THE UN CONVENTION ON THE RIGHTS OF THE CHILD

A COMMENTARY

EDITED BY
JOHN TOBIN

OXFORD

OXFORD COMMENTARIES
ON INTERNATIONAL LAW

General Editors: *Professor Philip Alston*, Professor of International Law at New York University, and *Laurence Boisson de Chazournes*, Professor of Law at the University of Geneva

The UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child

A Commentary

Edited by

JOHN TOBIN

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© John Tobin 2019

The moral rights of the author have been asserted

First Edition published in 2019
Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2018956529

ISBN 978–0–19–826265–7

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Reflection

This project nearly didn't happen. In early 2000 I was working on another project with Philip Alston for UNICEF which involved an assessment of the impact of the Convention on the Rights of the Child during its first ten years in force. Towards the end of the project Philip asked me as to whether I'd be prepared to work with him on a commentary to the Convention. He had started this project in the early 90s and needed some assistance to bring it to completion. I thanked him for the offer and told him I'd think about it. About a week or so later I somewhat sheepishly emailed him to say that I wasn't able to commit to working on the commentary. I was about to finish the project with UNICEF and had decided that I would return to my previous job as a youth lawyer with Victoria Legal Aid. I just wasn't sure that I was up for another research position and was keen to return to the coal face. And so, I closed that door.

A few months later I started to regret my decision. I was missing the engagement with international law and children's rights. I had also been seconded to the Department of Justice to work on legal issues concerning children. It was interesting work but the Ministerial briefings weren't really working for me. I decided to contact Philip again to see if the offer to work on the commentary was still open. As only Philip can do, he made the necessary arrangements to make it happen. So, I leapt into the unknown, resigned from my job and in October 2000 I started work on a project that was supposed to last twelve months! Eighteen years later—a period that just happens to coincide with the duration of childhood under the Convention—this project has finally come to an end.

During this time much has happened. When I started, the Committee had not issued one general comment. By the time I submitted the final manuscript, it had issued twenty-three. A vast and expanding body of literature and jurisprudence has emerged in which the meaning of the Convention and its various provisions have been discussed and examined. On a personal level, I have sat beside both my parents as they drew their final breath and I have been blessed to have four children—Grace, Charlie, Tess, and Will—with my wife and best friend, Lorraine. For a long time now, children, the role and responsibilities of parents, *and* children's rights have been both my work and family life.

As I reflect back over this time, the gap between my knowledge of children's rights in 2000 compared to 2018 is as stark as night and day. I have lost far too much sleep worrying about when and indeed, whether, the commentary would ever get published. However, a gestation period of 18 years has its upsides. It has allowed me to engage with a vast body of literature on the Convention and to enlist the support and expertise of a talented group of scholars who have made a wonderful contribution to the commentary. It has also offered me the opportunity to test the implementation of the Convention and its underlying values in practice. I have had the pleasure of working with scholars and practitioners in the areas of urban planning, juvenile justice, policing, media, local government, child protection, judicial education, children's health, education, early childhood, law reform, and international aid and development. What has this taught me? That as a lawyer and legal scholar, even after eighteen years, I still have much to learn about how other disciplines can contribute to the realization of children's rights. It has also taught me that despite its almost universal ratification, the Convention still remains poorly understood.

When giving a presentation about the Convention I often ask the participants to list the first three words that come into their head to describe children. The answers invariably include terms such as 'vulnerable', 'innocent', 'immature', in need of 'protection', and 'the future'. I explain that these labels aren't wrong but they reflect a deficit model of childhood in which children are defined exclusively by reference to their vulnerabilities. I try to explain that under a rights-based approach there is also a need to see children as having evolving capacities, expertise, and agency and that as adults we need to take measures to support children to express their views, to listen to them carefully, and to take them seriously. I recognize, however, that there is still a long way to go before we all know how to do this effectively.

Indeed, on a personal note I know how difficult it is to embrace this model in practice. Away from my desk, I have spent many hours as a literacy helper in my children's classes and as a coach of their junior cricket, basketball, football, and soccer teams. Every class, every training session, every game has become an opportunity to explore and reflect on what it means to adopt a rights-based approach to matters involving children. I have also tried to parent four children with the provisions of the Convention constantly rattling around inside my head. What has this taught me? That the implementation of this treaty can be difficult. It requires a reorientation of values and misplaced assumptions regarding children that as adults, we have unconsciously internalized. Despite eighteen years of writing and lecturing about the need to enable children to express their views and treat them seriously I still find myself returning to my own home and wondering whether I actually do this myself when I am parenting. Indeed, when you're supposed to be an expert in children's rights and your 16-year-old daughter tells her mum that she can't speak to dad because he doesn't listen (true story), it's a reminder that the translation of theory into practice requires a large dose of self-reflection.

So, as I close off on what has been and will be the single largest research project of my life, my hope is that this large collection will not just contribute to a greater understanding of the meaning of each right under the Convention. My greater aspiration is that it might contribute in some small way to a degree of self-reflection on the part of all those whose work impacts directly or indirectly on the lives of children—parents just like me who struggle to do the right thing for their children, teachers, doctors, policy makers, police, armed forces, politicians, judges, social workers, urban planners, journalists, sports coaches, health professionals, and the list could go on. This process of self-reflection starts not by reading this commentary. It starts by being genuinely prepared to listen to children, to hear their views in whatever way we can enable them to express them, and to treat them seriously.

With this in mind, I want to recall one of the last entries that Anne Frank wrote in her diary. It's a passage that I often read to myself and my students:

> So, if you're wondering whether it's harder for the adults here than for the children, the answer is no, it's certainly not. Older people have an opinion about everything and are sure of themselves and their actions. It's twice as hard for us young people to hold on to our opinions at a time when ideals are being shattered and destroyed, when the worst side of human nature predominates, when everyone has come to doubt truth, justice and God.
>
> Anyone who claims that the old people have a more difficult time in the Annex doesn't realise that the problems have a far greater impact on us. We're much too young to deal with these problems, but they keep thrusting themselves on us until, finally, we're forced to think up a solution though most of the time out solutions crumble when faced with the facts. It's difficult in times like

> these: ideals, dreams and cherished hopes rise within us, only to be crushed by grim reality. It's a wonder I haven't abandoned all my ideals, they seem so absurd and impractical. Yet I cling to them because, in spite of everything, I believe that people are truly good at heart.[1]

Anne's views demand that we listen to her; they demand that we listen to all children; that we remember what it was to be a child; that we see the world again through those eyes and remember how hard some things can be when you are a child living in a world constructed and controlled by adults; they demand that we treat the views of all children seriously; that we nurture rather than crush the dreams of children; and they demand that we act in ways that affirm rather than displace Anne's faith that 'people are truly good at heart'. This all starts with the simple act of listening.

[1] Anne Frank, *Diary of a Young Girl* (Penguin Books England 2000) 329–30.

Acknowledgements

A project of this size requires an enormous level of assistance. Thus, it will come as no surprise that the list of people to whom I am indebted is very long. It starts with Philip Alston who had the confidence in me to invite me to become part of this project back in 2000. Over the past eighteen years Philip has remained one of the strongest contributors on the international stage to the protection of human rights occupying various UN roles. However, he has maintained his commitment to this project and provided his insightful feedback on numerous chapters. I consider myself fortunate to have him as a colleague and friend.

Next is the long list of contributors who agreed to contribute to this project—David Archard, Samantha Besson, Damon Barrett, Claire Breen, Bronagh Byrne, Nigel Cantwell, Judith Cashmore, Christian Courtis, Sylvie Langlaude Doné, Mark Drumbl, John Eekelaar, Sarah Field, Anne Gallagher, Elizabeth Handsley, Sonia Harris-Short, Harry Hobbs, Urfan Khaliq, Eleonor Kleber, Malcolm Langford, Gerison Lansdown, Nigel Lowe, Elliot Luke, Laura Lundy, Chelsea Marshall, Aoife Nolan, Aisling Parkes, Noam Peleg, Jason Pobjoy, Cate Read, Jonathan Todres, Florence Seow, and Sheila Varadan. It is to state the obvious that without the willingness of these colleagues to participate in this project, there would be no commentary. I had toiled away for over a decade to produce a large number of chapters but the task was simply too big. Their contribution was not only critical, it also enriched the quality of the analysis immeasurably.

I suspect that many of my colleagues may have come to doubt whether their work would ever see the light of day, such were the delays in completing the final manuscript. For many others my, at times, overly enthusiastic editorial style would have also been a cause of frustration. To all of you, I thank you for your patience and understanding. I also thank the many other colleagues who took the time to review numerous chapters. Their names are listed in the relevant chapters but special mention needs to be made of Sara Dillon for her help with article 20 and John Eekelaar and Laura Lundy whom I regularly called upon for feedback on numerous chapters and who did so willingly.

A special mention must also go to Elliot Luke and Florence Seow who worked as research fellows on this project over significant periods of time. Both were extremely capable and did an outstanding job in assisting me and other contributors in the performance of the research, writing, editing, and formatting tasks. The Melbourne Law School Academic Research Service, headed by Robin Gardner, also provided extraordinary assistance of the highest quality throughout the entire project. I feel quite privileged to have had the benefit of working with both my research fellows and the Legal Research Service team whose generosity was humbling and whose research expertise is unparalleled. There is a need to thank the Melbourne Law School and all my colleagues for their support over the duration of this project especially Alison Duxbury and Bruce 'Ossie' Oswald who have sat in the offices beside me for the better part of eighteen years—better colleagues one could not wish for.

The Australian Research Council ('ARC') also requires thanks for awarding me a significant amount of money to allow for the completion of the project known as 'DP120104218'. At all times, I remained conscious that I had been the recipient of

a significant amount of tax payers' money. My hope is that the Commentary and the various other outputs delivered under this project, will vindicate the faith placed in me by the ARC.

Oxford University Press deserve a medal for their patience. Other publishers may well have closed off on this project given its delays. But John Louth, Merel Alstein, Natasha Fleming, and Jack McNichol have remained supportive at all times. Their professionalism has been extraordinary. The work done by NewGen especially Dipak Durairaj and Allan Hoyano in preparing the Commentary for final publication has also been of the highest standard.

Finally, on a personal level I need to thank my partner, Lorraine, and my four children, Grace, Charlie, Tess, and Will. Words cannot compensate for the time lost, the grumpiness, or the failure to listen when one of them was talking. We actually trialled a traffic signal approach for everyone to use when they wanted to get my attention and drag me away from the computer—if the issue was red, I had to stop typing and leave my desk, if it was yellow or green it wasn't quite as urgent but I still had to respond at some stage. I'm not sure if this worked. But I do know that without the support of my family I could not have worked on this project for such a sustained period of time. They are and will always remain the most important people in my life.

Table of Contents

Table of Cases xv
Table of Abbreviations xxxv
Notes on Contributors xxxvii

Introduction The Foundation for Children's Rights John Tobin 1
Article 1 The Definition of a Child David Archard and John Tobin 21
Article 2 The Right to Non-Discrimination Samantha Besson and Eleonor Kleber 41
Article 3 The Best Interests of the Child John Eekelaar and John Tobin 73
Article 4 A State's General Obligation of Implementation John Tobin 108
Article 5 The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities John Tobin and Sheila Varadan 159
Article 6 The Rights to Life, Survival, and Development Noam Peleg and John Tobin 186
Article 7 The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents John Tobin and Florence Seow 237
Article 8 The Right to Preservation of a Child's Identity John Tobin and Jonathan Todres 281
Article 9 The Right Not to Be Separated from Parents John Tobin and Judy Cashmore 307
Article 10 The Right to Family Reunification Jason M Pobjoy and John Tobin 343
Article 11 Protection against the Illicit Transfer and Non-Return of Children Abroad John Tobin with Nigel Lowe QC (Hon) and Elliot Luke 370
Article 12 The Right to Respect for the Views of the Child Laura Lundy, John Tobin, and Aisling Parkes 397
Article 13 The Right to Freedom of Expression John Tobin and Aisling Parkes 435
Article 14 The Right to Freedom of Thought, Conscience, and Religion Sylvie Langlaude Doné and John Tobin 475
Article 15 The Rights to Freedom of Association and Peaceful Assembly Claire Breen 517
Article 16 The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation John Tobin and Sarah M Field 551

Article 17 The Mass Media and Children: Diversity of Sources, Quality of Content, and Protection against Harm John Tobin and Elizabeth Handsley 600
Article 18 Parental Responsibilities and State Assistance John Tobin and Florence Seow 646
Article 19 The Right to Protection against All Forms of Violence John Tobin and Judy Cashmore 687
Article 20 Special Protection for Children Deprived of Their Family Environment John Tobin 725
Article 21 Adoption Philip Alston, Nigel Cantwell, and John Tobin 759
Article 22 Refugee Children Jason M Pobjoy 818
Article 23 Children with Disabilities Bronagh Byrne 856
Article 24 The Right to Health John Tobin 902
Article 25 The Right to Periodic Review John Tobin and Elliot Luke 970
Article 26 The Right to Social Security Malcolm Langford and Urfan Khaliq 986
Article 27 The Right to a Standard of Living Adequate for the Child's Development Aoife Nolan 1021
Article 28 The Right to Education Christian Courtis and John Tobin 1056
Article 29 The Aims of Education Laura Lundy and John Tobin 1116
Article 30 Cultural, Linguistic, and Religious Rights of Minorities and Indigenous Children Sonia Harris-Short and John Tobin 1153
Article 31 The Right to Rest, Leisure, Play, Recreation, and Participation in Cultural Life and the Arts Gerison Lansdown and John Tobin 1195
Article 32 The Right to Protection from Economic Exploitation Philip Alston 1225
Article 33 Protection from Narcotic Drugs and Psychotropic Substances Damon Barrett and John Tobin 1273
Article 34 Protection from Sexual Exploitation and Sexual Abuse John Tobin and Florence Seow 1310
Article 35 Protection against the Abduction, Traffic, and Sale of Children Anne Gallagher 1356
Article 36 Protection against All Other Forms of Exploitation John Tobin 1402
Article 37 Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty John Tobin and Harry Hobbs 1420
Article 38 The Rights of Children in Armed Conflict Mark A Drumbl and John Tobin 1503
Article 39 The Right to Reintegration and Recovery John Tobin and Chelsea Marshall 1561

Article 40 The Rights of the Child in the Juvenile Justice System
John Tobin with Cate Read 1596
The Optional Protocol on Children and Armed Conflict
Mark A Drumbl and John Tobin 1666
The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography John Tobin 1712

Index 1789

Table of Cases

INTERNATIONAL

France-New Zealand Arbitration Tribunal

The Rainbow Warrior (New Zealand v France) (1990) 82 ILR 449 148

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43 1516

Armed activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda (2006) 45 ILM 271 214

Asylum Case (Colom v Peru) 1950 ICJ 266 11

Barcelona Traction (Second Phase, Judgment) [1970] ICJ Rep 3 44

Case Concerning Rights of Nationals of the United States of America in Morocco (Fr v US) 1952 ICJ. 176 11

Land Island and Maritime Frontier Dispute (El Sal v Hond) 1992 ICJ 351 11

Legal Consequences for States of the Continued Presence of South Africa in Namibia 1971 ICJ 6 14–15

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Reports 2004; [2004] ICR Rep 136 . . . . 214, 1513, 1514–15

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 . . . . 214–15, 1510–11

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)(Merits) [1986] ICJ Rep 14 1516

South West Africa (Second Phase, Judgment) [1966] ICJ Rep 3 . . . . 44, 58

International Criminal Court

Prosecutor v Katanga and Chui (Decision on the confirmation of charges) (ICC-01/04-01/07) 1547

v Lubanga (Decision establishing the principles and procedures to be applied to reparations) (ICC-01/04-01/06) 1548, 1561–62, 1565

v Lubanga (Decision on the Confirmation of Charges) (ICC-01/04-01/06) 1539–40, 1541

v Thomas Lubanga Dyilo (ICC-01/04-01/06), (Sentencing Judgment) 1547–48, 1558–59

v Thomas Lubanga Dyilo (ICC-01/04-01/06), (Trial Judgment) 1539, 1548, 1558–59

v Thomas Lubanga Dyilo (ICC-01/04-01/06 A 5), (Appeals Judgment) 1539

INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA

International Criminal Tribunal for Rwanda

Prosecutor v Jen-Paul Akayesu (ICTR-96-4-T) 1317, 1320, 1453

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Furundžija (IT-95-17/1-T) 1453–54

v Kunarac, Kovac and Vukovic (IT-96-23 & IT-96-23/1-A, A Ch) 1316, 1441–42, 1453

v Kunarac, Kovac and Vukovic, (IT-96-23-T & IT-96-23/1-T, T Ch) 1316, 1339, 1429, 1441–42, 1453–54
v Kvočka (IT-98-30/1-A) 1429, 1440, 1441–42, 1444–45
v Naletilic and Martinovic (IT-98-34-T). 1529
v Tadic (IT-94-1-AR72) 1510–11, 1518
Zdravko Mucić et al (IT-96-21-T). 1453

Permanent Court of International Justice

Greco-Bulgarian Communities, Advisory Opinion (1930 PCIJ (ser. B) No. 17) 1159, 1163–64
Minority Schools in Albania [1935] PCIJ Rep Series A/B No 64 57

UNITED NATIONS TREATY BODIES

Committee Against Torture

Tebourski v France (300/2006). 1458
Halimi-Nedzibi v Austria (8/1991) 1434

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Human Rights Committee

A v Australia (560/1993). 1478–79, 1495
Adonis v Philippines (1815/2008) 448
Alphen v The Netherlands (305/1988) 1470
Alzery v Sweden (1416/05) 199–200, 1458
Arieh Hollis Waldman v Canada (694/1996) 1148
Azuaga Gilboa v Uruguay (147/83) 1444–45, 1447
Baban v Australia (1014/01) 1479
Bakhtiyari v Australia (1069/2002) 582–83, 847, 1479
Ballantyne, Davidson and McIntyre v Canada (359/1989 and 385/1989) 1163–64
Bandajesky v Belarus (1100/02) 1639–40
Barrett and Sutcliffe v Jamaica (270/88, 271/88) 1462–63
Berry v Jamaica (330/88). 1491–92
Berterretche Acosta v Uruguay (162/83) 1444–45
Bickaroo v Trinidad and Tobago (555/93). 1462–63
Bikramjit Singh v France (1852/2008) 512–13
BL v Australia (2053/2011). 199–200, 1458
Blessington and Elliot v Australia (1968/2010) 1463
Blom, Carl Henrik v Sweden (191/1985) 1148
Boimurodov v Tajikistan (1042/01) 1457–58
Broeks v Netherlands (172/984). 6
Buckle v New Zealand (858/1999) 582–83
Bulgakov v Ukraine (1803/2008). 591, 596–97
Burgos v Uruguay (52/1979) 1636–37
C v Australia (900/99) 199–200, 1458, 1479
Canessa et al v Uruguay (1637/2011), (1757/2008), and (1765/2008). 6
Celepli v Sweden (456/1991) 1468–69
Charles Chitat Ng v Canada (469/91). 1462–63
Chiti v Zambia (1303/2004) 588
Choudhary v Canada (1898/2009) 199–200, 1458
Coeriel and Aurik v The Netherlands (453/91) 560–61, 567

Coleman v Australia (1157/03) 537–38
Coronel v Columbia (778/1997) 587–88
Cox v Canada (539/93) 1462–63
D and E v Australia (1050/02) 1479
De Voituret v Uruguay (109/1981) 1456
Delgado Paez v Colombia (195/1985) 1466–67
El Hagog v Libya (1755/08) 1441
Estrella v Uruguay (74/1980) 589–90, 591, 1459
Fei v Columbia (514/1992) 589–90
F.H. Zwaan-de Vries v the Netherlands (182/1984) 67
Fedotova v Russian Federation (1932/2010) 470–71
Francis v Jamaica (320/1988) 1449–50, 1462–63
Fuenzalida v Ecuador (480/1991) 1638–39
G and L Lindgren and others v Sweden (298/1988 and 299/1988) 1121–22
Georgopoulos v Greece (1799/2008) 588
Gillot v France (932/2000) 63–64
Giri v Nepal (1761/08) 1441, 1459
González de Río v Peru (263/87) 362–63
Gordon v Jamaica (237/1987) 1638
Grant v Jamaica (353/1988) 1638–39
Henry v Jamaica (230/1987) 1640
Herrera Rubio v Colombia (161/1983) 1433
Hertzberg and others v Finland (61/1979) 470–71
HTB v Canada (534/1993) 1639–40
Huamán v Peru (1153/2003) 567
Hudoyberganova v Uzbekistan (931/2000) 510–11
Jacobs v Belgium (943/2000) 63–64
Johnson v Jamaica (588/94) 1462–63
Joslin v New Zealand (902/99) 566–67
JRT and the WG Party v Canada (104/1981) 591
Judge v Canada (829/1998) 12
Kindler v Canada (470/1991) 199–200, 1458
Kivenmaa v Finland (CCPR/C/50/D/412/1990 (412/90)) 533
KNLH v Peru (1153/2003) 914–15
Koneenko et al v Belarus (CCPR/C/88/D/1274/2004) 547–48
Lavende v Trinidad and Tobago (554/93) 1462–63
Lee v Republic of Korea (1119/02) 530
Leirvåg v Norway (1155/2003) 501–2, 503–4
Lilian Celiberti de Casariego v Uruguay (561979) 214
Lopez Burgos v Uruguay (52/1979) 55–56
Love v Australia (983/2001) 368
Lovelace, Sandra v Canada (A/36/40) 1172–73
Lubuto v Zambia (390/1990) 1631–32
Lumley v Jamaica (662/1995) 1640
McCallum v South Africa (1818/05) 1457–58
Madafferi v Australia (1011/2001) 582–83, 585
Marais v Madagascar (48/1979) 1456
María Cruz Achabal Puertas v Spain (1945/2010) 1433
Marques de Moraies v Angola (1128/2002) 448
Massiotti v Uruguay (25/1978) 1455
Morael v France (207/1986) 1632
Mukong v Cameroon (458/91) 1423, 1427, 1455, 1482–83
Ngambi and Nebol v France (1179/2003) 577

Nystrom v Australia (1557/07) 363–64
Ominayak, Chief Bernard and Lubicon Lake Band v Canada
(CCPR/C/38/D/167/1984) 1167, 1184
Orazova v Turkmenistan (1883/09) 362–63
Peart and Peart v Jamaica (464/1991 and 482/1991) 1447, 1638–39
Peiris v Sri Lanka (1862/2009) 588
Perera v Australia (536/1993) 1638, 1639–40
Pillai v Canada (1763/08) 199–200, 1458
Pinkney v Canada (27/1978) 589, 590–91
Polay Campos v Peru (577/1994) 1447
Potter v New Zealand (632/95) 1482–83
Pratt and Morgan v Jamaica (210 and 225/1987) 1638
Prince v South Africa (1474/2006) 1286–87
PS v Denmark (397/90) 528–29
Quinteros v Uruguay (107/81) 1459
Rajapakse v Sri Lanka (1250/04) 1435–36
Rojas García v Colombia (687/96) 588, 1442
Salgar de Montejo v Colombia (64/1979) 1640
Sayadi and Vinck v Belgium (1472/06) 362–63
Sendic v Uruguay (63/1979) 1456
Sergio Euben Lopez Burgos v Uruguay (12/52) 214
Shafiq v Australia (1324/2004) 1496
Singer v Canada Comm (455/1991) 1163–64
Singh Bhinder v Canada (208/1986CCPR/C/37/D/208/1986) 512–13
Spakmo v Norway (631/1995) 1473
Stephens v Jamaica (373/89) 1498
Suarez de Guerrero v Colombia (45/79) 201
Sultanova v Uzbekistan (915/2000) 587–88
Tcholatch v Canada (1052/2002) 578–79, 582–83
Thomas v Jamaica (321/1988) 1449–50
Tomlin v Jamaica (589/1994) 589–90
Toonen v Australia (488/1992) 556, 557, 566–67, 582–83
Torres v Finland (291/88) 1497
Van Hultz v Netherlands (903/1999) 589–90
Velasquez-Rodriguez v Uruguay (322/88) 1437
Vuolanne v Finland (265/87) 1444–45, 1449–50
Wight v Madagascar (115/1982) 1455
Winata and Li v Australia (CCPR/C/72/D/930/2000) 577, 582–83, 585
Yklymova v Turkmenistan (1460/2006) 1473
Young v Jamaica (615/1995) 1449–50, 1638

REGIONAL

African Commission on Human and Peoples' Rights

ACHPR World Organisation against Torture and Others v Zaire (25/89, 47/90,
56/91, 100/93) 487
Kazeem Aminu v Nigeria (205/97) 195

African Committee of Experts on the Rights and Welfare of the Child

Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice
Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of
Kenya (002/Com/002/2009) 240

European Commission on Human Rights

A v UK (25599/94) 1451–52
Association X v Sweden (1977) (6094/73) 9 DR 5 528
Austria v Italy (788/60) (1961) 4 YB 116 1622
Bruggeman and Scheuten v FRG (1977) 10 DR 100 566–67
Christians Against Racism and Fascism v United Kingdom (1980) 21 DR 138. . . . . 538, 548
Family H v United Kingdom (10233/83) 37 DR 105. 1066
Gottesmann v Switzerland (10616/83) 480
Ingrid Jordebo Foundation of Christians Schools and Ingrid Jordebo v Sweden 51 DR 125 (1987) 1147
Larmela v Finland (26712/95) 548–49
Leuffen v Germany (19844/92) 1065–66
M v Germany (10272/82). 1495
Rassemblement Jurassien et Unité Jurassien v Switzerland (1979) 17 DR 93 . . . . . 533, 548
Stevens v United Kingdom (1986) 46 DR 245. 462
Warwick v United Kingdom (9471/81). 1451–52
X v Austria (8278/78) 1468
v Denmark (7374/76) 480
v Iceland (1976) 5 DR 86. 566
v Ireland (1973) 16 YB 388 1466–67
X & Y v Sweden (1982) 5 EHRR 147. 1468
Y v United Kingdom (14229/88). 1107–8

European Court of Human Rights

A v UK (1998) 27 EHRR 611 . . . . . 1429, 1430–31, 1440, 1453
AB v Netherlands (37328/97). 592
Abdoella v Netherlands (12728/87) (1995) 20 EHRR 585 1631
Abdulaziz, Cabales, and Balkandali v United Kingdom (1985) 7 EHRR 471 583
Ahmed v Austria (1996) 24 EHRR 278 1429
Ahmut v The Netherlands (1997) 24 EHRR 62. . . . . 583, 584
Airey v Ireland (1979–80) 2 EHRR 305 . . . . . 1629, 1631–32
AK and L v Croatia (37956/1) 323
Aksoy v Turkey (1996) 23 EHRR 553. . . . . 1438, 1443–45
Al-Saadoon and Mufdhi v UK (61498/08) 199–200, 214–15, 1458
Al-Skeini v United Kingdom (55721/07) 55–56, 214
Abdulaziz, Cabales and Balkandali v United Kingdom (1985) Series A no 94 (9214/80, 9473/81, 9474/81) 59–60, 580–82
Airey v Ireland (1979) 2 EHRR 305 . . . . . 580–82, 596
Aktas v France (43563/08) 510–11
Andersson v Sweden (1992) 14 EHRR 615 580–82
Andreou v Turkey (45653/99) 201
Aneva and Others v Bulgaria (66997/13, 77760/14, 50240/15) 580–82
Angelova and Iliev v Bulgaria (55523/00) 202–3
Anguelova v Bulgaria (38361/97). 204–5
Appel-Irrgang v Germany (45216/07). 501–2
Appleby v United Kingdom (2003) 37 EHRR 38 536–37
Aquilina v Malta (2000) 29 EHRR 185 1498–99
Ashingdane v United Kingdom (1985) 7 EHRR 528 1468
Assenov v Bulgaria (1998) 28 EHRR 652. . . . . 1433, 1434, 1435, 1453
Axen v Germany (14 December 1981) 424–25, 1642
v (8273/7881) (1984) 6 EHRR 195 1642
Aydin v Turkey (1997) 25 EHRR 251. . . . . 1443–45, 1453
B v Romania (No 2) (1285/03) 328, 582–83

Babar Ahmad and Others v UK [2012] ECHR 609 1457
Bączkowski and Others v Poland (1543/06) 548–49
Barbera, Messegue and Jabardo v Spain (1989) 11 EHRR 360 1622
Bayrak v France (14308/08) 510–11
BB and FB v Germany (18734/09 and 9424/11) 582–83
Bekos and Koutropoulos v Greece (2006) 43 EHRR 2 1433
Belgian Linguistic Case (Series A no 6), (1986) 1 EHRR 252 . . . . .57–58, 59–60, 63, 1190
Belkacemi and Oussar v Belgium (37798/13) 510–11
Benham v United Kingdom (19380/92) (1996) 22 EHRR 293 1629
Bensaid v United Kingdom [2001] 33 EHRR 10 . . . . 261, 284, 569
Benthem v Netherlands (1986) 8 EHRR 1 1496
Berrehab v The Netherlands (1988) 11 EHRR 332 583–84
Beru v Turkey (47304/07) 203–4
Bezicheri v Italy (1989) 12 EHRR 210 . . . . 304, 1495, 1497
Botta v Italy (1998) 26 EHRR 97 . . . . 561, 565, 566
Boultif v Switzerland (54273/00) 583–84
Bouamar v Belgium (1989) 11 EHRR 1 1495
Boyle v United Kingdom (1994) 19 EHRR 179 578–79
Branko Tomašić and Others v Croatia (46598/06) 204–5
Brogan v UK (1989) 13 EHRR 439 . . . . 1492, 1498–99
Buchholz v Federal Republic of Germany (1981) 3 EHRR 597 1631–32
Butt v Norway (470-17/09) 584
C v Finland (18249/02) 413
  v Italy (14584/89) (1988) 56 DR 40 1632–33
Çakici v Turkey (2001) 31 EHRR 133 1459–60
Campbell v UK (13590/88) 591–92, 1490
  v (1985) 7 EHRR 165 1496
Campbell and Cosans v UK (7511/76), (1983) 4 EHRR 293 . . . . 485, 501, 1066, 1450, 1459
CAS and CS v Romania (26692/05) 1435
Certain Aspects of the Laws on the Use of Languages in Education, Case Relating to
    (series A, no 6) 1148
Chalal v UK (1996) 23 EHRR 413 . . . . .1429, 1458
Chassagnou and Others v France (1999) 29 EHRR 615 . . . . .532, 548–49
Cheall v United Kingdom (1986) 8 EHRR 74 . . . . .527–28, 531
Christian Democratic People's Party v Moldova (2007) 45 EHRR 392 534
Copland v UK (2007) 45 EHRR 37 . . . . 589–90, 1490
Costello-Roberts v UK 19 EHRR 34 561–62
  v (Series A No 247-C) 1107–8
  v (1993) 19 EHRR 112 . . . . .1429, 1451–52, 1453
Creangă v Romania (2012) 56 EHRR 361 1467–68
Cusan and Fazzo v Italy (77/07) 252
Cuscani v United Kingdom (32771/96) (2003) 36 EHRR 2 1641–42
Cyprus v Turkey (1976) 4 EHRR 482 . . . . .1455, 1468
D v UK (146/1996/767/964) 199–200, 1458
Dahlab v Switzerland (42393/98) 505, 510–11
Dakir v Belgium (4619/12) 510–11
DD V Lithuania [2012] ECHR 254 1467–68
De Haes and Gijsels v Belgium (19983/92) (1998) 25 EHRR 1 1633–34
De Jong, Baljet and Van den Brink v Netherlands (1986) 8 EHRR 20 1498–99
De Wilde, Ooms and Versyp v Belgium [1971] ECHR 1 1496
Dybeku v Albania (41153/06) 1427
Deschomets v France (31956/02) 497–98
D G v Ireland ECHR 2002-III 361 60

D.H. and others v Czech Republic [GC] ECHR 2007-IV 241 65
Djavit An v Turkey (2003) 40 EHRR 1002 . . . . .534, 537–38
Dogru v France (27058/05) 512
Dojan v Germany (319/08-2455/08-7908/10-8152/10-8155/10) 501–2
Dudgeon v United Kingdom (1981) Series A no 45, (1981) 4 EHRR 149 . . . . 47–48, 566–67
E v Norway (1990) 17 EHRR 30. . . . . .304, 1497
E and Others v UK (2003) 36 EHRR 31 1452
East Asian Africans v United Kingdom (1973) 3 EHRR 76 1449–50
E.B. v France (435456/02) 781
Edwards v United Kingdom (13071/87) (1993) 15 EHRR 417 1634
v (46477/99). 204–5
Ekbatani v Sweden (10563/83) (1991) 13 EHRR 504 1632–33
El Masri v the Former Yugoslav Republic of Macedonia (39630/09). 1433
Engel v Netherlands (1976) 1 EHRR 706. 1467–68
v (1979–80) 1 EHRR 647 . . . . 1611–12, 1622, 1638, 1639
Ensslin, Baader and Raspe v Germany (7572/76) (1978) 14 DR 64 1628
Eriksson v Sweden (1989) 12 EHRR 183 . . . . .309–10, 578–79, 580
ES and Others v Slovakia (8227/04) 1452
Éva Molnár v Hungary (10346/05) 547–48
Ezelin v France (1991) 14 EHRR 362. . . . . .538, 548
Guerra v Italy (1998) 26 EHRR 375 588
F v United Kingdom (18123/91) (1993) 15 EHRR CD32 1639
Fadayeva v Russia (5573/00). 588
Fedele v Germany (11311/84) 1640–41
Finogenov and Others v Russia App No 18299/03 (2011) 202
Finucane v United Kingdom (2003) 37 EHRR 29 1392
Folgerø v Norway (15472/02) 502, 503
Fox, Campbell and Hartley v UK (1990) 13 EHRR 157 . . . . .1492, 1497
Friedl v Austria (15225/89). 548
Fretté v France (36515/97), [2002] I Eur Court HR 345 . . . . .94, 781
Friend and The Countryside Alliance and Others v United Kingdom
(16072/06 and 27809/08) 535
Frydlender v France (30979/96) (2001) 31 EHRR 52 1631
Funke v France (10828/84) (1993) 16 EHRR 297 . . . . .1634, 1637
G v Germany (13079/87) 538
v United Kingdom (1983) 35 DR 75 1634
Gäfgen v Germany (2010) 52 EHRR 1. . . . . .1433, 1435–36, 1455, 1459, 1634
Gamaleddyn v France (18527/08) 510–11
Garib v The Netherlands (43494/09). 885
Gard and Others v the United Kingdom (39793/17) 206–7
Gas and Dubois v France (25951/07) 578–79, 781
Gaskin v United Kingdom (1989) 12 EHRR 36 . . . . .260, 293, 295, 444, 568, 578–79
Georgel and Georgeta Stoicescu v Romania (9718/03) 260, 284, 567–68
Ghazal v France (29134/08) 510–11
GHB v United Kingdom (42455/98) 578–79
Giacomelli v Italy (59909/00). 588
Gillow v United Kingdom (1986) 11 EHRR 335 586
Gineitienė v Lithuania (20739/05) 497–98
Glor v Switzerland (13444/04). 63–64
Goddi v Italy (8966/80) (1984) 6 EHRR 457 . . . . 1628, 1632–33
Gongadze v Ukraine (2006) 43 EHRR 44 1459–60
Goodwin v UK (2002) 35 EHRR 18. 247–48
Gorzelik and Others v Poland (44158/98) 532

Granger v United Kingdom (11932/86) (1990) 12 EHRR 469 . . . 1629
Greek Case (1969) 12 YB 1 . . . 1441–42, 1447, 1449–50, 1455
Grayson v United Kingdom (2009) 48 EHRR 30 . . . 1623
Grori v Albania (25336/04) . . . 1450
Guerra v Italy (1998) 26 EHRR 375 . . . 588
Guincho v Portugal (8940/80) (1985) 7 EHRR 223 . . . 1631–32
Gul v Switzerland (1996) 22 EHRR 93 . . . 583, 584
Gülec v Turkey (21593/92) . . . 204–5
Gustafsson v Sweden (1996) 22 EHRR 409 . . . 532–33
Güveç v Turkey (70337/01) . . . 1431
Guzzardi v Italy (1980) 3 EHRR 333 . . . 1468
Haas v Switzerland (21322/07) . . . 211–12
Hadjianastassiou v Greece (12945/87) (1993) 16 EHRR 219 . . . 1635
Handyside v United Kingdom (1976) 1 EHRR 737 . . . 436, 448, 460–61, 472, 602
Hassan v United Kingdom (29750/09) . . . 214–15
Hatton v UK (36022/97) . . . 588
Hauschildt v Denmark (1990) 12 EHRR 266 . . . 1496
Heaney v Ireland (2001) 33 EHRR 12 . . . 1622
Hellig v Germany (2012) 55 EHRR 3 . . . 1455
Hendriks v Netherlands (1982) 5 EHRR 223 . . . 577–79
Herczegfalvy v Austria (10533/83) . . . 1446
Herrmann v Germany (9300/07) . . . 532
Hewitt and Harman v UK (1991) 14 EHRR 657 . . . 317–18
HLR v France (1998) 26 EHRR 29 . . . 1429
Hoffmann v Austria (1993) 17 EHRR 293 . . . 497–98
Hokkanen v Finland (1994) 19 EHRR 130 . . . 580–82
Horváth and Kiss v Hungary (11146/11) . . . 65–66
Hurtado v Switzerland [1994] ECHR 280 . . . 1455
Hussain v UK (1996) 22 EHRR 1 . . . 1465
I v UK (25680/94), (2002) 35 EHRR 447 . . . 247–48, 596
Ignaccolo-Zenide v Romania (31679/96), (2001) 31 EHRR 7 . . . 391–92, 580–82
Ihlan v Turkey (22277/93) . . . 1444–45
Inze v Austria (1988) Series A No 126 . . . 62
Ipek v Turkey (47532/09) . . . 1459–60
Ireland v UK (1978) 2 EHRR 25 . . . 1429, 1441–42, 1443–44, 1448, 1449, 1459, 1492, 1498–99
Irka Cederberg-Lappalainen v Sweden (11356/85) . . . 534
Ismailova v Russia (37614/02) . . . 98, 497–98
Isyar v Bulgaria (391/03) . . . 1640–41
Jäggi v Switzerland (58757/00) . . . 260, 284, 568
Jalloh v Germany (2007) 44 EHRR 32 . . . 1449–50, 1455, 1622, 1634
James, Wells and Lee v United Kingdom (2013) 56 EHRR 12 . . . 1465
Jasinskis v Latvia (45744/08) . . . 204–5
Jasvir Singh v France (25463/08) . . . 513–14
Jersild v Denmark (1994) 19 EHRR 1 . . . 448
Jespers v Belgium (1981) 27 DR 61 . . . 1633–34
Jeunesse v The Netherlands (12738/10) . . . 584
Johansen v Norway (1783/90) 23 EHRR 33 . . . 73, 309–10
Juppsala v Finland (18620/03) . . . 195
K v United Kingdom (1986) 50 DR 199 . . . 578–79
K and T v Finland (2003) 36 EHRR 18 . . . 983
v (25702/94), (2001) 36 EHRR 255 . . . 309–10, 580–82
KA v Finland (27751/95) . . . 326
Kalashnikov v Russia (2002) 36 EHRR 87 . . . 1426

Kamasinski v Austria (9783/82) (1991) 13 EHRR 36 . . . 1626, 1635, 1641
Kaplan v Norway (32504/11) . . . 584
Kaufman v Belgium (1986) 50 DR 98 . . . 1633–34
Kayak v Turkey (60444/08) . . . 203–4
Keegan v Ireland (16969/90) . . . 580–82
Kerr v UK (40451/98) . . . 1497
Kjeldsen, Buxk Madsen and Pedersen v Denmark (5095/71; 5920/72; 5926/72); (1976) 1 EHRR 711 . . . 501–2, 913–14
Kemaloglu and Kemaloglu v Turkey [2012] ECHR 623 . . . 203–4
Kervanci v France (31645/04) . . . 512
Kjeldsen Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711 . . . 501–2, 1118–19
Klass v FRG (1978) 2 EHRR . . . 1490
Koch v Germany (497/09) . . . 211–12
Koendjbiharie v Netherlands (1990) 13 EHRR 820 . . . 304, 1497
Kokkinakis v Greece (1993) 17 EHRR 397 . . . 476–77, 487, 1619
König v Federal Republic of Germany (1979–80) 2 EHRR 170 . . . 1631
Konrad v Germany (35504/03) . . . 506, 1065–66
Kraska v Switzerland (13942/88) (1994) 18 EHRR 188 . . . 1632–33
Kurt v Turkey [1998] 27 EHRR 373 . . . 1459–60, 1466
Kutzner v Germany (2002) 35 EHRR 653 . . . 323, 326
Labita v Italy [2000] ECHR 161 . . . 1433
Lafuente Penarrieta et al v Bolivia (176/84) . . . 1444–45
Lambert and Others v France (46043/14) . . . 206
Lamguindaz v United Kingdom (1994) 17 EHRR 213 . . . 583–84
Larissis v Greece (1998) 27 EHRR 329 . . . 487
Lautsi v Italy (30814/06) . . . 505
LCB v United Kingdom (1998) 27 EHRR 212 . . . 202–3
Leander v Sweden (1987) 9 EHRR 433 . . . 444
Lebbink v Netherlands (45582/99) . . . 578–79
Leela Forderkreis EV and others v Germany (2009) 49 EHRR 5 . . . 485
Legal Consequences of the Construction of the Wall (Advisory Opinion) [2004] ICJ Rep. 136 . . . 55–56
Leyla Şahin v Turkey (44774/98) . . . 510–11
Lingens v Austria (1986) 8 EHRR 103 . . . 448
Lobo Machado v Portugal (15764/89) (1997) 23 EHRR 79 . . . 1633–34
Loizidou v Turkey (15318/89), 29 Eur HR Rep 99, 72 (1995) . . . 12
Lopez Ostra v Spain (1994) 20 EHRR 277 . . . 588
Luberti v Italy (1984) 6 EHRR 440 . . . 304, 1497
Luedicke, Belkacem and Koç v Federal Republic of Germany (1979–80) 2 EHRR 149 . . . 1640–41
Lynas v Switzerland (1976) 6 DR 141 . . . 1633–34
M and M v Croatia (10161/13) . . . 1452
MC v Bulgaria (2003) 40 EHRR 459 . . . 1435
McCann and Others v UK (18984/91), (1996) 21 EHRR 97 . . . 201, 202, 1392
McFeeley v United Kingdom (1980) 20 DR 44 . . . 528–29
McVicar v United Kingdom (46311/99) (2002) 35 EHRR 22 . . . 1629
Maaouia v France (2000) 33 EHRR 107 . . . 583
Magyar Helsinki v Hungary (18030/11) . . . 444
Maiorano ao v Italy (28634/06) . . . 195
Malone v United Kingdom (1984) 7 EHRR 14 . . . 317–18, 786
Mandet v France (30955/12) . . . 261, 569
Marckx v Belgium (1979) Series A No 31, (1979) 2 EHRR 330 . . . 62, 165, 286–87, 578–79, 596
Margareta and Roger Andersson v Sweden (1992) 14 EHRR 165 . . . 309–10
Mark Anderson v United Kingdom (1998) 25 EHRR CD 172 . . . 535

Martins Casimiro and Cerveira Ferreira v Luxembourg (448888/98) 501
Mathieu-Mohin and Clerfayt v Belgium (9267/81). 1006–07
Mattoccia v Italy (23969/94) (2003) 36 EHRR 47 1626
Maumousseau and Washington v France (39388/05) (2007) 51 EHRR 822 391–92
Mayeka and Mitunga v Belgium [2008] 46 EHRR 23 . . . . 344–45, 346–47
MC v Bulgaria (2005) 40 EHRR 20 1453
MD v Malta (64791/10) 328
Medova v Russia (25385/04) 202–3
Megyeri v Germany A 237-A (1992) 15 EHRR 584 1493
Menesheva v Russia (2006) 44 EHRR 1162. 1444–45
Mennesson and Others v France (65192/11) 256, 261, 569
Mihailova v Bulgaria (35978/02) 584
Milasi v Italy (1987) 10 EHRR 333. 304
Mladenović v Serbia (1099/08). 204–5
Mubilanzila Mayeka and Kaniki Mitunga v Belgium (13178/03) 561
Mikulic v Croatia (53176/99). 568
Moustaquim v Belgium (1991) 13 EHRR 802. 583–84
Mubilanzila Mayeka and Kaniki Mitunga v Belgium (13178/03) 1478
Müller and Others v Switzerland (1988) 13 EHRR 212 448
Murray v United Kingdom (1994) 19 EHRR 193. 586
v (1996) 22 EHRR 29. 1622
Muskhadzhiyeva v Belgium (41442/07) 847
Nada v Switzerland (10593/08) 390
Navarra v France (1993) 17 EHRR 594 . . . . .304, 1497
Neilsen v Denmark (1988) 11 EHRR 175 1468
Neimetz v Germany (1992) 16 EHRR 97. 586
Neulinger and Shuruk v Switzerland (41615/07) 54 EHRR 31 . . . . .379–80, 392
Neumeister v Austria (No 1) (1979–80) 1 EHRR 91 1633–34
Nicklinson and Lamb v UK (2478/15, 1787/15). 211–12
Nölkenbockhoff v Germany (1988) 10 EHRR 163. 1622
Nunez v Norway (55597/09) 584
Nylund v Finland (27110/95). 578–79
Oberschlick v Austria (1994) 19 EHRR 389 448
Ocalan v Turkey (46221/99). 214
Odièvre v France [2003] ECHR 86 . . . . 260, 265–66, 568
Ognyanova and Choban v. Bulgaria (46317/99) 204–5
Okkali v Turkey (2006) 50 EHRR 1228 1435–36
Ollinger v Austria (76900/01) 548–49
Olsson v Sweden (No1) (1988) 11 EHRR 259 . . . . 308, 309–10, 317–18, 323, 461, 580–82, 786, 787
Olsson v Sweden (No 2) (74/1991/326/398); (1997) 17 EHRR 134 . . . . .580–82, 983
Opuz v Turkey (33401/02) 202–3
Orhan v Turkey (25656/94) 1459–60
Osman v UK (2000) 29 EHRR 245 . . . . 195, 202–3, 210
Osmanoğlu and Kocabaş v Switzerland (29086/12). 501
Oya Ataman v Turkey (74552/01) 548
Ozturk v Germany (1984) 6 EHRR 409. 1611–12
Palau-Martinez v France (64927/01) 497–98
Pedersen and Baadsgaard v Denmark (No 2) (2006) 42 EHRR 486 1631
Peers v Greece (2001) 33 EHRR 51. 1450
Pelissier and Sassi v France (25444/94) (2000) 30 EHRR 715. . . . . .1626, 1631
Persian and Others v Turkey (12336/03). 201
Phillips v United Kingdom (41087/98); (2000) 30 EHRR CD170 1622

Piersack v Belgium (1983) 5 EHRR 169 1496
Pini Bertani, Manera and Atripaldi v Romania (78028/01 and 78030/01) 771
Platform Arzte fur das Leben v Austria (1988) 13 EHRR 204 .... 523–24, 534
Poitrimol v France (14032/88) (1994) 18 EHRR 130 1632–33
Poltoratskiy v Ukraine (38812/97) 1427
Popov v France (39472/07) 1478
Powell and Rayner v United Kingdom (1990) 12 EHRR 355 588
Pretto v Italy (1983) 6 EHRR 182 .... 424–25, 1642
Pretty v UK (2346/02), (2002) 35 EHRR 1, [2002] ECHR 427 .... 211–12, 260, 284, 561, 565, 567–68, 1449
Price v United Kingdom (1988) 55 DR 1988; (2002) 34 EHRR 53 .... 578–79, 1449
Putintseva v Russia (33498/04) 201
Puzinas v Lithuania (4480/98) 591–92
PV v Spain (35159/09) 73, 582–83
Quaranta v Switzerland (12744/87) 1629
Ramsahai ao v Netherlands (52931/99) 204–5
Raninen v Finland (1997) 26 EHRR 563 .... 561–62, 1450, 1468
Ranjit Singh v France (27561/08) 513–14
Rantsev v Cyprus and Russia (25965/04), (2010) 51 EHRR 1 .... 202–3, 1392
Rees v UK (9532/81) 596
Refah Partisi (The Welfare Party) and Others v Turkey (41340/98, 41342/98, 41343/98, and 41344/98) 546–48
Ribitsch v Austria (1995) 21 EHRR 573 1435
Riera Blume v Spain (1999) 30 EHRR 632 490
Ringeisen v Austria (2614/65) 1496
R M S v Spain (28775/12) 323–24, 582–83
Rodrigues de Silva and Hoogkamer v The Netherlands (50435/99) 584
S v Switzerland (1992) 14 EHRR 670 1630
Salabiaku v France (1991) 13 EHRR 379 1623
Salman v Turkey (2002) 34 EHRR 17 .... 1435, 1444–45
Sanchez-Reisse v Switzerland (1986) 9 EHRR 71 .... 304, 1497
SAS v France (43835/11) 485, 510–11
Saviny v Ukraine (2008) 51 EHRR 780 .... 323, 326
SC v United Kingdom (60958/00) (2005) 40 EHRR 10 .... 1633–34, 1650
Schmidt v France (35109/02) 497–98
Selcuk & Asker v Turkey (1998) 26 EHRR 477 1449
Selmouni v France (2000) 29 EHRR 403 .... 1443–44, 1448–49, 1450
Sen v The Netherlands (31465/96) 584
Shishkin v Russia (18280/04) 1455
Sigurjonsson v Iceland (1993) 16 EHRR 462 532–33
Silver v United Kingdom (5847/72), (1983) 5 EHRR 347 .... 343, 591–92, 1490
Socialist Party v Turkey (20/1997/804/1007) 546–47
Soering v UK (14038/88) 199–200, 1458, 1462–63
Sokolowski v Poland (757955/01) 448
Sommerfield v Germany (2004) 36 EHRR 565 577–78
Stanford v UK (16757/90) 1632–33
Stankov and the United Macedonian Organisation Ilinden v Bulgaria (29221/95 and 29225/95) 533, 547–48
Stec & others v United Kingdom (65731/01 and 65900/01) 997
Steel and Morris v United Kingdom [2005] EMLR 15 1629
Storck v Germany (2005) 43 EHRR 96 1467
Stubbings v UK (1996) 23 EHRR 213 561
Sunday Times v UK (1979) 2 EHRR 245 .... 318, 365–66, 787, 1471, 1618–19

Sussman v Germany (1998) 25 EHRR 64 1631–32
T v United Kingdom (2000) 30 EHRR 121. . . . . 423, 425, 432, 1459, 1465, 1632, 1633, 1643, 1650
Tanda-Muzinga v France (2260/10). 344–45, 357–58
Tanis and Others v Turkey (2008) 46 EHRR 14 1459–60
Thlimmenos v Greece ECHR 2000-IV 263 60
Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan (37083/03) 541
Telfner v Austria (2002) 34 EHRR 7. 1622
Tlapak v Germany (11308/16, 11344/16) 171–72
Tomasi v France (1992) 15 EHRR 1 . . . . 1429, 1435, 1449
Tsonyo Tsonev v Bulgaria (3372/03) 591–92
Tuquabo-Tekle v The Netherlands (60665/00). 344–45, 584
Tyrer v United Kingdom (5856/72), (ser A) (1978), (1978) 2 EHRR 1 . . . . 12, 1449–50, 1451–52, 1612–13
Ukrainian Media Group v Ukraine (72713/01) 448
Ünal Tekeli v Turkey (29865/96) 252
Üner v Netherlands (46410/99), [2006] ECHR 873 . . . . 82–83, 584
United Communist Party of Turkey v Turkey (1998) 26 EHRR 121 . . . . 530, 546, 547–48
United Macedonian Organisation Ilinden and Ivanov v Bulgaria (44079/98) 534
United Macedonian Organisation Ilinden and Others v Bulgaria (No 2) (34960/04). 546–47
Unterpertinger v Austria (9120/80) (1991) 13 EHRR 175. 1634
V v United Kingdom (24888/94) (2000) 30 EHRR 121 . . . . 425, 432, 1459, 1465, 1632, 1633, 1643
Van de Hurk v Netherlands A 288 (1994) 18 EHRR 481 1496
Van Droogenbroeck v Belgium A 50 (1982) 4 EHRR 443. 1495
Varnava and others v Turkey (2009) 50 EHRR 21. 1460
VC v Slovakia (18968/07). 1446
Vilvarajah v United Kingdom (1991) 14 EHRR 248 1458
Vojnity v Hungary (29617/07). 494–95, 497–98, 582–83
Von Hannover v Germany (2005) 40 EHRR 1 . . . . 561, 565, 566
W v United Kingdom Series (1987) 10 EHRR 29. 328
Waite and Kennedy v Germany (26083/94). 153, 965–66
Wallova and Walla v Czech Republic (23848/04). 323
Wallman v Austria (1002/01) 532
Wasmuth v Germany (12884/03) 573
Weeks v United Kingdom (1988) 10 EHRR 293. 1496
Wemhoff v Germany 2 ECtHR (ser A) 55, 8 (1968). 12
Wetjen v Germany (68125/14, 72204/14) 171–72
Winterwerp v Netherlands (1979) 2 EHRR 387 1471
X v Austria (1972) 42 CD 145. . . . . 1633–34, 1639
v Federal Republic of Germany (1970) 31 CD 107. 1639
v (1967) 24 CD 50 1641–42
v (722/60). 1628
v France (993/82). 578–79
v Germany (1984) 7 EHRR 152 1455
v (1971) 38 CD 77 1622
v Latvia (27853/09) 59 EHRR 3 . . . . 387, 392, 393
v United Kingdom (6298/73) (1975) 2 Dig 831 1628
v (1981) 4 EHRR 188. . . . . 1495, 1496
X and Others for Austria (19010/07). 781
X and Y v Federal Republic of Germany (1972) 42 CD 139 1628
v Netherlands (1985) 8 EHRR 235. . . . . 561, 580–82
Yagci and Sargin v Turkey (1995) 20 EHRR 505. 1631

YC v United Kingdom (4547/10) 98, 580–82
YF v Turkey (24209/94) 561
Young James and Webster v UK (1981) 4 EHRR 20 528
Yousef v The Netherlands (3371/96) 98
Z and Others v UK [2001] 34 EHRR 97 1452
v [2002] 34 EHRR 3 1431
Zengin v Turkey (14448/04) 502, 503–4
Zimmerman and Steiner v Switzerland (1983) 6 EHRR 17 . . . . . 304, 1631–32
Zontul v Greece (12294/07) 1444–45

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Association Internationale Autisme-Europe v France, (13/2002); (2004) 11 IHRR 843; (2004) 38 EHRR CD265 885
European Action of the Disabled (AEH) v France (81/2012) 885
European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France (82/2012) 582–83
Federation of Employed Pensioners of Greece ((IKA—ETAM) v Greece (76/2012) 993
Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece (79/2012) 993
Panhellenic Federation of Public Service Pensioners v Greece (77/2012) 993
Pensioner's Union of the Agricultural Bank of Greece (ATE) v Greece (80/2012) 993
Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece (78/2012) 993

