinčić, 1990, p. 59.

77 Tobin and Pakes argue that any such manifestation of beliefs always falls within the scope of a child's right to freedom of expression, underlining yet again the interconnection and interdependence of children's rights. See: Tobin and Parkes, 2019, p. 439; See also: Langlaude Doné and Tobin, 2019, p. 487.

78 Langlaude Doné and Tobin, 2019, pp. 479-480.

79 Freeman, 2020, p. 186.

80 Langlaude Doné and Tobin argue that children have been and continue to be entitled to the right to freedom of thought, conscience and religion, as provided by the ECHR or the ICCPR, because they have always been included in term "everyone". See: Langlaude Doné and Tobin, 2019, pp. 477 and 487.

a child's right to freedom of thought, conscience and religion. Unlike the Convention, the ICCPR, ECHR, and Charter elaborate in detail what the right in question includes: the freedom to change religion or belief and freedom, either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice and observance. Therefore, Freeman believes that the Convention does not provide the child the right to choose or change his or her religion, in contrast to other authors who believe that one of the objectives of Article 14 should be to create a presumption that the child has the right to choose or change his or her religion in accordance with their evolving capacities.⁸¹ Family law theory also accentuates that more States Parties have expressed reservations to Article 14 than any other article in the Convention, finding this 'concession to Islamic nations which do not accept freedom of religion' contrary to Article 51 Paragraph 2 of the Convention.⁸²

'States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.'

Clearly, the Convention accepts the indispensable role of parents in directing the child to exercise his or her right to freedom of religion, thought and conscience. The influence of parents in shaping their child's religious values and beliefs is recognised as legitimate, provided that several preconditions prescribed by the Convention are fulfilled. First, the role of parents in ensuring appropriate direction and guidance in the child's exercise of the right to freedom of religion, thought and conscience should always be interpreted in a manner consistent with the child's evolving capacities (Article 14 Paragraph 2 in connection with Article 5). Further, the role of parents is also limited by the requirement that direction and guidance be "appropriate" (Article 5 CRC), as well as by the requirement that parents when exercising their parental responsibilities act in the best interests of the child (Article 3 CRC).⁸³ Finally, Article 14 Paragraph 2 when read in conjunction with Article 12, requires parents to seek the views of their children to discover what the right to freedom of thought, conscience and religion means to them and how they wish to manifest their right.⁸⁴

In this context, it is noteworthy that the provision of Article 14 Paragraph 2 is compatible with that of Article 2 of the First Protocol to the ECHR which recognises the importance of States Parties respecting the right of parents to ensure education

81 Freeman, 2020, p. 186; For contrary opinion see: Langlaude Doné and Tobin, 2019, pp. 478 and 489; Hrabar et al., 2021, p. 217.

82 Freeman, 2020, p. 186; Langlaude Doné and Tobin, 2019, pp. 477, 479 and 489; A similar standpoint was taken by the Committee on the Rights of the Child in the General comment No. 5 (2003), par. 15.

83 Freeman, 2020, pp. 8, 241-242 and 390; Khazova and Dawit Mezmur, 2019, p. 315; Vučković-Šahović et al., 2012, p. 488; Langlaude Doné and Tobin, 2019, pp. 477, 479, 486 and 492.

84 Langlaude Doné and Tobin, 2019, p. 493.

and teaching in conformity with their own religious and philosophical convictions.⁸⁵ This confirms the importance of parents' legitimate and appropriate influence on their children's enjoyment of their right to freedom of thought, conscience and religion. However, the Committee on the Rights of the Child points to the ambit of parents influence, noting that 'it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence'.⁸⁶

'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'

A child's right to manifest freedom of thought, conscience and religion is not absolute and is subject to reasonable limitations. If a State Party wishes to limit a child's rights under Article 14, the limitation will be justified if three requirements are satisfied: a) it must be provided by law; b) it must pursue a legitimate aim (e.g. protection of public safety, order, health or morals, or the fundamental rights and freedoms of others); and c) it must be necessary in a democratic society, meaning it must conform to the principle of proportionality (e.g. it must be the least intrusive possible limitation).⁸⁷ The extent and meaning of possible limitations to the child's right to freedom of thought, conscience and religion have not yet been the object of a General Comment or been analysed in detail by the Committee on the Rights of the Child.⁸⁸

5. The right of the child to freedom of association and to freedom of peaceful assembly – Article 15 CRC

'States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly'

Children's participation rights are viewed as a "cluster of rights" encompassing, among other, the right of the child to freedom of association and peaceful assembly provided

85 A provision similar to the provision of Article 2 of the First Protocol to the ECHR is included in Article 18 Paragraph 4 of the ICCPR.

86 Committee on the Rights of the Child (2016). General Comment No. 20 (2016) – The Implementation of the Rights of the Child during Adolescence, CRC/C/GC/20, 6 December 2016, par. 43.

87 Langlaude Doné and Tobin, 2019, pp. 507-509.

88 For more detailed information on certain aspects of limitations to children's rights to freedom of thought, conscience and religion, for example, the provision of medical treatment in contravention of a child's religious convictions, the restrictions on Islamic headscarves or restrictions on other manifestations of religious beliefs (wearing a Sikh kara bracelet, carrying Catholic rosary beads, having dreadlocks consistent with the principles of Rastafarianism), see: Langlaude Doné and Tobin, 2019, pp. 510-516.

for in Article 15. Family law theory considers this a fundamental civil and political right because it ‘carries the promise of legitimately engaging children in the social and political functions of their communities’.⁸⁹ Article 15 generates an obligation on States Parties to respect, protect and promote this right (Article 15 Paragraph 1 in connection with Article 2 Paragraph 1).⁹⁰ Similar human rights for adults and children can be found in other important global and regional human rights treaties, such as the ICCPR (Articles 21 and 22), the ECHR (Article 11), and the Charter (Article 12).⁹¹

The scope of the child’s right to freedom of association and freedom of peaceful assembly is wide, as it includes the right to form, join, and leave associations of all types, assemble peacefully for a wide range of purposes, and associate freely with friends or others in public or private spaces to share or protect common interests.⁹² Therefore, these rights cover children’s association and assembly with others, including other children, in a wide range of contexts: in the family environment, in school or educational settings (for example, the establishment of student organizations or clubs in school or membership on school councils), in social and other settings (for example, peaceful demonstrations, participating in NGO’s, children organizations in local municipalities such as sport clubs or associations of stamp collectors, various other child and youth organizations, sometimes within larger organizations such as the children’s or youth parliaments or the network of young advisors of the Ombudsman for children), including the child’s enjoyment of public spaces with other children (for example, visiting and playing in parks, schoolyards and playgrounds).⁹³ Considering the scope and content of the child’s right to freedom of association and freedom of peaceful assembly, it is clear that they are closely linked to the exercise of other participation rights of the child, as derived from Articles 12, 13, 14, 17, and 31 of the Convention. Such interconnection and interdependence mean that the effective exercise of these rights will contribute to the proper participation of children in his or her political, economic, social and cultural environments.⁹⁴

‘No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.’

89 Assim, 2019, p. 399.

90 Breen, 2019, pp. 523-524.

91 Breen considers that the rights to freedom of association and peaceful assembly, as provided by the ECHR or the ICCPR, are extended to “everyone”, this including children as holders of these rights. See: Breen, 2019, pp. 517-518 and 534.

92 Breen, 2019, p. 518; Assim, 2019, pp. 403-406.

93 Assim, 2019, pp. 403-406; Breen, 2019, pp. 519, 529-530, 535 and 541.

94 Assim, 2019, p. 403; Breen, 2019, pp. 519-520, 522 and 539-540.

A child's right to freedom of association and freedom of peaceful assembly is not absolute and is subject to reasonable limitations. If a State Party wishes to limit a child's rights under Article 15, the limitation will be justified if three preconditions are fulfilled: a) it must be in conformity with the law; b) it must pursue a legitimate aim (e.g. protection of national security or public safety, order (*ordre public*), health or morals, or the fundamental rights and freedoms of others); and c) it must be necessary in a democratic society, meaning it must be in accordance with the principle of proportionality (e.g. the type and intensity of the limitation must be least intrusive).⁹⁵ The extent and meaning of possible limitations to the child's right to association and freedom of peaceful assembly have not yet been the object of a General Comment or been analysed in detail by the Committee on the Rights of the Child.⁹⁶

95 Breen, 2019, pp. 542-549.

96 For more detailed information on certain aspects of limitations to children's right to freedom of association and freedom of peaceful assembly, for example, high level of surveillance, punitive youth justice policies or age-related restrictions preventing children from establishing, joining or freely participating in associations including unions, NGO's, political parties or school management committees, see: Breen, 2019, pp. 544-549.

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The Role of the Committee on the Rights of the Child

Mariusz GRABOWSKI

ABSTRACT

The Committee on the Rights of the Child was established under Article 43 of the Convention on the Rights of the Child of 1989. According to Articles 43-45 of the Convention, the Committee on the Rights of the Child is treaty-based.

The Committee should operate strictly within the express competences established by the Convention and the Optional Protocols. This is a condition for the legality of the Committee's actions. There is no room for "presumed competencies".

The Committee can only deal with matters that are referred to it under the provisions of the Convention. Therefore, the Committee cannot interfere in matters that fall within the sovereign competence of a State Party to the Convention. Moreover, the Committee is not an authoritative body over the States Parties to the Convention. Even in matters assigned to it by the Convention. Dialogue and advice are the way it operates.

The Committee on the Rights of the Child is an important body that protects the rights of children. It has considerable authority as a treaty-based body. Although the Committee does not have "executive" competencies, it significantly influences the application of the law. This can be seen, for example, in the introduction of subsequent provisions of the Convention and Optional Protocols in various countries. This influence is particularly evident in the application of laws. The General Comments issued by the Committee play an important role in stabilising the protection of children's rights. They create significant standards for legal protection. Owing to the various activities described above, the Committee on the Rights of the Child contributes to spreading legal awareness in individual countries and internationally.

KEYWORDS

Child rights, Committee on the Rights of the Child, human rights, United Nations, conventions, international law, child's best interest, child protection

1. Introduction – legal framework

The Committee on the Rights of the Child was established under Article 43 of the 1989 Convention on the Rights of the Child.¹ However, this does not mean that the

1 The Convention was adopted by the United Nations General Assembly on 20 November 1989.

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issue of child rights protection was not subject to international legal regulations. The Convention on the Rights of the Child directly refers, in the Preamble, to the most important international legal acts enacted earlier. These acts directly concern the legal protection of children and humans. They should be indicated here first, as they are the “background” of the Convention on the Rights of the Child. These are legal frameworks for child protection under international law and directly determine the legal and institutional position of the Committee on the Rights of the Child. Invoking the provisions of specific legal acts involves the direct application of these provisions together with the Convention on the Rights of the Child. Simultaneously, the listed provisions do not exhaust the legal frameworks that define the principles of the Committee on the Rights of the Child. Therefore, the following legal acts invoked in the Preamble to the Convention on the Rights of the Child and other important acts of international law² should be considered.

1. The Convention on the Rights of the Child refers in its Preamble to the following legal acts:
 - Geneva Declaration of the Rights of the Child of 1924³
 - Declaration of the Rights of the Child⁴
 - Universal Declaration of Human Rights
 - International Covenant on Civil and Political Rights⁵
 - International Covenant on Human Rights
 - International Covenant on Economic, Social and Cultural Rights⁶
 - Declaration of Social and Legal Principles (Beijing Principles)
 - Declaration on the Protection of Women and Children in Emergency and Armed Conflict

2. International law acts whose provisions concern the protection of child rights and the Committee on the Rights of the Child:
 - International Agreement on Combating Trafficking in Living Goods⁷
 - International Convention on Combating Trafficking in Living Goods⁸

2 Owing to the limitation of the subject of considerations to acts of international law, the Charter of Family Rights *presented by the Holy See to all persons, institutions and authorities interested in the mission of the family in the contemporary world*, issued in Rome in 1983, is not considered here. An interesting attempt to compare the Charter of Family Rights with acts of international law, in the context of protecting the rights of the child, is undertaken, e.g.: Ildikó, pp. 33–40.

3 Adopted by the General Council of the International Child Welfare Union on 13 February 1923, and then incorporated (adopted) by the General Assembly of the League of Nations on 16 November 1924. Expanded and supplemented by the International Child Welfare Union in 1948, and since then called the Charter of Children’s Rights.

4 Adopted by the United Nations General Assembly on 20 November 1959.

5 Enacted under United Nations General Assembly resolution 2200A (XXI), opened for signature in New York on 19 December 1966.

6 Adopted at the United Nations conference in New York, under resolution 2200/XXI of the General Assembly, opened for signature in New York on 19 December 1966.

7 Adopted in Paris on 18 May 1904.

8 Adopted in Paris at the Second Conference from 18 April to 4 May 1910.

- International Convention on the Suppression of the Traffic in Women and Children⁹
- International Convention on the Suppression of the Circulation of and Traffic in Obscene Publications¹⁰
- Final Act of the International Conference on the Suppression of the Circulation of and Traffic in Obscene Publications¹¹
- Convention on Certain Questions Relating to the Conflict of Nationality Laws and Protocol on Statelessness¹²
- Convention for the Facilitation of the International Circulation of Films of an Educational Character¹³
- Protocol Amending the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Full-Grown Women, concluded at Geneva on 11 October 1933¹⁴
- Convention on the Recovery Abroad of Maintenance¹⁵
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery¹⁶
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages¹⁷
- International Convention on the Elimination of All Forms of Racial Discrimination¹⁸
- International Convention on the Suppression and Punishment of the Crime of Apartheid¹⁹
- Convention on the Elimination of All Forms of Discrimination Against Women²⁰
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict²¹
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography²²

9 Signed in Geneva on 30 September 1921.

10 Signed on 12 September 1923, in Geneva.

11 The conference convened at the invitation of the Government of the French Republic, gathered in Geneva on 31 August 1923, under the auspices of the League of Nations.

12 Signed in The Hague on 12 April 1930.

13 Signed in Geneva on 11 October 1933.

14 Signed in Lake Success on 12 November 1947.

15 Prepared in New York on 20 June 1956.

16 Signed in Geneva on 7 September 1956.

17 Adopted by the United Nations General Assembly on 7 December 1962, and opened for signature in New York on 10 December 1962.

18 United Nations - opened for signature in New York on 7 March 1966.

19 Adopted on 30 November 1973, by United Nations General Assembly resolution 3068 (XXVIII).

20 Adopted by the United Nations General Assembly on 18 December 1979.

21 Adopted in New York on 25 May 2000.

22 Adopted in New York on 25 May 2000.

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime²³
- International Convention for the Protection of All Persons from Enforced Disappearance²⁴
- Optional Protocol to the Convention on the Rights of the Child on a communications procedure²⁵

The Convention on the Rights of the Child of 1989 refers in its Preamble to human (child) rights, as stated in the aforementioned legal acts (conventions). According to the provisions of these Conventions, human rights must be understood in a realistic (natural law) manner. This means that every human being (or child) has inalienable rights, regardless of executive, judicial, or legislative authority. These rights belong to every human being because of their inherent dignity (natural law).²⁶ Any other understanding of human rights²⁷ always leads to the denial and violation of these rights. This note is necessary because there is currently a discussion, also in the Committee on the Rights of the Child, which undermines the objective nature of human rights. However, this issue is not the subject of this chapter. It belongs to the philosophy of law. Nevertheless, it cannot be ignored that any attempt to separate the acts of international law cited here from their natural law sources and foundations leads directly to the relativization and anarchisation of law. Consequently, instead of the objective legal protection of children's rights postulated in these acts, in the practice of applying the law, either every "protected" child right is directly denied or legal protection is overpowered in favor of ideological disputes.

The Preamble refers to the foundation, which is "inherent dignity" and "the value of the human individual", "the family as the fundamental unit of society and the natural environment for the growth and well-being of all its members, especially children". It emphasises that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding' and that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'. This foundation is the reason, principle, and basis for the application of the Convention and the legal existence of the Committee on the Rights of the Child. This is the most important interpretative criterion. However, according to Article 1 of the Convention, 'a child refers to every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier'.

23 Adopted by the United Nations General Assembly on 15 November 2000.

24 Adopted on 20 December 2006, during the 61st session of the United Nations General Assembly.

25 Protocol adopted at the United Nations General Assembly on 19 December 2011.

26 Cf. Araujo, 2010, pp. 197–222.

27 E.g. Marxism, legal positivism.

According to Articles 43-45 of the Convention, the Committee on the Rights of the Child is a treaty body.

The Committee operates within the competencies and objectives set by the Convention and the Optional Protocols. The legality of the Committee's actions lies in implementing the competencies assigned in the Convention. There is no room for "presumed competencies". In some cases, the Committee's activities, such as "law-making" (General Comments), may appear controversial. However, the Committee does not have legislative competencies in the strict sense. Such competency violates the sovereignty of States Parties to the Convention. However, there are situations where the Committee usurps the right to "binding" interpretation of the Convention's provisions. There is an ongoing discussion on this issue in legal science.²⁸

The Committee on the Rights of the Child can only deal with matters to which the States Parties to the Convention have agreed. Provisions of the Convention define these issues. The Committee may not interfere with matters that fall within the sovereign competence of the State Party to the Convention. It is not an authority or court in relation to the States. It solves these problems through dialogue and communication.²⁹

Various scientific disciplines are interested in protecting children's rights. The issue of children's rights is considered a new field of science.³⁰

2. Membership, Composition

The Committee on the Rights of the Child was established pursuant to Article 43.1 of the Convention on the Rights of the Child (hereinafter the Convention).

The Committee comprises eighteen experts. Members of the Committee are elected by States Parties from among their nationals based on geographic distribution and principal legal systems (Article 43.2 of the Convention).

Members of the Committee are elected by secret ballot from a list of persons nominated by States Parties. Each State may nominate one person from among its nationals (Article 43.3 of the Convention).

Elections to the Committee are held every two years. At least four months before each election, the Secretary-General of the United Nations sends a letter to the States Parties, asking them to submit the names of nominated individuals within two months. The Secretary-General then prepares a list of all nominated persons, arranged in

28 More: Stadniczeńko, pp. 71-78, 2019.

29 More: Michałowska, p.123, 2016.

30 Various theories in this regard, including: Kehily, 2008, pp. 15-16; Qvortrup, 1993, p. 113; Durkheim, 1926, p. 49; Śliwowski, 2007, pp. 83-84; James and Prout, 1990, pp. 8-9; Bourdieu, 1986, pp. 69-72; Znaniński, 1973, p. 47; Goffman, 1963; Goffman, 1974, p. 181; Qvortrup, 1994, pp. 5-6.; Garbarino, Kostelny and Dubrow, 1991; Garbarino et al., 1992; Garbarino, 1995; Garbarino, 1999; Garbarino, 2006; Bowlby, 1969; Casas, 2000, p. 8; Jamrozik and Sweeney, 1966, p. 17; Jaworski, 1973; Veerman, 1991; Lewin, 1993, pp. 66-69; Smolińska-Theiss, 2013; Lewowicki, 1994; Cornock and Montgomery, 2011, pp. 3-19.

alphabetical order, indicating the State by which they were nominated, and submits this list to the States Parties to the Convention (Article 43.4 of the Convention).

Elections are held at meetings of the States Parties, convened by the Secretary-General at the headquarters of the United Nations. At these meetings, the quorum is two-thirds that of the States Parties. Those who receive the highest number of votes and an absolute majority of the votes of the present and voting representatives of the States Parties are elected (Article 43.5 of the Convention).

Members of the Committee are elected for a term of four years. They may be re-elected. The term of five of the members elected in the first elections expires after two years. These five members are selected by lottery by the chairperson of the meeting (Article 43.6 of the Convention).

In the event of the death of a Committee member, their resignation, or their declaration that they cannot perform the duties of a Committee member for any other reason, the State Party that nominated the member shall, with the consent of the Committee, appoint another expert from among its nationals for the remainder of the term (Article 43.7 of the Convention).

The Committee on the Rights of the Child adopts its procedures. It also elects its officers for a period of two years (Article 43.8-9 of the Convention).

Committee meetings are held at the headquarters of the United Nations or at another convenient location determined by the Committee. The Committee generally holds annual meetings. The duration of the Committee's meetings is adopted, when necessary, at a meeting of the States Parties, with the consent of the General Assembly (Article 43.10 of the Convention).

The Secretary-General of the United Nations provides the necessary staff and conditions for the Committee's effective work (Article 43.11 of the Convention).

Members of the Committee receive honoraria from United Nations funds for the duration and on terms determined by the Assembly (Article 43.12 of the Convention). The detailed election procedures are included in the Rules of Procedure of the Committee on the Rights of the Child.³¹

3. Rules of Procedure

Detailed solutions are provided in the Optional Protocol to the Convention on the Rights of the Child on communications procedures (hereinafter the Protocol).

According to Article 1 of the Protocol, the Committee is competent only in matters concerning the States Parties to the Convention.

The general principles guiding the Committee are set out in Article 2 of the Protocol. The Committee is guided by the principle of the best protection of the child's interests. It also considers the rights and views of the child, assigning due weight to the child's views according to their age and maturity.

31 Principles 19–22, CRC/C/4 Rev.3.

The Committee operates based on the rules adopted in the procedure. Rules governing this procedure must consider these principles. The rules of the procedure should protect the child from manipulation by people acting on their behalf. The Committee may refuse to examine a complaint if it does not serve the child's best interests (Article 3 of the Protocol).³²

The official languages of the Committee are the official languages of the United Nations: Arabic, Chinese, English, French, Russian, and Spanish. The working languages of the Committee are English, French, Spanish.³³ The Committee's decisions are issued in the Committee's official languages. Official documents are prepared in the working languages.

The Committee meets two types of sessions: ordinary and special. Ordinary sessions are conducted in January, May, and September. Special sessions are convened based on the decision of the Committee or that of the Committee's chairperson, at the request of the majority of the Committee members or at the request of a State Party. Special sessions are convened as soon as possible.³⁴

Committee sessions can be either public or private. They are usually public unless the Committee decides otherwise.³⁵ Representatives of report authors and representatives of bodies, institutions, and organisations whose statutory activities concern the protection of child rights participate in the sessions.

4. Working Methods

The chief working methods of the Committee on the Rights of the Child include state reporting, individual complaints, interstate complaints, urgent interventions, complaints about systematic violations (Inquiry Procedures), General Comments, Open Letters and Statements, thematic discussions and conferences, and civil society participation. According to Article 16 of the Protocol, the Committee submits a report on its activities undertaken under the Protocol to the General Assembly of the United Nations. The Committee must do it every two years, (Article 44.5 of the Convention).

4.1. State reporting

The Convention on the Rights of the Child imposes the obligation to submit periodic reports on the implementation of the Convention (Article 44 of the Convention). The first report is submitted two years after the ratification of the Convention by a particular State, and subsequent reports are submitted every five years. The reports should contain information that provides the Committee with full knowledge of the

32 Committee regulations: Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, 16 April 2013 (CRC/C/62/3), The Rules of Procedure of the Committee on the Rights of the Child, 16 April 2013 (UN Doc. CRC/C/4 Rv.3).

33 Principle 34, CRC/C/4 Rev.3.

34 Principle 3, CRC/C/4 Rev.3.

35 Principle 39, CRC/C/4 Rev.3.

Convention's provisions in a given country. A State Party that has submitted a comprehensive initial report to the Committee is not required to repeat the information in subsequent reports.

The Committee may request additional information from the States Parties. The States Parties are obliged to make reports available to the public in their countries.

After reviewing reports on the implementation of the Convention, the Committee on the Rights of the Child (a team of experts) makes general recommendations based on the information received. The Committee's suggestions and general recommendations are communicated to the concerned State Party and made known to the General Assembly. Comments from the States Parties are also made known.

The Committee on the Rights of the Child has adopted principles regarding these reports. These reports include the following:

- Information about measures adopted to harmonise national law and policy with the provisions of the Convention;
- Information on actions taken to promote and observe the Convention;
- Information on the implementation of general principles concerning the welfare of the child;
- Information on the implementation of specific provisions, that is, specific rights, civil liberties, and rights related to the family environment;
- Information on measures taken in specific situations, such as protection of the disabled, refugees, minorities, and children in conflict with the law; protection against drug addiction and alcoholism; protection against exploitation of children for prostitution and pornography; and protection against illegal trafficking of children.

The acceptance and assessment of a State Party's government report by the Committee on the Rights of the Child involves the acceptance of the government report. The Committee may submit proposals to the selected non-governmental organisations of a country to comment on the report. This could also serve as a proposal for writing alternative reports.

Furthermore, the Committee may meet with relevant non-governmental organisations and representatives of relevant international organisations to discuss comments on the report.

The Committee then meets with members of the government of the State Party to the Convention. The discussion on the report of a given State Party concludes with the Committee on the Rights of the Child developing concluding observations. After adoption, the Committee on the Rights of the Child issues a resolution and submits it to the State Party.³⁶

36 Overview of the Reporting Procedures, Committee on the Rights of the Child, 24 October 1994 (UN DOC.CRC/C/33), p. 19.

4.2. Individual Complaints, Urgent Intervention, and Complaints of Systematic Violations (Inquiry Procedures)

Under the Optional Protocol on notifications, the Committee on the Rights of the Child can receive and consider individual and interstate notifications of violations of children's rights.

The Committee can offer assistance to the parties involved in achieving an amicable resolution (Article 9 of the Protocol). An agreement can be reached at any stage of the case examination. The signing of an agreement closes the examination of notifications under this Protocol. The Committee may request that a State Party apply interim measures (Article 6 of the Protocol) necessary to prevent potential irreversible harm to the victim or victims of the alleged violation.

The procedure for submitting individual notifications is determined by Articles 5-11 of the Optional Protocol.

Notifications can be made by persons or groups of persons under the jurisdiction of the State Party or on behalf of a person or group of persons claiming to be victims of a violation by the State Party of any of the rights mentioned in the Convention; the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; the Optional Protocol to the Convention on the involvement of children in armed conflicts; and other international conventions concerning the welfare of the child. Individual complaints can be submitted when the State is party to the aforementioned legal acts.

Submitting a complaint requires, in principle, the consent of the concerned persons.

At any time after receiving a notification and before issuing a decision on the merits of the case, the Committee may transmit to the State Party concerned, for urgent consideration, a request to apply such interim measures as may be necessary in special circumstances to avoid potential irreversible harm to the victim or victims of an alleged violation.

The Committee's use of such competence does not constitute a decision on the admissibility or merits of the notification.

The requirements for notification are contained in Article 7 of the Protocol, and the Committee will consider a notification inadmissible if:

- a) the notification is anonymous;
- b) the notification is not in written form;
- c) the notification constitutes an abuse of the right to submit such notifications or is incompatible with the provisions of the Convention or the Optional Protocols to the Convention;
- d) the same case was or is being examined by the Committee or was or is being considered under another international procedure of investigation or resolution;
- e) not all available domestic remedies have been exhausted; this rule does not apply in the case of unjustified delays in the appeal process or a lack of likelihood that the procedure will result in an effective solution;

- f) the notification is clearly unfounded or insufficiently substantiated;
- g) the facts that are the subject of the notification occurred before the Protocol came into force for the respective State Party, unless those facts continued after that date;
- h) the notification was not submitted within one year of exhausting domestic remedies, except in situations where the author could prove that it was not possible to submit the notification within this period.

The rules related to the submission of complaints are specified in Article 8 of the Protocol.

The Committee confidentially informs the respective State Party of every notification submitted to the Committee under the Protocol as soon as possible unless the Committee deems the notification inadmissible. Thereafter, the State Party submits to the Committee written explanations or statements about the case and any legal measures possibly applied. The State Party submits its position as soon as possible within six months.

According to Article 9 of the Protocol, an attempt is made to achieve an amicable resolution. The Committee offers assistance to the parties involved in achieving an amicable resolution based on respect for the obligations contained in the Convention or the Optional Protocols to the Convention. An agreement reached under the auspices of the Committee concludes the examination of the notification.

The procedure for examining notifications is described in Articles 10-11. The Committee considers notifications as promptly as possible, provided that this information is communicated to interested parties. The Committee examines notifications (complaints) in closed sessions. It considers complaints in an expedited manner. It may request the State Party to apply interim measures.

In examining notifications regarding alleged violations of economic, social, or cultural rights, the Committee considers the adequacy of the measures adopted by the State Party.

Immediately after examining the notification (complaint), the Committee transmits its opinion on the notification along with any recommendations to the concerned State Party.

The State Party should consider the Committee's opinion along with any recommendations. It then presents a written response to the committee, including information on actions taken and planned. The State Party submits its position as promptly as possible within six months.

The Committee may request that the State Party provide additional information on any measures adopted by that State Party in response to the Committee's opinions or recommendations or as part of the implementation of an agreement. Information accepted and acknowledged by the Committee concludes the procedure.

Based on the provisions of the Optional Protocol concerning notifications (complaints), the Committee on the Rights of the Child may, in cases of identified violations of children's rights, request the State Party to:

- a) change domestic legislation inconsistent with the provisions of the Convention or the Optional Protocols;
- b) grant the complainant permission to leave the country;
- c) release a specific individual from prison or detention;
- d) commute the sentence;
- e) enable the complainant to file an appeal;
- f) provide appropriate medical care;
- g) ensure regular contact with children;
- h) provide the child (victim of the violation) with fair compensation;
- i) conduct an investigation and hold accountable those responsible for cases related to the violation of children's rights.

4.3. General Comments

General Recommendations issued by the Committee on the Rights of the Child are intended to facilitate the application of the provisions of the Convention on the Rights of the Child and create favorable conditions for international cooperation in the protection of children. The Committee on the Rights of the Child can make suggestions and general recommendations based on the information received in accordance with Articles 44 and 45 of the Convention.

These suggestions and general recommendations are communicated to the concerned State Party and made known to the United Nations General Assembly, along with comments from the States Parties.

General Comments are recommendations in which the Committee presents its positions on important issues related to the realisation of children's rights. These recommendations cover several topics. All the recommendations of the Committee are not discussed here. Many of these are available on the websites of the Committee on the Rights of the Child and the United Nations.

The discussed recommendations are the proposals. They are not legally binding on the States Parties to the Convention. These comments represent the views of the Committee members on various issues. Some recommendations are widely accepted, whereas others are controversial, leading to accusations of politicisation. It is important to remember the legal frameworks for the Committee's actions, as indicated in the introduction. These legal frameworks are essential and decisive criteria for evaluating the conduct of the Committee on the Rights of the Child.

Moreover, General Comments are treated as opinions of lawyers who are advisors to the Committee. Using such opinions is one of the many instruments used by the Committee, as listed in the Committee's Rules of Procedure.

The Committee on the Rights of the Child does not have the authority to issue binding interpretations of the Convention. There is no legal basis for this in any international legal act, including the Convention. However, opinions of lawyers with significant authority often influence the practical application of the law.

An example of a valuable recommendation by the Committee that is unfortunately relevant at present is the Recommendation on Children in Armed Conflict.³⁷ The Committee pointed out the need to improve the standards for protecting children from participation in armed conflict.

In General Comment No. 1 (2001),³⁸ the Committee discusses the “aims of education” contained in Article 29 of the Convention. The Committee states that the “aims of education” promote, support, and protect the fundamental values of the Convention, which are human dignity inherent in every child and their equal and inalienable rights.

The Committee urges States Parties to take the necessary steps to formally incorporate the principles contained in the Convention and Article 29 (1) at every level of legislation and into local curricula.

General Comment No. 2 (2002)³⁹ addresses ‘the role of independent national human rights institutions in the promotion and protection of children’s rights’, based on Article 4 of the Convention. The Committee encourages States Parties to establish independent institutions that support the implementation of the provisions of the Convention.

The Committee recognised that independent national human rights institutions (NHRI) should be anchored in the Constitution and have a legislative mandate. A “legislative mandate” refers to the ability to promote and protect human rights, considering the Convention on the Rights of the Child. The “appointment process” for national human rights institutions should be based on consultations, integration, and transparent actions. This process should be initiated and supported at all levels of government administration.

The Committee appeals for ‘providing legal protection measures in case of violations of children’s rights’. All national human rights institutions should be authorised to consider individual complaints and petitions, and to conduct investigations on behalf of or directly by children. They should have the power to summon and hear witnesses and access documents and places of detention (prison or pre-trial detention). They should also ensure the implementation of effective legal protection measures for children. The NHRI should have the authority to bring cases to court on behalf of children and intervene in court cases.

General Comment No. 4 (2003) discusses⁴⁰ ‘Adolescent health and development in the context of the Convention on the Rights of the Child’. The Comment relates to Article 6 of the Convention (the right to life, survival, and development) and Article 24 of the Convention (the right to health protection). The Committee pointed out that

37 Recommendation on Children in Armed Conflict, Committee on the Rights of the Child, 19th Session, September 1998 (UN DOC. CRC/C/80).

38 General Comment No. 1 (2001), 17 April 2001. CRC/GC/20.

39 General Comment No. 2 (2002), issued 13 November 2002, and adopted during the 32nd session of the Committee on the Rights of the Child from 13–31 January 2003. CRC/GC/2002/2.

40 General Comment No. 4 (2003), issued on 1 July 2003, and adopted during the 33rd session of the Committee on the Rights of the Child from 19 May – 6 June 2003. CRC/GC/2003/4.

everyone has the right to protection against discrimination, and States Parties are obliged to ensure that all human beings, including children, have the opportunity to freely enjoy the rights presented in the Convention.

Furthermore, parents or other persons responsible for children must ensure that adolescent children have the right to development so that they can fully enjoy their rights later. The Committee notes that under Article 12 of the Convention, every child has the right to respect, health protection, and proper development. To guarantee this right, public authorities, parents, and other adults working with children must create an environment based on trust.

The Committee reminds that States Parties have an obligation to provide appropriate legislative and administrative measures and procedures, providing three examples of ensuring rights: determining the minimum age for sexual consent, marriage, and the possibility of treatment without parental consent. Adolescents should have easy access to individual, judicial, and extrajudicial complaints. Adolescents should be guaranteed a proper legal process with respect to their right to privacy. The Committee calls on States Parties to protect young people from exploitation and violence. Further, it calls for protection against criminal activity. The Committee emphasises that education is about ‘developing to the fullest extent the personality, talents, and mental and physical abilities of the child’.

In this comment, the Committee addresses the problem of child and adolescent labour. It calls on States Parties to eliminate children’s exploitation. National laws should determine minimum permissible employment ages. Young people’s right to fair remuneration should be respected. Children and adolescents with disabilities should have equal educational and employment opportunities. The Committee recommends raising the minimum age of marriage to 18 years.

The Committee notes a high suicide rate among teenagers. States Parties should provide appropriate support to young people who struggle with mental health issues and illnesses. This includes, among other things, controlling access to alcohol and drugs.

General Comment No. 3⁴¹ concerns problems associated with HIV and AIDS. States Parties should identify the problem and implement mechanisms to prevent infections.

Furthermore, the Committee calls for action against the homelessness of children and adolescents. The Committee highlights the sexual exploitation of youths. It is the duty of States Parties to establish appropriate laws that prohibit sexual exploitation and illegal trafficking. In this regard, States should cooperate internationally.

The Committee reminds us that by ratifying the Convention on the Rights of the Child, a State undertakes a commitment to implement it. According to Article 4 of the Convention, a State Party should take ‘all appropriate legislative, administrative, and other measures’ to realise the rights expressed in the Convention. All national

41 General Comment No. 3 (2003), issued on 17 March 2003, and adopted during the 32nd session of the Committee on the Rights of the Child from 13–31 January 2003. CRC/GC/2003/3.

legislation must be consistent with the Convention. The Committee offers detailed recommendations on this issue. The Committee again calls on States to guarantee every child's right to life without discrimination. The Committee notes that the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also apply to children and adolescents. Judicial procedures must protect these rights.

General Comment No. 6 (2005)⁴² discusses the issue of 'treatment of unaccompanied and separated children outside their country of origin'. The Committee warns about the increasing number of unaccompanied children. Reasons for this include persecution, international conflicts, civil wars, and child trafficking. The Committee defines 'separated children' as those separated from both parents or from their legal or customary caregivers. The Committee also clarifies the concept of 'country of origin' as the country of nationality or habitual residence in the case of a stateless person.

General Comment No. 7 (2005)⁴³ deals with 'realising the rights of the child in early childhood'. The Committee discusses the obligations of States Parties towards the youngest children. The Committee emphasises aspects of early childhood. The Committee stresses that children should have the same rights as other community members from the beginning of life. The Committee states that 'young children require special protection'. The Committee discusses issues affecting children's rights in early childhood. Examples include situations such as abuse, neglect (Article 19), family deprivation (Articles 20 and 21), refugee status (Article 22), disability (Article 23), harmful labour (Article 32), use of children in the production of illicit substances (Article 33), molestation and sexual exploitation (Article 34), child trafficking and kidnapping (Article 35), and deviant behaviour and law-breaking (Article 40). The Committee indicates the duties of States Parties in this regard.

General Comment No. 8 (2006)⁴⁴ discusses 'the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment' based on Articles 19, 28(2), and 37 of the Convention on the Rights of the Child. The Committee shows that a State Party to the Convention has an obligation to promptly prohibit all corporal punishment and all other cruel or degrading forms of punishment of children. The Committee proposed a way to achieve this goal. In this comment, the Committee paid much attention to proposals for solutions to protect children from all forms of violence. The Committee discusses the Convention's provisions for protecting children from violence.

42 General Comment No. 6 (2005), issued on 2 March 2007, and adopted during the 42nd session of the Committee on the Rights of the Child from 15 May – 2 June 2006. CRC/GC/2005/6.

43 General Comment No. 7 (2005), issued on 20 September 2006, and adopted during the 40th session of the Committee on the Rights of the Child from 12–30 September 2005. CRC/C/GC/7.

44 General Comment No. 8 (2006), issued on 2 March 2007, and adopted during the 42nd session of the Committee on the Rights of the Child from 15 May – 2 June 2006.

General Comment No. 9 (2006)⁴⁵ discusses “the rights of children with disabilities” in Articles 2 and 23 of the Convention on the Rights of the Child. The Committee proposes solutions and aid for States Parties to the Convention regarding the protection of the rights of children with disabilities. The Committee comprehensively discusses the provisions of the Convention on children with disabilities. In this comment, the Committee explains the definition of a person with a disability, ‘Persons with disabilities include those with long-term physical, mental, intellectual, or sensory impairments, which, in interaction with various barriers, may limit their full and effective participation in society on an equal basis with other citizens’. The Committee interprets the provisions of Articles 2 and 23 of the Convention. States Parties to the Convention are obligated to ensure that all children enjoy the rights protected by the Convention. This discrimination is unacceptable. All forms of violence, particularly violence caused by disabilities, were excluded. The Committee lists actions that should be taken by States. These actions include clear constitutional provisions prohibiting discrimination against persons with disabilities. Disability cannot be a reason for discrimination, particularly in the realm of legal provisions. States are obligated to effectively counteract violations of the rights of children with disabilities. It is also the duty of the State to guarantee access to the appropriate means of protection against discrimination. Such protective measures should be made available to children with disabilities, their parents, and legal guardians. Public awareness campaigns should be conducted in the States. Individual qualified persons should also be educated, considering the prevention and elimination of discrimination against children with disabilities. States are obligated to ensure dignified conditions for children with disabilities. States should implement mechanisms to facilitate the independence of such children.

General Comment No. 10 (2007)⁴⁶ deals with the problem of “children’s rights in the juvenile justice system”. This interpretation is based on Articles 37 and 40 of the Convention on the Rights of the Child. The Committee encourages States Parties to develop and implement a comprehensive policy for juvenile justice, aimed at preventing juvenile delinquency. The Committee calls for assistance from the Interagency Panel on Juvenile Justice, which includes representatives from the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children’s Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), and nongovernmental organisations. The Interagency Panel on Juvenile Justice was established under ECOSOC Resolution 1997/30. In this comment, the Committee broadly discusses the guidelines and recommendations concerning juvenile justice. The Committee calls for the implementation of alternative measures to respond to juvenile delinquency without resorting to judicial procedures. This interpretation

45 General Comment No. 9 (2006), issued on 27 February 2007, and adopted during the 43rd session of the Committee on the Rights of the Child, from 11-29 November 2006. CRC/C/GC/9.

46 General Comment No. 10 (2007), issued on 25 April 2007, and adopted during 44th session of the Committee on the Rights of the Child, from 15 January – 2 February 2007. CRC/C/GC/10.

thoroughly discusses the provisions in Articles 37 and 40 of the Convention. The Committee also urges the implementation of various international standards in juvenile justice, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules). The Committee indicates that a comprehensive and sensible policy on juvenile justice must include the prevention of juvenile delinquency, interventions without resorting to judicial proceedings (alternative proceedings), interventions including judicial proceedings, the minimum age of criminal responsibility, the upper age limit in juvenile justice, and guarantees of a fair trial. Therefore, these conditions were necessary. To prevent juvenile delinquency, the Committee refers to the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) adopted in General Assembly Resolution No. 45/112 of December 14, 1990.

General Comment No. 14 (2013)⁴⁷ concerns ‘the right of the child to have his or her best interests taken as a primary consideration’. The Committee presents its opinion based on Article 3.1 of the Convention on the Rights of the Child. The Committee seeks a uniform interpretation of the principle concerning ‘the best interests of the child’. The Committee emphasises that respecting this principle is paramount in all actions concerning the protection of children’s rights. This principle expresses all fundamental values of the Convention on the Rights of the Child. The Committee reminds us that the Convention contains clear references to this principle in Articles 9, 10, 18, 20, 21, 37(c), and 40.2(b). This concept of “the best interests of the child” is used in the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (Preamble and Article 8 of the Protocol), and the Optional Protocol to the United Nations Convention on the Rights of the Child on a communications procedure (Preamble and Articles 2 and 3 of the Protocol). The Committee states that all rights and principles written in the Convention and the Optional Protocols refer to “the best interests of the child”. No right can be violated by an incorrect interpretation of ‘the best interests of the child’. According to the Committee, the realisation of this principle involves securing the physical, psychological, moral, and spiritual integrity of the child. These types of integrity are important for human dignity. The principle of best interests of a child has three meanings. First, a child’s best interests are paramount to all other interests. In the event of a conflict of interest, the cited best interests of the child should always be selected. This is a fundamental principle in decision making. The Committee calls this ‘the principle of substantive law’. This principle has a direct application and can be invoked before a court. Second, if a legal provision can be interpreted differently, the interpretation that best serves “the best interests of the child” should be adopted. Here, we address the general clauses. This is the basis for interpreting all rights guaranteed by the Convention and the Optional Protocols.

47 General Comment No. 14 (2013), issued on 29 May 2013 and adopted on 62nd session of the Committee on the Rights of the Child, from 14 January – 1 February 2013. CRC/C/GC/14.

The Committee calls this general clause “the principle of fundamental legal interpretation”. Third, if a decision is to be made in the application of the law that affects a child (children), then in making this decision: 1) the impact of this decision on the child (children) should be considered, 2) the justification for the decision must show that ‘the best interests of the child’ have been considered. The State Party to the Convention is obliged to explain how ‘the best interests of the child’ have been considered in making the decision, that is, what actions have been recognised as serving “the best interests of the child”. What were the criteria for the decision, and how was the child’s interest guaranteed compared with other solutions? The Committee calls this “the principle of procedural procedure”.

General Comment No. 22 (2017)⁴⁸ discusses the ‘general principles concerning the rights of children in the context of international migration’. In this comment, the Committee thoroughly discusses measures that should be applied to effectively protect the rights of children threatened by migration. Moreover, the Committee explains the legal provisions contained in the Convention and Optional Protocols in relation to international migration.