EUROPEAN COURT OF JUSTICE

Google Spain v AEPD and Mario Costeja Gonzalez (131/12) 573
Kalanke v Freie Hansestadt Bremen (C-450/93) [1995] ECR I-3051 57
R (MA) v SSHD (CJEU, C-648/11) 827

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Domingues v United States (Report No 62/02 Case C12.P285) 1461–62
Roach & Pinkerton v United States (Res No 3/87 Case No 9647) 1461–62
Victims of the Tugboat '13 de Marzo'v Cuba (Case C11.P436, Report 47/96) 187, 214

INTER-AMERICAN COURT OF HUMAN RIGHTS

Atala Riffo y Ninas v Chile, Caso (Series C No 165) 578–79, 582–83
Barrios Altos v Peru (Series C No 75) 1436–37
Baruch Ivcher Bronstein v Peru (Series C No 74) 278
Bulacio v Argentina (Series C No100) 1441–42
Cantoral-Benavides v Peru (Series C No 69) 1443–44
Castillo Petruzzi et al v Peru (Series C No 52) 278
Escher et al Brazil (Series C No 6) 589–90, 592–93
Gelman v Uruguay (Series C No 221) 1436–37
Goiburu v Paraguay (Series C No 153) 1460
Gomes Lund et al (Guerrilha do Araguaia) v Brazil (Series C No 219) 1436–37
Gómez-Paquiyauri Brothers v Peru, Case of (Series C No 110) 594
Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights (Advisory Opinion OC-10/89), (Series A. No 10) 994

Ituango Massacres v Columbia, Case of the (Series C No 148) 586
Jailton Neri da Fonseca v Brazil (merits) (C11.P634, 33/04) 204–5
Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 (Series A No 17) 60
Juridical Condition of the Undocumented Migrants, Advisory Opinion OC-18/03 (Series A No 18) 44
La Cantuta v Peru (Series C No 162). 1436, 1460
Montero-Aranguren et al (Detention Center of Catia) v Venezuela (Series C No 150) 195, 202–3, 204–5
Myrna Mack Chang Case (Series C No 101) 204–5
Oscar Elias Biscet at al v Cuba (771/03 and 841/03). 547–48
Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (Series A No 4) 59–60
Raquel Martí de Mejía v Peru (C10.P970, Report No 5/96) 1453
Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, The, Advisory Opinion, 1999 (Series A No 16) 12
Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection, Advisory Opinion OC-21/14 (Series A No 21) 840–41, 1431
Serrano-Cruz Sisters v El Salvador (Merits, Reparations and Costs) (Series C No 120). 301–2
'Street Children' (Villagran-Morales et al) v Guatemala (Series C No 63). 195
Tristán Donoso v Panamá, Case of (Series C No 193) 589–90
Vélasquez Rodríguez v Honduras (Series C No 4) 202–3, 1436–37, 1561–62
Villagran-Morales et al v Guatemala (Series C No 63). 1454–55
X and Y v Argentina (38/96, C10.P506). 563
Yean and Bosico v Dominican Republic (Series C No 130) 278, 568
Zambrano Vélez and Others v Ecuador (Series C No 166) 187

DOMESTIC

Argentina

Arriola, Sebastián and others (9080, A 891 XLIV). 1293

Australia

A & B v Children's Court of Victoria [2012] VSC 589. 405, 419–20, 428–29
Abebe v Commonwealth (1999) 197 CLR 510 832
Alex, Re: Hormonal Treatment for Gender Identity Dysphoria [2004] FamCA 297. 282
An application under the Major Crime (Investigative Powers) Act 2004, Re [2009] VSC 381 12–13
Angela, Re (2010) 43 Fam LR 98. 888
Bieganski and Bieganski (1993) 16 FamLR 353. 336
Chen Shi Hai v MIMA (2000) 201 CLR 293 . . . . 827–28, 835
CNK v R (2011) 32 VR 64. 1649
DAS v Victorian Human Rights and Equal Opportunity Commission (2009) 24 VR 415 . . . . 461, 509
Director of Public Prosecutions v Hills (Ruling No 11) [2011] VSC 88 1649
DPP (Vic) v SL [2016] VSC 714. 1633
Inquest into the Death of Tyler Cassidy (23 November 2011) (Coroners Court of Victoria, Australia). 202
Jamie, Re [2013] FamCAFC 110 . . . . 175–76, 413
Levy v Victoria (1997) 189 CLR 579 449
McBain v Victoria [2000] FCA 1009. 779

Marion, Re [Marion's Case] [1992] HCA 15, 175 CLR 218 . . . . . 94–95, 175–76, 405, 413, 571, 888
Marion (No 2), Re (1992) 17 Fam LR 336 888
MIMIA v SGLB (2004) 207 ALR 12 832
P and P (1994) 120 ALR 454 888
Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; (2011) 244 CLR 144 848
R v Hill [1996] 2 VR 496 1649
v Mills (1998) 4 VR 235 1649
v Momcilovic (2010) 25 VR 436 . . . . . 461, 509
Secretary, Department of Health and Community Services v JWB & SMB (Marion's Case) (1992) 175 CLR 218 *see* Marion's case
Sydney Children's Hospital Network v X, The (2013) NSWSC 368 514
X v MIMA (1999) 92 FCR 524 841

Botswana

Attorney-General v Kealotswe 1998 BLR 632 (HC) 498

Canada

AC v Manitoba (Director of Child and Family Services) SCC 30 (2009), [2009] 2 SCR 181 . . . . . 85, 416, 514, 917
B (R) v Children's Aid Society of Metropolitan Toronto [1995] 1 SCR 315 498
Baker v Canada (MCI) [1999] 2 SCR 817 841
Bueckert v Canada (MCI) 2011 FC 1042; [2011] FCJ No 1335 829
Canada (Minister of Citizenship and Immigration) v Li [2001] FCJ No 620 830–31
Canada (MCI) v Patel 2008 FC 747 831–32
Canadian Foundation for Children, Youth and the Law v A-G (Canada) [2004] 1 SCR 76 94–95
Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331 211–12
Ek v Canada (Minister for Citizenship and Immigration) [2003] FCJ No 680 853
Eve, Re (1986) 31 DLR (4th) 1 888
Khadra Hassan Farah (IRB, 10 May 1994) 830–31
Kim v Canada (Minister of Citizenship and Immigration) [2011] 2 FCR 448 828
Li v Canada (MCI) [2000] 198 FTR 81 830–31
Lorne v Canada (MCI) 2006 FC 384; [2006] FCJ No 487 829
Multani v Commission Scolaire Marguerite-Bourgeoys [2006] 1 SCR 256 513–14
R v Oakes [1986] 1 SCR 103 . . . . . 461, 509
v Sharpe [2001] 1 SCR 45 . . . . . 99, 1326–27
v Smith [1987] 1 SCR 1045 1447–48
Simoes v Canada (Minister of Citizenship and Immigration) [2000] FCJ No 936 (QL) 843–44
T93-02403 (IRB, 15 March 1994) 831–32
T93-09636, T93-09638 and T93-09639 (IRB, 26 January 1994) 830–31
T93-12579 and T93-12586 (IRB, 25 July 1995) 830–31
TA0-05472 (IRB, 30 May 2001) 829
V99-02929 (IRB, 21 February 2000) 829
V99-02929 and V99-02950 (IRB, 9 May 2000) 830–31
V99-03532 (IRB, 12 October 2001) 830–31
Xiao v Canada (MCI) 2001 FCT 195; [2001] FCJ No 349 830–31
Zhu v Canada (Minister of Citizenship and Immigration) 2001 FCT 884 829

Cayman Islands

Grant and Anor v The Principal, John A Cumber Primary School and Others (23 February 2001) Civil Appeal No 16 of 1999, Unreported 512–13

Finland

KKO 2008: 93 499–500

Germany

Case against Andreas Thomas Vogel (1 Ss 319/05) Frankfurt Court of Appeals (Oberlandesgericht) 537–38

India

Francis Coralie Mullin v Union Territory of Delhi 1981 AIR 746 194
Tellis and Others v Bombay Municipal Corporation and Others 1986 AIR 180 194

Malawi

Re CJ A Female Infant (MSCA Adoption Appeal No. 28 of 2009) [2009] MWSC 1 800

Mauritius

Bishop of Roman Catholic Diocese of Port Louis v S Tengur Privy Council (Appeal No 21 of 2003) 1148
Tengur v The Minister of Education (77387), (2002) SCJ 48 1148

Namibia

Ex Parte AG, Namibia: In Re Corporal Punishment by Organs of the State (1991) 3 SA 76 . . . . . 1439, 1449–50

New Zealand

A v Chief Executive, Department of Labour [2001] NZAR 981 843–44
Auckland Healthcare Services Ltd v Liu (unreported) 11-7-96, M 812/96 514
Chief Executive, Ministry of Business, Innovation and Employment v Liu [2014] NZCA 37 843–44
Huang v Minister of Immigration [2008] NZCA 377 843–44
J, Re (An Infant) B and B v Director-General of Social Welfare [1996] 2 NZLR 134 498
Liu v Chief Executive of the Department of Labour [2012] NZHC 2753 . . . . . 350–51, 843–44
Refugee Appeal Nos 76494 and 76495 (RSAA, 23 November 2010) 830–31
Seales v Attorney-General [2015] NZHC 1239 211–12
Tavita v Minister of Immigration [1994] 2 NZLR 257 843–44
Ye v Minister of Immigration [2008] NZCA 291 843–44
Ye v Minister of Immigration [2009] NZSC 76 841
Zanzoul v Removal Review Authority [2009] NZHC 687 843–44

Nigeria

Esanubor v Faweya [2009] All FWLR (Pt 478) 380 498

Sierra Leone

Prosecutor v Brima (Alex Tamba) and ors, Sentencing judgment (SCSL-04-16-T, ICL 101) 1545
v Brima, Kamara, and Kanu, (Appeals Judgment) (SCSL-04-16-A) 1545, 1546
v Brima, Kamara and Kanu (Trial Judgment), (SCSL-04-16-T) 1541
v Fofana and Kondewa (Appeals Judgment), (SCSL-04-14-A) 1541, 1545
v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment) (SCSL-04-15-T) 1545–46

v Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (SCSL-2004-14-AR72(E)) 1545
v Sam Hinga Norman Decision on Preliminary Motion Based on Lack of Jurisdiction (SCSL-2004–14-AR72(E)) 1507
v Sesay, Kallon, and Gbao (Appeals Judgment), (SCSL-04-15-A) 1545–46

Republic of South Africa

AD v DW [2007] ZACC 27 . . . . . 770, 800
Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11 498
Du Toit & Anor v The Minister for Welfare and Population Development & Ors (2003) 4 CHRLD 21 . . . . . 779, 780
Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 116–17
M v State Centre for Child Law [2007] ZACC 18 . . . . . 421–22, 770
Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28 116–17
MEC for Education: KwaZulu-Natal v Pillay 2008 (2) BCLR 99 439–40
Minister for Welfare and Population Development v Fitzpatrick & Ors, The [2000] ICHRL 39; [2000] 1 LRC 292; (2000) 3 CHRLD 144 806
of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 116–17
of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198 116–17
Prince v President of the Law Society of the Cape of Good Hope [2002] 2 SA 794 1286–87
S v Williams [1995] 3 SA 632 . . . . . 1439, 1449–50
Soobramoney v Minister of Health (Kwazulu- Natal) 1998 (1) SA 765 116–17
State v M (2008) 3 SA 232 . . . . . 82, 90
State v Makwanyane [1995] 1 LRC 269 1462–63
YG v The State Case (2018) (1) SACR 64 1452

United Kingdom

AA (unattended children) Afghanistan CG [2012] UKUT 00016 831–32
Agar-Ellis, Re (1883) 24 ChD 317 91
ALJ and A, B and C's Application for Judicial Review [2013] NIQB 88 827
Ashby v White (1703) 92 ER 126 1501
B, Re (A Child) [2009] UKSC 5 93–94
(A Minor) [1987] 2 All ER 206 (HL) 888
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 1618–19
B-S (Children), Re [2013] EWCA Civ 1146 90–91
CIN Properties v Rawlins [1995] 2 EGLR 130 537
D, Re (A Minor) (Abduction: Rights of Custody) [2006] UKHL 51 [2007] 1 AC 619 . . . . . 386, 388–89
DS (Afghanistan) v SSHD [2011] EWCA Civ 305 831–32
DT v LTB [2010] EWHC 3177 392
DW (a minor), Re (custody) (1984) 14 Family Law 17 91
E, Re (P) [1969] 1 All ER 323 91
EM (Lebanon) v SSHD [2008] UKHL 64, [2009] 1 AC 1198 . . . . . 345–46, 577–78
F, Re (A Child) [2015] EWCA 882 90–91
G, Re (Children) (Residence: Same-Sex Partner) [2006] UKHL 43 93–94
Gillick v West Norfolk and Wisbech AHA [1986] AC 112 . . . . . 86–87, 405, 413, 571
Great Ormond Street Hospital v Charlie Gard (his guardian) [2017] EWHC 972 206
H v H (child custody) (1984) 14 Family Law 112 91
HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25; [2013] 1 AC 338 . . . . . 82–83, 841, 853

HK (Afghanistan) v SSHD [2012] EWCA Civ 315 831–32
Hines v London Borough of Lambeth [2014] EWCA Civ 660 82–83
J, Re (A Minor) (Wardship: Medical Treatment) [1991] Fam 33 1 FLR 366 206
J v C [1970] AC 668 95–96
L v The Children's Commissioner for England [2013] EWCA Crim 991 [2013]
WLR (D) 249 1382
Mikulic v Croatia [2002] 1 FCR 720 260
Minister of Home Affairs v Fisher [1980] AC 319 12
NHS Trust v A [2007] EWHC 1696, [2008] 1 FLR 70 . . . . 206, 498
Nicklinson v Ministry of Justice [2014] UKSC 38. 211–12
Pratt and Morgan v Attorney General for Jamaica [1994] 2 AC 1 1462–63
R v Ashworth Hospital Authority (now Mersey Cate National Health Service Trust)
(Appellants), ex parte Munjaz [2006] 2 AC 148 317–18
v DPP; ex parte Kebilene [2000] 2 AC 326 1623–24
v Lambert [2002] 2 AC 545 1624–25
v Ministry of Justice (Respondent), R v Director of Public Prosecutions (Appellant)
[2014] UKSC 38 211–12
v Secretary of State for the Home Department ex p. Simms [1999] UKHL 33,
[2000] 2 AC 115 436
v Ungvari [2003] EWCA Crim 2346 1641–42
R (Axon) v Secretary of State for Heath [2006] 2 WLR 1130 571
(Bibi) v SSHD [2015] 1 WLR 5055 345–46
(BT) v SSHD [2011] EWCA Civ 1446 827
(on the application of) ABC (A Minor) (Afghanistan) v Secretary of State for the Home
Department [2011] EWHC 2937 (Admin) 831
(on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence
(Respondent) [2007] UKHL 58 214
(on the application of Hodkin and another) (Appellants) v Registrar General of Births,
Deaths and Marriages (Respondent) [2013] UKSC 77. 484–85
(on the Application of ProLife Alliance) v BBC [2004] 1 AC 185. 448
(Playfoot) v Millais School Governing Body [2007] EWHC 1698 (Admin) 511
(Rose and Another) v Secretary of State for Health and Human Fertilisation and
Embryology Authority [2002] EWHC 1593 . . . . 261, 268, 569
(Shabina Begum) v Headteacher and Governors of Denbigh High School [2006]
UKHL 15 . . . . 511, 512
(ST) v Secretary of State for the Home Department [2010] EWCA Civ 643;
[2010] 1 WLR 2858 824–25
(TS) v SSHD [2010] EWHC 2614 (Admin) 827
(Watkins-Singh) v Aberdare Girls' High School Governors [2008] EWHC
1865 (Admin) 512–13
(Williamson) v Secretary of State for Education and Employment [2005] UKHL 15. 498
(ZAT) v SSHD [2016] UKUT 0061 (IAC) 344–45, 346–47, 357–58, 827
RA (AP) v SSHD [2011] CSOH 68 829
Rex v Gorrie [1919] 83 JP 136. 1652
S, Re (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47,
[2005] 1 AC 593 439–40
(A Minor) (Consent to Medical Treatment) (1994) 2 FLR 1065. 514
(A Minor) (Medical Treatment) [1993] 1 FLR 376 498
(Specific Issue Order: Religion: Circumcision) [2004] EWHC 1282 (Fam). 499–500
Sheldrake v DPP [2005] 1 AC 264 1624
Smith v Ministry of Defence [2014] AC 52 214
SSHD v ZAT [2016] EWCA Civ 810, [2016] 1 WLR 4894 . . . . 344–45, 346–47, 354–55, 827
T, Re (Abduction: Child's Objections to Return) [2000] 2 FLR 192

TN (Afghanistan) v SSHD [2013] EWCA Civ 1609; [2014] 1 WLR 2095 831–32
Venables and Thompson v News Groups Newspapers Limited, Associated Newspapers Limited, MGM Limited [2001] FAM 430 575–76
W v W [1993] 2 FLR 211 389
ZH (Tanzania) (FC) v Secretary of State for the Home Department [2011] 2 AC 166, [2011] 2 WLR 138 . . . . . 79, 85, 89–90, 96, 354, 841, 843–44
ZJ (Afghanistan) v SSHD [2008] EWCA Civ 799 831–32

United States of America

Abay v Ashcroft, 368 F 3d 634, 640 (6th Cir, 2004) 831–32
Abebe v Ashcroft 379 F 3d 755, 764 (9th Cir, 2004) 843–44
American Civil Liberties Union et al v Reno 929 FSupp 824, 882 (EDPa 1996) 471–72
Ashcroft v Free Speech Coalition 535 US 234; 122 S Ct 1389 (2002) 99, 1310–11, 1326–27
Baxter ex rel Baxter v Vigo County School Corp 26 F 3d 728 (7th Cir 1994) 464
Bethel School District v Fraser 478 US 675 (1986) 467–68
Beussink v Woodland R-IV School District 30 F Supp 2d 1175 (ED Mo 1998) 468
Bivens ex rel Green v Albuquerque Public Schools 899 F Supp 556 (DNM 1995) 464
Board of Education v Earls 38 US 822 (2002) 563–64
Bob Jones University v United States (1983) 461 US 574 506
Breen v Kahl 296 F Supp 702 (1969) 464
Brown v Board of Education 347 US 483 (1954) 493 1057–58
v Entertainment Merchants Association 131 SCt 2729 (2011) 639–40
v Louisiana 383 US 131 (1966) 449
Cabrera-Alvarez v Gonzales 423 F 3d 1006, 1011 (9th Cir, 2005) 843–44
Canjura-Flores v INS 784 F 2d 885, 887 (9th Cir, 1985) 830–31
Chalifoux v New Cancy Independent School District 976 F Supp 659 (SD Tex 1997) 464, 512–13
Cohen v California, 403 US 15 (1971) 448, 449
De Pinto v. Bayonne Board of Education 514 F Supp 2d 633 (DNJ 2007) 468
Denver Area Educational Telecommunications Consortium Inc v Federal Communications Commission et al 518 US 727 (1996) 743 470–71
Edwards v Aguillard 482 US 578 (1987) 1087
Ferrell v Dallas Independent School District 392 F 2d 697 (1968) 464
Fisher v University of Texas 631 F 3d 213 (2013) 1100
Furman v Georgia 408 US 238, 270 (1972) 1448
Gault, Re 387 US 1, 27–29 (1967) 1600
Graham v Florida 560 US 48 (2010) 1448
Gregg v Georgia 428 US 153, 171 (1976) 1448
Grutter v Bollinger 539 US 306 (2003) 1100
Ginsberg v New York 390 US 629 (1968) 470–71
Hamdan v Rumsfeld (2006) 548 US 557 1518
Harper v Poway Unified School District 445 F3d 1166 (9th Cir 2006) 466
Hazelwood School District v Kuhlmeier 484 US 260 (1988) 467–68
Jacobellis v Ohio (1964) 378 US 184 1737
Jeglin v San Jacinto Unified School District 827 F Supp 1459 (CD 1993) 464
Johnson v Los Angeles Unified School District (CV 94-1782 (EEx) DC Cen Dist CA (16 May 1994) 466
José Fuentes-Colocho v United States Attorney General, Amici Curiae Supporting Petitioner, (9th Cir, 2014) (No. 13-70470) 830–31
JS v Bethlehem Area School District 757 A 2d 412 (Pa Commw Ct 2000) 467–68
Karr v Schmidt 460 F 2d 609 (1972) 464
Keyishian v Board of Regents 385 US 589 (1967) 449

Little v Arkansas 435 US 957 (1978) 961 1637
Lowery v Euverard 497 F3d 584 (6th Cir 2007) 468
Mejilla-Romero v Holder, 600 F 3d 63, 77 (1st Cir, 2010) 832
Miller v Alabama 567 US 460 (2012) 1448, 1464
Mills v Board of Education 348 F.Supp. 866 (1972) 880
Montgomery v Louisiana 577 US ___, 14 (2016) 1464
Morse v Frederick 551 US 393 (2007) 467–68
Pangle v Bend-Lapine School District 10 P 3d 275 (Or Ct App 2000) 468
Pennsylvania Association for Retarded Children (PARC) v Commonwealth of Pennsylvania
334 F.Supp 1257 (E.D. PA 1971) 880
Phoenix Elementary School Dist No 1 v Green 943 P 2d 836 (Ariz App Div 2 1997) 464
Pinard v Clatskanie School District 467 F3d 755 (9th Cir 2006) 468
Polovchak v Meese 774 F 2d 731, 737 (7th Cir, 1985) 830–31
Prince v Massachusetts (1944) 321 US 158 498
Ramos v Town of Vernon 353 F 3d 171 (2d Cir 2003) 1469
Reno v ACLU 521 US 8444 (1997) 471–72
Roper v Simmons (03-633) (Briefs Amici Curiae in Support of the Respondent) 1603–4
v543 US 551 (2005) 1448, 1461–63, 1603–4
Roth v United States 354 US 476 (1957) 448
Salaam v INS 229 F 3d 1234, 1238 (9th Cir, 2000) 830–31
Stafford Unified School District#1 v April Redding (2009) 557 US 364 1294
Texas v Gregory Lee Johnson 491 US 397 (1989) 447
Tinker v Des Moines Independent Community School District 393 US 503
(1969) 514 .... 437, 439–40, 465–66, 467–68, 471–72
v (1969) 393 US 507 1120–21
Trop v Dulles 356 US 86, 101 (1958) 1448
US v American Library Association Inc 539 US 215 (2003) 470–71
Vernonia School District 47J v Acton 515 US 646 (1995) 563–64
Weems v United States 217 US 349 (1910) 1448
West Virginia State Board of Education v Barnette 319 US 624 (1943) 449, 466, 467, 469
Wildman v Marshalltown School District 249 F3d 768 (8th Cir 2001) 468
Zummo v Zummo (1990) 394 Pa Super 30, 574 A.2d 1130 490

Zambia

Kachasu v Attorney General (1967) ZR 145 466

Zimbabwe

Ncube & Ors v State [1988] LRC (Const) 442 .... 1439, 1449–50

Table of Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
ACIERWC	African Committee of Independent Experts on the Rights and Welfare of the Child
ACrtHR	Inter American Court of Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfCHPR	African Court on Human and Peoples' Rights
ALRC	Australian Law Reform Commission
AmCHR	Inter American Commission on Human Rights
CADE	Convention on the Elimination of Discrimination in Education
CAT	Convention Against Torture
CED	Convention on Enforced Disappearances
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CETS	Council of Europe Treaty Series
CND	United Nations Commission on Narcotic Drugs
CO	Concluding Observations
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRMWF	Convention on the Rights of Migrant Workers and their Families
CRPD	Convention on the Rights of Persons with a Disability
ECHR	European Convention of Human Rights
ECmHR	European Commission on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EFA	Education for All (UNESCO project)
EMCDDA	European Monitoring Centre on Drugs and Drug Addiction
GATT	General Agreement on Tariffs and Trade
HR Council	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
IPEC	International Programme on the Elimination of Child Labour
ISCED	International Standard Classification of Education
LNTS	League of Nations Treaty Series
MDG	Millennium Development Goal
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development

OHCHR	Office of the High Commissioner for Human Rights
OPAC	Optional Protocol on the Involvement of Children in Armed Conflict
OPSC	Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography
SCSL	Special Court for Sierra Leone
SDG	UN Sustainable Development Goal
SRRE	Special Rapporteur on the Right to Education
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees (UN Refugee Agency)
UNICEF	United Nations Children's Emergency Fund
UNODOC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTS	United Nations Treaty Series
VLCT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WTO	World Trade Organisation

Notes on Contributors

Philip Alston is John Norton Pomeroy Professor of Law at New York University. He is currently UN Special Rapporteur on extreme poverty and human rights, and previously served as Special Rapporteur on extrajudicial executions (2004–10) as well as Chairperson of the UN Committee on Economic, Social and Cultural Rights (1991–98). During the drafting of the CRC he was UNICEF's Legal Adviser, and in 2011 he received UNICEF's Aldo Farina Award for Child Rights.

David Archard is Emeritus Professor of Philosophy at Queen's University Belfast, having previously taught at the Universities of Ulster, St Andrews, and Lancaster. He has published extensively in applied ethics, political philosophy, and philosophy of law, especially on the topics of children, the family, sexual consent, and the public role of philosophy. He has been Honorary Chair of the Society for Applied Philosophy and is its Vice-President. For twelve years he was a Member of the Human Fertilization and Embryology Authority, and latterly its deputy Chair. He is Chair of the Nuffield Council on Bioethics and a Member of the Clinical Ethics Committee of Great Ormond Street Hospital.

Damon Barrett is a lecturer in health and human rights in the Section for Epidemiology and Social Medicine, Faculty of Medicine, University of Gothenburg. He is also a co-founder of the International Centre on Human Rights and Drug Policy, based at the Human Rights Centre, University of Essex, where he is a visiting fellow. Damon is recognized internationally for his leading work in the areas of human rights and drug control and has worked both for child rights and drug policy NGOs. He has advised UN agencies, governments, and donors on issues relating to human rights and drugs and has authored numerous academic articles and NGO reports in these areas. He holds a PhD in international law from the University of Stockholm, where his thesis focused on drugs and the Convention on the Rights of the Child.

Samantha Besson is Professor of Public International Law and European Law at the University of Fribourg (Switzerland), Co-Director of the European Law Institute of the Universities of Bern, Fribourg, and Neuchâtel (Switzerland) and Vice-Dean of the Law Faculty, University of Fribourg (Switzerland). She holds a degree in Swiss and European Law (Universities of Fribourg and Vienna), a Magister Juris in European and Comparative Law (University of Oxford), a PhD in Law (University of Fribourg) and a Habilitation in Legal Theory and Swiss, Comparative, European, and International Constitutional Law (University of Bern). She has been a visiting professor at the Universities of Zurich, Lausanne, Duke, Lisbon, and Harvard. Her publications and research interests lie in international and European human rights law and theory and anti-discrimination law.

Bronagh Byrne is a Lecturer in Social Policy at Queen's University Belfast, Northern Ireland, UK. She is Co-Director of the Centre for Children's Rights at Queen's and Co-Chair of the University's Disability Research Network. Bronagh's expertise is in the rights of children and young people with disabilities with a particular focus on education, transitions, and the implementation of the UN Conventions on the Rights of Persons with

Disabilities and the Rights of the Child. She has published widely on disability and the right to inclusive education and has been a principal or co-investigator in a range of interdisciplinary research projects funded by the UK Economic and Social Research Council and the Council of Europe, public bodies such as the Northern Ireland Commissioner for Children and Young People, and leading charitable foundations such as UNICEF, Marie Curie, and Barnardos.

Nigel Cantwell is a Geneva-based consultant on child protection policies who has been working on the human rights of children internationally for forty years. In the 1980s he coordinated the NGO Group for the Convention on the Rights of the Child throughout the drafting of that treaty, and then participated actively in developing the 1993 Hague Convention on Intercountry Adoption. He headed up the 'Implementation of International Standards' unit at UNICEF's Innocenti Research Centre in Florence from 1998 until 2003. His subsequent work has focused mainly on safeguarding children's rights in intercountry adoption and alternative care, and he played a lead role in drafting the 2009 UN Guidelines for the Alternative Care of Children.

Judy Cashmore *AO* is Professor of Social Legal Research and Policy at Sydney Law School, and Professorial Research Fellow in the Department of Education and Social Work at the University of Sydney. She has a PhD in developmental psychology and the focus of this research has been on children's experience of and involvement in family law, child protection, and criminal proceedings, and other processes where decisions are made about their lives and the implications for law, social policy, and practice. She has chaired or served as a member of a number of government and non-government committees concerning child protection, child death reviews, and the review of child protection legislation and policy. She was involved in the presentation of Australia's alternative report to the UN Committee on the Rights of the Child in 2005 and 2011.

Claire Breen is a Professor of Law at Te Piringa Faculty of Law at the University of Waikato, Aotearoa, New Zealand. Dr Breen has a Bachelor of Civil Law from the National University of Ireland, University College Cork, and an LLM in International Law and a PhD from the University of Nottingham. She teaches in the areas of human rights law, international humanitarian law, and public international law at the undergraduate and postgraduate level, as well as supervising LLM and PhD students in those areas. Prof Breen has published widely in the area of international children's rights with publications in the Human Rights Quarterly, the International Journal of Children's Rights and the International Journal of Children's Rights. Books include *The Standard of the Best Interests of the Child* (2003) and *Age Discrimination and Children's Rights* (2006), as well as chapters in *International Human Rights Law in Aotearoa New Zealand* (2016) and *Aotearoa and Implementation of the UN Declaration on the Rights of Indigenous peoples—Theory and Practice* (2016).

Christian Courtis is a Human Rights Officer with the Office of the UN High Commissioner for Human Rights. Based in the OHCHR New York Office, he is a member of the Human Rights and Sustainable Development Section, working on sustainable development issues, economic and social rights, and human rights mainstreaming. Born in Argentina, he is a former law professor at the University of Buenos Aires Law School (Argentina) and invited professor at ITAM Law School (Mexico). He has been visiting professor and researcher at different universities in Europe, Latin America, and

the United States. He has served as a consultant for the World/Panamerican Health Organization, UNESCO, the UN Department for Economic and Social Affairs (DESA), the Economic and Social Commission for Latin America and the Caribbean (ECLAC), and the Inter-American Institute for Human Rights. He was previously the coordinator of the Economic, Social and Cultural Rights Project of the International Commission of Jurists (Geneva).

Sylvie Langlaude Doné was a law lecturer at Queen's University Belfast between 2008 and 2015 and the Deputy Director of its Human Rights Centre between 2011 and 2014. She taught various aspects of international law, public law, family law and human rights law. Sylvie published on human rights law, freedom of thought conscience and religion, children's rights, and freedom of expression. She is the author of *The Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff 2007). She was a member of the editorial board of *Religion and Human Rights* (Brill) and a case note editor for the *Oxford Journal of Law and Religion*. She was a member of the Executive Committee of the Association of Human Rights Institutes in Europe (AHRI) between 2013–15. She holds a PhD from the University of Bristol (2006), a LLM in Human Rights Law from the University of Nottingham (2002), and an undergraduate law degree from the University of Aix-en-Provence (2001). She lives in Dublin.

Mark A Drumbl is the Class of 1975 Alumni Professor at Washington & Lee University School of Law, where he also serves as Director of the Transnational Law Institute. He has held visiting appointments on several law faculties, including Oxford University, Free University of Amsterdam, Université de Paris II (Panthéon-Assas), University of Melbourne, University of Sydney, University of Ottawa, Monash University, and Trinity College-Dublin. His research and teaching interests include public international law, international criminal law, international human rights law, and transitional justice. His book, *Atrocity, Punishment, and International Law* (CUP 2007) has received critical acclaim and has won commendations from the International Association of Criminal Law (US national section) and the American Society of International Law. In 2012, he published *Reimagining Child Soldiers in International Law and Policy*, which has also been extensively and enthusiastically reviewed. He has worked in criminal defence in Rwanda, lectures widely, and serves as an expert in US courts; his research also has been cited by courts in Canada, the US, and the United Kingdom. He has degrees in law and political science from McGill, Toronto, and Columbia universities. He would like to thank Charity King for her research assistance.

John Eekelaar taught family law at Pembroke College, Oxford from 1965 to 2005, and was its Academic Director from 2005 to 2009. He was Lecturer (later Reader) in Law at Oxford University from 1965 to 2005. He was a founding member of the International Society of Family Law, of which he was President from 1985 to 1988, and founding co-editor of the International Journal of Law, Policy and the Family. He has written and researched widely in family law. He was elected a Fellow of the British Academy in 2001 and Distinguished Visiting Fellow by the New Zealand Law Foundation in 2005. He has many publications in a range of topics, especially in family law.

Sarah M Field has a blend of applied and academic experience supporting the fulfilment of international human rights law through international research and advocacy projects. In this capacity she has led and coordinated projects in Europe, southern and eastern

Africa and Asia for organizations such as the International Labour Office, The African Child Policy Forum and Cross-European GENOVATE Consortium. Her doctoral research probed peace processes from a juristic, human rights and child rights perspective, as developed in *Law of Peace (making) and Children's International Human Rights*. Together with her broader applied experience, the findings of this research forged the development of *Rights Streams*. It includes projects on this and other interrelated subjects including the international legal protection of education in emergencies and armed conflict. Sarah has an LLB from Trinity College Dublin and a PhD from University College Cork, Ireland.

Anne Gallagher is a lawyer, practitioner, teacher, and scholar working in the fields of human rights and the administration of criminal justice. She served as a UN official for over a decade and, during that time, was directly involved in the development of the international legal frameworks around human trafficking and migrant smuggling. She continues to work closely with the UN and its Member States as an adviser and consultant on legal and policy matters related to migration. An independent and award-winning scholar, Dr Gallagher is widely recognized as the leading global authority on the international law of human trafficking and of migrant smuggling. In 2018 she was elected President of the International Catholic Migration Commission. Her other current and recent roles include Co-Chair of the International Bar Association's Presidential Task force on Trafficking; Member of the IOM Migration Policy Group; Member of the Asia Dialogue on Forced Migration; and Academic Member, Doughty St Chambers.

Elizabeth Handsley, BA LLB (UNSW), LLM (Northwestern) is a Fellow of the Australian Academy of Law, Professor of Law at Flinders University in Adelaide, South Australia and President of the Australian Council on Children and the Media. She was a co-editor of *Children's Wellbeing in the Media Age: Multidisciplinary Conversations from the Harvard–Australia Symposium* (Federation Press 2015); a co-author of 'A Children's Rights Perspective on Food Advertising to Children' (2014) 22 International Journal of Children's Rights 93–134; and a co-host of the Rights of the Child Consumer Conference, Sydney, 20 November 2015. She has also published on food advertising regulation in Health Policy, Public Health Ethics, Public Health Nutrition, ANZ Health Policy, and the Media and Arts Law Review; and on other issues regarding the child audience in Andrew Kenyon (ed), TV Futures (Melbourne University Press, 2007), Viewpoint, The Conversation, and Online Opinion and Reform.

Sonia Harris-Short is an Honorary Professor of Family Law and Policy at the University of Birmingham, UK. She has published widely on issues of children's rights and cultural diversity under both national and international law and has a special interest in the rights of indigenous children. She has worked in both Canada and Australia and is the author of *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Vulnerable under International Law* (Ashgate Publishing 2012). Professor Harris-Short is now a full-time judge specializing in child protection.

Harry Hobbs is a lecturer in the Faculty of Law at the University of Technology, Sydney and a PhD Candidate and Lionel Murphy Postgraduate Scholar at the University of New South Wales, Faculty of Law. He holds a BA/LLB (Hons 1) from the Australian National University and a LLM in International Legal Studies from New York University, where he was awarded the Jerome Lipper Prize and the Prize for International Human Rights Law.

Before starting his PhD, Harry was a Principal Research Officer in the Parliamentary Joint Committee on Human Rights. He has also worked as a Human Rights Legal and Policy Adviser at the Australian Capital Territory Human Rights Commission and as the Legal Research Officer at the High Court of Australia.

Urfan Khaliq is Professor of Public International and European Laws at Cardiff University in the United Kingdom. He has published extensively in the areas of economic and social rights, foreign policy, and human rights and children's rights. He has acted as an advisor to a number of NGOs, international organizations, and governments on matters related to the protection of individual rights, in particular children's rights. He is an elected fellow of the Learned Society of Wales.

Eleonor Kleber is a lawyer at the Court of Justice of the Canton Geneva (Switzerland). She holds a Bachelor in Law (University of Lausanne), a Master in Law (University of Geneva) and a PhD in Law (University of Fribourg). Her doctoral thesis on multiple discrimination was published as a book in 2015 (La discrimination multiple: Etude de droit international, suisse et européen, AISUF, Bern: Schulthess). Her publications and research interests lie in anti-discrimination law.

Malcolm Langford is a Professor of Public Law at the University of Oslo and Co-Director of the Centre on Law and Social Transformation, University of Bergen and CMI. He is the Co-Editor of the CUP Book Series on *Globalization and Human Rights,* co-directs the Global School on Socio-Economic Rights, and coordinates several large research grants on the politics of rights. Langford's research and teaching cross several disciplines and span international investment law, human rights, international development and relations, comparative constitutionalism, and the politics of the legal profession. His publications include *Global Justice, State Duties* (CUP 2014), *MDGs and Human Rights* (CUP 2014), and *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008). He has also been a Visiting Fellow at the University of California (Berkeley), Fridtjof Nansen Institute, University of Mannheim, University of Stellenbosch, and University of NSW.

Gerison Lansdown was the founder and director from 1992 to 2000 of the Children's Rights Alliance for England. She has since worked as an international consultant and advocate, publishing and lecturing widely on the subject of children's rights. She supported the Committee on the Rights of the Child in the development of several General Comments, including on the right of children to be heard and to play and recreation, and on the rights of children during adolescence. She has an Honorary Doctorate from the Open University, an Honorary Fellowship from the University of Central Lancashire, is a member of the Open Society Foundation Early Years Advisory Board, and is on the editorial advisory board of the Canadian Journal of Children's Rights. She is a former Vice Chair of UNICEF–UK and is currently Chair of Child to Child.

Nigel Lowe *QC (Hon)* is an Emeritus Professor of Law at Cardiff University, having been a Professor there from 1991 until his retirement in 2014. He is a member of the UK International Family Law Committee and Consultant both to the Permanent Bureau of the Hague Conference on Private International Law and the Council of Europe. He was a member of the Panel of Experts appointed by the European Commission in 2015 to advise on proposals to reform the revised Brussels II Regulation. He has written extensively

on both national and international family law issues, including, most recently, Lowe and Douglas' *Bromley's Family Law* (11th edition, OUP 2015) and *International Movement of Children* (2nd edition, Family Law 2016) by Lowe and Nicholls. Together with Victoria Stephens, he has just completed a fourth statistical survey of applications made under the 1980 Hague Abduction Convention, focussing on applications received by Central Authorities in 2015.

Elliot Luke holds an LLM from the University of Cambridge, an MSc in Development Studies from the London School of Economics and Political Science, a JD from the University of Melbourne, and a Bachelor of Arts from University College London. From 2012 to 2014, he was a Research Fellow at Melbourne Law School, where he worked with Professors John Tobin and Philip Alston to produce a comprehensive commentary on the United Nations Convention on the Rights of the Child. During this time, he was twice a Scholar in Residence at the Center for Human Rights and Global Justice at NYU School of Law. Prior to his legal career, Elliot worked for a number of NGOs in Australia and Latin America as a researcher and campaigner in the field of human rights.

Laura Lundy is Co-Director of the Centre for Children's Rights and a Professor of Education Law and Children's Rights in the School of Social Sciences, Education and Social Work at Queen's University, Belfast. She is Co-Editor in Chief of the International Journal of Children's Rights. Her expertise is in children's right to participate in decision-making and education rights. She has extensive practical experience of rights-based, participatory research and consultation with children of all ages and has provide training and advice to a range of international organizations including the UN Committee on the Rights of the Child, the Council of Europe, and Child Rights Connect.

Chelsea Marshall's background is in transitional justice and human rights, particularly the rights of children and other marginalized groups to participate in public decision-making. Her doctoral research explored the experiences of girls and young women growing up in contentious areas of north and west Belfast during the transition from the conflict in Northern Ireland. She was public hearings coordinator for the Greensboro Truth and Reconciliation Commission and has researched the inter-generational effects of conflict in the U.S. and Northern Ireland. At the Centre for Children's Rights at Queen's University Belfast, she researched models of child rights advocacy.

Aoife Nolan is Professor of International Human Rights Law at Nottingham University School of Law. She was elected to the Council of Europe's European Committee of Social Rights in November 2017. She has published extensively in the areas of human rights and constitutional law, particularly in relation to economic and social rights, children's rights, and non-state actors. She is the founding coordinator of the Economic and Social Rights Academic Network, UK and Ireland (ESRAN-UKI). She has worked with and acted as an expert advisor to a wide range of international and national organizations and bodies working on human rights issues, including a range of UN Special Procedures, UN treaty-monitoring bodies, the Council of Europe, multiple NHRIs, and NGOs. Her books include *Children's Socio-economic Rights, Democracy & the Courts* (Hart 2011), *Human Rights & Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013) (co-edited with R. O'Connell and C. Harvey), Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources (Routledge, 2014) (with R. O'Connell & C. Harvey, M. Dutschke, and E. Rooney), *Economic and*

Social Rights after the Global Financial Crisis (CUP 2014) and the *United Nations Special Procedures System* (co-edited with R. Freedman and T. Murphy).

Aisling Parkes is an academic at the School of Law, University College Cork, Ireland. She is a founding member and Co-Director of the newly established Sports Law Clinic at the School of Law, UCC and she is also a member of the Child Law clinic. She specializes in researching and teaching in children's rights, child law, international disability law, sports law, and English land law. Aisling's book—*Children and International Human Rights Law: The Right of the Child to be Heard (*Routledge-Cavendish 2013) focusses on the legal implementation internationally of the voice of the child including the right to freedom of expression. Aisling has been actively involved in the design and delivery of a course on Article 12 and listening to children to legal professionals and members of the judiciary across Europe for a number of years.

Noam Peleg, PhD, is a Lecturer at University of New South Wales, Faculty of Law, where he teaches international children's rights law and family law. He held the positions of visiting research fellow at HUJI Minerva Centre of Human Rights and a Postdoctoral Fellowship at University College London, where he also wrote his PhD. His main research and teaching areas are international children's rights law, family law, and socio legal studies. He has published and presented widely on children's rights matters and consulted non-governmental organizations on various children's law related issues. His forthcoming books include *The Child's Right to Development* (CUP), and *Commentary on Article 30 of the UN Convention on the Rights of the Child* (Brill). Noam is also the book review editor and member of the editorial board of the International Journal of Children's Rights. Noam practiced law with a number of human rights NGOs, where he represented children in courts.

Jason M Pobjoy is a barrister at Blackstone Chambers, where he has a broad practice including public and human rights law, refugee and immigration law, and public international law. He appears regularly in the Supreme Court, the European Court of Human Rights, and the Court of Justice of the European Union. Jason has published widely in the areas of refugee law, public and human rights law and is the author of *The Child in International Refugee Law* (CUP 2017). Jason has taught at the University of Cambridge and University of London and was the founding chair of the Cambridge Pro Bono Project. Jason completed a Master in Law at the University of Melbourne, a Bachelor of Civil Law at the University of Oxford, and a doctorate at the University of Cambridge. He was a Research Associate at the Refugee Law Project at Makerere University in Kampala, a Hauser Visiting Doctoral Researcher at New York University School of Law and is currently a Research Associate at the Refugee Studies Centre at the University of Oxford.

Cate Read is a Trial Division Researcher at the Supreme Court of Victoria and is currently undertaking a Master of Laws at the Melbourne Law School. She has undergraduate and Master's degrees in law and political science, and also works for the Academic Research Service at Melbourne Law School. Cate was admitted to the legal profession as an Australian Lawyer in 2008 and has held a volunteer legal practising certificate since 2009. She is a volunteer lawyer at Fitzroy Legal Service and the Asylum Seeker Resource Centre.

Florence Seow obtained her LLB and BA (Asian Studies–Japanese specialist) degrees from Murdoch University, and her LLM and PhD degrees in international law at Kanagawa

University. She is currently an assistant lecturer with the Public Interest Law Initiative at Melbourne Law School and previously worked as a research fellow with John Tobin on the project to produce the Commentary to the UN Convention on the Rights of the Child.

John Tobin is the Francine V McNiff Chair in International Human Rights Law at the University of Melbourne where he is also the Co-director of Studies for the Human Rights Program in the Law School. He is the principal examiner for the Law Institute of Victoria Child Law Specialisation scheme and has worked as a youth lawyer with Victoria Legal Aid and a legal officer with the Department of Justice.

Jonathan Todres is Professor of Law at Georgia State University College of Law in Atlanta, USA. His research focuses on children's rights and child well-being. He has authored numerous publications on child trafficking and other forms of violence against children, the implementation of children's rights law, and legal and cultural constructs of childhood. He is co-author of *Human Rights in Children's Literature: Imagination and the Narrative of Law* (OUP 2016). He was a Fulbright Scholar in residence at University College Cork School of Law in Ireland (Spring 2018). He serves as a regular advisor to nongovernmental organizations working to address various children's rights issues. Jonathan is also a member of the Board on Children, Youth, and Families of the National Academies of Sciences, Engineering, and Medicine. He holds a JD from Columbia Law School and a BA (International Development) from Clark University.

Sheila Varadan is pursuing a PhD in Law at the University of Leiden in the Netherlands. The subject of her dissertation is a legal doctrinal study of article 5 of the UN Convention on the Rights of the Child. Prior to her doctoral studies, Sheila practiced as an international human rights lawyer with the International Commission of Jurists in Southeast Asia and briefly as a criminal prosecutor in Canada. Sheila has completed a Bachelor of Arts in Political Science from the University of Guelph, a Bachelor of Common Law and a Bachelor of Civil Law from McGill University in Canada, and a Master of Law from the London School of Economics and Political Science in the United Kingdom.

Introduction

The Foundation for Children's Rights

I. The Adoption of the Convention 3
A. The 1924 Declaration on the Rights of the Child 3
B. The 1959 Declaration on the Rights of the Child 4
C. The 1989 Convention on the Rights of the Child 5
II. The Scope and Structure of the Commentary 7
A. A Focus on Substantive Rights 7
B. The Structure of the Commentary 8
III. A Methodology for Interpreting the Convention 9
A. Methodology Matters 9
B. A Principled Interpretation 10
1. The General Rule 10
2. Special Rules for Human Rights Treaties 12
C. A Clear and Practical Interpretation 13
D. Coherence 13
1. Coherence in Reasoning 14
2. System Coherence 14
E. Context Sensitivity 16
1. Local Context Sensitivity 16
2. Global Context Sensitivity 18
Conclusion 19

The UN Convention on the Rights of the Child ('CRC', 'the Convention') was adopted by the UN General Assembly on 20 November 1989 and came into force on 2 September 1990. It remains the most widely ratified human rights treaty and provides an extraordinary catalogue of rights for children. Its impact has been extensive. Its influence can be seen in the content of national constitutions,[1] judicial decision-making,[2] the work of international and national institutions,[3] law reform,[4] policy development,[5]

[1] See eg John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 South African Journal on Human Rights 86.

[2] See eg: John Tobin, 'Judging the Judges: Are Judges Adopting the Rights Approach in Matters Involving Children' (2009) 33 Melbourne University Law Review 579; Helen Stalford, Katherine Hollingsworth, and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice.* (Hart 2017).

[3] See eg Philip Alston, John Tobin, and Mac Darrow, *Laying the Foundations for Children's Rights* (UNICEF Innocenti Insight 2005).

[4] See eg Laura Lundy, Ursula Kilkelly, Bronagh Byrne, and Jason Kang, *The UN Convention on the Rights of the Child: A Study of the Legal Implementation in 12 Countries* (UNICEF United Kingdom 2012);

[5] See eg: Council of Europe—Children's Rights https://www.coe.int/en/web/children (accessed 15 May 2018); Helen Stalford and E Drywood, 'Using the CRC to Inform EU Law and Policy-Making' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate 2011); Ursula Kilkelly, 'Using the Convention on the Rights of the Child in Law and Policy? Two Ways to Improve Compliance' in Invernizzi and Williams.

advocacy efforts,[6] service delivery, and research concerning children across a multitude of disciplines.[7] Whether it be in a resolution of the Security Council or on the wall of a maternal health clinic, the Convention has been found to be deserving of a place of significance in a remarkably vast range of matters concerning children at the local, national, regional, and international level.

This is to not to suggest that the Convention is without its detractors, has necessarily transformed the lives of all children, or is necessarily known to every individual who works with/or on matters concerning children. It is after all an international human rights treaty and like its normative siblings, it harbours progressive ambitions in areas ranging from health and education to juvenile justice and child protection, the realization of which will be gradual and time consuming. That said, it has already contributed to 'a qualitative transformation' in the status of children as the holders of rights[8]—an idea that must now surely be taken seriously.[9] It also continues to bear its imprint on matters concerning children and provides the foundation for discussions about children's rights.

These discussions can take all manner of directions—philosophical (should children have rights?);[10] strategic (what is the best way to persuade others to recognize children's rights?);[11] practical (how should we implement children's rights);[12] and legal (what is the meaning of the rights for children under the Convention?). It is this last discussion that is the focus of this Commentary. Although the interpretation of human rights treaties has attracted significant attention, this is never an easy task and the Convention provides no exception. It contains no definitions section and many of its terms are expressed in

[6] See eg CRIN (Children's Rights International Network) https://www.crin.org (accessed 18 May 2018); Jude Fernando, 'Children's Rights: Beyond the Impasse' (2001) 575 Annals of American Academy of Political and Social Science 8, 10 (noting that advocacy for international children's rights is 'one of the most powerful movements of the twentieth century').

[7] See eg: the scholarship published in the International Journal of Children's Rights; Martin Ruck, Michele Peterson-Badali, and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2017); Wouter Vandenhole, Ellen Desmet, Didier Reynaert, and Sara Lembrechts (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) Part 1; Didier Reynaert et al, 'A Review of Children's Rights Literature since the adoption of the United Nations Convention on the Rights of the Child' (2009)16 Childhood 518; Ann Quennerstedt, 'Children's Rights Research Moving into the Future—Challenges on the Way Forward' (2013) 21 International Journal of Children's Rights 233; Laura Lundy and Laura McEvoy, 'Children's Rights and Research Processes: Assisting Children to (in)Formed Views' (2011) 19 Childhood 129; Laura Lundy, Laura McEvoy, and Bronagh Byrne, 'Working with Children as Co-researchers: An Approach Informed by the United Nations Conventions on the Rights of the Child' (2011) 22 Early Education and Development 714.

[8] Alston, Tobin, And Darrow (n 3) ix.

[9] See Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 International Journal of Children's Rights 5.

[10] See eg: John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395; David Archard, *Children, Rights and Childhood* (Routledge London 2004); John Eekelaar, 'The importance of thinking that children have rights' (1992) 6 International Journal of Family Law 221; Didier Reynaert et al, 'Between 'Believers' and 'Opponents': Critical Discussions on Children's Rights' (2012) 20 International Journal of Children's Rights 155; Rosalind Dixon and Marta Nussbaum, 'Children's Rights and a Capabilities Approach: The Question of Special Priority*'* (2012) 97 Cornell Law Review 553.

[11] See eg: John Tobin, 'Understanding a Rights Based Approach for Children: Conceptual Foundations and Strategic Considerations' in Invernizzi. and Williams (n 5) 61.

[12] See eg: Plan International, *Promoting child rights to end child poverty: Achieving lasting change through Child-Centred Community Development* (Plan International 2010); Save the Children Sweden, *Child Rights Programming: How to Apply Rights-Based Approaches to Programming* (Save the Children Sweden 2005) 9; UNICEF, *The State of the World's Children 2014: Every Child Counts: Revealing Disparities, Advancing Children's Rights 2014* (January 2014); UNICEF *Global Evaluation of the Application of Human Rights Based Programming to UNICEF Programming* (UNICEF 2012).

broad and ambiguous terms. Thus, the aim of the chapter is threefold. First, it offers a brief history of the Convention; second, it outlines the scope of the commentary; and third, it details an interpretative methodology to guide the interpretation of the articles in the Convention.

The central argument is that the broad formulation of the rights under the Convention invites a lively and dynamic discussion about the meaning of these rights. Such discussions are to be encouraged and can be seen in the debates generated by the work of the Committee on Rights of the Child ('CRC Committee', 'the Committee') in its discussion days, the process for the drafting of its general comments and the responses to its concluding observations. That said, there is still a need to remain conscious that the ambiguity of the Convention's provisions provides a constant opportunity to align the meaning of these provisions with the values and preferences of the individual interpreter. Such 'result driven jurisprudence'[13] may well be persuasive among those who share similar expectations with respect to the meaning of the Convention, but its influence is unlikely to extend much further.

Thus, it is suggested that when interpreting the Convention, consideration should be given to adopting an approach that is likely to produce the most persuasive meaning.[14] *Within the context of international law*, as a minimum this requires an application of the accepted conventions regarding the interpretation of international human rights treaties especially the general rule of interpretation as set out in article 31 of the Vienna Convention on the Law of Treaties.[15] It is further suggested, however, that an application of the general rule will not produce *the* meaning for each article under the Convention. As such, the persuasiveness of a meaning being offered for any article under the Convention will be enhanced if it is not only principled, but also practical, coherent and context sensitive.

I. The Adoption of the Convention

A. The 1924 Declaration on the Rights of the Child

The Convention is not the first international instrument to deal with children's rights.[16] On 26 September 1924 the Fifth Assembly of the League of Nations adopted the *Declaration on the Rights of the Child*, also known as the 'Geneva Declaration'. This instrument was largely based on a draft prepared by Eglantyne Jebb, the founder of Save the Children UK, who in the aftermath of the experiences of children during World War I saw a need to consolidate international efforts to protect children from harm.[17] Its

[13] Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 International Journal of Constitutional Law 2, 6.

[14] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 201.

[15] Vienna Convention on the Law of Treaties ('VCLT') (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[16] See: Alston, Tobin, And Darrow (n 3) 3–8 (outlining the stages in the development of international efforts to protect children and their rights); Zoe Moody, 'Transnational Treaties on Children's Rights: Norm Building and Circulation in the Twentieth Century' (2014) 50 Paedagogica Historica 151, 152 (examining the history of children's rights at the international level and arguing that the 'an interdisciplinary approach is required to take into account the multiple facets of children's rights, which cannot be solely considered as a legal concept, an educational evolution or a social construction').

[17] Alston, Tobin, And Darrow (n 3) 4. See also Clare Mulley, *The Woman Who Saved Children: A Biography of Eglanytne Jebb: Founder of Save the Children* (Oneworld Publications England 2009). The other great figure

provisions reflect a welfare approach with an emphasis on the provision of assistance to children in need. For example, article 1 requires that 'the child must be given the means requisite for its normal development' and article 2 provides that 'the child who 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 waif must be sheltered and succoured'. Indeed, the Geneva Declaration contains no provisions that could be considered civil and political rights and children were merely to be seen but not heard under this instrument. Despite this welfarist orientation, according to the historian of the UN Children's Fund ('UNICEF') the adoption of the Declaration marked 'the formal establishment of an international movement for children's rights'.[18] Although this claim remains open to question, 'the Declaration provided the inspiration for much that was to follow'[19] in terms of international efforts to protect children.

B. The 1959 Declaration on the Rights of the Child

The period following World War II represented a watershed in the development of international human rights law, first with the adoption of the Universal Declaration of Human Rights and then the International Covenants. Children are certainly mentioned in these instruments— again largely through a welfare lens with an emphasis on the obligation of states to provide children with special care and protection.[20] However, the most significant milestone for children's rights during this post-war period came with the adoption by the UN General Assembly of the Declaration on the Rights of the Child on 20 November 1959.[21] This instrument, which traces its origins to debates within the Social Commission of the Economic and Social Council ('ECOSOC') from as early as 1946,[22] was intended to build on the Geneva Declaration. In 1947 the Social Commission recommended that 'even though great weight should be given to the Geneva Declaration', the proposed Charter should nevertheless include additional principles which 'would transform the document into a United Nations Charter of the Rights of the Child embodying the main features of the newer conception of child welfare'.[23]

Although the adoption of the 1959 Declaration was considered to be ground breaking in several respects,[24] its greatest significance lay in the fact that it 'gave a broad imprimatur to the concept of children's rights per se'.[25] That said, it still failed to include any traditional civil and political rights for children beyond protection against non-discrimination and it maintained a focus on welfare concerns with an emphasis on the protection rather than the empowerment of children.[26] As a consequence, there remained a reluctance for major international agencies working with children to move beyond a welfare approach.[27]

in the history of children's rights is Janusz Korczak, the Polish paediatrician who became a champion for children's rights and courageously choose to accompany orphaned children in his care to the gas chambers in Treblinka during the second world war: Martha Ignaszewski et al, 'Dr Janusz Korszak and his legacy' (2013) 55 BC Medical Journal 108.

[18] Maggie Black, *The Children and the Nations: The Story of UNICEF* (UNICEF Sydney 1986) 199.

[19] Alston, Tobin, And Darrow (n 3) 4.

[20] See International Covenant on Civil and Political Rights ('ICCPR') art 24(1); International Covenant on Economic Social and Cultural Rights ('ICESCR') art 10.

[21] United Nations General Assembly ('UNGA') Resolution 1386 (XIV) of 20 November 1959.

[22] Alston, Tobin, And Darrow (n 3) 5; Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007) ('*Legislative History*') 4–25 (detailing the drafting history and debates concerning the adoption of the 1959 Declaration).

[23] *Legislative History* (n 22) 4. [24] ibid 4. [25] ibid 4. [26] ibid 4. [27] ibid 6.

There was also a degree of institutional scepticism about the value of the 1959 Declaration. This is reflected in the comments of the Director of the UN's Division on Human Rights at the time who wrote that he 'had some reservations about the wisdom of adopting such a declaration … I also thought there was something wrong with our priorities. It was easier to draft a declaration on the rights of children than to devise practical measures for the protection of human rights'.[28]

C. The 1989 Convention on the Rights of the Child

Leaping forward another two decades, 1979 was proclaimed by the UN General Assembly as the International Year of the Child in recognition of the twentieth anniversary of the adoption of the 1959 Declaration.[29] In preparation for this event, in 1978 the Polish government submitted a draft Convention on the Rights of the Child to the UN Commission on Human Rights.[30] The Commission on Human Rights agreed to establish an open-ended working group to discuss the idea of a convention for children.[31] There was an expectation that the Polish draft, which was largely based on the 1959 Declaration, would be readily accepted by states.[32] Indeed a resolution from UN General Assembly requested the Commission on Human Rights 'to organize its work on the draft on the convention on the rights of the child … so that the draft of the convention may be ready for adoption if possible during the International Year of the Child'.[33] History shows, however, that this expectation was never met and the drafting process endured ten long years of negotiation and compromise before the Convention was finally adopted by the Working Group in 1989.[34]

In his account of the drafting process, Adam Lopatka, the Chairman/Rapporteur of the Working Group, has explained that a range of challenges frustrated this process: the tension between the USA and former Soviet Union; tactics of obstruction from some countries; and the submission of a large number of proposals; which all consumed considerable drafting time.[35] Nigel Cantwell, the coordinator and spokesperson for the Non-Governmental Organization ('NGO') Ad Hoc Group involved in the drafting of the Convention has also explained that the response to the original proposal 'was hardly a wave of unbounded enthusiasm'.[36] Some states complained that the 'wording of the draft was unsuitable for a treaty and overlooked many rights that needed to be incorporated'.[37] There was also a reluctance on the part of NGOs to embrace the idea of the Convention.[38] Indeed UNICEF, which now champions the Convention, was initially sceptical of the utility of an international instrument dealing with children's

[28] John Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers Dobbs Ferry 1984) 255–56.

[29] UNGA Resolution 31/169 on an International Year of the Child adopted on 21 December 1976.

[30] See *Legislative History* (n 22) 32–34. [31] ibid.

[32] Adam Lopatka, 'Introduction' in *Legislative History* (n 22) xxxviii.

[33] UNGA Resolution 33/166 on the 'Question of a Convention on the Rights of the Child' adopted on 20 December 1978 without a vote; *Legislative History* (n 22) 49.

[34] See Lopatka (n 32) for a summary of the drafting process. For a full account of the drafting history see *Legislative History* (n 22) Part 2.

[35] Lopatka (n 32) xxxviii.

[36] Nigel Cantwell, 'Word that Speak Volumes: A Short History of the drafting of the CRC' in Jane Connors, Jean Zermatten, and Anastasia Panayotidis (eds), *18 Candles: The Convention on the Rights of the Child Reaches Majority* (Institut international des droits de l'enfant Switzerland, 2007) 21, 21.

[37] ibid. [38] Lopatka (n 32) xxxviii; Cantwell (n 36) 21.

rights.[39] This attitude shifted part way through the drafting process when its Executive Director, James Grant, recognized that the Convention would be so important and influential that UNICEF had to be actively involved in the drafting process.[40] He subsequently committed UNICEF both physically and financially to resolving the draft of the Convention before 1989, the thirtieth anniversary of the 1959 Declaration.[41] Other international organizations such as the International Labour Organization ('ILO'), the United Nations Educational, Scientific and Cultural Organization ('UNESCO') and the International Committee of the Red Cross ('ICRC') also became more actively involved in contributing to the drafting process as did NGOs under the umbrella of the NGO Group.[42]

The input of these non-state actors although uncoordinated and unproductive in the early years of drafting,[43] 'had unprecedented impact' on the final text of the Convention.[44] Ultimately, however, as is the case with any international treaty, it was the states involved in the Working Group that resolved and adopted the actual text of the Convention. Significantly, the Working Group adopted all provisions on the basis of consensus, which meant that any state effectively had the capacity to veto a proposal.[45] Unsurprisingly there were issues on which states disagreed vehemently—the definition of childhood being one of the most contentious[46]—and another being the minimum age for recruitment and participation in armed conflict.[47] However, given that any state had the capacity to effectively derail agreement on any provision, it is remarkable that consensus was actually achieved to enable the Working Group to adopt a draft Convention even after ten years.

The compromises required to arrive at this point were not without consequences and concern was expressed that the 'standards set in some articles in the draft convention were too low'.[48] The counterpoint made at the time, however, was that this was necessary to enable 'States with limited resources to ratify the Convention'.[49] Moreover, the inclusion of article 41 serves as a safeguard by providing that '[n]othing 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 … the law of a State party … or … International law in force for that State'. As such the Convention, although ambitious in its aspirations for children, actually represents the minimum standards agreed to by states with respect to the treatment of children within their jurisdiction.

On 20 November 1989 the UN General Assembly adopted the Convention and opened it for signature. Under article 49, twenty ratifications were required before the Convention could enter into force. This was achieved in a staggeringly short period of time largely due to the concerted effort of James Grant, the Executive Director of UNICEF, who lobbied every state in the world to ratify the Convention.[50] The result

[39] Lopatka (n 32) xxxviii; Cantwell (n 36) 21. [40] Lopatka (n 32) xxxix. [41] ibid.

[42] ibid.

[43] Cantwell (n 36) 23–24 (explaining that in 1983 a group of NGOs decided to set up the NGO Ad Hoc Group for the Convention which allowed NGOs to prepare coherent proposals and allocate designated spokespersons on specific themes).

[44] ibid 29. See also Cynthia Price Cohen, 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' (1990) 12 Human Rights Quarterly 137.

[45] Lopatka (n 32) xxxix. [46] ibid xli. [47] Cantwell (n 36) 25. [48] ibid.

[49] ibid.

[50] Jimmy Carter, 'Foreword' in Richard Jolly (ed), *Jim Grant: UNICEF Visionary* (UNICEF Innocenti Florence) 11, 16.

was that the Convention came into force on 2 September 1990 and has for many years has enjoyed almost universal ratification. Indeed, the only state still not a party to the Convention remains the United States of America which signed the Convention on 16 February 1995 but has refused to ratify it.[51]

II. The Scope and Structure of the Commentary

A. A Focus on Substantive Rights

This Commentary aims to provide an analysis of the meaning of articles 1 to 40 of the Convention and its first two optional protocols, the Optional Protocol on the Involvement of Children and Armed Conflict[52] and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.[53] It does not attempt to offer any commentary on the preamble and articles 41 to 54 of the Convention or the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.[54] This is not to suggest that the preamble, these additional articles, and the third Optional Protocol are not deserving of analysis. The decision to exclude these parts of the Convention and the third Optional Protocol was influenced by a number of considerations.

The first and most pressing was logistical. This project has already taken eighteen years and if it were to examine every provision of the Convention and every Optional Protocol it is unlikely to have ever been completed. Thus, hard decisions had to be made. The preamble was excluded on the grounds that it is non-binding and there is very little practice that could shed light on its meaning. Articles 41–54 were omitted from the scope of this commentary on the basis that with the exception of article 41,[55] they generally concern procedural arrangements and do not contain any substantive rights for children. For the same reason, the third Optional Protocol has also been excluded from the Commentary. These omissions mean that the Commentary does not offer a comprehensive analysis of the entire Convention and *all* its Protocols. That said, these omissions could still become the subject of an additional volume to the complement this commentary at some time in the future. Moreover, in the interim there are other commentaries and scholarship that

[51] See United Nations Treaty Series https://treaties.un.org/Pages/ViewDetails.aspx?src= TREATY&mtdsg_no=IV-11&chapter=4&clang=_en accessed 15 May 2018 (providing the dates on which states signed, ratified, and acceded to the Convention and details regarding state declarations and reservations); Howard Davidson, 'Does the UN Convention on the Rights of the Child Make a Difference?' (2014) 22 Michigan State International Law Review 497 (discussing the considerable involvement of the United States in drafting the Convention, its reluctance to ratify the Convention, and the attendant consequences).

[52] Adopted by UNGA Resolution A/RES/54/263 of 25 May 2000; entry into force 12 February 2002.

[53] Adopted by UNGA Resolution A/RES/54/263 of 25 May 2000; entry into force 18 January 2002.

[54] Adopted by the Human Rights Council 14 July 2011 A/HRC/RES/17/18.

[55] CRC art 41 actually falls within Part I of the Convention and is clearly more than a procedural provision. It is what is typically referred to as a savings clause and provides that nothing in the 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'. See generally Deborah Russo, 'Addressing the Relation between Treaties by Means of 'Savings' Clauses' in (2015) 85 *British Yearbook of International Law* 133.

offer guidance with respect to those articles under the Convention that are omitted from this commentary[56] and the third Optional Protocol.[57]

B. The Structure of the Commentary

Although a number of scholars have contributed chapters to this Commentary, considerable effort has been made to ensure a degree of coherence in the approach to the many and varied provisions under the Convention. This necessarily involved a greater degree of interaction with contributors than is commonly the case. Differences in both style and substance inevitably arise in a project of this size. However, it is hoped that the process adopted has led to the production of a reasonably coherent body of work. To assist in achieving this end, each chapter is dedicated to an article under the Convention and consists of four parts: an introduction; an analysis of the article; an evaluation of the article; and a select bibliography.

The introduction seeks to offer some general observations in relation to the right under discussion. It offers, for example, a discussion of the historical status of the right, its contemporary significance, and its underlying values. Where appropriate, the introduction includes a brief discussion of the article's relationship with other provisions of the CRC *and* other international human rights instruments. The introduction also identifies the key issues for interpretation that arise under the article and will generally offer a summary with respect to the resolution of these issues.

The second part of each chapter provides the commentary for each right. It is designed to offer an in-depth analysis of the text of each article. The structure of this analysis will depend on the structure of the article itself. Generally speaking however, each chapter offers a discussion as to the scope of the right in question and the nature of the obligation imposed on states with respect to that right. The methodology used to generate this commentary is discussed below. Importantly, the goal of the commentary is not to 'resolve' every issue that might arise under each article or focus on a range of diffuse case studies. Instead the aim is to identify the fundamental principles that should guide and inform the understanding of each right so that these principles and this understanding can be applied by those who read the commentary to a range of diverse case studies in practice.

The evaluation section for each chapter provides an opportunity to draw together some of the observations made during the analysis relating to the article's strengths, weaknesses, unresolved issues, and future development. Finally, the select bibliography is designed to

[56] See eg: Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007); Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 1999); Mieke Verheyde and Geert Goedertier, 'A Commentary on the United Nations Convention on the Rights of the Child, Articles 43–45: The UN Committee on the Rights of the Child' in André Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans, and Mieke Verheyde (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 2006).

[57] See eg: Trevor Buck and Michael Wabwile, 'The Potential and Promise of Communications Procedure under the Third Optional Protocol to the Convention on the Rights of the Child' (2013) 2 International Human Rights Law Review 205; Rhona Smith, 'The Third Optional Protocol to the UN Convention on the Rights of the Child?—Challenges Arising Transforming the Rhetoric into Reality' (2013) 21 International Journal of Children's Rights 305. See also: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 819–909; Martha Freeman et al, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 608–79 (each providing a commentary on several provisions under the first optional protocol to the ICCPR and CEDAW which are similar to those found in the 3rd optional protocol to the Convention).

identify the key scholarly works (primarily but not exclusively any leading monographs and journal articles) relevant to the article.

A detailed account of the drafting history is not included as a separate section in each chapter. This decision was made for three reasons. The first was to keep the overall length of the Commentary within manageable limits. The second was that it was considered to be more useful and appropriate to incorporate the noteworthy aspects of the drafting history into the main body of the textural analysis consistent with article 32 of the Vienna Convention on the Law of Treaties.[58] The final reason is that in 2007 the Office of the High Commissioner in collaboration with Save the Children produced a detailed account of the drafting history of the Convention which is readily available on line.[59] As such, the inclusion of a separate section on the drafting history for each article in the commentary would have served a limited function.

III. A Methodology for Interpreting the Convention

A. Methodology Matters

Too often engagement with the Convention is unaccompanied by any explanation as to the methodology being employed to generate the meaning of its provisions. Even the CRC Committee rarely outlines the principles and methodology it employs to generate its general comments or concluding observations.[60] It is also common for advocates, policy makers, service providers, professionals, and even academics to read the Convention through the prism of their own subjective values and agendas to generate meanings that accord with these same preferences and agendas. It is easy to do given the malleability of the text of the Convention. This malleability may well be one of the strengths of the Convention as it allows for interpretations that can accommodate the changing needs and circumstances of children and address matters that may not have been anticipated at the time of drafting.[61] However, the Convention's malleability is also accompanied by a risk that in the absence of any agreed constraints on the interpretative process, its provisions can be readily stretched to accommodate broad and competing agendas. This creates a real risk of divergence and disagreement with respect to the meaning of the Convention.

[58] Vienna Convention on the Law of Treaties art 32:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

[59] *Legislative History* (n 22) available on line at: https://resourcecentre.savethechildren.net/library/legislative-history-convention-rights-child-volume-1. See also: http://legal.un.org/avl/ha/crc/crc.html (providing links to the original preparatory documents relating to the drafting of the Convention).

[60] Kerstin Mechlem 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905 (arguing that the work of the human rights treaty bodies often suffers from methodological weaknesses and a lack of coherence and analytical rigor, which compromise the legitimacy of their work).

[61] Laura Lundy and Ursula Kilkelly, 'Children's Rights in Action: Using the UN Convention on the Rights of the Child as an Auditing Tool' (2006) 18 Child and Family Law Quarterly 331 (arguing that the malleability of the Convention addresses the concerns of those who fear that the Convention will age with time); Tobin, *Justifying Children's Rights* (n 10) 40 (arguing that the malleability of the Convention is one of its greatest strengths and offers the potential for a dynamic and inclusive evolution of children's rights in which children must play an active role, consistent with their evolving capacities).

To an extent, a level of disagreement is inevitable given the indeterminacy of language. Indeed, it is unrealistic to expect that agreement will always be reached with respect to *the meaning* of every aspect of every article under the Convention. That said, radical indeterminacy—a label often directed at terms such as the 'best interests of the child'—leaves us with nothing. Thus, the challenge is to persuade others beyond the converted to accept *a meaning* for each article under the Convention from among a suite of potential meanings. In order to meet this challenge, there is a need to adopt a methodology for the interpretation of the myriad of terms and phrases within the Convention that will be rigorous and persuasive. There is also a need to be transparent with respect to the process being used to generate *a* meaning for each article so that others can both understand and critique the suitability of this process and the veracity of the meaning it produces for the articles under the Convention.

What then is the most persuasive method for the interpretation of the Convention? My argument is that it must consist of four qualities—it must be principled, practical, coherent, and context sensitive. It is to the meaning of each of these considerations that I now turn.

B. A Principled Interpretation

1. The General Rule

Under international law, the default position when seeking to bring legitimacy to the interpretation of an international treaty is the general rule of interpretation under article 31(1) of the Vienna Convention on the Law of Treaties ('VCLT').[62] This provision states that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms ... in their context and in light of its object and purpose.

For good measure the provisions of the VCLT also allow recourse to subsequent practice among states, other relevant rules, and the *travaux préparatoires* of a treaty as additional tools by which to resolve the interpretative dilemma.[63] Thus there is an expectation that for the interpretation of the provisions of the Convention to be persuasive it must, as a minimum, engage with, and apply, the general rule of treaty interpretation under the VCLT and consider, where appropriate, the *travaux préparatoires* for the Convention.[64]

Although necessary, such an approach is insufficient given that it has been widely acknowledged, even at the time of its adoption, that the inherent elasticity associated with an application of the general rule under the VCLT is incapable of producing *the* determinate meaning of a treaty.[65] First, there is the issue of which interpretative approach

[62] See eg: Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 5; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) xxvi–xxvii; Marsha Freeman, Christine Freeman, and Beate Rudolf (eds), *The UN Convention on the Elimination of Discrimination Against Women: A Commentary* (OUP 2012) 13; James Hathaway, *The Rights of Refugees Under International Law* 48–73 (CUP 2005); Matthew Craven, *The International Covenant on Economic Social and Cultural Rights: A Perspective on its Development* 7–8 (OUP 1995).

[63] VCLT arts 31(2)–(3), 32, 23.

[64] Gardiner (n 62) 5.

[65] Joseph Weiler, 'Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century' (Feb. 14 2008) (unpublished manuscript, International Legal Theory Colloquium, Institute for International Law and Justice, New York University School of Law) 5–6; Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26(1) European Journal of International Law 169; Gardiner (n 62) 5.

takes precedence—the textual, contextual, teleological, or historical? Second, the textual approach assumes an understanding as to the 'ordinary meaning' of a term in an international treaty which will invariably be contentious. Consider for example terms under the Convention such as 'a child's best interests'; the obligation to give 'due weight' to a child's views; a child's right to the 'highest attainable standard health'—the ordinary meaning of these terms is far from readily apparent.

It is true that the limitations of a formal textual approach are recognized by the inclusion of a requirement to consider the broader 'context'—an acknowledgement that the ordinary meaning of a word cannot be ascribed in isolation.[66] But the inclusion of a requirement to consider context raises a question as to how widely 'context' is to be understood.[67] To a certain extent the 'objects and purpose' of a treaty will assist in the resolution of this dilemma by contributing to an understanding of the 'context'. But the teleological approach is not without its own problems. First is the question of priority: 'what significance is to be attached to them [*the object and purpose*] in comparison with other factors? And secondly what is the method of ascertaining them'.[68]

The preamble of a treaty may assist with respect to this second question.[69] But an examination of the preamble of any international human rights treaty will generally yield an answer which is expressed at such a high level of abstraction that is unlikely to narrow the interpretative inquiry. The preamble to the Convention is no different in this respect. It is clear that childhood is entitled to special care and assistance but views will differ as to what care and assistance means. The use of a smack to discipline a child may be considered appropriate guidance and care by one parent but a form of abuse by another. It is also clear from the preamble that the family, as the fundamental group of society, is deserving of special protection. But what is the definition of a family? Some might insist on an opposite sex couple who have children conceived in wedlock whereas other will embrace a same-sex relationship in which the partners care for children conceived via a surrogate or assisted reproductive technology.

There still remains the possibility to make recourse to the drafting history of the Convention to resolve any interpretative dilemmas. However, most commentators have recognized the limits of the drafting history as a means of resolving interpretative disputes.[70] This is not to say that the drafting history is irrelevant. However, its significance and role should not be overstated. Thus, while the directives under the VCLT must inform and constrain the interpretation of the Convention, they will not produce its meaning. Other considerations will necessarily come into play when advancing an interpretation of its provisions.

[66] See *Land Island and Maritime Frontier Dispute* (*El Sal v Hond*) 1992 ICJ 351, at 719 (separate Opinion of Judge Bernandez).

[67] Francis Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference' (1969) 18 International and Comparative Law Quarterly 318, 334.

[68] ibid 337. See also: Myres McDougal, 'The International Law Commission's Draft Articles Upon Interpretation: Textuality *Redivivus*' (1967) 61 American Journal of International Law 992, 993, ('Lest it be thought that the references to "context" and to "object and purpose" are intended to remedy the blindness and arbitrariness of "ordinary meaning", context is immediately defined as including mere text').

[69] *Case Concerning Rights of Nationals of the United States of America in Morocco* (*Fr v US*) 1952 ICJ. 176, 196 ('the purposes and objects of this Convention were stated in its Preamble'); *Asylum Case* (*Colom v Peru*) 1950 ICJ 266, 282.

[70] See Tobin, *Seeking to Persuade* (n 14) 223–24.

2. Special Rules for Human Rights Treaties

There is a widespread, albeit contested, view that human rights treaties, as a form of special regime, warrant a special interpretative methodology.[71] These special principles have been largely developed by the European Court of Human Rights,[72] which has held that an interpretation of the rights under the European Convention on Human Rights and Fundamental Freedoms must be one which:

- 'is most appropriate in order to realize the aim and achieve the objective of the treaty *not that which would restrict to the greatest possible degree the obligations undertaken by States* (emphasis added)';[73]
- will 'make its safeguards practical and effective';[74] and
- adopts a dynamic interpretation that responds to evolving standards.[75]

A similar approach has been adopted by the Inter-American Court of Human Rights[76] and to a lesser extent some of the United Nations human rights treaty monitoring committees.[77]

These principles, although contentious, should also be used to inform the interpretation of the Convention. They require a generous interpretation as to the scope of each right[78] and a restrictive approach when interpreting any limitations which can be imposed

[71] Gardiner (n 62) 474–77; Mark Toufayan, 'Human Rights Treaty Interpretation: A Postmodern Account of its Claim to "Speciality"' Center for Human Rights and Global Justice Working Paper Number 3, 2005; J G Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993) chs 4–5 (detailing methods of interpretation and principle of effectiveness); Rudolf Bernhardt, 'Thoughts on the Interpretation of Human Rights Treaties' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension Studies in Honour of Gerard J Wiarda* (1st edn, Heymanns 1988) 65.

[72] See generally: Francis Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in Mireille Delmas-Marty (ed), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* 285; E C J Mosler, 'Problems of Interpretation in the Case Law of the European Convention of Human Rights' in Fritz Kalshoven et al (eds), *Essays on the Development of the International Legal Order in Memory of Haro T van Panhuys* (Sitjhoff & Noordhoff 1980).

[73] See eg *Wemhoff v Germany* 2 ECtHR (ser A) 55, 8 (1968). See also eg *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (Lord Wilberforce: noting that the interpretation of human rights treaties requires a generous interpretation that avoids 'the austerity of tabulated legalism suitable to give individuals the full measure of the fundamental rights and freedoms referred to').

[74] See eg *Loizidou v Turkey* App No 15318/89, 29 Eur HR Rep 99, 72 (1995) (Commission Report).

[75] See eg *Tyrer v United Kingdom* App No 5856/72, 2 Eur HR Rep 1 (ser A) (1978).

[76] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion, 1999 Inter-Am Ct HR (ser A) No 16 (1 October 1999) paras 114–15.

[77] See eg: Human Rights Committee, 'General Comment No 6: The Right to Life' (30 April 1982) UN Doc HRI/GEN/1/Rev.7 paras 4, 5 in which the Human Rights Committee stressed the obligations of states to take 'effective measures to prevent the disappearance of individuals' [and] 'noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures'; *Judge v Canada* Comm No 829/1998, CCPR, 78th sess, (2002) UN Doc CCPR/C/78/D/829/1998 para 10.3 explaining that the ICCPR 'should be interpreted as a living instrument and the rights protected under it should be applied in context and in light of present day conditions'). See also Committee on the Elimination of Discrimination Against Women, 'General Comment No 25 Temporary Special Measures' UN Doc HRI/GEN/1/Rev.7 270, 3, in which the Committee stated that '(t)he Convention is a dynamic instrument'; 'Issues relating to Reservations made Upon Ratification of Accession to the Covenant of the Optional Protocols or in Relation to Declarations under Article 41 of the Covenant' (1994) UN Doc CCPR/21/Rev.1/Add.6.

[78] See eg *Re an application under the Major Crime* (*Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009) (Aust) Warren CJ, para 80 ('human rights should be construed in the broadest possible way').

on a right.[79] However, their application will still not produce a determinate meaning for each provision. Inevitable tensions will arise, for example, regarding the measures required to make the enjoyment of a child's right 'effective'. Debate will also endure regarding how far the principle of dynamic interpretation can be used to extend the scope of a right beyond what was intended by states as reflected in the *travaux préparatoires*.[80] The prospect of these controversies means that there is a need to identify the additional considerations required to generate a persuasive account as to the meaning of the rights under the Convention.

C. A Clear and Practical Interpretation

In light of the high level of abstraction that characterizes the Convention, the interpretative process must be directed at achieving increasing levels of clarity as to the content of a human right. As Maarten Bos has emphasized, the interpretative process must not only be 'an activity … designed to clarify the text of a written manifestation of law, it must also be cognizant of the need to ensure that the interpretation offered is capable of application to the realities of daily life and practice'.[81] Clarity and practicality are therefore essential attributes of an interpretative process that seeks to produce a persuasive interpretation.

The requirement that the interpretation of a right under the Convention must be clear and practical is perhaps so obvious that its identification as a specific element of a persuasive interpretation could be considered unwarranted. Surely every act of interpretation would instinctively be guided by these features? In practice however, reliance on instinct raises the risk that the subjective preferences of an interpreter will be insufficiently attentive to the need to ensure that the interpretation offered is clear and practical. As Vagts has explained, the focus must be on the practical with 'less attention given to finding 'the' right way of interpreting … than on identifying techniques that clarify, that help achieve the target of the drafters and that further a fruitful interaction between the writers and the readers of documents'. [82] The interpretation offered must be 'socially manageable'[83] and 'action guiding'[84] rather than being so ambitious and demanding that implementation becomes impossible even with the best of intentions.

D. Coherence

A persuasive interpretation of the rights under the Convention must also demonstrate coherence both in its reasoning and coherence within the international legal system.[85]

[79] United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1985) UN Doc E/CN.4/1985/4 Annex, A.3.

[80] See eg: Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (OUP 2014); Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2015); Shai Dothan, 'In Defence of Expansive Interpretation in the European Court of Human Rights Part II: Interpretation in International Law Symposium' (2014) 3 Cambridge Journal of International and Comparative Law 508.

[81] M Bos, 'Theory and Practice of Treaty Interpretation' (1980) Netherlands International Law Review 3, 15.

[82] Detlev Vagts, 'Treaty Interpretation and the New American Ways of Law Reading' (2003) 4 European Journal of International Law 472, 473.

[83] James Griffin, *On Human Rights* (OUP 2009) 37–39 (arguing that the criteria for assessing the justification of a human right is whether its obligations are 'socially manageable').

[84] Charles Beitz, *The Idea of Human Rights* (OUP 2009) 163.

[85] Leonor Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice' (2003) 16 Ratio Juris 296, 296.

Although the two are interconnected, as Soriano explains, '[t]heories of coherence in legal reasoning focus on the arguments and on how the given arguments are connected' whereas 'coherence in the legal system focuses on fitting a decision into the legal system and on the fitting together of all components of the legal system'.[86]

1. Coherence in Reasoning

Coherence in reasoning essentially involves the provision of arguments to support premises. The coherence of these arguments is assessed by reference to the connectedness of their underlying reasons—what Soriano calls their 'supportive structures.'[87] Of particular relevance are: the number of supportive relations; the length of the supportive structure; the strength of the support; and the capacity for what is termed 'netting' of reasons.[88] This netting of reasons is actually a common feature of attempts to interpret human rights standards. The body or person interpreting a right will almost invariably enlist the work of a human rights treaty body, a relevant special rapporteur, domestic courts, commentators, and/or other experts to support their interpretation.

The reasons underlying recourse to the interpretative work of other actors are seldom if ever acknowledged. Perhaps this approach is considered so self-evident that no explanation is warranted. However, it remains important to expressly acknowledge why such an approach is necessary, namely, to enhance and defend the coherence and rigour of the interpretation being offered. Moreover, an active awareness as to the reason for 'netting' the views of other actors guards against a tendency to simply import such views into the meaning of the right under interpretation. In the case of the Convention, it demands that careful consideration must be given to critically assessing whether the reasons underlying the views of the CRC Committee are actually convincing and persuasive. Consideration must also be given to the extent to which the interpretative work of other bodies which may have been developed in light of the experiences of adults remains relevant and applicable to children.

The final point to make is that coherence in the reasoning offered to justify an interpretation of a right under the Convention can be further strengthened by the 'netting' of reasons from *non-legal sources*.[89] Where appropriate efforts should be made to draw on the insights from other disciplines such as health, education, and psychology, to support the meaning of a right under the Convention. Indeed, this is a highlight of this Commentary, which seeks to draw insight from a broad and diverse range of disciplines when mapping out the contours of each article. Critically, the existence of a coherence in reasoning that only satisfies the expectations of the legal interpretative community will be of little benefit and utility if it is unable to appeal to those disciplines that actually develop and deliver the policies that impact on the lives of children.

2. System Coherence

At the international level, the International Court of Justice has also held that 'an international instrument has to be interpreted and applied within the framework of the entire

[86] ibid 296–97. [87] ibid 310–20.

[88] ibid 311–19. The idea of netting reasons is used in contrast to the idea of chained reasons. It is preferred because it is considered to better reflect the need to pursue the interconnectedness and reciprocal nature of reasons as opposed to the simple cumulation of independent chains of reasons. ibid 310–11.

[89] ibid 311–19.

legal system prevailing at the time of the interpretation'.[90] Such a position indicates that the interpretation of the rights under the Convention must pursue coherence with the system of international law as a means to enhance its persuasiveness. This pursuit of system coherence must be directed at an interpretative outcome which is considered coherent when examined (a) within the context of the other provisions of the Convention—what I have termed 'internal system coherence' and (b) the entire system of international law—'external system coherence.[91]

Internal system coherence aligns with the requirement under article 31(2) of the VCLT that the context in which a treaty is to be interpreted extends to a consideration of the text of the treaty itself. In practical terms it means, for example, that the best interests principle under article 3 must be interpreted in light of the obligation to hear a child's views under article 12. External system coherence (or 'systemic integration' as it is often described by other commentators) is slightly more complicated given the fragmentation of international law. In relation to this issue there are however some principles outlined in the International Law Commission ('ILC') Fragmentation Study that offer assistance.[92] First, '[i]n international law there is strong presumption against normative conflict'. [93] The application of this presumption supports a preference for harmonization or systemic integration. Such an approach works well in resolving any apparent conflicts that may arise between the provisions of the Convention and other treaties such as the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic Social and Cultural Rights ('ICESCR') which have an object and purpose which is broadly similar. Thus, for example, harmonization offers an appropriate interpretative guideline with respect to the resolution of apparent conflicts between the formulation of for example the right to health under the CRC and ICESCR or the general articles regarding implementation of rights under the CRC and the twin Covenants. Unless there is evidence in the drafting history to suggest that an alternative meaning was intended, the interpretation of similar provisions in different human rights treaties should pursue harmonization.

Harmonization cannot however resolve genuine conflicts between norms under international law.[94] When this occurs with respect to a provision under the Convention two considerations are relevant. First, article 41 of the Convention provides that where a

[90] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* 1971 ICJ 6. See also Campbell McLachlan, 'The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279, 280 (arguing that VCLT art 31(3)(c), which requires that any relevant rules of international law must be taken into account in the interpretative process, 'expresses a more general principle of treaty interpretation, namely that of systemic integration within the international legal system').

[91] This concept of external system coherence seeks to accommodate and exceed the requirement under VCLT art 31(3)(c) that the application of the general rule under art 31(1) take into account any relevant rules of international law applicable in the relations between the parties. The requirement of external system coherence requires a consideration of not just these rules but the entire system of international law especially the provisions of other human rights treaties but also other multilateral treaties and regimes within international law.

[92] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'—Report of the Study Group of the International Law Commission (13 April 2006) UN Doc A/CN.4/L.682 ('ILC Fragmentation Report'). See also: Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to Be Learned from the Case Law of the European Court of Human Rights' (2015) 28(4) Leiden Journal of International Law 863; Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) International & Comparative Law Quarterly 557.

[93] ILC Fragmentation Report (n 92) para 37.

[94] ibid para 42.

higher standard exists, this standard must prevail. Conversely, if the Convention offers the higher standard relative to another international standard, the standard under the Convention must prevail.

The second consideration involves the principle of *lex specialis*, (that special law derogates from general law) which is the 'accepted maxim of legal interpretation and technique for the resolution of normative conflicts'.[95] With respect to its impact on the interpretation of a right under the Convention, it demands that where there is a *special rule* that is relevant to the potential scope of that right under another instrument, that special rule should inform the interpretation of the right under the Convention.[96] The principle of *lex specialis* can thus be used to perform a type of harmonization function. However, such a technique also indicates that there are limits with respect to the extent to which the interpretative process can expand the meaning and content of a right under the Convention. This is because the coherence of the international legal system will be undermined if the interpretative process seeks to extend the boundaries of a right under the Convention beyond another special rule with a more precisely delimited scope of application.[97] Care must therefore be taken to maintain the distinction between *lex lata* and *lex ferenda* when interpreting the Convention—the law as it is and the law as it might be.[98]

E. Context Sensitivity

It is now widely accepted that, rather than being natural and immutable, the content of international law is always contextualized.[99] As Justice Higgins, former President of the International Court of Justice, explains, 'A refusal to acknowledge political and social factors cannot keep law "neutral", for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics.'[100] For Justice Higgins it follows that, 'the assessment of so-called extra-legal considerations is part of the legal process'.[101] What these considerations are and the extent to which they should inform the interpretative process remains a matter for debate. As a minimum, however, it is suggested the interpretation of the Convention must demonstrate sensitivity to context in at least two respects – the local and the global.

1. Local Context Sensitivity

The role, meaning, and place of culture within the interpretation of human rights remains contentious. It is clear that rights discourse can be used in a hegemonic way to displace, devalue, and colonise all other competing agendas.[102] It is also clear, as Philip Alston has explained, '[j]ust as culture is not a factor which must be excluded from the human rights

[95] ibid para 56.

[96] ibid para 60 ('lex specialis may also seem useful as it may provide better access to what the parties have willed').

[97] ibid para 57.

[98] Rosalyn Higgins, *Problems and Process: International Law and How We Use It?* (Clarendon Press 1994) 10.

[99] See eg: Bruno Simma and A Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' in Stephen Ratner and Anne Marie Slaughter, *The Methods of International Law Studies* (Studies in Transnational Legal Policy No 38 ASIL 2004) 23, 29; Siegfried Wiessner and Andrew Willard, 'Policy Orientated Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' in Ratner and Slaughter (ibid) 47, 48.

[100] Higgins (n 98) 5. [101] ibid.

[102] See eg David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2001) 14 Harvard Human Rights Journal 101.

equation so too must it not be accorded the status of a meta-norm which trumps human rights'.[103] What remains unclear however is where to draw the line. The principle of local context sensitivity represents an attempt to allow the social, cultural, and political values of a state to play a role in developing an understanding of the meaning of the rights under the Convention.

The means by which to demonstrate local context sensitivity when interpreting the Convention is assisted by an examination of the margin of appreciation doctrine developed under the European Convention on Human Rights.[104] The principle, which is not expressly provided for within international human rights treaties and has been the subject of significant criticism, was developed by the European Court in an attempt to allow states a margin of discretion in the measures required to comply with their obligations under the European Convention in light of the particular circumstances within the State Party. Although the initial application of the principle was largely confined to the context of assessing the reasonableness of limitations imposed upon rights by a state, it is now also used to inform determinations as to the scope of a right.[105]

The rationale underlying the justification for the doctrine is the perceived need to accommodate cultural diversity within the States Parties to the Convention.[106] After undertaking a careful analysis of the case law of the Court, Arai-Takahashi concluded that '[t]he doctrine's only defensible rationale … is to enable the Strasbourg Court to provide endorsement of the maintenance of cultural diversity, ensuring to the citizens of Europe the means to articulate and practice their preferred values within a multicultural democracy'.[107] Such an observation is significant in the context of any attempt to articulate an interpretative approach to the Convention that remains sensitive to the socio-political context within a state. Despite the fact that the margin of appreciation has its dissenters,[108] it remains a necessary interpretative technique.[109]

[103] Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (OUP 1994) 20.

[104] ibid (also advocating this approach). See also Matthew Craven, *The International Covenant on Economic Social and Cultural Rights: A Perspective on its Development* (OUP 1995) 115–16 (advocating this position with respect to the obligations of states under the ICESCR). The literature with respect to the principle is extensive. However, the work of Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer Law International 1996) provides one of the more comprehensive insights into the operation of this doctrine. See also Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd edn, OUP 2007) 629–34.

[105] See Yourow (n 104) 183.

[106] ibid 195–96; Humphrey Waldock, 'The Effectiveness of the System Set Up by the European Court of Human Rights' (1980) 1 Human Rights Law Journal 1,1 (arguing that the margin of appreciation doctrine was designed to 'reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy').

[107] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 49.

[108] See eg: Timothy Jones, 'The Devaluation of Human Rights under the European Convention' (1995) 6 PL 430; Ronald MacDonald, 'The Margin of Appreciation' in Ronald MacDonald, Franz Matscher, and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 124 (expressing concern that the doctrine obscures the reasons for a court's decisions).

[109] See: Jereon Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights' (1998) 19 Human Rights Law Journal 30; Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 Human Rights Law Journal 1 (detailing those factors which should influence and inform the scope of the margin of appreciation).

As a general rule the scope of a state's margin of discretion will generally be wider when there is less agreement within the relevant interpretative community as to the scope of a particular right. This discretion accorded to states however is not without limits and there will remain an overarching requirement that the understanding of a right must be directed towards the effective realization of the object and purpose of the right in question. In other words, an approach to interpretation that is context-sensitive must also be consistent with the requirement that the interpretation offered is principled.

2. Global Context Sensitivity

An awareness of the context in which the interpretation of a human right takes place also requires an understanding of the tension that marks both the origins and implementation of the Convention. Although the Convention may act as a legal constraint on the exercise of state sovereignty, its implementation is still constrained by the reality of state sovereignty. Unlike domestic law, where a state cannot as a general rule unilaterally disengage from domestic adjudicative processes or dismiss their directives, this is a permanent and accepted feature of the international legal system given its consensual nature. In the absence of effective coercive measures, dialogue and communication are the tools by which the standards under the Convention are to be secured. This means that there is an ever-present risk that states are likely to disengage from and exit any interpretative dialogues (whether they be with the CRC Committee, NGOs, advocates, or other actors) if they perceive that the interpretation being offered is discordant with their expectations as to the scope of the right.

The challenge therefore is to develop an interpretative methodology that is sensitive to this political reality. A restrictive approach to interpretation is unlikely to antagonize states. However, interpretative appeasement creates the risk that the object and purpose of Convention will be subverted in order to avoid antagonizing states. In such circumstances the interpretative act risks becoming, to borrow the words of Koskenniemi, nothing more than an 'apology'.[110] It may be pragmatic but it will not be principled.

Moreover, such an approach, even if it were adopted, would still be unable to address what are termed here as 'effectiveness gaps' in a treaty. These 'gaps' include what Dixon has labelled as 'blind spots' and 'burdens of inertia' to explain deficiencies within the *domestic* legislative process that occur for various reasons and require a judicial response to remedy the subsequent weaknesses in the legislation caused by the existence of such features.[111] These terms can also be appropriated to describe deficiencies within the drafting process of an international treaty like the Convention. 'Blind spots' are taken to refer to those specific issues which were overlooked or unanticipated in the drafting process but which remain essential to the effective operation of the relevant provision and thus require the development of an appropriate interpretative response.

'Burdens of inertia' refer to those matters that may have been discussed during the drafting process but which were not specifically included because factors such as time and political intransigence on the part of some states prevented consensus with respect to an appropriate formulation. In such circumstances a gap may be left within the text of the Convention which unless addressed may undermine its effective implementation. Hence,

[110] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).

[111] Rosalyn Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited' (2007) 5 International Journal of Constitutional Law 391.

the use of the phrase 'effectiveness gaps' to illustrate the areas in which the interpretative exercise will need to develop an appropriate understanding of the Convention with respect to matters unanticipated or unresolved between states but necessary for the effective operation of the Convention.

When responding to such gaps it remains important to heed the warning of Lord McNair that: 'Conditions should only be implied with great circumspection; for if they are implied too readily they would become a serious threat to the sanctity of a treaty'.[112] That said, even McNair was prepared to concede that 'it is reasonable to expect that circumstances should arise … in which it is necessary to imply a condition in order to give effect to this intention'.[113] At the same time, the need to offer an interpretation of the Convention that ensures its rights are real rather than illusory for children does not provide an unfettered license for inflating the terms of a treaty in such a way that the intentions and expectations of states are ignored.

IV. Conclusion

The Convention is a remarkable instrument. Its ambitions are as vast as the scope of its provisions. Very few stones are left unturned. So many of the issues that would be expected to feature in an instrument on children's rights drafted during the 1990s are addressed—juvenile justice, education, adoption, child labour, family violence, and health care.[114] But there is so much more—the role of the media, the responsibilities for parents, a child's right to an identity, and of course the right of the child to be heard in all matters affecting him or her. It is little wonder then that the Convention has attracted so much attention. For anyone seeking to advance or address the interests of children, there are likely to be several provisions of relevance. The precise meaning of these provisions will, however, invariably remain an issue for debate—who is a parent? How are the best interests of a child to be assessed? What is the scope of the right to health? These debates are to be encouraged. But so too is the need for self-reflection and caution. The is a constant need to consider whether and the extent to which personal agendas and values might be clouding the interpretation of the Convention. There is also a need to be strategic and consider the extent to which the interpretation offered has a receptive audience beyond the converted.

Neither this introductory chapter nor the other chapters in this commentary seek to stifle or control debates about how to determine the meaning of the provisions under the Convention. Rigorous and ongoing debates are to be encouraged. Indeed, there is a need to remain mindful of the work of Sally Merry and her ideas about the vernacularization of human rights whereby local actors appropriate and transform international human rights standards in ways that adapt and respond to local cultural considerations.[115] That said, there is also a need to recognize that the process of interpreting the Convention is

[112] Arnold McNair, *The Law of Treaties* (Clarendon Press, 1961) 436. [113] Ibid 436.

[114] See Laura Lundy et al, 'What if Children Had Been Involved in the Drafting the Convention on the Rights of the Child?' in Alison Diduck, Noam Peleg, and Helen Reece (eds), *Law in Society: Reflections on Children, Families, Culture and Philosophy: Essays in Honour of Michael Freeman* (Brill 2015).

[115] Sally Merry, 'Crossing Boundaries: Ethnography in the Twenty-First Century' (2000) 23 Political and Legal Anthropology Review 127, 129. See also: Sally Merry, *The Practice of Human Rights: Tracking Law Between the Global and the Local* (CUP 2007); Didier Reynaert, Ellen Desmet, Sara Lembrechts, and Wouter Vandenhole, 'A Critical Approach to Children's Rights' in Vandenhole et al (n 7) 1, 7 (noting that 'children's rights depending on the context … may be interpreted and realized in a different 'localized' way').

far from simple if the interpretation being offered is to be persuasive. *Within the context of international law*, the general rule of interpretation and the special rules for the interpretation of human rights treaties must guide and constrain the interpretation process. Their application alone however does not produce *the* meaning of the text. Thus, there is a need to provide an account of those additional considerations that should be employed to generate a persuasive meaning for the provisions under the Convention. I have suggested that beyond being principled, any interpretative endeavour must also seek to produce a meaning that is clear and practical, coherent, and context sensitive. Others will take issue with this approach. This is to be welcomed.

Ultimately, the analysis offered in the chapters to this Commentary provides a detailed account as to the meaning of the rights under the Convention. Commentators will no doubt differ with respect to aspects of the interpretations offered and a plurality of voices with a plurality of views is to be encouraged.[116] What is clear however is that there can be no suggestion that the Convention is simply a collection of vague, aspirational, and ambiguous terms. For the policy maker, teacher, doctor, social worker, health professional, academic, judicial officer, and indeed anyone working on matters that affect children, this Commentary hopefully contributes in a substantial way to an understanding of what is required to transform the aspirations of the Convention into reality.

JOHN TOBIN*

[116] It is acknowledged that this commentary focuses on the English version of the Convention and that the contributors to this collection largely come from Western Europe, North America, and Australia. This is largely due to my limited ability to travel which has meant that my contacts in children's rights have been limited to these regions. It is recognized that scholars, advocates, and policy makers from other regions—Africa, the Middle East, Latin America, Asia, and Eastern Europe—already have made and will continue to make a significant contribution to the understanding of the Convention.

* Thanks to Philip Alston and Laura Lundy for their helpful comments on earlier drafts of this chapter. All errors and omissions remain my own.

Article 1. The Definition of a Child

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

I.	**Introduction**	21
	A. A Presumptive, Age-Based Conception of Childhood	21
	B. Key Issues	24
II.	**Analysis of Article 1**	24
	A. The Beginning of Childhood	24
	B. The Status of the Unborn Child: Three Possible Conceptions	25
	C. The End of Childhood	27
	1. A Culturally Sensitive Approach	27
	2. Bright Line Rules and the Misperception of Incoherence	29
	3. The Need to Recognize the Heterogeneity of Childhood	30
	4. The Determination of a Person's Age	31
	D. Justifying the Distinction between Adulthood and Childhood	32
	E. Childhood as an Enduring Concept	33
	F. Understanding Childhood as a Constructed Concept	34
	G. The Modern Conception of Childhood	36
	H. A Single Conception of Childhood?	37
III.	**Evaluation: A Flexible and Culturally Sensitive Conception of Childhood**	39
	Select Bibliography	40

I. Introduction

A. A Presumptive, Age-Based Conception of Childhood

The concept of the child was well known to international human rights law before the adoption of the Convention on the Rights of the Child ('CRC', 'the Convention'). The Universal Declaration on Human Rights ('UDHR') and the International Covenants on Economic Social and Cultural Rights and Civil and Political Rights all include a right to special protection for children ('ICESCR' and 'ICCPR').[1] The 1924 and 1959 Declarations on the Rights of the Child are dedicated to the rights of children.[2] None of

[1] See: art 25(2) of the Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plan mtg, UN Doc A/810 (10 December 1948) ('UDHR'); arts 14, 18, 23, and 24 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'); arts 10(3) and 12(2) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 November 1976) 993 UNTS 3 ('ICESCR'); art 19 of the American Convention on Human Rights (adopted signature 22 November 1969, entered into force 19 July 1978) 1144 UNTS 123 ('ACHR'); and art 18(3) of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

[2] Geneva Declaration of the Rights of the Child of 1924 (adopted 26 September 1924), League of Nations OJ Special Supplement 21, 43 (1924); and Declaration of the Rights of the Child, GA Res 1386 (XIV) (10 December 1959).

these instruments, however, contain an explicit definition of a child. This is not to say that international law completely ignored this issue prior to the adoption of the Convention. Various ILO Conventions dedicated to the protection of children were adopted long before the Convention,[3] as were provisions within international humanitarian law instruments, which include a number of articles that provide age-specific protection.[4] Article 1 of the Convention, however, represents the first international human rights instrument to offer a definition of a child.[5]

Article 1 states that 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. Thus, unlike other human rights treaties, the Convention adopts a presumption in favour of an age-based conception of childhood. This conception defines the *scope* of the Convention—those *to whom* the remaining articles apply. It does not spell out the content of those rights—what they are rights *to*—nor the manner in which they apply—that they apply equally and without discrimination to all children, in accordance with article 2. Article 1 simply and solely defines who is a child for the purposes of the Convention and thus determines who is entitled to the rights listed elsewhere in it.

At the outset, it should be acknowledged that who counts as a child, and who in consequence has the rights listed in the Convention, obviously matters. It should further be noted that the possession by children of the Convention rights is not unequivocally a good thing. To have rights rather than lack them is on the face of it to be welcomed. A holder of rights is entitled to things from which someone who lacks these rights is excluded. However, it matters greatly *which* rights are accorded and which, correspondingly, are withheld. The holder of some set of rights may be excluded from the privileges and benefits afforded to those who hold some other set of rights. Thus, children may have children's rights; and adults, by contrast, may have rights that are exclusive to adults, which may be denied to children.[6]

Moreover, it also matters *why* rights are accorded. The reason for affording children their own particular rights could well be a characterization of children and childhood that is prejudicial or pejorative to both. Thus, it might be the case that it is because children are thought to have certain qualities or features—ones that are not necessarily or obviously estimable—that they are given their particular set of rights. Further, it might

[3] See eg: ILO Convention No 58, Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea (adopted 24 October 1936, entered into force 11 Apr 1939) and ILO Convention No 138, Convention concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 Jun 1976).

[4] See eg: arts 14, 23, 24, 38(5), 50, and 89 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; arts 77–78 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS; and arts 4(3) and 6(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609. Note that none of these provisions, however, offers an explicit definition of the child.

[5] The same definition is contained in art 2 of the African Charter on the Rights and Welfare of the Child (adopted11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49.

[6] It is important to note that the rights under instruments such as the UDHR, the ICESCR, and ICCPR are enjoyed by all humans, and not just adults. In practice, however, there is always the risk that an adult-centric interpretation of these instruments will lead to the denial, neglect, or marginalization of the idea that children are also entitled to rights.

also be mistaken to see children as possessed of those qualifying characteristics. Critical in this context is the CRC's preambular statement, taken from the 1959 Declaration of the Rights of the Child, that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care'. Rights are given to the child and not to adults in virtue of a claim about what is special about childhood.

We can express these basic concerns in terms of status and rank.[7] Human beings enjoy a moral, political, and legal status that is not enjoyed by non-human animals. The making of such a distinction is not, of course, uncontroversial but it is generally made and accepted. The distinction between humans and non-human animals is thus one of rank. Human beings are ranked above non-human animals. Nevertheless, it is normally thought that all those who enjoy a particular status do so equally and without any further distinction of lesser or greater status. In short, members of a status group are of equal rank. Thus, the UDHR affirms in article 1, that '*[a]ll* human beings are born free and equal in dignity and rights,' (emphasis added) and, in article 2, that '*[e]veryone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind' (emphasis added).

A distinction of age is one that provides the conventional divide between adulthood and childhood, and yet it is not mentioned in article 2 of the Convention, whereas distinctions of other kinds (such as race, sex, language, and religion) are. However, according rights to children that, by implication, are not accorded to adults raises a question as to whether children and adults enjoy distinct statuses that may be differently ranked or simply be equal but nevertheless requiring different measures of protection. Although the resolution of this philosophical dilemma is not the focus of this chapter, it remains important to draw attention to such issues. The questions of who is a child, why children should be entitled to rights and which rights they should be entitled to, are deeply contested.[8] The text of the Convention may well provide a legal response to some of these issues but it does not obviate the need to encourage reflection and commentary on the justification for the approach adopted under the Convention and its consequences, not just for children but also for adults. Just as there is the risk that granting special rights to children may exclude them from rights accorded to adults, there is also the potential for adults to be excluded from rights enjoyed by children but which may be of benefit to adults.[9] As such, although the presumption in favour of an age-based conception of childhood under the Convention may answer a question that was previously ignored under international human rights law, it does not provide an answer to *all the questions* concerning the concept of childhood.

[7] For an excellent analysis of the concepts of status and rank in the explication of the idea of human dignity, see Jeremy Waldron, *Dignity, Rank, and Rights: The Berkeley Tanner* Lectures (OUP 2012).

[8] Classic philosophical critiques of the idea that children have rights can be found in: Onora O'Neill, 'Children's Rights and Children's Lives' (1988) 98(3) Ethics 445; and Laura Purdy, 'Why Children Shouldn't Have Equal Rights' (1994) 2 International Journal of Children's Rights 223. Critical surveys of the arguments for and against the ascription of rights to children can be found in: John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395; and in David Archard, *Children, Rights and Childhood* (3rd edn, Routledge 2014) Part II. A representative collection of philosophical views on children's rights can be found in the contributions in 'Part I: Children and Rights' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (OUP 2002).

[9] Consider eg the following articles of the Convention, which provide entitlements to children that could arguably be adapted and extended to adults: sentencing principles (art 40), the express right to be heard in matters affecting them (art 12), or the right to identity (art 8).