The previous section briefly discussed general comments from the Committee on the Rights of the Child. These comments are essential for the application of the law, as the provisions of the Convention and other international legal acts are general in nature. Therefore, supplementary clarifications regarding specific situations are necessary. Particularly interesting are the Committee’s interpretations of concepts such as the welfare of the child, customary norms, and the best interests of the child.

4.4. Open Letters and Statements

The Committee on the Rights of the Child prepares documents and presents its official positions on various issues.

For example, the Committee drafted a document titled ‘*Working Methods concerning the Participation of Children in the Reporting Process of the Committee on the Rights of the Child*’.⁴⁹ In this way, the Committee addressed child organisations to which the definition of “competent bodies” (Article 45.a of the Convention) applies. The Committee stated that it is important to know the opinions of children.

The Committee also uses “open letters”, which are public calls for the respect of children’s rights, particularly in dramatic situations related to various conflicts and humanitarian crises.

4.5. Thematic Discussions and Conferences

An important part of the Committee’s work is organising conferences. It is worth mentioning that the “Day of General Discussion” is organised every year when the Committee explains and promotes selected provisions of the Convention on the Rights

48 General Comment No. 22 (2017), issued on 16 November 2017. CMW/C/GC/3-CRC/C/GC/22.

49 Working Methods for the Participation of Children in the Reporting Process of the Committee on the Rights of the Child, 16 October 2014 (CRC/C/66/2).

of the Child. These discussions are attended by representatives of States Parties to the Convention, international and national non-governmental organisations. Examples of topics for these conferences include: *The Impact of Armed Conflict on Children* (2018), *Children's Rights and the Natural Environment* (2016); *Digital Media and Children's Rights* (2014); *The Rights of All Children in the Context of International Migration* (2012); *Children of Incarcerated Parents* (2011); *The Right of the Child to Education in Emergency Situations* (2008); *Resources for the Rights of the Child – States' Responsibility* (2007); *The Right of the Child to be Heard* (2006); *Children Without Parental Care* (2005); *Implementing Child Rights in Early Childhood* (2004); *Rights of Indigenous Children* (2003); *Private Sector as Service Providers* (2002); *Violence Against Children in the Family and School* (2001); *State Violence Against Children* (2000).

4.6. Civil Society Participation

The participation of non-governmental organisations in the protection of children's rights and their cooperation with the Committee on the Rights of the Child require extensive discussion. Certain fundamental observations were made in international law. This issue is discussed extensively in a separate chapter of this book. Therefore, the above analysis appears sufficient at this point.

5. Concluding Remarks

The Committee on the Rights of the Child is an international body that is supposed to help protect the rights of children. Its legal basis is strong, because it is based on international treaties. However, the Committee does not have any authoritative competences over the States Parties to the Convention on the Rights of the Child, but the Committee's influence on the application of the law by these States is clear. An example is the successive implementation of the provisions of the Convention and the Optional Protocols in various countries. Despite the lack of authoritative competences of the Committee, its General Comments play a significant role and create important standards of legal protection for children. The Committee on the Rights of the Child contributes to the dissemination of these standards in the legal awareness of individual countries and the international community.

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Part III

**The Optional Protocols to
the United Nations Convention
on the Rights of the Child**

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography – Criminalising Practices Including and Exceeding Exploitation and Abuse of Children

Jan STAJNKO – Agnesa FETAI

ABSTRACT

The 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography is considered one of the most widely ratified international treaties, promulgating the incrimination of customers and intermediaries in cases of sexual and other forms of exploitation of children. This chapter highlights its strengths and limitations. Special emphasis is placed on provisions prohibiting and criminalising practices covered under the Protocol, particularly concerning topical and divisive issues such as commercial surrogacy, virtual pornography and the maximum age of protection under the Optional Protocol. Moreover, topics such as sanctions and other substantive issues, jurisdiction, freezing and confiscation of assets, extradition and further instruments of mutual legal assistance, rights of child victims and preventive measures are briefly addressed. Where applicable, the contrast between the Convention and the Optional Protocol is emphasised, as the drafters of the latter opted for a more welfarist approach. This implies that the Optional Protocol drastically limits children's agency to, for example, using explicit sexual materials in the context of sexting as a part of their sexual development. Recognising this issue, the authors argue against an unreasonably extensive interpretation of the Protocol's provisions which concern practices that far exceed the exploitation or abuse of children.

KEYWORDS

trafficking, illicit trade, cybercrime, exploitation, commercial adoption, commercial surrogacy, international law

ABBREVIATIONS

CoE – Council of Europe
CRC – Committee on the Rights of the Child
EC – European Commission
ECOSOC – United Nations Economic and Social Council
ECtHR – European Court of Human Rights
EU – European Union
GA – United Nations General Assembly

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HCCH – Hague Conference on Private International Law
ILO – International Labour Organization
UN – United Nations
UNCHR – United Nations Commission on Human Rights
UNHRC – United Nations Human Rights Council
UNICEF – United Nations International Children's Emergency Fund

1. Introduction

The 1989 Convention on the Rights of the Child (hereinafter Convention) contains measures protecting children from various forms of violence, including the trafficking and sale of children, sexual exploitation and abuse (see Articles 19, 34, and 35). However, despite its overwhelmingly positive reception in the international community,¹ newly established monitoring bodies highlighted those severe forms of exploitation of children, including prostitution, pornography, and trafficking, remained a serious problem.² Among these, the CRC was established under this Convention. For example, in 1994, the CRC adopted recommendations concerning the economic exploitation of children, calling for a strict prohibition of activities involving *inter alia* the sale of children or situations of servitude.³

Similar calls for action were raised by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography (hereinafter Special Rapporteur), appointed in 1990 by the UNHRC. For example, in his 1994 report, the Special Rapporteur emphasised that the root cause of the exploitation of children was criminality⁴ and that national laws needed to be reformed to extend jurisdiction to cover the offences of nationals against children in other countries.⁵ He further called upon the international community to promulgate laws and policies incriminating customers and intermediaries in cases of sexual and other forms of child exploitation.⁶

In this context, the GA in 1994 expressed substantial concern over the growing number of incidents worldwide related to the sale of children, child prostitution, and child pornography, and urged the international community to enhance international cooperation to eradicate such practices.⁷ A year later, the GA authorised the UNCHR working group to draft the Optional Protocol to the Convention in cooperation with the CRC and the Special Rapporteur.⁸ The working group came together in six sessions⁹ held between 1994 and 2000, producing a final draft of the Optional Protocol to

1 See for example para. 21 of the 1993 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna.

2 Santos Pais, 2010, pp. 552-555.

3 UN Committee on the Rights of the Child, 1994, p. 42.

4 UN Commission on Human Rights, 1994, p. 55, para. 234.

5 *Ibid.*, p. 57, para. 251.

6 *Ibid.*, p. 58, para. 254.

7 UN General Assembly, 1994.

8 UN Commission on Human Rights, 1995.

9 For a detailed analysis of discussions during these sessions, see Tobin, 2019, pp. 1719-1726.

the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereinafter Optional Protocol).

The Optional Protocol was adopted by the GA in 2000¹⁰ and came into force in 2002. Although its reach falls short of that of the Convention, it is considered one of the most widely ratified international treaties, with 178 States Parties and 7 additional signatories as of mid-2023. Concerning the Convention, the Optional Protocol extends the measures adopted by States Parties to guarantee the protection of child victims from the sale of children, child prostitution and child pornography. The Protocol achieves this, particularly by demanding the prohibition and criminalisation of such practices. The CRC oversees the implementation of the Optional Protocol and is tasked with drafting concluding observations upon receiving comprehensive reports on implementation measures by States Parties (Article 12). In practice, additional monitoring is provided by the Special Rapporteur and Special Representative of the Secretary-General on Violence Against Children, who was appointed by the Secretary-General in 2009 at the request of the GA.¹¹

This chapter focuses on the Optional Protocol and highlights its strengths and limitations. The first part of this chapter addresses the prohibition and criminalisation of the sale of children, child pornography and child prostitution in detail. Additionally, the chapter briefly touches upon the provisions of the Protocol related to sanctions and other substantive issues, jurisdiction, freezing and confiscation of assets, extradition, other instruments of mutual legal assistance, provisions on the rights of child victims and preventive measures. Where applicable, this chapter also points in the direction of international treaties and EU law addressing (at least in part) similar practices, such as the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (Palermo Protocol) and the 2007 CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).

2. Sale of children

Article 2 of the Optional Protocol provides an overarching definition of the sale of children. According to this definition, the sale of children amounts to ‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’. As this definition is rather broad, Article 3 further clarifies which acts constituting the sale of children need to be criminalised by States Parties. This is only the case when a child is offered, delivered, or accepted for sexual exploitation, organ transfer for profit, engagement in child labour, or if an intermediary improperly induces consent for the adoption of a child.

10 UN General Assembly Resolution A/RES/54/263, 25. May 2000.

11 UN General Assembly, 2008, p. 14, para. 58. See also Santos Pais, 2010, p. 558-559.

However, before diving into the intricacies of the above definitions, attention must be drawn to the differences between the sale of children and trafficking of children. The CRC reminds us that a legal definition of trafficking can be found in Article 3 (a) of the Palermo Protocol:¹² ‘recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’.

Comparing both definitions clarifies that some forms of sale of children fall within the scope of the definition of trafficking of children. Trafficking encompasses several forms of child abuse and exploitation, including the sale of children for purposes such as sexual exploitation, prostitution, forced labour and child marriage, to name a few. Nonetheless, a careful reading of Article 2 of the Optional Protocol clarifies that the sale of children differs from this definition of trafficking under the Palermo Protocol.¹³ For example, the criminalisation of child trafficking does not require the exchange of children for payment or profit and is, from this perspective, broader in scope. However, child trafficking offences always require seeking control over another person for exploitation. By comparison, the sale of children under the Optional Protocol does not require such circumstances.¹⁴ For example, this is important under the prohibition of commercial adoption and child prostitution under the Protocol, which needs to be criminalised, even if no elements of achieving control over a child for his exploitation appear to be present.

Furthermore, the obligation to prohibit and criminalise the sale of children under Articles 1 and 3 is more specific and elaborate than the general obligation under Article 34 of the Convention to protect children from exploitative prostitution and pornography, and the obligation under Article 35 to prevent the sale of children. Instead, the Protocol formulates a necessary legal framework to protect child victims through criminal law and provides significant instructions regarding the measures to be adopted to fulfil this obligation. However, as aforementioned, the sale of children under the Protocol only ought to be criminalised when the perpetrator deals with the sale of children for a special purpose (for the purpose of sexual exploitation, transfer of organs for profit, or forced labour) or in cases of commercial adoption. Each of these modes of transfer criminalised under the Optional Protocol is discussed separately in the following sections.

Regarding the *sale of children for sexual exploitation*, the meaning of sexual exploitation should be read together with Article 34 of the Convention, which states that States Parties need to ‘protect the child from all forms of sexual exploitation and sexual abuse’, including the exploitative use of children in prostitution, pornographic

12 UN Committee on the Rights of the Child, 2019b, para 15. A similar definition can be found in Art. 2 of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

13 UN Committee on the Rights of the Child, 2019b.

14 Ibid, p. 5, para. 15.

performances and materials. However, under the Optional Protocol, a child is considered a victim of sale for sexual exploitation only if he is sold to participate in sexual activity in exchange for something (*for a profit or another type of benefit*, or even the promise of such). As argued by Tobin, it is clear that the remuneration condition requires a broad interpretation and includes non-monetary gains, such as the receipt of goods and expectations of future benefits.¹⁵ Therefore, the CRC has recently drawn attention to the fact that the sale of children may also occur in the context of child marriage.¹⁶ Indeed, where the marriage of a child to an adult is accompanied by the expectation of (pre-) adolescent sexual activity, States Parties are undoubtedly obligated to criminalise such practices (even more so in cases where child marriages include dowry payments, bride prices or even transfer of brides to settle family debts).¹⁷

No additional clarification was provided by the Protocol regarding the sale of children for *organ transfer*. However, it is indisputable that the removal must be performed to provide a benefit for a certain party (such as for the parents selling their child or for a third party, such as an intermediary facilitating the transaction), and thus must be distinguished from circumstances where a child's organ is transferred for altruistic reasons (e.g. a child's sibling). The explicit reference to profit in the context of illegal organ transfer, as opposed to a reward or any other form of compensation, as it appears in the general definition of the sale of children, suggests that the definition places a greater focus on finance.¹⁸

Moreover, the sale of children needs to be criminalised when it is performed with the purpose of involving a child in *forced labour*. The definition of the term forced labour is not provided in the Optional Protocol. However, the term could be interpreted in accordance with the 1930 ILO Forced Labour Convention (No. 29), which provides in Article 2 that forced or compulsory labour is to be understood as 'all work or service which is extracted from any person under the menace of any penalty and for which the said person had not offered himself voluntarily'.¹⁹ In this context, children can be sold for domestic services or working in shops and agriculture for little or no money.²⁰ For example, a UK-led investigation found that approximately two-thirds to three-quarters of cannabis farms are run by Vietnamese criminal gangs, who traffic Vietnamese children into the UK to grow drugs under exploitative conditions.²¹

Commercial adoption is perhaps one of the most controversial topics covered under the Optional Protocol. Under Article 3 (1) States Parties need to criminalise the sale

15 Tobin, 2019, p. 1732.

16 UN Committee on the Rights of the Child, 2019b, p. 11, para. 51.

17 Greijer and Doek, 2019, p. 60; Witting, 2022, p. 39.

18 Tobin, 2019, p. 1742; Witting, 2022, p. 39.

19 Exceptions to this rule are provided in Art. 2 of the Forced Labour Convention. They include, *inter alia*, work or services exacted as a consequence of a conviction or in cases of emergency. See Tobin, 2019, p. 1743; Witting, 2022, p. 33.

20 UN General Assembly, 2016, pp. 9-13, paras. 29-49.

21 Daly, 2014, p. 17-18.

of children when it amounts to ‘improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption’. Article 3 (5) further clarifies that States Parties should ‘take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments’.

At least two issues arise from these provisions. First, does commercial adoption always amount to the improper inducement of an incentive for adoption and, therefore, be criminalised altogether? Alternatively, does the Optional Protocol allow exceptions? A major factor behind illegal adoption is the financial gain that can be obtained from procuring children for adoption, particularly intercountry adoption.²² Therefore, it is unsurprising that the CRC assumed the position that improperly inducing consent for adoption always includes doing so through remuneration or any other form of consideration.²³

However, this is not evident from the wording of the Protocol itself, which introduces a somewhat vague standard of inappropriateness rather than using the term ‘through remuneration or any other consideration’. Nonetheless, improper induction of consent should be interpreted in accordance with Article 4 of the 1993 Hague Convention on Protection of Children and Cooperation in respect of the Intercountry Adoption (hereinafter Hague Convention), which does not allow for commercial intercountry adoption.²⁴ This is, at least, the case for States Parties to the Optional Protocol that ratified the Hague Convention and for which this instrument is applicable. It appears reasonable to demand that such countries criminalise all forms of inter-country commercial adoption. Contrarily, this approach does not appear convincing for countries which are not bound by the Hague Convention (such as Bosnia and Herzegovina, Russia and Japan).

As argued by representatives of the US and Japan during the negotiation sessions for the adoption of the Protocol, it is reasonable to believe that, in such cases, the Protocol does not demand a flat-out penalization of commercial adoption.²⁵ Instead, such States Parties to the Protocol may merely be obliged to criminalise the most reprehensible forms of inducing consent for adoption through remuneration.²⁶ Nonetheless, when contemplating the inappropriateness of induced consent, international legal instruments other than the Hague Convention should be considered. For example, the 2008 revised European Convention on the Adoption of Children stipulates in Article 5 (5) that a mother’s consent for adoption cannot be provided until she recovers sufficiently from the effects of giving birth.

The second glaring issue, arising from the wording of the Optional Protocol, is related to the fact that it aims only at intermediaries which facilitate the illicit adoption process. Furthermore, only actions constituting the induction of consent should

22 UN Human Rights Council, 2017, p. 8.

23 UN Committee on the Rights of the Child, 2019b, p. 11, para. 50(a).

24 Ibid, para.50(b).

25 UN Commission on Human Rights, 2000, para. 46-47.

26 Dennis, 2000, pp. 93-94. Cf. Tobin, 2019, p. 1744; Witting, 2022, p. 57.

be criminalised. As pointed out by Witting, this is problematic because ‘there are plenty of other criminal acts committed in the intercountry adoption process, such as the kidnapping of children for the purpose of adoption’.²⁷ Unfortunately, these actions are not covered by the Protocol. Nonetheless, as the Protocol merely sets forth a *de minimis* standard of conduct to be penalised, States Parties may decide to extend these crimes to acts and persons not covered under the Protocol.

Another controversial issue arising from the wording of the Protocol is the issue of *commercial surrogacy*, a practice involving a transaction where the surrogate provides gestational services and a child is then transferred from the surrogate mother to the intended parents in exchange for remuneration beyond the reimbursement of expenses.²⁸ Such transactions inevitably present a real threat to the exploitation and commodification of children and potentially of surrogates.²⁹ Hence, some argue that commercial surrogacy should be prohibited under the Optional Protocol because it constitutes the sale of children.³⁰ Others disagree, arguing that the Protocol clearly does not cover this topic³¹ and that prohibition of surrogacy arrangements conducted abroad is problematic in practice because it inevitably leads to ‘issues surrounding, *inter alia*, rights to identity, access to origins and the family environment for the child’.³² In its Guidelines, the CRC also does not provide a definitive answer to this question, merely indicating that surrogacy *may* constitute a sale of children.³³ Moreover, the national legislation surrounding the issue varies significantly. In many countries, surrogacy is not regulated, with surrogacy arrangements deemed void and unenforceable (e.g. the Czech Republic or Slovenia). Additionally, although some States Parties banned all forms of surrogacy (Germany, France and Italy), others allowed for altruism (Portugal or the UK), and under some circumstances, commercial surrogacy (Russia or some states in the US).³⁴

When interpreting the Optional Protocol regarding the prohibition of commercial surrogacy, the Report of the Special Rapporteur, which contains a thematic study on the surrogacy and sale of children, should be considered. In this report, the Special Rapporteur rightfully argued that ‘commercial surrogacy could be conducted in a way that does not constitute a sale of children if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child’.³⁵

27 Witting, 2022, p. 57.

28 See UN Human Rights Council, 2018, p. 11.

29 Greijer and Doek, 2019, p. 60.

30 See Tobin, 2014, pp. 335-338; Smolin, 2016, pp. 283-284.

31 See Johnson, 2019, pp. 716-718; Michaels, 2022, p. 5.; Gerber and O’Byrne, 2016, p. 97; Luckey, 2011, pp. 236-237.

32 Greijer and Doek, 2019, p. 60. These issues, in particular, potential harm to the right to identity, have also been brought up by the ECtHR in cases *Menesson v. France*, App. no. 65192/11, and *D v. France*, App. no. 11288/18.

33 UN Committee on the Rights of the Child, 2019b, p. 11, para. 52.

34 Witting, 2022, p. 35; Greijer and Doek, 2019, p. 61; UN Human Rights Council, 2018, pp. 4-6, paras. 14-16.

35 UN Human Rights Council, 2018, p. 17.

This involves the discretion of States Parties to prohibit or criminalise altruistic surrogacy and certain types of commercial surrogacy. However, even when the State decides to legalise such practices, the CRC encourages States Parties to appropriately regulate surrogacy to avoid any form of sale of children.³⁶ The existence of such regulatory mechanisms is not to be understated as it is important for the prevention of the sale and exploitation of children in the context of (altruistic as well as commercial) surrogacy.³⁷

3. Child pornography

The Optional Protocol prohibits child pornography in Article 1 and defines it in Article 2 as ‘any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes’. Further, Article 3 requires States Parties to criminalise ‘producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography’.

Although the Protocol presented a significant leap forward in combating child pornography, it left unresolved certain issues regarding the scope of conduct which ought to be criminalised. This subsection examines such challenging areas by first addressing the issue of criminalisation of mere possession of child pornography, and then proceeding to the issue of where to draw boundaries of pornographic material with respect to artistic expressions, animated videos, and materials which are not captured with ill intent, such as family photographs of naked children. Finally, this subsection examines certain types of abusive conduct which are not directly addressed by the Protocol, such as engaging in pornographic performances and witnessing sexual acts by children, grooming, and sextortion.

The most glaring issue arising from the text of the Optional Protocol regarding child pornography is the criminalisation of the mere *possession of pornographic material*. According to Article 3, mere possession of child pornography should be criminalised in cases of possession “for the above purposes” – for purposes of producing, distributing, disseminating, importing, exporting, offering or selling.³⁸ As correctly pointed out in the UNICEF Handbook on the Optional Protocol, this implies that when interpreted strictly, the Optional Protocol does not demand that States Parties criminalise mere possession of child pornography.³⁹ As argued by Tobin, this implies that the focus of the Protocol appears to be ‘on the criminalization of those activities that relate to the creation and dissemination of child pornography rather than its use for

36 UN Committee on the Rights of the Child, 2019b, p. 11, para. 52.

37 Greijer and Doek, 2019, p. 61.

38 In comparison, simple possession ought to be criminalised according to Art. 9 of the CoE Convention on Cybercrime (Budapest Convention) and Art. 20 of the Lanzarote Convention.

39 UNICEF Innocenti Research Centre, 2009, p. 12.

sexual gratification'.⁴⁰ However, this did not stop the CRC from encouraging countries to prohibit and criminalise simple possessions.⁴¹ Nonetheless, although undoubtedly issued with the best intentions, such recommendations are not binding upon States Parties.

Optional Protocol distinguishes between two types of prohibited pornographic material. First, these materials include any representation of a child engaged in real or simulated *explicit sexual activities*. Although the Protocol does not define sexual activity, it is clear that sexual activity is an objective criterion. This implies that the sexual character of the material in question is derived from the material itself and does not depend on the intentions of the person who creates it or otherwise engages in it.

However, the Protocol also considers as prohibited pornographic material any representation of the sexual parts of a child *for primarily sexual purposes*. This definition relies on objective and subjective criteria. Hence, photographs, videos, or other materials which depict a naked child not engaged in sexual activities may be considered child pornography but only insofar as such materials are produced primarily for sexual purposes. Therefore, the Protocol does not extend to the criminalisation of paedophiles engaged in establishing collections and trading objectively innocuous materials which depict children without exposing their sexual parts. Moreover, even collections of photographs of naked children with exposed body parts are not considered child pornography if, for example, they are produced by the child's parent for sentimental reasons (e.g. a family photograph of a naked child in a swimming pool). Therefore, it could be argued that from this perspective, the Protocol was drafted in a rather conservative manner with respect to the nature of the prohibited material. However, some authors emphasise that it would be difficult to formulate viable legislation criminalising all materials that paedophiles and other sex offenders consider erotic.⁴² Therefore, it was prudent for the working group to opt for a definition which did not encourage overcriminalisation in a field as delicate as child pornography.

Another problem arising from the wording of the Protocol is *fictional pornographic material* such as fictional drawings of non-existent children and virtual pornography. According to the Protocol, any representation of a child engaged in real or simulated sexual activities or the sexual organs of children should be considered prohibited child pornography. However, some authors have pointed out that by engaging in fictional drawings or animated materials (for example, *hentai*), perpetrators do not harm the sexual integrity of children.⁴³ Hence, it is controversial whether this Protocol also extends to the prohibition of purely fictional materials.⁴⁴ This is also reflected in the Committee Guidelines, wherein States Parties are merely *encouraged* to extend

40 Tobin, 2019, p. 1745.

41 See for example UN Committee on the Rights of the Child, 2012a, paras. 62-63; Cedrangolo, 2009, p. 9.

42 Gillespie, 2010, p. 30.

43 Ibid., p. 25.

44 Cf. Tobin, 2019, p. 1736, who emphasises that there can be no ambiguity as to whether child pornography under the Protocol also extends to situations involving fictional children.

the criminalisation to non-existing children or persons appearing to be children, ‘in particular where such representations are used as a part of a process to sexually exploit children’.⁴⁵

Nonetheless, the Protocol should at least be interpreted in a manner that does not cover cases where fictional material becomes so abstract, blurred, or cartoonish that it ceases to represent children or even human beings (for example, when fictional beings, such as succubi, demons, or androids, are depicted in a manner that loosely resembles children). As convincingly argued by Witting, ‘the more the material can be qualified as merely “child-like” yet non-human depictions [...] the more likely that freedom of expression/artistic freedom aspects prevail⁴⁶ over the interest to protect children from harm done by fictional child pornography. However, this does not mean that virtual pornography, including VR games that simulate sexual activities with children⁴⁷ and deepfake pornographic material,⁴⁸ never constitutes child pornography. Where such material depicts realistic-looking sexually explicit activity, it clearly falls within the scope of the Optional Protocol.

Additional controversies relate to cases involving *audio or written forms of pornographic material*. Although the Protocol seemingly includes the prohibition of any form of child pornography, States Parties need to consider that banning all books, audiobooks, and other similar materials which contain explicit sexual scenes with children could constitute a breach of freedom of expression. This becomes even clearer when considering that, in many cases, audio and written materials represent artistic expressions.

The boundaries between prohibited child pornography and permissible *artistic expression* are not easy to define. Therefore, it is unfortunate that the Protocol does not address the issue and merely states that any representation of a child engaged in real or simulated explicit sexual activities should be treated as prohibited child pornography. Simulating the sexual activities of (older) children is widely accepted in movies and other art media. For example, the character Rose is believed to be 17 years old in *Titanic*, Jane is 16 years old in *American Beauty* and Dolores is 14 years old in a movie depiction of Nabokov’s *Lolita*. Despite these movies simulating sex scenes involving children, one would be hard pressed to argue that our society would be better off banning them or even prosecuting all those involved in their production and dissemination.

Considering the aforementioned, it becomes apparent that the term *explicit sexual activity* as provided in the Protocol, should be interpreted narrowly. In this respect,

45 Committee on the Rights of the Child, 2019b, p. 13, para. 63.

46 Witting, 2022, p. 48. Cf. Committee on the Rights of the Child, 2012a, p. 12, paras. 62-63, which condemned Austria for not adequately addressing pornographic cartoon representation of children.

47 For an analysis of how adult some VR games are becoming dangerously close to VR pornography, see Esposito, 2019, pp. 1936-1939.

48 For an analysis of synthetic child pornography which can be indistinguishable from traditionally generated images, see Spivak, 2022, pp. 874-879; Olson, 2022, p. 875.

Tobin argues, and rightfully so, that ‘representations which merely imply or are suggestive that a child may be engaged in sexual activity will not fall within the meaning of explicit sexual activity’.⁴⁹ However, even in cases where explicit sexual activity is depicted, the prohibition and criminalisation of child pornography may give way to the protection of artistic expression. The recent book series *A Song of Ice and Fire* as well as the television series *Game of Thrones* spring to mind because they both include several very explicit scenes depicting the sex of underage characters (for example, Daenerys is only 13 years old when consummating her marriage).

Another problem arises when children produce sexual material of themselves. In recent years, the production and sharing of such materials with peers has increased.⁵⁰ The Protocol does not contain any exceptions to the criminalisation of *self-generated sexual content*. This is problematic because, in the majority of States Parties, children are capable of being criminally liable for committing criminal offences, including the production of child pornography.⁵¹ This is problematic because children may be put in a position for being prosecuted instead of being protected for doing something which they (and perhaps even society at large) perceive as socially accepted behaviour, or even where they produce such material under duress or excessive social pressure.

It is perhaps exactly the issue of the criminalisation of self-generated sexual content, where the somewhat excessively paternalistic nature of the Protocol becomes evident. The Protocol eliminates the agency of children (even those with adequate mental capacity) in deciding whether they want to participate in the production and dissemination of such pornographic material. There is no requirement for the representation of a child as exploitative or abusive. This may lead to situations in which a child may be allowed to decide upon entering into a marriage or even opt for sex change therapy but not film himself during sexual intercourse and share his material. As noted by Tobin, such an approach is in stark contrast to Article 34 of the Convention, which is at least able to accommodate and recognise a child’s potentially legitimate use of explicit sexual materials as part of his sexual development (for example, in the context of *sexting*).⁵² Therefore, it should not be surprising that the CRC has been advocating strongly for States Parties to decriminalise the production of self-generated child pornography.⁵³ However, because of the overall welfarist approach and poor wording of the Protocol which does not provide any exceptions regarding such content, it appears that States Parties are, nonetheless, within their full right to extend criminalisation to child perpetrators who produce and disseminate such child pornography.

49 Tobin, 2019, pp. 1738-1739.

50 Witting, 2022, p. 52.

51 However, the exact age from which children acquire criminal responsibility varies widely from state to state and is often debatable in politics, psychology and criminal legal theory.

52 Tobin, 2019, pp. 1735, 1746-1747; Witting, 2022, pp. 52-54.

53 See for example UN Committee on the Rights of the Child, 2019b, p. 13, para. 67.

Nonetheless, in cases where children produce self-generated images because they find themselves under duress or in an abusive or exploitative scenario, criminal sanctioning of such children may be at odds with Article 39 of the Convention. It would be difficult to argue that sending child victims of abuse or exploitation to prison constitutes an appropriate measure ‘to promote physical and psychological recovery and social reintegration’.

Although the Optional Protocol casts a wide net regarding criminalised conduct motivated by paedophilic urges, there are certain predatory activities which fall outside the scope of the Protocol. One example is *grooming* of children to facilitate online (or offline) sexual contact. Another example is *sextortion*, which involves extorting children under the threat of exposure to sexual material depicting the child.⁵⁴ Although this behaviour is not fully covered by the Protocol, it may constitute an attempt to produce child pornography. It is clear that, according to the Protocol, such attempts need to be criminalised by States Parties. Similarly, *revenge pornography* is covered by the Protocol when the disseminated material is classified as child-related pornography.⁵⁵

Under child pornography provisions, the Protocol only addresses *representations* (depictions or portrayals) and not the direct involvement or abuse of children in sexual activities. This implies that despite the CRC encouraging States Parties to criminalise the intentional cause of children witnessing sexual activities for sexual purposes,⁵⁶ such conduct is clearly not covered by the Protocol. The involvement of children in live sexual performances which are not recorded, but rather enjoyed by the audience in a live session is more ambiguous. Although this is not readily evident from the wording of the Protocol, the narrative is being pushed that live performances also constitute child pornography, and are therefore, prohibited by the Protocol.⁵⁷

Although pushing for criminalisation of such conduct certainly appears reasonable, it nonetheless falls outside the scope of the Protocol when it does not constitute the sale of children or child prostitution. It would be difficult to argue that attending a live performance in any way constitutes producing, distributing, disseminating, importing, exporting, offering, selling, or possessing such a live performance. In the context of digitalised child pornography, this limitation has become even more evident with a growing number of cases involving *live streams* of online child pornography. As pointed out by Witting, accessing child pornography material online cannot reasonably be interpreted as possessing such material.⁵⁸ Hence, in stark contrast to

54 See Greijer and Doek, 2019, pp. 71-72.

55 For more on revenge pornography, see Šepec and Lango, 2020.

56 UN Committee on the Rights of the Child, 2019b, p. 14, para. 70. However, in contrast to Art. 22 of the Lanzarote convention, Guidelines fail to make a distinction between children above or below the age of sexual consent. Greijer and Doek, 2019, p. 72.

57 UNICEF, 2009, p. 12; Tobin, 2019, p. 1736; Committee on the Rights of the Child, 2019b, p. 13, para. 64.

58 Witting, 2022, pp. 58-59.

Article 20 of the Lanzarote Convention, live streaming of child pornography falls outside the prohibition of child pornography.

Furthermore, the Protocol does not demand penalisation for the production and dissemination of material *advertising* involvement in child pornography.⁵⁹ Instead, Article 9 merely obliges States Parties to implement appropriate measures to effectively prohibit the production and dissemination of such materials. Nonetheless, the CRC regularly encourages States Parties to criminalise advertising of practices prohibited by the Protocol.⁶⁰ Moreover, in some States Parties, such advertising could already be criminalised, as it could constitute an attempt (for example, if advertising to children paid involvement in the production of pornographic material) or an instigation to commit a criminal offence (where such instigation is not limited to perpetrators already having a specific instigated person(s) in his mind).

Finally, it is noteworthy that the question of the *maximum age for the protection of children* from pornography emerged as one of the most pressing issues during the drafting of the Protocol.⁶¹ During the drafting procedure for the Protocol, several Western delegations proposed to allow for a protection age lower than 18 years. However, the US, Canada, Italy, and several developing countries advocated precluding the possibility of a person under the age of 18 years consenting to involvement in child pornography.⁶² As a compromise, the final version of the Protocol completely omitted any reference regarding the age of protection or the age of consent. Hence, for the majority of States Parties, the Protocol needs to be interpreted as offering protection to *children* as defined in Article 1 of the Convention. This implies that the Protocol extends to every human being below the age of 18 years, except in cases where, according to national law, the majority is attained earlier.

This approach has two problems with respect to harmonising child pornography offences. At first glance, it is clear that in States Parties where children attain the majority at a comparatively early age (for example, 15 years for boys and 9 years for girls in Iran⁶³ or 16 years for married girls in Indonesia⁶⁴), the extent to which the Protocol protects them is limited in comparison to their peers in other countries who attain the majority at 18 years.

However, there is an additional problem. Following a heated discussion between delegations which almost threatened to derail the adoption of the Optional Protocol,⁶⁵ finally, it was stated in Article 13 that the Protocol is open to signature and ratification by any State that is either a party to the Convention or has signed it.⁶⁶ However, this compromise does now provide a clear answer regarding the question of how to treat

59 Tobin, 2019, p. 1741.

60 UN Committee on the Rights of the Child, 2019b, p. 13, para. 66.

61 Dennis, 2000, p. 794.

62 UN Commission on Human Rights, 1998, paras. 42-43.

63 UN Committee on the Rights of the Child, 2016a, p. 5, paras. 27-28.

64 UN Committee on the Rights of the Child, 2014, p. 3, paras. 9-10.

65 Tobin, 2019, p. 1783; UN Commission on Human Rights, 2000, paras. 32-34, 53, 60.

66 Dennis, 2000, pp. 795-796.

States Parties to the Protocol, such as the US which has merely signed but has not yet ratified the Convention. According to Article 14 of the 1969 Vienna Convention on the Law of Treaties, the consent of a State to be bound by a treaty is expressed by ratification when, for example, the representative of the State has signed a treaty subject to ratification. In such cases, a State merely expresses its intention to comply with a treaty by signing it. However, the expression of intent is not binding. This means that signing the Optional Protocol does not automatically entail States Parties assuming any obligations under the Convention. Hence, States Parties who have not yet expressed their consent to be bound by the Convention are also free to interpret the term *child* differently from the Convention. In theory, this would allow the US to limit the protections granted by the Protocol to persons below (or even over) the age of 18 years and decouple it from the age of the majority.

Although States Parties such as the US, Iran and Indonesia may be encouraged to extend protection to all children below the age of 18 years, they are not obliged to do so. This presents a liability for the harmonisation of child pornography legislation and the smooth functioning of cross-border cooperation which could have been avoided if the delegations had been able to find a solution regarding the maximum age for protection when drafting the Protocol.

4. Child prostitution

In comparison to the sale of children and child pornography, the obligation of States Parties to criminalise child prostitution is prescribed in the Optional Protocol more concisely. It prohibits child prostitution in Article 1 and defines it in Article 2 as ‘the use of a child in sexual activities for remuneration or any other form of consideration’. Furthermore, Article 3 requires States Parties to criminalise ‘offering, obtaining, procuring or providing a child for child prostitution’.

However, the Protocol does not define *sexual activities*. Nonetheless, sexual activities do not require penetration.⁶⁷ In the CRC Guidelines, sexual activities are defined as all forms of sexual intercourse and intentional sexual touching involving children, independent of the sex of all involved persons and any lascivious exhibition of the genitals or pubic area of children.⁶⁸ Although this definition is certainly helpful in the drafting of harmonised national legislation, it is not, in any way, binding upon States Parties.

Sexual activities with minors are not covered by the Optional Protocol’s prohibition of child prostitution, unless sexual activities are obtained for remuneration or any other form of consideration. Although any form of payment to either the child or another person can be interpreted as remuneration, it is less clear which other forms of consideration should be taken into account. Hence, the Optional Protocol

67 Witting, 202, p. 40; Greijer and Doek, 2019, p. 61.

68 UN Committee on the Rights of the Child, 2019b, p. 11, para. 53.

extends to sexual activities which differ from the classical example of sex provided in exchange for monetary compensation.⁶⁹ Hence, the CRC Guidelines provide an example of a child being provided with food or shelter as compensation.⁷⁰

However, it is less clear how to deal with cases in which the reward has no tangible monetary value, such as elevated social status or mere praise of the child. Although the CRC seemingly pushes for an interpretation which includes sexual activities for such rewards (including various types of *commodified relationships*) as criminalised under the Protocol,⁷¹ caution is advised. In many States Parties, minors below the age of 18 years are allowed to legitimately pursue sexual activities and relationships, even with adult partners at similar mental developmental stages (e.g. a 19-year-old man may be allowed to pursue a relationship with a 17-year-old girl). Involvement in such relationships may naturally include benefits and rewards such as elevated social status and even certain reasonably modest monetary benefits for the involved child. However, it would be a stretch to push for the criminalisation of such relationships under the prohibition of child prostitution legislation by claiming that such relationships are *always* exploitative or abusive. Completely banning (older) children from pursuing sexual activities and relationships for social and even modest monetary benefits (such as small gifts between partners) may be at odds with Article 6 of the Convention which stipulates that States Parties should ensure the development of the child to the maximum extent possible.

As pointed out by Tobin, the fact that the Protocol demands that a child be *used* in sexual activities should not be interpreted as a requirement for such use to be exploitative or unlawful in nature.⁷² Contrarily, although some delegations during the course of the drafting procedure argued for the alignment of the Protocol with Article 34 of the Convention which calls for the prevention of the *exploitative* use of children in prostitution,⁷³ the welfarist approach resting upon the assumption that even an older child can never consent to prostitution prevailed.⁷⁴ This is important for States Parties, where the age of consent is set below the age of the majority (for example, at 15 or 16 years, while the majority is mostly attained at 18 years). The CRC consistently reminded States Parties that the criminalisation of child prostitution should not depend on the age of consent.⁷⁵ Moreover, not limiting criminalisation to exploitative child prostitution leaves no doubt that various forms of online, commercialised child prostitution are prohibited under this Protocol. This also applies to subscriber-only websites which offer sex workers a fair amount of autonomy and protection, such as OnlyFans.⁷⁶

69 Cedrangolo, 2009, p. 7.

70 UN Committee on the Rights of the Child, 2019b, p. 13, para. 5

71 *Ibid.*, p. 12, para. 58.

72 Tobin, 2019, p. 1734.

73 See for example UN Commission on Human Rights, 1998, para 43.

74 Tobin, 2019, pp. 1732-1733.

75 Cedrangolo, 2009, p. 8.

76 Witting, 2022, p. 42.

Although it is clear that offering child prostitution should be criminalised for intermediaries, there is less clarity regarding the criminalisation of (older) children who offer sexual activities out of their own accord or without any intermediaries. Although the CRC condemns the criminalisation of children involved in prostitution,⁷⁷ the Protocol itself does not address this issue. As argued above, in the context of child pornography, this position is only defensible in the context of child victims forced into child prostitution of an exploitative or abusive nature. Punishing child victims is contrary to Article 39 of the Convention. However, in cases where, for example, a 17-year-old decides to offer live sexual content to paying customers via OnlyFans to afford a new iPhone or simply to boost her social standing with her peers,⁷⁸ the Protocol cannot be read in a manner that stands in the way of criminalisation. Simply put, although such offering of sexual content may count as child prostitution within the meaning of the Protocol, the 17-year-old does not necessarily count as a child victim of exploitation or abuse within the meaning of the Convention.

Finally, the issue of sexual exploitation of children in *travel and tourism* is typically mentioned within the context of child prostitution.⁷⁹ Although this phenomenon is not mentioned in Articles 1, 2, and 3 as a separate criminal offence, its importance for the development of the Protocol continues to be reflected in the preambulatory clauses and Article 10 on international cooperation. Nonetheless, the CRC encouraged multiple States Parties to criminalise such conduct as a separate criminal offence.⁸⁰ As argued by Witting, such an approach is not necessary, since the sexual exploitation of children in travel and tourism is already covered by the obligation to criminalise the sale of children, child pornography and child prostitution.⁸¹

5. Sanctions and other substantive issues

Regarding issues usually discussed within the framework of the General Part of substantive criminal law, the Protocol is, unsurprisingly,⁸² rather sparse. Nonetheless, some attention has been paid to the issues of adequate sanctioning and liability of legal persons. The Protocol included attempts, complicity and participation. This subsection briefly discusses provisions addressing these issues.

According to Article 3 (2), *attempts* as well as complicity and participation need to be fully covered under the criminal law provisions of States Parties. The Protocol

77 See for example UN Committee on the Rights of the Child, 2012b, p. 7, paras. 27-28. See also UNICEF Innocenti Research Centre, 2009, pp. 11-12; Tobin, 2019, pp. 1733-1734.

78 Regarding the problem of glamour being associated with some forms of child prostitution, see Greijer and Doek, 2009, p. 18.

79 See for example UN Committee on the Rights of the Child, 2019b, p. 12, para. 59.

80 See for example UN Committee on the Rights of the Child, 2019a, p. 3, paras. 9-10.

81 Witting, 2022, pp. 43-44.

82 On the lack of consensus to harmonise general principles of substantive criminal law in the European context, see Stajanko, Šepec and Weingerl, 2023, pp. 225-227.

does not define these terms and leaves them to national law to allow the Protocol to be compatible with the widest possible number of legal systems. However, this does not mean that States Parties are completely free to interpret the said offences as they please. For example, the CRC Guidelines state that promising remuneration for sexual activity with a child should be criminalised under the Protocol.⁸³ In most States Parties, such offering of monetary compensation in exchange for sex would be criminalised as an attempt to engage in child prostitution if it did not lead to sexual activity.

In continental legal systems, the notion of *participation* in criminal law usually includes various forms of multiple principal offenders committing a crime, as well as principals by proxy, *aiding* (helping), and *abetting* (encouraging).⁸⁴ However, the Explanatory Report of Committee Guidelines offers a different explanation for Article 3 (2). Within the meaning of the Protocol, participation is supposed to be understood in terms of co-perpetrators who should be punished as perpetrators if the charges are proven. However, complicity must be understood in terms of aiding and abetting.⁸⁵

The Protocol does not specify the type or severity of *sanctions* to be imposed. Instead, it merely stipulates in Article 3 (2) that States Parties ought to make the offences ‘punishable by appropriate penalties that take into account their grave nature’. This provision allows States Parties to have a significant degree of discretion regarding the form and severity of imposed sanctions.⁸⁶ Nonetheless, imposed sanctions cannot be as mild as not to reflect the serious nature of offences which ought to be criminalised under the Protocol. For example, the commission, in its concluding observations, emphasised that mere financial penalties and short-term imprisonment are worrisome.⁸⁷ On the other side of the spectrum, a concern has been voiced that some States Parties interpret this provision as encouraging capital punishment for the sale of children, child prostitution, and child pornography.⁸⁸ Surprisingly, the CRC missed the opportunity to address this issue in its Committee Guidelines. This may even be interpreted by proponents of capital punishment as a tacit concession that this form of sanctioning may be deemed appropriate under the Protocol.