B. Key Issues

An age-based conception of childhood creates two issues—at what age does childhood begin and at what age does childhood end? Article 1, however, does not actually define the beginning of childhood and it also allows for the 'law applicable to the child' to displace the presumption in favour of 18 years of age as being the end of childhood. Thus, there is an issue as to when childhood begins under the Convention and when an applicable domestic law could legitimately end childhood at some point less than 18 years of age. These issues will be the focus of the discussion in this chapter. Two central arguments will be made. First, there is no principled basis for the claims made by some commentators that the Convention *necessarily* extends the conception of a child to the unborn child.[10] Rather, a principled interpretation of article 1 leads to the unequivocal view that as a minimum, childhood begins at birth. States certainly enjoy the discretion to extend childhood to any point preceding birth, including from the moment of conception, but they are under no legal obligation to adopt such an approach. Second, states can invoke domestic law to justify the end of childhood at a point less than 18 years of age, but the legitimacy of any alternative conception of childhood will only be justified in exceptional circumstances.

II. Analysis of Article 1

A. The Beginning of Childhood

The perceived ambiguity with respect to the beginning of childhood under the Convention arises because article 1 is silent as to when childhood begins and simply refers to '*every human being below the age of 18 years*'. This in turn invites the question, who is a human being? Some commentators have argued that this dilemma must be resolved in favour of extending the Convention to the unborn child[11] because the text of the sixth preambular paragraph of the Convention provides that:

> Bearing in mind that … the child by reason of his physical and mental maturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*.

Such an interpretation is flawed for three reasons. First, the preamble of a Convention is 'not the appropriate place for stating obligations',[12] which are more appropriately located 'in operative articles of the treaty or in annexes.'[13] As such, the preamble is not an operative part of the Convention and does not itself impose any obligations on states. Second, it is accepted that the preamble can play an interpretative role but only in circumstances where the meaning of a term is 'ambiguous or obscure'.[14] In international law, it is has

[10] See eg Rita Joseph, *Human Rights and the Unborn Child* (Martinus Nijhoff 2009). Cf Tania Penovic, 'Book Review: Rita Joseph, Human Rights and the Unborn Child' (2011) 33 Human Rights Quarterly 229. See also Alison Duxbury and Christopher Ward, 'The International Law Implications of Australian Abortion Law' (2000) 23(2) University of New South Wales Law Journal 1.

[11] See generally Joseph (n 10); Patrick Ferdinands, 'How the Criminal Law in Australia has Failed to Promote the Right to Life for Unborn Children: A Need for Uniform Criminal Laws on Abortion Across Australia' (2012) 17 Deakin Law Review 43; and Ligia M de Jesús, 'Treaty Interpretation of the Right to Life Before Birth by Latin American and Caribbean States: An Analysis of Common International Treaty Obligations and Relevant State Practice at International Fora' (2012) 26 Emory International Law Review 599.

[12] Richard Gardiner, *Treaty Interpretation* (OUP 2010) 186.

[13] ibid.

[14] Philip Alston 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child' (1990) 12 Human Rights Quarterly 156, 171.

never been accepted that a child or other terms such as 'human being' or 'human person' extend to an unborn child.[15] Although, the American Convention on Human Rights explicitly extends the right to life to a person from the moment of conception,[16] this approach was rejected during the drafting of the Convention.[17]

Third, the *travaux préparatoires* reveal 'that there was no generally shared intention of using the preambular paragraph' to expand the definition of a human being to the unborn child.[18] Certainly proposals were made to adopt such a definition in the operative part of the Convention;[19] however, they were rejected because consensus could not be achieved on this issue. Indeed, as noted by Philip Alston, the acceptance of the sixth preambular paragraph was made on the condition that 'the following interpretative statement would be placed in the *travaux préparatoires* on behalf of the entire Working Group':

> In adopting this preambular paragraph the Working group does not intend to prejudice the interpretation of article 1 or any other provisions of the Convention by States parties.[20]

As such, the sixth preambular paragraph cannot be relied upon to extend the scope of the Convention in circumstances where states had actively resisted proposals for a definition of a child under article 1 that would have extended to the unborn child.

Thus, as Alston explains, the relationship between the preamble and article 1 represents a ' "compromise" solution, which had intentionally failed to resolve the issue definitively one way or the other'.[21] However, as he also points out, this compromise:

> carefully left the way clear to individual states which might ratify the Convention to adopt whatever position they prefer with respect to the rights of the unborn child, provided that act in conformity with other applicable provisions of international human rights law.[22]

Interestingly, several states have felt compelled to enter declarations or reservations which seek either to prohibit or allow abortion.[23] This approach, however, is likely to be overly cautious and such declarations and reservations are in fact unnecessary since the Convention defers responsibility for the determination of this issue to states.

B. The Status of the Unborn Child: Three Possible Conceptions

Although the Convention does not impose an obligation on states to extend rights to the unborn child, it would be inappropriate to assume the Convention, and in particular the sixth preambular paragraph, have nothing to say about the treatment and status of

[15] See generally ibid. See also: Christina Zampas and Jaime Gher, 'Abortion as a Human Rights-International and Regional Standards' (2008) 8 Human Rights Law Review 249, 262–68; Duxbury and Ward (n 10).

[16] ACHR art 4. [17] Alston (n 14) 170. [18] ibid.

[19] At the second reading of the draft Convention, the Maltese and Senegalese delegations proposed to extend the protections of the Convention to all human beings 'from conception'. See Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007) ('*Legislative History*') 309 and 311.

[20] Alston (n 14) 167. [21] ibid 157.

[22] ibid 157. See also Jozef Dorscheidt, 'The Unborn Child and the UN Convention on Children's Rights: The Dutch Perspective as a Guideline' (1999) 7 International Journal of Children's Rights 303, 310.

[23] eg Argentina entered a reservation asserting that 'a child means every human being from the moment of conception' and the Holy See declared that 'the Convention … will safeguard the rights of the child before as well as after birth'. In contrast, the UK declared that 'it interprets the Convention as applicable only following a live birth' and Luxembourg declared that 'the … Convention presents no obstacle to … legislation concerning … the prevention of back-street abortion and the regulation of pregnancy termination'. See UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child (3rd edn, UNICEF 2007) 2.

unborn children. If, as is generally accepted, the preamble plays a general inspirational or hortatory role,[24] what then can be gleaned from the statement that a child is entitled to special care and protection *before as well as after birth*? One possible response is to distinguish between three different conceptions of the 'unborn child', which operate in the context of providing normative guidance as to what we do and do not owe to those yet to be born.

In the first and second senses of 'unborn child' what is being picked out is what actually exists before birth, the being *in utero*. However, in the first sense this being has a status independent of what comes later and after birth. Indeed, in this understanding of the phrase, an 'unborn child' is thought to enjoy the same moral status as the 'born child'. For those opposed to abortion, the destruction of the 'unborn child', *in utero*, is as wrong as the destruction of a child that has been delivered and is now living outside the mother's womb. This sense of 'unborn child' is what is centrally at stake in the ethical debate between those who wish to proscribe and those who wish to permit abortion. The final text of the Convention avoids any determination on this issue by devolving responsibility to states on the question of whether childhood extends to the unborn child. Although the Committee on the Rights of the Child ('CRC Committee', 'the Committee') has refrained from entering this contested territory, it has expressed its concern at the practice of sex-selective abortion in its concluding observations for China[25] calling on the state to:

> strengthen its implementation of existing laws against selective abortions and … take all necessary measures to eliminate any negative consequences arising from family planning policies, including … unbalanced sex ratios at birth.[26]

This recommendation was presumably motivated by the CRC Committee's concern to ensure gender equality. Indeed, it concerns about the practice of sex selective abortion in its concluding observations for India are located under its discussion of the right to non-discrimination.[27] However, there remains a question as to whether the CRC Committee's mandate extends to such comments given that the Convention defers responsibility to states to determine the status and arguably the treatment of the unborn child.

On the second sense of 'unborn child' what is wrong with what might be done to the being *in utero* should be understood *only* in terms of what might follow for that child *once born*. Thus, we know, for example, that prospective mothers can engage in behaviour—such as the consumption of alcohol or drugs—whose effects are deleterious for the child yet to be born. If we were to indict the mother in such cases of immoral behaviour (indeed if we were criminally to prosecute her or allow the pursuit of a civil action in the name of the resultant child) we would do so by arguing that what she did harmed her child. She did this by acting wrongfully towards the child as yet unborn. The harm that

[24] Alston (n 14) 171. [25] CO China, CRC/C/CHN/CO/2 paras 28–29. [26] ibid para 29.

[27] CO India, CRC/C/IND/CO/3-4 paras 33–34 (expressing concern at the traditions and cultural influences that perpetuate sex selective abortions and recommending that the state 'ensure the effective implementation of the Pre-Conception and Pre-natal Diagnostic Techniques Act so as to prevent sex selective abortions'); CO India, CRC/C/15/Add.115, para 49 ('recommending studies to determine the socio-cultural factors which lead to practices such as female infanticide and selection abortion and to develop strategies to address them.'); CRC Committee, 'General Day of Discussion on the Rights of Children with Disabilities, Recommendations' (6 October 1997) CRC/C/66, Annex V, para 338(d) (urging states to review and amend legislation that 'denies disabled children an equal right to life, survival and development, including in those states which allow abortion—discriminatory laws on abortion affecting disabled children').

motivates the charge of wrongful maternal behaviour is done to the future child and not directly to the being that exists *in utero*.

A question arises as to whether it is reasonable to read the Preamble consistently with this second sense of 'unborn child', as enjoining states to protect the future child whilst it is as yet unborn. This is clearly distinct from an injunction to protect the unborn child *in utero* as a being quite independent in its moral and legal status from the child that it will become. The CRC Committee itself has yet to make any detailed comments with respect to this potential obligation and it is questionable whether it would have the mandate to do so given that the Convention does not demand that the unborn child has rights. Thus, although there may be a strong moral basis to demand state intervention in order to protect the unborn child from harm, perhaps the CRC Committee's mandate with respect to this issue is confined to a hortatory role.

In the third sense of 'unborn child' we can refer to *possible* children, those children that might come into existence as a result of the reproductive acts and omissions of adults. It is this sense of 'unborn child' that lies at the heart of a rich and intriguing ethical and jurisprudential literature on procreative ethics. It is a literature considerably influenced by the work of Derek Parfit on the 'non-identity' problem[28] and by the following thought. So long as the life that is created is better overall, even if only very marginally, than non-existence, then no wrong is done in bringing that life into being. No one can complain at having a miserable life if the only alternative is never to have existed and if the life, however miserable, is nevertheless better than no life at all.

The work done in this area addresses the question of whether we owe very much to the child yet to be conceived and born beyond the guarantee of a minimally worthwhile life.[29] Some of those who think that the future child is owed more than simply a life better than non-existence are prepared to argue that the future child has a 'birthright'. This is a right at birth to the reasonable assurance of the enjoyment of a range of benefits across their life.[30] And one might think of those benefits precisely in terms of what the Convention guarantees to every child.[31] Clearly, if the unborn child, in the third sense of a future possible child, has a birthright to those rights enumerated in the Convention, then that right would significantly constrain the exercise by adults of their putative rights to procreate.

C. The End of Childhood

1. A Culturally Sensitive Approach

Article 1 says that a child is any 'human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier*'. In other words, it creates a presumption in favour of an age-based conception of childhood which ends at 18 and can be rebutted where a state determines that the age of legal majority should be younger. This test reflects the compromise that was necessary to accommodate the fact that, as

[28] Derek Parfit, *Reasons and Persons* (Clarendon Press 1984) ch 16: 'The Non-Identity Problem'.

[29] For a critical overview of this work see David Archard, 'Procreative Ethics,' in Steven Luper (ed), *Cambridge Companion to Life and Death* (CUP, forthcoming 2014).

[30] Joel Feinberg, 'Wrongful Life and the Counterfactual Element in Harming' (1986) 4 Social Philosophy and Policy 145; reprinted in Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton University Press 1992) 3.

[31] See David Archard, 'Wrongful Life' (2004) 79 Philosophy 403.

explained by the French delegation during the initial stages of drafting, 'the age at which a child attains his majority varies from one country to another'.[32] Alternative ages were certainly proposed during drafting, including a suggestion from some delegates 'that, since the General Assembly had set the age-limit at 15 in connection with the International Year of the Child, the same position should be adopted in the draft convention'.[33] There was also a proposal from Finland to adopt an alternative conception of childhood, which would have been based on considerations such as the recognition of full legal capacity and the capacity to enter into contractual relationships, dispose of property, and determine one's place of residence.[34] However, the consensus view was that 18 was an appropriate age at which to end childhood for the purposes of the Convention provided states had a discretion to adopt an earlier age of majority.

For its part, the CRC Committee has repeatedly pressed states to adopt 18 as the end point for childhood. It has expressed concern where this is not the case[35] and urged states to review their 'legislation to ensure that all children up to the age of 18 receive the protection they need as provided for in the Convention'.[36] Indeed, in its observations for Namibia it actually went so far as to say that the definition of a child as anyone under the age of 16 years, is '*not compatible with the Convention*'.[37] It is questionable, however, whether this view is justified given that the text of the Convention clearly anticipates the possibility for states to use an age other than 18 to define the end of childhood.

The CRC Committee has also been critical of states which adopt 18 as the official age of majority under national legislation but still tolerate customary practices which adopt alternative conceptions of childhood based on, for example, the attainment of puberty.[38] The CRC Committee has generally shown little tolerance for such approaches and recommended, for example, in its report for Pakistan that 'the State party ensure the full harmonization of its legislation as regards the definition of a child so as to define a child as every human being below the age of 18 years'.[39] Again it is questionable whether the text of the Convention supports such an unequivocal position by the CRC Committee.

At the same time, the CRC Committee is arguably within its mandate to demand that states must at least justify any definition of a child that does not extend to 18 years. To hold otherwise would be to give license to a state to avoid its obligations under the Convention by simply reducing the age of majority for reasons of convenience as opposed to a need to respect and accommodate long standing cultural or customary conceptions of childhood and adulthood. Interestingly, in its report for Nigeria, the CRC Committee urged the state party 'to intensify its ongoing dialogue with traditional and religious leaders and state authorities to enhance the understanding and importance of conceptualizing persons under the age of 18 years as children with special rights and needs guaranteed under the Convention'.[40] This non-directive approach not only sits more comfortably within the mandate of the CRC Committee but may well be a more

[32] *Legislative History* (n 19) 302. [33] ibid 305. [34] ibid 307.

[35] See eg: CO Albania, CRC/C/ALB/CO/2-4 para 25; CO Vietnam, CRC/C/CNM/CO/3-4 para 27; CO Cuba, CRC/C/CUB/CO/2 para 22.

[36] CO Albania, CRC/C/ALB/CO/2-4 para 26. See also CO Myanmar, CRC/C/MMR/CO/3-4 para 34; CO Thailand, CRC/C/THA/CO/3-4 para 32; CO Bangladesh, CRC/C/BGD/CO/4 para 31(a).

[37] CO Namibia, CRC/C/NAM/CO/2-3, para 28. See also CO Cuba, CRC/C/CUB/CO/2 para 23.

[38] See eg: CO Nigeria, CRC/C/NGA/CO/3-4 para 27; CO Sudan, CRC/C/SDN/CO/3-4 para 28; CO Pakistan, CRC/C/PAK/CO/4 para 26.

[39] CO Pakistan, CRC/C/PAK/CO/4 para 27. [40] CO Nigeria, CRC/C/NGA/CO/3-4 para 27.

effective approach in extending the conception of childhood within groups whose customary practices have no historical links with an age-based conception of childhood that ends at 18.[41]

2. Bright Line Rules and the Misperception of Incoherence

The implication of a definition that sets 18 years of age as the indicator of adulthood might be that *all* of the rights subsequently listed in the Convention are to be enjoyed only by persons below whatever is fixed unequivocally and uniquely within a jurisdiction as the age of legal majority. Every right is to be enjoyed by every child, and in each state what counts as a child will be determined by a single age of majority. Nevertheless, states invariably fix the boundary between adulthood and childhood in terms of the enjoyment of *adult* rights at various ages. Traditionally, considerations such as the voting age, consent to medical treatment, participation in military service, eligibility to marry, the age at which alcohol may be consumed, at which a driving license may be obtained, at which paid employment is legal, and so on, are set at different points. Some of these points may be determined by bright line rules that apply to children as a class, for example, children cannot drive a car until they reach the age of 17. In contrast, other rules may involve a personalized assessment of a child's capacity to undertake an activity such as consent to medical treatment.

A question arises as to whether minimum age rules are consistent with the Convention. Is it not incoherent to define a child as a human being under the age of 18 but then deny children various entitlements on the basis of ages other than 18? The short answer is no. In its original *Guidelines for Periodic Reports*, adopted in 1991, the CRC Committee requested that states provide information within the context of article 1 with respect to the minimum legal age in relation to, among other issues: legal and medical counselling without parental consent; medical treatment without parental consent; the end of compulsory education; admission to work; marriage; sexual consent; voluntary enlistment in the armed forces; and the age of criminal responsibility.[42] Thus, the CRC Committee anticipates that states will need to set minimum age requirements in a number of areas as a measure to ensure protection against the potential harm to children. The real issue is whether the ages on which these rules are based can be justified as necessary to protect children's protective rights under the Convention or unreasonably interfere with their autonomy rights. It is true that the Convention imposes an obligation on states, parents, and guardians both to protect children against harm (arts 3, 18, and 19) and to provide direction and assistance to children in the exercise of their rights (art 5). However, the exercise of this protection obligation is subject to the evolving capacities of a child, which anticipates that as a child ages, in the normal course of their development, so too will their capacity to perform tasks without the need for adult intervention (arts 5 and 12). Thus, any minimum age rules must be consistent with these overarching provisions.

When undertaking an assessment of the legitimacy of a minimum age-based rule, the presumption is that such a rule will prima facie constitute interference with a child's right (and more specifically differential treatment with respect to a child's enjoyment of a particular right on the basis of their age). However, as set out in the commentary on article

[41] For further discussion, see John Tobin, *The Right to Health in International Law* (OUP 2012) 317–23.

[42] Committee on the Rights of the Child, *General Guidelines regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44, Paragraph 1(a) of the Convention*, UN Doc CRC/C/5 (30 October 1991).

2 of the CRC, differential treatment alone does not constitute a violation of a right. On the contrary, and broadly speaking, an interference with a right will be justified where it is *reasonable*. This standard will be satisfied where (a) the treatment is consistent with a valid law, (b) it pursues a legitimate aim, and (c) the measures used to achieve the aim are proportionate. Moreover, when assessing the proportionality of an age-based restriction, there must a rational connection (or objective evidence) between the aim sought and the measure used *and* there must be no other alternative measures reasonably available that would have also achieved the same aim and minimized the interference with a child's right.

In practical terms this means that if a state wished to prohibit children from driving cars until they reached 17 years of age, it would need to (a) establish a legitimate aim, (b) provide evidence that is both cogent and persuasive that the age-based restriction was necessary to achieve that aim, and (c) establish that no other reasonably available measures would be effective. In this example, the aim of such a rule would be to protect not only children but also other drivers and pedestrians. Moreover, it is well accepted that there is strong evidence to support restrictions on children's ability to drive because of their physical and neurological development. Thus, an age-based restriction on driving would be justified. Moreover, the fact that one state may adopt 16 as the minimum age for driving whereas another state adopts 17, would also be justified as being within the discretion afforded to states with respect to such matters provided the exercise of this discretion was informed by the available evidence.

However, what if a child were to produce evidence that he or she personally had the requisite capacity and maturity to drive a car at an age earlier that the legislative minimum? Would there not be an obligation on a state to displace the presumptive minimum age rule in favour of the child? The answer to this question depends on the extent to which it would be reasonable for a state to accommodate individualized assessments of children's capacity with respect to those activities that were subject to minimum rule requirements. Thus, for example, it would be relatively easy for such an assessment in the case of medical procedures because the child is already presenting before a medical practitioner when they are seeking treatment. However, with respect to requests to displace minimum age-based rules for issues such as driving, employment, or the consumption of alcohol or tobacco, a state could make a strong argument that individualized assessments of capacity in these instances would be administratively unworkable, contrary to the 'the [state's] economic and social priorities and needs',[43] and therefore unreasonable.

3. *The Need to Recognize the Heterogeneity of Childhood*

It is surely consistent with any legal definition of childhood—whereby all who fall below a certain age are deemed to be children—that the class of persons picked out should be sub-divided into different groups. Moreover, such sub-sets of children are themselves identified by age as distinct and successive stages of childhood. Hence, we might speak of neonates, infants, adolescents, and young persons. Moreover, it is also consistent with according a single set of rights to children that we might accord further and distinctive rights to each sub-group. Young persons might thus have rights within a criminal justice system that adults lack and that could not be afforded to infants.

[43] Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF 2005) 49. See generally Lansdown's discussion at 49–53.

The CRC Committee has certainly taken the view that children for the purpose of the Convention should not be conceived of as a homogenous group and explained that:

> the implementation of rights should take account of children's development and their evolving capacities. Approaches adopted to ensure the realization of the rights of adolescents differ significantly from those adopted for younger children.[44]

The CRC Committee has further recognized three broad yet distinctive dimensions of childhood—early childhood, middle childhood, and adolescence. According to the CRC Committee, early childhood refers to 'all young children; at birth and throughout infancy: during the preschool years; as well as during the transition to school'.[45] Given that the transition through each of these stages varies among states, the CRC Committee has proposed 'as an appropriate working definition of early childhood the period from birth to the age of 8 years'.[46] Middle childhood covers the period from when a child has made the transition to school to the time when he or she reaches adolescence.[47] As the CRC Committee has recognized, 'adolescence is not easily defined and that individual children reach maturity at different ages'.[48] That said, it is:

> a period characterized by rapid physical, cognitive and social changes, including sexual and reproductive maturation; the gradual building up of the capacity to assume adult behaviours and roles involving new responsibilities requiring new knowledge and skills.[49]

Although these conceptions of childhood will be contested by some commentators, the key point to stress is that children are not a homogenous group. As such, there is need to ensure that the definition of a child under article 1 is not used to inadvertently deny or overlook the extraordinary difference in the needs, interests and capabilities of children over the period from birth until 18 years of age.

4. *The Determination of a Person's Age*

In the normal course of events, the registration of a child's birth consistent with article 7 of the Convention will provide evidence as to the age of a person. In practice, however, the birth of a child is not always registered, or registered accurately, or the official record of a child's birth registration may not be available. In such circumstances, there is a need to determine whether the person is under 18 years of age and thus a child for the purposes of the Convention. The CRC Committee in its General Comment No 23 has indicated that, [t]o make an informed assessment of age, states should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development.'[50] It has added that such 'assessments should be carried out in a

[44] CRC Committee, 'General Comment No 20: Implementation of the Rights of the Child During Adolescence' (6 December 2016) CRC/C/GC/20 ('CRC GC 20') para 1.

[45] CRC Committee, 'General Comment No 7: Implementing Child Rights in Early Childhood' (20 September 2006) UN Doc CRC/C/GC/7/Rev.1 para 1.

[46] ibid para 4. [47] ibid para 8.

[48] CRC GC 20 (n 44) para 5 (The Committee has further explained that its general comment does not seek, 'to define adolescence, but instead focuses on the period of childhood from 10 years until the 18th birthday to facilitate consistency in data collection').

[49] CRC Committee, 'General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4 para 2. See also CRC GC 20 (n 44) para 2.

[50] 'Joint General Comment No 4 (2017) of the Committee on the Protection of Migrant Workers and their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding

prompt, child friendly, gender sensitive and culturally appropriate manner'.[51] Moreover, 'documents that are available should be considered genuine unless there is proof to the contrary and … [t]he benefit of the doubt should be given to the individual being assessed'.[52] Finally, the CRC Committee has recommended that states 'refrain from using medical methods based on, inter alia, bone and dental analysis, which may be inaccurate with wide margins of error'.[53]

D. Justifying the Distinction between Adulthood and Childhood

Article 1 defines a child as anyone who falls below a certain age. Were that all that is intended by such a definition, then the associated ascription of a normative significance to the difference between adults and children, signalling what can be done to and by children as opposed to adults, would be open to serious criticism. The criticism in question would be that age alone is a morally arbitrary basis for any difference of normative treatment. An illuminating parallel is the charge of 'speciesism' made philosophically, and most famously by Peter Singer, in respect of our unwarranted treatment of animals.[54] The argument in question runs as follows: we accord a different moral status to humans and to non-human animals. This is unjustified. Either it is claimed by those who would defend the distinction of status that the mere difference of species identity suffices to justify the difference of status. In that case the differential treatment is charged with being 'speciesist' and as wrong in exactly the way that sexism (viewing the mere difference of sex as sufficient to justify different status) or racism (viewing the mere difference of race as sufficient to justify different status). Or it is claimed that membership of the distinct species correlates with differences that do justify the difference in status. Such differences would be in the possession of important features that are morally relevant to the distinction of status—such as certain capacities (language, reason, sentience). However, this defence of the distinction in status is vulnerable to the identification of what are termed 'marginal' cases, individuals in one species who do not differ in any significant respect from those in the other. In the case of the human/non-human animal distinction these would include infants and seriously brain-damaged adult humans.

Thus—to pursue the suggested analogy—it will be charged that marking a distinction—in respect of the enjoyment of rights—between adults and children on the basis of age alone is simply ageist. However, the definition offered in article 1 must be understood in context. Thus, the sixth paragraph of the Preamble to the Convention, already quoted, affirms that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care.' In other words, the ascription to the child of those rights subsequently enumerated is not in virtue of age alone but rather in consequence of what is here claimed to be associated with age, namely 'physical and mental immaturity'.

However, that qualified claim, and the consequent explication of the significance of age as a definition of the child, is open to criticism. This criticism is analogous to the second fork of the disjunctive argument against the defence of any human/non-human animal difference in status, that which appeals to 'marginal cases'. In what follows we

the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (16 November 2017) CMW/C/GC/4-CRC/C/GC/23 ('CRC GC 23') para 4.

[51] ibid. [52] ibid. [53] ibid.

[54] Peter Singer, *Animal Liberation: Towards an end to Man's Inhumanity to Animals* (Harper Collins 1975).

carefully spell out the kinds of criticism that can be made, and thereby offer a fuller account of the significance of article 1.

The criticisms fall into broad kinds. First, there is the claim that there is no real distinction to be made between child and adult. Second, there is the claim that the distinction, if it can be made, is not such as can justify the normative difference in status. Let us take each kind of criticism in turn.

E. Childhood as an Enduring Concept

A work that has been hugely influential on the making of any distinction between childhood and adulthood is *L'Enfant et la Vie Familiale sous l'Ancien Régime* (1960) by Philippe Ariès, translated into English as *Centuries of Childhood* (1962).[55] The book is an exercise in social history whose principal claim is that the 'concept of childhood' did not begin to emerge until the late seventeenth century:

> In medieval society the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for children: it corresponds to an awareness of the particular nature of childhood, that particular nature which distinguishes the child from the adult, even the young adult. In medieval society, this awareness was lacking.[56]

The evidence Ariès cites comprises the visual representation of children (clothed as adults) and their uncensored participation in games and practices we would recognize as appropriate only for adults. Since Ariès is explicit that his claim is about an awareness of the particular nature of childhood, not about affection for children, it can be distinguished from the claim made in writing by Lloyd de Mause and Lawrence Stone, amongst others.[57] This argues that children in the past were cruelly treated, and that such abuse was regarded as normal; parents displayed only cold indifference to their offspring.

Criticism of Ariès has been of two kinds. The first is that his supporting evidence is poorly chosen, selective, and does not support his principal claims.[58] The second kind of criticism is that the work shares a general failing of much historical writing on childhood and the family. This is the tendency to view the modern period as conceptually and morally superior to the past.[59] Indeed there is a 'Whig' view of history as making steady but incremental progress from past barbarism to present-day Enlightenment. On this view, how we now view childhood and how we now treat children is the benchmark by which earlier attitudes and behaviour is judged, and found seriously wanting.

In fact, various claims need to be disentangled. One is that only modernity has a concept of childhood. This seems evidently false. All societies at all periods of history have marked a distinction of some kind and to some degree between the child and the adult.[60]

[55] Philippe Aries, *L'Enfant et la view familaire sous l'ancien regime* (Librarie Plon 1960), translated from the French by Robert Baldick as *Centuries of Childhood* (Jonathan Cape 1962).

[56] Baldrick (n 55) 125.

[57] Lawrence Stone, *The Family, Sex and Marriage in England 1500–1800* (Harper and Row 1977); Lloyd de Mause (ed), *The History of Childhood, New Edition* (Jason Aronson 1995).

[58] Two useful overviews of the failings of Aries' book can be found in Adrian Wilson, 'The Infancy of the History of Childhood' (1982) 21 History and Theory 132 and Richard T Vann, 'The Youth of *Centuries of Childhood*' (1982) 21 History and Theory 279.

[59] See Alan Macfarlane's review of Stone (n 57) in Alan Macfarlane, 'Book Review: *The Family, Sex and Marriage*' (1979) 18 History and Theory 103.

[60] These matters are discussed at greater length in David Archard, *Children, Rights, and Childhood* (3rd edn, Routledge 2014) Part I.

They have obviously done so in different ways, and the boundary between adult and child has been placed at different points. For example, primitive agrarian communities may set to work alongside adults those who in developed Western industrial societies would be regarded as still children.

A claim that makes more sense is that there have been, and perhaps still are, different understandings of childhood. One way to distinguish this from the previous claim is by noting the difference between 'concept' and 'conception'. John Rawls, the American moral and political philosopher, borrows this distinction from the jurisprudential theorist, H.L.A. Hart, in order to argue that, whilst all can agree what is meant and required by the concept of 'justice'—something like the 'fair and non-arbitrary treatment of all persons'—it is nevertheless controversial what exactly this requires by way of specific rules of social distribution. Thus, whilst there may be a single, univocal concept of justice, there are different and competing 'conceptions' of justice.[61]

One might in very similar ways argue that 'childhood' can be understood, simply and unequivocally, as that stage of human development prior to and distinct from adulthood, but that it has been conceived in different ways at different times and within different cultures. The concept of childhood is in this manner single, whereas the conceptions are possibly many and varied.

The claim that childhood is a modern invention is thus ambiguous between the claim that only in modernity is there a concept of childhood and the claim that there is a distinctive conception of childhood in modernity. The former is false although it acquires some credibility from presuming and employing the modern idea of a 'concept'—an abstract construction of intellectual deliberation and open to explicit and conscious formulation. If one thinks only of a concept as an idea or thought that may only be implicit in behaviour or consistent linguistic usage then the first claim (that only modernity has a concept of childhood) is implausible. The latter claim (that there is a special understanding of childhood in modernity) is certainly defensible, and indeed there is much academic and popular writing about the distinctiveness of a modern view of childhood. There are thus books such as those by Hugh Cunningham arguing that a modern childhood is more extended than pre-modern versions, and by Neil Postman arguing that the invention and development of television has been destructive of what should be special about childhood.[62]

In sum, all societies at all times have had some concept of childhood. However, different societies at different times have had different conceptions of childhood. The modern conception of childhood is distinctive and importantly different from earlier conceptions.

F. Understanding Childhood as a Constructed Concept

One body of academic work that is indebted to the work of Ariès and that trades on some of the distinctions and ambiguities noted above is that within the emergent discipline of the sociology of childhood. This argues that childhood is a 'social construction'. To make better sense of this claim it helps to introduce and define some terms employed by philosophers of science. In the first instance, there are 'natural kinds'. These describe

[61] John Rawls, *A Theory of Justice*, (OUP 1999) 5, citing HLA Hart, *The Concept of Law* (Clarendon Press 1961) 155–59.

[62] Hugh Cunningham, *The Invention of Childhood* (BBC Books 2006); Neil Postman, *The Disappearance of Childhood* (Vintage Books 1996).

those basic groupings of objects within nature that the physical sciences disclose as sharing key properties in common. The scientific discovery of these kinds and of their essential properties is said, in a frequently employed metaphor due to Plato, to 'carve nature at its joints'.[63]

By contrast are 'artefact kinds' which group together those objects that are the product of human activity; they may share something in common but this is not an essential, natural property. Examples would be tables, cutlery, and pens. There are also entirely arbitrary groupings of random objects such as 'those queueing every morning for the Number 19 bus'. Of interest here is the idea of 'social kinds'. These gather together objects, most notably persons, whose existence as a group is to be explained by social causes. Examples would be 'voters' or 'consumers'.[64]

Now of social kinds various different things can be and are said. One is that their existence is entirely a matter of their being regarded as constituting a kind. That one is thought of as a member of a kind, K, is sufficient to be a member of K. It will also be said that social kinds are fundamentally normative and not neutral, descriptive terms. It will be said that there are no natural facts that underlie membership of a social kind. A social kind is not, in other words, a natural kind, or even a set of natural kinds. It will be said—and this constitutes the most radical of claims—that a social kind has no real existence.

'Social kinds' can, as a concept, be used to great and important critical effect, although caution is needed in the spelling out of the conceptual work that can be done.[65] This has been most notably the case with the categories of 'race' and 'gender'. Thus, it has been argued by feminists that the notion of 'gender' and the distinction between 'masculinity' and 'femininity' is ideological and not rooted within, and to be explained by, the natural kinds of sex, namely 'man' and 'woman'. Equally, critical race theorists have argued that the division of humanity into 'races' does not map onto any real biological differences. 'Races' are not natural kinds.

Now of course individuals can regard themselves as, and be treated as, members of a race or gender. This self-regard and this treatment by others make a substantial difference to their lives. To that extent these social kinds have reality. Moreover, critical exposure of the fact that 'race' is a social kind term would not be sufficient to diminish or eliminate the adverse treatment to which members of a race are subject. To say then that 'race' and 'gender' have no natural or biological basis is not to say, nor does it support the claim that, they do not exist, that there is no such thing as 'race' or 'gender'.

In terms of 'children' the influential claim within sociology of childhood is that childhood is a 'social construction'.[66] This draws upon the distinction, even if not it is explicitly stated as such, between 'natural' and 'social' kinds. Thus, just as sex is biological and gender is social, it will be argued that physical immaturity is a natural fact whereas

[63] Alexander Bird and Emma Tobin, 'Natural Kinds' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2012), http://plato.stanford.edu/archives/win2012/entries/natural-kinds/ accessed xx.

[64] Muhammad Ali Khalidi, 'Kinds (Natural Kinds vs. Human Kinds)' in Byron Kaldis (ed), *Encyclopedia of Philosophy and the Social Sciences* (Sage, 2013) (forthcoming).

[65] Sally Haslanger, 'Philosophical Analysis and Social Kinds: What Good are our Intuitions?' (June 2006) 80 The Aristotelian Society, Supplementary Volume 89.

[66] Chris Jenks, *Childhood* (Routledge 1996); Allison James and Alan Prout, 'A New Paradigm for the Sociology of Childhood' in Allison James and Alan Prout (eds), *Constructing and Reconstructing Contemporary Issues in the Sociological Study of Childhood* (Falmer Press 1990) 7; Barry Goldson, '"Childhood": An Introduction to Historical and Theoretical Analyses' in Phil Scraton (ed), *'Childhood' in 'Crisis'* (University College London Press 1997) 1.

'childhood' is a social construct. However, the distinction can be overdrawn and the implications of the claim that childhood is socially constructed can be overstated.

Immaturity is not a fixed, constant, and immutable stage of human life. The standard indices of physical maturation can be reached at different stages. Thus, the average age of the onset of puberty in both boys and girls has got progressively lower in modern times, at least within Western societies. The significance of immaturity is also subject to particular socially constructed understandings.

Rather than represent childhood as either a natural or a social kind term, as being defined by either biology or social facts, it makes better sense to understand it as hybrid of both. Childhood is that period of human life marked by biological immaturity, as not being yet fully developed. Yet it is that particular period or stage of life as it has been understood and interpreted in various different ways. These modes of interpretation in turn have an irreducible social explanation. Thus, children are not a natural kind, but neither is 'childhood' merely a social construct. Moreover, it would not follow from the fact that 'childhood' is, in part or even in whole, a social construction that it somehow does not exist. A claim such as that 'it is quite possible for a culture to exist without children'[67] trades on the ambiguity cited earlier between a concept of childhood and particular conception or social construction of 'childhood.' Of course, cultures can exist that lack *our* understanding of childhood, but a culture literally without children is one that will eventually die.

G. The Modern Conception of Childhood

The importance of Ariès may lie not in the claim that the concept of childhood is a modern invention but instead in the claim that there is a particular modern conception of childhood. Its principal features are as follows.[68] First, childhood tends now to be more clearly defined as a distinct, distinctive, and entirely separate stage of human life. To the extent that this is so, it is easier to represent the normative status of adults and children as correspondingly different. It is appropriate to do to and for children, in virtue of the nature of childhood, what it is not appropriate to do to and for adults, in virtue of the nature of adulthood. The world of childhood is very unlike that of adulthood, and this understanding is reflected in our modern institutional arrangements, activities, practices, customs, habits, and cultural outlook.

This conception of childhood is underpinned and reinforced by a cluster of modern scientific accounts of human development, psychological, social, and biological. These tend to confirm the view of human maturation as the progress from one stage to another. Moreover, and this is a second element in the modern conception of childhood, that development is progressive. It is a movement from lack and incompleteness to the achieved and final state of human adulthood. Adulthood is an end-state, a *telos*, and childhood is to be understood as what comes before and merely on the way to that concluding stage. The movement is from lesser and inferior to more and better. Moreover, the process of development is inevitable and it is endogenous. Humans do and must grow; this is written into the very nature of humanity.

[67] Postman (n 62) xi.
[68] A fuller explication of what follows can be found in Chapter 3 of Archard (n 8).

It is worth noting that this view of adulthood as a *telos* or end-state seems to presume that adulthood is achieved in a completed form, that once someone has become an adult there is no further progress or development. This is evidently false, as the process of maturation that marks the progress from childhood to adulthood does not cease upon the passing of a notional age of majority. Everybody carries on growing and changing across lifetimes. Recognition of this fact throws into critical relief the otherwise sharp distinction between childhood becoming and adult being.

The third and closely related element of the modern conception of childhood is thus the tendency to view the child's nature as defined in terms of what it is not, namely an adult one. It is a 'privative' conception of children in the same way that a definition of 'health' as the absence of illness is. The contrast would be with a view of childhood that emphasizes what is distinctive and special about childhood in its own terms. A major influence here for such a view is Jean-Jacques Rousseau's insistence in *Emile* that we need to consider 'the child in the child'.[69] Overall the contrast between a view of the child as that which will develop into an adult and of childhood as that which has its own distinctive character is elegantly summarized as that between 'becoming' and as 'being'.[70]

A final feature of the modern conception of childhood is one that emphasizes its essential innocence. The innocence in question is of various forms. It is a moral innocence understood as an incapacity to see or to do wrong, a freedom from sin. It is an epistemic innocence understood as a basic ignorance of the full and complex nature of the world and of adults. It is a sexual innocence construed as an asexual nature, the child neither knowing of its eventual adult sexuality nor motivated by any sexual desires. Such a picture, especially in respect of the last, is controversial and is contested by what we have learned about children in the last 150 years. Nevertheless, the picture of the child as an innocent is extremely influential and it is underpinned by deep-lying cultural influences drawn from literature and religion, most evidently Christianity. The picture helps to reinforce a certain construal of the child as essentially weak, vulnerable and dependent upon adults.

The modern conception of childhood to which Ariès and those who follow him draw attention is of course a recognizably Western conception. It applies to the developed societies of the global North. Indeed, those patterns of family life, forms of work, social structures, and levels of economic activity that allow for what he and others characterize as the separation of adult and child lives, and the related ascription of a distinctive stage of childhood, are not to be found everywhere in the world. For very many children today the world they inhabit, live, work and play in, is not, and cannot be, so radically disconnected from that of their adult guardians.

H. A Single Conception of Childhood?

If the Convention presumes that a child is anyone under 18 and is, as such, to be thought of as possessed of a uniform invariant nature meriting the ascription of the same forms of legal recognition then it would be subject to two major criticisms. It will help, in concluding this chapter to distinguish between those criticisms and briefly re-emphasize earlier points by way of reply.

[69] Jean-Jacques Rousseau, *Emile*, translated by Alan Bloom (Basic Books 1979).
[70] Harry Hendrick, *Children, Childhood and English Society 1880–1990* (CUP 1997) 3–4.

One criticism would be that it would be mistaken to assume that a clear bright line divides all adults from all children in respect of the rights each class of person enjoys. It was argued above that the Convention acknowledges cultural variation in the age of majority and that the implementation of the Convention is sensitive to such cultural differences.

Moreover, as explained above it is perfectly consistent with the Convention to accord children some legal rights at an age at which some other legal rights are denied. Thus, one might fix the voting age at a different age from that at which children can have sex, marry, drive a car, or purchase alcohol. It was also emphasized that some clear bright line rules apply to children as a class, whereas other rules may involve a personalized assessment of a child's capacity to undertake. Acquiring a licence to drive and being empowered to consent to medical treatment are, respectively, examples of each.

A second criticism would be that the Convention presumes all children to be immature, vulnerable and dependent to the same degree. However, childhood is understood by the Convention as being complex and continually evolving.[71] Thus, as the capacity of a child develops so too must adult respect for the child's evolving autonomy (art 5). Far from being reduced to an object of intervention and protection, the child's views must be given due weight in accordance with his or her age and level of maturity (art 12).

One influential philosophical characterization of the child's evolving capacities for autonomous choice, and the correlative duties of adults to respect choices and foster autonomy is John Eekelaar's notion of 'dynamic self-determinism.'[72] This has been interpreted as an attempt to spell out how a child's evolving capacities make a difference to the weight of the child's own opinions. However, it can also be seen as having less to do with promoting the child's voice and more to do with a construction of what is in a child's best interests that is appropriately sensitive to the child's ongoing development.[73] The underlying problem may remain how one should respect a child's evolving capacity to express his or her own views on matters affecting his or her own interests *and* discharge an adult duty to promote those interests.[74]

Recognition of the agency of a child is accompanied in the Convention's understanding of a child's evolving capacities by increasing responsibilities and an obligation to respect the rights of other persons. Thus, for example, the education of a child must be directed towards respect for human rights, as well as 'for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own' (art 29). Moreover, a child who offends the criminal law must be treated in a way that 'reinforces the child's respect for the human rights and fundamental freedoms of others and … promot[es] the child's reintegration and the child's assuming a constructive role in society' (art 40). A child is not essentially innocent. Nor are children simply *becomings*. They are also *beings* who not only enjoy rights but also owe moral obligations to other persons. Children may be vulnerable to abuse and exploitation (so too

[71] For a more detailed discussion, see Tobin (n 8).

[72] John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Selfdeterminism' in Philip Alston (ed), *The Best Interests of The Child: Reconciling Culture and Human Rights* (OUP 1994) 54.

[73] See: David Archard, 'Children, Adults, Best Interests and Rights' (2013) 13 Medical Law International 55; Nigel Thomas and Claire O'Kane, 'When Children's Wishes and Feelings Clash with Their Best Interests' (1998) 6 International Journal of Children's Rights 137.

[74] David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 International Journal of Children's Rights 1.

are adults) but children are not defined by this vulnerability.[75] On the contrary, as their capacities evolve they have the ability and indeed entitlement to shape not only their only lives but to contribute to the lives of others.

The preamble may state that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care'. However, it also provides 'that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity'. This exhortation does not demand that a child need only live such a life upon reaching adulthood. It demands such a life of every child, as a child, consistent with their evolving capacities.

III. Evaluation: A Flexible and Culturally Sensitive Conception of Childhood

Article 1 defines who the Convention is to regard as a child. It thereby makes clear the scope of application for the rights subsequently listed as being those of a child. With respect to the beginning of childhood, the article abdicates responsibility with respect to the issue of whether an unborn child falls within the scope of the Convention. This matter is left to the prerogative of states. Such an outcome was inevitable given that consensus among states on this issue was never going be achieved. Undoubtedly this will frustrate those who wish to enlist the legitimacy of the Convention in their struggle to protect what they perceive as the moral *and* human rights of the unborn child. However, those who persist with this argument cannot mistake the law as it is (*lex lata*) under the Convention with the law that they would wish to see (*lex ferenda*). At the same time, just because the Convention has taken a particular view on the beginning of childhood this does not preclude rigorous and ongoing discussions as to the status of the unborn child, whether such a child should be accorded rights and if so what are the consequences.[76]

Turning to the end of childhood, the treatment of this issue under article 1 is also not without is tensions. Preference is given for a presumptive age-based conception of child. However, it is clearly not age, or age alone, that is the difference between a child and an adult. Age is a generally reliable marker of a difference in 'maturity', a term that here summarizes a cluster of properties that taken together serve to distinguish adults from children. These properties have to do with cognitive abilities, experience, knowledge of the world and of oneself, decisional independence, self-control, strength, and vulnerability to others.

Inasmuch as children and adults do differ, and children are of a nature that warrants 'special protection' as well as the possession of rights to act in certain ways, some such definition as article 1 will be needed. Once that need has been conceded, many criticisms of the article fall away. Disputes over the precise boundaries of legal childhood are of

[75] John Tobin, 'Understanding Children's Rights: A Vision Beyond Vulnerability' (2015) Nordic Journal of Human Rights 155.

[76] See eg: Marc Cornock and Heather Montgomery, 'Children's Rights In and Out of the Womb' (2011) 19 International Journal of Children's Rights 3 (arguing that rights discourse ought play a role in social debates about the boundary between a child and fetus will continue as technology continues to improve and further blur this boundary); Rhonda Copelon and others, 'Human Rights Begin at Birth: International Law and the Claim of Fetal Rights' (2005) 13 Reproductive Health Matters 120 (resisting any extension of rights to the unborn child because of a perceived incompatibility with women's rights).

course inevitable. They do not impugn the need for some boundary markers. Disputes over what might be presumed in our understanding of childhood are also inevitable. They too, if properly understood and evaluated, do not obviate the need for recognition of the distinctiveness of childhood and thus for some definition of its boundaries.

Moreover, we can acknowledge that childhood does differ from adulthood *and*, as the preceding section emphasized, acknowledge that the age of majority need not be fixed at the same point for all legal entitlements across all cultures and without acknowledgment of the possibility of making case by case determinations of such entitlements in some contexts. A child is not, for the law's purposes, an adult. Yet the law, even whilst marking that difference, need not characterize all children as alike in all respects.

Finally, the deference given to states under article 1 to adopt a legal definition of majority other than 18 years of age, demonstrates a culturally sensitive approach to this issue that is often overlooked in criticisms of the Convention that it seeks to impose a Western conception of childhood. This flexibility remains problematic given that a state could use it to lower the age of majority simply to minimize its obligations under the Convention. However, the CRC Committee's routine insistence that an age of majority other than 18 is incompatible with the Convention is without justification and serves to fuel allegations of a Western bias in the interpretation of the Convention. In contrast, the CRC Committee's suggestion that increased dialogue with cultural and religious leaders about the importance of conceptualizing persons under 18 as children with special rights, is not only justified but likely to be more conducive to extending the protections afforded under the Convention.

Select Bibliography

Alston P, 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child' (1990) 12 Human Rights Quarterly 156

Archard D and Macleod C (eds), *The Moral and Political Status of Children* (OUP 2002)

Archard D, *Children, Rights and Childhood* (3rd edn, Routledge 2014)

Aries P, *L'Enfant et la View Familaire Sous l'Ancien Regime* (Librarire Plon 1960)

Cassidy C, 'Children's Status, Children's Rights and "Dealing with" Children' (2012) 20 International Journal of Children's Rights 57

Cornock M and Montgomery H, 'Children's Rights in and out of the Womb' (2011) 19 International Journal of Children's Rights 3

de Mause L (ed), *The History of Childhood* (Souvenir Press 1976)

Freeman M, *The Rights and Wrongs of Children* (Frances Pinter 1983)

Schapiro T, 'What is a Child?' (1999) 109 Ethics 715

Tobin J, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395

Tobin J, 'Understanding Children's Rights: A Vision Beyond Vulnerability' (2015) Nordic Journal of Human Rights 155

Turner S and Matthews GB, *The Philosopher's Child: Critical Perspectives in the Western Tradition* (University of Rochester 1998)

Vann RT, 'The Youth of *Centuries of Childhood*' (1982) 21 History and Theory 279

Warren MA, 'On the Moral and Legal Status of Abortion' (1973) 57 Monist 43

Wilson W, 'The Infancy of the History of Childhood' (1982) 21 History and Theory 132

Wringe C, *Children's Rights* (Routledge and Kegan Paul 1981)

DAVID ARCHARD JOHN TOBIN

Article 2. The Right to Non-Discrimination

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 her or his 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.

I. Introduction 42
- A. Background 42
- B. Context 43
  - 1. Non-Discrimination in International and Regional Human Rights Law 43
  - 2. Extension to Children 47
- C. Specificity 48

II. Analysis 49
- A. Function 49
- B. Duties: 'Shall Respect and Ensure' and 'Shall Take All Appropriate Measures' 50
- C. Scope: 'The Rights Set Forth in the Present Convention to Each Child within Their Jurisdiction' 52
  - 1. Material Scope 53
  - 2. Personal Scope 53
  - 3. Territorial Scope 55
- D. Content: 'Without Discrimination of Any Kind' 56
  - 1. Concept of Non-Discrimination 56
  - 2. Conception of Discrimination 58
  - 3. Constitutive Elements of Discrimination 59
  - 4. Special Measures 64
- E. Monitoring 66
  - 1. Domestic Monitoring 66
  - 2. International Monitoring 67
  - 3. Budgetary Exception 68
- F. Special Provisions Relating to Child Discrimination 69
  - 1. *Leges Speciales* in the ICCPR and the ICESCR 69
  - 2. *Lex Specialis* in the CRPD 69

III. Evaluation 70

Select Bibliography 71

I. Introduction

A. Background

To date, every human rights treaty, whether international or regional, obligates States Parties to guarantee that the rights enshrined in the treaty are recognized and exercised without discrimination of any kind. As an international human rights treaty, the 1989 Convention on the Rights of the Child ('CRC', 'the Convention') sets such an obligation for its States Parties in its article 2.

The non-discrimination principle actually bears a specific role in the context of children's rights. Historically, indeed, the struggle against child discrimination has been a central driving force in the development of the rights of the child and one understands the latter better through the lens of three kinds of child discrimination.

First of all, the discrimination between *children and adults*. The principle of non-discrimination has clearly been at work in the gradual recognition of children's rights as such.[1] For a long time indeed, children were not deemed as capable of holding human rights, and were hence discriminated against by comparison to adults. Slowly, but surely, children's rights have been recognized. This recognition culminated in the adoption of the Convention in 1989. Children's interests are now deemed as fundamentally equal to those of adults, even though they are deemed as more vulnerable and hence in need of special protection. Second, the discrimination between *children and young adults*. A second step in the protection of children against discrimination has been the definition of the 'child', and the delineation of childhood from adulthood as a result. This is still a very controversial question given CRC article 1's incomplete definition of the 'child' and the potential discrimination of 'children' depending on their qualification as children from one state to the next.[2] Finally, the discrimination between *children and children*. Children are being discriminated against all the time. Little girls are not treated like little boys,[3] children with a disability are not treated like children without a disability,[4] rural children do not get the same opportunities as those living in cities, migrant children do not benefit from the same rights as local children,[5] and so on.[6] Moreover, children are often discriminated against on account of the status of

[1] Anne McGillivray, 'Why Children Do Have Equal Rights (Reply to Laura Purdy)' (1994) 1 International Journal of Children's Rights 243; David Archard, 'Children's Rights' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2016 edn) https://plato.stanford.edu/archives/sum2016/entries/rights-children/> accessed 4 March 2018; James Griffin, 'Do Children Have Rights?' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children: New Essays* (OUP 2002); John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395.

[2] See Chapter 1 in this Commentary. See also Sonja Grover, 'On Recognizing Children's Universal Rights: What Needs to Change in the Convention on the Rights of the Child' (2004) 12 International Journal of Children's Rights 259.

[3] Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and Marginalisation of the Girl-Child' (2009) 17 International Journal of Children's Rights 345.

[4] Gerison Lansdown, 'It is our World Too! A Report on the Lives of Disabled Children for the UN General Assembly Special Session on Children, New York 2001' (Disability Awareness in Action 2001) http://www.daa.org.uk/uploads/pdf/It%20is%20Our%20World%20Too!.pdf accessed 4 March 2018.

[5] Claire Breen, 'Refugee Law in Ireland: Disregarding the Rights of the Child-Citizen, Discriminating against the Rights of the Child' (2003) 15 International Journal of Refugee Law 750.

[6] See examples mentioned in: Rachel Hodgkin and Peter Newell, *The Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007) 24–25; Sarah Muscroft, *Children's Rights:*

their parents or guardians. The adoption of a general clause prohibiting discrimination among children based not only on their status, but also on the status of their parents was therefore an important step in the struggle against child discrimination. This was done with the insertion of paragraph 2 in article 2 of the CRC.[7] It guarantees children the equal benefit of all Convention rights without discrimination.

B. Context

Non-discrimination clauses, whether general or specific, are among the most standard provisions in international human rights treaties. To assess the comparative potential and limits of article 2, it is worth taking a brief look at major international and regional guarantees of the principle of non-discrimination and their applicability to children. It is only by replacing the principle in its general context that one is able to grasp the full measure of the progress made with the adoption of article 2 of the CRC, but also some of its current limitations.

1. Non-Discrimination in International and Regional Human Rights Law

Equality and non-discrimination are fundamental moral principles.[8] They are also key constitutional principles in a modern democracy where human rights are protected. As a matter of fact, it is the egalitarian dimension of both human rights and democracy that explains why they are usually regarded as interrelated. Human rights are situated in a constitutive relationship to equal moral status and democracy is the only political regime able to protect that equal moral status and the corresponding political equality.[9]

No wonder then that, nowadays, equality and non-discrimination occupy pride of place in most written constitutions and that numerous countries have non-discrimination legislation either against all forms of discrimination or against some specific forms of discrimination only, such as racial or sex discrimination.

Whereas traditional international law used not to concern itself with the principles of equality and non-discrimination, except in relation to states and state sovereignty, the Second World War triggered an unprecedented concern for human rights protection, including guaranteeing them for all without discrimination. The 1945 Charter of the

Equal Rights? Diversity, Difference and the Issue of Discrimination (The International Save the Children Alliance 2000) 32–40.

[7] See on art 2 CRC: Lisa Hitch, 'Non-discrimination and the Rights of the Child, Article 2' (1989) 7 New York University Law School Journal of Human Rights 47; Philip Alston, 'Cadre juridique de la Convention relative aux droits de l'enfant' (1992) 91(2) Bulletin des droits de l'homme 1; Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer 1995) ch 2; Lawrence J LeBlanc, *The Convention on the Rights of the Child. United Nations Lawmaking on Human Rights* (University of Nebraska Press 1995) 94–107; Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) art 2; Muscroft (n 6) Part I; Samantha Besson, 'The Non-discrimination Principle in the Convention on the Rights of the Child' (2005) 13 The International Journal of Children's Rights 433; Hodgkin and Newell (n 6) art 2; Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-discrimination* (Martinus Nijhoff 2008); Nevena Vuckovic Sahovic, Jaap Doek, and Jean Zermatten, *The Rights of the Child in International Law* (Stämpfli 2012) part 2, chapter 3.

[8] On the relationship between equality and non-discrimination, see Samantha Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 Archiv für Sozial- und Rechtsphilosophie Beiheft 19.

[9] On the egalitarian dimension of human rights and the relationship between human rights and democracy, see ibid.

United Nations itself includes the principle of equal rights of peoples and the promotion and encouragement of respect for human rights and fundamental freedoms as two of its major goals.[10]

From the 1950s onwards, conventional guarantees of the non-discrimination principle multiplied. The principle of non-discrimination is now one of the most frequently protected norms of international human rights law.[11] The generality and regularity of these international legal recognitions of the principle of non-discrimination is actually often taken as evidence of its customary nature.[12] It is even sometimes invoked as proof of its imperative or pre-emptive force.[13] According to the Inter-American Court of Human Rights (Inter-Am. CtHR),[14] for instance, the prohibition of discrimination belongs to *jus cogens* norms.

In a nutshell, one may identify three kinds of guarantees of the principle of non-discrimination in international human rights law: general, ground-specific, and context-specific prohibitions of discrimination.

First of all, *general* prohibitions of discrimination. These clauses prohibit discrimination on all grounds in the protection of the human rights guaranteed by the relevant international instrument.

The three major international human rights instruments, that is, the 1948 Universal Declaration of Human Rights ('UDHR'),[15] the 1966 International Covenant on Civil and Political Rights ('ICCPR') and the 1966 International Covenant on Economic, Social and Cultural Rights ('ICESCR')[16] protect the principle of non-discrimination in a general clause, placed prominently at the beginning of the treaties. Article 2 of the UDHR

[10] Arts 1(2) and 1(3) UN Charter (adopted 24 October 1945) 1 UNTS XVI. See also art 55(c).

[11] See on non-discrimination in international human rights law: Wilhelm Kewenig, *Der Grundsatz der Nichtdiskriminierung im Völkerrecht der internationalen Beziehungen, Vol I: Der Begriff der Diskriminierung* (Athenäum 1972); Egbert W Vierdag, *The Concept of Discrimination in International Law, with Special Reference to Human Rights* (Martinus Nijhoff 1973); Christian Tomuschat, 'Equality and Non-discrimination under the International Covenant on Civil and Political Rights' in Ingo von Münch (ed), *Staatsrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (W de Gruyter 1981); Warwick McKean, *Equality and Discrimination under International Law* (OUP 1983); Bertrand Ramcharan, 'Equality and Non-discrimination' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1983); Yoram Dinstein, 'Discrimination and International Human Rights' (1985) 15 Israel Yearbook of Human Rights 11; Anne Bayefsky, 'The Principle of Equality and Non-discrimination in International Law' (1990) 11 Human Rights Law Journal 1; Karl J Partsch, 'Discrimination' in Ronald St J Macdonald, Franz Matscher, and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 571–92; Wouter Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia-Hart 2005); Dinah Shelton, 'Prohibited Discrimination in International Human Rights Law' in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law* (Martinus Nijhoff 2009) 261–92; Olivier de Schutter, *International Human Rights Law* (2nd edn, Cambridge 2014) 632–757; Daniel Moeckli, 'Equality and Non-discrimination' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (3nd edn, OUP 2018) 148–64.

[12] See: *South West Africa* (Second Phase, Judgment) [1966] ICJ Rep 3, 293 (Tanaka J); ICJ, *Barcelona Traction* (Second Phase, Judgment) [1970] ICJ Rep 3, 32.

[13] McKean (n 11) 277–83; Hitch (n 7) 50; Ramcharan (n 11) 249; Van Bueren (n 7) 55.

[14] Inter-Am CtHR, *Juridical Condition of the Undocumented Migrants*, Advisory Opinion OC-18/03 (2003) Series A No 18, paras 97 ff, 101.

[15] Universal Declaration of Human Rights UNGA Res 217 A(III).

[16] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 July 1976) 993 UNTS 3.

prohibits discrimination in the enjoyment of the rights recognized in the Declaration, but the principle of non-discrimination is also specified further in the legal context with a guarantee of equality before the law and in the law (UDHR art 7).[17] Article 2(1) of the ICCPR prohibits discrimination in the enjoyment of the rights recognized in the Convention while article 26 of the ICCPR provides an autonomous guarantee of equality in and before the law and hence against discrimination.[18] Article 2(2) of the ICESCR contains a general non-discrimination clause that prohibits discrimination in the enjoyment of the rights in the ICESCR. There is, however, no equivalent to article 26 of the ICCPR in the ICESCR.[19]

General prohibitions of discrimination may also be found in all regional human rights treaties. The principle of non-discrimination appears in the first article of the American Convention on Human Rights ('ACHR') which lays down the obligations of States Parties[20] and in the second article of the African Charter on Human and Peoples' Rights ('ACHPR').[21] Article 14 of the European Convention on Human Rights ('ECHR')[22] prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention, whereas article 1 of Protocol No 12 to the ECHR contains an autonomous

[17] Universal Declaration of Human Rights UNGA Res 217 A(III). Art 2 UDHR reads as follows: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Arts 10, 16, 21, and 26(2) also refer to components of equality.

[18] Art 2(1) ICCPR reads as follows: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' According to art 26 ICCPR: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

[19] Art 2(2) ICESCR reads as follows: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

[20] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (1969) 9 ILM 99. Art 1 reads as follow: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'. See also art 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) (1989) 28 ILM 156.

[21] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. Art 2 reads as follows: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. Art 3 guarantees that every individual shall be equal before the law and shall be entitled to equal protection of the law.

[22] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) CETS 5. Art 14 reads as follows: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. See also Art E of the 1996 European Social Charter (European Social Charter revised, adopted 3 May 1996, entered into force 1 July 1999) CETS 163 and the Preamble to the 1961 European Social Charter.

prohibition of discrimination which extends the prohibition laid down in article 14 of the ECHR to 'any right set forth by law' and to any action taken by a public authority.[23] Finally, mention should be made of the Charter of Fundamental Rights of the European Union.[24] An entire chapter of the Charter is dedicated to equality (Chapter III). It starts with a general prohibition of discrimination (art 21), but also contains a specific article on children's rights (art 24).

These general international and regional guarantees of the non-discrimination principle share common features. First of all, most of them are *subordinate* and non-autonomous clauses, which qualify other guaranteed rights in commending their respect free of any discrimination rather than prohibiting discrimination in itself.[25] This is the case, for instance, of article 2(1) of the ICCPR, article 2(2) of the ICESCR, article 2 of the UDHR, article 1 of the ACHR, article 2 of the ACHPR, and article 14 of the ECHR. Exceptions to this may be found in article 7 of the UDHR, article 26 of the ICCPR, article 1 Protocol No 12 of the ECHR and article 24 of the ACHR. These autonomous clauses guarantee equality in and before the law not merely in the context of a threat to another Covenant or Convention right or freedom, but in general. Second, most of these provisions have an *open-ended* scope. In this sense, the list of prohibited discrimination grounds is purely indicative and can be extended to other similar grounds.[26] This is what is meant by terms like 'other status' or 'such as' used in the non-discrimination clauses. As to the list of exemplary discrimination grounds prohibited in all the clauses mentioned, it is more or less the same. Finally, most of these guarantees are *not directly justiciable* norms. In this sense, they cannot be invoked directly by individuals against the state. Exceptions to this may be found in article 26 of the ICCPR, article 14 of the ECHR, article 1 Protocol No 12 of the ECHR, and article 24 of the ACHR.

Second, *ground-specific* prohibitions of discrimination. These clauses prohibit discrimination on specific grounds only, in the context of the protection of the human rights guaranteed by the relevant international instrument—which is itself often drafted as a non-discrimination treaty.

The two most prominent ground-specific prohibitions of discrimination are to be found in the 1965 International Convention on the Elimination of all Forms of Racial Discrimination ('ICERD') and in the 1979 Convention on the Elimination of all Forms of Discrimination against Women ('CEDAW').[27] The two conventions aim at combating various forms of ground-specific discrimination by granting non-discrimination rights.[28] They also include a ground-specific non-discrimination clause applicable to the exercise of these other ground-specific non-discrimination rights in the Convention (ICERD art

[23] Protocol No 12 to the ECHR (adopted 4 November 2000, entered into force 1 April 2005) CETS 177. The Protocol is open for signature by all the members States of the Council of Europe, but as of November 2018 only twenty of the forty-seven members States have ratified it.

[24] Charter of Fundamental Rights of the European Union [2010] OJ C83/02.

[25] Bayefsky (n 11) 3–4. See also UN Human Rights Committee ('HR Committee'), 'General Comment No 18: Non-discrimination' (1989) ('HRC GC 18') in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol I) 195 para 12.

[26] Bayefsky (n 11) 5–8.

[27] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[28] On the distinction between non-discrimination *rights* and the *principle* of non-discrimination in international human rights law, see Besson, 'The Egalitarian Dimension' (n 8).

5; and CEDAW art 3). A distinct example is the 2006 Convention on the Rights of Persons with Disabilities ('CRPD').[29] The Convention includes various disability-specific rights, and not only non-discrimination rights like the other two, but it also includes a disability-specific non-discrimination clause (CRPD art 5). It further entails non-discrimination clauses addressing cases of multiple discrimination of disabled women (CRPD art 6) and, as we will see, disabled children (CRPD art 7).

Finally, *context-specific* prohibitions of discrimination. These clauses prohibit discrimination in the protection of the human rights guaranteed by the relevant international instrument, albeit in a specific context only: that is, that of the instrument itself, which is often drafted as a context-specific non-discrimination treaty. One may mention the 1958 ILO Convention no 111 concerning Discrimination in Respect of Employment and Occupation and the 1960 UNESCO Convention against Discrimination in Education.[30]

2. Extension to Children

In principle, children are protected by the general non-discrimination clauses entailed in international and regional human rights instruments, whether general, ground-specific, or context-specific, just as adults would in the same situation.[31] After all, human rights treaties are supposed to apply to 'every human being', and hence independently of age. As a matter of fact, age discrimination is directly or at least indirectly prohibited by most non-discrimination clauses in international and regional human rights instruments and should apply *a fortiori* to other international and regional human rights instruments.[32]

All the same, the principle of non-discrimination as we know it from international and regional human rights law has been largely unable to effectively counter child discrimination.[33] This is due partly to these instruments' general misapplication and reservations, but also to their inadequacy to protect children against all kinds of child-specific discrimination.

There are various types of child-specific discrimination one may mention. First, children often require special measures of protection that take into account their particular

[29] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[30] UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 29 May 1962) 429 UNTS 93; lLO Convention (no 111) concerning Discrimination in Respect of Employment and Occupation (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31. As regards work, one should also mention the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3. Art 7 ICPMW prohibits discrimination in the enjoyment of the rights guaranteed by the Convention 'in accordance with the international instruments concerning human rights'.

[31] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 26; See HR Committee, 'General Comment no 17: Article 24. Rights of the Child' (1989) reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol I) 193 para 2.

[32] Age is an explicit prohibited ground in the ICPMW (art 7), the Charter of Fundamental Rights of the European Union (art 21) and the Inter-American Convention against all Forms of Discrimination and Intolerance (adopted 5 June 2013, not yet entered into force) OEA/Ser.P AG/RES. 2804 article 1). It has been recognized as a prohibited ground of discrimination by the HR C (HR Committee, *Love et al. v Australia* (Comm no 983/2001) (final views adopted on 25 March 2003) [para 8.2) and the Committee on Economic, Social and Cultural Rights ('ESCR Committee') ('General Comment No 6: The economic, social and cultural rights of older persons' (1995) in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol I) 27 paras 11–12). As this last example shows, discrimination based on age often refers to discrimination against *elderly people*, however.

[33] Van Bueren (n 7) 39.

vulnerability vis-à-vis the state, but also vis-à-vis their families and other individuals. Children may indeed be discriminated against because of actions that their parents or family members have engaged in, and hence in a way that is mediated through their parents. Second, children are often not only discriminated against when compared to other children, but also by comparison to *adults*. Thus, children are excluded from actively taking part in judicial procedures through which they could claim their rights not to be discriminated against. Finally, children are often doubly discriminated against: first, as children and, second, as members of a *specific group*. These discriminations are often invisible, partly because the difference of treatment based on age may appear, at first sight, necessary to protect the child. This is the case, for instance, of certain differentiations based on age for sexual consent between homosexual and heterosexual acts, which have been thought to protect young adults and hence deemed justified, but which have turned out quite detrimental to homosexual young adults.[34] This '*double jeopardy*' weighing on children is difficult to handle merely through general guarantees of the principle of non-discrimination and needs to be addressed specifically.

Hence the need for a special international instrument guaranteeing children the respect of their human rights without discrimination.

C. Specificity

The Convention on the Rights of the Child includes a guarantee of the principle of non-discrimination in article 2.[35] It is a general discrimination clause that is neither ground-specific nor context-specific. It is unique to the extent that it is a general non-discrimination clause in a ground-specific human rights instrument. Unlike the other non-discrimination clauses in ground-specific instruments, it is not restricted to one discrimination ground only. Nor, however, is it so general that it is oblivious to the child-specific nature of the discrimination at stake and it cannot therefore be conflated with a general non-discrimination clause in a general human rights instrument.

At first sight, the wording of article 2 of the CRC is very similar to that of several other general non-discrimination clauses in general human rights instruments, such as article 2(1) of the ICCPR or article 2(2) of the ICESCR. It may be compared to those clauses as follows.

First, article 2 uses the term '*discrimination*' like article 2(2) of the ICESCR and article 14 of the ECHR, by contrast to article 2(1) of the ICCPR and article 2 of the UDHR which refer to 'distinction'.[36] It is generally accepted nowadays that both refer to the same kind of differentiation without reason. Second, the *list of prohibited grounds* of discrimination in article 2(1) is the same as those of major non-discrimination clauses with the additional grounds of *disability* and *ethnic origin*. Third, it is important to emphasize that article 2(1) is a *subordinate* rather than an autonomous clause of non-discrimination. As such, it applies only to those rights guaranteed in the Convention, by contrast to

[34] ibid 39–40. See ECtHR, *Dudgeon v United Kingdom* (1981) Series A no 45.

[35] One of the regional counterparts of the CRC, the African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49, also contains a general provision on non-discrimination (art 3), which reads as follows: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status'.

[36] Hitch (n 7) 54–58.

article 26 of the ICCPR, for instance. In this sense, it is very similar to article 2(1) of the ICCPR, article 2(2) of the ICESCR, and article 14 of the ECHR. This is not the case, however, of article 2(2) of the CRC which applies to cases of discrimination of a child on the basis of her or his parents' activities or status only. Fourth, the scope of application of article 2 is *open* and cannot be limited to some areas only. It applies to education as much as to private ownership. Finally, article 2 is a *directly justiciable clause* that may be invoked by victims of discrimination directly before domestic institutions. This mirrors the solution chosen by article 2(1) of the ICCPR.

A careful reading of the international provisions discussed before shows, however, that article 2 of the CRC is also unique in several ways. On the one hand, it protects the child in all her or his specificities and not only as any other human being (art 2(1)). On the other, it protects children not only against discrimination directly targeted at them, but also against discrimination based on attributes of their parents, legal guardians or family members (art 2(1) and (2)). Indeed, very often, children are easy targets for discrimination through their parents.

Thus, like other children's rights in the Convention, article 2 of the CRC recognizes both the special status and needs of children, due to their very dependency, through a child-specific non-discrimination clause, and, at the same time, the same basic human rights and fundamental freedoms already recognized to adults through a non-discrimination clause that is at least as inclusive as general non-discrimination clauses in other international and regional human rights instruments.

II. Analysis

Article 2 is a short but complex provision that requires a careful analysis. The following section presents its function, the duties implied by this provision, and its scope and content, before turning to its implementation and the monitoring thereof. A final section considers the relationship between article 2 CRC and specific measures protecting particularly vulnerable children against discrimination.

A. Function

Article 2 is the general non-discrimination clause in the Convention on the Rights of the Child. Together with articles 3, 6, and 12 of the CRC, if forms part of the so-called *general principles of the CRC*.[37] As such, it applies to the interpretation and application of the whole treaty and to the many ways in which children rights may be applied in a discriminatory fashion.[38]

[37] CRC Committee, 'Overview of the reporting procedures' (1994) CRC/C/33; CRC Committee, 'General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1 (a), of the Convention on the Rights of the Child' (1991) CRC/C/5 ('CRC Committee, General guidelines'), para 9; CRC Committee, 'General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42, and 44, para 6)' (2003) ('CRC GC 5') reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 421, para 12. See on the general principles of the CRC, Laura Lundy and Bronagh Byrne, 'The Four General Principles of the United Nations Convention on the Rights of the Child: the Potential Value of the Approach in Other Areas of Human Rights Law' in Eva Brems, Ellen Desmet, and Wouter Vandenhole (eds), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge 2017) 52–70.

[38] Muscroft (n 6) 27–28.

Article 2 amounts to more than a non-discrimination clause, however. It also has another, albeit related, function in the determination of the content of States Parties' obligations. Besides the obligations not to discriminate in the protection of all the rights set forth in the Convention, article 2 also identifies the general obligations of States Parties with respect to those rights.[39] This general function of article 2 comes very close to that of article 4 of the CRC which deals with the implementation of Convention rights. Thus, one may say, following Philip Alston, that article 2(1) states the *objectives* of the Convention, while article 4 indicates the *means* to implement them.[40]

This dual function of article 2 of the CRC is essential to understanding the duties of States Parties entailed in this provision. First, States Parties shall *respect* and *ensure* all the rights set forth in the Convention. The means for doing so are described in article 4 of the CRC[41]—not in article 2 as it is the case in the ICCPR. Second, States Parties shall *respect* and *ensure* all the rights set forth in the Convention *without discrimination*. In what follows, we will focus on the specific duties related to the prohibition of discrimination.

B. Duties: 'Shall Respect and Ensure' and 'Shall Take All Appropriate Measures'

Like article 2(1) of the ICCPR, article 2(1) of the CRC foresees two kinds of duties (or obligations) which complement each other.[42]

First of all, duties to *respect*. These duties are passive or negative. In general, duties to respect require States Parties to refrain from violating any of the rights enshrined in the Convention.[43] In relation to the prohibition of discrimination, they imply that the State may not actively discriminate in any way against children in their protected rights. Second, duties to *ensure*. In his commentary on the ICCPR, Nowak has explained that '[i]n contrast to the obligation to respect … the obligation to *ensure* is a positive duty'.[44] He has further explained that:

> The obligation to ensure consists of the obligation to *protect* individuals against interference by third parties (horizontal effect) and the obligation to *fulfil* which in turn incorporates and obligation to facilitate the enjoyment of human rights and provide services.[45]

This model aligns with what is typically referred to as the typology of tripartite obligations under international human rights law which consists of an obligation to respect, protect, and fulfil (promote).[46]

[39] See HR Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) ('HRC GC 31') reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol I) 243, paras 6, 8, 10.

[40] Alston (n 7) 4. [41] See chapter 4 of this Commentary. [42] Detrick (n 7) 68–69.

[43] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd NP Engel 2005) 37; Human Rights Committee General Comment No 31: 'The Nature of the General Legal Obligation imposed on State Parties to the Covenant' CCPR/C/21/Rev.1/Add.13 (26 May 2004) ('HRC GC 31') para 6; Robin Geib, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Andrew Clapham, Paola Gaeta, and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 111, 117 (noting that this obligation 'simply amounts to a reaffirmation of the rule expressed with the Latin tag *pacta sunt servanda* and codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties').

[44] Nowak (n 43) 37. See also: HRC GC 31 (n 43) para 6; Geib (n 43) 117–19; Hodgkin and Newell (n 6) 22.

[45] Nowak (n 43) 38.

[46] For a discussion of the development and features of this model see: Olivier de Schutter (n 11) chapter 3; Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (OUP 2009) 96–120. The

In general, therefore, the duty 'to respect and ensure' under article 2 requires States Parties to take whatever measures are necessary to give effect to the rights enshrined in the Convention.[47] It is a broad and onerous obligation that applies *to all rights quite independent* of the obligation to protect children against discrimination in their enjoyment of these rights. With respect to the prohibition of discrimination, however, there is both a negative duty to refrain from discrimination and a positive duty to prevent discrimination irrespective of whether the threat arises from a government or private actor.[48] This protection can take place *legally* through the adoption of non-discrimination laws.[49] Often, however, non-discrimination laws exist, but are not effectively implemented.[50] As a result, *practical* measures should also be taken to prevent and combat discrimination that cannot only be eradicated through laws, as in the context of social, economic, and cultural rights, for instance. Socially internalized forms of discrimination and the media are indeed at the origins of many forms of discrimination and should be targeted directly.[51] This is confirmed by article 4 of the CRC which emphasizes that legislative measures are not the only ones the state should take to combat discrimination. It is important to emphasize that positive duties of protection apply to all areas of political control, whether official or private, thus also calling for *mainstreaming* measures in all these areas.

These positive duties under article 2(1) are complemented by the duties to take all appropriate measures set by article 2(2) in relationship to grounds of discrimination related to the child's parents' or guardians' person or status.

The Committee on the Rights of the Child ('CRC Committee', 'the Committee') has summarized these two kinds of non-discrimination duties in its general comment on the best interest of the child:

> The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights

tripartite typology is not an explicit feature of the CRC or indeed other international human rights instruments. Its emergence and gradual acceptance however can be traced to the efforts of scholars and Committee bodies in the 80s and 90s who sought to generate an understanding and acceptance of economic and social rights relative to civil and political rights. See especially the work of: Asjborn Aide, *The Right to Adequate Food as a Human Right* E/CN.4/Sub.2/1983/25 (1983); Henry Shue, *Basic Rights, Subsistence, Affluence and US Foreign Policy* (Princeton University, Princeton 1980) 52; The Maastricht Guidelines on Violations of Economic Social and Cultural Rights (1997) (adopted by the a group of academic experts in Maastricht 22–26 January 1997) para 6 ('Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil'); ESCR Committee, General Comment No 12: The Right to Adequate Food (art 11) E/C.12/1999/5 (12 May 1999) para 15; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Comm No 155/96 (2001) AHRLR 60 (ACHPR) (15th Annual Activity Report) paras 44–48; Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2005) paras 47–48.

[47] Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed), *The International Bill of Rights* (Columbia University Press 1981) 77; see the comment made by the United Nations Children's Fund (UN Doc E/CN.4/1989/WG.1/CRP.1) during the drafting process, reproduced in Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007) 329–30 ('*Legislative History*').

[48] Alston (n 7) 4–5. [49] Hodgkin and Newell (n 6) 23. [50] Muscroft (n 6) 34.

[51] CRC Committee, CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 paras 29–30; Hodgkin and Newell (n 6) 24.

under the Convention. This may require positive measures aimed at redressing a situation of real inequality.[52]

More generally, the States Parties' obligations under article 2 have been specified further by the Committee in various general comments and concluding observations.

In its 'General Comments', on the one hand, the CRC Committee considers that article 2 imposes the following duties: to ensure that the principle of non-discrimination is reflected in all domestic legislation and can be directly applied and appropriately monitored and enforced through judicial and administrative bodies; to identify individual children and groups of children the recognition and realization of whose rights may demand special measures; to collect data and disaggregate them in order to identify discrimination; to amend legislation, administration, and resource allocation, as well as educational measures when needed to change attitudes; and to take special measures.[53] Specific obligations to vulnerable children have also been identified by the Committee. To combat discrimination against children with disabilities, for example, states should: include disability as a forbidden ground in their constitution or legislation; provide effective remedies in case of violations of the rights of children with disabilities; conduct awareness-raising and educational campaigns; and pay particular attention to girls with disabilities.[54]

Specific duties relating to the non-discrimination principle may also be identified from the CRC Committee's *concluding observations* on States Parties' reports, on the other hand. The Committee regularly requests, for instance, that states provide 'specific information on the measures and programmes relevant to the Convention on the rights of the child undertaken by the State party to follow up on the Durban Declaration and Programme of Action adopted at the 2001 World conference against racism, racial discrimination, xenophobia and related intolerance'.[55]

C. Scope: 'The Rights Set Forth in the Present Convention to Each Child within Their Jurisdiction'

To get a full grasp of the scope of article 2, its specific material, personal, and territorial scopes need to be examined in turn.

[52] CRC Committee, 'General Comment No 14 on the right of the child to have her or his best interests taken as a primary consideration (art 3, para 1)' (2013) CRC/C/GC/14 ('CRC GC 14') paras 40, 48.

[53] CRC Committee, 'General Comment No 11: Indigenous children and their rights under the Convention' (2009) CRC/C/GC/11 ('CRC GC 11') paras 23–24; CRC GC 5 (n 37) para 12.

[54] CRC Committee, 'General Comment No 9: The rights of children with disabilities' (2006) reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 497 ('CRC GC 9') para 9. With respect to migrant children see: 'Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (2017) CMW/C/GC/3-CRC/C/GC/22 paras 21–26; CRC Committee, 'General Comment No 21 on children in street situations (2017) CRC/C/GC/21 paras 25–27; CRC Committee, 'General Comment No 20 on the Implementation of the Rights of the Child During Adolescence (2016) CRC/C/GC/20 ('CRC GC 20') para 21; CRC GC 11 (n 53) paras 23–29.

[55] CRC Committee, CO Albania, CRC/C/ALB/CO/2-4 para 28; CO Malta, CRC/C/MLT/CO/2 para 29; CO Guyana, CRC/C/GUY/CO/2-4 para 25; CO Andorra, CRC/C/15/Add.176 para 30; CO Bahrain, CRC/C/15/Add.175 para 30; CO Bangladesh, CRC/C/15/Add.221 para30; CO Belarus, CRC/C/15/Add.180 para 30; CO Brunei Darussalam, CRC/C/15/Add.219 par 28; CO New Zealand, CRC/C/15/Add.216 para 24. See also CRC GC 11 (n 53) para 28.

1. *Material Scope*

The material scope of article 2 may be approached from the perspective of the rights protected, but also from that of the areas covered and that of the prohibited grounds of discrimination.

(a) Rights Protected

The phrase 'the rights set forth in the present Convention' in article 2(1) indicates that the obligation of non-discrimination applies only with respect to the rights set forth in the Convention, and not beyond. The rights in the Convention may indeed be respected in ways that exclude or discriminate children.

The CRC's principle of non-discrimination is not an independent and autonomous principle of non-discrimination, therefore, but a dependent or derivative one. In that respect, it comes close to the one captured by most other non-discrimination clauses in international human rights instruments.

There is an *exception* to this restriction, however, in article 2(2). That provision extends the prohibition of discrimination to any rights and areas where discrimination may take place, even if they fall outside the ambit of the Convention. This has very broad implications, although these remain still largely unexplored to date.[56]

(b) Areas Covered

Depending on the duties at stake, the non-discrimination obligations of the state have a different material scope.

When the obligation is one of negative 'respect' of the prohibition of discrimination according to article 2(1), the obligation applies only to any governmental measure of state action by an official or authority at any level of government. When the obligation is one of positive 'protection' according to article 2(1) and 2(2), however, the obligation extends also to removing private obstacles to the enjoyment of the designated rights.

For the rest, however, there are no context-specific restrictions to the material scope of article 2 of the CRC.

(c) Grounds of Discrimination

The insertion of an exhaustive list of prohibited discrimination grounds can restrict the material scope of a prohibition of discrimination. This is the case in the CEDAW, which only refers to discrimination against women, and in the CERD, which only refer to discrimination on the grounds of race, colour, or ethnic or national origin.

By contrast, article 2(1) of the CRC contains a long list of suspect grounds. This list is purely exemplary, however, and can be extended to other grounds as is apparent from the wording 'other status' at the end of the list. The interpretation of the notion of 'other status' is addressed in further detail below. Article 2(2) only applies, on the contrary, to the discrimination of children that is based on the status of their parents.

Of course, article 2 of the CRC protects children against discrimination and, as result, focuses on the child-specific dimensions of those discriminations whatever the grounds.

2. *Personal Scope*

The personal scope of article 2 can be apprehended from the perspective of the right-holders and from that of its duty-bearers. Duties stemming from article 2 can indeed be

[56] Hodgkin and Newell (n 6) 30.

directly invoked by children against the institutions of States Parties. To that extent, it amounts to more than an interpretative principle.

(a) Right-Holders

Those protected against discrimination by article 2 are *all children*. As such, the application of article 2 depends on article 1 of the CRC's definition of 'child'.[57] This definition regards any person under 18 as a child, except when national law determines a different age for the children's majority. This flexibility has been heavily criticized for allowing discrimination among children of different States Parties. One may argue, however, that the age-based definition in the Convention has already become quite authoritative since 1989 and this may be seen as a sign of progress when compared to the multitude of definitions that used to prevail.

The only *exceptions* to the general scope of right-holders of article 2 are identified in article 22, 23 and 30 of the CRC. Those three provisions provide for special protection against discrimination of children in particularly vulnerable situations, and respectively to refugee, disabled and indigenous children. Only children falling into these three groups may therefore benefit from the special protection measures foreseen by the respective provision, thus giving rise to interesting questions of inequality before non-discrimination clauses and hence of discrimination in non-discrimination rights.

Of course, the children protected against discrimination are only those children situated 'within the jurisdiction' of the relevant State party (art 2(1)). As explained below, jurisdiction should not be conflated with nationality, however. The children protected may not be discriminated against because they are *non-nationals* of the State in which they are discriminated. This applies even if they are in irregular situation.

(b) Duty-Bearers

From a purely practical point of view, discrimination, like any other violation of human rights, may have many perpetrators.

First of all, *public institutions*. They are indeed the source of power and coercion that can most discriminate or omit to prevent discrimination from occurring. Second, *parents* or *guardians*. They constitute another important source of discrimination, as they dispose legally and materially of important power over children. Third, *other individuals.* Other individuals in the society may also contribute to causing discrimination against children. This is the case of the media or of other social groups such as religious lobbies which may contribute to entrenching biases against children in social attitudes.[58] Finally, other *children*. Children are also often at the origin of discrimination against other children.

Identifying the actual bearers of the corresponding non-discrimination duties is more complicated, however. The scope of duty-bearers of the prohibition of non-discrimination is indeed more restricted than the scope of potential discriminators.

First of all, *States* are clearly the sole negative and positive duty-bearers of article 2(1) and 2(2), provided they have ratified the Convention. Of course, their duties also extend, as explained before, to preventing individuals from discriminating against children. Indeed, States Parties have a positive duty to prevent legally or practically individuals from discriminating against children.[59]

[57] See in this Commentary, Chapter 1.

[58] Muscroft (n 6) 35.

[59] See CRC Committee, 'General Comment No 16: State obligations regarding the impact of the business sector on children's rights' (2013) CRC/C/GC/16 ('CRC GC 16') para 14: 'States are required to prevent discrimination in the private sphere in general and provide remedy if it occurs'.

The second question to arise is whether non-discrimination clauses may also have horizontal effect and generate non-discrimination duties for *individuals* themselves. One may distinguish between two types of potential horizontal effect of article 2 of the CRC: direct horizontal effect and indirect horizontal effect.

Granting article 2 *direct* horizontal effect would mean that the non-discrimination principle binds individuals directly in their relations to children. This is controversial domestically. It is even more so in international law. States are by and large still the only parties to international treaties and hence the only direct bearers of the duties they give rise to. They are also the only ones responsible before international monitoring bodies. As a result, direct horizontal effect has never been granted to the non-discrimination principle in international law. It could be recognized, however, through domestic law provided domestic law grants the prohibition of non-discrimination direct horizontal effect in some or all circumstances, on the one hand, and the latter extends to international law within the domestic legal order, on the other.

In the absence of direct horizontal effect, international guarantees of the principle of non-discrimination are generally regarded as having *indirect* horizontal effect. What this means is that domestic judges and other institutions ought to refer to the principle of non-discrimination to interpret domestic private law and the law regulating inter-individual relationships in a way that prohibits discrimination among private parties. Article 2 of the CRC clearly is meant to have such an indirect horizontal effect and binds domestic authorities in the interpretation of the Convention's rights.[60]

3. Territorial Scope

Article 2(1) applies to all children *under the State's jurisdiction*. This is a broad clause that was thoroughly debated in the *travaux préparatoires*.[61] Such jurisdiction clauses have now become common practice in international and regional human rights law and their interpretation by courts or quasi-judicial bodies[62] has generated substantial debates.[63] Curiously, article 2 of the CRC's jurisdiction clause replaces a general jurisdiction clause

[60] CRC Committee, CO Cambodia, CRC/C/15/Add.128 para 26 ('The Committee recommends that the general principles of the Convention (art. 2, 3, 6, and 12) be included in all relevant legislation affecting children and *taken into account in all administrative and judicial decisions*, as well as in all policies and programmes related to children' (emphasis added)); CO Niger, CRC/C/15/Add.179 para 26.

[61] The revised draft (UN Doc E/CN.4/1349), which was the basic working document for the working group, mentioned that the rights extended to all children 'in the territories' of the States Parties. The formulation remained the same after the first reading (UN Doc E/CN.4/1988/WG.1/WP.1/Rev.1). UNICEF made the suggestion to complete the formulation by adding 'in their territories *or* subject to their jurisdiction'. During the second reading, some states proposed amending the 'or' with 'and' but it was finally agreed that reference to territories would be deleted and only the reference to jurisdiction would be kept (see UN Doc E/CN.4/1989/48 paras 146–69). All extracts are reproduced in OHCHR, *Legislative History* (n 47) 74–75, 83, 331–33. See ICCPR art 2: 'to all individuals within its territory and subject to its jurisdiction'.

[62] See eg: ICJ, *Legal Consequences of the Construction of the Wall* (Advisory Opinion) [2004] ICJ Rep. 136 para 107 ff; HR Committee, *Lopez Burgos v Uruguay* Communication no 52/1979 (final views adopted on 29 July 1981); in the regional context: ECtHR, *Al-Skeini v United Kingdom* App no 55721/07 (Judgment of 7 July 2011).

[63] See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford 2011); Malcolm Langford, Wouter Vandenhole, Martin Scheinin, and Willem Van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2012); Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic Yearbook of International Law 183.

in the Convention. This combination of a general and non-discrimination jurisdiction clause may actually also be found in other international human rights instruments (eg art 2, ICCPR).

As is clear from the *travaux préparatoires,* the notion of 'jurisdiction' is not equivalent to those of 'territory' or 'nationality'. In a nutshell, the Convention's non-discrimination principle's jurisdiction clause excludes limiting the prohibition of discrimination only to those children situated on the territory of the State party or only to children who hold the nationality of the State party as opposed to foreign children.[64] The jurisdiction of a State party extends to national and foreign children inside and outside its territory when that territory is occupied or protected by the State or when the State exercises a form of effective control over those children outside its territory.[65]

This applies whether the discriminated child is under the state's jurisdiction regularly or not.[66] During the drafting process, the United States tried to limit the scope of the protection to those children who were 'lawfully' in a territory. This proposal was harshly criticized and finally abandoned.[67] As such, the Convention specifically addresses the rights of certain groups of vulnerable children, such as refugee children, children in trouble with the law, children in situations of armed conflict, and children from minority groups.

Finally, article 2 of the CRC applies to children under a State party's jurisdiction whether or not the state from which this child is a national has ratified the Convention. The only exceptions to this general rule are those foreseen in article 22 of the CRC which deals with refugee children.[68]

D. Content: 'Without Discrimination of Any Kind'

States shall respect and ensure the rights set forth in the CRC 'without discrimination of any kind'. To capture the exact content of the prohibition of discrimination, it is important to start by presenting some distinctions pertaining to the concept of non-discrimination, before looking more closely at the relevant conception of discrimination and at its constitutive elements. Finally, special measures, that is, measures aiming at achieving material equality and that amount to a special kind of positive non-discrimination duties, are also considered.

1. Concept of Non-Discrimination

There are different distinctions necessary to the identification of the concept of non-discrimination in practice. The following distinctions are of particular relevance: the

[64] HRC GC 31 (n 39) para 10.

[65] ibid para 10; ICJ, *Legal Consequences of the Construction of the Wall* (Advisory Opinion) [2004] ICJ Rep 136, para 107 ff See for an interesting application of territorial jurisdiction to the father of a child to benefit the child: Appellant's Submissions in *DWN027 v The Republic of Nauru* in the High Court of Australia on Appeal from the Supreme Court of Nauru No M145 of 2017 paras 55–64 available on line: http://www.hcourt.gov.au/cases/case_m145-2017 (accessed 20 April 2018) (discussing and using this notion of jurisdiction to argue that when considering an application by a father located within the territory of a state for refugee status, the state must take into account the best interests of a child of that father (consistent with art 3 of the Convention) even though the child is in another state and not under the power or control of the state).

[66] LeBlanc (n 7) 95–96.

[67] UN Doc E/CN.4/L.1575 paras 39–56 reproduced in Office of the United Nations High Commissioner for Human Rights, *Legislative History* (n 47) 321–23.

[68] Detrick (n 7) 69–70.

distinction between equality and non-discrimination, the distinction between formal and material equality, and the distinction between equality before and in the law.

(a) Equality and Non-Discrimination

Article 2 CRC does not guarantee 'equality'. All it does is prohibit 'discrimination'. In this respect, it is unlike other general or ground-specific non-discrimination clause one finds in international human rights instruments that usually associate the principles of equality and non-discrimination.[69] Equality and non-discrimination are indeed often understood as positive and negative statements of the same principle.[70] According to this common view, one is treated equally when one is not discriminated against, and one is discriminated against when one is not treated equally.[71]

The lack of mention of the principle of equality in the Convention does not have significant consequences for the interpretation of article 2 CRC, however. The CRC Committee also refers to equality when interpreting the non-discrimination principle. It actually sometimes uses both principles interchangeably.[72]

(b) Formal and Material Equality

Article 2 CRC aims at realizing not only formal, but also material equality. The CRC Committee has stressed many times that the non-discrimination principle does not mean identical treatment in every instance.[73]

Equality may be deemed *formal* when what matters is the different treatment of similar situations or the similar treatment of different situations seen in strict terms. By contrast, what matters for *material* equality is whether someone is treated differently in practice or *de facto*.[74] Someone may be treated equally from a formal perspective, but be treated differently materially when her or his position is assessed from a practical standpoint.

Two further distinctions help clarifying the notion of material equality.

First, one usually opposes equality of opportunities to equality of results. Whereas the former is an equality of starting gates, as when men and women are given equal education, the latter looks at results, as when men and women have not fared equally well overall in the labour market, although they have been given equal chances. Measures of protection of equality may focus on the former or the latter, depending on the overall policy one follows. Promoting equality of opportunities is usually regarded as less damaging for formal equality than targeting inequalities of result.[75]

Second, one may contrast symmetrical with asymmetrical equality. When equality calls for the equal treatment of similar situations and the differentiated treatment of different situations, it is referred to as symmetrical equality. Equal treatment does not necessarily mean identical treatment in every instance, however.[76] Some persons or situations may call for special measures of protection and favourable treatment. When equality justifies special protection of people with special needs or favourable treatment to correct past or

[69] On the relationship between equality and non-discrimination, see Besson, 'The Egalitarian Dimension' (n 8).

[70] Bayefsky (n 11) 1. Contra: Elisa Holmes, 'Anti-discrimination Rights without Equality' (2005) 68 Modern Law Review 175.

[71] McKean (n 11) 285.

[72] eg CRC GC 14 (n 52) para 41.

[73] CRC GC 5 (n 37) para 12. See also HRC GC 18 (n 25) para 8.

[74] See PCIJ, *Minority Schools in Albania* [1935] PCIJ Rep Series A/B No 64, 19. See also HRC GC 18 (n 25) para 8.

[75] See eg ECJ, Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

[76] Bayefsky (n 11) 11; ECtHR, *Belgian Linguistic Cases* (1986) Series A no 6, para 10.

present discrimination, one speaks of asymmetrical equality. This opposition between symmetrical and asymmetrical equality actually corresponds to two successive trends in the history of the development of non-discrimination law: first of all, the idea that equality implies similarity and, second, the idea that equality protects, on the contrary, diversity.

Whereas duties to protect formal equality are necessarily symmetrical, this is not the case in respect of duties to promote material equality. The latter may indeed be undifferentiated and target all groups indifferently, as with general education programmes or other active promotions of equality which benefit everybody. But they may also—and this is more controversial—favour groups over others, thus discriminating some of them formally in order to redress material discrimination.

(c) Equality before and in the Law

The major case of formal equality is legal equality or equality *de jure*. This includes equality before the law, but also equality in the law.

Equality before the law pertains to the status of a person when the law applies to her. For instance, equality before the law is in question when the legal subjecthood is unequally distributed. *Equality in the law* by contrast is the equality the law guarantees in effect. Equality in the law thus addresses the lawmaker. For instance, gender equality in the law can be exemplified by the equal treatment of the duties of men and women in family law.

Unlike article 26 of the ICCPR, article 2 of the CRC does not expressly guarantee the concept of *equality before the law*. Of course, such an express recognition of the child's legal personality may have been useful. It may be derived indirectly, however, from article 12(2) of the CRC's guarantee of the right of the child to participate in procedures and be heard.[77]

By contrast, article 2 of the CRC protects *equality in the law*. This has been confirmed by the Committee in its guidelines and its monitoring of States Parties' legislation for violations of equality.[78] One finds another confirmation in article 4 of the CRC's duties of implementation of equality that mention legislative duties of implementation.

2. *Conception of Discrimination*

Article 2 of the CRC does not define the concept of 'discrimination' and the CRC Committee has never defined it clearly. All it said on the subject in its first general comment issued in 2001 was that:

> discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.[79]

The absence of a clear definition is not surprising. Although non-discrimination is a dominant and recurring principle of international human rights law, its content has not been specified in a detailed fashion in the different sources of international law.[80] As Judge Tanaka noted in the *South West Africa Case*, 'although the existence of this principle [of non-discrimination] is universally recognised … its precise content is not very clear'.[81]

[77] Van Bueren (n 7) 45. [78] Hodgkin and Newell (n 6) 22.
[79] CRC Committee, 'General Comment No 1: Article 29 (1): The Aims of Education' (2001) ('CRC GC 1') reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 384.
[80] Bayefsky (n 11) 34.
[81] ICJ, *South West Africa* (Second Phase, Judgment) [1966] ICJ Rep 3, 6.

A widely used definition of discrimination is the one given by the UN Human Rights Committee ('HR Committee') in its general comment on non-discrimination. According to this definition, discrimination should be understood as:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[82]

This understanding combines the key elements of the various definitions of discrimination one finds in international human rights law. On the one hand, it corresponds to those one finds in the ILO Convention no 111 and the UNESCO Convention about education.[83] It also corresponds to the definition of discrimination against women (art 1, CEDAW) and the definition of racial discrimination (art 1, ICERD), both of them being expressly cited by the HR Committee as a source of inspiration. On the other hand, later definitions of discrimination adopted by other UN human rights treaty bodies after the HR Committee's general comment on non-discrimination and in international and regional Conventions[84] were actually modelled on it. For example, the Committee on Economic, Social and Cultural Rights ('ESCR Committee') has chosen a similar, albeit not identical, definition in its 2009 general comment on the notion of discrimination.[85]

This common understanding of discrimination in the international human rights context applies to article 2 of the CRC. Indeed, the fact that article 2 features a similar structure and wording as other existing non-discrimination clauses in international law shows a clear intention to keep in line with what applies more generally in international non-discrimination law. Moreover, the CRC Committee often refers to other international instruments in its interpretations, and usually follows the approach adopted by other UN human rights treaty bodies.[86]

3. Constitutive Elements of Discrimination

The general definition of discrimination entails various constitutive elements. Those elements have been specified over time by the UN human rights treaty bodies[87] and regional human rights courts.[88] In a nutshell, the principle of non-discrimination is understood as

[82] HRC GC 18 (n 25) para 7.

[83] See: art 1 ILO Convention No 111 (n 30); art 1 UNESCO Convention Against Discrimination in Education (n 30).

[84] See CRPD art 2: 'Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. See also the definition of discrimination in the Inter-American Convention against all Forms of Discrimination and Intolerance (n 32).

[85] ESCR Committee, 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20 ('ESCR GC 20') para 7.

[86] See eg: CRC GC 5 (n 37) para 12 (making special reference to the HRC's general comment 18 on non-discrimination); CRC GC 11 (n 53) para 18.

[87] HR Committee, *Canessa et al v Uruguay* Communications nos 1637/2011, 1757/2008, and 1765/2008 (final views adopted on 24 October 2011) paras 9–10; HR Committee, *Broeks v Netherlands* Communication no 172/984 (final views adopted on 9 April 1987); HRC GC 18 (n 25), para 13; ESCR GC 20 (n 85) para 13.

[88] See: ECtHR, *Belgian Linguistic Cases* (1968) Series A no 6, para 10; ECtHR, *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) Series A no 94, para 72; Inter-Am. CtHR, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84 (1984) Series A no 4, paras 56–57 (making reference to the case law of the ECtHR).

the prohibition of treating similar situations differently without an objective justification. Although the CRC Committee does not usually specify the elements of discrimination, it has already invoked this definition in the past.[89]

There are three elements in the definition:[90] an *unfavourable treatment* based on a *prohibited ground* that cannot be *justified*. Each of these elements has to be interpreted further to adapt to the child-specific context.

(a) An Unfavourable Treatment

To start with, discrimination implies a difference of treatment of similar situations or a similar treatment of different situations.[91] What makes situations different or alike is a matter of evaluation of which substantial factual differences should count and of how they should count. This is clearly a very controversial evaluation to perform, particularly in the context of child discrimination. It should not, however, be confused with the judgment of discrimination itself which relies on the pre-existence of a similar situation being treated differently.

When one assesses whether situations are alike and should therefore be treated alike, it is important to determine what should be the criterion of comparison. The general case is a *comparison between children*. For instance, girls should not be treated differently from boys at school. A special case one should mention, however, is that of a *comparison between children and adults*. This is probably the most difficult assessment to perform. On the one hand, the Convention itself recognizes the specificity of the child's situation and thus points out the difference between children and adults. Consequently, children must be treated differently. As the Inter-Am. CtHR noted in its advisory opinion on children rights, 'differentiated treatment granted to adults and to minors is not discriminatory per se'.[92] On the other hand, a great achievement of the Convention is the recognition that children are right-holders. Thus the Convention itself does not endorse the view that children are always in a different position just because they are children and cannot be treated as adults. One may think of many differences of treatment between children and adults that are not justified.[93]

The difference of treatment or distinction at stake may cover any kind of treatment one may think of. Legislation, measures, and practices that have the purpose or the *effect* of nullifying or impairing the guaranteed rights are prohibited. It is thus not necessary to show intent to discriminate. This is also what follows from most international guarantees of the principle of non-discrimination.[94]

[89] CRC Committee, CO Belgium, CRC/C/15/Add.178 para 6: 'With respect to article 2, the Committee, noting that the general principle of non-discrimination in the Convention prohibits differences in treatment on grounds that are arbitrary and objectively unjustifiable, including nationality, is concerned that the declaration on article 2 may restrict the enjoyment of non-Belgian children in Belgium of rights contained in the Convention'. See also eg CRC GC No 20 (n 54) para 21.

[90] Bayefsky (n 11) 11–24.

[91] Alston (n 7) 6. See ECtHR, *Thlimmenos v Greece* ECHR 2000-IV 263.

[92] Inter-Am. CtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 (2002) Series A no 17, para 55. See also ECtHR, *D G v Ireland* ECHR 2002-III 361, para 115.

[93] See the examples in Child Rights Information Network, *Guide to Non-discrimination and the CRC* (CRIN 2009) 4; see also Claire Breen, *Age Discrimination and Children's Rights* (Martinus Nijhoff 2006), 20–33 (discussing in detail which criteria should be taken into account to assess differences of treatment between children and adults).

[94] McKean (n 11) 287; Bayefsky (n 11) 8–10.

This means that both *direct* and *indirect* discrimination are prohibited by article 2 of the CRC. In fact, the CRC Committee urges states to combat both forms of discrimination, but does not define the terms explicitly.[95] Direct discrimination occurs when a difference of treatment is based on a protected characteristic. Indirect discrimination takes place when a law or a measure is based on a seemingly innocuous ground, but disadvantages certain children in fact. For instance, a disabled child may be indirectly discriminated against by a rule which requires written work as an admission test to a school. True, formally speaking, this ground of discrimination is perfectly innocuous and admissible in an educational context. However, seen from the perspective of a disabled child, it might constitute an insurmountable obstacle in the access to further education and integration.[96]

Article 2(2) of the CRC mentions a special form of discrimination: that is, any form of *punishment* related to the child's parents' or guardians' status. This is an additional child-specific dimension of the principle of non-discrimination in the CRC that focuses on the fact that children are often discriminated in ways that match their specific position in human society. And punishment constitutes one of those established social practises that apply to children specifically. Children have indeed become the victims of human rights violations, including imprisonment or torture because of actions that their parents or family members have engaged in.[97]

(b) Based on a Prohibited Ground

A differential treatment of comparable cases may only be deemed discriminatory if the ground on which the differential treatment is based constitutes a prohibited ground of discrimination or if the consequence of the differential treatment is the imposition of a particular disadvantage to persons belonging to a protected group.

Article 2(1) of the CRC provides a long list of suspect classification and discriminatory grounds. This list is only exemplary and can be extended to other criteria. As we will see, the CRC Committee has made extensive use of the non-exhaustive character of this list.

Interestingly, article 2(1)'s list of grounds indicates that the prohibition against discrimination applies both to the 'child's *and* her or his parents' or legal guardian's' race, colour, gender, language, and the like. Article 2(1) is the only international guarantee of the principle of non-discrimination that expressly states that a person can be discriminated against not only because of her or his status, but also because of the status of a person close to her or him. Article 2(2) only applies, by contrast, to the discrimination of children that is based on the status, activities, expressed opinions, or beliefs of their parents, legal guardians, or family members.

Article 2(1) lists the suspect classifications foreseen in most international and regional human rights instruments, such as the UDHR, the ICCPR, the ICSCR, and the UNESCO Convention against Discrimination in Education, but adds an important one: *disability*. Discrimination against persons with disabilities was largely ignored at the time of the adoption of the UNDHR, ICCPR, ICESCR, and ICERD. It was still the case in 1979 when the CEDAW was adopted, although the first steps towards the recognition of the rights of persons with disabilities date back to the 1970s. The CRC is more recent,

[95] See: CRC Committee, CO Austria, CRC/C/AUT/CO/3-4 para 25; CO Viet Nam, CRC/C/VNM/CO/3-4 para 29; CO Thailand, CRC/C/THA/CO/3-4 para 33. See, however, CRC GC 1 (n 79), for the opposition between 'overt' and 'hidden' discrimination.

[96] Lansdown, 'It is our World Too!' (n 4) 24.

[97] LeBlanc (n 7) 97.

however, and this explains why it was the first international convention to contain a specific reference to this ground of discrimination. As a matter of fact, discrimination against children with disabilities was (and still is) one of the most common case of discrimination against children (see also article 7, CRPD).

Article 2 does not mention birth out of wedlock as a ground of discrimination even if this ground is often used in practice to differentiate between children.[98] It was a sensitive topic at the time of the drafting of the Convention and although there was mention at some stage in the *travaux préparatoires* of the need to protect non-marital children expressly against discrimination when compared to marital children, this was not done in the end for lack of consensus.[99] It was also argued that the term 'birth' already covered children born out of wedlock.[100] Furthermore, it became clear that this ground of discrimination could not only be derived from others in article 2 CRC, but also from other international and regional guarantees against discrimination.[101] In fact, article 41 of the CRC encourages the most liberal interpretation of the Convention's provisions by giving priority to more favourable international clauses over less protective norms in the CRC.

The debate on the inclusion of this or that ground of discrimination loses its significance as soon as one looks at how the CRC Committee has made extensive use of the non-exhaustive character of article 2 of the CRC. The Committee has interpreted the notion of 'other status' to extend the protection against discrimination to grounds not even discussed during the drafting process. So far, the Committee has identified no less than fifty-three grounds of discrimination based on the child's status or her or his parents' status,[102] including sexual orientation and HIV/Aids.[103] The Committee has furthermore condemned discrimination based on sexual orientation in various concluding observations.[104]

There are no differences between the grounds explicitly covered by article 2 and grounds recognized later on by the Committee. The only difference one may think of is related to implementation. According to the Committee, all grounds for discrimination expressly spelled out in article 2 CRC should be reflected in States Parties' domestic constitution or legislation, and this is arguably not the case for other grounds.[105] This is only a

[98] CRC Committee, CO Japan, CRC/C/JPN/CO/3 para 33; CO Mozambique, CRC/C/MOZ/CO/2 para 30; CO Philippines, CRC/C/PHL/CO/3-4 paras 10, 29–30; CO Maldives, CRC/C/MDV/CO/3 para 33.

[99] See: E/CN.4/1324 (suggestion to include 'born out of wedlock' among the grounds of discrimination); E/CN.4/1986/39 paras 13–21 (discussion in the working group 1986 of the proposal submitted by China and the proposal submitted by Austria to include a specific provision regarding children born out of wedlock—no consensus reached); E/CN.4/1988/28 paras 226–30 (discussion in the working group 1988 of the proposal submitted by Germany to include a specific provision regarding children born out of wedlock—withdrawal of the proposal). All extracts are reproduced in *Legislative History* (n 47) 315–28, 887–90.

[100] E/CN.4/1988/28 para 228; *Legislative History* (n 47) 889–90.

[101] LeBlanc (n 7) 100–01; Van Bueren (n 7) 41–45; Detrick (n 7) 75–77. The ECtHR dealt with numerous cases of discrimination between marital and non-marital children during the 1980s. According to the ECtHR, 'only very weighty reasons' can justify a difference of treatment between children born in or out wedlock: ECtHR, *Marckx v Belgium* (1979) Series A No 31*; Inze v Austria* (1988) Series A No 126, para 41.

[102] See: the list provided by Hodgkin and Newell (n 6) 24–25; Child Rights Information Network (n 93).

[103] CRC Committee, 'General Comment No 3: HIV/AIDS and the Rights of the Child' (2003) reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol II) 398 para 9.

[104] See eg: CO Romania, CRC/C/ROU/C05 paras 16 and 17; CO Mongolia, CRC/C/MNG/CO/5 paras 15–16; CO United Kingdom and Great Britain, CRC/C/GBR/CO/5 paras 21–22 (all expressing concern with respect to discrimination against lesbian, gay, bisexual, transgender, and intersex children).

[105] CRC Committee, 'General guidelines regarding the form and content of periodic reports to be submitted by States Parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (1996) CRC/C/58 para 25. Note, however, that the actual guidelines are less clear in this regard. See 'Harmonized

slight difference, however. Moreover, the Committee has already requested States Parties to adopt legislation against discrimination based on sexual orientation, for example.[106]

Not only has the CRC Committee expanded the list of the protected grounds. It has also emphasized that discrimination is often based on more than one ground and that specific attention should be paid to these forms of *multiple* discrimination.[107]

In a nutshell, one may distinguish three types of multiple discrimination of the child. First, many differences of treatment target specific groups of children, such as girls, for instance. Adults of the same group, women in this example, are not subject to the same detrimental treatment. In this case, age discrimination is combined with sex discrimination. One may think of female genital mutilation in girls as a case in point.[108] Second, many children are discriminated against on multiple grounds, but age is not necessarily a factor in that discrimination. One may think of girls from rural areas who are deprived of their right to education. Third, a child may be discriminated against because of her or his status *and* the status of her or his parents. One may think of discrimination against coloured children whose parents have a same-sex relationship.