Regarding the *liability of legal persons* for offences established under the Optional Protocol, Article 3 (4) stipulates that subject to national provisions, States Parties need to take measures, where appropriate, to establish the liability of legal persons for such offences, whereby such liability may be criminal, civil or administrative in nature. Although this clause provides States Parties a good measure of discretion regarding its implementation, it does not mean that they can invoke national law to render this obligation meaningless.⁸⁹ In General Comment No. 16, the CRC encourages

83 Committee on the Rights of the Child, 2019b, p. 12, para. 56.

84 Bohlander, 2009, pp. 153-155.

85 Greijer and Doek, 2019, p. 55.

86 Tobin, 2019, p. 1748.

87 UN Committee on the Rights of the Child, 2012c, p. 6 para. 26.

88 Cedrangolo, 2009, p. 11.

89 Tobin, 2019, pp. 1749-1750.

States Parties to opt for criminal liability of legal entities in cases concerning serious violations of the rights of the child. Where the criminal liability of legal persons is not foreseen in the national legal order, the CRC recommends any other form of legal liability with comparable deterrent effects.⁹⁰

In some States Parties, statutes of limitation are considered (at least partly) substantive in character, and are therefore addressed in this subsection. Although the Optional Protocol does not address temporal limitations, the CRC in its Guidelines recommends that States Parties not just extend but completely abolish them in relation to child pornography, child prostitution and the sale of children.⁹¹ Although this recommendation was certainly provided with the best intentions, it fails to recognise that the reasons why statutes of limitation are provided in national legislation do not necessarily wither away, simply because the court is dealing with crimes such as the sale of children.⁹² Moreover, it would be out of place if killing a child or intentionally causing him to become paraplegic was covered by the statute of limitation, while forcing him to work in a family-owned restaurant was not. Hence, it appears more reasonable to adjust the statutes of limitation to the nature of the crime, particularly by ensuring that they begin to run only when the victim reaches the majority.⁹³ This enables the victim to report the crime when he reaches the appropriate age and stage of mental development.

6. Jurisdiction

Rules on jurisdiction are widely perceived to have a dual procedural and substantive character,⁹⁴ and are therefore addressed in this subsection. The Optional Protocol does not address this duality of rules concerning the applicability of national substantive criminal law and the competence of national courts. Instead, Article 4 (1) tackles jurisdiction by first stressing that States Parties need to take measures that may be necessary to establish their jurisdiction following the traditional principle of territorial jurisdiction. Article 4 (2) further allows (but does not oblige) States Parties to prosecute offences covered by the Protocol regarding active (according to the nationality of the habitual residence of the offender) and passive (according to the nationality of the victim) personality principles of extraterritorial jurisdiction.⁹⁵

Contrarily, Article 4 (3) obliges (and not merely allows) States Parties to establish their jurisdiction when the alleged offender is present in their territory, and they do not extradite him to another State Party on the grounds that the offence was committed by one of its nationals, regardless of where such a crime was committed.

90 UN Committee on the Rights of the Child, 2016b, p. 19, para. 70. See also Witting, 2022, p. 62.

91 *Ibid.*, p. 17, para. 95.

92 Cf. Shinton, 2017, pp. 332-336, and Leibowitz, 2003, pp. 936-941.

93 UN Committee on the Rights of the Child, 2019b, p. 17, para. 95.

94 Satzger, 2017, p. 8, para. 3.

95 Tobin, 2019 p. 1754; Vandenhole, Türkelli and Lembrechts, 2019, p. 447.

This obligation should be read closely alongside Article 5 (5), which further establishes the *aut dedere aut iudicare* principle and forces the State Party to adopt suitable measures to prosecute if it does not want to extradite the offender. Although this solution could be considered as a savings clause prohibiting States Parties from acting as safe havens for nationals involved in sex tourism and other cross-border offences, it falls short of its obligation to assert universal jurisdiction regarding offences covered by the Protocol.⁹⁶

As noted above, according to the Optional Protocol, States Parties are not strictly obliged to establish a legal framework for extraterritorial jurisdiction according to active and passive personality principles. However, the CRC in its Guidelines instead assumed the position that States Parties *should* establish their jurisdiction over such offences.⁹⁷ Furthermore, the Commission regularly opposes limiting the applicability of national legislation implementing offences with a double criminality constraint, which often serves as a barrier to extraterritorial jurisdictions.⁹⁸ Nonetheless, the only tangible obligation of States Parties to establish extraterritorial jurisdiction under the Optional Protocol remains Article 4 (3) under the *aut dedere aut iudicare* condition.

7. Seizure and confiscation

Under Article 7 (a), States Parties must provide for the seizure and confiscation of goods, assets and other instrumentalities used to commit or facilitate offences covered under the Protocol, as well as the proceeds of crime. Moreover, according to Article 7 (c), they need to adopt measures aimed at closing premises used to commit such offences on a temporary or definitive basis. It is up to States Parties to decide if such measures are of a substantive or procedural nature, whether they are considered a punishment or a protective (security) measure, and whether they are considered instruments of criminal, administrative or even civil law (for example, in Slovenia, the state prosecution may strive to confiscate assets of illicit origin in a special type of civil proceeding).

Surprisingly, the Optional Protocol does not extend to the freezing of assets. As freezing orders go hand-in-hand with efficient confiscation measures, this appears to be a missed opportunity. Simultaneously, it could be argued that providing adequate freezing measures is a key preventive measure in the sense of Article 9 of the Optional Protocol, and should therefore be implemented by States Parties.

⁹⁶ Ibid, p. 1756.

⁹⁷ Compare with UN Committee on the Rights of the Child 2019b, p. 15, para. 82, which assumed the position that States Parties *should* establish their jurisdiction over such offences.

⁹⁸ See for example UN Committee on the Rights of the Child, 2019a, p. 6, para. 29; UN Committee on the Rights of the Child, 2017, p. 18, para. 69.

8. Extradition treaties and mutual legal assistance

In Article 5, the Protocol aims to address various issues that arise in the context of extradition proceedings. First, it stipulates in Article 5 (1) that offences covered by the Protocol need to be treated as extraditable offences in any existing extradition treaty between States Parties. It further imposes on states that parties include extraditable offences in every extradition treaty that is subsequently concluded. According to Article 5 (3), even when no treaty exists between States Parties, they need to recognise such offences as extraditable. However, this obligation does not extend to attempts, complicity and participation in such crimes.⁹⁹

The extradition procedure is further simplified by the fiction of *locus delicti*, as Article 5 (4) obliges member states to treat offences covered by the Protocol as if they were committed in the territory of the requesting state, even if this is not the case. This fiction is important when one of the conditions for extradition is the requirement that the offence occurs in the requesting state.¹⁰⁰

The Optional Protocol aims to not only simplify the extradition procedure but also facilitate the use of other instruments of mutual legal assistance between States Parties. Hence, Article 7 (b) stipulates that States Parties need to execute requests from other States Parties for the seizure or confiscation of assets or proceeds of crime. Furthermore, according to Articles 6 and 10 (1), they need to afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings and strengthen international cooperation by international arrangements for detection, investigation, prosecution and punishment of crimes covered under the Protocol.

9. Protecting the rights of child victims

The Optional Protocol devotes a large portion of its text to provisions aimed at making the criminal justice systems of States Parties more accessible and welcoming for children. In this regard, Article 8 (1) obliges them to design criminal procedures in a manner that protects the rights and interests of child victims of crimes covered under the Protocol, whereas Article 8 (3) calls for the best interest of the child to be a primary consideration in criminal procedures involving child victims. Adequate support needs to be provided throughout the legal process, and the special needs of such children should be recognised, including when they appear as witnesses. In general, unnecessary delays should be avoided, and the CRC recommends the fast-tracking of cases involving child victims.¹⁰¹ In addition, where appropriate (e.g.

99 Witting, 2022, p. 67.

100 Tobin, 2019, p. 1758.

101 UN Committee on the Rights of the Child, 2019b, p. 18, para. 98.

where there is a risk of exposure to intimidation and retaliation), protective measures ought to be applied to safeguard children's privacy and identity and ensure the safety of such children and their families. Additionally, the right to be informed and heard must be granted to children involved in the criminal justice process, regardless of whether they have legal capacity.¹⁰²

Another clause aimed at protecting the rights of child victims in criminal procedures relates to uncertainty regarding the victim's age. As pointed out by Witting, legal identity documents are an important precondition for many children to access the justice system; without those documents, they may not be considered children.¹⁰³ Hence, Article 8 (2) of the Optional Protocol obliges States Parties to ensure that uncertainty regarding the actual age of a victim does not prevent the initiation of criminal investigations. In practice, this means that persons such as migrants without documents should be given the benefit of doubt and treated as children (at least for criminal investigation of offences covered under the Protocol) when no conclusive results regarding their age can be reached using standard assessment methods.¹⁰⁴

Other obligations of States Parties include the need to implement all feasible measures to ensure the social reintegration and full recovery of child victims, and provide adequate procedures to seek compensation for damages, as provided in Articles 9 (3) and (4). Finally, Article 8 (4) demands that States Parties provide special training for persons working with child victims. Such persons include not only police, state prosecutors, judges, and other practitioners involved with child victims in the course of the criminal procedure, but also those who work with children during reintegration and compensation procedures.

The scope of this chapter does not address the complexities of all provisions relating to the protection of the rights of child victims and their implementation in national legal systems in detail. Nonetheless, it is noteworthy that provisions of the Optional Protocol on the rights of child victims should be implemented and interpreted in accordance with the ECOSOC Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, which 'set forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles'.¹⁰⁵ Additionally, best practices were gathered and recommendations focusing on the reparation of child victims were drafted by the Special Rapporteur.¹⁰⁶

102 Witting, 2022, p. 76.

103 *Ibid.*, p. 80.

104 *Ibid.*

105 ECOSOC, 2005.

106 UN Human Rights Council, 2023, pp. 18-20.

10. Preventive measures

Although criminalising certain conduct and punishing offenders is linked to general prevention (deterrence), this is arguably not the only or even the most effective means of tackling criminal behaviour on a societal scale.¹⁰⁷ This has been acknowledged in the Optional Protocol, which stipulates in Article 9 (1) that States Parties shall strive to prevent the sale of children, child prostitution, and child pornography by using legislation, administrative measures, social policies, and programmes. The Protocol does not necessarily contain any new obligations aimed at preventive action which are not already expressly or implicitly imposed on States Parties by the Convention (primarily by Articles 34 and 35), for which it has been heavily criticised.¹⁰⁸ Indeed, as argued by Todres, the Convention itself already imposes a mandate on States Parties ‘to address the causes of children’s vulnerability and prevent all forms of child exploitation’.¹⁰⁹ However, the Protocol could continue to be considered as a means of affirming and codifying such obligations in a more detailed and unambiguous manner.¹¹⁰

According to the CRC, special attention is to be accorded by States Parties to underlying causes of problems addressed by the Protocol, ‘which may serve to foster, normalize or perpetuate them’.¹¹¹ Such root causes may include poverty, underdevelopment and cultural stereotypes which contribute to the abuse and exploitation of children.¹¹² Additionally, the CRC drew attention to the need to implement measures which specifically target sex offenders and economic profiteers, who drive the demand for the abuse and exploitation of children.¹¹³

Furthermore, adequate attention should be paid to children who are at risk of falling victim to offences covered by the Protocol. The CRC stressed the need to identify, support and monitor such children; provide social protection and financial support to vulnerable families; and prevent harmful practices which expose children to situations where they are at risk, such as child marriages.¹¹⁴

Other measures include raising awareness and dissemination activities, as stipulated in Article 9(2). Such measures should primarily target the general public but may also include comprehensive sex and online safety education for schoolchildren,¹¹⁵

107 On the primary prevention which concerns pre-event strategies tackling online child sexual abuse and exploitation, see Quayle and Koukopoulos, 2019, p. 351-354.

108 Maxwell, 2023, pp. 70-71.

109 Todres, 2017, pp. 91-92.

110 Tobin, 2019, p. 1773.

111 UN Committee on the Rights of the Child, 2019b, p. 8, para. 32.

112 Cedrangolo, 2009, p. 12; Tobin, 2019, p. 1774.

113 UN Committee on the Rights of the Child, 2019b, p. 8, para. 32.

114 *Ibid.*, para. 33.

115 Regarding the importance of empowering children to develop relevant self-protection skills see Maxwell, 2023, p. 76.

as well as the training and support of relevant professionals, families and caregivers.¹¹⁶ Moreover, the CRC pointed out that specialised training for law enforcement officials, lawyers, and state prosecutors and judges would be beneficial, particularly in the context of preventing online sales and sexual exploitation of children.¹¹⁷

Finally, the Protocol also stresses in Article 10 (1) the importance of international cooperation in preventing prohibited practices, with special emphasis given in Article 10 (3) on cooperation to address root causes such as poverty and underdevelopment. More specifically, Article 10 (4) stipulates that States Parties in a position to do so should provide financial, technical, or other assistance to developing nations. Although all the obligations under Article 10 are rather vague and cannot constitute a legal obligation of States Parties to cooperate or provide support in specific cases, they remain important tools for invoking political pressure on States Parties not contributing to the global prevention of practices prohibited under the Protocol.¹¹⁸

11. Discussion

The Optional Protocol is one of the most important international treaties for protecting children against abuse and exploitation. Simultaneously, it is plagued by imprecise definitions and omissions which can lead to the uneven protection of child victims across various jurisdictions. However, it also pushes towards overcriminalisation beyond conduct constituting the exploitation or abuse of children.

One of the more glaring issues spanning across all crimes is the lack of the definition of a child, allowing States Parties to set the maximum age for protection below 18 years. Regarding the sale of children, criminalisation of commercial adoption appears surprisingly limited and, for example, does not cover the kidnapping of children for adoption. However, an open-ended definition of the sale of children sparked a fiery debate regarding the prohibition of commercial surrogacy under the Protocol. Regarding child pornography, a similar debate ignited concerning the treatment of virtual pornography and artistic expression – topics not addressed under the Protocol. Other peculiar omissions include the exclusion of freezing measures from provisions dealing with the confiscation of assets, whereas provisions for prevention measures appear particularly vague.

Although many of these issues can be resolved by providing guidelines, recommendations, and handbooks to States Parties, others cannot. Two more glaring examples are the aforementioned issues of commercial surrogacy and virtual pornography. Sometimes, subject matter which may potentially fall within the scope of the Optional Protocol was not necessarily initially intended to be covered by its

116 UN Committee on the Rights of the Child, 2019b, p. 7-8, para. 28-29; Greijer and Doek 2009, p. 20.

117 *Ibid.*, p. 9, para. 39.

118 Tobin, 2019, p. 1782.

provisions. Simultaneously, the prohibition and criminalisation of certain practices may far exceed the fight against child exploitation and could instead be related to the protection of interests other than those of children. This is the case with respect to the criminalisation of dealings with fictional and overly cartoonish drawings of naked children (where merely public morality may be at stake) or adequately regulated commercial surrogacy (where the chief legally protected interest at risk is the dignity of the surrogate mother).

In such cases, it is unreasonable to overextend the scope of the Optional Protocol. Instead, this appears to be fertile ground for the international community to advocate for fresh international legal frameworks to address these issues. It has been argued that there is a desire and willingness to propose an international convention on intercountry surrogacy.¹¹⁹ In 2022, the HCCH working group produced a report arguing for the desirability and general feasibility of such a binding legal instrument.¹²⁰ Furthermore, the EC included surrogate-born children within the scope of the latest proposal for regulations on the recognition of parenthood in the EU.¹²¹ Such an approach would certainly benefit the international community more than interpretative *salti mortali* aimed at extending criminalisation and prohibition under the Protocol increasingly further away from practices constituting the exploitation or abuse of actual children.

119 Mohapatra, 2016, p. 32. Cf. Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60, 15 January 2018, pp. 6-7, paras. 20-21.

120 HCCH Parentage / Surrogacy Experts' Group, 2022, p. 49, paras. 164 and 167.

121 Tryfonidou, 2023, pp. 95-97.

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- Greijer and Doek, (2019), p. 60. These issues, in particular, potential harm to the right to identity, have also been brought up by the ECtHR in cases *Mennesson v. France*, App. no. 65192/11, and *D v. France*, App. no. 11288/18.
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Optional Protocol on the Involvement of Children in Armed Conflict

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ABSTRACT

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict is a legal instrument aimed at prohibiting the recruitment and use of children in armed hostilities. This chapter provides a historical and legal analysis of the Protocol, exploring its evolution, core provisions, and implementation challenges. The discussion begins by contextualizing the Protocol within two primary international legal frameworks: international humanitarian law and international human rights law. These frameworks, including the Geneva Conventions, the Convention on the Rights of the Child (CRC), and the Rome Statute, establish the minimum standards for protecting children in armed conflicts. Specific attention is given to the Protocol's Articles 1-13, which address the prohibition of child recruitment by both state and non-state entities, establish the minimum age for voluntary and compulsory recruitment, and mandate the demobilization and rehabilitation of former child soldiers. The chapter critically examines the Protocol's limitations, including its non-absolute language and its focus on "direct" rather than "indirect" participation in hostilities, which could allow for the indirect involvement of children in conflict-related activities. The analysis also underscores the essential role of the Committee on the Rights of the Child and civil society in ensuring compliance with the Protocol's standards and promoting its universal ratification. Despite these achievements, ongoing armed conflicts highlight the persistent challenges in safeguarding children's rights, necessitating an intensified commitment to enforcing and strengthening international legal standards.

KEYWORDS

Optional Protocol, child soldiers, armed conflict, international humanitarian law, children's rights, CRC, non-state armed groups, demobilization, international human rights law

1. Introduction

Before examining the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, it is essential to note that the legal protection of children during armed conflicts is primarily outlined in two separate bodies of international law: international humanitarian law and international human rights law.

International humanitarian law includes the four Geneva Conventions of 1949 and two Protocols from 1977, supplementary to the Conventions. The Geneva Conventions and their Additional Protocols provide minimum standards of protection and humane treatment for civilians who become victims of armed conflicts, including general protection and provisions explicitly related to children. The protection enshrined in the Convention and Protocols is derived from the vital principle of international humanitarian law: the distinction between civilian objects and military objectives (i.e. legitimate and illegitimate targets).¹ This wartime protection is binding to state entities and non-governmental armed groups. As it relates to the treatment of children, the key Convention is the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which, beyond general protective measures for civilians, offers special protection to children across its 17 articles.² It was drafted after one of the darkest chapters in history, the Second World War. The incomprehensible tragedy the War brought into the lives of millions of children worldwide has left its mark on the text of the Convention. The Second World War cruelly victimised children, as their innocence and vulnerability made them particularly susceptible to the hardships inflicted on them. This transgression against one of humanity's most sacred principles—the protection of children who represent our future—left an enduring mark on the collective conscience of humanity. Legally safeguarding children became a paramount concern in the postwar period, prompting the inclusion of child protection provisions in the Geneva Convention relating to civilians. International Humanitarian Law extends its protective measures to children through three fundamental approaches. First, it acknowledges the imperative of affording special safeguards to children owing to their young age, which has become a customary international legal norm. Second, it raises concerns about the involvement of children in military operations. Third, it considers the immaturity of children when they commit offences during armed conflicts. This legal framework differentiates combatants

1 Article 48 of the 1977 Additional Protocol I provides: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between (...) civilian objects and military objectives'. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, Article 48.

2 Articles 14, 17, 23 to 27, 40, 50, 51, 68, 76, 81, 82, 84, 89 and 132 of the Convention. International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

from non-combatants. The Third Geneva Convention, which focuses on the care and safeguarding of prisoners of war, stipulates that prisoners of war should receive equal treatment from detaining powers, with allowances for potential privileged treatment based on factors such as age, among other criteria (Article 16). Moreover, the detaining power may use the labour of physically fit POWs, considering various criteria, including age (Article 49). Notably, there is no specific age limit for prisoners of war under the Third Geneva Convention, however, age can warrant special treatment because of children's unique vulnerabilities. Recognising the distinct vulnerabilities of children, the Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 established a comprehensive set of rules to grant special protection to children. More importantly, children who directly participate in hostilities remain entitled to this special form of protection.

International human rights law includes a range of specialised treaties that are particularly relevant to safeguarding children in armed conflicts. The International Covenant on Civil and Political Rights includes various rights such as the right to life and freedom from slavery, torture, and arbitrary arrest. The International Covenant on Economic, Social, and Cultural Rights acknowledges rights to food, clothing, housing, health, and education. The Convention on the Elimination of All Forms of Discrimination against Women is particularly significant. Additionally, there are treaties that address specific themes or groups that include issues such as genocide, torture, refugees, and racial discrimination. In the context of this book, the most notable specialised treaty is the Convention on the Rights of the Child. International human rights law, as embodied in the Convention on the Rights of the Child (CRC) of 1989 and its subsequent Optional Protocol on the Involvement of Children in Armed Conflict (CRC-OP-CAC) of 2000, emphasises safeguarding children from the repercussions of armed conflicts. The CRC-OP-CAC outlines important provisions, such as setting the age limit for compulsory recruitment and direct participation in hostilities at 18 years of age, and mandates that States Parties raise the minimum age for voluntary recruitment to at least 16 years. It unequivocally forbids insurgent armed groups from recruiting individuals under 18 years or involving them in hostilities. Furthermore, the Rome Statute of the International Criminal Court (ICC) introduced a mechanism for holding individuals accountable for war crimes, crimes against humanity, and genocide, specifically focusing on crimes affecting children. For instance, the Statute designates the conscription, enlistment, or use of children under the age of 15 years in both international and internal armed conflicts as war crimes. Together, the CRC, CRC-OP-CAC, and Rome Statute have reinforced the global framework for safeguarding children in armed conflicts.

In international human rights law, the primary obligation to uphold human rights falls on States. This responsibility stems from their exclusive ability to become contractual parties to relevant treaties. Consequently, even sizable influential opposition groups cannot be directly bound by the provisions of human rights treaties. However, it is noteworthy that a reverse dynamic exists regarding the application of international humanitarian law to non-state entities during conflict.

This apparent inconsistency between these legal frameworks highlights that, for practical purposes, non-State entities should be treated as if they are bound by relevant human rights standards. Although human rights laws are applicable both in times of peace and war, certain rights may be temporarily restricted. Many human rights treaties permit States to deviate from their obligations by temporarily suspending the exercise of certain rights during times of war or other public emergencies. Nevertheless, there are specific rights that can never be subject to such derogation, including the right to life, freedom from torture, inhuman or degrading treatment, freedom from slavery, and the non-retroactivity of penal laws. In cases where derogation is allowed, stringent conditions must be fulfilled: the emergency must pose a threat to the nation's life; international bodies must be notified; and measures taken must be proportionate, free from discrimination, and consistent with other international obligations. Entities such as the Commission on Human Rights, the Human Rights Committee, and the Committee on the Rights of the Child meticulously scrutinise any government's claim that derogation is necessary and justified.

Currently, approximately 450 million children reside in conflict-ridden environments.³ Safeguarding children's rights during armed conflicts has emerged as a significant challenge in the realm of international children's law and its enforcement. International legal provisions designed to shield children amid armed conflicts are included in two distinct yet interrelated legal frameworks: international human rights law and international humanitarian law. This chapter explores one such law – international human rights law – and within it, specifically, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

2. Historical Background

Throughout history and across various cultures, children have played a significant role in military endeavours. Progress towards ending the use of children for military purposes has been slow, partly because many national armed forces have historically relied on children to fill their ranks. Initial efforts to restrict the involvement of children in armed conflicts began with the adoption of Additional Protocols to the 1949 Geneva Conventions in 1977.⁴ These new Protocols prohibited the military recruitment of children under the age of 15 years and their direct participation in

3 The number of children living amid armed conflicts, as calculated by the Peace Research Institute Oslo based on conflict data from the Uppsala Data Program, reveals that in 2022, over 468 million children - more than 1 out of 6 - were living in a conflict zone. Statistical data available at: <https://data.stopwaronchildren.org/> (Accessed: October 1, 2023).

4 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609. Available at: <https://www.refworld.org/docid/3ae6b37f40.html> (Accessed: October 1, 2023).

hostilities. However, they allowed state armed forces and non-state armed groups to recruit children aged 15 years and older for warfare. Another shortcoming of the Protocols was that they did not limit belligerents from using children under the age of 15 years in hostilities when their involvement was not direct, such as in roles like scouts, informants, spies, message carriers, and other support functions.

In addition to the overarching safeguarding of children offered by general human rights and humanitarian legal frameworks, children were also granted protection under the 1989 Convention on the Rights of the Child. The Convention on the Rights of the Child defines a child as someone under 18 years of age. Unfortunately, because the CRC, following the footsteps of the Additional Protocols to the Geneva Conventions, incorporated the same limited standards of protection into the text of the CRC in 1989, advocates for children's rights were left disappointed, as they believed that a treaty establishing the fundamental rights of children should safeguard them from all forms of military involvement.⁵ To address this concern, a small group of human rights activists and supportive governments initiated a global campaign for a new treaty, resulting in the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2000.

Of specific significance in ensuring the welfare of children affected by armed conflicts in Article 38 of the CRC is as follows:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts that are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure the protection and care of children who are affected by an armed conflict.⁶

From the outset, Article 38 faced substantial criticism for two primary reasons. First, it is the sole provision within the Convention deviating from the overarching

5 Becker, 2013. p. 11

6 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. Available at: <https://www.refworld.org/docid/3ae6b38f0.html> (Accessed: October 1, 2023).

age limit of 18 years, despite addressing one of the most perilous situations children can encounter – armed conflict. Additionally, concerning the prohibition of recruitment and participation, it largely confines itself to reiterating Article 77 of Additional Protocol I to the Geneva Conventions. In doing so, it failed to introduce anything new and risked diverting attention from the more robust standards set forth in Additional Protocol II to the Geneva Conventions. Considering this backdrop and in accordance with growing awareness and concern within the international community regarding the severe challenges faced by children affected by armed conflicts, an initiative emerged within the United Nations system only a few years after the CRC came into force. This initiative aimed to increase the minimum age for recruitment and participation in hostilities to 18 years. This endeavour closely aligned with the stance adopted by the International Red Cross and Red Crescent Movement, which in 1993 embarked on developing an action plan to enhance their existing activities in support of children. The 1995 Plan of Action articulated two commitments, the first of which was ‘to promote the principle of non-recruitment and non-participation in armed conflict of children under the age of 18 years’.⁷ In that same year, during the 26th International Conference of the Red Cross and Red Crescent, a resolution was passed recommending ‘that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities’.⁸ In alignment with numerous other organisations and nations, the International Committee of the Red Cross (ICRC) voiced its endorsement of the creation of an additional protocol to the CRC. The ICRC communicated its stance on global forums, such as the UN Commission on Human Rights and the General Assembly. Furthermore, it actively engaged in the drafting process by producing a comprehensive document outlining the ICRC’s position on several pivotal matters under deliberation.

By 1994, five years after the adoption of the CRC, advocates for children’s rights and supportive governments successfully persuaded the international community to establish a working group within the United Nations Commission on Human Rights. The working group comprised representatives from numerous countries, non-governmental organisations, United Nations agencies, and independent experts, and was tasked with drafting the Optional Protocol concerning children’s involvement in armed conflicts. Subsequently, over six years, the working group engaged in discussions and refined the draft, which culminated in 2000. On 25 May the United Nations General Assembly officially adopted the Optional Protocol by Resolution A/RES/54/263 in its fifty-fourth session of the General Assembly of the United Nations.

7 Plan of Action for the Red Cross and Red Crescent Movement, Geneva 1995. Available at: <https://www.nzdl.org/cgi-bin/library.cgi?e=d-00000-00---off-0aedl-00-0---0-10-0---0direct-10---4-----0-11-11-en-50---20-about---00-0-1-00-0-0-11-1-0utfZz-8 00&cl=CLL1.1&d=HASH960ce995f08c24f8a85d8a.8&gc=1> . (Accessed: October 1, 2023).

8 Resolution 2 of the 26th International Conference of the Red Cross and Red Crescent in 1995 recommended that parties to conflict ‘take every feasible step to ensure that children under the age of 18 years do not take part in hostilities’.

After securing the initial ten ratifications required for its implementation,⁹ the Optional Protocol became legally binding on 12 February 2002. The working group's mission was to initiate negotiations for a new protocol for the Convention aiming to elevate standards concerning the involvement of children in military activities.

Although most states participating in the protocol negotiations were inclined to end the recruitment of children under the age of 18 years in armed forces (often referred to as the *straight-18 principle*), a few countries held opposing views. The dissenting group included Bangladesh, Cuba, Israel, South Korea, Kuwait, Pakistan, the United Kingdom, and the United States. According to Jo Becker, a human rights advocate actively engaged in the negotiation process,

'governments began a series of annual negotiations in Geneva, but by 1998, negotiations floundered as it became clear that governments that had long used under-eighteens in their national armed forces, notably the United States and the United Kingdom, were not willing to support a new standard that conflicted with their national practice'.¹⁰

Although some states opposing the change stated that they would not obstruct it, the United States insisted on maintaining its position. A crucial factor in rallying substantial support for the Optional Protocol was a proposal by children's rights advocates for a comprehensive study on the impact of armed conflicts on children. This study was proposed by the Committee on the Rights of the Child and commissioned by the UN General Assembly. Graça Machel, Mozambique's first post-independence Minister for Education and advocate for children's rights, undertook this massive project.¹¹ In her 1996 presentation to the General Assembly, her report titled "Impact of armed conflict on children" portrayed the harsh realities experienced by countless children entangled in conflicts. This report elucidated the pivotal importance of this issue for international human rights, development, peace, and security. It served as a resounding call for immediate action, highlighting the unconscionable reality of our society, bearing witness to such relentless assaults on children's rights without mounting a robust defence. It is unforgivable that children endure assault, violation, and even death while our conscience remains unprovoked and our sense of dignity remains undisturbed. This situation signifies a fundamental crisis in our civilisation. The Machel Report identified children as the foremost victims of armed conflicts and proposed a series of recommendations, including the appointment of a special representative of the Secretary-General on children and armed conflicts,

9 The first ten States to ratify were the following: Andorra, Austria, Bangladesh, Canada, Democratic Republic of the Congo, Holy See, Iceland, New Zealand, Romania and Sri Lanka.

10 Becker, 2013. p.12.

11 Office of the Special Representative of the Secretary-General for Children and Armed Conflict: Graça Machel and the Impact of Armed Conflict on Children. Available at: <https://childrenandarmedconflict.un.org/about/the-mandate/mandate/the-machel-reports/> (Accessed: October 1, 2023).

with the aim of ensuring that safeguarding children remains a top priority on the international agenda for human rights, peace, security, and development. The report was particularly concerned with the use of younger children as participants in armed conflicts and presented evidence that thousands of children were killed, maimed, and psychologically scarred worldwide each year. Furthermore, it proposed cessation of child recruitment by all armed forces.¹²

There is an undeniable and compelling moral imperative to shield all children while diligently pursuing peaceful conflict resolution and scrutinising the justification for any form of armed strife. The immediate harm inflicted on children, including physical injury, sexual violence, and psychosocial distress, contradicts the values that inspired the establishment of the Convention on the Rights of the Child. This Convention obligates States to uphold a broad spectrum of children's rights, ensure access to health and education, and nurture growth and development within caring and supportive familial and communal environments. Armed conflicts consistently trample these rights. The impact of armed conflicts on children is a concern for everyone and is the responsibility of all governments, international organisations, and every facet of civil society.

In 1998, when negotiations for the new treaty reached an impasse, the Coalition to Stop the Use of Child Soldiers, now known as Child Soldiers International, emerged. The Coalition was founded by five human rights and humanitarian organisations: Human Rights Watch, Amnesty International, Rädde Barnen, Jesuit Refugee Service, and QUNO Geneva. Their primary objective was to campaign for the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and to integrate the straight-18 principle into the new treaty. The Coalition worked in collaboration with a select group of nations that actively advocated for the straight-18 principle on the global stage, including Canada, Denmark, Ethiopia, Finland, Japan, Mozambique, Norway, Portugal, South Africa, Sweden, and Switzerland.¹³ The Coalition organised a series of intergovernmental regional conferences with initial financial support from the Canadian government. African and Latin American conferences robustly endorsed the straight-18 principle. However, the European conference supported the end of children's participation in armed conflicts, but not their recruitment, primarily owing to resistance from Austria, France, Germany, Luxembourg, the Netherlands, and the UK, all of which enlisted children aged 16 or 17 years into their armed forces. By 1999, the straight-18 principle garnered significant support from a substantial majority of states, as well as backing from the Committee on the Rights of the Child, the International Committee of the Red Cross, the International Labour Organization, the European Parliament, the Organization of African Unity, and the World Council of Churches.¹⁴

12 Machel, 1996. p. 41.

13 Becker, 2013. p.14.

14 Brett, 2005. p. 4.

During the final stages of the negotiations, only five states remained opposed to the straight-18 principle: Egypt, Kuwait, Singapore, the UK, and the US. The US eventually yielded after an intervention by Secretary of State Madeleine Albright, although both the US and the UK continued to assert their prerogative to enlist individuals aged 16 (UK) and 17 (US) years. This adjustment paved the way for a compromise between the negotiating parties. The new text of the Protocol would not outright prevent states from recruiting individuals to their armed forces at the age of 16 or 17 years. However, it would mandate that *all feasible measures* be adopted to ensure that children did not participate directly in hostilities. This is one of the weaknesses of the Protocol, as children's protection would have been more effective if the wording was to *take all necessary measures*. The Committee on the Rights of the Child is anticipated to adopt a stringent interpretation when assessing whether States have genuinely adopted all *feasible measures* to attain the stated goal. The second limitation pertains to the level of protection offered to children regarding their engagement in hostilities. According to this provision, children are shielded from *direct* participation in hostilities, which does not preclude them from being used indirectly in armed conflicts. This compromise was a way to ratify the Optional Protocol. As of October 2023, 172 UN Member States have ratified the Protocol, seven have signed but not yet ratified (Haiti signed in 2002, Islamic Republic of Iran signed in 2010, Lebanon signed in 2002, Liberia signed in 2004, Nauru signed in 2000, Somalia signed in 2005, Zambia signed in 2008), and 17 have not signed or ratified the Protocol (among others: Antigua and Barbuda, Barbados, Sao Tome and Principe, Tonga, Trinidad and Tobago, United Arab Emirates).¹⁵

Since the adoption of the CRC-OP-CAC, there has been a significant increase in the number of countries that have imposed restrictions on enlisting only adults over the age of 18 years, and several countries where the recruitment of children had been a common practice have prohibited the enlisting of children. The prohibition of child recruitment to the armed forces is gradually being eradicated; however, approximately 50 countries continue this practice. Numerous non-state armed groups continue to engage in child recruitment. Annually, the UN Secretary-General releases a list of shame that identifies the state armed forces and non-state armed groups involved in the recruitment and use of children.¹⁶ Owing to the CRC-OP-CAC many states and some non-state-armed groups now acknowledge the harm associated with recruiting children. This progress, combined with the reinforcement of international legal standards, is gradually establishing the straight-18 principle as the prevailing norm. It is noteworthy that States that permit child recruitment tend to be larger, more affluent, and allocate more resources to the military. For instance, Australia, China, France, Germany, Saudi Arabia, and the US have allowed enlistment from the age of 17 years. Brazil, Canada, and the UK are among the few countries that have set

15 Ratification status of the Optional Protocol. Available at: <https://childrenandarmedconflict.un.org/tools-for-action/opac/ratification-status-of-the-optional-protocol/>. (Accessed: October 1, 2023).

16 Children and armed conflict - Report of the Secretary-General (A/77/895-S/2023/363).

the minimum enlistment age even lower at 16 years. Global efforts to eradicate child recruitment are undermined if the world's most influential nations do not adhere to this principle. Children's rights advocates strive for a worldwide ban on all-child recruitment for military purposes and insist on holding those responsible for recruiting children accountable.

The recruitment of children and their involvement in hostilities by non-state-armed groups has been a persistent and grave issue for decades, with such groups being primarily responsible for using children in violent conflicts today. Despite these challenges, notable advances have been made since the adoption of CRC-OP-CAC. Since 1999, over 60 armed groups have, independently or through bilateral agreements, made commitments to reduce or ultimately halt the recruitment of children.¹⁷ These commitments have led to changes in internal policies and practices. Additionally, the number of armed groups that have established 18 years as the minimum age for recruitment has increased. Although implementation may exhibit inconsistencies, these commitments illustrate a growing acknowledgement by an expanding array of armed groups regarding the imperative to safeguard children from involvement in military organisations. Although attitudes towards child recruitment vary widely, from dedication to indifference, it is apparent that armed groups now possess greater awareness and acceptance of their international legal responsibilities than they did in the past.

3. Core Provisions

3.1. Preamble

The drafters of the Optional Protocol promptly reached a consensus on the phrasing of the Preamble. Consequently, the Optional Protocol is positioned within the framework of human rights laws. The merging of international humanitarian law and international human rights law in the context of child combatants highlights how human rights principles have become integral to the corpus of international humanitarian law.

When the working group began drafting the text of the CRC-OP-CAC, there was a widespread consensus that the practice of using children as soldiers should be completely abolished, and one of the proposed methods to achieve this goal was to raise the minimum recruitment age for the armed forces. Diverse opinions were voiced concerning the working group's mandate and content of the prospective optional protocol. Some participants strongly emphasised the need to uphold the principle that the best interests of the child must be a paramount consideration in all actions involving children. They expressed their readiness to promptly adopt an optional protocol

17 Child Soldiers International, *A Law Unto Themselves? Confronting the Recruitment of Children by Armed Groups*, 2016, p. 15.

in which the minimum recruitment age was firmly set at 18 years, highlighting the importance of establishing this threshold.

However, other participants argued that while every possible effort should be dedicated to maximising children’s protection from involvement in armed conflicts, elevating the age limit for recruitment was not the exclusive means to attain this objective. Several delegations cited their own national legislation, which permitted the enlistment of individuals below the age of 18 years in the armed forces under specific conditions and circumstances. Consequently, they believed that such national laws would inevitably clash with the provisions of the proposed protocol envisioned by the Committee on the Rights of the Child. Additionally, it was emphasised that a protocol alone would not immediately resolve the existing predicament of children in armed conflicts.

Discussions on the preamble were the smoothest, and the States Parties arrived at a consensus promptly on all preambular paragraphs, with only minor suggestions for wording changes. For example, the first preambular paragraph originally read:

The first preambular paragraph read as follows:

‘Encouraged by the fact that an unprecedented number of States have to date become parties to the Convention, thereby demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child.’¹⁸

During the fifth meeting on 2 November 1994, delegates from Nigeria, the US, and the Netherlands suggested replacing the phrase *an unprecedented number of States* with an alternative wording. In response, the representative of India proposed substituting *the fact that an unprecedented number of States have to date become parties to* with *the overwhelming support for*. Additionally, a representative from China recommended using the full title of the Convention on the Rights of the Child. During the 17th meeting on 10 November 1994, the working group accepted India’s proposal and agreed with the Chairman-Rapporteur’s suggestion to remove the word “thereby”. These changes were mostly cosmetic in nature and resulted in the final text of the first preambular article.

‘Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child.’¹⁹

18 CHR, 51st, 10/02/1995, E/CN.4/1995/96, Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on the involvement of armed conflict.

19 UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000. Available at: <https://www.refworld.org/docid/47fdfb180.html> (Accessed: October 1, 2023).

3.2. Article 1

‘States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.’

This provision in the Optional Protocol is widely regarded as crucial. Increasing the age threshold for participation in armed conflicts from 15 to 18 years signifies an enhancement of the existing protection offered by international law. This provision served as the catalyst for children’s rights advocates campaigning for the Optional Protocol, specifically to shield all children from the horrors of armed conflicts, particularly their direct involvement in hostilities. This was not an isolated goal, but a global trend to pursue the straight-18 principle. Some legal instruments predating the Optional Protocol had already enshrined this principle. The African Charter on the Rights and Welfare of the Child from 1990 states in its Article 22 that ‘States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child’.²⁰ The Worst Forms of Child Labour Convention of the International Labour Organization from 1999 also deals with the question of children in the armed forces and prohibits it in its Article 3: ‘For the purposes of this Convention, the term the worst forms of child labour comprises (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.’²¹

The key problem with the wording of this provision is that it uses the term “all feasible measures to ensure” that children under the age of 18 years do not participate – which does not provide an absolute prohibition of children being used in armed forces. It will be up to the Committee on the Rights of the Child to assess whether States have indeed adopted “all feasible measures” to attain the stated objective. The wording used in the Rome Statute of the International Criminal Court was also considered when drafting the Optional Protocol text. The Rome Statute states that ‘children shall not be used (...) to actively take part in hostilities’, which could have provided significantly stronger protection. However, this was not accepted by several countries (most notably the US and the UK), which continued to assert their prerogative to enlist children under 18 years of age. Most delegations expressed support for establishing a clear age limit of 18 years for participation. Several delegations believed that this age restriction should include both participation in hostilities and all forms of recruitment. This perspective was shared by the Committee on the Rights of the

20 Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990). Available at: <https://www.refworld.org/docid/3ae6b38c18.html> (Accessed: October 1, 2023).

21 International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182, 17 June 1999, C182. Available at: <https://www.refworld.org/docid/3ddb6e0c4.html> (Accessed: October 1, 2023).

Child, the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, UNICEF, the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, and the Coalition to Stop the Use of Child Soldiers.²² They argued that a universal age threshold of 18 years would offer the most comprehensive protection for children, aligning with the general age of the majority outlined in the Convention on the Rights of the Child and most national laws. In the final text, a compromise was reached by using the term *all feasible measures*. This compromise accommodated the concerns and interests of delegations whose national laws and practices allowed the recruitment of children under the age of 18 years.²³

The other issue with this provision is that it uses the term “direct part in hostilities”. This is a step back – the 1977 Additional Protocol II to the Geneva Conventions had used more robust protection when it unequivocally prohibited any participation by stating that children shall not be permitted to “take part in hostilities”.²⁴ The Additional Protocol used 15 years as the threshold age; therefore, it can be considered weaker, however, it explicitly prohibits the participation of children in any hostilities. However, the CRC-OP-CAC prohibits direct participation in hostilities and does not prohibit indirect participation, which means that children could continue to participate in military operations as spies, decoys, porters, messengers, transporters, and for gathering information. Furthermore, indirect participation could involve the use of girls for sexual exploitation or forced marriages. However, the scope of the article clearly does not include an exhaustive list of forms of participation, and it ignores the fact that involving children in any frontline activities exposes them to substantial risks of physical harm and emotional trauma. Although the term “direct part in hostilities” was agreed upon and incorporated into the final text, the travaux préparatoires of the Optional Protocol lack specific guidance on the definition of this term and do not distinguish between direct and indirect participation. The Rome Statute of the ICC, Additional Protocol II to the Geneva Conventions, and Cape Town Principles have all used a more comprehensive interpretation of children in armed conflicts and include any participation (whether direct or indirect) to offer the broadest protection possible to children in armed conflicts. The CRC-OP-CAC falls short here, as it only includes a ban on taking a direct part in hostilities and fails to recognise that it is not only children in active military combat that require protection, and children indirectly participating may continue to be exposed to considerable dangers. Most child soldiers are recruited

22 Joint statement entitled “UN bodies call for a prohibition on the recruitment and participation of children under age 18 in armed conflict” by the Committee on the Rights of the Child, the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, UNICEF, United Nations High Commissioner for Human Rights, Office of the United Nations High Commissioner for Refugees, released to the press on 13 January 2000.

23 Helle, 2000.p. 805.

24 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Accessed: October 1, 2023).

from the most impoverished, least educated, and socially marginalised segments of society. They are coerced or threatened into becoming soldiers by the government, paramilitary forces, or rebel forces under a looming spectrum of violence or death, as they are perceived as easily manipulated and intimidated. These recruited children are used in various roles, including combat, laying mines and explosives, espionage, messaging, guarding, scouting, cooking, carrying loads, serving as attendants, and sexual exploitation. Owing to sexual abuse, children may contract HIV/AIDS or other sexually transmitted diseases, and many girls face the risk of unsafe abortions or early motherhood. When conflict situations de-escalate and end, many children become physically disabled and/or psychologically scarred. Having been subjected to an extended militarised way of life, deprived of education, and stigmatised by their former communities, many have struggled to adapt to a peaceful society. As neither the Optional Protocol provides guidance regarding the term direct participation nor preparatory proceedings, it can only be inferred from other sources. The reporting guidelines of the Committee on the Rights of the Child regarding the Optional Protocol offer a potential source of insight.²⁵ The Committee requests that States elaborate in their reports on the interpretation of “direct participation” as it applies to their legislation and practices. This finding suggests that a more expansive or narrower definition of the term should be used. Additionally, States are called upon to provide details about the actions taken to prevent the deployment or retention of armed forces members under the age of 18 years in areas with ongoing hostilities, as well as the challenges encountered in implementing these measures.

Although the text of Article 1 of the CRC-OP-CAC has its drawbacks, it does leave an important obligation to States Parties, that is, to adopt measures to fulfil their obligations stemming from Article 1. These measures can include legislative, administrative, or other forms of action. This may involve steps to prevent individuals under the age of 18 years in the armed forces from being sent to or retained in areas of active hostilities. The reporting guidelines do not provide any additional indications. However, in its concluding observations of reports submitted under the CRC, the Committee has recommended that States Parties establish a comprehensive strategy to ensure the non-involvement of children in armed conflicts.²⁶ This strategy should include proactive preventive measures and ensure the effectiveness of the measures taken.²⁷

3.3. Article 2

‘States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.’

25 CRC Committee, Guidelines regarding initial reports of States Parties to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (UN Doc. CRC/OP/AC/1, 200).

26 For example: CRC Committee, Concluding Observations: Papua New Guinea (UN Doc. CRC/C/Add. 229, 2004), para. 56.

27 CRC Committee, Concluding Observations: Pakistan (UN Doc. CRC/C/Add. 217, 2003), para. 68.

Prior to the adoption of the CRC-OP-CAC, the protection against compulsory recruitment was enshrined in Article 38 of the CRC, which states that

‘States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.’²⁸

This level of protection was rather weak with respect to children between 15 and 18 years, as States Parties were only required to prioritise the oldest individuals. Therefore, the CRC-OP-CAC and Article 2 serve as significant complements to the prohibition against participation in hostilities. Preventing children’s recruitment into the armed forces is a crucial safeguard against their involvement in hostilities. Although negotiations for the Optional Protocol did not result in the establishment of a universal straight-18 principle, the Protocol represents an advancement over previous international legal standards. It set a minimum age of 18 years for compulsory recruitment by government authorities. Furthermore, it elevated the benchmark for voluntary recruitment by government forces to those above 15 years of age. Moreover, it unequivocally prohibits the recruitment of all individuals under the age of 18 years by non-state groups. In this context, recruitment includes any method by which an individual becomes a member of either a national armed force or an armed group. Therefore, Articles 2, 3, and 4 of the CRC-OP CAC are interconnected.

This Article of the Optional Protocol explicitly prohibits the compulsory recruitment of individuals under 18 years of age. This represents an elevation in international legal standards that previously allowed recruitment from the age of 15 years. Once an individual reaches the age of 18 years, they may be subject to compulsory recruitment into the armed forces. The protocol designates the person’s birthday as the beginning point for this consideration. It is noteworthy that the Protocol uses the term persons under the age of 18 years rather than children. According to Article 1 of the Convention on the Rights of the Child, a child is defined as any individual below the age of 18 years unless the child reaches the legal majority earlier according to the applicable law. Therefore, the prohibition of compulsory recruitment specified by the Optional Protocol pertains to adults under 18 years of age.

The obligation of the States stemming from Article 2 is to ensure that individuals under the age of 18 years are not subject to compulsory recruitment to their armed forces. Consequently, the prohibition against compulsory recruitment is directed at authorities overseeing the recruitment process rather than at individuals under 18 years. Unlike in Article 1 (*take all feasible measures*), the obligation outlined in Article 2 (*shall ensure*) is absolute and constitutes an outcome-based requirement.²⁹

28 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

29 Helle, 2000. p. 801.

Challenges arise when States lack a robust birth registration system, a situation often observed in developing countries. In such instances, States should refrain from recruiting anyone who could potentially be under the age of 18 years.

3.4. Article 3

‘1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in Article 38, Paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.

3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person’s parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.

4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

5. The requirement to raise the age in Paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with Articles 28 and 29 of the Convention on the Rights of the Child.’

Article 3 raises the minimum age for voluntary recruitment by at least one year, as indicated in the declaration that States are required to submit upon ratifying the new Protocol. In simple terms, the minimum age for voluntary recruitment was raised from 15 to 16 years, which was undoubtedly a step in the positive direction.³⁰ However, this article considerably weakens the protections enshrined in Article 2. Determining whether a child has been voluntarily or mandatorily recruited can be

30 Article 38 of the CRC: ‘States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.’

complex, which is why a straight-18 principle should have been adopted in Article 3. The straight-18 approach was endorsed by the Committee on the Rights of the Child. (It is noteworthy that although the text itself does not follow the straight-18 principle, the CRC continues to endorse it. In its Concluding Observations regarding the report submitted under the Optional Protocol by New Zealand, the CRC Committee suggested that the State Party explore the potential for raising the minimum age for voluntary recruitment to 18 years.)³¹ In contrast, some States contended that, in accordance with practices in many countries, 17 or 16 years should be the minimum age for voluntary recruitment. Additionally, it was argued that enforcing an 18-year age limit undermines a significant ancillary objective of military service, which is the education of young individuals. The lower age limit for voluntary recruitment and exemption from military schools was justified by many delegations as necessary to ensure an adequate pool of qualified applicants for their national armies. Moreover, a system based on voluntary services by individuals under 18 years of age was preferable to one of the compulsory services for those above that age. Military schools are one of the few opportunities for young people in economically disadvantaged countries to gain access to higher education. Article 3 embodies a compromise between these two viewpoints. Safeguards designed to ensure recruitment are genuinely voluntary, and no child under the minimum age is recruited; however, the practical implementation of these safeguards can be challenging. For instance, in numerous conflict-affected developing countries, the requirement to provide reliable proof of age may be difficult to fulfil, considering the limited existence of birth registration systems in those areas. The wording of the provision is not absolute, unlike Article 2, and as such, it facilitates options of bypassing the age limits set for recruitment. This departure from the straight-18 principle pursued by many delegations significantly diminishes the prospects of safeguarding children from involvement in armed conflicts.

The safeguards included in Article 3 require, first, that recruitment be voluntary, but no definition is provided for voluntary recruitment; therefore, it is difficult to ensure that this requirement is satisfied. Second, recruitment must be conducted with informed consent from parents or legal guardians. Parental consent, in this case, should be irrelevant because, particularly in zones of military conflict, parents may be financially motivated to encourage their children to join the armed forces. Parental consent is required; however, it is not specified whether such consent needs to be documented or whether oral consent is sufficient, which is another potential point of failure of these safeguards. The third safeguard is that individuals must be fully informed about the responsibilities associated with military service, which means that those expressing a desire to volunteer should have a clear understanding of their prospective duties in the armed forces. This requirement calls for transparency so that potential volunteers can make informed decisions. Fourth, individuals must provide reliable proof of their age before being accepted into the national

31 CRC Committee, Concluding Observations: New Zealand (UN Doc. CRC/C/OPAC/CO/2003/NZL, 2003), para. 7.

military service. This may involve the presentation of birth certificates and affidavits. However, considering the challenges many developing countries face regarding birth registration systems, this requirement is difficult to control.

3.5. Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.'

Article 4 prohibits the recruitment of children by non-state entities, whether forcibly or voluntarily, and involving them in hostilities, whether directly or indirectly. This provision demonstrates a positive intent on the part of States to regulate the conduct of non-state entities, thereby addressing situations of non-international armed conflicts. The ICRC strongly supported the inclusion of the issue of non-state entities in the new Protocol, recognising that the impact on children involved in non-international armed conflicts is as severe and traumatising as in international conflicts. The widespread presence of child soldiers in internal armed conflicts highlights the need to address such situations. A clause aimed at preventing the recruitment and use of children by armed groups was a pivotal aspect of the Optional Protocol. This is particularly significant, considering that most contemporary armed conflicts are internal in nature, involving various warring factions, and that the majority of child soldiers are forcibly conscripted by non-state armed groups. Securing adherence from non-state entities will undoubtedly be a challenging endeavour, particularly because these armed groups typically operate outside the bounds of legality.³²

The wording of Article 4 is not flawless; instead of the stronger “shall not”, the text uses the phrase “should not”, which indicates a moral obligation rather than a legal one under international law. The wording of Article 4(1) is reflective of the conventional perspective that international human rights law primarily obligates States and allows them to be parties to treaties, whereas the behaviour of non-state entities is regulated by domestic law. This provision underlines the international community’s strong stance without conferring legal status on these non-state armed groups. Although the Article does not provide any legal status to these non-state-armed groups, it imposes a duty on States to regulate their actions. The Optional Protocol, along with other international legal instruments, can be employed as a tool to engage non-state groups in dialogue, aiming to secure commitments that enhance child protection and ensure the safety of humanitarian workers. This engagement

32 Sheppard, 2000, p. 37.

includes negotiations for granting humanitarian workers access to children and advocating respect for their rights. Moreover, it can facilitate arrangements for the early release and demobilisation of child soldiers, even in the absence of a formal peace agreement. We have seen this already occur in various nations, non-state armed factions have provided verbal or written pledges to release and demobilise children or to abstain from recruiting and employing child soldiers. On multiple occasions, these commitments were extended to United Nations representatives. Consequently, this has led to the liberation of children under the custody of these armed groups, with them being entrusted to child protection organisations.

The obligations derived from Article 4 are with the States. The States Parties are obliged to prevent the recruitment and utilisation of individuals under the age of 18 years by armed groups separate from the armed forces of the State. In its reporting guidelines, the Committee on the Rights of the Child requests that States provide details on the armed groups operating within or originating from the State's territory, or having a sanctuary within that territory.

3.6. Article 5

'Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.'

Article 5 of the Optional Protocol introduces a safeguarding clause. This clarifies that the Protocol should not be interpreted as preventing a State Party from enacting laws or adhering to international instruments and international humanitarian law that better promote the realisation of children's rights. Consequently, the Optional Protocol enables States to commit to standards that exceed those outlined in the Protocol through national legislation and other international treaties in accordance with the general principles of international law. These provisions should be detailed in the reports submitted by the States Parties. For instance, States that opt to implement a straight-18 policy regarding recruitment, or are parties to the African Charter on the Rights and Welfare of the Child, are bound by these higher standards. A safeguard clause similar to that found in Article 41 of the CRC is also applicable. Article 41 of the CRC states that 'Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child, and which may be contained in: (a) The law of a State party; or (b) International law in force for that State'.³³ These safeguards in the CRC and the CRC-OP-CAC refer to situations in which a State policy surpasses the stipulated minimum requirements. Several States Parties have included such policies in their declarations, enabling their implementation on a national scale through legislative measures. It is essential to highlight that in cases

33 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations.

where a State is bound by multiple legal obligations, a fundamental tenet of international law dictates that the State should prioritise the obligation that offers the highest level of protection for human rights and the best interests of the child.

3.7. Article 6

- ‘1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.
2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.’

This is a key provision for CRC-OP-CAC. The initial paragraph addresses the aspects of enforcing and upholding the Protocol, whereas the subsequent paragraph focuses on the dissemination of the Protocol. The third point, which holds significant importance, underscores the necessity for the demobilisation and rehabilitation of child soldiers. Article 6 of the Optional Protocol mandates that States Parties revise and enforce their domestic laws and procedures. In accordance with Article 4 of the CRC, States must adopt suitable legislative, administrative, and other actions to implement the rights acknowledged in the Convention. Advocates of child protection and rights play a crucial role by providing legal expertise to ensure that domestic legislation aligns with the provisions of the Optional Protocol. The process of reforming national laws can present opportunities for broader changes and updates to child rights laws. Activities such as training government, military, and law enforcement officials, along with the development of a national action plan, can fortify the implementation process and foster partnerships between government entities and civil society.

Additional measures include spreading awareness of the rights and responsibilities outlined in the Optional Protocol. As per Article 6(2), States Parties commit to ensuring that the principles and provisions of the Protocol are widely disseminated and promoted among both adults and children. This dissemination obligation can be viewed as one of the methods of implementing the Protocol. In a customary sense, the word *undertake* implies a commitment to initiate or perform an action without necessitating its completion. Hence, this obligation is less stringent than using the term *shall*. It encompasses the duty to inform all segments of society about the Protocol, including adults and children, using suitable means. In the context of children, school curricula can serve as an effective avenue for dissemination while ensuring relevant training for peacekeeping personnel, other military personnel, and various

professional groups working with and for children.³⁴ Furthermore, it is advisable to publish and circulate both initial reports and concluding observations. This can stimulate debates, raise awareness, and contribute to the implementation and monitoring of the Protocol.

The third paragraph contains further obligations guaranteeing the demobilisation and reintegration of children who have been recruited or used in armed conflicts. Children released from the armed forces or groups should be promptly transferred to civilian care, with child protection agencies actively involved in providing healthcare, counselling, and other forms of support. The primary focus should be on tracing and reuniting children with their families. States Parties are obligated to adopt all practical steps to ensure that children within their jurisdiction who have been recruited or used in armed conflicts in violation of the Protocol are demobilised or released from their service. Additionally, when necessary, they provide these individuals with suitable support for their physical and psychological recovery and successful reintegration into society. The Optional Protocol does not explicitly define the terms recovery or reintegration. Broadly, reintegration can be described as the process of helping former soldiers transition back to civilian life. Reintegration programmes are support initiatives designed to enhance the potential of ex-combatants and their families to reintegrate economically and socially into civilian society. These programmes include various forms of assistance, such as cash aid or in-kind compensation, vocational training, and income-generating activities.³⁵

Recognising the necessity of rehabilitating and reintegrating children has been a relatively recent development in international law, notably articulated in Article 39 of the CRC: ‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.’³⁶ However, it was not until the adoption of the Optional Protocol that a binding international agreement explicitly imposed an obligation to demobilise, rehabilitate, and reintegrate children who had been recruited or used in armed conflicts. To address resource constraints in fulfilling this commitment, the Optional Protocol mandates States to collaborate through technical and financial assistance, whereas international programmes should be devised for long-term support.

3.8. Article 7

‘1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance.

34 Vandewiele, 2005.p. 4.

35 Mahling Clark, 1995. p. 50.

36 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.

2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.’

Article 7 delineates the actions that States Parties are required to take to facilitate the reintegration of children who have been recruited or utilised in armed conflicts. This article discusses its implementation through international collaboration. The first section addresses cooperation between states, while the second section explores various avenues for achieving this collaborative effort. States Parties must offer technical and financial support as well as assistance in areas such as education, life skills, vocational training, healthcare, psychosocial support, family tracing, and community development initiatives. These approaches are the most efficient for reintegrating children and establishing a stable community environment. Children engaged in armed conflicts must receive support to overcome the challenges they encounter in postwar settings. Reconciliation plays a crucial role in this process. To achieve this, States Parties must collaborate and cooperate in the execution of the Protocol. Such cooperation can take various forms, including technical assistance and financial support. Implementation of reintegration initiatives should occur in cooperation with child protection organisations and other international institutions (UNICEF, WHO, UNDP, UNHCR).

3.9. Article 8

‘1. Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.

2. Following the submission of the comprehensive report, each State Party shall include in the reports it submits to the Committee on the Rights of the Child, in accordance with Article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.

3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.’

Article 8 of the Optional Protocol addresses the reporting procedure and is divided into three paragraphs. Monitoring of Protocol implementation is entrusted to the

Committee on the Rights of the Child, as established under Article 43 of the CRC. This article states,

‘For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided’.³⁷

The Committee comprises 18 members from diverse nations and legal backgrounds, all of whom are distinguished by their strong moral principles and expertise in the realm of human rights. The body plays a pivotal role in overseeing and assessing adherence to the CRC. The Committee convenes three times annually in Geneva, Switzerland, for four weeks.³⁸ This period comprises three weeks of plenary sessions, followed by one week of pre-session activities aimed at preparing for the upcoming Committee session. During the latter week, preparations are made to assess the progress of States Parties in fulfilling their obligations under the CRC and the Optional Protocol. It is noteworthy that the Committee can only receive or consider information pertaining to countries that have ratified or acceded to the Optional Protocol. The Committee adopts a non-confrontational approach, seeking to engage with States Parties in a constructive dialogue. The objective is to accurately evaluate children’s situations within a country through collaborative and positive interactions. The Committee formulated comprehensive guidelines for the preparation of these reports under CRC-OP-CAC. As per Article 8, Paragraph 1 of the Optional Protocol, State parties are required to provide a report to the Committee on the Rights of the Child within two years of the Protocol’s entry into force for the respective State Party. This report contains comprehensive details of the measures taken to implement the Optional Protocol. Reporting guidelines offer in-depth instructions on the specific content of a comprehensive report. The report should include copies of key legislative documents, judicial rulings, and relevant instructions for both civilian and military armed forces. Additionally, detailed statistical data, indicators referenced in the report, and pertinent research findings should be incorporated. States Parties should also elucidate how the implementation of the Optional Protocol aligns with the overarching principles of the Convention on the Rights of the Child, which encompass non-discrimination (Article 2 of the CRC), the best interests of the child (Article 3 of the CRC), the right to survive and develop (Article 6 of the CRC), and the right to have their views heard and taken seriously (Article 12 of the CRC). Furthermore, the report should delineate the preparation process, including the engagement of governmental and non-governmental organisations or bodies in its drafting and dissemination. After the first comprehensive report, States are required to submit periodic reports on the execution of the Protocol. Article 8(2) distinguishes between States that are

37 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

38 Theytaz Bergman, 2010. p.21.

Parties to the CRC and those that are not Party to this Convention. Both categories of States can become Parties to the Protocol; therefore, both are obligated to provide periodic reports. In accordance with Article 8, Paragraph 3 of the Optional Protocol, the Committee has the authority to seek additional information from States Parties concerning the implementation of the Protocol.

3.10. Article 9

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. The Secretary-General, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to Article 3.'

As the Optional Protocol establishes rights and obligations beyond those set out in the CRC, it is considered an agreement independent of the Convention, necessitating a separate process for ratification or accession, as outlined in this article. There are two means by which a State can become Party to the Optional Protocol: ratification or accession. Both acts signify the State's willingness to be legally bound by the terms of the Protocol. Although accession carries the same legal weight as ratification, the procedures for these acts differ. In the case of ratification, a State initially signs and subsequently ratifies the treaty. In contrast, there is no signature requirement prior to accession. For human rights treaties, such as the Optional Protocol, there is typically no fixed timeframe during which the instrument is open for signature. Many States opt to sign the Protocol relatively soon after its adoption as a demonstration of public support, whereas accession may take longer because of a State's particular domestic procedural requirements. The act of signing the Protocol does not create a legally binding obligation, nor does it commit a State to proceed with ratification. However, it imposes the obligation to refrain from actions that would undermine the purpose and objectives of the Protocol. Once a State becomes a Party to the Optional Protocol, it is legally obliged to implement the treaty, including amending domestic laws to align with the Protocol's provisions. The relationship between the Optional Protocol and domestic law depends on the legal system of the State. Most States automatically incorporate international treaties into national law upon ratification, often with constitutional provisions that prioritise ratified international treaties over existing domestic laws. In the case of conflict, an international treaty takes precedence. These States typically follow a civil law system. However, dualist States must enact specific legislation to make the treaty enforceable at the domestic level. These States typically follow a common law system. Irrespective of whether a country follows a monist or dualist system, certain provisions of the Optional Protocol require distinct

implementation of legislation to ensure that States Parties can fulfil their obligations under the treaty.³⁹

3.11. Article 10

- ‘1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.’

Article 10 addresses the entry into force of the CRC-OP-CAC, both in general and for each State Party. According to Article 10(1), the Protocol comes into force three months after the deposit of the tenth instrument of ratification or accession. After securing the initial ten ratifications required for its implementation, the Optional Protocol became legally binding on 12 February 2002. The first ten States to ratify were Andorra, Austria, Bangladesh, Canada, the Democratic Republic of the Congo, the Holy See, Iceland, New Zealand, Romania and Sri Lanka. Interestingly, at the time of drafting the text of the CRC-OP-CAC, the United States proposed to replace the word with the word twenty-fifth.⁴⁰ Article 10(2) specifies that for each State that ratifies or accedes to the Protocol after coming into force, the Protocol becomes effective one month after the deposition of its own instrument of ratification or accession. This one-month period is relatively brief, particularly since States must adopt adequate measures immediately after becoming a Party to the Protocol to ensure that they do not inadvertently violate its provisions.

3.12. Article 11

- ‘1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties of the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year, the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any

39 UNICEF and Coalition to Stop the Use of Child Soldiers, 2003. Guide to the Optional Protocol on the Involvement of children in Armed Conflict, New York, UNICEF and Coalition to Stop the Use of Child Soldiers, 2003.

40 CHR, 51st, 10/02/1995, E/CN.4/1995/96.

matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.’

A State is not obliged to stay a Party to the Protocol; it has the option to denounce the Optional Protocol, which entails making a formal announcement of withdrawal, at any point, through written notice to the Secretary-General of the United Nations. Subsequently, the Secretary-General is responsible for informing both the other States Parties of the Convention and all the States that have signed the Convention. These denunciations become effective one year after the Secretary-General receives the notification. However, if the State Party renouncing the Protocol is involved in an armed conflict at the end of that year, denunciations will not occur until the armed conflict ends. This final provision is intended to prevent States from denouncing the Protocol solely to avoid immediate compliance with its provisions. This sentence was included in the final text at the insistence of the observer for the ICRC, who proposed inserting the last sentence of the first paragraph at the preparatory meeting of the working group.⁴¹ In the context of armed conflicts, no distinction is made between international and internal armed conflicts. It is noteworthy that denunciations do not absolve the State Party of its obligations under the Protocol concerning any actions that occurred prior to the date on which the denunciations became effective.⁴²

3.13. Article 12

‘1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favor a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one-third of the States Parties favor such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. An amendment adopted in accordance with Paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments they have accepted.’

41 Ibid.

42 Vandewiele, 2005. p. 25.

Article 12 of the Optional Protocol outlines the procedures for making amendments. The proposed amendments to the Optional Protocol can be presented to the Secretary-General. The Secretary-General then relays these proposed amendments to the States Parties of the Optional Protocol and requests feedback on whether they support convening a conference of States Parties to review and adopt the proposals. If at least one-third of the States Parties express their agreement within four months, a conference is convened to vote on the proposed amendments. Any amendment endorsed by a majority of the States Parties in attendance and voting at the conference is presented to the United Nations General Assembly for approval. Once the General Assembly approves the amendment and secures the acceptance of a two-third majority of States Parties, the amendment becomes effective only for those States Parties that have accepted it. Disappointingly, the Protocol does not allow the adoption of amendments that would be binding to all States Parties through a majority vote. For instance, this would enable most States to establish a higher age limit for voluntary recruitment applicable to all States. The amendment process, although lengthy and intricate, mirrors the procedure outlined in Article 50 of the CRC.

3.14. Article 13

- ‘1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.’

Finally, Article 13 addresses practical considerations. In this article, the Arabic, Chinese, English, French, Russian, and Spanish versions of the text are of equal authenticity and will be stored in the UN archives of the United Nations. This mirrors the CRC; its Article 54 contains the same provision. This signifies that the Protocol’s text holds equal weight in all United Nations official languages, making these six languages equally authoritative for interpreting the text. This was the smoothest article to agree upon in the preparatory proceedings of the CRC-OP-CAC. During the session of the working group, no formal amendments to this article were submitted.

4. Conclusion

Children inevitably bear the brunt of armed conflicts. Every child deserves a childhood free from violence. Countless children find themselves entangled in conflicts where they are not simply bystanders, but direct targets. Some are the casualties of general attacks on civilians, whereas others suffer from deliberate acts of genocide. Many children endure the consequences of sexual violence and myriad deprivations inflicted by armed conflicts, which exposes them to hunger and disease.

Armed conflicts frequently result in shattered societies, where at-risk children may be lured into joining the armed forces or groups as a means of sustenance and recognition, and they may struggle to regain a normal life without specific assistance. These collective concerns led the international community to a shared standard, culminating in the Convention on the Rights of the Child. This Convention is a unique instrument that has garnered almost universal ratification. Several States and organisations have been discontent with the level of protection offered by the Convention, and this dissatisfaction led to the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The Optional Protocol signifies a noteworthy stride towards prohibiting the recruitment of children into armed forces and groups and their involvement in hostilities. Although the Optional Protocol is a commendable achievement, child soldiers continue to be used at alarming rates. Admittedly, the final text of the Protocol fell short of expectations. It is apparent that its content resulted from a compromise and was considerably less robust than many expected. The Committee on the Rights of the Child compensated for some of these deficiencies by adopting a rigorous interpretation of the text. Notwithstanding these shortcomings, the Protocol undoubtedly represents progress and reinforces existing international law standards regarding the protection of children against recruitment and involvement in hostilities, and plays a crucial role in effectively addressing the plight of children ensnared in the turmoil of war.

It is noteworthy that the Protocol places an obligation on States not only to ensure the effective enforcement of its provisions, but also to facilitate the demobilisation of child soldiers and support their rehabilitation and reintegration into society. The transition to civilian life can be challenging for both children and their communities. Beyond addressing the basic needs of children, including food and shelter, it is crucial to consider their emotional and developmental requirements.

In recent years, amid the ongoing and newly ignited armed conflicts, the toll on children has remained alarmingly high. The blatant and systematic disregard for international humanitarian and human rights laws continues to compromise the protection of children. It is imperative to fortify compliance with international humanitarian and human rights obligations through unwavering commitment, resolute determination, and concrete actions. Words alone are inadequate to safeguard our children. Urgent action is necessary to secure the present and bestow upon them a future devoid of fear, conflict, and exploitation.

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Optional Protocol on a Communications Procedure

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ABSTRACT

The *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (hereinafter OPIC) was adopted on December 19, 2011,¹ and entered into force on April 14, 2014.² It opened the possibility for individual complaints to be brought to the Committee on the Rights of the Child (hereinafter CRC Committee or Committee) whenever domestic remedies were exhausted, in cases of the occurrence of an *alleged violation* to the provisions of the United Nations (UN) Convention on the Rights of the Child (CRC) or its two Optional Protocols,³ by state parties to any of these international instruments, as well as when for an *unreasonably long time no step was taken* by the given state to address the alleged violation. The main aim of the OPIC was to enhance children's access to their rights, especially to effective remedy at an international level. The OPIC was also the last piece of the puzzle⁴ in the UN treaty body system, as its adoption led all UN treaty bodies to have the competence to receive individual communications procedures. Nevertheless, although the CRC itself is the most widely ratified human rights treaty⁵ and the other two Optional Protocols have a very wide acceptance, the OPIC has a low rate of signatory states and an even lower ratification rate.⁶

KEYWORDS

United Nations Convention on the Rights of the Child, children's rights, Optional Protocols, OPIC, CRC Committee, State Party, remedy, interim measures, individual communications, Inter-State complaint, inquiry procedure, legal capacity of a child

1 Adopted by General Assembly resolution A/RES/66/138.

2 The first country that became party to ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC) was the Kingdom of Thailand, having deposited the ratification during the 67th Session of the United Nations General Assembly on September 25, 2012.

3 Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and Optional Protocol to the Convention on the involvement of children in armed conflicts.

4 Beco, 2013, p. 367.

5 All countries in the world have ratified the CRC, except for the United States of America.

6 As of July 3, 2023, 66 states have signed the OPIC, of which 50 also ratified it. Among the Central European Countries (i.e. Croatia, Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia), Croatia, the Czech Republic, Slovakia and Slovenia are state parties, while Poland, Romania, and Serbia have only signed the OPIC, and Hungary made no actions so far.

1. History of Optional Protocol to the Convention on the Rights of the Child on a communications procedure

The need for a communications procedure appeared during the United Nations (UN) Convention on the Rights of the Child (CRC) negotiations from 1978 until its adoption in 1989. However, the idea was dropped because of the comprehensiveness of the CRC itself and because it was widely argued by state parties that the CRC contained economic, social, and cultural rights that were considered to be non-justiciable.⁷ In addition, the Committee on the Rights of the Child (hereinafter CRC Committee or just Committee) is not a judicial body, and state parties to the CRC did not consider to provide the CRC Committee with the competence of receiving and deciding on national, internal child rights violations.⁸

The idea of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (hereinafter OPIC) became relevant again in late 2007, when the CRC became the only core international human rights treaty that had no corresponding communications procedure. It was also emphasised that the monitoring mechanism envisaged in the CRC was allegedly incomplete, ineffective, and fraught with defects.⁹ The discussion about the OPIC was initiated by the Chairperson¹⁰ of the CRC Committee and non-governmental organisation groups, and the first proposal was presented in January 2008 at the 47th Session of the CRC Committee. At this session, the Committee had not yet endorsed the procedure but started an in-depth study on the need for it and how to make it child-friendly and effective. The proposal was eventually endorsed at the 48th Session of the CRC Committee, and officially announced¹¹ by the Chairperson of the CRC at an event organised by non-governmental organisations.¹² Then, on June 17, 2009, the UN Human Rights Council decided¹³ to establish an Open-ended Working Group to explore the possibility of an optional protocol on communications procedures, leading to the beginning of a drafting process that would go on for approximately one and a half years.

During the drafting process, member states of the Human Rights Council raised various concerns that prevented them from fully backing the idea of the OPIC,¹⁴ with one major concern being whether the OPIC had overall added value. The states also questioned the following: whether the CRC Committee could handle such an extra

7 Reasons and Timing to Elaborate a Communications Procedure under the Convention on the Rights of the Child, December 10, 2009, A/HRC/WG.7/1/CRP.4 at 2.

8 It is one of the reasons for non-ratification until today.

9 Woldemichael, 2015, p. 80.

10 At that time, the position was filled by Yanghee Lee, who served from 2007 to 2011.

11 The Chairperson said: 'Time has come (...), we are now inviting all stakeholders to come forth and seriously work together on a drafting process'. For details please see: <http://www.crin.org/recourses/infoDetails.asp?ID=17602&flag=news>.

12 The event was attended by approximately 30 government representatives.

13 Resolution A/HRC/RES/11/1.

14 Lee, 2010, pp. 573 – 576.

burden of work; the lack of legal expertise¹⁵ in the OPIC; the scope of the protocol, namely whether the OPIC should cover only the CRC or should extend to cover the first two Optional Protocols to the CRC; whether all provisions of the preceding documents should be under the scope of the third Protocol or some (e.g. the best interest of the child, which is very difficult to define) should be left out; the issue of the legal capacity of children and whether children would be able to pursue communication either on their own behalf or through representatives;¹⁶ the duration of the procedure, which connects closely to the status of the child and the question of how the individual child will benefit if the case takes a long time for a decision (e.g. the decision is made after the child is no longer a child).¹⁷ Meanwhile, a core point during the drafting process was the national sovereignty of states, which remains until today one of the main reasons for opting out.

The OPIC was approved by the Human Rights Council¹⁸ in June 2011, and subsequently adopted by the UN General Assembly in December 2011.¹⁹ On February 28, 2012, the Human Rights Council held an official signing ceremony during which 20 countries signed the third Optional Protocol.²⁰ The OPIC came into force three months after the deposit of the tenth instrument of ratification,²¹ and is currently open to signatures,²² ratifications,²³ and accession²⁴ for states that have ratified or acceded to the CRC or to either of the first two Optional Protocols. For each state party that was or is ratifying or acceding to the OPIC after its initial entry into force, the OPIC shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.²⁵

15 Legal expertise is not a criterion for election to the CRC Committee. From the committees, the monitoring of human rights treaties, such as the International Covenant on Civil and Political Rights and the Committee Against Torture, should consider 'the usefulness of the participation of some persons having legal experience'. Like in other conventions, Art. 43 of the CRC only declares that 'the members of the Committee shall be elected by states parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems'.

16 This issue was really a core point, taking into consideration the fact that Article 1 of the CRC defines children as everyone under 18 (unless majority attained earlier). This means that the beginning of childhood is defined in national legal systems.

17 Lee, 2010, p. 575.

18 UN General Assembly, A/HRC/RES/17/18, July 14, 2011.

19 UN General Assembly, GA/11198, December 19, 2011.

20 Phillips, p. 6.

21 Art. 19, para 1 of the OPIC.

22 Art. 18, para 1 of the OPIC.

23 Art. 18, para 2 of the OPIC.

24 Art. 18, para 3 of the OPIC.

25 Art. 19, para 2 of the OPIC.

2. Structure and content

The OPIC consists of a *Preamble* and *four separate parts*, namely the *General Provisions* (Arts. 1–4), *Communications Procedure* (Arts. 5–12), *Inquiry Procedure* (Arts. 13–14), and *Final Provisions* (Arts. 15–22). The General Provisions and Final Provisions describe principles and key elements governing the procedures of the OPIC, complemented by the Preamble. The Communications Procedure and Inquiry Procedure deal with three key procedures that can be brought to or dealt with in front of the CRC Committee, which are (I) the *Individual Communications Procedure*, (II) the *Inter-State Complaint Mechanism* and (III) the *Inquiry Procedure*.²⁶

2.1. Preamble of the OPIC

The legal nature of the preamble is to guide stakeholders in applying and enforcing the law through the application of the binding provisions of the law. The same applies to the OPIC, in that its preamble has no binding effect but provides an interpretative framework to the CRC Committee and to the state parties when applying and enforcing its statutory part. The preamble was inspired by the preambles of similar human rights instruments,²⁷ and thus recognises the inherent dignity and equal and inalienable rights of humans, and reaffirms the universality, indivisibility, interdependence, and interrelatedness of all human rights and fundamental freedoms.

In addition to these general guiding principles, the preamble underlines specificities unique to children’s human rights, and draws attention to the fact that the CRC applies to all children without discrimination,²⁸ reaffirming the status of the child as a subject of rights with evolving capacity and full human dignity and not merely an object of protection. It also underlines that children are particularly vulnerable and that their dependent status may create difficulties in pursuing remedies for violations of their rights. Furthermore, the preamble stresses the principle of the best interests of the child, the importance of child-sensitive procedures at all levels,²⁹ and recalls the important role of national human rights institutions and other relevant specialised institutions, which are mandated to promote and protect the rights of the child. Moreover, it highlights the importance of providing domestic remedies and complementarity with national and regional mechanisms to protect children’s rights.

26 There was extensive lobbying by non-governmental organisations to add a fourth type of procedure to the OPIC, which would be the collective complaint mechanism, but at the end no such mechanism was included. This collective complaint mechanism would open a way to non-governmental organisations to bring a complaint on behalf of unnamed individuals in front of the CRC Committee.

27 Beco, 2013, p. 373.

28 Art. 2 of the CRC.

29 The importance of the best interests of the child and child-sensitive procedures in strengthened also by the statutory part of the OPIC.

2.2. Guiding principles, key aspects, and working methods of the CRC Committee

Similar to the CRC, the main principles that should govern the application of the OPIC and the actions of the CRC Committee are the *best interest of the child* and the *respect for the rights and views of the child*, which shall be given due weight in accordance with the age and maturity of the child.³⁰ According to the OPIC, to ease and accommodate the effectiveness of the procedures, the CRC Committee shall adopt *rules of procedure* which need to be *child-sensitive* and should put safeguards in place to prevent the manipulation of a child.³¹ State parties shall take all steps to ensure that individuals under their jurisdiction are not subject to any human rights violation, ill treatment, or intimidation as a consequence of communication or cooperation with the CRC Committee pursuant to the OPIC.³² Procedures under the OPIC shall be *confidential* unless there is the express consent of the individual or group of individuals that initiate the procedure.³³ It is also emphasised in the OPIC the need for providing international assistance and cooperation for states in the implementation of the views and recommendations of the Committee.³⁴

The CRC Committee adopted the Rules of Procedure under the OPIC³⁵ on April 8, 2013. The Rules of Procedure strengthen and complement the provisions of the OPIC,³⁶ define the methods of work of the CRC Committee, and reinforce the principles of the best interests of the child and the due weight of the view of the child.³⁷ It also lays down the principle of expeditiousness³⁸ and privacy³⁹ and details the rules of protection measures.⁴⁰ In the framework of the rules governing the methods of work, the Rules of Procedure impose an obligation on the Secretary-General of the UN to maintain a permanent record of all procedures initiated under the OPIC, and make all information available to any member of the Committee in the language of the submission.⁴¹ The Committee bears the possibility of establishing working groups and designating rapporteurs to obtain adequate support for its work – these entities shall all work in line with the Rules of Procedure –⁴² and to consult experts on its own initiative.⁴³ Furthermore, the Rules of Procedures detail conflict of interest

30 Art. 2 of the OPIC.

31 Art. 3 of the OPIC.

32 Art. 4, para. 1 of the OPIC.

33 Art. 4, para. 2 of the OPIC.

34 Art. 15 of the OPIC.

35 CRC/C/62/3.

36 The Rules of Procedure are not discussed at this point in its entirety. Respective provisions of the Rules of Procedure are discussed at the respective parts of this chapter.

37 Rules of Procedure, Rule 1.

38 Rules of Procedure, Rule 2.

39 Rules of Procedure, Rule 3.

40 Rules of Procedure, Rule 4, describing the possibility of the CRC Committee to request the state party to adopt and take appropriate measures urgently to stop the alleged breach in cases where the state party has not complied with its obligation under Art. 4, para. 1 of the OPIC.

41 Rules of Procedure, Rule 5.

42 Rules of Procedure, Rule 6.

43 Rules of Procedure, Rule 10.

rules, according to which a member of the CRC Committee shall not participate in, be present, or influence the procedure in any way if (I) the procedure is against a state of which he/she is a national, (II) he/she as a member of the Committee has a personal or professional interest in the case or any other conflict of interest, (III) he/she has participated, in any capacity, in making and adopting any decision on the communication other than those under the procedures applicable to the OPIC, the CRC itself, or the other two substantive Protocols.⁴⁴ Moreover, if, at any time, a member considers that he/she should not take part in the procedure, the member shall withdraw and parallelly inform the Committee of the withdrawal.⁴⁵ As for financial resources, the Secretary-General provides the budget for the Committee to undertake the activities under the OPIC.⁴⁶

Every two years, the CRC Committee submits a report to the General Assembly on its activity under the OPIC,⁴⁷ which is based on Art. 44, para. 5 of the CRC, and part of the report is made in accordance with this article. The state parties to the OPIC also undertake to disseminate information about the Protocol and facilitate access to information about the CRC Committee and its documents, particularly those concerning the state party. This information shall be easily accessible to both children and adults, including those living with disabilities.⁴⁸ In addition, state parties to the OPIC have the right to denounce⁴⁹ it at any time through a written notification to the Secretary-General of the UN, which shall take effect one year after the date of receipt.⁵⁰

2.3. *Three key procedures of the OPIC*

Currently, the OPIC comprises three key procedures, two of which are discussed under the umbrella of *communications procedures* and one which is an *inquiry procedure*. These communications procedures, in general, are established to monitor the implementation of international instruments, and mainly refer to procedures that allow individuals, groups of individuals, or their representatives who claim that their rights have been violated by a state that is party to a human rights convention to bring a complaint before the relevant Committee established under one of the treaties.⁵¹

44 Rules of Procedure, Rule 8.

45 Rules of Procedure, Rule 9.

46 Rules of Procedure, Rule 11.

47 Art. 16 of the OPIC.

48 Art. 17 of the OPIC.

49 Denunciation shall be without prejudice to the continued application of the provisions of the OPIC to any communications submitted under Art. 5 or 12 or any inquiry initiated under Art. 13 before the effective date of denunciation. (OPIC Art. 22, para. 2)

50 OPIC Art. 22, para. 1.

51 Woldemichael, 2015, p. 81.

In general, communications procedures may be either individual⁵² or collective⁵³, but the OPIC recognises only individual communications procedures.

2.4. Individual communications procedures

2.4.1. Submitting individuals

An *Individual communications procedure* may be initiated by individuals or groups of individuals within the jurisdiction of a state party claiming to be victims of a violation by the state party of any of the rights set forth in the CRC – or its two substantive Protocols.⁵⁴ The term individual refers to children (and the representatives acting on their behalf) and those individuals who are not children (and the representatives acting on their behalf) at the time of submission but were victims of violation of their rights by the time they were children.⁵⁵ If the submission is made by representatives, it shall be accompanied by the express consent of the alleged victim unless a submission is required in the best interest of the child and thus can be evaluated without express consent.⁵⁶ Both individuals and representatives have the right to correspond directly with the Committee throughout the procedure.⁵⁷

2.4.2. Interim measures

Any time after the receipt of the communication and before a determination of the merits has been reached,⁵⁸ in case of a presumption that there is a possible, *irreparable damage* to the victim(s) of the alleged violation of the rights of the child, there is the possibility for the Committee, the working group, or the rapporteur (with the guidance of the Committee) to request, in *exceptional circumstances*, the state to take *interim measures* to avoid the irreparable damage.⁵⁹ The CRC Committee considers that *exceptional circumstances* refer to a grave impact that an action or omission by a state party can have on protected rights or on the eventual effect of a pending decision in a case or petition before the Committee.⁶⁰ Irreparable damage refers to a violation of rights which, owing to their nature, would not be susceptible to reparation, restoration, or adequate compensation.⁶¹ Compliance with the interim measure shall be monitored by the Committee, working group, or rapporteur,⁶² and the state party may

52 Individual communications procedures means that only individual victims or groups of victims are given an opportunity to present communications to the respective committee.

53 Collective communications allow other entities such as non-governmental organisations and/or national human rights institutions to bring communications on behalf of a group.

54 Art. 5 of the OPIC.

55 Woldemichael, 2015, p. 82.

56 Rules of Procedure, Rule 13.

57 Rules of Procedure, Rule 12.

58 Art. 6 of the OPIC.

59 Rules of Procedure, Rule 7, para. 1-2.

60 Guidelines for Interim measures under the OPIC para. 2.

61 *Ibid*, para. 2.

62 Rules of Procedure, Rule 7, para. 4.

at any time request for the interim measure to be lifted if the state considers that it is no longer justified.⁶³ Furthermore, interim measures are two-sided because they are concomitantly *precautionary* and *protective*,⁶⁴ as their aim is to avoid irreparable harm and preserve the exercise of human rights (i.e. protective nature) and preserve the legal situation under consideration by the Committee (i.e. precautionary nature).