These distinctions between multiple discrimination based on age and one or more grounds, on the one hand, and multiple discrimination based on other grounds than age, on the other, may seem artificial. It is difficult indeed to neatly separate the grounds that lead to discrimination in practice. However, these distinctions are useful to highlight the especially vulnerable position of children in society, and the Convention's lack of explicit protection against discrimination based on age *together with* other grounds.

(c) In the Absence of Justification

As the CRC Committee has explained, 'not every differentiation in treatment will constitute discrimination'.[109] It is only when these differences of treatment are unreasonable and lack an objective justification that they may be deemed discriminatory.[110]

The notion of a reasonable and objective justification entails two elements. First, the difference of treatment must pursue a legitimate aim (or pressing social need). Second, the measures to achieve the aim must be proportionate.[111] Within the context

guidelines on reporting under the international human rights treaties, including guidelines on a core document and treaty-specific documents' (2006) HRI/MC/2006/3 in 'Compilation of guidelines on the form and content of reports to be submitted by States Parties to the International human rights treaties' (2009) HRI/GEN/2/Rev.6 and CRC Committee, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (2015) CRC/C/58/Rev.3.

[106] CO Australia, CRC/C/AUS/CO/4 para 30; CO Korea, CRC/C/KOR/CO/3-4 para 28.

[107] CRC GC 9 (n 54) para 5; 'General Comment No 7: Implementing child rights in early childhood' (2006) reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 466, para 11; CO Seychelles, CRC/C/SYC/CO/2-4 para 35; CO Philippines, CRC/C/PHL/CO/3-4 para 30; CO Poland, CRC/C/POL/CO/3-4 paras 16–17. See, on multiple discrimination against children, Camilla Ida Ravnbol, *Intersectional Discrimination against Children: Discrimination against Romani Children and Anti-Discrimination Measures to Address Child Trafficking*, Innocenti working paper (UNICEF 2009).

[108] See CO Guinea-Bissau, CRC/C/GNB/CO/2-4 para 24.

[109] CRC GC 20 (n 54) para 21. Discrimination is used here to refer to *unjustified*, unlawful and particularly damaging differences of treatment. As a result, 'discrimination' itself cannot be justified *stricto sensu*. This reading is compatible with the text of art 2 CRC. Contra: Abramson (n 7) 22.

[110] See: CRC GC 20 (n 54); ECtHR, *Belgian Linguistic Cases* (1986) Series A no 6, para 10; HRC GC 18 (n 25) para 13; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4 (28 September 1984) Annex paras 10–11.

[111] This is what follows from the practice of various UN human rights treaty bodies and from the practice of regional courts, prominently the ECtHR (see eg ECtHR, *Glor v Switzerland* (App no 13444/04) (Judgement

of discrimination law, there are some general conditions for this proportionality test, although they are not always clearly articulated or strictly applied by courts or in practice:[112] the means must be apt to attain the end, be necessary means to do so, and amount to the least restrictive means to reach that end.[113] This approach may be regarded as consistent with the broader commentary in international law as to when an interference with an human right will be justified.[114] Importantly, it is the state which carries the burden of providing evidence which establishes a nexus between the differential treatment and the legitimate aim being pursued[115]—what is sometimes referred to as the rational connection test.

One may distinguish two hypotheses of differential treatment justifiable in the context of article 2 of the CRC. First, differences of treatment may be required when the situations are different. This may be the case for certain distinctions made between children and adults, albeit not all of them. Second, even when situations are similar, a difference of treatment may be justified in order to achieve material equality. This would be the case for certain positive measures drawing formal distinctions between equally situated children, albeit to enhance their material equality. Those 'special measures' are discussed in the next section.

Importantly, in the context of child protection, article 3 of the CRC and its principle of the best interest of the child constitute an additional test in the justification of differential treatments between children and adults or between children only.[116]

4. *Special Measures*

To achieve material equality, it is sometimes necessary to adopt special measures,[117] that is, measures aimed at redressing material inequalities or improving de *facto* equality.

of 30 April 2009) paras 72, 81 ff). See: ESCR GC 20 (n 85) para 13; UN Committee on the Elimination of Racial Discrimination, 'General recommendation no 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination' (2009) CERD/C/GC/32 para 8. The practice of the HR Committee is less clear, but the HR Committee sometimes refers explicitly to a proportionality test: HR Committee, *Jacobs v Belgium* Comm no 943/2000 (final views adopted on 17 August 2004) para 9.5; *Gillot v France* Comm no 932/2000 (final views adopted 27 July 2002) paras 13.2, 13.17. See also: HRC GC 18 (n 25) para 13; CRC GC No 20 (n 54) para 21.

[112] See Samantha Besson, 'Evolutions in Anti-Discrimination Law within the ECHR and the ESC Systems' (2012) 60 American Journal of Comparative Law 147.

[113] Although the CRC Committee does not generally make reference to proportionality, it has already emphasized that special measures should be taken when they appear to be *necessary*: CO Australia, CRC/C/AUS/CO/4 para 30; CO United Kingdom and Northern Ireland, (2008) CRC/C/GBR/CO/4 para 25.

[114] Siracusa Principles (n 110) paras 10–11; John Tobin, *The Right to Health in International Law* (OUP 2012) 180–84.

[115] Siracusa Principles (n 110) paras 10 and 12.

[116] Muscroft (n 6) 30.

[117] Note on the terminology: special measures are often equated with 'affirmative action', 'positive measures' and 'positive action'. However, the term 'special measures' is the most adequate term in the international context because it is compatible with various international human rights instruments (see art 4(1) CEDAW; art 1(4) ICERD). Affirmative action is most commonly used in the USA while the term 'positive action' or 'positive measures' is the term most often adopted in Europe. One should note, however, that the terms 'positive action' and 'positive measures' can add to the confusion because positive action may be conflated with positive duties, whereas positive duties do not necessarily amount to duties to adopt special measures. Finally, the term 'positive discrimination' should be avoided as it entails a contradiction in terms. See on these questions: UN Commission on Human Rights, 'The concept and practice of affirmative action. Preliminary report submitted by Mr Marc Bossuyt, Special rapporteur, in accordance with Sub-Commission resolution 1998/5' (2000) UN DocE/CN.4/Sub.2/2000/11; UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 25: Article 4, paragraph 1, of the Convention (temporary special measures) (2004)' reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol II) 365.

These measures should not be confused with positive (action) measures in general.[118] Positive action involves a wide range of measures and special measures only constitute a subset of those.

Article 2 of the CRC does not expressly foresee the duty to adopt special measures or, at least, the justification for doing so, by contrast to what non-discrimination clauses in other international human rights instruments do.[119] All the same, article 2 protects equality among children in a more flexible and open way than previous general non-discrimination clauses.[120] It generally prohibits measures which treat differently similar situations and equally different situations. As such, it clearly protects formal equality and requests negative measures of non-discrimination. However, article 2 has also been interpreted as protecting material equality and as imposing positive duties, and these in turn may include special measures.

More particularly, article 2 could be interpreted as giving rise to two kinds of special measures to promote material equality.

First of all, *special protection measures* which are selective and address special needs. Those measures are even more important in the case of children, as children may be particularly vulnerable by way of past discriminations and those discriminations impact how one may redress their material inequality. The Preamble to the CRC actually recognizes that 'in all countries of the world, there are children living in exceptionally difficult conditions, and that such children need special consideration'. Hence, for instance, the special measures mentioned in articles 22 and 23 of the CRC for the special protection of disabled and refugee children.

These special measures of protection are, however, very controversial. Although one may understand the need for measures of special care, there is a sense in which claiming that some children have special needs and that they are somehow different as a result is in itself discriminatory both against them and other children. Special measures may also be deemed discriminatory because different treatment to answer special needs often amounts to less favourable treatment. Recent European cases of Roma children sent to special schools for 'children with special needs' have highlighted the poor quality of education provided by these schools. The children followed simpler curricula and had fewer opportunities than in mainstream schools.[121]

Criticism of special protection measures on grounds of indirect discrimination has led to the development of a new trend in non-discrimination law and the emergence of more inclusive rights and mainstreaming.[122] Those new approaches reject the differentiating effect of special measures and recommend adopting more inclusive measures which protect neutral activities such as parenthood instead of motherhood or an inclusive right to education instead of a right to special education. One may identify the same trend with respect to the education of children with disabilities. In that context, it is now generally accepted that integration should be the standard and separate schooling the exception.[123]

[118] Bayefsky (n 11) 24–33.
[119] See CEDAW art 4(1) and (2); ICERD art 1(4).
[120] Alston (n 7) 1.
[121] See ECtHR, *D.H. and others v Czech Republic* [GC] ECHR 2007-IV 241. See also regarding the schooling of children with disabilities: ECtHR, *Horváth and Kiss v Hungary* App no 11146/11 (Judgment of 29 January 2013).
[122] Lansdown, 'It is our World Too!' (n 4) 18–20.
[123] See European Committee on Social Rights, *Autism-Europe v France* Complaint no 13/2000 (decision on the merits of 4 November 2003).

The CRC Committee highlighted that point in its general comment on the rights of children with disabilities.[124] The CRPD has also confirmed this shift in the understanding of the needs of children with disabilities and insists on *inclusive* education at all levels (CRPD art 24).[125]

Second, one should also mention *temporary special measures* which aim at remedying the situation of material inequality of a certain group. They go further than special protection measures. Temporary special measures openly favour certain people identified by their status in order to eliminate conditions which have caused or perpetuated discrimination in practice. As they openly use suspect discrimination grounds to differentiate people and formally discriminate, special temporary measures are subject to strict conditions in international human rights law[126] and in the practice of the Committee.[127] First of all, they are only justified for a limited period of time. They should be discontinued when their targeted results have been achieved. Special measures should, moreover, be accompanied by other measures which focus on other dimensions of the discrimination process than its results. Finally, they should be aimed at a special group and never be absolute.[128]

The CRC Committee imposes on States Parties a duty to 'identify individual children and groups of children the recognition and realization of whose rights may demand special measures'.[129] To identify these children, states are in particular requested to provide statistical data, as explained below.

E. Monitoring

The implementation of States Parties' duties is controlled primarily domestically through the monitoring of national courts and then internationally through that of the CRC Committee. Given its prevalence in practice, the admissibility of the budgetary exception in discrimination cases also needs to be discussed.

1. Domestic Monitoring

Article 2 is directly applicable by domestic authorities, on the model of article 2(1) of the ICCPR.[130]

The implementation of article 2 can and should be monitored by domestic courts, as a result. The latter should apply the Convention's non-discrimination principle like any other domestic non-discrimination principle. To mention one example: a potential domestic piece of legislation that differentiates between adopted children and children conceived artificially could be sanctioned judicially on the basis of article 2, and lead to

[124] CRC GC 9 (n 54) para 66. [125] See chapter 23 of this Commentary.

[126] HRC GC 18 (n 25) para 10: 'as long as these special measures are needed to correct discrimination in fact, it is a case of legitimate differentiation'.

[127] CO India, CRC/C/15/Add.228 paras 31–32: ('While welcoming the special temporary programmes and other activities to improve the enjoyment of rights by girls and vulnerable groups such as children belonging to Scheduled Castes and Tribes, the Committee expresses its concern at the possibility that other children in situations similar to that of those groups are not receiving the same benefits. 32. The Committee recommends that all existing and future special temporary programmes be provided with specified goals and timetables, in order to evaluate their success and justify their continuation, expansion and dissemination. The Committee further recommends that the State party start to develop special programmes for the allocation of educational and other benefits that are based on the child's needs and rights rather than on the basis of sex, caste or tribe, or any other characteristic that may result in unjustifiable discrimination').

[128] HRC GC 18 (n 25) para 10. [129] CRC GC 5 (n 37) para 12. [130] Detrick (n 7) 69.

the recognition of the absolute right to know one's origins independently of one's mode of conception.[131]

Importantly, therefore, the prohibition of discrimination is recognized as a directly justiciable right whether the discrimination occurs in the ambit of a civil right or an economic, social, and cultural right. It is not subject to the progressive realization principle[132] and the distinction between the two categories of rights under article 4 of the CRC cannot be invoked to mitigate the effects of article 2. On the contrary, the non-discrimination principle can be used to trigger judicial control of economic and social issues, as exemplified in the practice of the HR Committee on article 26 of the ICCPR.[133]

2. *International Monitoring*

The international monitoring of states takes place primarily[134] through the examination of periodic reports submitted to the CRC Committee (CRC art 44). The Committee has issued general guidelines regarding the form and content of initial (CRC art 44(1)a) and periodic (CRC art 44(1)b) reports. Each of them contains specific sections relative to the non-discrimination principle.[135]

These guidelines are complemented by the harmonized guidelines on reporting under the international human rights treaties which contain all relevant indications regarding the constitution of the 'common core document', that is, the first part of the report to be submitted to the UN human rights treaty bodies.[136] As the non-discrimination principle is a central provision in all international human rights treaties, it is no surprise that States Parties are requested to provide relevant information concerning the application of the principle of non-discrimination in this common core document.

Under those harmonized guidelines, States Parties have the following obligations. First of all, they are requested to provide information on the implementation of their international obligations to guarantee equality before the law and equal protection of the law for everyone under their jurisdiction and factual information on measures taken to eliminate discrimination in all its forms and on all grounds, including multiple discrimination.

[131] It has been the case in Switzerland, in particular. See ATF 128 I 63; Samantha Besson, 'Das Recht auf Kenntnis der eigenen Abstammung—Wege und Auswirkungen der Konkretisierung eines Grundrechts' (2005) Revue de droit suisse 39; Samantha Besson, 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 International Journal of Law, Policy and the Family 137.

[132] See ESCR Committee, 'General Comment No 3: The Nature of States Parties Obligations (art. 2, para 1, of the Covenant)' (1990) reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol I) 7, para 5; Economic and Social Council, 'Report of the United Nations High Commissioner for Human Rights: the concept of progressive realization of economic, social and cultural rights in international human rights law' (2007) UN Doc E/2007/82, para 15: 'First of all, it is important to note that not all obligations relating to economic, social and cultural rights are subject to progressive realization and the "maximum of available resources" clause. Notably, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities all impose an immediate obligation to guarantee that economic, social and cultural rights are enjoyed without discrimination'.

[133] See HR Committee, *F.H. Zwaan-de Vries v the Netherlands* Comm no 182/1984 (final views adopted 9 April 1987) paras 12.4–12.5.

[134] The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) UN Doc A/RES/66/138 provides an alternative method of international control over the implementation of the Convention by States Parties.

[135] CRC Committee, 'General guidelines' (n 37) paras 13–14; CRC Committee, 'Treaty-specific guidelines' (n 105) paras 23–27.

[136] 'Harmonized guidelines' (n 105).

Second, States Parties should indicate whether the principle of non-discrimination is included as a general binding principle in a basic law, the constitution, a bill of rights, or in any other form of domestic legislation, and the definition of and legal grounds for prohibiting discrimination. Interestingly, it is on that basis that the CRC Committee has regularly requested states to revise their domestic law to adapt it to the requirements of article 2.[137] Third, information should be provided on the steps taken to ensure that discrimination in all its forms and on all grounds is prevented and combated. As already mentioned, the Committee emphasizes, in particular, the need for the collection of data to be disaggregated to enable potential discriminations to be identified. Finally, States Parties are asked to indicate the specific measures adopted to reduce economic, social, and geographical disparities, including between rural and urban areas; the specific measures to prevent discrimination, including situations of multiple discrimination; the specific measures against the persons belonging to the most disadvantaged groups; and in specific circumstances, whether temporary special measures have been taken.[138]

Further, there is an entire section in the treaty-specific guidelines of the CRC Committee on the implementation of the principle of non-discrimination. It provides insights into the Committee's view of the States Parties' duties with regard to the prohibition of discrimination.[139] For instance, the Committee requests States Parties to provide information on special measures taken in order to prevent discrimination and calls on the States Parties to mention measures taken to combat gender-based discrimination and to ensure the full enjoyment of their rights by children with disabilities, children belonging to minorities, and indigenous children.

3. Budgetary Exception

Limited budgetary resources are a common way of attempting to justify differential or unfavourable treatment of children. As a matter of fact, poverty constitutes one of the main causes of discrimination against children. The invocation of budgetary constraints raises very difficult issues in the context of positive action and special protection measures according to article 2(1) and (2) of the CRC.

The issue of resources and budgetary allocations is treated in further detail elsewhere in this commentary.[140] However, it is worth noting at this stage that, according to the Committee on the Rights of the Child, the application of article 2 'cannot be made dependent upon budgetary resources'.[141] Quite the reverse: the Committee requires that the implementation of the principle of non-discrimination of children be an important element of budget-making at national level.[142] Here again, the distinction regarding states' obligations according to whether the right at stake is economic, social, and cultural cannot be invoked to mitigate the effects of article 2.

[137] CRC Committee, CO Israel, CRC/C/ISR/CO/2-4 para 22; CO Liberia, CRC/C/LBR/CO/2-4 para 412; CO Viet Nam, CRC/C/VNM/CO/3-4 para 30; CO Ukraine, CRC/C/UKR/CO/3-4 para 28; CO The former Yugoslav Republic of Macedonia, CRC/C/MKD/CO/2 para 27.

[138] 'Harmonized guidelines' (n 105) paras 50–58.

[139] CRC Committee, 'Treaty-specific guidelines' (n 105) paras 23–27.

[140] See chapter 4 of this Commentary; see CRC Committee, 'General Comment No 19 on public budgeting for the realization of children's rights (art. 4)' (2016) CRC/C/GC/19.

[141] CRC Committee, CO Bolivia, CRC/C/15/Add.1 para 14; CO France, CRC/C/15/Add.20, para 19.

[142] Hodgkin and Newell (n 6) 23.

F. Special Provisions Relating to Child Discrimination

The CRC, like other international human rights instruments, guarantees the principle of non-discrimination in many places other than its non-discrimination clause. Those special provisions take priority over article 2 when applicable.

Thus, the principle of non-discrimination may be found in article 22 of the CRC relating to the special protection of refugee children, in article 23 of the CRC relating to the special protection of disabled children, and in article 30 of the CRC relating to the special protection of indigenous children. One also finds echoes of the non-discrimination principle in different other provisions, like article 28 of the CRC in the context of the right to education. These *leges speciales* are addressed in detail elsewhere in this commentary.[143]

Importantly for our purpose, one also finds child-specific non-discrimination clauses in other international human rights instruments and, in particular, in the ICCPR and the ICESCR[144] and the CRPD.

1. Leges Speciales in the ICCPR and the ICESCR

The ICCPR and the ICESCR contain two *leges speciales* which extend the applicability of their respective general non-discrimination clause to children. According to article 24(1) of the ICCPR:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

This norm is restricted, however, to foreseeing the possibility of arranging special protection measures in favour of children and the need to ensure the absence of discrimination in these special measures.

This specific approach to child discrimination in the context of special measures of protection is confirmed by article 10(3) of the ICESCR:

> Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

2. Lex Specialis in the CRPD

The CRPD contains numerous provisions on the rights of children with disabilities.[145] It has also become an important tool to enhance the protection of the rights of children with disabilities in practice. To be clear: *all* provisions in the CRPD apply to children. However, experiences with other international human rights instruments have revealed that the absence of explicit references to children's perspectives tend to make them

[143] See chapters 22, 23, 30, and 28 of this Commentary.

[144] There are other less general ones, of course, eg the ILO Conventions. See Marks and Clapham (n 31) 27.

[145] See Louis Alfonso de Alba, 'The Rights of the Child in the Convention on the Rights of Persons with Disabilities' in Carol Bellamy and others (eds), *Realizing the Rights of the Child*, Swiss Human Rights Book (Rüffer & Rub 2007) Vol 2, 75–77.

invisible in practice, even when situations of vulnerability are addressed.[146] The inclusion of specific provisions regarding children with disabilities in the CRPD was thus necessary to avoid under-inclusive protection in practice, on the one hand, and restrictive interpretation of the rights in respect of adults only, on the other.

Regarding the principle of non-discrimination, article 7 of the CRPD is the central provision. According to its first paragraph:

> States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

It is interesting to note the difference in wording between article 2 of the CRC and article 7 of the CRPD. According to article 2(1) of the CRC, only the rights of the CRC are guaranteed without discrimination (derivative clause). Article 7 of the CRPD, by contrast, stipulates that 'all human rights and fundamental freedoms' of children with disabilities should be enjoyed on an equal basis with other children (autonomous clause).

Various controversies have arisen with respect to article 7 of the CRPD. To start with, when special non-discrimination clauses in a ground-specific instrument are further specified in relation to a specific group (children in this case), there is a risk that other dimensions in the discriminatory treatment may become less visible. Moreover, during the drafting process of the CRPD, some government representatives actually argued that including specific provisions for children with disabilities might undermine the rights included in the CRC. In response to these arguments, it was made clear by the then chair of the Committee on the Rights of the Child that the CRPD had to be considered as reinforcing the existing rights under the CRC.[147] The CRPD helps to 'elaborate the interpretation of the CRC for children with disabilities'.[148] The solution seems to be that whenever the provisions of the CRPD provide higher protection than the similar provisions of the CRC, the former should apply (CRC art 41(b)).

III. Evaluation

More than twenty-five years ago, the Convention on the Rights of the Child was adopted and, within it, a guarantee of the non-discrimination principle entrenched prominently in article 2. This provision captures the child-specific dimensions of child discrimination and has been used most effectively against the latter.

Retrospectively, this provision may be interpreted as a strong signal, for it marked the culmination of the progressive emergence of children's rights. The latter may indeed be conceived as the outcome of the gradual conquest of their equality, first of all, vis-à-vis adults, then in regard to young adults, and finally, with respect to other children.

Regrettably, the prohibition of discrimination enshrined in article 2 CRC remains vague and may be still interpreted in various ways, including weaker ones. The notion of 'special measures' is one of those current interpretive difficulties. That notion is in need of further clarification as special protection measures may have destructive discriminatory

[146] Gerison Lansdown, *See Me, Hear Me: A Guide to using the UN Convention on the Rights of Persons with Disabilities to promote the Rights of Children* (Save the Children 2009); ESCR Committee, 'General Comment No 5: Persons with Disabilities' (1994) reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol I) 17.

[147] Lansdown, *See Me, Hear Me* (n 146), 23.

[148] ibid.

consequences on particularly vulnerable children whose integration should be States Parties' foremost goal. Of course, assessing the objectives and proportionality of these special measures allows one to distinguish between non-discriminatory special measures and discriminatory ones. However, the proportionality test, as often, is open to varying interpretations. Given the centrality but also the complexity of the non-discrimination principle in the context of children's rights, the time has come therefore for a general comment of the CRC Committee on article 2 of the CRC.

More generally, and thinking outside the children's rights realm, one may wonder about the justification of non-discrimination clauses in specific human rights instruments. There certainly are strong arguments in favour of specific instruments of protection against discrimination.[149] This is obvious when members of a specific group (eg children or persons with disabilities) have largely been ignored by the mainstream human rights movement and/or when general treaties are not adapted to the specific situation of a certain group. Specific treaties adopted to protect specific groups always carry with themselves a stigmatizing and essentializing risk, however.[150] Besides inequalities in human rights protection and hence ultimately in equality,[151] the fragmentation of international human rights instruments and non-discrimination clauses along group lines risks sidelining those groups' perspectives from general human rights and non-discrimination debates. In this respect, it suffices to observe how the issue of child discrimination has been neglected in recent general debates on the non-discrimination principle.[152] Non-discrimination is an element common to all human rights treaties and should thus be addressed more consistently in the future to avoid not only inequalities, but also gaps in the effective protection of all human beings' equal moral status.

Select Bibliography

Abramson B, *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-discrimination* (Martinus Nijhoff 2008)

Alston P, 'Cadre juridique de la Convention relative aux droits de l'enfant' (1992) 91(2) Bulletin des droits de l'homme 1

Besson S, 'The Non-discrimination Principle in the Convention on the Rights of the Child' (2005) 13 The International Journal of Children's Rights 433

[149] See on this question: Frédéric Mégret, 'Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 Human Rights Quarterly 494; Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11 Human Rights Law Review 37.

[150] Hitch (n 7) 54.

[151] See on the question of the inequality of human rights with respect to minority rights: James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 154–67; Samantha Besson, 'La vulnérabilité et la structure des droits de l'homme—L'exemple de la jurisprudence de la Cour européenne des droits de l'homme' in Laurence Burgorgue-Larsen (ed), *La vulnérabilité saisie par les juges* (Bruylant 2014).

[152] See eg: Shelton (n 11); Dagmar Schiek and Anna Lawson (eds), *European Union Non-discrimination Law and Intersectionality* (Ashgate 2011); Malcolm Sargeant (ed), *Age Discrimination and Diversity. Multiple Discrimination from an Age Perspective* (Cambridge 2011). See also Taefi (n 3) for an analysis of the practice of the UN Committee on the Elimination of Discrimination against Women. For a recent effort to adopt a common approach to the issue of harmful practices, see 'Joint General Recommendation/General Comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices' (2015) CEDAW/C/GC/31-CRC/C/GC/18. The CRC Committee often refers to this joint general recommendation/general comment in its recent concluding observations, see eg: CO Chile, CRC/C/CHL/CO/4-5 para 49; CO Mexico, CRC/C/MEX/CO/4-5, para 38; CO Switzerland, CRC/C/CHE/CO/2-4 para 43.

Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999)

Hitch L, 'Non-discrimination and the Rights of the Child, Article 2' (1989) 7 New York University Law School Journal of Human Rights 47

Hodgkin R and Newell P, *The Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007)

LeBlanc L J, *The Convention on the Rights of the Child. United Nations Lawmaking on Human Rights* (University of Nebraska Press 1995)

Muscroft S (ed), *Children's Rights: Equal Rights? Diversity, Difference and the Issue of Discrimination* (The International Save the Children Alliance 2000)

Sandberg K, 'The Convention on the Rights of the Child and the Vulnerability of Children' (2015) 84 Nordic Journal of International Law 221

Schiek D and others (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart Publishing 2007)

Van Bueren G, *The International Law on the Rights of the Child* (Kluwer 1995)

Child Rights Information Network, *Guide to Non-discrimination and the CRC* (London 2009)

Vuckovic Sahovic N, Doek J E, and Zermatten J, *The Rights of the Child in International Law* (Stämpfli, 2012), part 2, ch 3

SAMANTHA BESSON ELEONOR KLEBER

Article 3. The Best Interests of the Child

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. 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. 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.

I. Introduction 74
- A. A Common but Contested and Complex Concept 74
- B. Key Issues 76

II. Analysis of Article 3 77
- A. Paragraph 1: The Best Interests Principle as a Primary Consideration 77
  1. Scope of the Principle 77
  2. Measures for the Implementation of the Best Interests Principle 81
  3. Assessment of a Child's Best Interests 83
- B. Paragraph 2: The Obligation to Ensure a Child's Well-Being 100
  1. Overview 101
  2. The Meaning of a Child's Well-Being 101
  3. Scope of the Obligation to Protect a Child's Well-Being 102
  4. Obligation to Take into Account the Rights and Duties of Parents 102
  5. Nature of the Appropriate Legislative and Administrative Measures to Be Taken 103
- C. Paragraph 3: The Obligation to Regulate Institutions and Services That Provide Care and Protection for Children 104
  1. Overview 104
  2. Scope of the Obligation 104
  3. Content of the Obligation: Conformity with Appropriate Standards 104

III. Evaluation 105

Select Bibliography 106

EEKELAAR/TOBIN

I. Introduction

A. A Common but Contested and Complex Concept

According to the Committee on the Rights of the Child ('CRC Committee', 'the Committee'), the right of the child to have his or her best interests taken into account as a primary consideration is 'a substantive right, an interpretative legal principle and a rule of procedure'.[1] It 'expresses one of the fundamental values' of the Convention on the Rights of the Child ('CRC', 'the Convention') and is one of its four general principles.[2] The text of the Convention certainly supports this view. References to the principle can be found in no fewer than seven articles of the Convention[3] and the scope of article 3, which demands that children's best interests are considered in *all actions concerning them*, indicates that there are no limitations to the application of this principle where children are concerned. Moreover, variations of this principle can be found in numerous international instruments,[4] national constitutions,[5] and domestic legal systems.[6]

However, for a principle of such ubiquity, it has generated much perplexity and sometimes hostility.[7] Thus it is surprising that despite its controversial status, it occasioned

[1] Committee on the Rights of the Child ('CRC Committee') 'General Comment No 20 (2016) on the Implementation of the Rights of the Child During Adolescence' (6 December 2016) CRC/C/GC/20 para 22. See also CRC Committee, 'General Comment No 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' (29 May 2013) UN Doc CRC/C/GC/14 para 6 ('CRC GC 14'). Cf: Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Sutherland, E.E. and Barnes Macfarlane, L-A. (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge: Cambridge University Press 2016) 51 (critiquing the Committee's position on the scope of the best interests principle).

[2] CRC GC 14 (n 1) para 1. The three remaining principles are non-discrimination (article 2), survival and development (article 6) and children's participation (article 12). See: Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin?' (2017) 25 International Journal of Children's Rights 285 (critiquing the general principles approach adopted by the Committee).

[3] See Convention, arts 3, 9, 18, 20, 21, 37, and 40.

[4] 'Declaration on the Rights of the Child' UNGA Res 1386 (XIV) (20 November 1959), arts 2 and 7; Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (opened for signature 29 May 1993, entered into force 1 May 1995) (1998) 32 ILM 1134, art 4(b); African Charter on the Rights and Welfare of the Child (opened for signature 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49, arts 49, 19, 20, 24, 25, and 31; Convention on the Elimination of all forms of Discrimination against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS, arts 5 and 16; Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, entered into force 3 May 2008) [2008] ATS 12, arts 7 and 23. Note that there is no reference made to the best interests of the child in the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights or the European Convention on Human Rights.

[5] Tobin notes that the best interests principle is contained in the national constitutions of a number of states including eg Ecuador (s 48); Ethiopia (36(2)); Gambia (29(1)); Namibia (15); South Africa (s 28(3)); and Uganda (s 34(1)) (see, John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 South African Journal on Human Rights 86, 113).

[6] See eg Belinda Fehlberg, Bruce Smyth, and Liz Trinder (common law systems: ch 3.3), Teresa Picontó Novales (southern European systems: ch 3.4) and Anna Singer (Nordic systems: ch 3.5) in John Eekelaar and Rob George (eds), *Routledge Handbook of Family Law and Policy* (Routledge 2014). See also Children's Act 2005, sections 7 and 9 (South Africa).

[7] Perhaps mostly vehemently from Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 Current Legal Problems 267. See also Bruce C Hafen and Jonathan O Hafen, 'Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 Harvard International Law Journal 449, 462–64 (fearing that the principle might lead to removal of children from parents when considered to be in the children's 'best interests'); Erica K Salter, 'Deciding for a Child: A Comparative Analysis of the Best Interests Standard' (2012) 33 Theoretical Medicine and Bioethics 179 (arguing that the test fails to provide clear guidance and fails to respect the family); Sandra Burman, 'The Best Interests of the South African Child' (2003) 17 International Journal of Law Policy and the Family 28 (arguing

relatively little debate during drafting,[8] with Freeman observing that its very familiarity actually 'bred content'.[9] Indeed, Alston notes that only *one* representative commented that 'the phrase was inherently subjective and that its interpretation would inevitably be left to the judgment of the person, institution or organization applying it'.[10] Instead, there was more discussion about whether the principle should be expressed as 'a' or 'the' primary consideration, and which actions it should cover. Significantly, the use of 'a' in the final text of article 3(1) clearly demonstrates that a child's interests were not to be considered an overriding factor. However, as Alston remarks:

> while contestable in the context of private law family proceedings, [it] could hardly have been otherwise in the context of an umbrella provision designed to be applicable in a very wide range of situations in which a vast array of competing considerations might arguably be relevant and appropriate.[11]

This ready acceptance of the weight to be accorded to a child's best interests is perhaps unsurprising. It would surely be uncontroversial to maintain that those taking legislative and administrative actions affecting other vulnerable groups, such as the infirm, persons with a disability, elderly, or those belonging to minorities, should have the best interests of members of those groups in the forefront of their minds when doing so. Why should it be different for children? The obligation under article 3 therefore exemplifies the general justification for the use of political power which has been widely accepted since at least what Jonathan Israel refers to as the 'moderate' enlightenment'.[12] In this context it is worth recalling John Locke's *Second Treatise on Government: Concerning the True Original Extent and End of Civil Government* (1690), in which he wrote:

> 131. But though men (sic) when they enter into society give up the equality, liberty, and executive power they had in the state of Nature into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require, yet it being only with an intention in every one the better to preserve himself, his liberty and property … the power of the society or legislative constituted by them can never be supposed to extend farther than the common good'.

Implicit in this directive is an obligation imposed on those who exercise power when taking decisions for the purpose of the common good to consider what impact it will have on the interests of individuals. With regard to parental power, which was closely analogized with monarchical power, Locke further wrote: '[f]irst, then, paternal or parental power is nothing but that which parents have over their children to govern them, *for the children's good,* till they come to the use of reason'(emphasis added). It seems that

that the individualistic nature of the concept and the fact that the social and economic problems encountered in South Africa affect its operation make it an inappropriate standard for the South African context); Jane Fortin, 'Children's Rights —Flattering to Deceive?' (2014) 26 Child and Family Law Quarterly 51; Lucinda Ferguson, 'The Jurisprudence of Making Decisions affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in A Diduck, N Peleg and H Reece (eds), *Law in Society: Reflections on Children, Culture and Philosophy: Essays in Honour of Michael Freeman* (Brill 2015) 141 (arguing that requiring decision-takers to act virtuously is more likely, among other things, to put the child's interests at the centre, and lead to an outcome that promotes the child's flourishing).

[8] Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Unicef and Clarendon Press 1994) 1, 10–11.

[9] Michael Freeman, 'Article 3: The Best Interests of the Child' in André Ale, Johan Vande Lanette, and others (eds), *Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 2007) 26.

[10] Alston (n 8) 11. [11] ibid 12–13.

[12] Jonathan Israel, *A Revolution of the Mind* (Princeton University Press 2010) 12, 19.

this particular directive would not necessarily apply to groups defined by social categorization. It would be odd to require legislation affecting, say, lawyers, to treat their best interests as a primary consideration, so the injunction seems to apply where political power is exercised over people with respect to the many conditions they experience (such as childhood, sickness, old age) simply as people. Given that people experience many conditions, no one would expect that the interests of those experiencing any particular one of them, even childhood, to be consistently promoted without regard for its effect on any other. Indeed, principles of distributive justice would be used to resolve competing claims between them.

Why, then, does the principle of the *best interests of the child* cause such difficulty? There is of course the perennial concern regarding the apparent indeterminacy of this principle. How are a child's best interests to be determined and by whom? But the anxiety associated with the principle also has a political explanation. Children are located within subordinate power structures (families, schools, and other institutions), in which they are invariably perceived to have incomplete agency. The concept of parental sovereignty and its entitlement to non-interference within the family remains a strongly held view within all societies. This leads some to fear that the principle allows the paternalism of external authorities to override the role of parents and other family members.[13] The perceived incompleteness of children's agency raises difficult issues regarding assessment of when it is achieved and of procedures for ascertaining their views. But it also creates fears that the application of the principle must accommodate children's evolving capacity, and might be used to further challenge and override parental interests.[14]

Children's lack of political power is also important. The paternalistic achievements of the 'moderate' enlightenment were eventually replaced by the goals of the 'radical' enlightenment.[15] Activism and protest eventually brought about democracy and representative government so that the ruled could express and often bring about what they considered to be in their interests rather than accept the way the political elite, even if paternalistic, defined them. Children cannot do this. On its face, and by itself, article 3(1) is similarly paternalistic, and, unlike other potential beneficiaries of paternalism, for example potentially (or, to a lesser extent, actually) sick or elderly adults, children cannot exercise political pressure and win the power to define and realize their own interests. And even if others are able to do something like this on their behalf, problems remain regarding how conflicts between the interests of children and those other beneficiaries are to be resolved.

B. Key Issues

These anxieties and dilemmas provide the backdrop against which article 3 must be interpreted. It is important to stress that the provision consists of three paragraphs, each of which imposes distinct yet related obligations on States Parties to the Convention. Sub-paragraph (1) imposes the general obligation to ensure that children's best interests are a primary consideration in all actions concerning them; sub-paragraph (2) imposes a specific and often neglected obligation to take all appropriate measures to ensure children's

[13] See eg H Tristan Engelhardt, 'Beyond the Best Interests of Children: Four Views of the Family and Foundational Disagreements regarding Pediatric Decision-Making' (2010) 35 Medicine and Philosophy 499, 503.

[14] See eg Hafen and Hafen (n 7).

[15] See Israel (n 12) vii–ix.

well-being; and sub-paragraph (3) imposes a specific obligation to create and enforce standards for children's care by institutions or by other bodies.

However, the most pressing and complex interpretative issues under article 3 relate to the general obligation in paragraph 1 to consider children's best interests. As a consequence, this chapter devotes considerable attention to the scope of this principle; the meaning of a child's best interests; and the weight to be accorded those interests. Three central arguments are made. First, the vast scope of the principle, which applies in all actions concerning children, is designed to address the historical disregard for children's interests by decision-makers at all levels of society, whether public or private. It therefore plays an important agenda-setting role which elevates children's interests to a primary and legitimate consideration in all decision-making which is about or has an impact on children. Second, the indeterminacy of this principle has been overstated and it is possible to adopt a culturally sensitive methodology that mitigates the potential for subjective preferences and assumptions to inform an assessment of a child's best interests. Third, children's best interests are not necessarily the *determinative* consideration in all actions concerning them. Rather, the principle's primacy can be retained consistently with the adoption of a process through which any decision that is inconsistent with a child or children's *best* interests must be justified as being reasonable in all the circumstances.

II. Analysis of Article 3

A. Paragraph 1: The Best Interests Principle as a Primary Consideration

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.

1. *Scope of the Principle*

(a) 'In All Actions Concerning Children'

According to article 3(1), the best interests principle applies in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. The CRC Committee has noted that 'the word "action" does not only include decisions, but also includes all acts, conduct, proposals, services and procedures and other measures'.[16] Moreover, 'inaction or failure to take action and omissions are also "actions" ' for the purposes of article 3'.[17] Such an expansive approach is appropriate because to exclude 'inaction' would be to tolerate, for example, the neglect of a child. It is also consistent with article 3(2), which imposes a positive obligation on states to take all appropriate measures to ensure a child's care, protection, and well-being.

The ordinary meaning of the phrase 'all actions concerning children' suggests that it ought to be construed broadly.[18] As Alston points out, 'the use of plural (children)

[16] CRC GC 14 (n 1) para 17. [17] ibid para 18.

[18] See Freeman (n 9) 46, who suggests this is implied by the use of the plural 'children'. See also Sharon Detrick, *A Commentary on the UN Convention on the Rights of the Child* (Martinus Nijhoff 1999) 90; Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF, Innocenti Studies, 1996) 9–10.

would seem to indicate an intention to achieve a broad rather than narrow coverage for the … principle'.[19] Moreover, as Freeman observes, the reference to children as a class demonstrates that the Convention 'is as much focused on distributive justice as it is on the individual child'.[20] This broad approach is also supported by the work of the CRC Committee, which has repeatedly called on States Parties to integrate and consistently apply the best interests principle 'in all legislative, administrative and judicial proceedings as well as policies, programmes and projects relevant to and *with an impact on children*'[21] (emphasis added) which includes not only the obvious issues such as parental care,[22] domestic violence,[23] juvenile justice,[24] and refugee policy,[25] but also budgetary allocations,[26] including international assistance.[27]

The phrase 'concerning' is generally interpreted by the CRC Committee as synonymous with 'affecting'.[28] This is a practical approach, which ensures consistency with article 12 of the Convention which provides children with a right to express their views in all matters 'affecting' them. The Committee has distinguished between the two levels at which the best interests principle applies. First, 'concerning' refers to 'measures and decisions *directly* concerning a child, children as a group or children in general' (emphasis added).[29] This would include a decision directly 'about' a particular child or children, for example in a custody or contact issue, or concerning a medical procedure for the child, the child's education, or how the child is to be disciplined. Second, the principle applies 'to measures that *have an effect* on an individual child, children as a group or children in general even if they are not the direct targets of the measure' (emphasis added).[30] This would include decisions regarding whether to offer asylum to adults or to deport them—despite not being primarily *about* their children, such decisions can 'affect' them—and a wide range of policy matters, ranging from planning decisions to economic policy, which may not explicitly be about children, but can affect them.

Indeed, such is the scope of article 3 that the CRC Committee has recognized that 'all actions taken by a state affect children in one way or another'.[31] However, it has also suggested that 'this does not mean that every action taken by the state needs to incorporate a full and formal process of assessing and determining the best interests of the child'. According to the Committee, 'where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate'.[32] As such, the term 'concerning' must be informed by the circumstances of each case in order to be discern the impact of the action on a child.[33]

[19] Alston (n 8) 14. [20] Freeman (n 9) 46.
[21] CO Albania, CRC/C/ALB/CO/2-4 (5 October 2012) para 30(a). See also: CO Australia, CRC/C/AUS/CO/4 (28 August 2012) para 32; CO Republic of Korea, CRC/C/KOR/CO/3-4 (2 February 2012) para 33; CO Argentina CRC/C/ARG/CO/3-4 (11 June 2010) para 33.
[22] See eg CO Nigeria, CRC/C/NGA/CO/3-4 (11 June 2010) para 31.
[23] See eg CO Turkey, CRC/C/TUR/CO/2-3 (20 July 2012) para 31.
[24] See eg: CO Nigeria, CRC/C/NGA/CO/3-4 (11 June 2010) para 31; CO Ukraine, CRC/UKR/CO/3-4 (21 April 2011) para 30.
[25] See eg: CO Australia, CRC/C/AUS/CO/4 (28 August 2012) para 32; CO Denmark, CRC/C/DNK/CO/4 (7 April 2011) para 35.
[26] See eg CO Myanmar, CRC/C/MMR/CO/3-4 (14 March 2012) para 37.
[27] See eg CO Democratic People's Republic of Korea, CRC/C/PRK/CO/4 (27 March 2009) para 22.
[28] Indeed, the word 'affecting' is used instead of 'concerning' in the Committee's report on the UK: CRC/C/GBR/CO/4 (20 October 2008) para 26 and CRC GC 14 (n 1) para 19.
[29] CRC GC 14 (n 1) para 19. [30] ibid para 19.
[31] ibid para 20. See discussion on this point in chapter 12 of this Commentary.
[32] CRC GC 14 (n 1) para 20. [33] ibid para 20.

In practice, it is argued that the distinction made between decisions that are primarily 'about' children and those that 'affect' them is sharper, and that the principle operates rather differently in each instance. As regards those decisions which merely affect but are not directly about children, the distinction operates to direct the attention of those whose activities might affect children, whether they are judicial officers, urban planners, or treasury officials, to the presence and relevance of children's interests. It seeks to arrest the historical ignorance of the relevance of children's interests in this context and essentially operates to reconceptualize the agenda for decision-makers so as to ensure that children's interests are given primary consideration. With respect to decisions directly *about children*, in areas such as child protection, family law, special medical procedures, and the like, the principle needs to sustain and justify potentially coercive state action regarding specific children, and therefore demands that children's interests are placed at the centre of the decision process.

Lady Hale of the UK Supreme Court made the same distinction in *ZH (Tanzania) (FC) v Secretary of State for the Home Department*[34] when she contrasted 'decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live'.[35] The best interests, she said, were to be the determining factor in the former case, but a primary consideration in the latter. It does indeed seem that in the former case the principle requires decisions to be articulated in terms of the child's best interests, which would not necessarily be so in the latter, although in that case the child's interests are relevant and might determine the matter, but this does not exclude consideration of other interests in the former case either. For example, it has been argued[36] that article 3 protects child refugees additionally to and independently of other provisions of international refugee law, and could create an alternative ground for a right of *non-refoulement* (not to be sent back). While this would cover both unaccompanied and accompanied children, decisions concerning unaccompanied children would be of the former kind, while a decision concerning an accompanied child's parents which had implications for their children would be of the latter. In some circumstances the outcome could be the same under either characterization. While the distinction between the two cases will usually be evident, there can be ambiguous cases, in which case the way the circumstances are characterized becomes important.[37]

Sometimes a process that is essentially directly about children is conducted as if it involves them only indirectly. For example, in the family law context, Eva Ryrstedt has analysed mediation sessions in child matters in Sweden.[38] This process was approached, not as being 'about' children as such, but as directed at achieving a settlement between the parties. It is perhaps unsurprising therefore that Ryrstedt found that children's interests were

[34] [2011] 2 AC 166 (UK). [35] ibid para 25.

[36] Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 196–203.

[37] This distinction is explored further in John Eekelaar, 'Two Dimensions of the Best Interests Principle: Decisions about Children and Decisions affecting Children' in Elaine E Sutherland & Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge: Cambridge University Press 2016) and John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 International Journal of Children's Rights 3.

[38] See Eva Ryrstedt, 'Mediation Regarding Children—Is the Result Always in the Best Interests of the Child? A View from Sweden' (2012) 26 International Journal of Law, Policy and the Family 220.

rarely the focal point of what was essentially a negotiation between adults. Sometimes they were not considered at all.

In contrast, the CRC Committee has stated clearly that 'in cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts' and that 'all legislation on separation and divorce has to include the right of the child to be heard by decision-makers and in mediation processes'.[39] One technique proposed is 'child inclusive mediation', whereby a specialist confers with the child and reports to the parties to the mediation.[40] This can be expensive, however, and the measures required of states in this regard must be reasonable in light of the available resources. There is also a serious tension between the overall goal of mediation that seeks to assist participants to reach their 'own' agreement and directing them to do what is best for the children.[41]

(b) 'Whether Undertaken by Public or Private … Bodies'

A question arises as to whom the obligation to consider children's best interests applies? It is clear from the text of article 3 that public *or* private social welfare institutions, courts of law, administrative authorities and legislative bodies must each consider children's best interests. The Committee has provided guidance with respect to these entities in its General Comment on article 3, stressing that 'its terms should not be narrowly construed'[42] and that relevant bodies to whom the principle applies include 'not only those related to economic, social and cultural rights (eg care, health, environment, education, business, leisure and play, etc.) but also institutions dealing with civil rights and freedoms (eg birth registration, protection against violence in all settings, etc.)'.[43] Private bodies include 'private sector organisations—either for-profit or non-profit which play a role in the provision of services that are critical to children's enjoyment of their rights'.[44]

The imposition of an obligation on *private* social welfare institutions in an international treaty to which only states are party is interesting. Earlier drafts of article 3 actually referred to 'official' bodies but this reference was deleted during drafting.[45] Although the *travaux préparatoires* provide no explanation for this approach, it is clear from the inclusion of the specific reference to *public or private bodies* that the best interests principle is not confined to public entities.

The CRC Committee has also indicated that 'although parents are not explicitly mentioned in article 3, paragraph 1, the best interests of the child "will be their basic concern" (art 18 para 1)'.[46] This raises the question of how these obligations can be monitored under the terms of the Convention when private institutions and parents are not parties. The answer to this dilemma lies in the fact that it is the obligation of each State Party to take effective domestic measures to ensure that private institutions and parents act

[39] CRC Committee, 'General Comment No 12: The Right to be Heard' (20 July 2009) UN Doc CRC/C/GC/12 ('CRC GC 12') paras 51 and 52.

[40] See Felicity Bell and others, 'Outcomes of Child-Inclusive Mediation' (2013) 27 International Journal of Law, Policy and the Family 116.

[41] See Mavis Maclean and John Eekelaar, *Lawyers and Mediators* (Hart Publishing 2016) 87–91, pointing out differences between mediation Codes of Practice in this regard.

[42] CRC GC 14 (n 1) para 26. [43] ibid. [44] ibid.

[45] Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Right of the Child* (United Nations 2007) 338 ('*Legislative History*') (referring to UN Doc E/CN.4/L.1575, paras 25–26).

[46] CRC GC 14 (n 1) para 25. Earlier drafts referred to actions undertaken by 'parents and guardians' and to 'official' actions. Both were subsequently removed: see Alston (n 8) 14–15.

consistently with the best interests principle. States will enjoy a margin of discretion with respect to such measures and parents will also enjoy a margin of discretion with respect to the determination of their children's best interests (as examined in detail in chapter 18). As a minimum, however, the Committee has recommended that states adopt appropriate legislation, training for professionals working with children, and the dissemination of information about article 3 to children and their families.[47]

2. *Measures for the Implementation of the Best Interests Principle*

The CRC Committee has explained that states must 'take all necessary, deliberate and concrete measures for the full implementation of the right'. This directive consists of three broad obligations:

(a) an obligation to ensure that the principle is appropriately integrated and consistently applied in every action taken by a public institution whose actions have a direct or indirect impact on children;
(b) an obligation to ensure that all judicial and administrative bodies, as well as policies and legislation concerning children, demonstrate that the child's best interests have been a primary consideration; and
(c) an obligation to ensure that children's' interests are assessed and taken as a primary consideration in decisions and actions taken by the private sector which concern children.[48]

The Committee has also listed several specific measures which states are required to adopt in order to ensure the creation of a regulatory and social system that is capable of ensuring that children's best interests are a primary consideration in all matters concerning them. These measures include appropriate legislative frameworks and complaints procedures, which must be coupled with data collection, and the provision of information and training to professionals whose work has a direct or indirect impact on children. It further requires that training be provided to children themselves, in a language they understand, in relation to the nature of their rights under article 3, as well as measures to combat negative attitudes and perceptions regarding the best interests principle.[49]

Moreover, its general comments on specific cohorts of children invariably contain recommendations for states with the respect to the application of the best interests principle in specific contexts.[50] Indeed, its General Comment No 22 on the general principles regarding the human rights of children in the context of international migration and migrant workers provides an exceptionally long list of measures required of states to give effect to the best interests principle.[51] These measures expected by the Committee are

[47] CRC GC 14 (n 1) para 15. [48] ibid paras 13–14. [49] ibid paras 15 (a)–(h).

[50] See eg CRC Committee, 'General Comment No 6: Treatment of Unaccompanied and Separated Children outside their country of Origin' CRC/C/GC/2005/6 (1 September 2005) paras 11–22; 'General Comment No 7: Implementing Child Rights in Early Childhood' CRC/C/GC/7 (20 September 2006); 'General Comment No 11: Indigenous children and their Rights under the Convention' CRC/C/GC/11 (12 February 2009) paras 30–33; 'General Comment No 20' on the implementation of the rights of the child during adolescence CRC/C/GC/20 (6 December 2016) para 22; 'General Comment No 21' on children in street situations CRC/C/GC/21 (21 June 2017) para 28.

[51] 'Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' CMW/C/GC/3-CRC/C/GC/22 (16 November 2017) paras 27–33 ('CRC GC 22').

onerous and states' obligations in this regard are extensive. Furthermore, these measures are resource intensive, meaning that implementation needs to be progressive and will be contingent upon available resources. They remain justified, however, given that the effectiveness of any regulatory system to protect children's best interests will only be achieved when those whose work impacts upon children have internalized the idea that children's best interests actually matter.

Despite their broad scope, these measures do not depend on any determinate perception of children's best interests. Rather, they call for a 'process' whereby the consequences of actions and decisions may be more consistently taken into account and for actions and decisions by public and private bodies to be assessed by reference to their impact on children, partly in order to help these bodies enhance their own understanding of children's interests. Within this context Freeman has strongly advocated for the preparation of 'child impact statements',[52] which would be similar to the financial, gender and human rights impact statements that commonly accompany legislative proposals. These statements would ensure that children's interests are 'on the agenda'.

The CRC Committee has endorsed this view[53] and in General Comment 14 set out exacting standards for fulfilling this objective:

> Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.[54]

In this context, there is usually no need to speculate about the long-term futures of the children concerned. The impact on children will usually be immediate and readily assessable.

The operation of the best interests principle at an 'agenda-setting' level need not occur only in the formulation of administrative and legislative proposals. It can also occur as an aspect of judicial decision-making. The South African Constitutional Court provided a remarkable example in *S v M*,[55] which centred on the effect of s 28(2) of the South African Constitution, requiring that a child's best interests have 'paramount importance in every matter concerning the child', on the sentencing of a child's primary carer to a period of imprisonment. The decision concerned the sentencing of a mother for social security offences and was therefore not *about* her children per se. Handing down the full judgment of the Court, Sachs J ruled, however, that in such cases:

> The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence … one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them.[56]

Whilst that Court was considering the principle in the context of the South African constitution, the European Court of Human Rights adopted the same reasoning regarding the

[52] Freeman (n 9) 26. [53] CRC GC 14 (n 1) para 99. [54] ibid 6(c).
[55] (2008) 3 SA 232 (Constitutional Court). [56] ibid para 39.

application of article 3 of the Convention in *Üner v The Netherlands*.[57] This case concerned the deportation of a parent who was guilty of manslaughter. Although the principle is not explicitly referred to in the European Convention on Human Rights, the Court ruled that the best interests of any children affected by a decision must be included among the criteria (that is, placed on the agenda) for deciding whether deportation would breach the applicant's right to family life under article 8 of the ECHR. On the facts, a majority of the Grand Chamber held that the children's interests were outweighed by other factors, in particular, the seriousness of the crime. It is therefore clear that in such cases the ostensible indeterminacy of the principle does not preclude a court from reaching a coherent decision. It is sufficient that the court considers the impact of the outcome on any relevant children and is able to justify as being reasonable a decision that may not necessarily accord with a child's best interests.

3. *Assessment of a Child's Best Interests*

(a) The Indeterminacy Dilemma

Most critiques of the best interests principle focus on its alleged indeterminacy.[58] It has been argued above that this is unlikely to be a problem with regard to decisions 'affecting' children. The critiques therefore occur in the context of decisions 'about' children, such as that by Robert Mnookin, who argued that predictions about the consequences of present arrangements on children's futures were necessarily so speculative as to make it inappropriate to use it in child protection cases as a standard for 'the proper allocation of responsibility between the family and the state'.[59] As regards private law disputes between parents over arrangements for children, Mnookin suggested partial replacement of the principle by two rules. One was that no action should be taken which would pose an immediate and substantial threat to the child's physical health and the other that, in disputes between parents, courts should prefer the adult 'who has a psychological relationship with the child from the child's perspective'.[60] Later Mnookin repeated his criticisms of the principle, suggesting that, in custody cases, the child's time should be divided between the parents in a manner similar to the way it was spent when the parents were together.[61]Moreover, the indeterminacy of the principle is such that it has often operated as a code or proxy for the interests of others.[62]

In response to concerns such as these, the CRC Committee has sought to offer a methodology by which to mitigate both the indeterminacy and the misuse of the best interests principle. It has emphasized that the principle is 'dynamic' and 'flexible' and that any assessment of a child's best interests must be individualized and follow two steps:

> First within the specific factual context of the case, find out what are the relevant elements in a best interests assessment, give them concrete content and assign a weight to each in relation to each other;

[57] [2006] ECHR 873. For similar outcomes in the UK see: *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; *Hines v London Borough of Lambeth* [2014] EWCA Civ 660.