2.4.3. Admissibility

Following the receipt of the communication, the State Party *examines the admissibility* of the communication and decides on its inadmissibility according to the following criteria: if the communication is (I) anonymous; (II) not in writing; (III) constitutes an abuse of the rights of submission of such communications or is incompatible with the provisions of the CRC or its two substantive Protocols; (IV) the same matter has been or is being examined under another procedure or international investigation or settlement; (V) not all domestic remedies have been exhausted;⁶⁵ (VI) the communication is manifestly ill-founded or not sufficiently substantiated; (VII) the facts subject to the communication occurred prior to the entry into force of the OPIC for the state party concerned, unless those facts continued after that date; (VIII) the communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.⁶⁶

The Committee shall decide on the admissibility by a simple majority as quickly as possible,⁶⁷ and whenever the Committee decides that communication is inadmissible, it shall, without delay, communicate the reasoned decision to the state party concerned through the Secretary-General.⁶⁸ The Committee may review the decision on inadmissibility whenever it receives a submission indicating that the reasons for inadmissibility no longer apply.⁶⁹ As soon as the decision on admissibility is adopted, the Committee is obliged to confidentially transmit the communication to the concerned state party.⁷⁰ Afterwards, the state party has six months to submit a written explanation, clarification of the matter, and remedy (if any).⁷¹

63 Rules of Procedure, Rule 7, para. 5.

64 Guidelines for Interim measures under the OPIC para. 2.

65 This shall not be a rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief.

66 Art. 7 of the OPIC.

67 Rules of Procedure, Rule 20.

68 Rules of Procedure, Rule 21, para. 1.

69 Rules of Procedure, Rule 21, para. 2.

70 Art. 8, para. 1 of the OPIC.

71 Art. 8, para. 2 of the OPIC.

2.4.4. *Transmission of communication: Friendly settlement and continuation of the procedure towards a decision on the merits*

After the transmission of the communication, there are two ways to continue the procedure, namely *friendly settlement*⁷² or *the continuation of the procedure* in a direction in which the CRC Committee provides recommendations on the merits of the case, that is, consideration of the communication. A *Friendly settlement* shall be initiated at any time after the receipt of a communication and before reaching a determination on the merits on the basis of the consent of the parties, in a confidential manner, and without prejudice to the parties' submissions to the Committee.⁷³ The Committee shall make available its offices and designate one or more of its members to facilitate the negotiations.⁷⁴ The facilitation may be terminated at any time whenever the Committee concludes that the matter is not susceptible to reaching a resolution, or if any of the parties does not consent to its application, decides to discontinue it, or does not display the requisite will to reach a friendly settlement based on respect for the obligations set forth in the CRC or its two substantive Protocols.⁷⁵ A friendly settlement is reached when the parties expressly agree on its merits. After ascertaining the consent of the parties, the CRC Committee adopts the decision with a statement of the facts and of the solution.⁷⁶ If no friendly settlement is reached, the Committee continues with further examination of the communication.⁷⁷

If there is no friendly settlement or the parties have no intention of starting a friendly settlement procedure, the Committee starts as soon as possible the *continuation of the procedure*, which involves the consideration and examination of the communication in light of all the documentation.⁷⁸ In the frame of this examination, the Committee shall at any time – before reaching a determination on the merits – consult or receive documentation from all other UN organs, bodies, specialised agencies, funds, programmes, and mechanisms, other treaty bodies instituted by international instruments and special procedures of the UN, other international organisations (e.g. from regional human rights systems), non-governmental organisations, national human rights institutions, other relevant specialised institutions mandated to promote and protect the rights of the child, and all relevant state institutions, agencies, or offices that may assist in the examination process.⁷⁹ The provision of documents and information does not mean that these parties would become parties to the proceedings. Whenever the reasons for submission for consideration

72 Art. 8 of the OPIC.

73 Rules of Procedure, Rule 25.

74 Art. 9 of the OPIC, and Rules of Procedure, Rule 25, paras. 2-3.

75 Rules of Procedure, Rule 25, para. 5.

76 Rules of Procedure, Rule 25, para. 6.

77 Rules of Procedure, Rule 25, para. 7.

78 Art. 10 of the OPIC.

79 Rules of Procedure, Rule 23, para. 1.

of the communication become moot under the CRC or its two substantive Protocols, the Committee may discontinue the consideration.⁸⁰

After closing the examination phase, the Committee shall, without delay, transmit its views on the communication, together with the recommendations, to the parties concerned.⁸¹ In the event that the Committee finds that a state party has violated its obligations under the CRC or its two substantive Protocols, it shall make recommendations on remedies for the alleged victims(s), such as, *inter alia*, rehabilitation, reparation, financial compensation, guarantee of non-repetition, request to prosecute the perpetrator(s), and indicate the time limit for their application. The Committee may also recommend that the state party take legislative, institutional, or any other kind of general measures to avoid the repetition of such violations.⁸² Committee members who participated in the decision-making may request that the text of his/her individual opinion be appended to the Committee's views.⁸³

2.4.5. Decisions in individual communications procedures

In summary, a submission of a communication may result in one of the following decisions: (I) decision on inadmissibility; (II) decision closing the consideration of communication following a friendly settlement; (III) the Committee's view on the merits. Any decision of the Committee shall be written in accessible language and adapted, to the extent possible, to the age and maturity of individuals whose rights were violated.⁸⁴ No decision on the merits shall be concluded unless a real consideration of applicability and admissibility.

2.4.6. Follow-up on individual communications procedures

In the follow-up phase, the views and recommendations adopted by the Committee shall be given due consideration by the state party, and the state party shall submit, within six months, a written response with information on any action taken and envisaged in light of the views and recommendations received.⁸⁵ After six months, the Committee may require the state party to submit information on the steps taken to remedy a breach of the rights of the child. The Committee also issues a follow-up progress report, with the first one ever having been issued on October 4, 2019,⁸⁶ and the latest one on February 29, 2024.⁸⁷ These reports examine the communications procedures submitted to the CRC Committee and evaluate them as follows:

80 Rules of Procedure, Rule 26.

81 Art. 10, para. 5 of the OPIC.

82 Rules of Procedure, Rule 27.

83 Rules of Procedure, Rule 24. It is important to note that the Committee may fix time limits for the submission of such individual opinions.

84 Rules of procedure, Rule 27, para. 1.

85 Art. 11 of the OPIC.

86 CRC/C/82/1.

87 CRC/C/95/2, CRC Committee: Follow-up Progress Report on Individual Communications Procedure.

- Compliant: The measures taken are satisfactory or largely satisfactory.
- Partial compliance: The measures taken are partially satisfactory and require additional information or actions.
- Noncompliance: The reply was received but the measures taken are not satisfactory, do not implement the views, or are irrelevant to the views.
- No reply: No cooperation or no reply was received.

2.5. Inter-state complaint mechanism

The inter-state complaint mechanism serves as a procedure for states to report to the CRC Committee alleged violations of children's rights committed by other states. This is a procedure in which state parties to the OPIC have considerable room for opt out, that is, the state parties are given the liberty to either accept or decline recognition of the competence of the CRC Committee to receive and consider *inter-state communications* with respect to the CRC or its two substantive Protocols.⁸⁸ The declaration can also be withdrawn at any time,⁸⁹ And the Committee shall not receive communications concerning a state party that has not made such a declaration, nor communications from a state party that has not made such a declaration.⁹⁰ The provisions of the OPIC concerning interstate communications also do not refer to the jurisdiction of the state parties, implying that such communication can be used to address extraterritorial violations of children's rights.⁹¹

To date, no inter-state communication has been initiated under the CRC. In theory, a government may initiate an inter-state communications against any other government that has given the Committee permission to receive and review these types of complaints. This permission shall be given when ratifying the OPIC, meaning that countries that have not ratified the OPIC do not have such opportunity. In the complaint, it must be specified which rights are being violated, which government is responsible, and the facts and circumstances around these violations. As with individual communications, governments can only be held responsible for failing to fulfil the obligations they have already accepted by ratifying the CRC or its two substantive Protocols.

2.6. Inquiry procedure

Unlike the inter-state complaint mechanism, where an express statement of the state party concerned is required to consider the complaint, an inquiry procedure is accepted upon a state party's ratification. The exception is if, at the time of signature or ratification of the OPIC, a state party declares that it does not recognise the competence of the Committee provided for initiating the inquiry procedure.⁹²

88 Woldemichael, 2015, p. 89–100; Art. 12, para. 1 of the OPIC.

89 Art. 12, para. 2 of the OPIC.

90 Art. 12, para. 3 of the OPIC.

91 Woldemichael, 2015, p. 101.

92 Art. 13, para. 7 of the OPIC.

Moreover, any state party that has made such a declaration has the opportunity to withdraw it by notifying the Secretary-General of the UN.

The *inquiry procedure for grave or systematic violation* is initiated when the CRC Committee receives reliable information indicating a grave and systematic violation of the rights set forth in the CRC or its two substantive Protocols.⁹³ The Secretary-General shall bring to the attention of the Committee any information that falls under an alleged grave or systematic violation.⁹⁴ Meanwhile, the Committee may preliminarily consider the reliability of the information brought to its attention under the inquiry procedure, and seek to obtain additional relevant information substantiating the facts of the situation.⁹⁵ The Committee then invites the concerned state party to cooperate in the examination of the information, and to submit observations without delay, and until the end of the examination process, with regards to the information that suggests the grave and systematic violation.⁹⁶ The Committee may decide to obtain additional information from the following: (I) representatives of the state parties concerned; (II) governmental organisations; (III) UN bodies, specialised agencies, funds, programmes, and mechanisms; (IV) international organisations, including from regional human rights systems; (V) national human rights institutions and other relevant specialised institutions mandated to promote and protect the rights of the child; (VI) non-governmental organisations; (VII) individuals, including children.⁹⁷ Based on the information received, the Committee is entitled to initiate an inquiry on its own initiative,⁹⁸ which may happen in a form of designating one or more of its members to conduct an inquiry and report urgently to the CRC Committee.

If necessary, the inquiry may include a visit to the concerned state party⁹⁹ and shall be conducted confidentially with a cooperative attitude.¹⁰⁰ During the visits, the designated member(s) of the Committee may conduct hearings to determine the facts or issues relevant to the inquiry.¹⁰¹ If a child or children are heard, the members of the Committee shall guarantee child-sensitive procedures at hearings, and shall particularly ensure that the child(ren) is heard separately, that her/his/their views are given due weight in accordance with age and maturity,¹⁰² and that her/his/their best interests are taken into paramount consideration every time. After examining the findings, the Committee shall transmit them through the Secretary-General to the concerned state party together with any comments or recommendations. The state party shall then submit its observations on the findings, comments, and recommendations as soon as

93 Art. 13 of the OPIC.

94 Rules of procedure, Rule 31, para. 1.

95 Rules of Procedure, Rule 34, para. 1.

96 Art 13, para. 1 of the OPIC.

97 Rules of Procedure, Rule 35, para. 3.

98 Rules of procedure, Rule 31, para. 2.

99 Art. 13, para. 2 of the OPIC.

100 Art. 13, para. 3 of the OPIC; Rules of Procedure, Rule 33.

101 Rules of Procedure, Rule 39, para. 1.

102 Rules of Procedure, Rule 39, para. 3.

possible, and not later than six months after receipt.¹⁰³ In frame of a follow-up to the comments and recommendations, the Committee may – if necessary and after the end of the six months waiting compliance period – invite the state party concerned to inform the Committee about the measures taken¹⁰⁴ and envisaged in response to the inquiry procedure.¹⁰⁵

3. Legal representation and legal capacity of a child during procedures

Currently, there is no provision in the OPIC that deals with the issue of legal representation or the legal capacity of a child in the procedures. Nevertheless, this question is essential, especially when considering individual communications procedures. During the drafting process of the OPIC,¹⁰⁶ state parties considered several options.¹⁰⁷ Some proposals put forward the restriction of legal representation,¹⁰⁸ while others suggested limiting access to the communications procedure for either children or their legal representatives, and some argued that a reference to national legislation should be made. The limitation of access to legal representatives would not consider the possibility of a conflict of interest between a child and a parent (legal guardian), and direct reference to national legislation would also raise further questions, as most jurisdictions limit the legal capacity of children to act and, as such, their individual access to domestic or international remedies. This could result in differential access for children under different jurisdictions which does not correspond to the aims of the CRC or the OPIC.

As of now, the OPIC merely requires the consent of individuals on whose behalf the complaint is submitted.¹⁰⁹ Meanwhile, the role of the Rules of Procedure is to prevent the manipulation of the child by those acting on his/her behalf,¹¹⁰ and they do not deal separately with the legal representation or legal capacity of children; instead, and as just mentioned, the Rules only address the manipulation of children by declaring that the CRC Committee shall take all measures to ensure that children are not subject to improper pressure of inducement by those acting on their behalf.¹¹¹ Moreover, apart from the fact that the Rules of Procedure emphasise child-sensitive procedures and the views of children being given due weight in accordance with age and maturity, manipulation is not addressed otherwise. The proper participation or

103 Art. 13, para. 5 of the OPIC; Rules of Procedure, Rule 41, para 3.

104 If necessary, it may request further information regarding the measures taken.

105 Art. 14 of the OPIC.

106 See the part on the history of OPIC as well.

107 Beco, 2013, p. 380.

108 These proposals represented the lack of trust especially in the non-governmental organisations.

109 Art. 5, para. 3 of the OPIC.

110 Art. 3, para. 2 of the OPIC.

111 Rules of Procedure, Rule 1, para. 2.

representation of children remains an open question that requires (and shall give space to) an individual assessment and a case-by-case analysis to ensure proper and genuine representation and participation of children.

4. Conclusions: pros and cons of the OPIC and possible amendments

Some argue that the OPIC was a huge step towards promoting children's rights¹¹² and a success in making the UN treaty body system more complete and child-sensitive.¹¹³ Countries that were more involved in the drafting and adoption of the OPIC ratified the instrument quickly, such as Thailand in 2012 and Slovakia in 2013.¹¹⁴ The proposition and adoption of the OPIC served indeed as a symbolic step considering the international recognition of the rights of the child. Despite the relatively quick ratification by some countries, the ratification rate is still very low compared to the ratification rates of the CRC and its two substantive Protocols.

Considering this, one may argue that the OPIC did not live up to the expectations. Surely, the OPIC addressed the issue of access to remedy for children at an international level; however, when taking a closer look, one may also observe several questions that arise and may serve as a justification for the observed lower ratification rate. One of the main questions is whether the CRC Committee can be seen as a judicial body and, as such, entitled to interpret the provisions of the CRC and its two substantive Protocols as a court of the last instance. There is also the question of whether children are capable of bringing complaints on their own behalf and whether the safeguards that are in place are enough to guarantee that their participation is real and genuine and that their manipulation is excluded to a sufficient level, as is required by the CRC. It is also uncertain whether, at the international level, the presence of a conflict of interest between a child and its representative (i.e. parents, legal guardians, or anyone acting on their behalf) can be well-assessed, and whether the possibility of manipulation is excluded to a sufficient level. It also arises the question as to whether the OPIC is a meaningful advancement in acknowledging the special nature of children.¹¹⁵ Despite the efforts and intentions to do so, the drafters of the

112 Fact Sheet No.7/Rev.1 (OHCHR, 2002) argues that it is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a personal real-life situation, the standards contained in international human rights treaties find their most direct application. The resulting body decisions may guide states, non-governmental organisations, and individuals in interpreting the contemporary meaning of the texts concerned.

113 The communication procedures established under other optional protocols are open to all individuals, including children. Nevertheless, none of these procedures were developed with the eyes for the special status of children, which was considered under the OPIC.

114 Key findings of the Roundtable discussion: Toward better implementation of the UNCRC through its third Optional Protocol on Communications Procedure, 2019, p. 7.

115 Woldemichael, 2015, p. 108.

OPIC were not entirely successful in creating a communications procedure adapted to the specificities of children and their rights.¹¹⁶ This question can be further developed to determine whether every step of the entire procedure is designed to serve the best interests of a child. Indeed, there are a few references in the text to the best interests of the child, but little has been done to genuinely achieve this.¹¹⁷

Art. 21 of the OPIC leaves the possibility for amendments to state parties, which also suggests the dissatisfaction of drafters with its character tailored to children and the intention to offer space for improvement. Moreover, Art. 21 provides that any state party may propose an amendment to the OPIC and submit it to the Secretary-General of the UN, who shall then communicate any proposed amendments to state parties with a request to be notified whether they favour a meeting of state parties for the purpose of considering and deciding upon the proposal. In the event that, within four months of the date of such communication, at least one-third of the state parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the UN. Any amendment adopted by a majority of the two-thirds of the state parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and, thereafter, to all state parties for acceptance. The amendment shall enter into force on the 30th day after the number of instruments of acceptance deposited reaches two-thirds of the number of state parties on the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any state party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only to those state parties that have accepted it.

From the nature of the implementation of children's rights, there is the need to consider characteristics such as child-sensitivity, interdisciplinarity, thorough understanding of the child's best interests in the given cultural environment, case-by-case analysis, genuine child participation, child-centred procedures, and so on. These characteristics are more likely to be met on a level that is closer to the child's everyday life, meaning that *the OPIC cannot be a substitute for a well-functioning, child-friendly remedy system on a national level*. Art. 4 of the CRC requires state parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC, which also includes a remedy system accessible to children and that considers the speciality of their rights at the national level. This is an aim that many state parties should approach, and an implementation gap that shall be narrowed down step-by-step, first by strengthening the inner remedy mechanisms.

116 Beco, 2013, p. 386.

117 *Ibid.*

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Part VI

**Implementation and Monitoring
of the Rights of the Child on
International and Local Levels**

The Role of National Human Rights Institutions, the Unicef, and Non-governmental Organisations in the Implementation of the United Nations Convention on the Rights of the Child

Márta BENYUSZ

ABSTRACT

The United Nations Convention on the Rights of the Child (CRC) is the most widely ratified human rights treaty in the world.¹ The CRC declares the rights of children and defines a minimum level of protection applicable to all state parties for each child. Children's rights are human rights, and as such, their addressees are first and foremost the states. In other words, the states are those primarily responsible for and entitled to the implementation of children's rights as per the CRC. Nevertheless, there are other organs that played important roles in the process of drafting and adopting the CRC and its Optional Protocols,² and which remain adding special expertise and giving echo to the voices of stakeholders (e.g. parents, churches, and children) amid the continuous implementation of the CRC. The importance of their roles is also articulated in Art. 45 of the CRC. Accordingly, this chapter delves into the *United Nations Children's Fund* (UNICEF; as an intergovernmental organisation), *non-governmental organisations*, and *national human rights institutions*, along with the respective roles they played in the drafting and adoption of the CRC and continue to play in its implementation and monitoring.

KEYWORDS

United Nations Convention on the Rights of the Child, rights of the child, non-governmental organisations, UNICEF, national human rights institutions, adoption, implementation, monitoring

1 Convention on the Rights of the Child, adopted in New York on 20 November 1989 by General Assembly resolution 44/25, UN Treaty Series no. 27531. All State Parties to the UN have ratified the treaty, except for the United States of America.

2 Currently, there are three Optional Protocols attached to the CRC, which are the Optional Protocol on the sale of children, child prostitution and child pornography, Optional Protocol on the involvement of children in armed conflict, and the Optional Protocol on a communications procedure.

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1. Non-governmental organisations

1.1. Definition, legal basis of the involvement of non-governmental organisations, and their general role at the United Nations level

There is no exact, unanimously agreed upon definition of non-governmental organisations (NGOs). Typically, they are organisations representing a specialised expertise, established by a group of individuals, operating voluntarily, most frequently on a non-profit basis, and independent of the government. The United Nations (UN) Development Programme (also known as UNDP) defines it as ‘a third sector existing alongside and interacting with the state and private industry’.³ The founders of the UN envisaged NGOs as stakeholders who would play a crucial and active role within the UN structure,⁴ with the UN Charter⁵ stating that:

‘the Economic and Social Council (hereinafter referred to as ECOSOC) may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.’

To fulfil this mandate, the Economic and Social Council adopted a resolution⁶ that describes the statutory requirements which must be met to obtain one of the three levels of consultative status with the UN.⁷ Each level carries specific privileges and all NGOs with consultative status are allowed to lobby freely among government delegations and participate, to some extent, in various UN meetings.⁸ From the perspective of this study, it is a starting point to emphasise that the Convention on the Rights of the Child (CRC) and its Optional Protocols⁹ formally acknowledge the role of civil society in protecting and promoting the human rights of children. Nevertheless, other treaties reference the role of civil society:¹⁰

- The Statute of the International Criminal Court: Arts. 15 (2) and 44 (4)
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: Art. 74 (4);

3 The United Nations Development Programme and Civil Society Organisations: A Policy Note on Engagement, para. 5 (Accessed: April 12, 2024).

4 Cohen, 1990, p. 137.

5 Chapter 10, Art. 71.

6 See in detail: ECOSOC Resolution 1296 (XLIV). Available at: <https://archive.globalpolicy.org/ngos/ngo-un/info/res-1296.htm>. (Accessed: April 12, 2024).

7 Cohen, 1990, p. 137.

8 *Ibid.*

9 See footnote 2.

10 Vučković Šahović, 2010, p. 3.

- United Nations Convention on the Rights of Persons with Disabilities, Arts. 32 (1) and 33 (3).

1.2. Role of NGOs in relation to the CRC

1.2.1. Role of NGOs in drafting and in the adoption of the CRC

The CRC adoption was preceded by the development of children's rights. Considering the concrete legislative steps taken at the international level, several NGO-initiated activities can be seen as important steps towards the CRC. For instance, the International Save the Children Fund,¹¹ a NGO established in Geneva by Eglantyn Jebb in 1920 and after the First World War, with the British Save the Children Fund and Swedish Rädde Barnen as leading members, played a key role in the declaration of children's rights at the international level. Jebb was the author of the Declaration of Geneva, which was adopted in 1924 by the League of Nations. This was the first international document to list children's rights using a holistic approach.

The drafting process of the CRC, which followed the Polish proposal based on the text drafted by Professor Tadeusz Smuczynski, began with the Human Rights Commission setting up the Working Group for its drafting in 1979. NGO activity at this point was not yet organised; nevertheless, the annual reports of the Working Group show that there was some sort of NGO activity from the very beginning, even if the reports did not detail the names of the NGOs that participated in this phase. The organised activity of NGOs started in 1983, when the NGO group for the CRC, known at the time as the *Informal Ad Hoc Group for the Convention on the Rights of the Child*, was created and played a crucial role in the drafting process. This NGO group was supported by the United Nations Children's Fund (UNICEF), and the International Save the Children Fund was a member of it. During the drafting process, the NGO group held meetings twice a year at the UNICEF headquarters in Geneva. The working method of the NGO group was to make recommendations on articles proposed by government delegations that either altered or completely revised them.

Still, since the NGO group comprised various individual NGOs, not all questions were unanimously agreed upon, and some NGOs represented different interests. Some topics upon which the NGOs in the group disagreed on included, for instance, *the rights of an unborn child*, which divided the NGO group, and some participants worked on different text proposals.¹² Consensus was not reached in the NGO group regarding Art. 1 in its entirety, as there was no unanimity on the end of childhood.¹³ A similarly difficult question concerned the *age threshold for children to get involved in armed conflicts*, with some NGOs wanting to exclude the possibility of involving children in armed conflicts altogether. This perception was eventually backed by most

11 Available at: <https://www.savethechildren.net/>. (Accessed: April 12, 2024).

12 Cohen, 1990, p. 141.

13 In the final text, Art. 1 leaves to the discretion of the state parties to define or leave open the exact beginning of childhood.

members of the NGO group, particularly Radda Barnen, who then made massive lobbying efforts to reach a common understanding with the state parties. Nevertheless, other interests prevailed, and in the final text of the CRC, Art. 38 defined the threshold for 15 years of age.¹⁴ The NGO group also played a crucial role in drafting articles on the protection of children against sexual exploitation, trafficking, torture, and armed conflict with special attention to including reintegration and promotion of physical and psychological recovery measures for children affected by these serious human rights violations.¹⁵ Furthermore, the provisions on juvenile justice were reducing the influence of NGOs.¹⁶

The work of the NGO group in drafting the CRC is irrevocable; it made a tangible imprint on almost all its articles,¹⁷ bringing in new aspects and points of view from their daily work.¹⁸ However, it must be underlined that the CRC is an international convention, and thus the role of NGOs is of providing professional consultation assistance; this means that while they have room to promote children's rights and lobby for interests, the real stakeholders and obliges are the state parties to the CRC, who also have the mandate to implement the convention in line with the text that they have agreed upon. Therefore, the constructive work provided by NGOs was important at the time of the drafting and adoption of the CRC and remains important during its current implementation and monitoring.

1.2.2. Role of NGOs in implementation and monitoring

Today, the network of NGOs most directly connected to the CRC, the Committee on the Rights of the Child (CRC Committee), and to the monitoring process of CRC implementation is the Child Rights Connect,¹⁹ which comprises 108 members, among which 103 are full members and five are observers. In the framework of the Child Rights Connect, the NGOs carry out their duties in working groups dedicated to specific topics, such as working groups on children and the right to education, child

14 Art. 38 of the CRC: '1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. • 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. • 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. • 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.'

15 Cohen, 1990, p. 143.

16 *Ibid.*

17 *Ibid.*

18 There are aspects that were added to articles, such as standards of school discipline, encouragement of breast-feeding, and discouragement of "traditional practises" (female circumcision), which would have been omitted if not the efforts of the NGO Groups.

19 Available at: <https://childrightsconnect.org/member-network/#members>. (Accessed: April 12, 2024).

participation, children's rights and environment, children and armed conflicts, children and violence, and children of incarcerated parents. According to Art. 45 of the CRC, to foster the effective implementation of the CRC and to encourage international cooperation:

- The specialized agencies, the UNICEF, and other UN organs shall be entitled to be represented in consideration of the implementation of such provisions of the CRC that fall within the scope of their mandate. The CRC Committee may invite specialised agencies, the UNICEF, and *other competent bodies* as it may consider appropriate to provide expert advice on CRC implementation in areas falling within the scope of their respective mandates. The Committee may also invite specialised agencies, the UNICEF, and other UN organs to submit reports on the implementation of the CRC in areas falling within the scope of their activities.
- The Committee shall transmit, as it may consider appropriate, to specialised agencies, the UNICEF, and *other competent bodies*, any reports from state parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications.

In the context of Art. 45, NGOs fall within the scope of other competent bodies, and since the adoption of the CRC, they have worked to monitor the Convention by participating in the reporting process.²⁰ In its concluding observations, the CRC Committee also tends to call for cooperation between civil society and state parties, and for the involvement of NGOs in the dissemination of the CRC.²¹ In addition, many General Comments issued by the CRC Committee refer to civil society.²²

The Child Rights Connect is also a strategic partner of the Committee and Office of the High Commissioner of Human Rights for the engagement of children's rights defenders in the reporting cycle.²³ Their role is to strengthen the capacity of children's rights defenders and of children per se to use the CRC's reporting cycle, in connection

20 With the inclusion of Art. 45, the CRC was the very first international treaty that included the role of civil society.

21 Vučković Šahović, 2010, p.14.

22 See, for example, General Comment No. 10 (2007) 'Children's Rights in Juvenile Justice', General Comment No. 2 (2002) 'The role of independent national human rights institutions in the promotion and protection of the rights of the child', General Comment No. 3 (2003) 'HIV/Aids and the Rights of the Child', General Comment No. 4 'Adolescent health', General Comment No. 5 (2003) 'the General measures of implementation for the Convention on the Rights of the Child', General Comment No. 6 (2005) 'Treatment of unaccompanied and separated children outside their country of origin', General Comment No. 8 (2006) 'Corporal punishment', General Comment No. 9 'Disabilities', General Comment No. 11 (2009) 'Indigenous children and their rights under the Convention', and General Comment No. 12 (2009) 'The right of the child to be heard'.

23 It does not mean that only members of Child Rights Connect can participate in the reporting process, this role is rather to facilitate and promote the possibility of participation of other actors. As referred to also above, it is open to local and regional non-governmental organisations to write alternative reports.

with other relevant UN human rights entry points, as an advocacy tool. The CRC Committee also accepts international, regional, national, and local organisations to submit written reports on how the CRC is being implemented in a given country. It is an alternative report to the one that must be submitted by state parties every five years – and which are followed by the concluding observations of the CRC Committee – and serves for these actors to engage in the reporting cycle.²⁴ Information may be submitted by individual NGOs or coalitions of NGOs national human rights institutions (NHRIs), ombudspersons, children, and organisations representing children. Furthermore, the CRC Committee encourages the submission of joint reports, which in turn require national cooperation of a coalition of NGOs. Thus, in many state parties, child rights coalitions²⁵ have been established, usually with strong coordination efforts from UNICEF, where members are national and local NGOs and individual well-recognised experts on children's rights. This allows national-level cooperation for enhancing the impact of the monitoring and reporting processes of the CRC. In addition, it is more difficult to neglect or discredit submissions by NGO coalitions.²⁶ Nevertheless, it is important to emphasise that the submission of a single alternative report, even if it is very comprehensive and drafted by members of such NGO coalitions, may still result in one-sided opinions. Therefore, even if from a practical point of view or from the perspective of comprehensiveness, it is important to encourage various reports from single actors or different groups of NGOs to allow the representation of various opinions, even those that do not fall within the scope of mainstream information.

Art. 44 (6) of the CRC provides for making the reports of state parties widely available to the public in their own countries. Therefore, NGOs interested in preparing written information for the Committee should request a copy of the state party report from their government. If, for whatever reason, the government does not provide an NGO with a copy of the report, it may be requested from the NGO Group Liaison Unit or may be found in unedited format at <http://www.ohchr.org/english/bodies/crc/>

24 Art. 44 paras. 1–4 of the CRC: '1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights: a) Within two years of the entry into force of the Convention for the State Party concerned; b) Thereafter every five years. • 2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned. • 3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 b) of the present article, repeat basic information previously provided. • 4. The Committee may request from States Parties further information relevant to the implementation of the Convention.'

25 In Hungary, it is called 'Gyermekjogi Civil Koalíció' (see more on <https://gyermekjogicivilkoalicio.hu/>), and it was established on February 13, 2015, a date that also marks the initiation of the operation of the UNICEF Office in Hungary. Similarly to Child Rights Connect, members of the coalition gather in working groups.

26 A Guide for Non-Governmental Organisations: Reporting to the CRC Committee, p. 9.

sessions.htm.²⁷ Nevertheless, the monitoring and analysis performed by NGOs are ongoing processes that need to start as early as possible. Therefore, the structure and methodology of the work done by the NGOs should precede the state report itself. The NGO report should also not be finalised until the state party has submitted its report to the Committee, so that it can comment on its contents and the need for an update can be avoided.²⁸ As to the content of the NGO reports, should contain a section-by-section analysis of the state party report, and shall follow a thematic structure based on the following eight clusters of topics:²⁹

- General measures of implementation (Arts. 4, 42, and 44.6).
- Definition of the child (Art. 1).
- General principles (Arts. 2, 3, 6, and 12).
- Civil rights and freedom (Arts. 7, 8, 13, 14, 15, 16, 17, 19, and 37(a)).
- Family environment and alternative care (Arts. 5, 9, 10, 11, 18, 20, 21, 25, and 27.4).
- Basic Health and Welfare (Arts. 18, 23, 24, 26, and 27).
- Education, leisure and cultural activities (Arts. 28, 29, and 31).
- Special protection measures (Arts. 22, 30, 32, 33, 34, 35, 37, 38, 39, and 40).

The Committee prefers this format to be able to more easily compare the NGO report with the state party report. Governments tend to prepare legalistic reports, while those of NGOs play an important role in providing information on the practical implementation (or its lack thereof) of the CRC.³⁰ NGOs also help significantly in bringing in the voices of particular groups of stakeholders on the matter, such as different groups of children, parents, and churches, to the Committee and governments.

In addition to the involvement of national and regional NGOs in the reporting, and the direct support provided by NGOs of the Child Rights Connect Network to the CRC Committee, NGOs may also get involved in the process through constant dialogue with the Committee, as well as by engaging in the follow-up of the concluding observations of the Committee. This is because, as aforementioned, the Committee commonly recommends civil society organisations to use the concluding observations to generate awareness of the CRC and its implementation and monitoring.³¹

27 *Ibid*, p. 10.

28 *Ibid*.

29 *Ibid*, p. 9.

30 *Ibid*, p. 11.

31 Vučković Šahović, 2010, p. 20.

2. UNICEF

The UNICEF, originally known as the United Nations Children’s Emergency Fund, was established in 1946,³² immediately after Second World War as the first intergovernmental organisation specialised only on children. Importantly, the Polish contribution can be seen not only in the beginnings of the CRC but also in the establishment of UNICEF. In fact, Ludwik Witold Rajchman, a Polish bacteriologist and social activist, was the founder and first head of UNICEF. It is a specialised agency of the UN currently present in 192 countries worldwide. It aims to provide humanitarian help to children in need, support their development, and advocate for the implementation of their rights. Their areas of activity³³ include child protection,³⁴ child survival,³⁵ education,³⁶ social policy,³⁷ emergency intervention,³⁸ gender equality,³⁹ innovation,⁴⁰ supply and logistics,⁴¹ and evidence-based research and analysis. UNICEF operates and relies on country offices and national committees in 33⁴² countries,⁴³ which are established as local NGOs but operate as an integral part of the global UNICEF. National Committees typically rely on fundraising, accept voluntary contributions, are responsible for raising one-third of UNICEF’s annual income, and form national coalitions to submit reports alternative to government reports.

32 It was created by a resolution 57(I) of the UN General Assembly on 11 December 1946.

33 See: <https://www.unicef.org/what-we-do>. (Accessed: April 12, 2024).

34 The UNICEF deals, for instance, with child protection in a specific understanding, adolescent development, social and behaviour change, gender equality, the protection of children with disabilities in child protection systems, and the impact of environment and climate change.

35 In the context of child survival, the UNICEF deals with early childhood development, child nutrition, healthcare, HIV and AIDS prevention, and water, sanitation, and hygiene issues.

36 In the context of education, the UNICEF deals with education for children with disabilities, early childhood development, education in emergencies, education in general, access to education without any discrimination, and innovation in education.

37 The UNICEF deals with social policy in general and with child-friendly city initiatives.

38 Emergency intervention mainly involves humanitarian actions for the sake of children.

39 This activity of UNICEF is mainly about the empowerment of women and girls.

40 UNICEF works with partners in different sectors to create innovative solutions that accelerate progress for children and young people.

41 This activity of UNICEF is mainly about ensuring access to lifesaving supplies to those children at risk.

42 Available at: <https://www.unicef.org/unicef-national-committees> (Accessed: March 28, 2024).

43 Andorra, Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Hong Kong Special Administrative Region, People’s Republic of China, Hungary, Iceland, Ireland, Israel, Italy, Japan, Republic of Korea, Lithuania, Luxemburg, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland & Liechtenstein, Turkey, the United Kingdom, and the United States of America.

According to its mission statement,⁴⁴ the UNICEF:

- (...) is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential.
- is guided by the UNCRC and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.
- insists that the survival, protection and development of children are universal development imperatives that are integral to human progress.
- mobilizes political will and material resources to help countries, particularly developing countries, ensure a "first call for children" and to build their capacity to form appropriate policies and deliver services for children and their families.
- committed to ensuring special protection for the most disadvantaged children – victims of war, disasters, extreme poverty, all forms of violence and exploitation, and those with disabilities.
- responds in emergencies to protect the rights of children. In coordination with United Nations partners and humanitarian agencies, UNICEF makes its unique facilities for rapid response available to its partners to relieve the suffering of children and those who provide their care.
- is non-partisan and its cooperation is free of discrimination. In everything it does, the most disadvantaged children and the countries in greatest need have priority.
- aims, through its country programmes, to promote the equal rights of women and girls and to support their full participation in the political, social and economic development of their communities.
- works with all its partners towards the attainment of the sustainable human development goals adopted by the world community and the realization of the vision of peace and social progress enshrined in the Charter of the United Nations.

Art. 45 of the CRC describes the UNICEF as an organ that shall be entitled to be represented at the consideration of the implementation of such provisions of the CRC that fall within the scope of their mandate. Furthermore, the CRC Committee cooperates with UNICEF on a wide range of topics, while the UNICEF issued an implementation Handbook for the CRC and intends to work on its global implementation.

44 Available at: <https://www.unicef.org/about-us/mission-statement> (Accessed: March 28, 2024).

3. NHRIs⁴⁵

In addition to NGOs and the UNICEF, NHRIs are important stakeholders in the monitoring and implementation of the CRC. Being state-mandated, state-financed, and safeguarded by national legislation, NHRIs can reflect on national specificities and, therefore, can be legitimate professional supporters of genuine duty bearers (i.e. states) in the implementation of the CRC. NHRIs for children differ from NGOs in that they are public entities and must account for its activities at a different level. In 1981, Norway became the first country to establish an independent ombudsman for children through legislation,⁴⁶ but since then, the number of NHRIs specific for children's rights has increased consistently.

3.1. Definition legal basis and general attributes

NHRIs are state-mandated bodies independent of the government, with a broad constitutional or legal mandate to protect and promote all human rights at the national level. Generally, NHRIs address a full range of human rights (e.g. civil, political, economic, social, and cultural rights), can take various forms (e.g. ombudsman offices, commissions, or councils), and while they operate independently of the government, they are still accountable to the public.

The possible necessity of NHRIs (i.e. not specifically focusing on the rights of the child) at the international level was first raised two years before the Universal Declaration of Human Rights.⁴⁷ Three decades later, in 1978, under the supervision of the Commission on Human Rights, draft guidelines were adopted on the possible role and functioning of NHRIs. In 1991, an international workshop was organised, resulting in the Paris Principles,⁴⁸ which are widely accepted as a guiding threshold for the credibility and legitimacy of these institutions.⁴⁹ In 2005, the Commission on Human Rights strengthened⁵⁰ the importance of establishing NHRIs designed in line with the requirements of the Paris Principles. The Paris Principles call for the establishment of NHRIs which meet the requirements of a broad mandate, function, pluralism, independence from the government, adequate power, resources, cooperative work, and international engagement. It is evident that children's rights are human rights

45 About this subchapter, the research made in the frame of the Polish-Hungarian Research Platform 3 (2023), in particular part II and part III/1 of the following article: Benyusz A child-rights based approach towards children with disabilities: The role of national human rights institutions (To be published in 2024).

46 Vučković Šahović, 2010, p. 38.

47 In 1945, the Economic and Social Council considered the issue of national institutions.

48 Principles Relating to the Status of National Institutions, which were endorsed by the Vienna World Conference on Human Rights and the UN General Assembly in 1993, by General Assembly resolution 48/134. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris> (Accessed: October 14, 2023).

49 National Human Rights Institutions; History; Principles; Roles and Responsibilities, p. 7.

50 Resolution 2005/74.

and, therefore, are somehow protected by an NHRI with a broad mandate. However, the fact that the CRC is the most accepted human rights treaty in the world and that it focuses on the vulnerability and outstanding importance of childhood in one's life justifies a specified approach and the necessity to establish separate human rights institutions.

Importantly, there are no direct references for the establishment of NHRIs in the CRC. Art. 45⁵¹ of the CRC gives much strength to the role of UNICEF, specialised agencies, and NGOs under the term "*other competent bodies*". Meanwhile, in Art. 33⁵² of the UN Convention on the Rights of Persons with Disabilities (also known as UNCRPD), where there are specific provisions regarding the rights of children with disabilities, mentions the important role that NHRIs play in national implementation, and obliges state parties to 'maintain, strengthen, designate or establish, a framework, including one or more independent mechanism, as appropriate, to promote, protect and monitor implementation of the present Convention'. Nevertheless, the lack of direct mention to NHRIs in the CRC text and that of the Convention on the Rights of Persons with Disabilities may have been purely a historical conundrum. Specifically, the CRC was adopted in 1989, whereas the importance of NHRIs was strengthened in the Vienna Declaration and the Paris Principles, both adopted in 1993 by the General Assembly.

51 Art. 45 of the CRC: 'a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities. • b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests of indications. • c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child; • d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted'.

52 Art. 33 of the Convention on the Rights of Persons with Disabilities: '1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels. • 2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights. • 3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process'.

Moreover, the Convention on the Rights of Persons with Disabilities was adopted after 1993. It is also the situation that the necessity of specified monitoring for the rights of the child and the establishment of specific NHRIs in this regard appears expressly in other documents of international law, as follows:⁵³

- In the *UN Guidelines on Alternative Care*, which call states to: ‘ensure that an independent monitoring mechanism is in place, with due consideration for the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). This monitoring mechanism should be easily accessible to children, parents, and those responsible for the children without parental care.’⁵⁴
- In the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, which aims to ‘establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhumane or degrading treatment or punishment’.⁵⁵ It requires State Parties to establish one or several independent national mechanisms to prevent torture in the country and, in doing so, to give due consideration to the principles related to the status of national institutions mandated to promote and protect human rights.⁵⁶
- In the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (also known as Havana Rules) calls for the appointment of independent inspectors with the power to conduct unannounced and regular inspections of facilities with unrestricted access to employees, juveniles, and records, and with full guarantees of independence in the exercise of this function. They also specify that independent offices should receive and investigate complaints from juveniles deprived of their liberty.⁵⁷
- Art. 10 of the *Lanzarote Convention* specifies that:
 - ‘(1) Each Party shall take the necessary measures to ensure the co-ordination on a national or local level between the different agencies in charge of the protection from, the prevention of and the fight against sexual exploitation and sexual abuse of children, notably the education sector, the health sector, the social services and the law-enforcement and judicial authorities.
 - (2) Each Party shall take the necessary legislative or other measures to set up or designate: a independent competent national or local institutions for the promotion and protection of the rights of the child, ensuring that they

53 UNICEF, p. 8.

54 UN Guidelines on Alternative Care, para. 130.

55 Art. 1 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

56 Art. 17 and Art. 18 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

57 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), Adopted by General Assembly resolution 45/113 of 14 December 1990, paras. 72 and 77.

are provided with specific resources and responsibilities; b mechanisms for data collection or focal points, at the, at the national or local levels and in collaboration with civil society, for the purpose of observing and evaluating the phenomenon of sexual exploitation and sexual abuse of children, with due respect for the requirements of personal data protection.

(3) Each Party shall encourage co-operation between the competent state authorities, civil society and the private sector, in order to better prevent and combat sexual exploitation and sexual abuse of children.’

Although the text of the CRC does not directly reference NHRIs, the CRC Committee deducts the alleged obligation of states parties to establish specialised NHRIs from Art. 4 of the CRC, which says that ‘the state parties undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention’. According to the CRC Committee, state parties are obliged to comprehensively review all domestic legislation and related administrative guidelines to ensure full compliance with the CRC. The review must consider the Convention not only article by article but also holistically, recognising the interdependence and indivisibility of human rights. The review must also be continuous, rather than one-off, and enshrined in existing legislation. Furthermore, while it is important that this review process is built into the machinery of all relevant government departments, it is also advantageous to have independent reviews be conducted by, for example, parliamentary committees and hearings, NHRIs, NGOs, academics, affected children, young people, and other stakeholders.⁵⁸ This review should also be supplemented with monitoring. The CRC Committee describes that self-monitoring and evaluation are obligatory for governments, as well as essential for the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups, and independent human rights institutions.⁵⁹

3.2. General Comment on the Role of NHRIs

The CRC Committee issued General Comment No. 2⁶⁰ to provide directions to states on establishing NHRIs. Importantly, General Comments are not legally binding instruments, making it such that their contents shall be considered guidelines and not binding provisions, and that it is up to each state to consider the necessity and method of establishing NHRIs to monitor and support the implementation of the CRC at the international level. Now, back to General Comment No.2, it states that while adults and children alike need NHRIs to protect their human rights, additional justification exists to ensure that children’s human rights are given special attention and need a

58 CRC/GC/2003/5 para. 18.

59 CRC/GC/2003/5 para. 46 (see also para. 65).

60 Committee on the Rights of the Child, General Comment No. 2, ‘The role of independent national human rights institutions in the promotion and protection of the rights of the child’, CRC/GC/2002/2 (2002).

specific focus.⁶¹ The justifying reasons include the ‘vulnerability stemming from the developmental state, the fact that their opinion is rarely considered and even less rarely considered seriously’, and the ‘difficulty and arising vulnerability that they face when meeting’ the judicial system. In general, children’s access to their rights tends to be limited.

Therefore, there should be NHRIs designed to protect constitutionally entrenched children’s rights, and these institutions must be at least legislatively mandated.⁶² NHRIs should be accorded such powers as necessary to enable them to discharge their mandates effectively, including the power to hear any person and obtain any information and documents necessary for assessing situations that fall within their competence. These powers should include the promotion and protection of the rights of all children under the jurisdiction of the state party in relation to not only the state but also all relevant public and private entities.