[58] eg Stephen Parker, 'The Best Interests of the Child: Principles and Problems' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Unicef and Clarendon Press 1994); Reece (n 7); Raymie H Wayne, 'The Best Interests of the Child: A Silent Standard—Will You Know it When You Hear it?' (2008) 2 Journal of Public Child Welfare 33.

[59] Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law & Contemporary Problems 226, 268.

[60] ibid.

[61] Robert Mnookin, 'Child Custody Revisited' (2014) Law and Contemporary Problems 249.

[62] Robert van Krieken, 'The "Best Interests of the Child" and Parental Separation: On the "Civilising of Parents"' (2005) 68 Modern Law Review 25, 33.

Secondly, . . . follow a procedure that ensures legal guarantees and proper application of the right.[63]

With respect to the identification of those elements that are relevant to this assessment, the Committee has provided a non-exhaustive and non-hierarchical list, which includes:

The child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situation of vulnerability; the child's right to health and the child's right to education.[64]

With respect to the balancing of these elements, the Committee has explained that 'the basic best interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others'.[65] As regards the resolution of a conflict between these elements, the CRC Committee has explained that 'the elements will have to be weighted against each other in order to find the solution that is in interests of the child or children'.[66]

It remains to be seen whether this model is sufficiently practical to guide those who are required to consider a child's best interests under article 3. However, there is some cause for concern. In the first instance, the Committee's model appears to rest on an assumption that its matrix of considerations and the weight to be accorded to them will produce a clear and uncontested determination of what is in the best interests of child.[67] But the high level of abstraction at which these considerations are stated and the failure to offer any guidance as to how to weigh them will present challenges for decision-makers. Indeed, it is difficult to see how concerns about indeterminacy and the potential for the principle to be used as proxy for the interests of others will be allayed by the Committee's model. Rather than offering 'concrete guidance',[68] it fails to address directly many of the critical issues that constantly plague the determination of a child's best interests. For example, it does not provide any substantive guidance as to how to resolve a conflict between a child and his or her parents, or between the child's parents themselves as to what is in the child's best interests. Furthermore, it does not address the extent to which cultural considerations should influence an assessment of a child's best interests. Nor does it address the extent to which a child's views should be determinative of his or her best interests or the role of evidence in mitigating the tendency for subjective values and preferences to inform an assessment of a child's best interests. How then are these issues to be resolved?

The first point to stress is that article 3(1) does not impose an obligation to determine a child's best interests unequivocally and objectively in every situation concerning him or her since this would be unfeasibly demanding. In this respect, the distinction made earlier between decisions affecting children directly and indirectly is relevant. However, especially with regard to decisions directly about children, it still demands the adoption of a *process* to mitigate the subjective and speculative assessment of children's interests by decision-makers.[69] This process requires decision-makers to consider

[63] CRC GC 14 (n 1) para 46. [64] ibid paras 52–79. [65] ibid para 80.
[66] CRC GC 14 (n 1) para 81. [67] ibid para 49. [68] ibid para 50.
[69] See John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children?' (2009) 33 Melbourne University Law Review 579, 590.

several overlapping factors when assessing a child's best interests for the purposes of the Convention.[70]

(b) Considerations which Reduce Indeterminacy

(i) Views of the Child

The views of the child are critical among the factors which must be considered when assessing a child's best interests.[71] Whereas the historical conception of the welfare principle was that a child should be seen but not heard, the rights-based conception of the best interests principle presumes that children must be seen and heard. This is because article 12(1) of the Convention mandates that States Parties assure to all children who are capable of forming a view the right to express their views on all matters affecting them. The meaning of this obligation is fully explored in chapter 12 but it is sufficient to note here that states must take active measures to determine the views of children in all matters which affect them and moreover, that any assessment as to their best interests must be considered in itself a matter affecting a child. The CRC Committee has actually declared, that:

> [a]ny decision that does not take into account the child's views or does not give the child due weight according to their age and maturity does not respect the possibility for the child or children to influence the determination of their best interests.[72]

States must therefore develop appropriate procedural safeguards and effective measures to ensure that children's views are heard and taken into account in the determination of their best interests.[73] The Committee has also affirmed the principle of 'reasonable accommodation' within disability rights discourse, which demands that measures be taken for children who may be young or vulnerable because of disability or membership of a minority group to ensure that they are fully able to participate in the determination of their best interests.[74]

But does this mean that a child or children must always participate actively and meaningfully in the making of any decision concerning their interests? This issue is explored more fully in chapter 12 and it is sufficient to note here that such a standard would be impractical. For example, a young child will often lack the capacity to express his or her views with respect to their interests, irrespective of the measures taken to enable them to do so. In such circumstances the historical tendency has been to substitute the child's views with adult assumptions and preferences. The Convention, however, demands a different approach under which if the child is not deemed to be presently competent, it will be necessary to consider whether [he or she] could be placed in an environment where he or she might become competent and affect the outcome later.[75] In other words, with

[70] David Archard and Marit Skivenes have referred to the substantive and procedural dimensions of the best interests principle: see David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 International Journal of Children's Rights 1, 7.

[71] See CRC GC 12 (n 39) para 74 ('there can be no correct application of article 3 is the components of article 12 are not respected'); *ZH (Tanzania) v Home Secretary* (n 34) paras 34–7 (highlighting the need for a child's views to inform what is in their best interests); *AC v Manitoba (Director of Child and Family Services)* SCC 30 (2009) (Canada) ('[t]he distinction between principles of welfare and autonomy narrows considerably—and often collapses altogether—when one appreciates the extent to which respecting a demonstrably mature adolescent's capacity for autonomous judgment is "by definition in his or her best interests" ') para 84.

[72] CRC GC 14 (n 1) para 53. [73] ibid paras 85–91. [74] ibid para 54.

[75] John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law & the Family 42–61.

respect to decisions that are not urgent in terms of the child's life, health or well-being, these decisions should be deferred until the child is competent to decide what is in his or her best interests.[76] Article 5 recognizes that this environment will usually be provided by the child's parents or extended family, who should guide the child 'in the exercise' of the rights under the Convention, including, of course, the best interests principle. Parents will therefore be in a position to guard children against making mistakes about their evaluation of the nature and possibilities of the social world.[77]

But what about those situations in which an urgent determination of the child's interests is required or when time constraints, logistical impediments or the availability of resources preclude consultation with the child? To insist that a child's views are considered in such circumstances would be unreasonable and impractical. Thus, as a general rule, it must be the case that decision-makers will be obliged merely to take all reasonable measures, in light of available resources, to ascertain a child's views when making an assessment as to their best interests. A decision-maker who is unable to obtain those views will bear a heavy burden to justify their failure to do so. Thus, a presumption arises that consultation with the child is necessary for any assessment of their best interests, and this can only be rebutted in circumstances where such consultation would be unreasonable. The appropriate methods by which to determine a child's views are discussed in detail in chapter 12, as is the requirement that measures be taken to mitigate any risks to children when seeking their views.

Some have seen the Convention as requiring states to allow children too much autonomy, at the expense of their protection. For example, Hafen and Hafen,[78] while acknowledging that the bulk of the Convention is focused on protection and welfare issues, represent the Convention as undermining parental paternalism by misguided promotion of children's autonomy and as inconsistent with US law on this basis. However, article 12(1) only gives a child who is 'capable of forming his or her own views' the right to 'express' those views, which are to be given 'due weight in accordance with the age and maturity of the child'. It does not require those views to be given determinative force, a point underlined by the reference in article 5 to the 'responsibilities, rights and duties' of parents and others to provide appropriate guidance to children in the exercise of their rights.

It has understandably been the area of medical decision-making that the most anxiety has arisen regarding the role of children's views. It is possible that English law, for example, does indeed allow a child the right 'to make his own decision when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision',[79] but this view is contested.[80] Nevertheless, English courts

[76] The principle is particularly significant with respect to various non-therapeutic medical procedures performed on very young children, such as male circumcision or gender reassignment for children born with ambiguous genitalia. It demands that these procedures be delayed until such a time when the child is competent to make a decision.

[77] See further discussion of parents' views below.

[78] See especially Hafen and Hafen (n 7) 449–91.

[79] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112, 186 ('*Gillick*').

[80] It is argued that Lord Fraser, in *Gillick* (ibid) restricted the child's autonomy within the best interests principle. The contrary view sees Lord Fraser's qualification simply as recognizing that doctors must always act only in the best interests of their patients, so are not bound to provide treatment that even a competent person wants if they think it medically undesirable. But that does not allow them to force treatment on a competent patient against their will: see Jonathan Herring, Rebecca Probert, and Stephen Gilmore, *Great Debates in Family Law* (Palgrave Macmillan 2012) 62–68.

tend to find that children who might otherwise be considered mature but who have declined life-saving medical treatment, usually for religious reasons, have been so affected by their situation as to lack sufficient understanding to make it.[81]

Archard and Skivenes[82] propose that when children's competence is assessed, they should not be held to a standard which most adults would fail to meet. This would reduce the capacity of courts to disregard a 'competent' child's determination to refuse treatment, yet courts seem to have done this where accepting the child's decision would have led to the child's death. This might be explained on the ground that, while the views of fully competent children may be determinative in some matters, they will not be determinative if they would damage their 'basic' interests, that is, those attributes that are necessary to lead a reasonably healthy life. The justification for this might be that, while it is true that everyone is influenced by people around them (and in that sense 'pure' autonomy is impossible), family members (especially parents) exercise a unique influence on children during childhood and this renders suspect an apparently autonomous decision by a child which severely damages the child. In such circumstances the child's views would, in Archard's terminology, be matters for 'weighting' rather than a threshold for making determinations.[83] Gilmore and Herring reach a similar conclusion by a different route, suggesting that in some factual situations a child might have a right to refuse consent to a particular treatment, but not to any treatment whatsoever.[84] However it can also be argued that a child who is deemed competent should be treated no differently from an adult as there is no longer any moral justification for such differential treatment. Indeed it has been argued that the conception of childhood under the Convention with its emphasis on children's evolving capacities (art 5) and right to be heard (art 12) anticipates that, for children who demonstrate competency with respect to a particular issue, there will be a point where the assessment of the child's best interests may be aligned with and determined by reference to the child's own views. [85] These issues are not easily resolved.

(ii) Other Rights under the Convention and International Law

The principles of internal and external system coherence[86] dictate that a decision cannot be in a child's best interests where the outcome would be contrary to another right under the Convention[87] or some other international human rights treaty. The idea of internal system coherence is reflected in the approach adopted by the CRC Committee in its General Comment on article 3, in which it lists several elements to be taken into account when assessing a child's best interests, including the child's views, identity, family environment, care and protection, and education and health, each of which is located in provisions of the Convention other than article 3.[88] The Committee's list of elements, which is selective in the sense that it does not refer to every right under the Convention, should

[81] See Archard and Skivenes (n 74). For an example from Spain, see Teresa Picontó-Novales, 'Religious Freedom and Protection of the Right to Life in Minors: A Case Study' in Mavis Maclean and John Eekelaar (eds), Managing Family Justice in Diverse Societies (Hart Publishing 2013) ch 8.

[82] Archard and Skivenes (n 74) 10.

[83] David Archard, *Children: Rights and Childhood* (London: Routledge 2004) 66.

[84] S Gilmore and J Herring, '"No" is the Hardest Word: Consent and Children's Autonomy' (2011) 23 Child and Family Law Quarterly 3.

[85] John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395, 432.

[86] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 37–39.

[87] CRC GC 14 (n 1) paras 6 and 32; Alston and Gilmour-Walsh (n 18).

[88] CRC GC 14 (n 1) paras 52–79.

not be used to ignore or overlook those rights which the Committee has not listed. As the Committee itself has stressed, its list is flexible and the 'ultimate purpose of the child's best interests should be to ensure the full and effective enjoyment of [all] the rights recognized in the Convention'.[89] The corollary is that, 'elements that are contrary to the rights enshrined in the Convention … cannot be considered as valid in assessing what is best for a child or children'.[90]

For example, when the CRC Committee has raised eliminating corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of 'reasonable' or 'moderate' corporal punishment can be justified as in the 'best interests' of the child. But interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity.[91] The best interests principle does not have a status that allows it to override the other rights set out in the Convention. Rather, it can reinforce them (as it does in the case of the right of the child to be heard), and inform the manner in which they are implemented (as it does in the case of economic, social, and cultural rights). The principle might inform the way authorities intervene to implement the right: for example, the criminal prosecution of parents might be more damaging to the children than other forms of intervention. But it does not override the right.

What the CRC Committee has neglected to mention, however, is that any assessment of a child's best interests also requires consideration of children's rights under other international human rights treaties, such as the Convention on the Rights of Persons with Disabilities, which provides an expanded catalogue of rights for children with disabilities.[92] Similarly, child marriages, condemned under the Convention on the Elimination of all Forms of Discrimination against Women, cannot be justified under the best interests principle.[93] This approach is consistent with the principle of external system coherence.[94] Importantly, in the event of conflict between a child's rights under the various international treaties, the higher standard of protection for the child will apply. This is consistent with the principle of good faith under article 26 of the Vienna Convention on the Law of Treaties, which requires states to comply with the obligations they assume upon ratification of or accession to a treaty. This principle demands that in the event of a conflict between treaty obligations, states are subject to the higher standard.

[89] ibid para 5. [90] ibid para 5.

[91] CRC Committee, 'General Comment No 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)' (2 March 2007) para 26.

[92] Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). See generally chapter 23 of this Commentary.

[93] See: Convention on the Elimination of Discrimination Against Women art 16(2); Committee on the Elimination of Discrimination Against Women General Recommendation 21: Equality in Marriage and Family Relations 1994 (1994); Joint General Recommendation/Comment No 31 of the Committee on the Elimination of Discrimination Against Women and No 18 of the Committee on the Rights of the Child CEDAW/C/GC/31/-CRC/C/GC/18 (4 November 2014) paras 6, 19–23.

[94] Tobin, 'Seeking to Persuade' (n 86).

(iii) Relevance of Parents' (and Other Relevant Persons) Views

Significantly, the requirement to consider all the provisions of the Convention when determining a child's best interests necessitates a consideration of the views of parents and other persons whose rights, responsibilities, and customs with respect to the care of a child are protected by article 5. Thus, the Convention starts from the premise that parents and those responsible for children's care have both a presumptive entitlement *and* a responsibility to determine the child's best interests. This position reflects the deference given to the role of parents and a child's extended family under the Convention and the reality that in the normal course of events, parents or guardians will be in the best position to guide children in their decision-making. So while it is accepted that a child will normally grow up subject to the control and influence of his or her parents or extended family, it is also expected that these persons will respect the child's rights and that decision-makers will also seek to advance them. Indeed, article 18 declares that parents must make children's best interests their basic concern. It is impossible to prescribe the extent of the freedom that ought to be granted to a developing child. Of course, the child's basic interests will always need protection. Apart from that, as a minimum, it may be said that the absolute preclusion of any opportunity for individual development would be inconsistent with the principle, as would restrictions that are otherwise deemed wrongful by society. In reality, the extent to which such opportunities are provided is bound to be heavily influenced by economic, social, and cultural factors.

Importantly, the presumption in favour of deference to parental views and wishes does not mean that such views are determinative. This is because the degree of deference to be afforded to parental views is subject to two caveats. First, it remains subject to the evolving capacities of a child (the meaning of which is examined fully in chapter 5), a principle which dictates that once a child demonstrates capacity or competency with respect to the determination of his or her best interests, deference to parental views ceases to be appropriate. Second, where deference to parental views is required, it is conditional on the requirement that these views constitute 'appropriate direction and guidance' for the realization of the child's rights. Thus, where the views of parents would threaten the enjoyment of a child's right under the Convention, they are not to be accommodated by a decision-maker. As the Committee has declared, 'an adult's judgment of a child's best interests cannot override the obligation to respect all rights under the Convention'.[95] This potential for conflict is manifest in many areas, including for example, parental objections to children receiving information about sexual and reproductive health, parental refusal to consent to life-saving medical treatment on religious grounds, or the use of corporal punishment. In each scenario the Committee has made it clear that an accommodation of parental views with respect to what they consider to be in a child's best interests would be inconsistent with the child's rights under the Convention.[96]

The final point to make in this context is that the assessment of a child's best interests 'must not be coloured by their parents' behaviour'. This principle was outlined by members of the UK Supreme Court in a case which involved the deportation of a mother of

[95] CRC GC 14 (n 1) para 4.

[96] See: CRC Committee, 'General Comment No 13: The Right of the Child to Freedom from All Forms of Violence' (18 April 2011) CRC/C/GC/13 paras 53, 56; 'General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4 para 29; and 'General Comment No 15: (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)' (17 April 2013) CRC/C/GC/13 para 31.

two children who had made fraudulent immigration claims. [97] The Court recognized that there was a need to balance her children's interests against the state's interest in controlling immigration control, but emphasized that any assessment of the children's best interests could not be influenced by consideration of the mother's behaviour.

(iv) The Child's Individual Circumstances, Including the Role of Social and Cultural Practices

The requirement to consider the views of a child and/or parents, and the catalogue of rights under the Convention will not necessarily mitigate the dangers associated with the traditional application of the best interests principle. A child may lack the maturity to provide an informative opinion as to the nature of his or her best interests, and parents or other relevant family members may be absent or have conflicting interests to those of their child. Parents and other relevant persons may also lack the requisite skills to assess a child's interests. Moreover, the matter may also involve an issue that is not expressly addressed by the provisions of the Convention. This raises the very real prospect that in some cases the substance of the best interests principle will be indeterminate.

Despite this risk, Sachs J of the South African Constitutional Court has suggested that this potential is the source of the principle's strength since it provides a decision-maker with the flexibility to tailor a decision to a child's individual circumstances.[98] Moreover, as he rightly warns, '[t]o apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned'.[99] The CRC Committee has effectively endorsed this approach by stressing that:

> the concept of the child's best interests is flexible and adaptable … [and] … should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into account their personal context, situation and needs.[100]

This approach has been expressed in a different way in terms of a 'holistic' approach applicable to decisions 'about' children, whereby the decision-maker examines a range of available options, and selects that which best suits the child in question, subject to any sufficiently weighty countervailing rights.[101] This individualized assessment must take into account the individual developmental needs of a child and the social and cultural context in which the child lives. The Committee has certainly stressed the importance of maintaining a child's cultural identity, which demands measures to preserve this identity in circumstances such as foster care or intercountry adoption.[102] However in its General Comment on article 3, the Committee avoided the more contentious issue of the extent to which social and cultural practices can, or must, be taken into account in an assessment of a child's best interests. The Convention certainly validates cultural diversity. Article 5 requires states to respect customary practices which are relevant to children's upbringing; article 30 provides children with the right to enjoy their own culture; article

[97] Lord Hope in *ZH (Tanzania) v Home Secretary* (n 34) para 45. See: Jane Fortin, 'Are Children's Best Interests Really Best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 Modern Law Review 932, 954.

[98] *State v M* [2008] 3 SA 232, 248–49 (South Africa) (Sachs J for Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya, and Van der Westhuizen JJ).

[99] ibid. [100] CRC GC 14 (n 1) para 32.

[101] See eg: *Re B-S (Children)* [2013] EWCA Civ 1146, para 36; *re F (A Child)* [2015] EWCA 882, para 28; Eekelaar (n 37).

[102] CRC GC 14 (n 1) para 56.

31 provides children with the right to participate in cultural life; and article 29 demands that children's education be directed to respect for their parents and cultural identity. But this embrace of cultural diversity raises the issue as to the extent to which decision-makers must accommodate dominant social and cultural practices when assessing a child's best interests.

Much of the commentary on this issue focuses on the conflict between non-Western cultural practices that may be considered consistent with a child's best interests in the jurisdiction in which they are performed, such as arranged marriages or female genital cutting, and Western perceptions of such practices as incompatible with the child's best interests. However, the tension between traditional social and cultural practices and the assessment of a child's best interests cannot be reduced to the standard cultural relativist argument. This is because all societies tend to assume that traditional social arrangements will benefit children. This is notorious in the context of education, especially for girls, and of discipline. The identification of children's welfare with the maintenance of patriarchy in nineteenth century western societies is well known.[103] Even in the last quarter of the twentieth century, judges based custody decisions on traditional conceptions of the woman's role as homemaker and the man's as income earner, and the bases that men should not receive state benefit while looking after their children; that children should have no contact with a homosexual parent; and that illegitimacy justifies severing the relationship between a child and his or her non-resident father to allow the child to be brought up by his or her mother and her husband as a respectable member of society.[104] One of the most extreme examples was the removal, during the nineteenth and twentieth centuries, of thousands of young children from England, mostly to Canada and later to Australia, often to conceal illegitimacy. The practice ended only in 1962.[105] It eventually led to the Australian and British governments issuing official apologies. In March 2013, following apologies from state authorities, the Australian Prime Minister apologized for the policy of forced, secret adoption of the children of unmarried mothers which was mainly carried out from the 1950s to the 1970s. This is particularly significant for the fact that most of those carrying out these practices would have claimed that they were furthering the children's best interests.

Thus, if the best interests principle is simply equated with actual social and cultural practices (meaning social structures or arrangements, and ideologies or values), it loses objective and independent value. As Reece argues,[106] the principle might prove dangerous to the extent that it confers on such practices the sanctity associated with the nurturance of children, making it harder to prevent potential harm to children and indeed, to others. However, if the principle is not to be identified with social practices, can decision-makers employ it independently of such practices? This could be difficult if a particular culture perceives it to be imposed by external forces and responds with what Ayalet Shachar has

[103] See *Re Agar-Ellis* (1883) 24 ChD 317, 334, in which Cotton LJ said: 'when by birth a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interests of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father but leave him the responsibility of exercising the power which nature has given him by the birth of the child'.

[104] *H v H (child custody)* (1984) 14 Family Law 112; *Re DW (a minor) (custody)* (1984) 14 Family Law 17; *Re E (P)* [1969] 1 All ER 323. See Reece (n 7).

[105] See: Margaret Humphreys, *Empty Cradles* (Corgi Books 1996); John Eekelaar, ' "The Chief Glory": The Export of Children from the United Kingdom' (1994) 21 Journal of Law and Society 487.

[106] Reece (n 7).

described as 'reactive culturalism,'[107] whereby the possibility of change is precluded by more fervent attachment to existing cultural values. It is well known that international human rights instruments are vulnerable to this perception and indeed, if they are interpreted as doing no more than replacing one culture's social organization with that of another, then it is unsurprising that such reactive culturalism might take hold. An-Naim recognizes this problem in the context of the Convention, arguing that its universality can be promoted only through the development of internal processes in different societies for the discussion of their own provisions, such as the best interests principle.[108] Specifically, he suggests a tentative model for regulating the definition of the principle which requires: clarity regarding the actions to which the principle is applicable; rigorous analysis of any action taken in order to identify those who benefit from it and its consequences; an understanding of the relevant power relations; and appreciation of the constraints on influencing them. Throughout, he argues, opportunities 'for contesting the nature and rationale of action regarding children from different perspectives and presenting alternative positions' should be maximized.[109]

Similarly, Freeman sees cross-cultural dialogue as the only way to 'communicate and create shared common sense.[110] It is clearly important to nurture dialogue in this way, and article 3(1) provides the means by which any social arrangements, in any society, may be interrogated and assessed. But it does more than simply set up a forum for discussion; it provides an orientation or centre of gravity for the discussion. It does so because article 3(1) is not simply an administrative measure which directs states how to carry out the actions which it specifies. As the CRC Committee has unambiguously asserted,[111] its location within the Convention means that it is a right of the child,[112] and states party to the Convention have accepted it as such.[113] It is immaterial that the word 'right' does not appear in article 3(1). Nor does it appear in article 2, which requires states to 'respect and ensure the rights set forth in the present Convention … without discrimination of any kind'. While that may not create an autonomous right to freedom from discrimination, it certainly requires that Convention rights are not applied in a discriminatory manner.

It is therefore necessary to consider carefully what is implied by accepting the best interests principle as a right and not merely as a directive, or indeed a duty. Central to the idea of rights is recognition that the interest protected by the right is understood *by the rightholder* as expressing an element of his or her well-being.[114] This view recognizes the difficulty of considering that something that a person considers freely and with full understanding not to be in their interest, could be a 'right' for that person. This is not all that is involved in the idea of rights; the interests must have sufficient weight, and there

[107] Ayalet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001) 60–61 and 84.

[108] Abdullah An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994).

[109] ibid 76–77. [110] Freeman (n 9) 39–40. [111] CRC GC 14 (n 1) para 6(a).

[112] Elsje Bonthuys has argued that the best interests principle in the South African constitution is not a right but a 'value': 'The Best Interests of Children in the South African Constitution' (2006) 20 International Journal of Law, Policy and the Family 23. Whatever may be the correct analysis in South African law, it is suggested this does not apply to the Convention.

[113] See Jean Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation* (Institut International des Droits de L'Enfant 2010), 2 ('[arts 3 and 12] are considered to be two of the four general principles of the Convention, but are, first and foremost, distinct individual rights').

[114] For a full discussion, see John Eekelaar, *Family Law and Personal Life* (2nd ed) (Oxford 2017) 36 et seq.

must be sufficient grounds for deeming the rightholder entitled to protection.[115] But for the purposes of understanding the principle, it is sufficient to observe that, on this view of rights,[116] the fact that the principle is expressed as a right requires that the evaluation of a child's best interests be undertaken as far as possible from each child's perspective of his or her own well-being, which could be seen in Sen's and Nussbaum's sense of a person's capability to do things he or she has reason to value.[117] If this analysis is not persuasive,[118] the same conclusion can be reached by reference to the requirement under article 12 that children's views are taken into account.

This opens the way to avoid decisions about a child's best interests simply replicating dominant cultural and social practices. Of course decision-makers will assume that their society's social arrangements benefit its children, but the principle requires that they should not be assumed to benefit all children in every situation. The CRC Committee has expressed it thus:

> [the best interests concept] should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.[119]

Nor should a society's social arrangements themselves be considered beyond evaluation. In adopting a child's perspective, decision-makers must genuinely evaluate their impact on the children's well-being. It is not enough simply to declare that a particular outcome conforms to social practice.[120]

(v) Use of Presumptions

Attempts to reduce indeterminacy, and also steer outcomes in a particular direction, have been made through the use of presumptions. These became particularly controversial in Australia with respect to 'shared parenting' arrangements after parental separation, but this has occurred also in other jurisdictions.[121] More recently it has been urged in Canada that presumptions should be used in the determination of 'relocation' disputes,[122] but

[115] ibid ch 2.

[116] There are of course other views about rights, eg in *What is Wrong with Children's Rights* (Harvard University Press 2005), Martin Guggenheim argues that claims about children's rights are used to advance adult agendas. However, this is based largely on child rights advocacy in US litigation, with little attention to the role of the Convention or analysis of the interaction between the concepts of rights and welfare: see Michael Freeman, 'Review' (2006) 2 International Journal of Law in Context 89.

[117] Amartya Sen, *Inequality Re-examined* (Oxford: Clarendon Press 1992); Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Harvard University Press 2011).

[118] Since this involves conceptions of concepts and not definitions of physical objects, different views might reasonably be taken. egDavid Archard, 'Children, Adults, Best Interests and Rights' (2013) 13 Medical Law International 55, 55–74 holds that the adoption of the child's perspective should be seen as an element of an understanding of the 'best interests' rather than of rights. It is certainly possible to understand the principle as incorporating the child's perspectives (as argued also in Eekelaar (n 75)), but, given the propensity to equate children's interests with social practices that ignore children's perspectives, there seems to be value in strengthening this by insisting that the incorporation of the duty to promote a child's best interests into the body of rights held by the child demands that they be interpreted from the child's perspective.

[119] CRC GC 14 (n 1) para 32.

[120] See John Eekelaar, 'Law, Culture, Values' in A Diduck, N Peleg, and H Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill 2015) ch 2.

[121] Belinda Fehlberg, Bruce Smyth, Mavis Maclean, and Ceridwen Roberts, 'Legislating for Shared Time Parenting after Separation: a Research Review' (2011) 25 *International Journal of Law, Policy and the Family* 318.

[122] Nicholas Bala and Andrea Wheeler, 'Canadian Relocation Cases: Heading Towards Guidelines' (2012) 30 *Canadian Family Law Quarterly* 271; Rollie Thompson, 'Presumptions, Burdens, and Best Interests in Relocation Law' (2015) 53 *Family Court Review* 40.

British Columbia has ruled out the use of presumptions that, in making parenting arrangements between separated parents, equal sharing of parental responsibilities, or equal sharing of parental time, are in the best interests of the child concerned.[123] The risk of presumptions is that they could divert attention away from the child's interests to how the presumption is to be interpreted and result in decisions about children that rest entirely, or substantially, on a social practice that is generally believed to be in children's interests, without a need to demonstrate that it is in fact so for the child in question. The UK Supreme Court recognized[124] this when it sought to dispel any misunderstanding of an earlier decision[125] that there might be a presumption that a child should be brought up by its 'natural' parent in preference to someone to whom the child was not genetically related. The Court stated:

> It is only as a contributor to the child's welfare that parenthood assumes any significance. In common with all other factors bearing on what is in the best interests of the child, it must be examined for its potential to fulfil that aim. There are various ways in which it may do so … but the essential task for the court is always the same.[126]

(vi) Role of Evidence

To minimize the risk that a decision is governed by the decision-maker's subjective preferences, or by routine application of generalized rules, decision-makers must consider the availability of any empirical evidence in relation to the child in question specifically, or children more generally, that may be relevant to the issues before them.[127] Moreover, absent empirical evidence regarding the impact of a particular practice or policy on children, states must monitor and evaluate its impact on children's interests.

At the same time, caution must be exercised when relying on empirical research in matters involving children. Courts may misconstrue a lack of available evidence to justify actions which are not only potentially incompatible with the best interests of children, but also the rights of others. Thus, for example, the European Court of Human Rights in *Fretté v France*[128] upheld the prohibition of a gay man from adopting a child on the basis that there was insufficient research to demonstrate that his sexual orientation would not be harmful to the child. This approach effectively reverses the accepted onus of international human rights law, which demands that differential treatment may only be justified where there is objective evidence that it is necessary to secure a legitimate aim.

The requirement of an evidence-based approach operates both to reduce the indeterminacy of the best interests principle and to mitigate the potential for decision-makers to substitute subjective or speculative notions of a child's best interests. When combined with the factors outlined above, it puts to rest criticism that the best interests principle is

[123] Family Law Act 2011 s 40(4). [124] *Re B (A Child)* [2009] UKSC 5.

[125] *Re G (Children) (Residence: Same-Sex Partner)* [2006] UKHL 43. [126] *Re B* (n 120) para 37.

[127] See eg John Tobin and Ruth McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 International Journal of Law Policy and Family 110 (using an evidence-based assessment of whether the adoption of children by same sex parents is compatible with the best interests of the child); John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using The Victorian Charter Of Human Rights And Responsibilities Act To Achieve The Right Balance' (2010) 36 Monash University Law Review 16 (using an evidence-based inquiry to assess whether discrimination against gay and lesbian staff and students in schools is consistent with a child's best interests).

[128] [2002] I Eur Court HR 345, 369, 374.

incapable of 'being identified with some precision',[129] creates an 'unexaminable discretion in the repository of the power',[130] functions as a 'juristic black hole',[131] and that any assessment of a child's best interests 'can become a moveable feast'.[132] This assessment may not be amenable to a precise formula. Indeed, it would be troubling if it were, because that would suggest that the outcome was dictated by some social or legal rule rather than a genuine appraisal of the child's welfare. But its contours and content are no less determinate than many others within rights discourse. The key consideration for decision-makers seeking to identify a child's best interests under a rights-based conception of this principle (as opposed to a simple welfare model under which children are seen but not heard) is therefore the process which they adopt. More specifically, this process must involve as a minimum a consideration of:

a) the views of a child;
b) the relevance of any other rights under the Convention or other international treaties;
c) the views of parents or other persons involved in the child's care;
d) the individual circumstances of the child, including his or her developmental needs and any relevant social, religious or cultural practices; and
e) any available empirical evidence of relevance.[133]

(c) **Weight to Be Accorded to a Child's Best Interests**

(i) A Primary Consideration

The 1959 *Declaration on the Rights of the Child* provided that 'the best interests of the child shall be *the paramount consideration*' (emphasis added).[134] This standard was echoed in the original Polish draft of the Convention[135] and requires that a child's best interests are not merely a consideration or the primary consideration which must be weighed in light of others, but the determinative consideration in all matters concerning the child.[136] The *travaux préparatoires*, however, indicate that several delegations were concerned by the burden which this standard would impose and in 1980 it was therefore proposed to

[129] *Canadian Foundation for Children, Youth and the Law v A-G* (Canada) [2004] 1 SCR 76, 95 (Canada) (McLachlin CJ for McLachlin CJ, Gonthier, Iacobucci, Major, Bastarache, and LeBel JJ), quoting *Rodriguez v A-G (British Columbia)* [1993] 3 SCR 519, 591 (Canada) (Sopinka J for La Forest, Sopinka, Gonthier, Iacobucci, and Major JJ.

[130] *Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218, 271 (Brennan J).

[131] van Krieken (n 62) 26.

[132] Jane Fortin, 'Children's Rights—Flattering to Deceive' (2014) 26 Child and Family Law Quarterly 51.

[133] These considerations will be modified and adapted in light of the circumstances in which a best interests determination is being sought. eg in the context of alternative care arrangements see Nigel Cantwell, Jennifer Davidson, Susan Elsley, Ian Malligan, and Neil Quinn, *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'* (Centre for Excellent for Looked After Children in Scotland 2012) 25 (outlining the considerations in best interests determination when assessing an alternative care arrangement which are listed to include the child's views; the views and capacities of family members; the stability provided by the child's day to day living arrangements; the likely effects of separation on a child; the child's developmental needs; any other issues such as cultural and religious background and a need to review the suitability of any care option in light of these considerations). In the context of refugee children see: *UNHCR Guidelines on Determining the Best Interests of the Child* (UNCHR May 2008) (offering guidance on the particular considerations relevant to the determination of a child's best interests for unaccompanied and refugee children including a checklist: Annex 9).

[134] Declaration on the Rights of the Child (n 4) principle 2.

[135] *Legislative History* (n 45) 335.

[136] See eg Lord MacDermott in *J v C* [1970] AC 668, 710; see also Tobin, 'Judging the Judges' (n 69) 588, footnote 51.

adopt a formulation that required the best interests of the child to be merely a primary consideration.[137]

The CRC Committee has stated that the use of the word 'primary' means that children's interests are to be considered 'on the same level' as other considerations, that when weighing children's interests against those of others, 'larger weight' must be given to what serves the child best; and that there must be 'willingness to give priority to those interests in all circumstances'.[138] These statements require further analysis. Taken literally, they suggest that children's interests must always be given greater weight than the interests of other individuals or groups, no matter what those interests are. However, that would be to treat children's interests as '*the*' primary consideration, not '*a*' primary consideration. In the same context, and somewhat inconsistently, the Committee has recognized the 'need for flexibility' in the application of the best interests principle and that potential conflicts between interests must be resolved on a 'case-by-case basis', 'carefully balancing the interests of all parties and finding a suitable compromise'.[139] Thus, the Committee's guidance with respect to the weight to be accorded to children's best interests is contradictory to the extent that it suggests that these interests are to be both *prioritized* and subject to *compromise*.

How then are decision-makers to treat a child's best interests? In *ZH (Tanzania) (FC) v Secretary of State for the Home Department*,[140] a decision of the UK Supreme Court which concerned a deportation decision with ramifications for the deportee's child, Lady Hale reasoned that the requirement for a child's best interests to be a primary consideration 'means that they must be considered first'.[141] She acknowledged that the child's best interests might be outweighed by 'the cumulative effect of other considerations',[142] but stressed that a decision-maker must not 'treat any other consideration as inherently more significant than the best interests of the children'.[143] Presumably she did not simply mean that in such cases children's interests should be considered first chronologically,[144] but that they should have some presumptive priority. It is doubtful, however, whether this can be properly inferred from the expression 'a primary consideration'. Indeed, the decision of the drafters of the Convention to relegate a child's best interests to *a primary consideration* evidences a deliberate and calculated decision to elevate but not prioritize them over all other competing considerations. One possible approach, mentioned earlier,[145] is to distinguish between *decisions directly about* children, which require the decision to focus primarily on the child's welfare in a holistic way and those interests are determinative, subject to the weight of competing interests (as explained below), and decisions which *affect children indirectly*, when decision-makers should seek the best outcome for the subject matter at hand, while nevertheless giving primary consideration to the impact on the welfare of any children, which may require adjustment (or in extreme cases, abandonment) of that outcome.

[137] *Legislative History* (n 45) 338. [138] CRC GC 14 (n 1) paras 37, 39, and 40.
[139] ibid para 39. [140] *ZH (Tanzania) v Home Secretary* (n 34). [141] ibid para 33.
[142] ibid para 33. [143] ibid para 26.
[144] Although they should clearly be considered before action is taken: UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (UNHCR 2008) para 3.1.
[145] See n 37.

(ii) When Can Children's Best Interests Be Displaced?

It is clear from the text of the Convention that children's interests must not be marginalized or overlooked in decisions about them or which affect them, and that processes must be developed which bring children's interests to the attention of decision-makers in all matters concerning children. But article 3 does not demand that these interests must necessarily prevail over competing interests, or even be considered first. David Archard rejects as 'implausible' a construction of the principle according to which 'we are obliged to promote the interests of the child to the highest degree possible rather than simply to take those interests into account to some degree'.[146] The real question then is when can a child's best interests be displaced by other considerations? The answer draws upon the principles of necessity and reasonableness, which underpin any discussion about an interference with a human right[147] and demand that when a state seeks to interfere with an individual's right, this will only be justified where three conditions are satisfied. First, there must be a lawful basis for the interference. Second, the interference must be necessary to achieve a legitimate aim or pressing social need. Third, the measures taken in order to achieve that aim must be proportionate. This in turn requires an inquiry into whether there is (a) an objective basis or rational connection between the measure taken and the aim sought; and (b) reasonably available alternative measures that would avoid or minimize interference with the right.[148]

When these principles are applied to the requirement to treat children's best interests as a primary consideration, it demands that a decision-maker seeking to displace the child's interests in favour of another interest must establish on the balance of probabilities that doing this has a lawful basis, pursues a legitimate aim, and is proportionate. Although this test anticipates that other interests can displace a child's best interests, it still imposes an onerous burden on a decision-maker to justify any interference on the basis of evidence rather than speculation and assumption. Thus, children's interests can be said to be accorded a privileged but not unassailable position. Importantly, the process for assessing reasonableness must be transparent. Indeed, the CRC Committee has explained that:

> any decision concerning the child must be … justified and explained … If the solution chosen is not in the best interests of the child the grounds for this must be set out in order to show that the child's best interests were [treated] as a primary consideration, despite the result.[149]

When viewed in this light, the best interests principle demands not just the elevation and consideration of children's best interests, but also a *process* by which such decisions may be justified and effectively communicated to children.

It is arguable that the position under the European Convention on Human Rights is similar. While that Convention makes no reference to the interests of children, the European Court of Human Rights has recognized the 'best interests' principle many times, though the way it has expressed its interaction with the other Convention rights

[146] David Archard, 'Children, Adults, Best Interests and Rights' (2013) 13 Medical Law International 55, 55.

[147] See John Tobin, *The Right to Health in International Law* (Oxford University Press 2012) 180–84. See also *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* E/CN.4/1985/4 (28 September 1984) Annex paras 10–11.

[148] ibid. See also Richard Clayton, 'Regaining a Sense of Proportion: the HRA and the Proportionality Principle' (2001) 5 European Human Rights Law Review 512. For a discussion in the family law context, see Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart 2010) 28–34.

[149] CRC GC 14 (n 1) para 97.

has fluctuated. In *Johansen v Norway*,[150] which concerned a child in public care, the Court had said in 1996 that where a child is removed from his or her parents:

> a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child … In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, *depending on their nature and seriousness*, may override those of the parent.[151]

On this formulation, in cases where the state takes coercive actions about children, whether children's interests prevail over other interests depends on an assessment of their 'nature and seriousness'.[152] However, in *Yousef v The Netherlands*,[153] the Court said in 2002 that 'where the rights of parents are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must always prevail'.[154] Whether there is inconsistency between these formulations is debated.[155] But it is unlikely that benefits to children, *however marginal*, will always prevail over an adult's interests, *however gravely affected*, especially in view of the importance placed by the Court on actions being 'proportionate'. Therefore, the practical outcomes are unlikely to differ whichever formulation is used. Both can be seen as maintaining a degree of priority for children's interests in such cases without excluding proper consideration of other interests.

(d) Striking the Balance with Equivalent Interests

A question remains regarding where the balance ought to be struck in circumstances where a child's best interests are of equal importance to competing interests. For its part, the Committee has argued that 'the right of a child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and [are] not just one of several considerations'.[156] Therefore, according to the Committee, 'a larger weight must be attached to what serves the child best'.[157] A defence of the Committee's position that the Convention gives priority to children's interests in such circumstances could be based on three arguments.

First, no human rights treaty demands that the interests of a particular group other than children be treated as a primary consideration. States have therefore granted a special status to children's interests and this supports the idea that in the event of equivalency between competing interests, those of children's interests should prevail. Although commentators might debate the moral justification for this special status, the text of the UN Convention, when viewed within the broader context of international law, supports this proposition. Second, by virtue of children's youth and relative vulnerability, decisions affecting them will have a longer-term or more significant impact on their interests, relative to others whose interests are also at stake. In such circumstances, prioritizing competing

[150] App No 1783/90 (1997) 23 EHRR 33. [151] ibid para 78 (emphasis in original).

[152] See Sonia Harris-Short, 'Family Law and the Human Rights Act 1998: Judicial restraint or Revolution?' (2005) Child and Family Law Quarterly 329; Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 236–37.

[153] App No 3371/96 (ECtHR, 5 November 2002).

[154] ibid para 73. See also *Ismailova v Russia* [2007] ECHR 37614/02 (ECtHR, 8 November 2007); *PV v Spain* App. 35159/09 (ECtHR, 30 November 2010); *YC v United Kingdom* App No 4547/10 (ECtHR, 13 March 2012).

[155] Claire Simmonds, 'Paramountcy and the ECHR: A Conflict Resolved?' [2012] Cambridge Law Journal 498–501.

[156] CRC GC 14 (n 1) para 39. [157] ibid.

interests over those of children would be morally indefensible. Third, children have less capacity to shape policy and determine events relative to adults, who will usually have more social and political control over their circumstances than children. This creates a special vulnerability in children and it is reasonable to demand that some degree of priority be accorded to the children's interests in such circumstances.[158]

(e) Best Interests Principle as a Precautionary Principle

As noted above, evidence is critical to the implementation of the best interests principle on two fronts. First, it can be used to provide an objective insight into the assessment of a child's best interests, and second, it is crucial to an assessment of whether an interference with a child's best interests is justified. However, a question remains as to what ought to occur when the evidence is not determinative. In such circumstances, it is suggested that where there is *reasonable* evidence (not mere speculation or assertion) that a particular practice is harmful to a child's best interests, the fact that it is inconclusive should not preclude prohibition or regulation of the practice in question, notwithstanding that such measures may interfere with the rights of others. In other words, the best interests principle could act similarly to the precautionary principle under international environmental law.[159]

By way of illustration, there is no evidence of an explicit causal nexus between *virtual child pornography* and harm to children. Thus, in the USA it has been held that a ban on virtual child pornography is unnecessary to secure children's interests and would be contrary to an individual's right to freedom of expression.[160] In contrast, the Canadian Supreme Court has held that despite the lack of a causal nexus between possession of such pornography and child sexual abuse, there is evidence that possession reduced the inhibitions of child sex offenders, fuelled fantasies, was used in grooming victims, and created cognitive distortions.[161] According to the Canadian Supreme Court, the cumulative effect of this evidence, although not conclusive, was sufficient to justify the criminalization of possession of child pornography, notwithstanding the consequent inference with a defendant's right to liberty of person and freedom of expression. In the same way, the best interests principle can and should be used to require decision-makers to take measures that may interfere with the rights and interests of others where there is reasonable evidence to suggest that children's interests may be at risk if such measures are not taken, even if that evidence is inconclusive.

(f) Circumstances in which Children's Best Interests Are More than a Primary Consideration

There are seven instances in which the Convention alters and modifies the basic principle that children's best interests must be a *primary* consideration in all matters affecting them:

1. article 9(1) stipulates that a child can only be separated from his or her parent

[158] Rosalind Dixon and Martha C. Nussbaum, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) 97 Cornell Law Review 549. The authors also argue that it is cost efficient for states to give priority to protecting children's capabilities.

[159] Principle 15 of the *United Nations Conference on Environment and Development* (Rio de Janeiro, Brazil 1992) defined this principle:

> Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[160] *Ashcroft v Free Speech Coalition* 535 US 234 (2002) (USA).

[161] *R v Sharpe* [2001] 1 SCR 45 (2001) (Canada).

where it is 'necessary' for the child's best interests;

2. article 9(3) refers to the 'right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests';
3. article 18(3) requires that parents make children's best interests their 'basic concern';
4. article 20 refers to states' obligations with respect to a child who is temporarily or permanently deprived of a family environment, or in 'whose own best interests' cannot be allowed to stay in that environment';
5. article 21 provides that in states with a system of adoption, the best interests of the child must be 'the paramount consideration';
6. article 37 requires that when deprived of their liberty, children should be separated from adults unless this is contrary their best interests; and
7. article 40 requires that when a child is subject to questioning in relation to criminal matters, he or she must be accompanied by counsel and or his or her parents, unless this would 'not be in the best interests of the child'.

The weight to be accorded to a child's best interests in each of these instances is discussed in the chapters dealing with each of these provisions. For present purposes, it is sufficient to note that caution is required in order to ensure that the basic principle does not become the default option when a matter falls for consideration under one of the articles containing a modified version of the principle. For example, only if the conditions for adoption have been met[162] will children's best interests trump those of all other parties. On the other hand, it is hard to accept that the child's right under article 9(3) to maintain contact with a parent prevails over the child's right to an arrangement involving less or no contact if that is in the child's best interests unless either the child desires this and has appropriate competence to determine the issue, or it is necessitated when giving appropriate weight to the *parent's* rights. Apart from those circumstances, article 9(3) should perhaps be read as proposing a strong presumption that such contact is in the child's best interests, although reservations about such presumptions have been expressed earlier.

B. Paragraph 2: The Obligation to Ensure a Child's Well-Being

State Parties undertake to ensure the child such protection and care as is necessary to 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.

[162] Art 9 (1) ensures that children should not be separated from their parents *unless* this is in the child's best interests. That is not the same as saying they should be separated if this would best promote their interests. The best interests principle is thus a qualifying factor to ensure that, where intervention is justified on other grounds (art 9 (1) refers to abuse or neglect of the child by the parents, or where the parents are living separately), it is carried out in a way that is in the child's best interests. This is clear from the further statement in art 21 that, in the case of adoption, the authorities must determine that the adoption process is permissible in view of the child's status concerning parents, relatives, and legal guardians and that 'if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary' (art 21(a)). There is no implication that parents must give this consent if the child can have a better life adopted, or that states must provide the possibility of adoption. There is in fact considerable variation between states in the use of adoption. See Neil Gilbert, Nigel Parton, and Marit Skivenes, *Child Protection Systems: International Trends and Orientations* (Oxford University Press 2011).

1. Overview

The drafting history of the Convention indicates that the inclusion of article 3(2) was prompted by the Australian delegation on the premise that it would it meet the 'basic aim of the Conference on the Legal Protection of the Rights of the Child held in Warsaw on 16–19 January 1979, namely the need to secure the rights of the child through support to the family in need'.[163] During the Technical Review, the WHO delegation subsequently commented that the paragraph aligned with one of the objectives of the WHO Constitution, which is 'to promote maternal health and child care'.[164] Beyond these comments, the drafting history reveals little else about the function or meaning of this paragraph.

Moreover, the CRC Committee has done little to address this gap and has largely overlooked this paragraph in its work on article 3. This indifference is understandable given that the principal aim of this provision, which is to impose a general obligation to protect children's well-being, might be considered an unnecessary inclusion in a treaty containing forty substantive articles which each aim to achieve this same end. Moreover, some of the articles in the Convention appear to mimic the subject matter of article 3(2) to such an extent that any substantive difference is difficult to discern. For example, article 19 requires states to protect children against all forms of violence, neglect, abuse, and maltreatment while in the care of parents or other persons; article 18(2) requires states to provide appropriate assistance to parents in the performance of their child rearing responsibilities, including services to care for children; article 27(3) requires states to assist parents to secure a child's right to an adequate standard of living; and article 20 entitles children deprived of their family environment to special protection and assistance.

Collectively, these provisions leave no doubt that states are obliged to take all appropriate measures subject to available resources to secure children's rights and well-being, whether directly via assistance to a child's parents or those other persons who may be responsible for his or her care. However, article 3(2) remains of fundamental importance as an umbrella provision which aims to guarantee children's well-being generally. Furthermore, in light of its comprehensiveness, it constitutes an important reference point for interpreting states' general obligations under the Convention.

2. The Meaning of a Child's Well-Being

The drafting history offers no insights into the meaning of the term 'well-being' and nor does the work of the CRC Committee. Indeed, relative to the best interests principle, this term as it appears in article 3(2) has attracted very little attention among scholars. In contrast, it has been the subject of considerable debate within the social science literature 'where there is a constant lament over the lack of any agreed definition and . . .the indicators used to measure it'.[165] Thus as Sutherland explains, 'internationally, everyone uses the term "well-being" but no one defines it'.[166] She has added that 'far from the lofty status

[163] *Legislative History* (n 45) 340. [164] ibid 343.

[165] Elaine Sutherland, 'Article 3 of the CRC: The Challenges of Vagueness and Priorities' in Sutherland E E and Barnes Macfarlane L-A (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016) 21, 40 (noting that UNICEF has outlined collections of indicators for child well-being but this is not the same as a definition). See: Laura Lippman, Kristin Moore, and Hugh McIntosh *Positive Indicators of Child Well Being: A Conceptual Framework, Measures and Methodological Issues* (Florence, Innocenti Research Centre 2009) and *Innocenti Report Card 11: Child Wellbeing in Rich Countries: A Comparative Overview* (Florence UNICEF Office of Research 2013).

[166] Sutherland (n 165) 40.

of being a right a principle and a rule of procedure, it becomes clear that well-being is simply an outcome'.[167] Moreover, within the political philosophy and economics literature Martha Nussbaum and Amartya Sen have developed, as a measure of well-being, the degree to which individuals possess the capacity to realize those things that are valuable to them.[168] Within the context of article 3(2), there would appear for be a need for further debate as to the meaning of the term 'well-being'. That said, as a minimum it would seem reasonable to conclude that an outcome which is inconsistent with one of the rights under the Convention would be inconsistent with a child's well-being.

3. Scope of the Obligation to Protect a Child's Well-Being

The obligation under article 3(2) is onerous. Although subject to the requirement that states take account of the rights and duties of others, the obligation is very clearly spelt out. The verb used to describe the obligation, 'to ensure', is strong and encompasses both passive and active obligations.[169]

The terms 'protection and care' must also be read expansively since their objective is not stated in limited or negative terms (such as 'to protect the child from harm', for example) but rather in relation to the comprehensive ideal of ensuring the child's well-being. The latter phrase is not a well-established term of art in international human rights law but it should not be confined to physical well-being alone and must also extend to other aspects of well-being.[170] Moreover, the decision to use the child's well-being as the appropriate benchmark, rather than to refer to the rather more nebulous phrase 'as his status requires'[171] signals the drafters' clear intention to provide for as comprehensive an obligation as possible. Accordingly, it is important to note that states are not obliged to ensure a child's well-being *per se* under this provision, which would be beyond the capacity of any government, but is limited to providing 'such protection and care as is necessary' for that purpose.

It should be further noted that this undertaking is not simply a restatement of the specific obligations imposed upon states elsewhere in the Convention. Rather, it is of general application and therefore serves to fill in any remaining lacunae. Thus, if a child's well-being is denied by virtue of an act or omission which is not specifically proscribed by the Convention, a state party would nonetheless be obliged by this umbrella provision to take appropriate measures to counteract this.

4. Obligation to Take into Account the Rights and Duties of Parents

The inclusion of the phrase, 'taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her', reflects the drafters' desire to balance states' obligations with the role of parents and others responsible for a child's care. These parties' involvement in a child's life ought to be

[167] ibid.

[168] A K Sen, *Commodities and Capabilities* (North-Holland 1985); A K Sen, *The Idea of Justice* (The Belknap Press 2009); M. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000); P Anand, G Hunter, and R Smith, 'Capabilities and Well-Being: Evidence based on the Sen-Nussbaum Approach to Welfare' (2005) 74 Social Indicators Research 9.

[169] For further discussion, see the discussion of art 2(1) in chapter 2 of this Commentary.

[170] A later proposal that was tabled but not discussed would have required that, in addition to ensuring that the child receive the protection and care necessary for his well-being, States should also undertake to ensure the child's 'right to physical and moral integrity': see *Legislative History* (n 45) 341.

[171] ibid 338–40.

complementary rather than competitive or exclusive. As provided for by articles 5, 18, and 27 of the Convention, in the first instance, states must defer to the rights and duties of parents and carers with respect to children's well-being of children. But this deference does not absolve states of their own responsibilities to take appropriate measures to ensure a child's well-being. Consider the vast range of factors which are beyond the capacity of parents and carers to address when seeking to provide care and protection for children. These might include ecological variations caused by environmental disasters and climate change, armed conflicts, or financial crises. In such scenarios, article 3(2) requires states to assist parents and those responsible for the care of children to ensure their well-being.

The ordinary meaning of the obligation to 'take into account' the rights and duties of parents and carers is not clear where the state and parents hold conflicting views regarding how best to secure the child's well-being. This might occur in a range of contexts, including for example, the prohibition of corporal punishment or the requirement that children attend school. In such circumstances, states' obligation to take into account parents' role should be informed by the general test under international law for assessing whether interference with a right (in this case, a parental right) is justified. As already discussed, this test involves a two-stage inquiry. First, consideration must be given to whether the parents' views are legitimately within the scope of their rights and duties. Second, if so, states bear the onus of demonstrating that the measure taken to secure the child's care and well-being was *reasonable*. The assessment of reasonableness requires the state to establish on the balance of probabilities that (a) there was a rational connection between the child's well-being and the measure being taken, and (b) that no other measure was reasonably available that would have minimized interference with parental rights or duties.