The NHRI establishment process should be consultative, inclusive, and transparent, initiated and supported at the highest levels of government, and encompass all relevant elements of the state, legislature, and civil society. To ensure their independence and effective functioning, NHRIs must have adequate infrastructure, funding (specifically for children’s rights within broad-based institutions), staff, premises, and freedom from forms of financial control that might affect their independence.⁶³ While the CRC Committee acknowledges that this is a very sensitive issue and that state parties function with varying levels of economic resources, the Committee believes that it is the duty of states to make reasonable financial provisions for the operation of NHRIs in light of Art. 4 of the CRC.⁶⁴

NHRIs must also have the power to consider individual complaints and petitions, as well as conduct investigations, including those submitted on behalf of or directly by children.⁶⁵ To effectively carry out such investigations, they must have the power to compel and question witnesses, access relevant documentary evidence, and places of detention. These institutions also have a duty to ensure that children receive effective remedies – independent advice, advocacy, and complaints procedures – for any breaches of their rights. Where appropriate, NHRIs should also undertake mediation and conciliation of complaints,⁶⁶ and should have the power to support children taking cases to court, including the power (I) to take cases concerning children’s issues in the name of the NHRI, and (II) to intervene in court cases to inform the court about the human rights issues involved in the case.⁶⁷

61 CRC/GC/2002/2 para. 5.

62 CRC/GC/2022/2 para. 7.

63 CRC/GC/2022/2 para. 10.

64 CRC/GC/2022/2 para. 11. In addition, the mandate and powers of national institutions may be meaningless, or the exercise of their powers limited, if the national institution does not have the means to operate effectively to discharge its powers.

65 CRC/GC/2022/2 para. 13.

66 CRC/GC/2022/2 para. 13.

67 CRC/GC/2022/2 para. 14.

Furthermore, NHRIs should be geographically and physically accessible for all children. In the spirit of Art. 2 of the Convention, they should proactively reach all groups of children, particularly the most vulnerable and disadvantaged, such as children in care or detention, from minority and indigenous groups, *with disabilities*, living in poverty, refugees and migrants, living in the streets, and with special needs in areas such as culture, language, health, and education.⁶⁸ The NHRI legislation should include the right of the institution to have access to conditions of privacy for children in all forms of alternative care and to all institutions that include children.

Specialised NHRIs, as stand-alone institutions focused on children's rights, can make children's rights and best interests more visible, the recognition of children as rights holders more tangible, and improve children's accessibility and genuine participation on matters revolving around their rights. If human, material, and financial resources are guaranteed, adequately specialised NHRIs have great chances to reach children and involve them in their work such that children's needs can be addressed directly. This also opens up the possibility of designing these institutions to be accessible to all children, including those with extensive difficulty realising their rights. Notwithstanding, research shows that children are often unaware of the existence of such institutions⁶⁹ and the possibility of filing complaints or raising their voices, highlighting that accessibility enhancement should also be dealt with at the national level, as the specificities of the local circumstances⁷⁰ and groups of children concerned need to be considered. However, there are some characteristics that should be considered when working on improving the accessibility of NHRIs, such as proactivity, age-appropriate outreach, the range of children covered by the institution (e.g. should also deal with the cases of children with disability), and accessible mechanisms that enable children to reach the institution using their own initiative. *Awareness raising* is also an important element of accessibility interconnected with Art. 42 of the CRC, which underlines the role of the state in making the principles and provisions of the CRC widely known by appropriate and active means, to both adults and children. *Geographical accessibility* is also essential and can be enhanced by establishing branches and developing solutions that raise accessibility for children with disabilities.

4. Concluding remarks

This chapter overviews the role of stakeholders supporting the implementation of the CRC, that is, NGOs, UNICEF, and NHRIs, from the drafting of the CRC through its adoption, implementation, and monitoring phases. It is unquestionable that these stakeholders play an important role in the dissemination of the CRC and hold an

68 CRC/GC/2022/2 para. 15.

69 UNICEF, October 2012, Office of Research: Championing Children's Rights: A global study of independent human rights institutions for children – summary report, p. 15.

70 It is more than the issue of location, although this is part of it.

expertise worthy of use in CRC implementation. It is also unquestionable that they have done much to make children's rights more accessible.

Nevertheless, the primary duty bearers in connection to the obligations stemming from the CRC are the states, which are also the ones that took on the duty to implement children's rights to the maximum extent possible. This implies that the responsibility regarding the implementation of the CRC and the right to guide such implementation shall lay on their shoulders, and as referred to already in the chapter, according to Art. 4 of the CRC, they shall 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention'.

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Children's Rights and the Sustainable Development Goals

Cocou Marius MENSAH

ABSTRACT

This chapter explores the complex relationship between child rights and the United Nations Sustainable Development Goals (SDGs). Recognising the vital need to protect children's well-being and ensure a sustainable future, this study critically examines the diverse legal dimensions, challenges, and opportunities that intersect as these two frameworks converge. By conducting a comprehensive analysis of the SDGs, international treaties, and various regional agreements, this chapter aims to shed light on the complex legal landscape and identify avenues for strengthening children's rights in the context of sustainable development. The discussion encompasses various aspects, including quality education (SDG 4), gender equality (SDG 5), the right to a quality life (SDG 14), life on land (SDG 15), and global partnerships (SDG 17), examining how progress in these areas can have a profound impact on children's rights. Furthermore, this chapter explores the role of states, international organisations, and civil society in promoting children's rights within the framework of the SDGs. Overall, this chapter highlights the critical need to align SDGs with international child rights standards and offers recommendations to address gaps, strengthen legal protection, and ensure children's active participation in pursuing a sustainable future.

KEYWORDS

children's rights, sustainable development goals, global partnerships, child participation in sustainable development, youth empowerment

LIST OF ABBREVIATIONS

ESD – Education for Sustainable Development

MDGs – Millennium Development Goals

ODA – Official Development Assistance

SDGs – Sustainable Development Goals

UN – United Nations

CRC – the UN Convention on the Rights of the Child

UNESCO – United Nations Educational, Scientific and Cultural Organization.

UNICEF – United Nations Children's Fund

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“We must rise higher to rescue the Sustainable Development Goals – and stay true to our promise of a world of peace, dignity and prosperity on a healthy planet.”

– ANTONIO GUTERRES

SECRETARY-GENERAL OF THE UNITED NATIONS

1. Introduction

Art. 1 of the United Nations (UN) Convention on the Rights of the Child (CRC) explicitly defines children as individuals aged up to 18 years.¹ This deliberate choice aimed to extend the protection and rights to the broadest age range feasible under the Convention. As of September 2024, and according to the latest data from the United Nations Children’s Fund (also known as UNICEF), the global population of individuals under 18 stands at approximately 2.415.319.658.² International efforts have played a crucial role in advancing children’s rights, with the Geneva Declaration of the Rights of the Child 1924 and the UN General Assembly Declaration of the Rights of the Child 1959 serving as key milestones. Notably, in 1959, the adopted declaration laid out children’s fundamental rights, including protection, education, healthcare, shelter, and adequate nutrition. In 1989, a landmark development began with the adoption of the CRC, which has since emerged as the most swiftly and extensively ratified international human rights treaty in history. This monumental agreement marked a paradigm shift in the perception and treatment of children, recognising them not as passive recipients of care and charity but as individuals possessing an inherent set of rights. The widespread acceptance of the CRC reflects a global commitment to implementing children’s rights.

Since the Convention’s inception, noteworthy progress has been made in protecting children, ranging from declining infant mortality rates to substantially increasing school enrolment. However, despite these advancements, significant challenges persist and continue to highlight the importance of protecting children worldwide. Critical issues include ensuring universal access to quality education,³ addressing

1 United Nations Convention on the Rights of the Child, 1989. Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed: August 17, 2023).

2 United Nations Children’s Fund, How many children under 18 are in the world?, 2023. Available at: <https://data.unicef.org/how-many/how-many-children-under-18-are-in-the-world/> (Accessed: September 3, 2024).

3 The Guardian, 2023. Available at: <https://www.theguardian.com/global-development/2023/oct/04/world-needs-44m-more-teachers-in-order-to-educate-every-child>. (Accessed: October 8, 2023).

health disparities,⁴ combating child labour,⁵ and safeguarding against various forms of exploitation and abuse.⁶ Ensuring the welfare of children is a critical imperative driven not only by ethical considerations but also by efforts to ensure the future well-being and prosperity of societies. This emphasises the need for a pioneering conceptual model that places child health at the forefront of the 2030 Agenda and Sustainable Development Goals (SDGs), emphasising the urgency of reshaping approaches to prioritise children's health.⁷ A multifaceted approach, including international conventions, national regulations, and SDGs, guides the implementation of children's rights, providing a comprehensive foundation for delineating children's rights and protections on a global scale.

Some of the major international conventions intended to be essential legal tools for protecting children worldwide include those outlined herein. The CRC,⁸ ratified in 1989, is the most comprehensive international treaty for safeguarding children's rights, delineating various civil, political, economic, social, and cultural rights of children. Fundamental principles enshrined in the CRC include non-discrimination, the paramount consideration of the child's best interests, the right to life, survival, and development, and the entitlement of children to express their views in all matters affecting them. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (also known as OPAC),⁹ adopted in 2000, was designed to shield children from recruitment and use in armed conflicts. This protocol mandates an increase in the minimum age for recruitment to armed forces and explicitly prohibits the use of children in hostilities. Also adopted in 2000, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (also known as OPSC)¹⁰ strives to shield children from sexual exploitation and abuse, addressing critical issues related to child trafficking, prostitution, and pornography. The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (also known as OPIC),¹¹ endorsed in 2011 empowers individual children or their representatives to lodge complaints of rights violations directly with the Committee on the Rights of the Child. The International Labour Organization (also known as ILO) Convention No. 182

4 Addo-Atuah et al. (2020), *Research in Social and Administrative Pharmacy*, 16(11), pp. 1614–1618.

5 Baqutayan et al. (2020), *Journal of Social Sciences Research*, 6(9), pp. 826–837.

6 M'jid, 2020.

7 Alfvén et al. (2019), *Global Health Action*, 12(1), pp. 1–4.

8 United Nations Convention on the Rights of the Child, 1989.

9 United Nations Office of the High Commissioner for Human Rights, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 2000.

10 Ibid.

11 United Nations Office of the High Commissioner for Human Rights, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, 2011.

on the Worst Forms of Child Labour,¹² established in 1999, aims to eradicate the most egregious forms of child labour, including forced labour, trafficking, hazardous work, and other exploitative practices.

Investing in the realisation of children's rights has emerged as a pivotal strategy in fostering a world that is not only just and equitable but also sustainable. International conventions (e.g. the CRC) and national regulations tailored to specific contexts play a vital role in shaping the legal and policy landscapes for safeguarding children and their rights. By acknowledging the strides made thus far and recognising the persistent challenges, collective global efforts are spurred to sustain the crucial work required to ensure a brighter and safer future for every child. Collaboration between international agreements, national legislations, and sustainable development initiatives stands to form a powerful alliance for advancing children's rights and, consequently, contribute to establishing a more resilient and compassionate global community. Another tool designed to empower the path towards development is the SDGs, which emphasise the interconnectedness of social, economic, and environmental dimensions and are positioned as powerful tools for advancing and safeguarding children's rights. The integration of children's rights into the broader framework of the SDGs has evolved into a comprehensive and far-reaching set of objectives that address various aspects crucial for the well-being and development of children.

Since its inception, the SDGs have become a paramount legal tool for protecting children globally. However, several challenges persist worldwide, particularly in Africa and least developed countries,¹³ as children in many regions still face barriers to accessing quality education owing to factors such as poverty and a lack of infrastructure. Meanwhile, health challenges, including preventable diseases and inadequate healthcare, remain obstacles to the well-being of children. Specifically in the context of Africa, some additional challenges include the following.

Poverty: Economic disparities and persistent poverty in certain regions hinder children's access to basic necessities, including education and healthcare.

Conflict and Instability: Many African nations grapple with conflict and political instability, leading to displacement, violence, and an increased risk of child exploitation.

Disease Burden: Certain African regions face health crises, with diseases such as malaria, HIV/AIDS, and other preventable illnesses disproportionately affecting children.

Access to Clean Water and Sanitation: Adequate access to clean water and sanitation facilities, which are critical for children's health, remains a challenge for various African communities. While the SDGs provide a robust framework for addressing these challenges, concerted global efforts and targeted interventions are essential

12 International Labour Organization (ILO), Worst Forms of Child Labour Convention (No. 182), 1999. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182 (Accessed: August 17, 2024).

13 United Nations, Civil society plays critical role to deliver on the SDGs, 2023.

to ensure their effective implementation and meaningful impact on children's lives worldwide, particularly in Africa. This chapter addresses the impact of the SDGs on protecting children and their rights, the challenges facing children, and their prospects. In order to achieve a successful investigation, we see the need to present a retrospective study of the mechanisms that have enabled and continue to allow global development and provide better opportunities for the world's population, including children.

2. Paving the Path to SDGs: Introducing the Millennium Development Goals¹⁴

Several mechanisms and frameworks to achieve global development goals were established before the SDGs' introduction in 2015. To fully understand the SDGs' impact, results, and challenges, it is mandatory to clearly understand their origin and the achievements and challenges of similar mechanisms targeting the enhancement of global development goals. More specifically, the predecessors to the SDGs were the Millennium Development Goals (MDGs), which were eight international development goals established following the Millennium Summit of the UN in 2000. *The eight MDGs that addressed poverty, hunger, gender equality, education, and healthcare by 2015 were set as follows.*

Eradicate Extreme Poverty and Hunger (MDG 1): The goal was to halve the proportion of people living in extreme poverty and hunger by 2015 by addressing income poverty, food security, and malnutrition.

Achieve Universal Primary Education (MDG 2): The objective was to ensure that all boys and girls could complete the entire primary education course, emphasising the importance of education as a fundamental right.

Promote Gender Equality and Empower Women (MDG 3): This goal sought to eliminate gender disparities in primary and secondary education and promote gender equality in employment, recognising the importance of women's rights.

Reduce Child Mortality (MDG 4): The aim was to reduce the under-five mortality rate by two-thirds by focusing on improving child health, preventing diseases, and enhancing healthcare access.

Improve Maternal Health (MDG 5): This goal sought to reduce maternal mortality and secure universal access to reproductive health services, recognising the importance of women's health in overall development.

Combat HIV/AIDS, Malaria, and Other Diseases (MDG 6): This goal aimed to combat major diseases (e.g. HIV/AIDS, malaria, and other infectious diseases) through prevention, treatment, and global partnerships.

14 United Nations, Millennium Development Goals. New York: United Nations, 2000. Available at: <https://www.un.org/millenniumgoals/> (Accessed: August 20, 2023).

Ensure Environmental Sustainability (MDG 7): This goal targeted environmental sustainability and addressed issues such as access to safe drinking water, sanitation, biodiversity conservation, and slum improvement.

Develop a Global Partnership for Development (MDG 8): The final goal emphasised the need for a global partnership for development, including trade, aid, debt relief, and technology transfer.

2.1. MDGs and Children's Rights

The MDGs directly impacted children's rights and reflected a commitment to ensuring their well-being and future. The educational, health, and protection goals were all linked to children's rights, with the goals of reducing child mortality (MDG 4) and promoting universal primary education (MDG 2), explicitly addressing children's rights to survival and education. Moreover, the gender equality (MDG 3) and maternal health (MDG 5) goals were crucial for securing women's rights and, by extension, children's rights within families, as a healthier and more empowered maternal population contributes to children's overall well-being. While the MDGs did not exclusively focus on children's rights, they laid the foundation for recognising and addressing the fundamental rights of children within the broader context of global development. The successes and lessons learned from the MDGs informed the subsequent development of the SDGs, which continue to emphasise the importance of securing children's rights in a more equitable and sustainable world.

The evaluation of specific countries' achievements or shortcomings in implementing the MDGs is complex because of the diverse nature of their progress across the various indicators. Nevertheless, insights based on general trends and reports offer a glimpse into the outcomes, albeit it is necessary to recognise that the success or failure of MDGs is often gauged on a goal-specific basis, with some nations excelling in specific areas and facing challenges in others. Below is a list of the progress of 10 nations on the MDGs.

CHILDREN'S RIGHTS AND THE SUSTAINABLE DEVELOPMENT GOALS

Countries	Achievements and Progress
China	Remarkable success in poverty reduction, education, and health indicators.
Brazil	Strides made in poverty reduction, education, and healthcare.
Maldives	Notable progress in healthcare, particularly in maternal health and child mortality reduction.
Vietnam	Significant advancements in achieving universal primary education and improving healthcare outcomes.
Rwanda	Progress in healthcare, poverty reduction, and education.
Ghana	Strides in improving access to education, healthcare, and reducing poverty.
Bangladesh	Progress in improving maternal health, reducing child mortality, and achieving gender parity in education.
South Korea	Rapid economic growth, poverty reduction, and improvements in healthcare and education.
Ethiopia	Progress in healthcare, poverty reduction, and education.
Thailand	Success in healthcare, particularly in reducing the spread of HIV/AIDS.

Other nations, however, struggled to implement the MDGs fully, such as those outlined below.

Countries	Challenges faced
Democratic Republic of Congo	Challenges in various MDGs, including poverty reduction and healthcare.
Haiti	Natural disasters in the region exacerbate the nation's challenges in achieving education and healthcare goals.
Yemen	The conflicts in the nation worsened struggles with poverty reduction, healthcare, and education.
Afghanistan	Challenges in achieving healthcare and education goals owing to internal conflict and instability.
Mozambique	Challenges in achieving healthcare and education goals.
Nigeria	Challenges in healthcare and education, particularly in conflict-affected regions.
Sierra Leone	The impact of the Ebola epidemic compounded challenges in healthcare and education.
Central African Republic	Struggles with poverty reduction, healthcare, and education, which are exacerbated by conflict.
Syria	Internal conflicts significantly hinder progress across various MDGs, including healthcare and education.
Zimbabwe	Challenges in healthcare, education, and economic stability.

Regardless of the individual nations struggling with the MDGs above, an analysis of the outcomes of the MDGs based on the 2015 UN Report¹⁵ underscores substantial accomplishments in global development initiatives from 2000 to 2015. Regarding MDG 1, focused on eradicating extreme poverty and hunger, we saw a remarkable reduction in the number of people living on less than \$1.25/day, with hunger affecting over 200 million fewer individuals.

MDG 2 was significant for children and youth worldwide, as the global net enrolment rate was 91% by 2015. Moreover, global progress in primary education is evident, as the number of out-of-school children of primary school age has nearly halved (i.e. from 100 million in 2000 to 57 million in 2015). Particularly noteworthy is the substantial improvement in primary education in sub-Saharan Africa, surpassing all other regions since the establishment of the MDGs; from 2000 to 2015, the region achieved a remarkable 20% increase in net enrolment rate, a notable improvement compared with the 8% gained between 1990 and 2000. There has also been a positive global trend in literacy rates among youth aged 15–24 years, with the literacy rate increasing from 83% to 91% between 1990 and 2015. This improvement also highlights the narrowing of the gender gap, signifying progress towards gender equality in education. These achievements underscore the global commitment to enhance primary education and literacy, with substantial gains in reducing the number of out-of-school children and promoting educational opportunities, especially in sub-Saharan Africa.

MDG 3, emphasising the just-mentioned gender equality, has also witnessed progress, with the proportion of girls enrolled in primary school reaching parity with boys in many countries. However, women still face underrepresentation in leadership roles and have higher poverty rates than men.

MDG 4 aimed to mitigate child mortality, and significant efforts have been made to achieve this objective globally. The under-five mortality rate declined substantially, more than halving between 1990 and 2015 (i.e. from 90 to 43 deaths per 1,000 live births). Moreover, despite the population growth in developing regions, the total number of deaths among children under five globally has significantly decreased, dropping from 12.7 million in 1990 to nearly 6 million in 2015. There has been a substantial acceleration in the reduction rate of under-five mortality globally since the early 1990s (i.e. more than tripled during this period). In sub-Saharan Africa, progress has been even more remarkable, with the annual reduction rate of under-five mortality being more than five times faster during 2005–2013 than during 1990–1995. Immunisation efforts have also prevented child deaths,¹⁶ with measles vaccination alone having helped prevent nearly 15.6 million deaths between 2000 and 2013, contributing to a 67% decline in globally reported cases of measles.

15 United Nations Resolution adopted by the General Assembly on 27 July 2015: 69/313. Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), 2015. Available at: <https://documents.un.org/doc/undoc/gen/n15/232/22/pdf/n1523222.pdf> (Accessed: September 3, 2024).

16 World Health Organization, Female genital mutilation, 2023. Available at: <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (Accessed: October 3, 2023).

The increased coverage of measles vaccines is evident, with approximately 84% of children worldwide receiving at least one dose in 2013, which is a significant improvement from the 73% in 2000. These achievements underscore the effectiveness of global health initiatives and vaccination programs in saving the lives of children under five years.

MDG 5 focused on enhancing maternal health, and since 1990, there has been a remarkable 45% global reduction in the maternal mortality ratio, with the most significant progress being observed after 2000. In Southern Asia, the maternal mortality ratio saw a substantial decline of 64% between 1990 and 2013; in sub-Saharan Africa, it dropped by 49%. Furthermore, more than 71% of births globally were attended by skilled health personnel in 2014, marking an increase from 59% in 1990. Notably, Northern Africa experienced a substantial increase in the proportion of pregnant women who received four or more antenatal visits (from 50% to 89% between 1990 and 2014). Moreover, there has been a positive trend in contraceptive use prevalence among women aged 15–49 years, married, or in a union, which surged from 55% in 1990 to 64% in 2015.

MDG 6 was dedicated to combating HIV/AIDS, malaria, and other diseases, and notable progress has been made. Between 2000 and 2013, there was a 40% reduction in new HIV infections, dropping from an estimated 3.5 million cases to 2.1 million. By June 2014, the global number of people receiving antiretroviral therapy reached 13.6 million, a substantial increase from 800,000 in 2003. The widespread use of antiretroviral therapy played a pivotal role in averting 7.6 million deaths from AIDS between 1995 and 2013. Substantial advancements have also been made in the fight against malaria, with over 6.2 million malaria-related deaths being prevented between 2000 and 2015, primarily among children under five years of age in sub-Saharan Africa. The global malaria incidence rate has witnessed a notable decrease of 37%, and the mortality rate due to malaria has been reduced by 58%. Furthermore, an impressive initiative delivered more than 900 million insecticide-treated mosquito nets to malaria-endemic countries in sub-Saharan Africa between 2004 and 2014. Regarding tuberculosis, interventions focusing on prevention, diagnosis, and treatment saved an estimated 37 million lives between 2000 and 2013. During this period, the tuberculosis mortality rate experienced a substantial 45% decline, with a 41% reduction in prevalence rates between 1990 and 2013. These achievements underscore the global commitment to address the complex challenges of HIV/AIDS, malaria, and tuberculosis.

MDG 7 focused on ensuring environmental sustainability. Since 1990, substantial progress has been made in eliminating ozone-depleting substances, and the ozone layer is expected to recover by the middle of the century. Across various regions, terrestrial and marine protected areas have seen significant increases, such as in Latin America and the Caribbean, where the coverage of terrestrial protected areas rose from 8.8% to 23.4% between 1990 and 2014. In terms of water, notable achievements include the fact that 91% of the global population used an improved drinking water source in 2015, whereas this rate was 76% in 1990. Moreover, among the 2.6 billion people who gained access to improved drinking water since 1990, 1.9 billion now have

piped drinking water on their premises. Globally, 147 countries have met the drinking water target, 95 have achieved the sanitation target, and 77 have met both targets. Access to improved sanitation has also been extended to 2.1 billion people, with the proportion of those practising open defecation nearly halving since 1990. Additionally, the proportion of the urban population living in slums in developing regions has decreased from approximately 39.4% in 2000 to 29.7% in 2014.

MDG 8, which focused on developing a global partnership for development, has seen a 66% increase in official development assistance (ODA) from developed countries between 2000 and 2014, reaching \$135.2 billion at the end of the period. In 2014, Denmark, Luxembourg, Norway, Sweden, and the United Kingdom exceeded the UN's official development assistance target of 0.7% of the gross national income, and 79% of imports from developing to developed countries were duty-free in 2014, up from 65% in 2000. The proportion of external debt service to export revenue in developing countries fell significantly, from 12% in 2000 to 3% in 2013. Technological advancements are evident, with 95% of the world's population being covered by mobile cellular signals as of 2015. Mobile cellular subscriptions have increased tenfold in the last 15 years, growing from 738 million in 2000 to over 7 billion in 2015. Internet penetration has surged from just over 6% of the world's population in 2000 to 43% in 2015, connecting 3.2 billion people to a global network of content and applications.

An analysis of the performance of countries in implementing the MDGs provides valuable insights. Countries such as China and Brazil have showcased effective strategies for poverty reduction, education, healthcare, and poverty alleviation. Conversely, the challenges faced by countries such as the Democratic Republic of the Congo and Yemen highlight obstacles hindering progress. This analysis underscores the importance of political will, socio-economic conditions, and effective governance. The MDGs played a pivotal role in setting global development priorities. However, in recognition of the shortcomings of the MDGs, the SDGs have emerged and attempted to address the issues of narrow focus, lack of inclusivity, and insufficient attention to environmental sustainability. The lessons learned from MDG implementation are used to inform the formulation and execution of SDGs, emphasising informed strategies, tailored interventions, and targeted resource allocation to achieve sustainable development on a global scale.

3. SDGs and Children's Rights¹⁷

A crucial initial step in creating a comprehensive narrative for the SDGs was to incorporate insights from the MDGs.¹⁸ Unlike the MDGs, which were primarily directed at developing nations, the SDGs go beyond geographical boundaries to

17 United Nations, Bringing dry land in the Sahel back to life, 2022. Available at: <https://news.un.org/en/story/2022/01/1110322> (Accessed: August 17, 2024).

18 Kumar et al. (2016), *Indian Journal of Community Medicine*, 41(1), pp. 1-4..

embody a collective global responsibility, constituting a 15-year agenda applicable to all countries that marks a significant shift in approach regarding these global goals. The framework comprises a universal agenda for transformation and features 17 goals, 169 targets, and 231 unique indicators¹⁹ that attempt to assert the following: synergise economic growth, social inclusion, and environmental sustainability; recognise the interdependence of these facets in fostering enduring development; integrate economic growth with social inclusion and environmental sustainability; acknowledge the interdependence of these dimensions in fostering lasting development. Accordingly, the SDGs serve as a comprehensive roadmap for global development, aiming to create a more equitable, sustainable, and prosperous world by 2030. The interconnected nature of the goals reflects the understanding that progress in one area can positively influence other areas.

Children are central to the SDGs as direct beneficiaries and agents of change. The goals recognise the unique vulnerabilities of children and emphasise their rights, which are encompassed in SDG 3 (Good Health and Well-being), SDG 4 (Quality Education), and SDG 16 (Peace, Justice, and Strong Institutions). Moreover, the overarching goal of leaving no one behind inherently includes children, ensuring that the developmental benefits extend to all regardless of age, gender, or socioeconomic status. By addressing the root causes of poverty, inequality, and environmental degradation, the SDGs lay the groundwork for a more secure and promising future for children. In the context of the SDGs, education becomes a tool for empowerment; healthcare serves as the foundation for growth, and sustainable practices guarantee a healthy planet. The success of the SDGs in enhancing overall development hinges on global collaboration, effective governance, and a commitment to realising the shared vision of a better world by 2030.

While the SDGs may not explicitly focus on children, they can be interpreted as powerful tools for empowering the well-being of children and contributing to the vision of a better society by 2030. Each of the 17 SDGs represents a continuum from the MDGs, with progress encountering obstacles that are exacerbated by the challenges posed by the COVID-19 pandemic and armed conflict in certain regions. SDG 1, aiming to 'End poverty in all its forms everywhere', protects children's rights significantly. Children living in poverty often face vulnerabilities that affect their health, education, and development. International conventions, such as the CRC, stress the link between poverty and children's rights. Art. 27 of the CRC emphasises the right of every child to a standard of living conducive to their physical, mental, spiritual, moral, and social development, whereas poverty directly obstructs these rights. Therefore, SDG 1 indirectly protects children's rights by striving to eradicate poverty, albeit achieving this goal necessitates the implementation of policies and programs that alleviate poverty and ensure children's access to essential services such as education and healthcare. Target 1

19 United Nations, SDG Indicators, 2023. Available at: [https://unstats.un.org/sdgs/indicators/indicators-list/#:~:text=The%20global%20indicator%20framework%20includes,different%20targets%20\(see%20below\)](https://unstats.un.org/sdgs/indicators/indicators-list/#:~:text=The%20global%20indicator%20framework%20includes,different%20targets%20(see%20below).). (Accessed: September 15, 2023).

of SDG 1 specifically advocates equal rights to economic resources for all, aligning with the principles of non-discrimination and equality outlined in the CRC. Unfortunately, the battle against poverty has witnessed a setback over the last four years, primarily due to the impact of COVID-19. The working poverty rate rose from 6.7% in 2019 to 7.2% in 2020, marking the first increase in over two decades.²⁰ The projections also indicated a surge in the number of people living in extreme poverty, which reached 676 million in 2022 and signified a rise from the pre-pandemic estimate of 581 million. This reversal underscores the urgent need for global collaboration to address the pandemic's socio-economic fallout, ensure children's well-being worldwide, and prevent setbacks in the fight against poverty.

SDG 3, on “Good Health and Well-being”, focuses on ensuring healthy lives and promoting well-being for all, directly benefiting children. Furthermore, the CRC recognises every child's right to the highest attainable standard of health (Art. 24), and achieving SDG 3 safeguards children's right to health, including access to essential healthcare services, vaccination, and nutrition. SDG 3 thus contributes towards reducing child mortality rates and ensuring that children survive and thrive.

SDG 4, on “Quality Education”, aims to ensure inclusive and equitable education. The CRC emphasises the right to education (Art. 28). It highlights the importance of free and compulsory primary education. SDG 4 builds on this by addressing broader educational quality, inclusivity, and relevance. Ensuring quality education aims to empower children with knowledge and skills, promote their overall development, and enable them to participate in society actively.

SDG 5, on “Gender Equality”, seeks to achieve gender equality and empower both women and girls. The CRC promotes gender equality in various articles by recognising the rights of girls and boys without discrimination. At the same time, SDG 5 further emphasises ending discrimination, violence, and harmful practices based on gender. By addressing gender inequality, SDG 5 contributes to creating an environment in which the rights of all children, regardless of gender, are protected.

SDG 6, on “Clean Water and Sanitation”, focuses on ensuring water and sanitation availability and sustainable management. Access to clean water and sanitation is crucial for children's health and well-being. The CRC recognises the right to a standard of living adequate for health, including access to clean water (Art. 27), which is complemented by SDG 6 through its aim of securing universal access to safe and affordable drinking water and sanitation, thereby directly benefiting children.

SDG 14, on “Life Below Water”, aims to conserve and sustainably use the oceans, seas, and marine resources. Although not directly related to children's rights, a healthy marine environment is vital for the overall well-being of current and future generations, including current and future children. The CRC emphasises the right to live in an environment that supports physical and mental development (Art. 29), and SDG 14 contributes to safeguarding this right by promoting environmental sustainability.

20 United Nations, *Bringing dry land in the Sahel back to life*, 2022.

SDG 15, on “Life on Land”, focuses on protecting, restoring, and promoting the sustainable use of terrestrial ecosystems. Similar to SDG 14, SDG 15 indirectly contributes to creating a healthy environment for children. The CRC recognises the right to a healthy environment (Art. 24), and the alignment of SDG 15 with the CRC lies in its promotion of biodiversity conservation and sustainable land use.

SDG 17, on “Partnership for the Goals”, emphasises the importance of global partnerships for securing sustainable development. While not directly tied to children’s rights, the achievement of all SDGs is interconnected. The CRC recognises the importance of international cooperation in realising children’s rights through various of its articles. At the same time, SDG 17 underscores the need for collaborative efforts to address global systemic issues that affect children.

In summary, the SDGs contribute to protecting children’s rights by addressing various aspects of their well-being, including health, education, gender equality, access to clean water, and a sustainable environment. The CRC provides a foundational framework upon which the SDGs build to create a comprehensive approach to ensure a better future for all children.

4. The 17 SDGs and Africa

The decision to adopt the 17 SDGs reflects a comprehensive and integrated approach to global development, where each SDG addresses a distinct aspect of sustainability, and the number of goals is not arbitrary. These 17 goals were also designed to be interlinked, recognising the complexity and interconnectedness of global challenges. Therefore, the SDGs aim to provide a universal and inclusive framework that spans the economic, social, and environmental dimensions, fostering a more balanced and sustainable future, and their moral and strategic imperatives underscore the global relevance of child rights within SDGs. Children constitute the foundation of human capital investment and actively contribute to social progress; thus, investing in children’s well-being can help break the poverty cycle and foster responsible citizenship. The SDGs provide a holistic framework that links education, health, gender equality, poverty reduction, and environmental sustainability.

With its burgeoning young population, Africa plays a pivotal role in the global pursuit and implementation of the 17 SDGs. The linkages between Africa, its young demographics, available resources, sustainability efforts, and the SDGs are multifaceted, shaping the continent’s trajectory on the global development agenda. The demographic structure of Africa thus necessitates strategic investments in education, healthcare, and employment opportunities to harness the potential of the youth population. The African Union’s ‘Agenda 2063: The Africa We Want’ is a comprehensive framework that outlines the continent’s vision for the future, emphasising sustainability, inclusivity, and development. Legal instruments such as national development plans and regional agreements also contribute to implementing the SDGs in Africa, where they have heightened significance in Africa because the population

is the youngest and fastest growing in the world. Still, harnessing the demographic dividend requires protecting children's rights, breaking the poverty cycle, promoting gender equality, ensuring environmental sustainability, and contributing to social stability. Amid these challenges and opportunities, this study seeks to illuminate the intricate relationship between child rights and sustainable development so as to offer insights into a more equitable and prosperous future for Africa and the world.

Agenda 2063: Recognising and prioritising the needs and rights of children in Africa is essential for its sustainable development. Through strategic investments in education, healthcare, and social infrastructure, Africa can harness the energy and creativity of its young population and foster a brighter and more prosperous future for the entire continent. To do so, the African Union implemented a strategic framework, Agenda 2063, that emphasises protecting and promoting children's rights as a fundamental component of its vision for the continent's future. Although the Agenda does not have specific goals exclusively focused on children, its broader aspirations and commitments contribute to creating an environment that supports children's well-being, development, and rights. The goals to be achieved by Agenda 2063 are as follows:²¹

1. Focusing on quality education and healthcare contributes to creating an environment where children can thrive, ensuring their right to education and health.
2. Ending child marriage and female genital mutilation to ensure children's rights to protection, health, and a safe environment, as well as promote gender equality and inclusive and equitable development.
3. Securing a "Safe and Secure Environment", as the agenda recognises the importance of peace and security for the continent and that creating a safe and secure environment is crucial to safeguard the rights of children affected by conflict and instability.
4. Ensuring "Access to Justice for Children", with the agenda promoting good governance, rule of law, and access to justice, which are essential for protecting children's rights, ensuring legal safeguards, and addressing child labour and exploitation issues.

The prospects for protecting children's rights under Agenda 2063 include continued efforts to strengthen the educational system, healthcare infrastructure, and legal frameworks to safeguard children's rights in alignment with the SDGs. Additionally, a reporting mechanism presents a comprehensive overview of the progress made on several SDGs while underscoring persistent challenges. The report also serves as a critical call to action, emphasising the urgency of addressing the climate crisis and other global issues to foster a future that is both sustainable and equitable.²²

21 African Union, Agenda 2063: The Africa We Want. Addis Ababa, Ethiopia: African Union, 2013. Available at: <https://au.int/en/agenda2063/overview> (Accessed: August 26, 2024).

22 See: United Nations, Bringing dry land in the Sahel back to life, 2022.

5. Selected SDGs and their implementation in Africa

5.1. SDG 3: Good Health and Well-being

Progress in maternal and child health has been achieved, yet the glaring regional inequalities demand attention. According to the report, the presence of skilled health professionals during childbirth helped reduce maternal and newborn morbidity and mortality.²³ Globally, from 2015 to 2021, approximately 84% of births were attended by skilled professionals, a notable increase from the estimate of 77% from 2008 to 2014. However, in sub-Saharan Africa, the coverage lagged 20% behind the global average. Advances in under-five and neonatal mortality have been observed, with the global under-five mortality rate having decreased by 14% from 2015 to 2020 (i.e. from 43 to 37 deaths per 1,000 live births). The neonatal mortality rate has dropped by 12% during the same period (i.e. from 19 to 17 deaths per 1,000 live births). Still, many children continue to perish, with approximately 5 million children having died in 2020 before their fifth birthday, even if this is an actual decrease from the 5.9 million in 2015. Of those that died in 2020, 2.4 million deaths occurred within the first month of life. Sub-Saharan Africa maintained the highest under-five mortality rate globally at 74 deaths per 1,000 live births in 2020, which is 14 times higher than the risk in Europe and North America.

The global adolescent birth rate has declined from 47.9 births to 41.2 births per 1,000 adolescents (i.e., individuals aged 15–19 years) between 2010 and 2020. Significant reductions were especially noted in Central and Southern Asia, where the rate dropped from 43.6 births to 23.7 births during the period. Meanwhile, early childbearing (i.e. among girls aged 10–14 years) is more prevalent in sub-Saharan Africa, Latin America, and the Caribbean. Nonetheless, most countries with measurable early childbearing rates have witnessed a reduction since 2000, and although data assessing the complete impact of COVID-19 on maternal and child health and adolescent fertility are not yet available, growing concerns suggest that the pandemic may have inadvertently hampered progress in these areas. Addressing these disparities and sustaining positive trends requires continued global efforts and targeted interventions to ensure the well-being of mothers, newborns, and adolescents worldwide.

5.2. SDG 4: Quality Education

Encouragingly, global net enrolment rates in primary and secondary education have risen to 91% and 84%, respectively, showing progress since the year 2000. Nevertheless, stark reality forces millions of children, particularly in sub-Saharan Africa and South Asia, to be denied access to education. The quality of education is also a growing concern, as many children do not acquire the foundational skills necessary for future success. Moreover, the COVID-19 pandemic has caused severe disruptions in educational systems worldwide, and the repercussions of school closures have been

23 Ibidem, pp. 23–29.

particularly alarming for children's learning and well-being, having significantly impacted girls and disadvantaged groups, including children with disabilities, rural residents, and ethnic minorities. Shockingly, an estimated 147 million children have missed over half of their in-person instruction over the past two years.²⁴ Consequently, this generation of children faces a potential collective loss of 17 trillion USD in their lifetime earnings. To address this crisis, governments must undertake ambitious programmes to ensure the return of all children to school, mitigate learning losses, and address their psychosocial needs.

5.3. SDG 5: Gender Equality

Significant advancements have been achieved in terms of gender equality, with girls' primary school enrolment reaching parity with that of boys in many countries. Women's wage employment proportion has also increased, even if challenges remain. For example, according to the report, the world might not achieve gender equality by 2030, and the repercussions of the pandemic have exacerbated the challenges. This can be seen in the progress regarding crucial areas such as unpaid care and domestic work, decision-making on sexual and reproductive health, and gender-responsive budgeting, which is lagging. Women's health services, which are already inadequately funded, have experienced substantial disruptions, and violence against women persists. It also persists that despite their pivotal role in responding to COVID-19, women continue to face obstacles in securing rightful decision-making positions. Urgent commitment and bold actions are imperative to expedite progress and require promoting laws, policies, budgets, and institutions to advance gender equality. Enhanced investment in gender statistics is also crucial because less than half of the data necessary to monitor SDG 5 is currently available.

Regarding children's rights, child marriage and female genital mutilation persist as human rights violations, hindering the advancement of the rights of girls and women.²⁵ Regarding child marriage, in 2021, almost one in five young women globally were married before turning 18, with the highest rates observed in sub-Saharan Africa and Southern Asia, where 34% and 28% of young women, respectively, experienced early marriage.²⁶ While the global child marriage prevalence has decreased by approximately 10% in the past five years, the COVID-19 pandemic's impact, including its economic shocks and disruptions in social services, has increased the risk for more girls. By 2030, up to 10 million additional girls are projected to face the risk of becoming child brides, adding to the 100 million who were already at risk before the pandemic.

Female genital mutilation, an extensively documented problem in developing nations, continues to be a widespread phenomenon that affects at least 200 million

24 United Nations, *Bringing dry land in the Sahel back to life*, 2022, p. 2.

25 United Nations Children's Fund, 2021.

26 Ibid.

girls and women in 30 countries.²⁷ In many nations, this practice persists at levels similar to those three decades ago, and even where progress has been made, it needs to be accelerated tenfold to meet the global target of eliminating female genital mutilation by 2030. Education plays a pivotal role in the eradication efforts, with opposition to female genital mutilation being the highest among educated women and girls. Girls with mothers who finished primary education were 40% less likely to undergo female genital mutilation than those with mothers lacking education. These persistent challenges underscore the critical need for intensified global efforts to safeguard the rights and well-being of girls and women.

5.4. SDG 6: Clean Water and Sanitation

Art. 24 of the CRC enshrines the right to health for children, emphasising the child's right to enjoy the highest attainable standard of health and access to medical services. Ensuring access to clean water, sanitation, and hygiene aligns directly with this provision and contributes to children's holistic well-being. Other international conventions also emphasise the crucial link between children's rights and access to water, sanitation, and hygiene, with an example being the International Covenant on Economic, Social, and Cultural Rights (also known as ICESCR), which recognises the right to an adequate standard of living, encompassing access to safe drinking water and sanitation. Furthermore, the International Decade for Action 'Water for Sustainable Development' underscores the importance of water-related goals in achieving broader sustainable development, echoing the interconnectedness between children's rights and water access.

If we recognise this link between children's rights and SDG 6, it becomes evident that addressing water and sanitation challenges is integral to upholding the rights and well-being of children worldwide. Furthermore, while the achievement of SDG 6 by all nations in 2030 remains uncertain, there has been some progress in this regard in recent years. Specifically, the proportion of the world's population with access to safely managed drinking water services increased from 70% in 2015 to 74% in 2020. However, the stark reality is that 2 billion people still lack these services, and 1.2 billion do not have access to basic services. This disparity becomes particularly pronounced in rural areas and least-developed countries. Unfortunately, the current trail of progress indicates a shortfall in achieving the 2030 target, leaving 1.6 billion without safely managed drinking water. Regarding sanitation service coverage, it increased from 47% in 2015 to 54% in 2020, with open defecation decreasing by one-third during the period. Nevertheless, hand hygiene, which is crucial for disease control, remains lacking for over one in every four people, and achieving universal access to clean water and sanitation by 2030 to save 829,000 lives annually will require a fourfold increase in current progress.

These water and sanitation challenges are intricately linked to children's rights, particularly the rights to health and a safe environment. Inadequate access to clean

27 World Health Organization, Female genital mutilation, 2023.

drinking water and sanitation affects children disproportionately, making them more vulnerable to waterborne diseases and infections. Moreover, the lack of proper hygiene facilities, including handwashing, poses a severe risk to children's health and hinders their overall well-being and development.

5.5. SDG 14: Life Below Water

Progress is evident in life below water, with marine fish stocks within sustainable levels increasing from 60% in 2000 to 65% in 2017 and marine protected areas having expanded from 1% in 2000 to 8% in 2021. However, overfishing and pollution, compounded by the adverse effects of climate change, pose ongoing threats to marine life. Human activities also jeopardise the world's oceans, affecting the largest ecosystem on earth and the lives of billions. Ocean acidification, rising temperatures, pollution, and the drastic loss of coral reefs all pose severe threats to marine life. The depletion of fish stocks due to increased consumption and poor fishery management also intensifies the strain on ocean health. This entails the need for urgent measures to secure a sustainable blue economy, which should emphasise a "source-to-sea" approach.

Marine pollution, primarily plastic pollution, is also escalating, with more than 17 million metric tons entering the ocean in 2021. This volume is expected to double or triple by 2040, thereby threatening marine life. Coastal areas face increasing eutrophication, leading to more "dead zones". Furthermore, the strategic placement of marine protected areas remains an important issue, even in light of the growth in marine protected areas, covering 8% of global waters in 2021. It is also a fact that key biodiversity areas lack protection, with 55% remaining exposed on average. Addressing these challenges is crucial for securing environmental sustainability and directly contributes to securing a healthy environment for current and future generations, ensuring the realisation of SDG 14 and Arts. 24.1 and 27.1 of the CRC.

5.6. SDG 15: Life on Land

Species extinction and habitat loss directly affect children's rights. SDG 15 underscores the importance of the ecosystem, while the CRC emphasises children's well-being, which in turn is hindered by ecosystem degradation as it jeopardises food, water, and a stable environment. Urgent measures to tackle such degradation include reversing habitat loss, transforming land management practices, and adopting sustainable agriculture. Despite a decline in global forest areas, efforts to combat deforestation have resulted in a 35% increase in certified forest land and a rise in long-term management plans. The latest SDGs report notes that over 700 million hectares are under legal protection, comprising 18% of global forest land and contributing to SDG 15 by safeguarding the environment for current and future generations and aligning with children's rights in international conventions and national constitutions. It remains that the implementation of SDG 15 faces challenges, particularly in regions affected by drought and climate change, with Africa's Sahel region, for example, having to

employ innovative techniques, such as half-moon ploughing, to enhance harvest.²⁸ Furthermore, ecosystems, which are crucial for sustenance, face various threats, with 40,000 species at risk, 10 million hectares lost annually, and over half of key biodiversity areas lacking protection. Human activities, such as logging and agriculture, endanger habitats and place 20% of reptile species at risk. The recovery process from the COVID-19 pandemic also neglected biodiversity, having led to a 9.2% Red List Index²⁹ deterioration, and disproportionately affecting Central and Southern Asia, Eastern and Southeast Asia, and small island developing states. These challenges affect children and future generations by hindering farming, life on land, and overall ecosystem sustainability, thereby affecting SDGs 1, 2, 3, and 4. Achieving SDG 15 globally is crucial for children's well-being.

5.7. SDG 17: Partnerships for the Goals

Regarding global partnerships that would facilitate the achievement of SDG 17, developing nations continue to struggle to recover from the COVID-19 pandemic, and this is despite a surge in ODA, global foreign direct investment, and remittance flows. In particular, rising inflation, interest rates, and impending debt burden hinder the economic recovery of developing nations, and those countries with limited fiscal space find it challenging to rebound. The unequal distribution of vaccines during the COVID-19 pandemic also threatens a differentiated recovery from COVID-19 worldwide.

Accordingly, achieving the SDGs may require a comprehensive transformation of international financial and debt structures. In 2021, ODA by the OECD Development Assistance Committee countries reached \$177.6 billion, a 3.3% increase from 2020, yet fell short of the 0.7% target. Despite a 20% increase in ODA since 2015, the ongoing crises have strained ODA, with one example being the Ukraine–Russia war, which impacted ODA in 2022 and influenced refugee-related spending. Global foreign direct investment rebounded to \$1.58 trillion by 2021, but uneven regional growth persists, with developed economies having experienced a 64% increase by 2021, whereas developing economies and least developed countries grew by 30% and 13%, respectively. SDG-related investments in developing countries rose by 70% by 2021, particularly in renewable energy, but least-developed countries received a reduced share (15%) compared with 2020 (19%). Meanwhile, remittance flows to low- and middle-income countries are expected to reach \$605 billion by 2021, surpassing foreign direct investment and ODA combined. High transaction costs, averaging at 6.0% (i.e. double the 3% target) persist despite robust remittance growth. SDG 17 emphasises the importance of effective partnerships to address these challenges, aligning with children's rights protection under international conventions and the CRC.

28 United Nations, Bringing dry land in the Sahel back to life, 2022.

29 The International Union for Conservation of Nature, 2023.

In summary, the UN Sustainable Development Goals Report³⁰ 2022 delivers a direct message, signalling a concerning deviation from achieving the SDGs by 2030. This underscores the need for immediate, unified efforts to address the climate crisis and other pressing global challenges. The report serves as an imperative call to action to forge a future characterised by sustainability and equity for every individual worldwide. This imperative resonates deeply with the protection of children's rights, as enshrined in various international conventions and, most notably, the CRC, which outlines the fundamental rights to which every child is entitled and underlines the need for a world in which children can grow, learn, and thrive in a safe and nurturing environment. The SDGs, including SDG 3 (Good Health and Well-being), SDG 4 (Quality Education), and SDG 16 (Peace, Justice, and Strong Institutions), align closely with the CRC principles, emphasising the interconnectedness between sustainable development and children's well-being. Moreover, the SDGs Report 2022 delineates the urgency of addressing global challenges collectively, which aligns with the spirit of international cooperation and collaboration outlined in various legal instruments beyond the SDGs, such as the Paris Agreement and the Universal Declaration of Human Rights. Protecting children's rights is intricately linked to these global initiatives and underscores the shared responsibility of nations to create a world where every child's right is respected, protected, and fulfilled.

In essence, the SDGs Report 2022 not only sounds the alarm for urgent global action but also reinforces the interconnected nature of sustainable development achievements and safeguarding the rights and well-being of children. It should serve as a powerful catalyst for nations to reevaluate their commitments, strengthen international cooperation, and redouble their efforts to ensure a future that is sustainable, equitable, and conducive to the flourishing of every child on the planet.

6. The European Approach

Europe's strategic approach to SDGs comprises exemplary practices and future trajectories. In this study, the strategies explored are those outlined herein.³¹

Integrated National Strategies: European nations have embraced the SDGs by comprehensively harmonising their national strategies with these goals, in that their national strategies intricately outline specific targets and indicators for each goal. This allows these nations to foster a unified, cross-sectoral approach to sustainable development. Indeed, the European Union (EU) seems committed to aligning its policies with sustainable development objectives, with prime examples being key initiatives such as the EU Green Deal³² and The New European Bauhaus,³³ showcasing

30 United Nations, 2022, Sustainable Development Goals. Available at: <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (Accessed: August 25, 2024).

31 European Commission, 2023.

32 Ibid.

33 Ibid.

a steadfast dedication to sustainable practices and providing a comprehensive framework for incorporating environmental, economic, and social considerations into policymaking. The EU Climate Law³⁴ also establishes the groundwork for achieving climate neutrality by 2050 in harmony with SDG 13 (Climate Action), while the European Solidarity Corps actively encourages the involvement of young people in solidarity activities, promoting social inclusion and contributing to SDG 10 (Reduced Inequality). These endeavours underscore the EU's dedication to fostering a holistic approach to development in accordance with the SDGs and addressing the economic, social, and environmental dimensions of sustainable development.

Stakeholder Engagement: At the heart of the implementation of SDGs in the EU is inclusive governance, which is characterised by the active engagement of diverse stakeholders. This entails that civil society, businesses, and local communities are regarded as integral participants in contributing varied perspectives and nurturing a collective sense of responsibility towards achieving the SDGs.

Data Monitoring and Reporting: The EU employs robust mechanisms for monitoring data and effectively tracking progress towards SDG targets. The routine reporting by European countries also helps with enhancing transparency and accountability, providing crucial insights into areas of success and those requiring attention.

Policy Coherence: European nations strive towards policy coherence across sectors, ensuring that domestic policies align with and support the attainment of the SDGs. The synchronisation of national policies with sustainable development objectives enhances the overall effectiveness of implementation efforts.

Innovation and Technology: Europe harnesses innovation and technology as pivotal tools for SDG realisation. Initiatives concentrate on sustainable practices, clean energy technologies, and digital innovations that contribute to economic growth while minimising the environmental impact.

Education for Sustainable Development (ESD): European Educational programs seamlessly incorporate ESD, and in so doing cultivate citizens' awareness and understanding of sustainable development principles. Integrating SDG-related topics into formal education curricula ensures that future generations are equipped with the knowledge required for sustainable living.

Green Economy Initiatives: European nations actively pursue a green economy model by investing in renewable energy, sustainable agriculture, and circular economy practices. These initiatives significantly contribute to SDGs related to clean energy (SDG 7), responsible consumption and production (SDG 12), and climate action (SDG 13).

Global Partnerships: The EU is actively and collectively engaged in global partnerships to address the challenges outlined in the SDGs, with collaborative efforts involving financial contributions, knowledge-sharing, and joint initiatives,

34 European Union European Climate Law, 2021. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R1119> (Accessed: September 3, 2024).

underscoring the interconnected nature of global issues and the importance of international cooperation.

Results and Challenges:³⁵ The *Sustainable development in the European Union – monitoring report on progress towards the SDGs in an EU context – 2023 edition* document highlights substantial advancements in the EU’s journey to achieve the SDGs. Notably, the EU has made significant strides in achieving the three pivotal SDGs, which are decent work and economic growth (SDG 8), reduction of poverty (SDG 1), and gender equality (SDG 5). Furthermore, commendable progress has been made in the domains of reducing inequalities (SDG 10), ensuring quality education (SDG 4), and fostering peace, personal security, access to justice, and trust in institutions (SDG 16). Despite the challenges posed by the COVID-19 pandemic, the EU has also demonstrated noteworthy advancements in health and well-being (SDG 3). Positive strides have also been made in innovation and infrastructure (SDG 9). These statistics underscore the EU’s commitment and effective measures in realising various SDGs, reflecting the states and civil society’s dedication to sustainable development.

7. Other Legal Regulations Empowering Global Sustainable Development

In the dynamic quest for global sustainable development, a robust legal framework of pivotal agreements has been meticulously crafted, one which has now seemingly transcended the scope of the SDGs. Each instrument in this framework represents a unique facet of the intricate challenge of fostering sustainability and offers a nuanced perspective on global progress. These tools collectively form a holistic approach to stimulating global development that underscores the interplay between sustainable development’s environmental, social, and economic dimensions. Some noteworthy contributions are explored hereinafter.

World Summit on Sustainable Development (also known as WSSD):³⁶ Held in Johannesburg in 2002, the World Summit on Sustainable Development sought to build on the achievements and challenges identified in the MDGs. It focused on sustainable development and its interconnected environmental, social, and economic dimensions. This landmark summit was a deliberate effort to build upon the achievements and challenges identified in the MDGs, marking a transition towards a more comprehensive and inclusive approach. The gathering brought together leaders, policy-makers, and stakeholders worldwide to deliberate on strategies that promote lasting and balanced development. The outcomes of the Summit provided a roadmap for global initiatives and policies, reinforcing the understanding that true sustainability

35 Eurostat, How has the EU progressed towards the SDGs? 2023. Available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/wdn-20230524-1> (Accessed: September 3, 2024)

36 United Nations, World Summit on Sustainable Development (WSSD), Johannesburg Summit, 2002. Available at: <https://sustainabledevelopment.un.org/milestones/wssd>. (Accessed: October 3, 2023).

requires the harmonious integration of environmental protection, social equity, and economic resilience. The legacy of this event has endured and continues to shape discussions, policies, and actions aimed at achieving the broader and more ambitious objectives encapsulated in the SDGs.

Paris Agreement:³⁷ Focused on addressing climate change, the Paris Agreement, adopted in 2015, aims to limit global warming to below two degrees Celsius above pre-industrial levels. This encourages countries to submit nationally determined contributions outlining their climate action plans. Moreover, the agreement aligns with children's rights and the SDGs by addressing climate change, a critical factor influencing children's well-being and future. The Agreement recognises the vulnerability of children to the impacts of climate change and emphasises the need to protect their rights and those of future generations, as well as describes the need to engage in the following

- a) **Mitigation and Adaptation Measures:** The Agreement commits its parties to undertake ambitious efforts to limit global warming to well below two degrees Celsius above pre-industrial levels, with an aspirational goal of limiting it to 1.5 degrees Celsius. By aiming for lower temperature thresholds, the Agreement seeks to mitigate the adverse effects of climate change, such as extreme weather events, rising sea levels, and ecosystem disruptions, all of which can disproportionately affect children.
- b) **Safeguarding the Right to Health and Survival:** Climate change exacerbates health risks, and children are particularly vulnerable to related changes. The Agreement's focus on limiting temperature increases helps safeguard children's rights to health and survival by reducing the prevalence of climate-related diseases, malnutrition, and other health challenges.
- c) **National Determined Contributions:** Each country must submit nationally determined contributions outlining its climate action plans. Numerous nationally determined contributions include measures to enhance resilience, protect ecosystems, ensure sustainable development, and benefit children and future generations.
- d) **Financial and Technological Support:** The Agreement recognises the importance of providing financial and technological support for developing countries in their climate mitigation and adaptation efforts. This support can enhance access to clean energy, education, and healthcare, thereby positively affecting children's well-being.
- e) **Education and Capacity Building:** The Agreement emphasises the importance of education and capacity building in enhancing climate resilience. Education is a key aspect of children's rights, and building climate literacy helps children contribute to climate action and adaptation in their communities.

37 United Nations, The Millennium Development Goals Report 2015, New York: United Nations, 2015.

- f) Interlinkages with SDGs: The Agreement's goals are inherently linked to several SDGs, including SDG 13 (Climate Action), SDG 3 (Good Health and Well-being), SDG 4 (Quality Education), and SDG 15 (Life on Land).
- g) Achieving the Agreement's objectives contributes to a more sustainable and equitable world that aligns with the broader agenda of the SDGs.

The overall impact of the Paris Agreement on children's rights lies in its potential to create a safer, healthier, and more sustainable world for the current and future generations. By addressing the root causes of climate change, the Agreement aims to secure a better future for children worldwide. Moreover, it underscores the interconnectedness of climate action, children's rights, and the broader SDGs, and its measures to mitigate climate change, enhance adaptation, and promote sustainable development are aligned with creating a world in which children can thrive in a healthy and resilient environment.

Addis Ababa Action Agenda (also known as AAAA):³⁸ Adopted at the Third International Conference on Financing for Development in 2015, the Addis Ababa Action Agenda outlines a global framework for financing sustainable development. This comprehensive agenda extends beyond rhetoric to outline a robust global framework specifically tailored to address the complex issue of financing sustainable development. The Agenda is a testament to the recognition that financial resources are the lifeblood of any transformative agenda, delving into key facets of financing, including domestic resource mobilisation, international public finance, and the crucial engagement of the private sector. By acknowledging the interconnectedness of these elements, the Agenda emphasises the need for a multi-stakeholder approach to effectively mobilise resources and ensure their targeted allocation for sustainable development initiatives. These characteristics render the Agenda not a mere declaration of intent but a pragmatic guide for nations and stakeholders, one that affords those invested in the matter with actionable strategies to navigate the intricate landscape of financing sustainable development – which can be easily considered a foundational element in achieving the SDGs.

Agenda for Humanity:³⁹ Launched during the 2016 World Humanitarian Summit, the Agenda for Humanity focuses on reducing human suffering and delivering improved humanitarian assistance. It provides a guiding set of principles and commitments that nations and organisations are encouraged to adopt, and that serve as a compass for shaping policies and actions that prioritise the alleviation of human suffering. Thus, it creates a vision where compassion and justice are integral to global development efforts. The principles are as follows:

38 United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), 2015.

39 Agenda for Humanity, An Agenda for Action and Change, 2016. Available at: <https://agenda-forhumanity.org/> (Accessed: September 3, 2024).

- a) **Prevention:** The Agenda for Humanity underscores the importance of prevention as a cornerstone of humanitarian efforts. By emphasising proactive measures to avert crises before they escalate, the framework recognises the efficacy of addressing root causes and vulnerabilities to mitigate the impact of disasters and conflicts.
- b) **Localisation:** Another crucial aspect of the Agenda for Humanity is the emphasis on localisation, acknowledging the significance of tailoring humanitarian responses to the specific needs and contexts of the affected communities. This approach ensures that interventions are culturally sensitive, contextually relevant, and directly responsive to the unique challenges communities face during a crisis.
- c) **Increased Collaboration:** Collaboration among humanitarian actors is a central theme in the Agenda for Humanity, which advocates for enhanced cooperation and coordination among various stakeholders, including governments, nongovernmental organisations, and international organisations. This collaborative approach aims to amplify the impact of humanitarian efforts by leveraging the strengths and resources of diverse entities.

New Urban Agenda:⁴⁰ Adopted at the UN Conference on Housing and Sustainable Urban Development (Habitat III) in 2016, the New Urban Agenda represents a pivotal framework within the broader context of the SDGs and has significantly impacted children's protection and well-being. It particularly addresses the challenges associated with urbanisation and recognises that a substantial proportion of the global population, including children, resides in urban areas. Accordingly, it prioritises sustainable urbanisation by envisioning inclusive, safe, resilient, and sustainable cities, which the following aspects should characterise.

- a) **Child-Centric Urban Development:** One noteworthy aspect of the New Urban Agenda is the explicit consideration of children in the urban development discourse. The framework acknowledges the unique vulnerabilities of children in urban settings and emphasises the need for policies and strategies to ensure their safety, well-being, and overall development. Recognising children as active participants in urban life, this agenda underscores the importance of creating environments that cater to specific needs, including access to education, healthcare, and recreational spaces.
- b) **Inclusive Cities for Children:** The New Urban Agenda strongly emphasises inclusivity, aiming to create cities where no one, including children, is left behind. It advocates urban planning that considers the diverse needs of different population segments, focusing on vulnerable groups such as children. It also encourages measures to combat issues such as child poverty, lack of

40 United Nations, New Urban Agenda, 2016. Available at: <https://unhabitat.org/about-us/new-urban-agenda> (Accessed: October 3, 2023).

- access to quality education, and inadequate healthcare services, thereby realising specific SDGs related to child rights and well-being.
- c) **Safe and Resilient Spaces:** Safety and resilience are integral components of the New Urban Agenda and directly affect the protection of children in urban environments. The framework calls for measures to create secure city spaces that are free from violence and exploitation. By addressing issues such as child trafficking, exploitation, and unsafe living conditions, the agenda aligns with the SDG targets related to protecting children from harm, abuse, and exploitation.
 - d) **Sustainability for Future Generations:** The New Urban Agenda aligns with the broader SDG narrative by promoting sustainable development. Meanwhile, creating sustainable urban environments addresses immediate challenges related to children and contributes to a better future for them. This creation surely involves environmental sustainability, access to green spaces, and measures to mitigate the impact of climate change on urban communities, directly supporting the SDGs that emphasise environmental conservation and climate action.
 - e) **The New Urban Agenda serves as a crucial link between the SDGs and the protection of children, envisioning urban spaces that prioritise the rights, safety, and well-being of the youngest members of society.** Through its inclusive and child-centric approach, this framework contributes significantly to the realisation of the targets of SDGs related to child protection, education, health, and overall sustainable development in urban contexts.

ESD:⁴¹ Although it is among the EU's approaches to achieving sustainable development, ESD is a global initiative led by the United Nations Educational, Scientific and Cultural Organization, and it plays a pivotal role in the broader framework of the SDGs, particularly in creating a world that prioritises the protection, education, and well-being of children. Launched in response to the increasing recognition of the interdependence of environmental, social, and economic challenges, ESD underscores education as a transformative force for sustainable development. Its inclusion in the SDGs framework amplifies the understanding that children, as beneficiaries and agents of change, play a central role in global sustainability.

- a) **Holistic Education for Children:** A significant contribution of ESD to the SDGs lies, specifically, SDG 4 (Quality Education) in its focus on providing children with holistic education beyond traditional academic knowledge. It also contributes to other health, well-being, and environmental conservation goals by emphasising the values, skills, and knowledge essential for sustainable living. Children are not merely recipients of information in ESD; they are

41 UNESCO, What is education for sustainable development? 2023. Available at: <https://www.unesco.org/en/education-sustainable-development/need-know> (Accessed: October 3, 2023).

- rather empowered with the understanding and tools required to actively participate in building a sustainable future.
- b) **Fostering Sustainable Values:** ESD emphasises instilling values that align with sustainability principles. Through education, children understand the importance of environmental stewardship, social responsibility, and economic inclusivity. This aligns with SDG 12 (Responsible Consumption and Production) and SDG 13 (Climate Action), which emphasise the role of education in shaping responsible and environmentally conscious global citizens.
 - c) **Skills for a Sustainable Future:** In the context of the SDGs, ESD recognises that children need knowledge and practical skills to contribute meaningfully to sustainable development. By integrating skills such as critical thinking, problem-solving, and innovation into the educational curriculum, ESD aligns with SDG 8 (Decent Work and Economic Growth) and SDG 9 (Industry, Innovation, and Infrastructure), ensuring that children are prepared for the challenges and opportunities of a rapidly changing world.
 - d) **Global Citizenship and Collaboration:** ESD goes beyond national boundaries to cultivate a sense of global citizenship among children. This aligns with SDG 17 (Partnerships for the Goals), which emphasises the importance of international collaboration in achieving sustainable development. By fostering a global perspective and a sense of interconnectedness, ESD contributes to the development of a generation that actively engages in collaborative efforts to address global challenges.
 - e) **Addressing Inequalities in Education:** ESD addresses the critical issue of unequal access to quality education and contributes to SDG 10 (Reduced Inequality). By promoting inclusive and equitable education, this initiative ensures that children, regardless of their socioeconomic backgrounds, can acquire the knowledge and skills necessary for sustainable development.
 - f) **ESD serves as a cornerstone of the SDGs, particularly in relation to the protection and empowerment of children.** By integrating sustainability principles into education, ESD supports the achievement of specific targets of the SDG and lays the foundation for a future in which children actively contribute to building a more just, equitable, and sustainable world.

The legal framework supporting global sustainable development comprises diverse mechanisms, international agreements, treaties, and conferences. While the SDGs are a comprehensive and integrated framework, a nuanced and targeted response to specific focus areas becomes possible through the synergy of complementary mechanisms. Each instrument – from the landmark Paris Agreement addressing climate change to the Addis Ababa Action Agenda outlining a global financing framework and the Agenda for Humanity emphasising humanitarian assistance – contributes uniquely to global efforts to achieve the SDGs. The New Urban Agenda and ESD further diversify these avenues, emphasising sustainable urbanisation and holistic education as integral components of global sustainable development. Together, these

mechanisms provide a robust legal foundation, offer a roadmap for sustainable development, foster collaboration and innovation in the face of the complex global challenges outlined in the goals set for accomplishment by 2030, and create a multifaceted approach to tackling the world's pressing challenges.

8. Conclusion

The 2023 Special Edition of the Sustainable Development Goals Report reveals alarming progress toward achieving the SDGs.⁴² With only seven years remaining until the 2030 Agenda deadline, over 50% of the global population is falling behind, with critical areas such as poverty, hunger, and climate experiencing weak or stalled progress. The compounded effects of the COVID-19 pandemic, climate change, biodiversity loss, and pollution highlight the urgent need for comprehensive reforms to the outdated international financial system. Climate finance remains insufficient and promises from developed countries to provide financial assistance for climate change have yet to materialise.⁴³ To address these global financing issues, UN Secretary-General António Guterres has proposed completely restructuring international financial institutions to ensure their universal benefits and create a safety net for all nations. Moreover, there is an urgent need to expand social protection, promote decent jobs, address the education crisis, tackle gender inequality, and enhance digital inclusion.

The Office of the High Commissioner for Human Rights emphasises the critical intersection between child rights and the 2030 Agenda for Sustainable Development. The progress in achieving SDGs aligned with the CRC and its Optional Protocols has been slow. The CRC provides a comprehensive set of rights essential for the SDGs, covering health, education, housing, non-discrimination, and protection from violence. To realise the “Leave no one behind” promise, monitoring and review processes, development frameworks, policies, and programs must integrate children's rights and prevent actions that jeopardise them.

Children's rights are foundational to sustainable and equitable development worldwide. This chapter encourages a broader discussion about the complex interconnections among the SDGs and invites reflection on practical steps for implementation. It also prompts consideration of the global community's challenges and shared responsibility to safeguard children's well-being and foster sustainable development.

The role of States is central in translating SDG commitments into concrete actions for children. National strategies aligned with the SDGs should serve as roadmaps, outlining policies and programs that address the unique vulnerabilities of children.

42 United Nations, *The Sustainable Development Goals Report: Special edition 2023*. New York: United Nations, 2023. Available at: <https://unstats.un.org/sdgs/report/2023/> (Accessed: August 25, 2024).

43 Puko, 2023.

Regional organisations have largely embraced this approach, integrating SDG targets into their agendas.

International organisations act as catalysts for global collaboration, facilitating the exchange of best practices and resources. Agencies such as UNICEF, UNESCO, and others accompany states in implementing SDG-aligned programs. These organisations leverage their expertise to address cross-border challenges such as refugee crises and child trafficking, recognising that collective action is vital to ensuring no child is left behind. However, it is essential to mention that some institutions' actions are unsustainable. Kate Donald argues in her article in the *Bretton Woods Observer* that institutions like the International Monetary Fund (IMF), which focuses on economic growth, often implement austerity policies that harm the poor and vulnerable. She also notes that IMF loan conditionality policies can undermine the SDGs by requiring countries to cut public spending on social services.⁴⁴

The civil society, comprising non-governmental organisations and community-based groups, is influential in advocating for children's rights. Since its establishment in 1945, the UN has actively embraced collaboration with non-governmental organisations and recognised their significance in advancing its ideals.⁴⁵ The primary platform for direct NGO involvement is through consultative status with the UN ECOSOC. Initially, 41 NGOs were granted this status in 1946; today, that number has grown to 5,593, representing diverse sectors, including those aligned with SDGs (e.g., education, health, poverty eradication, human rights, and gender equality). NGOs have become essential in facilitating the 2030 Agenda for Sustainable Development since its adoption in 2015, especially in advocating for children's rights. Many NGOs conduct awareness campaigns, lobby for policy changes, and directly support children in need. Grassroots initiatives driven by civil society have significant community-level impacts, contributing to achieving SDGs related to poverty reduction, education, and health. These community-based approaches, often led by local organisations, gain traction due to their rapid implementation by local actors.⁴⁶ Larger organisations benefit from engaging with grassroots initiatives and addressing specific concerns that need attention. These grassroots groups also act as first responders to crises, offering solutions tailored to local contexts. Collaboration between grassroots organisations and international entities becomes especially effective when addressing community-specific needs, as these groups provide a nuanced understanding of complex challenges and contribute to SDGs associated with poverty reduction, education, and health. Their involvement fosters community trust, validating innovations' potential benefits, identifying shortcomings, and suggesting necessary iterations.

However, opinions vary when assessing civil society's role in SDG implementation. Some argue that the SDGs provide a valuable asset for businesses, as they enhance

44 Donald, 2019.

45 United Nations, SDG Indicators, 2023.

46 Bettencourt, 2023.

alignment between policymakers, civil society, and the private sector.⁴⁷Others propose rethinking civil society to understand its dynamics better and identify ways to support its transformative potential.⁴⁸ On the other hand, some still emphasise that while civil society participation is crucial for SDG attainment, its impact is often limited by the power it is given.⁴⁹

Overall, achieving the SDGs by 2030 requires addressing global challenges faced by humanity in general and children in particular. Children's rights at the heart of every state's development agenda; policies and programs are vital to ensuring a better future.

47 Pedersen (2018), *Procedia CIRP*, 69, pp. 21-24.

48 Kontinen and Millstein (2017), *Forum for Development Studies*, 44(1), pp. 69-89.

49 Sénit (2020), *Environment and Planning C*, 38(4), pp. 693-712.

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Part V
Children and International
Criminal Law

Children in the Practice of the International Criminal Court

Péter KOVÁCS

ABSTRACT

The International Criminal Court (ICC) is paying enhanced attention to children by all its important institutions. The article would like to give an overview on the children related activity of (1) the Office of the Prosecutor, (2) the judiciary and (3) the Trust Fund for Victims. Children are victims of several crimes, inter alia child-soldiering, attacks against civilian population and different sexual and gender-based crimes. Special care is required when the ICC experts are collecting the children's testimonies about crimes committed against them. The article gives an introduction into the children-related practice of the ICC and its considerations are based on quotations from the most important judicial decisions and the Policy Papers of the Prosecutor.

KEYWORDS

International Criminal Court, Rome Statute, OTP Policy Papers, crime of child-soldiering, 'ting-ting', SGB crimes, 'Do no harm' principle, danger of retraumatization, Trust Fund for Victims, assistance mandate, reparation mandate, transgenerational harm

1. Children in the text of the Rome Statute

Children are mentioned numerous times in the Statute. They appear in the Preamble¹ and in subsequent articles either in the context of certain crimes (genocide,²

1 Rome Statute, Preamble: '(.) Mindful that during this century millions of *children*, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, (...)'.
2 Rome Statute, Article 6, Genocide: 'For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (...) (e) Forcibly transferring *children* of the group to another group'. (Same text as in the 1948 Genocide Convention).

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enslavement,³ child-soldering⁴) or in connection with the required age for criminal responsibility⁵ or with the qualifications that candidates are required to produce to be elected to the judiciary.⁶ There are references to children in other articles emphasising the need for deep children-related expertise in the Office of the Prosecutor (OTP).⁷ The articles containing the Prosecutor’s duties and powers mention the word “children” in the context of witness protection during the investigation.⁸

3 Rome Statute, Article 7, Crimes against humanity: ‘1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) (c) Enslavement; (2) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and *children*’.

4 Rome Statute in Article 8 (2)(b) concerning war crimes committed in an international armed conflicts and in Article 8 (2)(e) about war crimes committed in a non-international armed conflict. Article 8 (2)(b) (...) (XXVI) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. Article 8 (2)(e) (...) (VII) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

5 Rome Statute Article 26, Exclusion of jurisdiction over persons under eighteen: ‘The Court shall have no jurisdiction over any person *who was under the age of 18* at the time of the alleged commission of a crime’.

6 Rome Statute, Article 36, Qualifications, nomination and election of judges: ‘(8) (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children’.

7 Rome Statute, Article 42, The Office of the Prosecutor: ‘(9) The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against *children*’.

8 Rome Statute, Article 54, Duties and powers of the Prosecutor with respect to investigations: ‘1) The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including *age*, gender as defined in Article 7, Paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against *children*; and (c) Fully respect the rights of persons arising under this Statute’.

The importance of focusing on children’s special needs when they are involved as witnesses or victims in an actual procedure is discussed in a more detailed article.⁹

The word “children” also emerges with respect to those who are entitled to submit a motion for the revision of a sentence if the condemned person passes away.¹⁰

The following sections provide an overview of the implementation of these abstract statutory norms, first through the soft-law-type policy documents issued by the Prosecutor when summarising the directions and principles of his proceedings, and second, by providing a short introduction to cases where children were directly concerned.

2. Children in the key strategic and policy documents of the Office of the Prosecutor

The Prosecutor issues policy papers to reveal the approach he follows in the different aspects of case-selection, prioritisation, investigation and representation of the charges to the legal community, media and public. The *twenty-*, thirty- or even forty-page long publications summarise the established practice in a condensed manner without requiring an interested public officer, academic researcher, or journalist to go through hundreds of submitted motions in a given case.

The Prosecutor issued a comprehensive document about the Policy on Children¹¹ in 2016 where “child sensitive approach” and “the best interest of the child” are the returning notions borrowed from the Convention on the Rights of the Child in the

9 Rome Statute, Article 68, Protection of the victims and witnesses and their participation in the proceedings: ‘1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in Article 7, Paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial - the rights of persons arising under this Statute. • 2. As an exception to the principle of public hearings provided for in Article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.’

10 Rome Statute, Article 84, Revision of conviction or sentence: ‘1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused’s death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person’s behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that: (...)’

11 Policy on Children, 15 November 2016. Available at: <https://www.icc-cpi.int/161115-otp-policy-children> (In the followings: Policy on Children, 2016).

nine chapters dealing *inter alia* with the regulatory framework, preliminary examinations, investigations, prosecutions, cooperation, institutional development and implementation. All these chapters have footnotes, reflecting the document's coherence with the convention and its monitoring, as well as the child-related approaches of different UN bodies.

As emphasised,¹² Article 21 of the Rome Statute¹³ is the basis for maintaining the practice of International Criminal Court (ICC) and that of the Convention on the Rights of the Child in harmony.

The booklet points out the importance of the twofold age limit: according to the Rome Statute, a child should be 15 years old or younger to be considered a child soldier, however, concerning other crimes and rules of protection, the age limit is 18 years or younger. This second age limit is also applicable when the word "child" is not mentioned in the legal definition of a given crime, however, the actual victims are children, as in the case of "forcible transfer of population" or "attacks against buildings dedicated to (...) education or (...) hospitals".¹⁴

Moreover, the OTP's approach relies on the use of a presumption based *de facto* on the physical outlook: 'the Office will consider young persons whose ages are unknown to be "children" for the sole purpose of its engagement with them, unless there is a reasonable basis to believe otherwise'.¹⁵ (As one footnote explains, this approach follows the jurisprudence of the Special Court for Sierra Leone.)

The booklet emphasises that the OTP requires

'a child-sensitive approach in all aspects of its work involving children. This approach appreciates the child as an individual person and recognises that, in a given context, a child may be vulnerable, capable, or both. The child-sensitive approach requires staff to take into account these vulnerabilities and capabilities. This approach is based on respect for children's rights and is guided by the general principles of the 1989 Convention on the Rights of the Child: non-discrimination; the best interests of the child; the right to life, survival and development; and the right to express one's views and have them considered'.¹⁶

12 Policy on Children, 2016, § 37, p. 18.

13 Rome Statute, Article 21, Applicable law: '1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (...). 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as gender as defined in Article 7, Paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. (...)'.

14 Policy on Children, 2016, §§ 2, 16, pp. 6, 11-12.

15 Policy on Children, 2016, § 16, p. 12.

16 Policy on Children, 2016, § 22, p. 13.

In the context of prosecutions, the “best interest of the child” implies that

‘[c]onsistent with its commitment to apply a child-sensitive approach, the Office will, within the context of its mandate, take into account the best interests of a child as a primary consideration. This involves an ongoing assessment of what would best protect a child’s physical, psychological and emotional safety, security and well-being, and applies to decisions that affect children, as individuals or in general’.¹⁷

This rule is implemented using a two-step process,¹⁸ where the first is the assessment of a given child’s specific situation,¹⁹ and the second comprises the examination of an eventual need to balance different interests.²⁰

When explaining the legal content of different crimes related to children, the Prosecutor states that a child’s victimisation could amount to the level of a crime of torture under the Rome Statute, even if an adult’s victimisation does not forcibly amount to the required threshold of torture in a similar case.²¹ Children’s victimisation can be

17 Policy on Children, 2016, § 28, p. 15.

18 Policy on Children, 2016, § 29, p. 16.

19 ‘In making an assessment about the child’s specific situation, in the first step of the best interests inquiry, the Office will consider: (I) the individual profile of the child concerned, taking into account relevant factors, such as age, level of maturity, experience, education, ability or disability, health conditions, membership in a minority group, sex, and gender, as well as whether the child has been displaced, separated, trafficked, detained, abducted or sexually exploited, or is a parent or head of household; and (II) the child’s social and cultural context, for example, the presence or absence of parents or caregivers, residence in a familial or non-familial setting, the quality of the relationships between the child and his or her family or caregivers, and the environment in relation to safety.’ Policy on Children, 2016, § 30, p. 16.

20 ‘Once a best interests assessment is made as a first step, the Office will then consider whether there are other factors, including legal or operational issues, which may require a balancing of various interests. The Office will resolve potential conflicts on a case-by-case basis, carefully balancing the interests of all parties, in an effort to find a suitable compromise. If harmonisation is not possible, the Office will analyse and weigh the rights and interests of all those concerned. Substantial weight will be placed on the child’s best interests. In circumstances where the ultimate conclusion is that other considerations outweigh the initial best interests assessment, the Office will strive to implement appropriate measures to mitigate any negative impact that such a decision may have on the child.’ Policy on Children, 2016, § 32, p. 17.

21 ‘The Statute also proscribes other related crimes, for example, other inhumane acts as a crime against humanity (Article 7(1)(k)), 62 and inhuman treatment (Article 8(2)(a)(II)), cruel treatment (Article 8(2)(c)(I)) and wilfully causing great suffering (Article 8(2)(a)(III)) 65 as war crimes. The Office recognises that, owing to their physical and emotional development and their specific needs, treatment, potentially amounting to torture and related crimes, may cause greater pain and suffering to children than to adults. It will bear this in mind when considering whether such treatment against children may amount to a crime under the Statute.’ Policy on Children, 2016, § 50, pp. 23-24.

rightfully considered when assessing the “gravity”²² and the “interest of justice”.²³ If committed against children, sexual- and gender-based crimes should be perceived as militating for prosecution.²⁴ Crimes committed against children deserve higher penalties²⁵ and should be considered when judges decide on reparation modalities.²⁶

According to the “*Do no harm*” principle and to avoid re-traumatisation, children’s character and their special needs are to be observed during contacts and interviews. A special psychosocial assessment, which should be video-recorded, should be performed prior to the interview.²⁷ Even if some children are ready and keen to step up as witnesses during the trial, the personnel of the OTP should carefully analyse whether this would really be in the child’s interest.²⁸ If the decision is to call him/her to testify, a special psychological coaching is required before, during and after the testimony.²⁹

To deal with all the complex policies concerning children and the ICC, the Prosecutor appointed a Special Advisor for children in and affected by armed conflict.³⁰

This Policy Paper underwent certain actualisation and was also subject to public consultation.³¹ The 2023 edition confirmed the established strategy, and the considerations and applied techniques were settled into a matrix constituting slightly reformulated objectives and principles.

The new version³² formulates six objectives and seven principles.

22 Policy on Children, 2016, § 57, p. 26.

23 ‘In determining the gravity of potential cases, the Office assesses the scale, nature and manner of the commission of the crimes as well as their impact on victims and communities. In general, the Office will regard crimes against or affecting children as particularly grave, given the commitment made to children in the Statute, and the fact that children enjoy special recognition and protection under international law.’ Policy on Children, 2016, § 59, p. 27.

24 Policy on Children, 2016, §§ 85-86, p. 34.

25 Policy on Children, 2016, §§ 101-102, pp. 38-39.

26 Policy on Children, 2016, §§ 105-107, pp. 39-40.

27 Policy on Children, 2016, §§ 71-82, pp. 30-33.

28 ‘In the process of selecting witnesses to testify, the Office will bear in mind the attributes a child may possess, including his or her vulnerabilities, capabilities and resilience, as well as the relevance of the evidence the child can provide. It will take into account considerations relating to any psycho-social and security assessments, as well as any possible healing effect which may be associated with providing evidence. The Office recognises that certain child witnesses may want to testify in support of judicial proceedings, and may regard testimony as a component of their own recovery process. The Office will give careful consideration to whether taking evidence will be of benefit or harm to a child. Engagement with children will be conducted by staff members with expertise relating to vulnerable witnesses, including children.’ Policy on Children, 2016, § 89, p. 35.

29 Policy on Children, 2016, §§ 91-97, pp. 35-37.

30 Policy on Children, 2016, § 120, p. 43.

31 The Office of the Prosecutor launches public consultation to renew the policy paper on crimes against or affecting children, Statement of 9 March 2023. Available at: <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-renew-policy-paper-crimes-against-or-affecting>.

32 Available at: <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf> (In the followings: Policy on Children - 2023).

The six objectives are as follows: *a.* To help remedy the historic under-representation and lack of engagement with children in international criminal justice processes; *b.* To emphasise its view that all crimes under the Rome Statute may be committed against children or otherwise affect them in myriad ways; *c.* To ensure that in all dealings related to children, the Office takes a child rights, child-sensitive, and child-competent approach guided by the best interests of the child; *d.* To actively reflect and adapt to issues related to intersectionality, children’s different developmental stages and their evolving capacities and capabilities; *e.* To emphasise the Prosecutor’s commitment to establish an institutional environment that facilitates effective investigation and prosecution of crimes against and affecting children – including through recruitment, training, external collaboration, and meaningful implementation, monitoring, and evaluation measures; *f.* To promote the exchange of lessons learned and best practices arising from local and international accountability efforts.³³

The following seven principles are enumerated and explained in the document: *a.* Taking a child rights, child-sensitive, and child-competent approach; *b.* Acknowledging diversity among children; *c.* Taking an intersectional approach; *d.* Taking a survivor-centred, trauma-informed approach; *e.* Proactive consideration of and engagement with children; *f.* Consent and assent; *g.* Cooperation and complementarity.³⁴

Children’s special interests are emphasised in other policy papers dealing with general or other special aspects of the OTP. Most were issued a few years prior to the publication of the Policy on Children.

When the *Policy Paper on Sexual and Gender-Based Crimes*³⁵ refers to children, it evokes the “Do no harm” principle³⁶ with special focus on gender aspects of child-soldiering and child victims of enslavement.³⁷ Special protective measures, including restrictions on public hearings, are advisable for child victims.³⁸

The *Policy Paper on Preliminary Examination*³⁹ stipulates that when the OTP is analysing the nature of the crime as a component of the assessment of the gravity of the crime,

33 Policy on Children, 2023, p. 7

34 Policy on Children, 2023, pp. 23, 26, 27, 28, 29, 30 and 31.

35 Policy Paper on Sexual and Gender-Based Crimes, June 2011. Available at: https://www.icccpi.int/sites/default/files/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf (In the followings: Policy Paper on Sexual and Gender-Based Crimes).

36 Policy Paper on Sexual and Gender-Based Crimes, § 5, p. 6.

37 Policy Paper on Sexual and Gender-Based Crimes, §§ 8, 34, pp. 6 and 21.

38 Policy Paper on Sexual and Gender-Based Crimes, § 88, p. 34.

39 Policy Paper on Preliminary Examinations, November 2013. Available at: https://www.icc-cpi.int/sites/default/files/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf (In the followings: Policy Paper on Preliminary Examinations).

it should particularly focus on whether the crimes have been committed against children.⁴⁰

The *Policy Paper on Case Selection and Prioritisation*⁴¹ states that the victimisation of children is considered an important factor when assessing the gravity of the crimes⁴² and promises that '[t]he Office will pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes'.⁴³ A relatively similar reference can be found in the *Policy Paper on Situation Completion*⁴⁴ and *Policy Paper on the Crime of Gender Persecution*,⁴⁵ in which the Prosecutor presents its policy concerning crimes falling under Article 7(1)(h)⁴⁶ of the Statute.

40 'The Office's assessment of gravity includes both quantitative and qualitative considerations. As stipulated in regulation 29(2) of the Regulations of the Office of the Prosecutor, the factors that guide the Office's assessment include the scale, nature, manner of commission of the crimes, and their impact. (...) The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.' *Policy Paper on Preliminary Examinations*, §§ 61, 63 p. 17.

41 *Policy paper on case selection and prioritisation*, 15 September 2016, https://www.icc-cpi.int/sites/default/files/20160915_OTP-Policy_Case-Selection_Eng.pdf (In the followings: *Policy paper on case selection and prioritisation*).

42 *Policy paper on case selection and prioritisation*, §§ 39, 46, pp. 13 and 16.

43 *Policy paper on case selection and prioritisation*, § 46, p. 16.

44 'The Prosecutor's decision whether to prosecute a case, or otherwise how to manage it, will be informed by a rigorous process of internal peer review of the evidence, including the participation of senior members of the Office assigned to other situations as well as relevant subject-matter specialists (law, analysis, sexual and gender-based crimes, children, etc.)' *Policy on Situation Completion*, 15 June 2021. Available at: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210615-Situation-Completion-Policy-eng.pdf>, § 38, p. 15.

45 'With regard to gender persecution committed against or affecting children, the Office considers such acts or crimes as particularly grave, given the commitment made to children in the Statute, and the fact that children enjoy special recognition and protection under international law. Persecutory acts targeting children on the basis of age or birth may be charged on intersecting grounds, including gender, in accordance with the Policy on Children. The Office will pay particular attention to child victims of all ages – from birth to adolescence – of gender persecution when assessing the gravity and impact of such crimes. Additionally, when engaging with children who are victims of gender persecution, the Office will apply a trauma-informed, child-sensitive and child-competent approach'. *Policy on the Crime of Gender Persecution*, 7 December 2022. Available at: <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> (In the followings: *Policy on the Crime of Gender Persecution*).

46 Rome Statute, Article 7, Crimes against humanity: '1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.'

The *Policy Paper on Victims' Participation*⁴⁷ issued during the first phase of the Lubanga trial raised two aspects of the crime of child-soldiering: I. the identification of natural persons who can act as indirect victims of this crime and their right of participation;⁴⁸ and II. the right of participation of legal persons, in fact schools.⁴⁹

The *Documenting international crimes and human rights violations for accountability purposes – Guidelines for civil society organisations*⁵⁰ is a recent document jointly issued by the Prosecutor, Eurojust and the EU Network for the investigation and prosecution of genocide, crimes against humanity and war crimes. When emphasising the importance of cooperation with NGOs, it is pointed out that these organisations should also observe the rules and principles protecting children because of their particular vulnerability⁵¹ and secure professional psychological pre-assessment and coaching prior to interviews.⁵²

According to the Prosecutor's regular reports on preliminary examinations, child-related crimes seemingly falling under the Rome Statute were well on the agenda; for example, in 2020,⁵³ preliminary examinations covered these types of crimes in the

47 Policy Paper on Victims' Participation, April 2010. Available at: https://www.icccpi.int/sites/default/files/Policy_Paper_on_Victims_Participation_April_2010.pdf (In the followings: Policy Paper on Victims' Participation.)

48 'The Chamber ruled that the category of "indirect victims" entitled to participate in the proceedings, in addition to those with a close personal relationship to a direct victim, may include the harm suffered by persons who intervened to prevent a crime alleged against the accused. By contrast, it excluded from the category of "indirect victims" those who suffered harm as a result of soldiers since 'it is only victims "of the crimes charged" who may participate in the trial proceedings pursuant to Article 68(3)'. The Office concurs that "victims" under rule 85(a) can be persons who were not the direct targets of a crime, but who suffered indirect harm as a result of the commission of a crime. The Office supports a broad characterization of "indirect victims". In Lubanga, the Office expressed its views that those who have suffered harm as a result of crimes committed by child soldiers, i.e. as a consequence of the crimes charged, are also entitled to participate'. Policy Paper on Victims' Participation, pp. 10 and 11.

49 'In relation to rule 85(b), the Office supports participation by legal persons meeting the criteria and having sufficient authority to represent the organization or institution concerned. Trial Chamber I in the Lubanga case ruled, for example, that the principal of a school from which children were recruited by Lubanga's militia, and who himself qualified as a victim under rule 85(a), also had sufficient authority to act on behalf of the school under rule 85(b). Accordingly, it held that he could participate both on his own behalf and on behalf of his school.' Policy Paper on Victims' Participation, p. 8.

50 Documenting international crimes and human rights violations for accountability purposes - Guidelines for civil society organisations (2022), Available at: https://www.icc-cpi.int/sites/default/files/2022-09/2_Eurojust_ICC_CSOS_Guidelines_2-EN.pdf, (In the followings: Documenting international crimes).

51 Documenting international crimes, pp. 13-14, 16 and 23-27, etc.

52 Documenting international crimes, pp. 13-15 and 24-27, etc.

53 Report on Preliminary Examination Activities 2020, 14 December 2020, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>, (In the followings: Report on Preliminary Examination Activities 2020).

following countries: Uganda,⁵⁴ Australia,⁵⁵ Venezuela,⁵⁶ Colombia,⁵⁷ the Philippines,⁵⁸ Israel and the Palestinian Authority⁵⁹ and Nigeria.⁶⁰

As for the OTP's investigative activity, children-related war crimes or crimes against humanity – in most cases in conjunction with other crimes—are currently under investigation, for example, in Libya,⁶¹ Ukraine and Russia,⁶² Sudan⁶³ and Afghanistan.⁶⁴

In the recently published Strategic Plan for 2023-2025 of the OTP,⁶⁵ the promise to 'ensure effective investigations and prosecutions of Sexual and Gender-Based Crimes and Crimes Against Children' figures at the sixth place among the strategic goals⁶⁶ with special emphasis on the fact that 'these crimes are considered, when reflecting the facts and evidence of the case, from the initial investigative and prosecutorial stages when developing case theories, investigation plans and charging strategies'⁶⁷ and that its staff should be continuously trained 'on the relevant legal framework and on cultural, child and gender-related issues related to the situation and the specific communities in which the investigation is being conducted'.⁶⁸ The document also underlined the need for 'a child-sensitive and child-competent approach to investigations and prosecutions, adapted to children's developmental stages and to diverse

54 Report on Preliminary Examination Activities 2020, Report on Preliminary Examination Activities, 2020, § 40, p. 13.

55 Report on Preliminary Examination Activities, 2020, § 46, p. 14.

56 Report on Preliminary Examination Activities, 2020, § 97, p. 25.

57 Report on Preliminary Examination Activities, 2020, § 109, pp. 109-110.

58 Report on Preliminary Examination Activities, 2020, § 188, p. 47.

59 Report on Preliminary Examination Activities, 2020, § 224, p. 57.

60 Report on Preliminary Examination Activities, 2020, § 255, 257, pp. 65-66.

61 Statement of ICC Prosecutor Karim A.A. Khan KC to the UN Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011), Statement of 12 May 202. Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-un-security-council-situation-libya-pursuant>.

62 Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova, Statement of 17 March 2023. Available at: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

63 Statement of ICC Prosecutor, Karim A.A. Khan QC, to the United Nations Security Council on the Situation in Darfur, pursuant to Resolution 1593 (2005), Statement of 25 August 2022. Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-United-nations-security-council-situation-darfur-0>.

64 Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, Statement of 27 September 2021. Available at: <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>.

65 Office of the Prosecutor Strategic Plan 2023-2025. Available at: https://www.icc-cpi.int/sites/default/files/2023-06/OTP-Strategic-Plan_2023-2025.pdf, 2023-strategic-plan-otp-v.3.pdf (icc-cpi.int), (In the followings: OTP Strategic Plan 2023-2025).

66 OTP Strategic Plan 2023-2025, p. 17.

67 OTP Strategic Plan 2023-2025, para. 59, p. 17.

68 OTP Strategic Plan 2023-2025, para. 61, p. 18.

types of crimes, taking into account the best interests of the child'.⁶⁹ Accordingly, prior control of conformity to these principles should be introduced in all OTP documents and publications.⁷⁰

The commitment of the OTP is also reflected in the Strategic Plan of the ICC:

'The OTP will pay special attention to victims of SGBC and crimes against or affecting children (CAC). An increased systematic focus in all situations and cases on these crimes, combined with an expansion of the OTP's competence to deal with victims of such crimes and with strict application of related policies and standards, will be at the heart of the OTP's strategy with regard to SGBC and CAC.'⁷¹

3. Children in the jurisprudence of the ICC chambers

3.1. Children as direct or indirect victims

Children can be direct victims of special children-related crimes (e.g. child-soldiering) and of several "ordinary" crimes such as wilful killing, persecution, torture, deportation, transfer of population, sexual and gender-based crimes and slavery.

They are indirect victims if the crime is committed against an adult; however, the harm caused also concerns them, such as their parents being killed or their educational premises being destroyed.

3.1.1. Child-soldiering

In the jurisprudence of the International Criminal Court, child-soldiering has been treated so far in the Lubanga,⁷² Ntaganda⁷³ and Ongwen⁷⁴ cases and forms part of the still pending Yekatom and Ngaissona cases.⁷⁵ This study presents some of the common features of this type of crime and the problems encountered.

69 OTP Strategic Plan 2023-2025, para. 61, p. 18.

70 OTP Strategic Plan 2023-2025, para. 63, p. 18.

71 International Criminal Court, Strategic Plan 2023-2025. Available at: https://www.icc-cpi.int/sites/default/files/2023-06/ICC-Strategic-Plan_2023-2025.pdf, Para 42, p. 14.

72 Available at: <https://www.icc-cpi.int/drc/lubanga>, <https://www.icccpi.int/sites/default/files/CaseInformationSheets/LubangaEng.pdf>.

73 Available at: <https://www.icc-cpi.int/drc/ntaganda>, .

74 Available at: <https://www.icc-cpi.int/uganda/ongwen>, <https://www.icc-cpi.int/sites/default/files/2022-12/OngwenEng.pdf>.

75 Available at: <https://www.icc-cpi.int/carII/yekatom-ngaissona>, <https://www.icc-cpi.int/sites/default/files/2023-03/yekatom-ngaissonaEn.pdf>.

The international and non-international armed conflict versions of this crime are nearly the same, the only difference being the presence of the adjective “national” in the first.⁷⁶

The first challenge was how to interpret the expression “*to participate actively in hostilities*”. In the case *The Prosecutor v. Thomas Lubanga Dyilo*, related to the civil war in the Ituri Province of the Republic Democratic of Congo, the Trial Chamber first explained why any reference to the jurisprudence of the Special Court for Sierra Leone (SCSL) was legitimate,⁷⁷ then followed the specific approach of the SCSL in its judgement, that is, ‘any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations’.⁷⁸ However,

[a]n armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning check-points or acting as human shields are some examples of active participation as much as actual fighting and combat’.⁷⁹

Trial Chamber I summarised the SCSL’s position as follows: ‘The SCSL therefore held that the concept of “using” children to participate actively in hostilities encompasses the use of children in functions other than as front-line troops (participation in combat), including support roles within military operations’.⁸⁰ It quoted, “[u]sing”

76 Rome Statute Article 8(2)(b), (XXVI) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; Art. 8 (2)(e) (VII) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

77 ‘The jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(VII) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL’s case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute.’ *The Prosecutor v. Thomas Lubanga Dyilo*, judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842 14-03-2012. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF, (In the followings: *The Prosecutor v. Lubanga judgement*), para. 603, p. 275.

78 SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, judgement, 28 May 2008 (“CDF Appeal Judgement”), para. 144, *The Prosecutor v. Lubanga judgement*, para. 573 and footnote 1719, p. 263.

79 SCSL, AFRC Trial Judgement, para. 737. *The Prosecutor v. Lubanga judgement*, para. 624, footnote 1798, p. 284–288.

80 *The Prosecutor v. Lubanga judgement*, para. 625, p. 285.

children to “participate actively in the hostilities” encompasses putting their lives directly at risk in combat’.⁸¹

Based on these considerations, the Trial Chamber reached the following conclusions:

‘The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an “indirect” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child’s support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber’s determination of whether a particular activity constitutes “active participation” can only be made on a case-by-case basis.’⁸²

In *The Prosecutor v. Bosco Ntaganda* case concerning the same civil war and the same paramilitary formation (i.e. Ntaganda was Lubanga’s deputy in command, a *quasi*-chief of staff within the UPC/FPLC), the Trial Chamber noted, ‘that active participation in hostilities is temporary in nature under IHL and that individuals cease to actively participate when not engaged in combat related activities. Any charge of active participation must therefore be framed in a more specific way’.⁸³

In *The Prosecutor v. Dominic Ongwen* case, linked with the religiously and partially ethnically motivated non-international armed conflict in “Acholiland” in the Northern part of Uganda, the Trial Chamber defined the duties performed by child soldiers of the Lord’s Resistance Army as follows:

‘Children under 15 years of age serving as soldiers in Sinia brigade took part in fighting. They further facilitated LRA attacks by raising alarms, burning and pillaging civilian houses, collecting and carrying goods from attack sites

81 SCSL, AFRC Trial Judgement, para. 736. *The Prosecutor v. Lubanga* judgement, para. 626, footnote 1800, p. 285.

82 *The Prosecutor v. Lubanga* judgement, para. 628, pp. 285-286.

83 *The Prosecutor v. Bosco Ntaganda*, judgement, ICC-01/04-02/06-2359, 08-07-2019. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF, para. 1113, p. 493.

and serving as scouts. During all four attacks relevant to the charges, children under the age of 15 participated in the hostilities.⁸⁴

Considering that the case *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* had not yet finished when these pages were written, this study can only refer to the decision on the confirmation of charges, issued by the Pre-Trial Chamber.⁸⁵ Mr. Yekatom, as one of the commandants of the Christian Anti-Balaka militia, and Mr. Ngaïssona, as an alleged top political leader of the organisation, are charged for crimes committed against the Muslim population in the Central African Republic and the crime of child soldering – as to Mr. Yekatom – was also confirmed by the Pre-Trial Chamber. The Pre-Trial Chamber concluded that there are substantial grounds to believe that child-soldering was performed in the following manner:

‘Children were also present in several other locations under Yekatom’s control or where Yekatom was present as well, including checkpoints and barricades established by his elements. (...) Once enlisted, children were used to carry out a variety of tasks. They were given the role of messengers or spies, sent to operate checkpoints set up by Anti- Balaka groups, or simply used as a free workforce, (..) Children were also forced to participate in military-style training aiming at teaching them how to behave in combat. (...) children were then used to injure and weaken captured enemies, prior to Anti-Balaka elements killing them. (...) Finally, children were mobilised to directly participate in hostilities (...).’⁸⁶

However, the recurring problem of prosecution for the crime of child-soldering is evidentiary in nature. How to certify the relevant age and i. how to assess the pertinence of the evidence which refer to child-soldering in UN terms, that is, *under the age of eighteen years*; and II. how to prove that the person in question was *under the age of fifteen years*.

The fact that the different UN peacekeeping missions in African countries identified child-soldiers as being eighteen years old or younger is based on the Convention

84 *The Prosecutor v. Dominic Ongwen*, Trial Judgement, ICC-02/04-01/15-1762-Red 04-02-2021. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF, para. 225, p. 70.

85 Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’ ICC-01/14-01/18-403-Corr-Red 29-06-2021. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_05873.PDF.

86 Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, paras. 148-149, pp. 67-68.

on the Rights of the Child (20 November 1989)⁸⁷ and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (25 May 2000),⁸⁸ both aiming to grant greater protection by fixing a higher age (18

87 Convention on the Rights of the Child, 20 November 1989, Article 38: '1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict'.

88 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000. Article 1: 'States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.'

Article 2: 'States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.'

Article 3: '1. States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in Article 38, Paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.

3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that: (a) Such recruitment is genuinely voluntary; (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians; (c) Such persons are fully informed of the duties involved in such military service; (d) Such persons provide reliable proof of age prior to acceptance into national military service.

4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

5. The requirement to raise the age in Paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with Articles 28 and 29 of the Convention on the Rights of the Child.'

Article 4: '1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. 2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. 3. The application of the present article shall not affect the legal status of any party to an armed conflict.'

years) than the first⁸⁹ and the second⁹⁰ additional protocols of 1977 to the 1949 Geneva Conventions which stipulate 15 years, as the Rome Statute does. (It is noteworthy that with the exception of the Rome Statute, other conventions distinguish between the minimum age for enlisting and participation in hostilities. A comment made by the International Committee of the Red Cross also recognises that problems of coherence exist in the interplay of these instruments⁹¹).

The outcome is that the use of UN reports when referring to child soldiers seen in training centres, camps and posts, is subject to caution within the ICC, and additional communication or materials are required before passing a decision on how many child soldiers have been detected. The same can be said about documents delivered during the *Disarmament and Demobilization and Reintegration Programs* (DDR), organised generally with the help and under the supervision of the UNICEF and the International Bank for Reconstruction and Development.

These difficulties are exacerbated by the fact that *I.* the beneficiaries of DDR programmes cannot always preserve their DDR certificates; *II.* for reasons of securing the child from ethnic retaliation, DDR certificates in the Congo did not contain any reference to the militia where the given person had been serving as a child soldier; *III.* several child-soldiers escaped from the militia and did not undergo a formal DDR

89 Additional Protocol I (1977), Article 77 - Protection of children:

'1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of Paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, Paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.'

90 Additional protocol II:

'3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; (...).'

91 Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/crc-opac-2000?activeTab=default>.

centre programme (“self-demobilization”) – consequently, they did not have any official attestation of their past; *iv.* the identity documents are easily falsifiable in some African countries; or *v.* even if the documents are valid, the contained data often contradict other valid documents because, given the lack of a centralised personal identity register, they are based only on the remembrances of a family member; *vi.* an additional challenge is that DDR certificates were issued several times without the thorough control of the given person, or even as a type of complaisance when the child belonged to the administrator’s family or community, or if the local official believed that the young person deserved financial compensation for his/her suffering and tragedy.

As the Trial Chamber pointed out in *The Prosecutor v. Bosco Ntaganda* case about birth dates provided in official documents,

‘[w]ith regard to the various types of documentary evidence submitted concerning the age of alleged child soldiers, it is noted that, generally, the reported conditions of production of most of these documents were such that the Chamber only attached a very low probative value to them. Where it appeared that documents were produced on the basis of the witness’s account alone, or that of their parents, and that no further verification as to the accuracy of the provided information was effectuated, the Chamber found that these documents had limited or no corroboratory value. This was the case, for example, for most of the birth certificates issued by the Etat civil. The Chamber, however, considered that the documents, to the extent that discrepancies could not be explained in a satisfactory manner, could be of relevance to impeach a witness’s credibility’.⁹²

Similarly,

‘[w]hen considering school records, and having had particular regard to the informed evidence provided by P-0551, the Chamber found that these records, to the extent that they are contemporaneous documents containing personal information about witnesses, can be given some weight in assessing the witnesses’ evidence. Relevant discrepancies, most notably regarding the purported age of alleged child soldiers, but also their attendance of or absence from school during periods for which they report having undergone training, have been discussed on a case-by-case basis’.⁹³

All these factors have contributed to such a jurisprudential practice that the precise number of child-soldiers is not mentioned in the judgements of condemnation; instead, formulas such as ‘a considerable number of child soldiers’, ‘a significant number of

⁹² *The Prosecutor v. Bosco Ntaganda*, judgement, para. 86, pp. 40 and 41.

⁹³ *The Prosecutor v. Bosco Ntaganda*, judgement, para. 87, p. 41.

children under the age of fifteen⁹⁴ who were trained or used as body guards, ‘a large number of child soldiers’⁹⁵ or ‘a large number of children’⁹⁶ have been applied and the calculation of the precise number of victims of child-soldiering (and of other crimes) was assigned to the Trial Chamber acting during the reparation phase.

Calculating the “precise number” is difficult and it needs a close cooperation with the Trust Fund for Victims, autonomous organ of the ICC dealing with assistance and reparation activities using the money collected from States’ voluntary contributions, individual and collective donations, in case of the condemned offender’s insolvency, which is practically always the case.

The implementation of the reparation case concerning only child-soldiers, that is, that of Mr. Lubanga, is approaching its end. It will cover cca. 2500 people.⁹⁷ The reparation order concerning Mr. Bosco Ntaganda’s victims was quashed on appeal, and the Appeals Chamber instructed the Trial Chamber to review its order and substantiate it through precise calculations.⁹⁸ A new order⁹⁹ was issued on 14 July 2023.

Considering the overlap between the Lubanga and Ntaganda cases, the responsibility for child-soldiering was a *res iudicata*. However, Ntaganda’s financial liability must be determined for harm caused by crimes committed against child-soldiers (SGB crimes or cruel corporal punishment). In the sub-point below, the reparation of Ntaganda’s victims for transgenerational harm is succinctly presented.

As Thomas Lubanga’s financial liability for child-soldiering was established as an *in solidum* liability, the obligation to recalculate Mr. Ntaganda’s financial responsibility concerned only the other crimes for which he was condemned. Therefore, the sums fixed in the Lubanga reparation order, its calculations and its implementation by the Trust Fund for Victims were *ab ovo* considered as an integral part of Mr. Ntaganda’s liability.

The order on the reparation due to Mr. Ongwen’s victims is under preparation in 2023. Dominic Ongwen was condemned not only for the crime of child-soldiering but also for other crimes; thus, his liability should also cover the reparation of these other crimes.

In 2023, The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona case is ongoing, which is why any authoritative judicial statements concerning child-soldiers in the Central African Republic cannot be cited.

94 *The Prosecutor v. Lubanga*, judgement, paras. 811, 838, 857, pp. 361, 369 and 376.

95 *The Prosecutor v. Bosco Ntaganda*, judgement, para. 432, note 1223, p. 192.

96 *The Prosecutor v. Dominic Ongwen*, judgement, paras. 223-224, p. 70.

97 More on this: Kovács, 2023, pp. 292-297.

98 See also: Kovács, 2023, pp. 309-319.

99 Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, ICC-01/04-02/06-2858-Red 14-07-2023. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2023_01595.PDF (In the followings: Addendum, Ntaganda victims’ reparation, 2023).

3.1.2. *Abducted children becoming child soldiers or first “ting-tings” than “forced wives”*

The background of *The Prosecutor v. Dominic Ongwen* was an armed conflict between governmental forces and a strange, partially ethnically, partially religiously coloured uprising movement, the Lord’s Resistance Army (LRA), led by a charismatic person, Mr. Joseph Kony,¹⁰⁰ acting as a supreme commander and a self-nominated prophet of a religion, mixed with Christianity, local spiritualism and animistic beliefs of the Acholi population.

After some clashes and battles, Mr. Kony allegedly shifted to Sudan and after the secession to South Sudan, where he used radio connections to conduct his troops being under his tough control and supervision both “politically” and “religiously”. Disobedience, real or suspected betrayal, and violation of the internal rules of the movement were severely punished.

One of the characteristics of the LRA manoeuvring in the northern part of Uganda was the attacks on not at all or poorly defended villages to plunder foodstuffs, ammunition and to abduct children. Boys were first used as transporters, but they were progressively taught military skills – often through rather bloody and cruel initiation exercises – to become child soldiers with the perspective of becoming commandants. Dominic Ongwen himself was an abducted child, earning more and more stars on his shoulders to become a “general” of a brigade.

Abducted girls became first “ting-tings” (servants, but in fact, domestic slaves) in the household of the LRA commanders. Their duties comprised taking care of their master’s children, helping their “wives” in cleaning and cooking. When they reached their maturity (this often happened as early as at the age of twelve or thirteen), they were attributed as “wife” to meritorious soldiers and commanders, who were often not even twenty years old.

Several witnesses during the Ongwen-trial mentioned that Kony *I.* wanted to establish a new generation ready to rule the region according to his beliefs and prophesies; *II.* reserved for himself the nicest girls, and he was living with a *de facto* harem comprising forty–eighty wives on the Sudanese basis; *III.* aimed to reward his followers by offering them “wives”; *IV.* was afraid of AIDS and other venereal diseases, which explains why he had young girls abducted who had no previous sexual relationship; *V.* prohibited extra-conjugal sexual relationships for the same reason; *VI.* the LRA did not ask the girl’s consent for the marriage. If her “husband” died in battle, she had to remarry after a certain mourning period; however, at that time, her consent had already been obtained. However, she could not remain a widow, and was not allowed to leave the LRA.

The Trial Chamber concluded Dominic Ongwen’s criminal responsibility for several types of crimes committed against children (i.e. child soldiering, enslavement, rape, sexual slavery, forced pregnancy and forced marriage as other inhuman acts).

100 Available at: <https://www.icc-cpi.int/uganda/kony>, <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/KonyEtAlEng.pdf>.

Moreover, several children were victims of murder perpetrated during attacks against four villages: Abok, Lukodi, Odek, and Pajule. Mr. Ongwen's criminal responsibility was also established for several other crimes unrelated to children.¹⁰¹

3.2. *The issue of transgenerational harms*

The issue of transgenerational harm first emerged in the reparation case of Germain Katanga's victims and later and more substantially, in the reparation case of Bosco Ntaganda's victims. Both cases were linked to the civil war in the Ituri province of the Democratic Republic of Congo, and the latter case included rape and sexual abuse perpetrated against the civilian population as well as against girls involved in the practice of child-soldiering.

The phenomenon of transgenerational harm was first circumscribed historically during the post WWII period, when children (and eventually much later born descendants as well) of former concentration camp prisoners or Jewish people ghettoised or hiding from persecution presented similar, mostly psychological distress symptoms, even if they were born in peaceful, normal and safe conditions. The scientific community has elaborated on two approaches for explaining this phenomenon.

The first approach is generally called *epigenetic school* because it explains the long-term effects of genetic transformations owing to malnutrition, corporal and mental harm, and in some cases also owing to the consequences of the Nazis' human experiments performed in some KZ camps. The second approach is the *social/behavioural school*, emphasising the social transmission of fears and feelings manifested in automatic reactions appearing in people who, *in personam* were not deported or ghettoised but who behaved and reacted in the same manner as their persecuted fellows or family members.

These two schools, presented here in a simplified manner, have followers of new mass crimes perpetrated in the last decades in different points of the globe.

Although in WWII cases, both schools agreed that men having suffered personal, physical or other harm could also be transmitters of the phenomenon, in the cases before the ICC, the symptoms were linked with SGB crimes (rape, sexual slavery, forced marriage) suffered during recent armed conflicts.

In the Germain Katanga victims' reparation case, the acting trial chamber first refused to enter into the examination of the transgenerational harm that eventually suffered. It argued that considering the divided nature of this scientific branch (i.e. the two schools and the applicability of their approaches in a non-WWII context), it does not consider itself qualified to pass a decision on the matter, much less in case the concerned persons are eligible for reparation on other grounds. However,

101 *The Prosecutor v. Dominic Ongwen*, Trial Judgement, 4 February 2021, ICC-02/04-01/15-1762-Red 04-02-2021. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF ;<https://www.icc-cpi.int/sites/default/files/itemsDocuments/ongwen-verdict/2021.02.03-Ongwen-judgment-Summary.pdf>, <https://www.icc-cpi.int/news/dominic-ongwen-declared-guilty-war-crimes-and-crimes-against-humanity-committed-uganda>, <https://www.icc-cpi.int/sites/default/files/2022-12/OngwenEng.pdf>.

the Appeals Chamber gave right to the victims' representatives and instructed the trial chamber to revisit the question.¹⁰² Although the Trial Chamber went through the most important teaching of the two schools in a new order, the decision was again negative. As Mr. Katanga was acquitted from the charges of rape and his liability was established "only" concerning his assistance to the massacre of Bogoro village, the Trial Chamber concluded that the causal nexus had not been established between the psychological harm suffered and the crimes for which Mr. Katanga was convicted.¹⁰³

However, owing to differences between the Germain Katanga and Bosco Ntaganda cases, and particularly the fact that Ntaganda's liability was also established concerning rape committed by soldiers under his command, the order in Bosco Ntaganda's victims' reparation cases is truly important. Amending the order of 2021¹⁰⁴ upon the instruction of the Appeals Chamber,¹⁰⁵ the order delivered in 2023¹⁰⁶ presents the two chief schools¹⁰⁷ and points out that in 2021, 'when defining the types of harm suffered by the victims, it considered all relevant information before it and concluded that the children of direct victims suffered transgenerational harm',¹⁰⁸ and the order

102 'The Appeals Chamber recalls that, in this case, the Trial Chamber assessed all applications for reparations individually with a view to determining whether the applicants were victims, and the harm suffered. These determinations were then the basis for awarding symbolic individual as well as collective reparations. While the Appeals Chamber has expressed concerns about this approach in this case, it has not found that it amounted to an error of law or an abuse of discretion. In these circumstances and bearing in mind that the number of applications alleging transgenerational harm is low, the Appeals Chamber considers it appropriate that these applications be reassessed. Thus, the Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to the Five Applicants and to remand the matter to the Trial Chamber, which has detailed knowledge of the case, for it to reassess the question of the causal nexus between the crimes for which Mr. Katanga was convicted and their psychological harm and whether they should be awarded reparations.' Judgement on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute" ICC-01/04-01/07-3778-Red 09-03-2018. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_01651.PDF, para. 260, pp. 110-111.

103 'On the basis of the foregoing, the Chamber considers that the evidence brought in support of the applications for reparations assessed above does not establish, to the standard of proof of a balance of probabilities, the causal nexus between the psychological harm suffered and the crimes of which Mr. Katanga was convicted.' Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgement of 8 March 2018, ICC-01/04-01/07-3804-Red-tENG. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04641.PDF, pp. 8-10, §§ 9-14.

104 Reparations Order, ICC-01/04-02/06-2659 08-03-2021. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01889.PDF.

105 Judgement on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order, ICC-01/04-02/06-2782 12-09-2022", Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_06187.PDF.

106 Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, ICC-01/04-02/06-2858-Red 14-07-2023. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2023_01595.PDF (In the followings: Addendum, Ntaganda victims' reparation, 2023).

107 Addendum, Ntaganda victims' reparation, 2023, pp. 71-75, §§ 174-175.

108 Addendum, Ntaganda victims' reparation, 2023, p. 78, § 183.

‘did not restrict transgenerational harm to psychological harm only. Accordingly, children of direct victims who can demonstrate to have suffered transgenerational harm should be provided with collective reparations with individualised components, to the extent of the individual harm suffered as a result of the crimes for which Mr. Ntaganda was convicted’.¹⁰⁹

To recognise a victim eligible for reparation for transgenerational harm, the applicant must undergo a case-by-case assessment because transgenerational harm cannot be presumed.¹¹⁰ However, other assumptions regarding the repair procedure apply.¹¹¹

All these considerations were crowned by a solemn tribute paid to children’s sufferings:

‘(...) the Chamber finds it essential to acknowledge the existence of the phenomenon of transgenerational harm and the personal suffering that children of victims of unimaginable atrocities may also experience. In the view of the Chamber, this approach is further justified in light of the fundamental principle of the “best interests of the child”, which should guide reparations decisions concerning children. A sensitive approach to the rights of children that – while ensuring that the rights of the convicted person are fully respected – also carefully promotes the protection of children and recognises the distinct personal harm that they may have suffered, in itself, may already constitute a measure of satisfaction’.¹¹²

109 Addendum, Ntaganda victims’ reparation, 2023, p. 78, § 184.

110 ‘In concrete terms, a child of a direct victim claiming to have suffered transgenerational harm, would generally need to prove (I) that a direct victim suffered harm as a result of a crime for which Mr. Ntaganda was convicted; (II) that the child of the direct victim suffered harm; (III) that the child’s harm arises out of the harm suffered by the direct victim, i.e., the causal link; and (IV) a parent-child relationship. As to the evidence required to prove the elements above, the Chamber considers that the same evidentiary criteria applicable in order to prove identity, the harm suffered, and the causal link between the crime and the harm, as for any other victims in the case, applies to victims claiming transgenerational harm.’ Addendum, Ntaganda victims’ reparation, 2023, p. 79, § 185.

111 ‘Regarding the first two requirements, i.e., harm of the direct victim and harm of the direct victim’s child, the Chamber considers that, although no presumption of transgenerational harm applies, the general factual presumptions established in the Reparations Order to the extent that are not affected by the Appeals Judgment still apply, meaning that, once direct victim status has been proven, (I) children of former child soldiers and of victims of rape and sexual slavery benefit from the presumption of material, physical, and psychological harm in relation to them (as close family members) and in relation to their parents (as direct victims); (II) children of direct victims of attempted murder and of direct victims of crimes committed during the attacks who personally experienced the attacks, benefit from the presumption of psychological harm in relation to their parents (as direct victims); and (III) children of direct victims who lost their home or material assets with a significant effect on their daily life, benefit from the presumption of psychological harm in relation to their parents (as direct victims).’ Addendum, Ntaganda victims’ reparation, 2023, p. 79, § 186.

112 Addendum, Ntaganda victims’ reparation, 2023, p. 84, § 195.

3.3. *The perception regarding the child soldier past of the accused*

The sentence condemning Mr. Ongwen to 25 years of imprisonment¹¹³ gave particular importance to the issue whether – and if yes, in what measure – Ongwen’s own child-soldier past and “socialization” within the LRA since 1987 (when he was probably nine years old) could be considered as a mitigating factor, as the defence suggested (however, the charged period concerned 2002-2005, when he was definitely well over 18 years).

As the Trial Chamber emphasised

[o]n the basis of all the available evidence, it is evident to the Chamber that Dominic Ongwen’s abduction at the age of around nine years and subsequent early years in the LRA brought to him great suffering and led to him missing out on many opportunities which he deserved as a child. (...) It is clear that Dominic Ongwen suffered following his abduction into the LRA, even though – as found in the Trial Judgment – this trauma did not lead to a mental disease or disorder and had no lasting consequences from that viewpoint.¹¹⁴

‘At the same time, the Chamber cannot ignore that the evidence laid out above, specifically concerning various time periods between Dominic Ongwen’s abduction in 1987 and 2002, the beginning of the period of the charges, indicates that whereas during the first years following his abduction, Dominic Ongwen’s stay in the LRA was extremely difficult, he was soon noticed for his good performance as a commander – already in the mid-1990s, at approximately 18 years old. His adaption into the LRA, including with its violent methods, indeed occurred relatively early. (...)’¹¹⁵

‘(...) the Chamber deems that Dominic Ongwen’s personal history and circumstances of his upbringing, since his young age, in the LRA – in particular his abduction as a child, the interruption of his education, the killing of his parents, his socialisation in the extremely violent environment of the LRA – must be given a certain weight in the determination of the length of each individual sentence. The present considerations must therefore be read as incorporated into the individual assessments conducted below concerning each crime.’¹¹⁶ ‘(...) Dominic Ongwen’s abduction and early experience in the LRA constitute specific circumstances bearing a significant relevance in the determination of the sentence, which shall be carefully balanced with all other relevant factors and circumstances in order to determine the most appropriate individual sentence for each of the crimes of which Dominic Ongwen was convicted. In approximate terms, and as a broad indication,

113 The Prosecutor v. Dominic Ongwen, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red 06-05-2021, Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_04230.PDF (In the following: Ongwen, sentence).

114 Ongwen, sentence, para. 83, p. 33.

115 Ongwen, sentence, para 84, p. 33.

116 Ongwen, sentence, para 87, p. 35.

the Chamber considers the Prosecution’s recommendation to consider these circumstances as warranting “approximately a one-third reduction”, in the length of the sentences that, in their absence, Dominic Ongwen would otherwise receive, to be generally fitting and reasonable – obviously depending on the particulars of each crime.¹¹⁷

The Defence submitted an appeal against the conviction and sentence, but the Appeals Chamber approved the Trial Chamber’s judgement, and it did not find any error in legal argumentation.¹¹⁸

3.4. The issue of children’s unlawful deportation or transfer

3.4.1. The issue of children’s unlawful deportation in the “situation in Myanmar”

In the “situation of Myanmar” concerning the deportation of seven to eight hundred thousand Rohingyas, a local Muslim community, the Pre-Trial Chambers were confronted with the assessment of a situation where, according to the Prosecutor, allegedly owing to the Myanmarian army’s action, several hundred thousand had to flee to the neighbouring Bangladesh to save their life and seek refuge. The forced exodus concerned not only families but also villages.

The importance of the first Rohingya decision is linked to the fact that the Pre-Trial Chambers confirmed the Prosecutor’s position: if one of the constitutive elements of a crime is committed in the territory of a State Party, the jurisdictional competence of the Court also concerns the elements that occurred in the territory of a non-State Party.¹¹⁹ In the second decision, authorising the Prosecutor to investigate, the other

117 Ongwen, sentence, para 88, p. 35.

118 Judgement on the appeal of Mr. Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, ICC-02/04-01/15-2022-Red 15 December 2022, Available at: <https://www.icc-cpi.int/court-record/icc-02/04-01/15-2022-red>, Judgment on the appeal of Mr. Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence”, ICC-02/04-01/15-2023, 15 December 2022, Available at: <https://www.icc-cpi.int/court-record/icc-02/04-01/15-2023>, <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-15-ongwen-judgment-summary-eng.pdf>.

119 ‘In the light of the foregoing, the Chamber is of the view that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. It follows that, in the circumstances identified in the Request, the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required threshold. This conclusion is without prejudice to subsequent findings on jurisdiction at a later stage of the proceedings.’ Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC-RoC46(3)-01/18-37 06-09-2018. Available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF, para 73, p. 42.

Pre-Trial Chamber made references to children, but only through the recapitulation of the victims' statements.¹²⁰

3.4.2. *The issue of children's unlawful deportation
or transfer in the "situation in Ukraine"*

In the context of the war launched by Russia against Ukraine in 2022, the Pre-Trial Chamber II granted the Prosecutor's request for arrest warrants for alleged perpetrators of unlawful transfer or deportation. It is well known that these arrests warrant concern for President Mr. Vladimir Putin and the ombudsperson for the children, Mrs. Maria Lvova-Belova. For the time being, the only publicly accessible documents

120 'Victims' representations also mention that children were often targeted and killed, including small children who were thrown into water or fire to die. Victims' representations refer to entire families being torched after perpetrators locked them in their homes.' (...) 'As noted above, victims' representations mention that perpetrators purposely targeted children and that sexual violence, often committed in a brutal manner, was prevalent. (...) 'As a result of these indiscriminate shootings, numerous Rohingya, including many children, were reportedly killed or injured, many whilst fleeing. (...) 'According to the material submitted, most of the Rohingya interviewed in refugee camps in Bangladesh wish to return to Myanmar, but expressed concerns about their safety and citizenship rights. Many stated that they would return only if they were treated with dignity, including respect for their religion, their ethnic identity, the return of their possessions, and a sustainable future for their children.' Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27 14-11-2019. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF, paras. 29, 37, 81, 107, pp. 14, 18, 38 and 49.

of the ICC were press releases issued on the decision,¹²¹ followed by the Prosecutor's

121 Press Release: 17 March 2023, Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova. 'Today, 17 March 2023, Pre-Trial Chamber II of the International Criminal Court ("ICC" or "the Court") issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr. Vladimir Vladimirovich Putin and Ms Maria Alekseyevna Lvova-Belova.' Mr. Vladimir Vladimirovich Putin, born on 7 October 1952, President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under Articles 8(2)(a)(VII) and 8(2)(b)(VIII) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Mr. Putin bears individual criminal responsibility for the aforementioned crimes, (I) for having committed the acts directly, jointly with others and/or through others (Article 25(3)(a) of the Rome Statute), and (II) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (Article 28(b) of the Rome Statute). Ms. Maria Alekseyevna Lvova-Belova, born on 25 October 1984, Commissioner for Children's Rights in the Office of the President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under Articles 8(2)(a)(VII) and 8(2)(b)(VIII) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Ms Lvova-Belova bears individual criminal responsibility for the aforementioned crimes, for having committed the acts directly, jointly with others and/or through others (Article 25(3)(a) of the Rome Statute). Pre-Trial Chamber II considered, based on the Prosecution's applications of 22 February 2023, that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population and that of unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children. The Chamber considered that the warrants are secret in order to protect victims and witnesses and also to safeguard the investigation. Nevertheless, mindful that the conduct addressed in the present situation is allegedly ongoing, and that the public awareness of the warrants may contribute to the prevention of the further commission of crimes, the Chamber considered that it is in the interests of justice to authorise the Registry to publicly disclose the existence of the warrants, the name of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the Chamber. The abovementioned warrants of arrests were issued pursuant to the applications submitted by the Prosecution on 22 February 2023. Available at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

statement¹²² and a video message from the ICC President.¹²³

The issue of these children is extensively covered in the international press and in some documents of international organisations,¹²⁴ however, at the time of writing the present article, no other public document was released by the ICC on the matter.

4. The Trust Fund for Victims and children

This special half-autonomous organ of the ICC's institutional complex deals with the needs of victims, many of whom are children, under two mandates. Under the reparation mandate, the Trust Fund manages the victims' reparations when the perpetrator is convicted. The condemned person is liable for the whole costs of reparation, however, pending his insolvency – which has always been the case so far – the Trust Fund “advances” a reasonable sum collected from states and private donors and it conducts the reparation services through hospitals, sick-bays and educational institutions.

Activity under the assistance mandate is linked with an ICC *situation*, but not with a given ICC *case*, and does not presuppose the perpetrator's condemnation.

122 ‘(...) Incidents identified by my Office include the deportation of at least hundreds of children taken from orphanages and children's care homes. Many of these children, we allege, have since been given for adoption in the Russian Federation. The law was changed in the Russian Federation, through Presidential decrees issued by President Putin, to expedite the conferral of Russian citizenship, making it easier for them to be adopted by Russian families. My Office alleges that these acts, amongst others, demonstrate an intention to permanently remove these children from their own country. At the time of these deportations, the Ukrainian children were protected persons under the Fourth Geneva Convention. We also underlined in our application that most acts in this pattern of deportations were carried out in the context of the acts of aggression committed by Russian military forces against the sovereignty and territorial integrity of Ukraine which began in 2014. In September last year, I addressed the United Nations Security Council and emphasised that the investigation of alleged illegal deportation of children from Ukraine was a priority for my Office. The human impact of these crimes was also made clear during my most recent visit to Ukraine. While there, I visited one of the care homes from which children were allegedly taken, close to the current frontlines of the conflict. The accounts of those who had cared for these children, and their fears as to what had become of them, underlined the urgent need for action. We must ensure that those responsible for alleged crimes are held accountable and that children are returned to their families and communities. As I stated at the time, we cannot allow children to be treated as if they are the spoils of war. (...)’

Statement: 17 March 2023, Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova. Available at: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>

123 President Hofmanski's speech is attached at the end of the press release cited *supra*.

124 Report on Violations and Abuses of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity, related to the Forcible Transfer and/or Deportation of Ukrainian Children to the Russian Federation, Publisher Organization for Security and Co-operation in Europe, 4 May 2023. Available at: <https://www.osce.org/odihr/542751> ; https://www.osce.org/files/f/documents/7/7/542751_0.pdf.

This means that victims of events that *ratione personae*, *ratione loci* or *ratione temporis* did not make part of the charges, in case the perpetrator was acquitted, or the case ended for any other reason without condemnation (e.g. the death of the person under investigation) can nevertheless have access to some help financed from the collection.

Despite the different legal nature of the two mandates and considering the sums available, the most urgent needs and their costs, the granted services are similar and in case of children-victims or ex-children victims such as child soldiers, domestic slaves (“*ting-tings*”), sexually abused or raped children and children born from rape, the services are centred on medical and psychological treatment, education and professional formation necessary for their social integration.¹²⁵

5. Conclusion

Children, as vulnerable victims, are the focus of attention of the International Criminal Court. Their enhanced presence in the Rome Statute and other normative texts, the importance attributed to the children in case selection, pre-trial and trial management and during reparation and assistance activities are absolutely justified. Their personal tragedy is often a relevant factor in the recurrence of hostility and transboundary extension.

125 See in detail and also with indication of costs in: Strategic Plan, 2023-2025, Trust Fund for Victims at the International Criminal Court. Available at: [https://www.trustfundforvictims.org/sites/default/files/reports/TFV Strategic Plan 2023-2025 ENG.pdf](https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Strategic%20Plan%202023-2025%20ENG.pdf); [https://www.trustfundforvictims.org/sites/default/files/inline-files/TFV Annual Report 2021_0.pdf](https://www.trustfundforvictims.org/sites/default/files/inline-files/TFV%20Annual%20Report%202021_0.pdf); <https://www.trustfundforvictims.org/en/locations/democratic-republic-congo>; <https://www.trustfundforvictims.org/en/locations/central-african-republic>; <https://www.trustfundforvictims.org/index.php/en/locations/uganda>; <https://www.trustfundforvictims.org/en/news/trust-fund-victims-launch-programme-georgia>.

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