The phrase 'rights and duties' and the categories 'parents, legal guardians, or other individuals legally responsible' are discussed below in the context of articles 5, 18, and 27 of the Convention.[172]

5. Nature of the Appropriate Legislative and Administrative Measures to Be Taken

The revised Polish draft of article 3 stipulated that States Parties should take 'necessary legislative measures' to ensure the relevant protection and care. The text adopted at the Group's 1981 session and retained in the final version[173] provided instead that signatories 'shall take all appropriate legislative and administrative measures' to that end. The change is significant. The addition of a reference to appropriate administrative measures clarifies that states must go well beyond merely adopting formal legislative provisions and must use all of their administrative powers to achieve the stated goal.

The failure to refer to measures other than legislative and administrative is of no significance since the umbrella provisions of article 4 (which do refer to other measures) are equally applicable in the context of article 3. With respect to the precise measures which states should implement in order to ensure children's care, protection, and well-being, the discussion in chapter 4 provides guidance. It is sufficient to note here that although states have a margin of discretion with respect to which measures they adopt and their implementation is subject to available resources, the measures must be consistent with the remainder of the Convention and must also be effective.

[172] See chapter 3 of this Commentary.

[173] *Legislative History* (n 45) 338.

C. Paragraph 3: The Obligation to Regulate Institutions and Services That Provide Care and Protection for Children

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.

1. Overview

This paragraph seeks to ensure that the staff and facilities involved in the formalized care or protection of children meet appropriate health, safety, and other standards, as determined by national or local authorities. Although its importance is indisputable given the long and sustained history of abuse experienced by children in institutional care, doubt was raised during drafting as to whether it was appropriate to include the provision in this part of the Convention.[174] The rationale for its placement appears to be that while article 3(1) lays down an overriding principle applicable in all contexts concerning children, and article 3(2) recognizes states' comprehensive obligation to ensure children's protection and care, article 3(3) applies the best interests principle in relation to a specific but very important and widely accepted area of governmental responsibility, namely institutional care and service provision. Indeed, article 3(3) is closely linked to article 18(2) which obliges states to take measures to assist parents in the fulfilment of their responsibilities by ensuring 'the development of institutions, facilities and services for the care of children'.

2. Scope of the Obligation

'institutions, services and facilities responsible for the care or protection of children'

The revised Polish draft of article 3(2) referred only to 'persons and institutions'[175] Paradoxically, the term 'persons' was, however, considered to be both too narrow and too broad. It was too broad in the sense that it might be applied to an individual caregiver, contrary to the apparent intentions of the sponsors of the proposal. It was also argued to be too narrow in that it did not necessarily ensure, for example, that 'the board of directors of a hospital or an orphanage' would be included.[176] Accordingly, the formulation was modified to extend to 'officials and personnel of institutions'.[177]

At the final session of the Working Group, there was concern that the version agreed in 1981 was too institutional in focus and that this contradicted the growing tendency in many countries to move away from institutional care for children. It was suggested to include references to 'programmes' or 'organizations', either in addition to or instead of the word 'institutions'.[178] The formulation 'institutions, services and facilities' was then adopted after it was proposed by a drafting group. Its inclusion, however, was not particularly felicitous since it sought on the one hand to avoid covering individual care givers, while on the other, ensuring comprehensive coverage outside the family context.

3. Content of the Obligation: Conformity with Appropriate Standards

The origins of this part of the phrase, 'shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and

[174] ibid 347–48. [175] ibid 338. [176] ibid 340. [177] ibid 340. [178] ibid 347.

suitability of their staff as well as competent supervision', appear to lie in an ILO proposal that States Parties should ensure '[appropriate] training, qualifications and competent supervision of officials and personnel of institutions directly responsible for the care of children'.[179] This was opposed first on the basis that it overlapped with article 18, and second, that 'it was enough to supervise institutions run by volunteer organizations without [also] imposing unnecessary bureaucratic requirements'.[180] When the proposal was presented to the Working Group, the coordinator of the drafting group stated that in the view of the group, the purpose of the proposed ILO amendment was already covered by the inclusion of the words 'suitability of their staff'.[181]

The formulation that resulted from this discussion is not particularly clear. The general reference to 'competent authorities' seems to leave it open to any authorities deemed competent to determine the appropriate standards. In principle then, a professional association of caregivers or similar group might undertake the task. The nature of the standards is not specified and therefore legislation or even regulation might not be considered essential for the purpose. Thus, although states will have a margin of discretion with respect the form of the standards, they must still be effective in providing guidance to the relevant bodies and systems in order to monitor compliance with the standards.

The issues which the standards must address are clear and include: (i) safety matters; (ii) health matters; (iii) the number of staff required, presumably as a ratio to the number of children; (iv) the suitability of staff; and (v) arrangements to provide competent supervision for staff members. Again, states will have a margin of discretion with respect to the development of these standards and this will be subject to available resources and social and cultural considerations. This margin is not limitless, however and states must ensure that the standards created are effective in providing for children's care and well-being. Of relevance in this regard are the *UN Guidelines for the Alternative Care of Children*,[182] which provide guidance with respect to the measures required to ensure that the rights of children in alternative care are protected.

III. Evaluation

The best interests principle is one of many rights granted to children by the Convention. On what basis might its elevation to the status of a human right be justified? This question can, of course, be asked about any human right and a variety of answers have been suggested.[183] In whatever way human rights, such as the rights of children protected in the Convention, are conceptualized, they form part of a discourse of rights. Such discourses have attracted criticism. Perhaps the most pervasive is that they treat individuals as isolated from one another and focus excessively on the self-centred demands of individuals, ignoring the responsibilities that individuals owe to others and the good of society as a whole.[184]

[179] ibid 347. [180] ibid 347. [181] ibid 348.

[182] UNGA Res 64/142 (24 February 2010) UN Doc A/RES/64/142.

[183] Recent contributions include: James Griffin, *On Human Rights* (Oxford University Press 2009); Charles Beitz, *The Idea of Human Rights* (Princeton University Press 2009), John Eekelaar, 'Naturalism or Pragmatism? Towards an Expansive View of Human Rights' (2011) 10 Journal of Human Rights 23; John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 295; Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013).

[184] This is eloquently expressed in Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press 1991).

This perception is aggravated if the right is attached to the best interests principle where this can be interpreted as subordinating all other interests to those of the child. It is, however, important to understand that accepting that people, including children, have rights, in the sense explained above, does not imply ignoring their responsibilities, and that, as discussed in some detail above, the best interests principle does not ignore a child's family or other relationships.

If, as maintained earlier, promoting a child's best interests implies adopting the child's perspective of those interests, maintaining the child's relationships with his or her parents and other members of their community will be a key feature, since relationships are central to most people's well-being.[185] At the same time, no one has a right to be subjected to relationships that damage their well-being. But that does not necessarily mean that rights discourse only supports self-interest in relationships because, even if a relationship fails to promote the well-being of one party, that party may yet have responsibilities to the other which arise out of the rights of the other. For example, caring for a child (or any person) with special needs might be inconsistent with the interests of carers, yet the child (or other person) may have a right to such care. In this way, mutual recognition of the rights of others enhances individuals' responsibilities. It does not diminish them, just as recognition of the rights of employees to safe working conditions has added to the duties of employers.

The Convention is fully consistent with these principles. States Parties are required to respect the 'responsibilities, rights and duties' of parents (art 5), and also the 'right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests' (art 9(3)). A child whose parents reside in different states 'shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents (art 10(2)). States Parties have agreed that children's education 'shall be directed to', among other things, 'the development of respect for human rights' and 'the development of respect for the child's parents' (art 29(1)).

It is within this context that the best interests principle in article 3, coupled with article 12, requires the adult world to continually re-appraise its activities by reflecting on how they might be felt by children, and, because it is a human right, to do so with respect to all the world's children. As Rob George has acutely observed:

> The greatest virtue of the welfare principle is not necessarily that it leads to the best possible outcome (though of course it aims to do so), but that it makes people think about the child. A parent is allowed to discuss the importance of their rights, their wishes, or their interests, but all such discussion has to be focused on the child.[186]

Select Bibliography

Alston P and Gilmour-Walsh B, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF 1996)

Alston P (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994)

[185] See eg Jonathan Herring, 'Forging a Relational Approach: Best Interests or Human Rights?' (2013) 13 Medical Law International 32.

[186] Rob George, *Ideas and Debates in Family Law* (Hart 2012) 127.

Archard D and Skivenes M, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 International Journal of Children's Rights 1

Committee on the Rights of the Child, 'General Comment No 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration' (29 May 2013) UN Doc CRC/C/GC/14

Eekelaar J, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law & the Family 42

Eekelaar, J, 'Two Dimensions of the Best Interests Principle: Decisions about Children and Decisions affecting Children' in E E Sutherland & L-A Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016)

Eekelaar J, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 International Journal of Children's Rights 3

Ferguson L, 'The Jurisprudence of Making Decisions affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in A Diduck, N Peleg, and H Reece (eds), *Law in Society: Reflections on Children, Culture and Philosophy: Essays in Honour of Michael Freeman* (Brill 2015) 141

Fortin J, 'Are Children's Best Interests Really Best? *ZH (Tanzania) (FC) v Secretary of State for the Home Department*' (2011) 74 Modern Law Review 947

Freeman M, 'The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children' (1997) 11 International Journal of Law Policy and the Family 360

Freeman M, *Article 3: The Best Interests of the Child* (Martinus Nijhoff 2007)

Parker S, 'The Best Interests of the Child—Principles and Problems' (1994) 8 International Journal of Law Policy and the Family 26

Salter E, 'Deciding for a Child: A Comprehensive Analysis of the Best Interests Standard' (2012) 33 Theoretical Medicine and Bioethics 179

Sutherland, E E and Barnes Macfarlane, L-A. (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge: Cambridge University Press 2016)

UNHCR, *Guidelines for Determining the Best Interests of the Child* (UNHCR 2008)

Van Krieken R, 'The Best Interests of the Child and Parental Separation: On the 'Civilizing of Parents' (2005) 68 Modern Law Review 25

Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 International Journal of Children's Rights 483

JOHN EEKELAAR JOHN TOBIN

Article 4. A State's General Obligation of Implementation

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and where needed within the framework of international cooperation.

I. Introduction 108
A. An Overarching and Complementary Provision 108
B. Key Interpretative Issues 110
II. The Obligation to Take All Appropriate Measures 112
A. The Meaning of All Appropriate Measures 112
B. Legislative, Administrative, or Other Measures 114
1. A Non-Exhaustive List 114
2. The Committee's Views 114
III. The Obligation with Respect to Economic, Social, and Cultural Rights 129
A. The Special Obligation with Respect to Economic, Social, and Cultural Rights 129
1. The Definition of Economic, Social, and Cultural Rights 129
2. Civil and Political Rights and the Question of Resources 130
B. The Obligation to Take Measures to the 'Maximum Extent of Available Resources' 131
1. Coherence with the ICESCR 131
2. The Meaning of Available Resources 132
3 The Obligation of Progressive Implementation 137
IV. The Obligation of States under the Framework of International Cooperation 144
A. A Commitment to Take Joint and Separate Action 144
B. Does the Obligation of Cooperation Extend to Civil and Political Rights? 145
C. The Obligations Imposed on States under the Framework for International Cooperation 146
1. An Elusive Concept 146
2. The Tripartite Typology of International Obligations 147
V. Evaluation: A Solid Platform 157
Select Bibliography 157

I. Introduction

A. An Overarching and Complementary Provision

Article 4 of the Convention on the Rights of the Child ('CRC', 'the Convention') imposes a general obligation on states with respect to the implementation of *all* the rights under the Convention. In this respect it is similar to article 2 which requires that 'States Parties shall respect and ensure the rights set forth in the Convention without

discrimination of any kind'. The drafting history indicates that the inclusion of article 4 was a deliberate attempt to adapt and fuse the general obligation provisions under both the International Covenant on Civil and Political Rights ('ICCPR') and International Covenant on Economic Social and Cultural Rights ('ICESCR') in a way that did not lead to a diminution in the protection offered under these instruments.[1] This is apparent given the parallels between the text of article 4 and the equivalent provisions of the two Covenants. Article 2(1) of the ICESCR imposes a general obligation on States 'to take steps, individually and through international assistance and co-operation … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means', whereas article 2(2) of the ICCPR requires states to '*take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*'. Although article 4 does not directly track the formulations used in the Covenants, the general thrust is the same. In particular, there is the nexus between resources and the implementation of economic, social, and cultural rights as seen in the ICESCR and the need to take all appropriate measures, and not just to legislate, to implement civil and political rights which is generally consistent with the ICCPR.

Moreover, despite slight differences in the formulation used in article 4 relative to the Covenants, there is nothing in the drafting history to suggest that these differences were ever intended to have any substantive consequences for the nature of the obligations imposed on states. On the contrary, the drafting history indicates a desire on the part of the drafters to maintain a consistency between the obligations under the twin Covenants and the obligations with respect to the two categories of rights under the Convention.[2] As a consequence, for example, no significance ought to be attached to the fact that article 2 of the ICCPR uses the phrase 'to give effect to' whereas article 4 of the Convention uses the phrase 'for the implementation of'.

Article 4, like its normative cousins under the ICESCR and ICCPR, is an overarching provision and is not intended to be read in isolation from the individual rights to which it applies. It complements those more specific provisions. The formulation of each of the discrete Convention rights contains both a recognition of the interest that is the subject of the right and an expression of the obligation imposed on states with respect to the protection of that right. States must '*recognize*', for example, the right to life (art 6); the right to freedom of association (art 15) and the right to health (art 24); and '*respect*' the right of a child to preserve his or her identity (art 8) and freedom of thought conscience and religion (art 14). They must '*assure*' children's right to express their views (art 12) and '*protect*' a child against all forms of exploitation (art 36). Article 4 does not displace these obligations. Instead, like article 2, and indeed the best interests principle under article 3, article 4 plays a complementary role in offering a full account of the means by which the obligations imposed on states with respect to each article under the Convention are to be implemented. As such, the nature of the obligation imposed on states with respect to each right under the Convention cannot be understood without an understanding of the general obligation under article 4.

[1] E/CN.4/1989/WG.1/CRP.1, 17–20 in OHCHR, *Legislative History of the Convention on the Rights of the Child*, vol 2 (OHCHR 2007) ('*Legislative History*'), 353–54.

[2] E/CN.4/1989/48 paras 171–75; *Legislative History* (n 1) 355.

B. Key Interpretative Issues

The close nexus between article 4 of the Convention and the general implementation provisions under the ICESCR and ICCPR means that the significant jurisprudence from the two Covenant treaty bodies[3] and academic commentary with respect to the equivalent provisions under these instruments[4] are important to understanding the meaning of article 4. At the same time, the unique formulation adopted under article 4 and its nexus with the other rights under the Convention demands that the interpretation of this provision must be relevant to the experiences and lives of children and the particular measures that will be required for them to enjoy their rights effectively.[5] In this respect the work of the Committee on the Rights of the Child ('CRC Committee', 'the Committee') is of particular importance. Although its concluding observations tend to offer programmatic guidance rather than legal interpretations of the meaning of article 4,[6] its 'General Comment No 5' on general measures of implementation[7] and its 'General Comment

[3] See especially: ESCR Committee, 'CESCR General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para. 1 of the Covenant)' (14 December 1990) ('ESCR GC 3'); ESCR Committee, 'General Comment No 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) E/C.12/1997/8; Human Rights Committee, 'General Comment No 3: Article 2 (Implementation at the National Level)' (29 July 1981); Human Rights Committee, 'General Comment No 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) CCPR/C/21/Rev.1/Add.1.

[4] On art 2(1) ICESCR see eg: Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (8 January 1987) E/CN.4/1987/17 ('Limburg Principles'); 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 691 ('Maastricht Guidelines'); 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights' (28 September 2011) http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 accessed 19 May 2017 ('Maastricht Principles'); Ben Saul, David Kinley, and Jaqueline Mowbray, 'The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials' (OUP 2014) ch 3; Mansuli Ssenyonjo, Economic Social and Cultural Rights in International Law (2nd edn, Hart 2016) ch 2; Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon 1998) ch 3 'State Obligations'; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156. On art 2(2) ICCPR see eg: Manfred Nowak, *The UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005); Anja Siebert-Fohr, 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 Para. 2' (2001) 5 Max Planck United Nations Year Book 399; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (OUP 1991) ch 1; American Association for the International Commission of Jurists, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' in ECOSOC, 'Status of the International Covenants on Human Rights' (28 September 1984) E/CN.4/1985/4; Human Rights Committee, 'CCPR General Comment No 3: Article 2 (Implementation at the National Level)' (29 July 1981) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6632&Lang=en accessed 21 May 2017.

[5] Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21 International Journal of Children's Rights 248, 248–70 (stressing the need to acknowledge and take account of the differences between art 4 of the Convention and its normative cousins when interpreting the general obligation of states).

[6] See generally: Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007), 47–71; Mervat Rishmawi, *Article 4: The Nature of States Parties' Obligations* (Martinus Nijhoff 2006).

[7] CRC Committee, 'General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42, and 44, para. 6)' (27 November 2003) CRC/GC/2003/5

No 19' on public budgeting for the realization of children's rights[8] are more apposite for this task.

The structure of this chapter is framed around the core interpretation issues that arise under article 4, namely, the nature of the general obligation to undertake all appropriate measures for the implementation of all Convention rights *and* the special obligations concerning the implementation of economic social and cultural rights which are subject to the availability of resources and a requirement that their implementation occur within the framework of international cooperation. With respect to these interpretative challenges the following broad conclusions are offered.

First, states enjoy a margin of discretion in determining what measures will be appropriate for the purpose of securing the enjoyment of the rights under the Convention within their jurisdiction. This discretion however is not unlimited and remains subject to the caveats that the measures taken must actually contribute to the realization of children's rights (the principle of effectiveness) and be implemented in a way that is consistent with all the articles under the Convention. Thus, for example, measures must not be discriminatory and the views of children must be sought in a manner that is consistent with article 12. States also bear the burden of demonstrating that the measures they have adopted are *appropriate* and must be guided by the significant work of the CRC Committee with respect to this issue.

Second, the text of article 4 indicates that only the implementation of economic social and cultural rights is subject to resources. However, in practice the full implementation of civil and political rights will also be dependent on the availability of resources. Although the CRC Committee is yet to address this issue, there is a need to develop a test that assesses the reasonableness of a state's efforts with respect to the implementation of civil and political rights. One possible response to this dilemma involves a consideration of three factors—the consequences for the child associated with an interference with such a right; the likelihood of the risk materializing; and the level of resources required to prevent the interference from occurring. Where, for example, the consequences and risk are high a state will be under a greater burden to allocate the necessary resources to mitigate the risk.

Third, the progressive nature of the obligation to implement economic social and cultural rights under article 4 is not an escape hatch for states. On the contrary it imposes an obligation on states to 'move as expeditiously and effectively as possible towards full realization of economic social and cultural rights'.[9] Moreover, even 'in times of economic crisis, regressive measures may only be taken after assessing all other options and ensuring that children are the last affected especially children in vulnerable situations'.[10] Thus states carry the burden of demonstrating that every effort has been made to use all its available resources to satisfy as a matter of priority the rights under the Convention.[11]

('CRC GC 5'); CRC Committee, 'General Comment No 19 (2016) on Public Budgeting for the Realization of Children's Rights (art. 4)' (20 July 2016) CRC/C/GC/19 ('CRC GC 19'); CRC Committee, 'Day of General Discussion 2007: Resources for the Rights of the Child—Responsibility of States' (5 October 2007) http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx accessed 19 May 2017.

[8] CRC GC 19 (n 7).

[9] ECSR GC 3 (n 3) para 9. See also CRC Committee, 'General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4.

[10] CRC GC 19 (n 7) para 31.

[11] ESCR GC 3 (n 3) para 10; ESCR Committee, 'General Comment No 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) E/C.12/2000/4 ('ESCR GC 14') para 47.

This obligation does not seek to mandate that certain levels of realization of an economic social and cultural right must be secured (obligations of result), or that certain measures must be taken by a state (obligations of conduct), given an existing level of resource availability. Instead it operates to facilitate and frame a dialogue within a state with respect to the direction and speed at which the state should pursue measures to secure the implementation of economic social and cultural rights. A caveat to this general principle however is that states must secure the minimum core of each right.

Finally, the text of article 4 suggests that the framework of international cooperation is only relevant to the implementation of economic, social, and cultural rights. This is problematic given that a developing state needs assistance with not only the realization of children's rights to health and education but also, for example, the administration of a juvenile justice system. There is however evidence from the drafting history to suggest that this consequence was not intended and that the obligation of international cooperation should extend equally to the realization of civil and political rights. A further question arises however as to the scope and nature of this framework of international cooperation. Although contentious, there is growing support for the idea that this framework consists of an extraterritorial obligation on states to respect, protect, and fulfil rights in other jurisdictions.[12]

II. The Obligation to Take All Appropriate Measures

A. The Meaning of All Appropriate Measures

The requirement that states 'shall undertake all appropriate … measures' for the implementation of the rights under the Convention imposes an immediate and mandatory obligation on states to take such measures. As the Committee has explained, 'States parties have no discretion as to whether or not to satisfy their obligation to undertake all appropriate … measures necessary to realize children's rights'.[13] However, questions arise as to the standard used to determine when measures will be 'appropriate' and who will make that determination. Two observations are offered with respect to this issue.

First, states enjoy a level of discretion in deciding which measures will be appropriate within their jurisdiction for the purposes of ensuring implementation of the rights under the Convention.[14] With respect to the equivalent phrase under article 2(1) of ICESCR—'all appropriate means'—the ESCR Committee has explained that 'each state must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights'.[15] However, 'as the means chosen will not always be self-evident' a state will bear the burden of demonstrating 'not only the measures that have been taken but also the basis on which they are considered to be appropriate under the circumstances'.[16]

Second, as explained by the ESCR Committee, 'the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee [and in the case of the Convention, the CRC Committee] to make'.[17] For its part, the CRC Committee has not been explicit with respect to the standards which it uses to assess the appropriateness of a state's measures. However, the ordinary meaning of the word

[12] See especially Maastricht Principles (n 4) 'Introduction'. [13] CRC GC 19 (n 7) para 18.
[14] Maastricht Guidelines (n 4) para 8. [15] ESCR GC 3 (n 3) para 4. [16] ibid.
[17] ibid.

'appropriate' demands that there must be a nexus between the measures undertaken and the end sought, namely, the effective implementation of the right in question. This aligns with the comments of the CRC Committee that, '[m]easures are considered appropriate when they are relevant to directly or indirectly advancing children's rights in a given context'.[18] Moreover, the principle of system coherence[19] demands that the measures adopted to implement one right under the Convention must be consistent with the other rights under the Convention and indeed the broader body of international human rights law.

The *requirement of effectiveness* imposes a burden on states to develop measures based on the available evidence rather than speculation, prejudice, or assumption about which measures are likely to be effective. Where there is an absence of sufficient evidence to guide the development of appropriate measures, states must develop, support, and enable systems and processes to monitor, review, and evaluate the impact of any measures they adopt to assess their effectiveness. Moreover, the CRC Committee has added that 'States parties shall show evidence of the outcomes obtained for children'[20] as a result of the measures adopted to implement their rights. It is not enough to simply assert that measures have been taken.

With respect to the requirement that states *act consistently with other provisions under the Convention*, the Committee has highlighted four articles which it believes operate as guiding principles when it comes to implementation of a state's general obligations under article 4. They are the prohibition against discrimination (art 2); the requirement to make the best interests of a child the primary consideration in all matters concerning children (art 3); the child's right to life, survival, and development (art 6); and the child's right to express his or her views in all matters 'affecting the child' (art 12).[21] This last requirement is especially pertinent to the question of when measures will be considered appropriate. Any measures adopted by a state to implement a child's rights will by definition *affect* a child. As such, article 12 demands that the views of children must be an additional criterion by which to assess whether the measures adopted by a state are appropriate. Children's views may not be determinative with respect to this issue as they need only be given due weight in accordance with the age and level of a child's maturity. However, as discussed in detail in the commentary on article 12, this provision requires a reorientation of the process by which appropriateness is assessed to include children's views as part of the matrix to be used when making such determinations.

In this respect the Committee has noted that since few states have reduced the voting age to 18, 'there is all the more reason to ensure respect for the views of disenfranchised children in Government and parliament'.[22] According to the Committee '[i]f consultation is to be meaningful, documents as well as processes need to be made accessible'.[23] Moreover, it has stressed that:

> appearing to listen is relatively easy: giving due weight requires real change. Listening to children should not be seen as a an end in itself but rather as a means by which states make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights.[24]

[18] CRC GC 19 (n 7) para 22.

[19] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 33–39.

[20] CRC GC 19 (n 7) para 24. [21] CRC GC 5 (n 7) para 12. [22] ibid. [23] ibid.

[24] ibid.

In the context of article 4, this dialogue with children, which draws on their expertise and insights, has the capacity to not only inform the understanding of when measures will be appropriate but also to assist in ensuring that such measures are in practice, appropriate.[25]

B. Legislative, Administrative, or Other Measures

1. A Non-Exhaustive List

Article 4 requires states to take legislative, administrative, *and other measures*. Earlier drafts reflect a shifting terrain with respect to the types of measures anticipated by states. The revised Polish draft of 1979 stressed the need to appropriate measures '*particularly in the areas of economy, health and education*'.[26] Another proposal from the USA preferred to focus on '*the adoption of legislative or administrative measures*'[27]—a formulation which was adopted at the first reading in 1988.[28] However, during the technical review, UNICEF expressed concern that this formulation differed from the open-ended formulations used in other international human rights treaties such as the ICCPR (art 2(2) '*legislative or other measures*'); ICESCR (art 2(1) '*all appropriate means including particularly the adoption of legislative measures*'); and CEDAW (art 3 '*all appropriate measures including legislation*').[29] The suggestion was therefore made to amend the phrase so as to ensure consistency with these other instruments and allow for a non-exhaustive list of potential measures which states ought to adopt to implement the rights under the Convention.[30] The final text of article 4 indicates that this suggestion was embraced.

2. The Committee's Views

Although states have a discretion with respect to which measures they adopt for the purposes of implementing children's rights, the Committee's 'General Comment No 5' outlines a number of measures, which are routinely affirmed in its concluding observations, and which it expects states to adopt. These expectations are not binding on states but they are required to justify to the Committee their failure to adopt such measures.

(a) Legislative Measures

(i) The Need for a Comprehensive Approach

With respect to the requirement to adopt appropriate legislative measures, the Committee has emphasized three key points. First, states must undertake 'a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention'.[31] This process of review must not only be retrospective but must be integrated into the process of law making to ensure that all new legislation is also consistent with the Convention. Moreover, an effective review process requires a form of independent scrutiny which can be provided by, for example, parliamentary committees, national human rights institutions, NGOs, academics, affected children, and young people.[32]

[25] See chapter 12 of this Commentary for a detailed discussion of the implications of art 12 with respect to measures to implement children's rights.

[26] E/CN.4/1349 art 4(2); *Legislative History* (n 1) 350.

[27] HR/(XXXVII)/WG.1/WP.14; *Legislative History* (n 1) 350.

[28] E/CN.4/1988/WG.1/WP.1/Rev.1; *Legislative History* (n 1) 352.

[29] E/CN.4/1989/WG.1/CRP.1; *Legislative History* (n 1) 353.

[30] E/CN.4/1989/WG.1/CRP.1; *Legislative History* (n 1) 353.

[31] CRC GC 5 (n 7) para 18.

[32] ibid para 18

Second, a state must ensure clarity with respect to the status of the Convention within domestic law and whether it is a 'self-executing treaty' that is automatically incorporated into domestic law or whether separate legislation is required to ensure its implementation into domestic law.[33]

Third, the Committee does not demand that legislative protection of children's rights under the Convention must take any particular form under domestic law. It has welcomed the adoption of specific pieces of legislation on children and the constitutional recognition of children's rights.[34] Ultimately, however, it is concerned with the effect of these initiatives and whether the cumulative impact of the legislative measures adopted by a state across all sectors—'education, health, justice and so on'—contribute to the effective implementation of the Convention in practice.[35]

(ii) The Requirement for an Effective Remedy

The Need for a Child-Sensitive Approach

Unlike other human rights treaties there is no explicit obligation under the Convention that requires states to provide an effective legal remedy for a violation of a child's rights.[36] The Committee, however, has explained that such a requirement is implicit in the Convention, because '[f]or rights to have meaning, effective remedies must be available to redress violations'.[37] This approach is justified on the basis that the obligation to provide children with an effective remedy represents an example of a measure under article 4 that is necessary and appropriate to contribute to the effective implementation of children's rights. Moreover, given the difficulties that children often face when pursuing remedies, the Committee has also stressed that states must develop 'effective, child sensitive procedures' for children and their representatives which include 'support for self-advocacy; and access to independent complaints procedures and to the courts with necessary legal and other assistance'.[38]

The Justiciability of All Rights Including Economic, Social, and Cultural Rights

Two points must be noted with respect to the right to an effective remedy which the CRC Committee has effectively implied into article 4. First, the Committee has emphasized that 'economic, social and cultural rights, as well as civil and political rights, must be regarded as justiciable'.[39] This position is consistent with the view of the ESCR Committee.[40] There is, however, a large body of commentary that challenges and problematizes the justiciability of economic, social and rights.[41] Rather than review this literature in detail, it is sufficient to observe that much of this criticism arises from the historical fact that relatively few legal systems make provision for the effective enforcement

[33] ibid para 21.

[34] ibid para 20. See also: CO Luxembourg, CRC/C/LUX/CO/3-4 para 12; CO Tuvalu, CRC/C/TUV/CO/1 para 8; CO Uzbekistan, CRC/C/UZB/CO/3-4 para 18.

[35] CRC GC 5 (n 7) paras 21–22.

[36] See eg: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), arts 2(3)(a), 2(3)(b); Convention on the Elimination of All Forms of Racial discrimination (opened for signature 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 6.

[37] CRC GC 5 (n 7) para 24. [38] ibid para 24. [39] ibid para 25.

[40] ESCR Committee, 'General Comment No 9: The Domestic Application of the Covenant' (3 December 1998) E/C.12/1998/24 paras 4–11.

[41] See: Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2012) chs 12, 14; Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012) ch 5; John Tobin, *The Right to Health in International Law* (OUP 2012) 204–07.

of economic and social rights such as the rights to health and housing.[42] This has led to a widely held perception that such rights are non-justiciable. However, as has been noted, '[t]he claim that ESCR are justiciable does not imply that every issue arising in relation to the implementation of these rights is best determined by a court nor even that individuals should be able to bring a legal claim in respect of every single dimension of a particular right'.[43] Moreover, as the ESCR Committee has also explained, there is no economic, cultural, or social right 'which could not … be considered to possess at least some significant justiciable dimensions'.[44]

These arguments received significant vindication by states as a result of the UN General Assembly's adoption of an Optional Protocol to the ICESCR which allows individuals to allege violations of the Covenant in communications to the ESCR Committee. One hundred and twenty-two states voted in favour of this Protocol, with only the United States opposing the resolution. Importantly, the ESCR Committee, in a special Statement, which is discussed in detail below, has indicated what factors it will consider when assessing the extent to which a state has complied with its obligations thereby offering a model to inform the justiciability of these rights.[45]

At the domestic level, there is also an increasing number of legal systems where courts now make decisions about economic social and cultural rights.[46] One of the most well known is South Africa where the Bill of Rights includes a set of such rights which are enforceable by the courts.[47] The approach adopted under the South African Constitution with respect to these rights has led Justice Yacoob of the Constitutional Court to declare that the justiciability of such rights is beyond question.[48] The real issue is how to decide whether the State has failed to comply with its obligations under the Constitution. To date, the Constitutional Court has adopted a model of 'reasonableness review' where it asks 'whether the means chosen [by the relevant State authority] are reasonably capable of facilitating the realization of the socioeconomic rights in question'.[49] This model has been applied in a range of contexts including the rights to housing, water, education, and access to health care.[50] Although this approach has also been the subject of significant

[42] Human Rights Council (Philip Alston), 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (28 April 2016) A/HRC/32/31 (2016).

[43] Philip Alston, 'Putting Economic Social and Cultural Rights back on the Agenda of the United States' (2009) Center for Human Rights and Global Justice Working Paper 22, 11.

[44] ESCR Committee, 'General Comment No 9: The Domestic Application of the Covenant' (3 December 1998) E/1999/22, Annex IV para 10.

[45] ESCR Committee, 'An Evaluation of the Obligation to Take Steps to the "Maximum Extent of Available Resources" under an Optional Protocol to the Covenant' (10 May 2007) E/C.12/2007/1.

[46] See generally: Young (n 41); Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Human Rights Program, Harvard Law School 2011); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008); Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008); International Commission of Jurists, *Courts and the Legal Enforcement of Economic Social and Cultural Rights: Comparative Experiences of Justiciability* (2009) Human Rights and Rule of Law Series No 2.

[47] Constitution of the Republic of South Africa (1996) (SA), arts 24–32.

[48] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 20.

[49] Sandra Liebenberg, 'Adjudicating Social Rights under a Transformative Constitution' in Langford (ed) (n 46) 83.

[50] See eg: *Government of the Republic of South Africa v Grootboom* (n 48) (housing); *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 (CC) (water); *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (SCA) (education); *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (health); *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (health).

critical commentary,[51] the point to stress here is that there is no basis for the claim that economic, social, and cultural rights are inherently non-justiciable. The experiences of many states and the evolving work of the CRC and ESCR Committees demonstrates that it is *possible* to develop an appropriate methodology by which to assess when there has been a violation of a child's right to health, housing, education, or water.

The Limits of Litigation

Although litigation remains an important strategy to secure the effective enjoyment of children's rights, its limitations must also be recognized.[52] It tends to be reactive rather than preventive, adversarial rather than conciliatory, excessively legalistic, invariably resource intensive, and often has a focus on addressing individual grievances rather than systemic change. It can also be counterproductive. For example, it has been suggested that right to health litigation in Brazil has led to a worsening of the country's health inequities.[53] This is largely because the right to health under the Brazilian Constitution has been interpreted as 'an individual entitlement to the satisfaction of one's own health needs ... *irrespective of costs*'.[54] Such an approach is not only unsustainable but also skews the benefits of the right to health to those with access to the legal system.[55]

It remains important to stress, however, that the Convention does not favour the Brazilian model of accountability for the right to health. It does not conceive of the right to health as a trump card. Instead, its implementation must be secured within the context of limited resources and the competing rights of individuals. However, even under this model, litigation still remains a mechanism with limited potential for ensuring the protection of a child's rights. This is because a range of factors invariably limits access to the courts and appropriate legal services. In the case of Brazil, for example, access to the courts was found to be 'significantly easier for those with resources and social attributes that are more predominant in higher socio-economic groups'.[56] This does not mean that judicial remedies are inappropriate as a measure that contributes to the enjoyment of a child's rights, but it does mean that they have limitations and must be accompanied by other measures.

(b) Administrative and Other Measures

The requirement that states adopt appropriate 'administrative and other measures' has in practice become an umbrella term to capture any measure, however characterized, that contributes to the implementation of children's rights. The Committee has acknowledged that it 'cannot prescribe in detail the measures which each or every State party will find

[51] See eg: Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) ('*Adjudication under a Transformative Constitution*'); Eric C Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-economic Rights and the South African Constitutional Courts' (2007) 38 Columbia Human Rights Law Review 321 (examines arguments against the justiciability of socio-economic rights and argues that the Court's jurisprudence is a viable, affirmative jurisprudence). Cf: Sandra Liebenberg, 'Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow' (2014) 37 Dublin University Law Journal 137 (evaluating the South African experience of justiciable constitutional socio-economic rights, and proposing strategies for assisting other jurisdictions contemplating constitutional reform to strengthen protection of socio-economic rights to avoid South African problems).

[52] Jane Williams, 'General Legislative Measures of Implementation: Individual Claims, "Public Officer's Law" and a Case Study on the UNCRC in Wales' (2012) 20 International Journal of Children's Rights 224, 225.

[53] Octavio Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities' (2009) 11 Health and Human Rights 33.

[54] ibid 34. [55] ibid 34. [56] ibid 39.

appropriate to ensure effective implementation of the Convention'.[57] It has, however, outlined a number of measures which it considers to be 'key advice for States'.[58] Although states are not compelled to accept this advice, they are required to explain and justify their failure to do so.

(i) The Development of a Comprehensive National Strategy

The Committee has repeatedly welcomed and recommended that states adopt a national strategy or plan of action for the implementation of children's rights which is 'rooted' in the Convention.[59] The content and detail of this strategy must be adapted to the particular circumstances of each state. As a minimum, however, the Committee has stressed that it must: (a) address all the rights in the Convention; (b) address the situation of all children *with priority to be given to marginalized and disadvantaged children*; (c) be developed through a process of consultation which includes children and young people; (d) be affirmed and endorsed by the highest level of government; (e) go beyond a list of good intentions to include setting real and achievable standards in relation to all rights; (f) extend to sectoral plans of actions in all relevant areas such as health and education; (g) be adequately resourced; (h) be widely disseminated, and (i) be subject to ongoing monitoring and review.[60]

(ii) Coordination of Implementation of Children's Rights

Based on its experience, the Committee considers that a failure to ensure coordination by a state among its various levels of government, its various departments, and across its regions will undermine the implementation of the Convention.[61] There is often a tendency to confine the relevance of children's right to areas such as health and education. However, the Committee has stressed that other departments such as those concerned with finance, planning, employment, and defence also take decisions that have an impact on children's rights.[62] The Committee has conceded that it is beyond its mandate to 'prescribe detailed arrangements appropriate for very different systems of government'.[63] It has, however, endorsed the idea of a special unit or body with responsibility for reporting to the President, Prime Minister, or Cabinet about the measures being taken within a state to ensure coordination across and within government.

This call for coordination and a commitment to children's rights across all levels and areas of government is often described as the process of mainstreaming children's rights.[64] It is a strategy for making children's rights an integral dimension of the design, implementation, monitoring, and evaluation of policies and programs in political, economic, and social spheres.[65] It demands that the impact of issues and decisions upon children

[57] CRC GC 5 (n 7) para 26. [58] ibid para 26.

[59] ibid para 28. See eg: CO Azerbaijan, CRC/C/AZE/CO/3-4 paras 13–14; CO Republic of Korea, CRC/C/KOR/CO/3-4 paras 14–15; CO Sao Tome and Principe, CRC/C/STP/CO/2-4 paras 6–7; CO Tuvalu, CRC/C/TUV/CO/1 paras 10–11; CO Turkey, CRC/C/TUR/CO/2-3 paras 14–15.

[60] CRC GC 5 (n 7) paras 28–33. [61] ibid para 37. [62] ibid para 37.

[63] ibid para 38.

[64] See: John Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14 International Journal of Children's Rights 275; John Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate 2011) 61.

[65] UN Secretary General, 'Renewing the United Nations: A Programme for Reform' (14 July 1997) A/51/950 paras 78–79.

must be seen and examined through the lens of rights with its focus on the entitlements of children and the duties of States, as opposed to alternative paradigms such as a needs-based approach[66] or, as is commonly the case with children, a welfare-based approach.[67]

(iii) The Relationship with the Private Sector

The Need for Both Regulation and Positive Engagement

The obligation to secure the implementation of the rights under the Convention is imposed on states rather than actors within the private sector. However, in practice, these private actors, whether they are multinational corporations, independent educational providers, or other private sector service providers, have significant capacity to both *adversely affect* and *positively contribute* to the implementation of children's rights. This potential requires that states take appropriate measures under article 4 to not only *regulate* the private sector to protect children against the threats to their rights which may arise from the activities of this sector but also *engage with and enlist the support* of the private sector to contribute to the implementation of children's rights.

The Committee's 'General Comment No 16' on state obligations regarding the impact of the business sector on children's rights, outlines in detail the key obligations of states with respect to its regulation and engagement with this sector.[68] In summary the Committee requires that states must take appropriate measures to:

- Ensure that the activities and operations of business enterprises do not adversely impact on children's rights;
- Create an enabling and supportive environment for business enterprises to respect children's rights; and
- Ensure access to an effective remedy for children whose rights have been infringed by a business enterprise.[69]

However, the Committee's understanding of the relationship between children's rights and the private sector is not confined to an adversarial paradigm in which the private sector is viewed only as a threat to children's rights. On the contrary, the Committee has recognized that 'the task of implementation needs to engage all sectors of society including business'[70] and that '[b]usiness enterprises and non-profit organisations can play a role in the provision and management of services such as clean water, sanitation, education, transport, health, alternative care, energy, security and detention facilities that are critical to the enjoyment of children's rights'.[71] However, as with all measures taken under article 4, the Committee has also explained that it 'does not prescribe the form of delivery of such services'[72] provided they are effective and remain consistent with the other rights under the Convention.[73]

[66] Mary Robinson, Address (World Summit on Sustainable Development, Johannesburg, 30 August 2002) (copy on file with author), Mac Darrow and Amparo Tomas, 'Power, Capture and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 Human Rights Quarterly 471; Urban Jonsson, *Human Rights Approach to Development Programming* (UNICEF 2003).

[67] Marta Santos Pais, 'A Human Rights Conceptual Framework for UNICEF' (1999) Innocenti Essays No 9; John Eekelaar, *Family Law and Personal Life* (OUP 2006).

[68] CRC Committee, 'General Comment No 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (17 April 2013) CRC/C/GC/16 ('CRC GC 16').

[69] ibid para 5. [70] ibid para 82. [71] ibid para 33. [72] ibid para 33.

[73] ibid para 34.

The Privatization of Services

With the context of article 4, a question arises as to the status and legitimacy of the privatization of services which affect children's enjoyment of their rights. At a Discussion Day of the CRC Committee on the private sector as service provider and its role in implementing children's rights in 2002, it was noted by the Chairperson of the CRC Committee, Jaap Doek, that there was increasing concern 'at the growing trend of privatisation including the provisions of basic services including health'.[74] Similarly, the ESCR Committee in its concluding observations has expressed concern 'that the gradual privatisation of health care risks making it less accessible and affordable'[75] and 'that the quality and the availability of the health services provided … have been adversely affected by the large scale privatisation of the health service'.[76] Such concerns are well founded given research which suggests that privatization of health care 'can have a negative effect on health outcomes and on the accessibility of health care services for poor and disadvantaged people, especially children.[77] However, as the ESCR Committee has explained, the ICESCR is neutral with respect to the economic system adopted by a state to secure its obligations under the Covenant.[78] The same principle applies to the Convention. As such, privatization of services is neither prohibited nor preferred as a measure to realize children's rights and states are entitled to adopt whatever public/private funding mix they determine to be appropriate subject to the caveat that the measures adopted are effective and consistent with children's rights.

With respect to the principles that guide states when contemplating privatization the first point to note is that the CRC Committee has stressed that 'states are not exempt from their obligations under the Convention when they outsource or privatize services that impact on their fulfilment of children's rights'.[79] The CRC Committee has further explained that, 'in any decentralization or privatization process, the Government retains clear responsibility and capacity for ensuring respect of its obligations under the Convention'.[80] In practical terms this means, for example, that with respect to the right to health, a state must 'ensure that privatisation of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services'.[81]

Moreover, where a state considers that privatization could play a role in securing a right like the right to health, the CRC Committee has recommended that this decision must be preceded by a 'comprehensive and transparent assessment of the political, financial and economic implications and the possible limitation[s]'[82] of this process on the right to health—sometimes referred to as a 'child rights impact statement'.[83] Such a directive

[74] See 'Day of General Discussion on the Private Sector as a Service Provider and its Role in Implementing Children's Rights' (20 September 2002) in CRC Committee, 'Report on the Thirty-First Session' (11 December 2002) CRC/C/121 ('DOD in Report on the Thirty-First Session'), ch VI, 145–57.

[75] ESCR Committee, CO Poland, E/C.12/POL/CO/5 para 28.

[76] CO ESCR Committee, CO India, E/C.12/IND/CO/5 para 38.

[77] Brigit Toebes, 'The Right to Health and the Privatization of National Health Systems: A Case Study of the Netherlands' (2006) 9 Health & Hum Rts 103, 106 (citing relevant studies).

[78] See ESCR GC 3 (n 3) para 8 (notes that ICESCR is neutral with respect to the economic system adopted by a state to secure its obligations).

[79] CRC GC 16 (n 68) para 34.

[80] CRC Committee, 'DOD Report on the Thirty-First Session' (n 74) para 15.

[81] ESCR GC 14 (n 11) para 35. See also CRC Committee, 'DOD in Report on the Thirty-First Session' (n 74) para 8.

[82] CRC Committee, 'DOD Report on the Thirty-First Session' (n 74) para 11.

[83] CRC GC 16 (n 68) paras 78–81.

represents a practical measure by which to ensure that a state takes appropriate measures to ensure privatization will not compromise the effective enjoyment of children's rights. The CRC Committee has not specified the form in which such an assessment must take place and a level of discretion will be accorded to states with respect to this issue. However, this discretion afforded to states remains subject to the caveat that the measures taken to assess the impact of privatization are 'comprehensive' and 'transparent'.

Finally, beyond the decision to privatize, the actual delivery of services under a system of privatization must be consistent with international human rights standards 'at all stages including policy formulation, monitoring and accountability arrangements'[84] to ensure that it contributes to the effective enjoyment of children's rights. According to the CRC Committee, in practice this requires that states create some institutional or regulatory framework to 'ensure independent monitoring of implementation as well as transparency of the entire process so as to contribute to the process of accountability'.[85] Thus, while privatization is not incompatible with the requirement that states must take appropriate measures to secure children's rights, this practice must be subject to significant conditions in order to ensure that it contributes to the realization of these rights.

(iv) Engagement with Civil Society

Although states bear legal responsibility for the implementation of children's rights, the Committee has recognized that effective implementation requires engagement with all sectors of society.[86] At a functional level this means that states must take measures that allow them to engage with, access, and enhance the capabilities of all sectors of society to contribute to the realization of children's rights. According to the Committee, in addition to engaging with the private sector as discussed above and working with children in accordance with article 12,[87] states must also 'work closely with NGOs in the widest sense'.[88] Although the Committee has not been prescriptive with respect to how this relationship should work, it has encouraged states to provide NGOs with 'non-directive support' and welcomed in particular measures that facilitate and enable 'popular participation and public scrutiny of government policies'.[89]

(v) Measures to Monitor Implementation

The Committee has emphasized the need for states to adopt measures to monitor the implementation of children's rights.[90] Critical to this process is the need for measures including, but not limited to: child impact assessments; data collection; the development of indicators and benchmarks; and the creation of independent monitoring systems.

Child Impact Assessments

A child impact assessment involves an analysis being undertaken as to the impact of any proposed law, policy, or budgetary allocation which affects children and the enjoyment of their rights.[91] The Committee has commended those states which have adopted this

[84] CRC Committee, 'DOD Report on the Thirty-First Session' (n 74) para 8 (Jaap Doek).

[85] ibid para 14. [86] CRC GC 16 (n 68) para 56. [87] ibid para 57. [88] ibid para 58.

[89] ibid para 59.

[90] CRC GC 5 (n 7) paras 45–47. See generally: Tara Collins, 'The Significance of Different Approaches to Human Rights Monitoring: A Case Study of Child Rights' (2008) 12 International Journal of Children's Rights 159; Edzia Carvalho, 'Measuring Children's Rights: An Alternative Approach' (2008) 16 International Journal of Children's Rights 545.

[91] Carmel Corrigan, 'Child Impact Statements: Protecting Children's Interests in Policy and Provision?' (2007) 2 Journal of Children's Services 30 (discussing the history and concept of child impact statements and offering a critical analysis of their effectiveness); Ellen Desmet and Hanne Op De Beek, 'Strategic Decisions

requirement and encouraged other states to do so as a means of promoting 'the visible integration of children [and their rights] into policy making'.[92]

The Committee has also drawn special attention to the need for states to extend this requirement to budgets. In its 'General Comment No 5' it explained that '[n]o state can tell whether it is fulfilling children's economic, social and cultural rights "to the maximum extent . . . of available resources" . . . unless it can identify the proportion of national and other budgets allocated to the sector and within that to children both directly and indirectly'.[93] This practice remains contentious and the Committee has recognized that states have not embraced this recommendation because of the challenges associated with its implementation.[94] In response, in 2016 the Committee issued 'General Comment No 19' on public budgeting for the realization of children's rights'[95] in which it outlined the core principles that must inform public budgeting for children's rights—effectiveness, efficiency, equity, transparency, and sustainability[96]—and how these principles ought be applied to the various stages of budgeting—planning, enactment, execution, and follow up.[97] There is also a growing body of literature which offers both guidance and a critique of the practice of human rights budgetary analysis which remains an innovative but under-theorized and under-developed practice.[98]

Importantly there remains a need to be cognizant of the fact that a genuine rights-based budgetary analysis must include an assessment of resource allocations that have an impact not just on children's rights but on the rights of other groups as well—women, persons with disabilities, racial groups, and so forth. The challenges associated with this practice must not be underestimated. The Committee has stressed the need to 'prioritize' children's rights in budgets[99] and to ensure that '[t]he best interests of the child should be a primary consideration throughout every phase of the budgetary process'.[100] However, children's rights cannot be considered the paramount, overriding, or determinative budgetary consideration. That said, where a state seeks to allocate resources for measures other than children's rights, it still carries the burden of justifying

in Setting up Child Rights Impact Assessments' (2014) 44 Revue Generale de Droit 125 (discussing strategic choices in implementing child impact assessments). For information on human rights impact statements generally, see eg Gauthier de Beco, 'Human Rights Impact Assessments' (2008) 27 Netherlands Quarterly of Human Rights' (2009) 139.

[92] CRC GC 5 (n 7) para 47. See also: CO Kuwait, CRC/C/KWT/CO/2 para 16; CO Monaco, CRC/C/MCO/CO/2-3 para 13(a); CO Sao Tome and Principe, CRC/C/STP/CO/2-4 para 14(d); CO Uzbekistan, CRC/C/UZB/CO/3-4 para7(b).

[93] CRC GC 5 (n 7) para 51. [94] ibid. [95] CRC GC 19 (n 7). [96] ibid paras 57–63.

[97] ibid paras 67–11.

[98] See eg: Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21 International Journal of Children's Rights 248, 271–76 (highlighting the need for the CRC Committee to address issues related to those rights which are immediately enforceable; the elements of a right that constitute its minimum core and the burden of proof required for retrogressive measures); Colin Harvey and Eoin Rooney, 'Integrating Human Rights? Socio-Economic Rights and Budget Analysis' (2010) 3 European Human Rights Law Review 66; Queen's University Belfast Budget Analysis Project, 'Budgeting for Economic and Social Rights: A Human Rights Framework' (QUB Law School 2010) https://www.researchgate.net/profile/Rory_Oconnell2/publication/228189073_Budgeting_for_Economic_and_Social_Rights_A_Human_Rights_Framework/links/557a96f608aeb6d8c0206b5b.pdf accessed 26 May 2017; Ben Warwick, 'Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights' (2013) 8 Irish Year Book of International Law 183.

[99] CRC GC 19 (n 7) para 12. [100] ibid para 45.

this alternative allocation in light of the totality of its human rights obligations under international law. Also relevant is the fact highlighted by the CRC Committee that investment in children's rights has 'long lasting positive impacts on future economic growth, sustainable and inclusive development and social cohesion'.[101] Thus the allocation of resources to realize children's rights should not be seen as necessarily incompatible with broader economic and development agendas and the CRC Committee has recommended that 'the macroeconomic framework of growth targets should be harmonized with a human development framework based on the Convention on the Rights of the Child'.[102]

Data Collection

The Committee has recommended that '[c]ollection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/disparities in the realisation of rights, is an essential part of implementation'.[103] Moreover, this data collection must 'extend over the whole period of childhood' and be 'coordinated throughout the jurisdiction ensuring nationally appropriate indicators'.[104] In terms of the basis on which the data must be disaggregated, it should include attributes such as sex, age, origin, and socio-economic status and include an analysis of the experience of specific groups within a state such as religious groups, ethnic and/or indigenous minorities, migrants, or refugees and persons with disabilities.[105] The CRC Committee has also stressed the need to pay significant attention to particular age groups of children with respect to specific rights. For example, with respect to the right to health of adolescents it has repeatedly urged states to undertake a comprehensive and multidisciplinary study with respect to this cohort and collect data on suicide rates among adolescents,[106] the incidence of sexually transmitted diseases,[107] early marriages,[108] pregnancy rates,[109] abortion rates,[110] violence,[111] substance

[101] ibid para 12.

[102] CRC Committee, 'DOD in Report on Thirty-First Session' (n 74) para 31.

[103] ibid para 48. [104] ibid para 48.

[105] For this emphasis, see eg: CRC Committee, 'General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4 para 13; CRC Committee, 'General Comment No 20 (2015) on the Implementation of the Rights of the Child During Adolescence' (6 December 2016) CRC/C/GC/20 para 37(c).

[106] See eg: CO Japan, CRC/C/JPN/CO/3 para 8; CO Albania, CRC/C/15/Add.249 para 56; CO Japan, CRC/C/15/Add.231 paras 47(b), 48; CO Eritrea, CRC/C/15/Add.204 para 41; CO Lesotho, CRC/C/15/Add.147 para 45; CO Suriname, CRC/C/15/Add.130 para 45; CO South Africa, CRC/C/15/Add.122 para 31.

[107] See eg: CO Seychelles, CRC/C/SYC/CO/2-4 para 22; CO Tanzania, CRC/C/25/Add.156 para 48; CO United Kingdom and Northern Ireland—Overseas Territories, CRC/C/15/Add.135 para 37; CO Suriname, CRC/C/15/Add.130 para 45.

[108] See eg: CO Tanzania, CRC/C/15/Add.156 para 48; CO South Africa, CRC/C/15/Add.122 para 31.

[109] See eg: CO Tanzania, CRC/C/15/Add.156 para 48; CO United Kingdom and Northern Ireland—Overseas Territories, CRC/C/15/Add.135 para 37; CO Suriname, CRC/C/15/Add.130 para 45; CO Georgia, CRC/C/15/Add.124 para 46; CO South Africa, CRC/C/15/Add.122 para 31.

[110] See eg: CO Tanzania, CRC/C/15/Add.156 para 48; CO United Kingdom and Northern Ireland—Overseas Territories, CRC/C/15/Add.135 para 37; CO Suriname, CRC/C/15/Add.130 para 45; CO Georgia, UN CRC/C/15/Add.124 para 46; CO South Africa, CRC/C/15/Add.122 para 31.

[111] See eg: CO Namibia, CRC/C/NAM/Co/2-3 para 19; CO China, CRC/C/CHN/CO/3-4 para 18; CO Sao Tome and Principe, CRC/C/STP/CO/2-4 para 15;CO Vanuatu, CRC/C/15/Add.111 para 20.

abuse,[112] alcohol consumption,[113] and tobacco use[114] among adolescents and the incidence of HIV/AIDS.[115]

The CRC Committee's insistence upon the collection of such information can be defended to the extent that it is directed towards identifying those groups of children for whom *appropriate measures* must be adopted to secure their rights. However, this approach requires two caveats. First, the comments of the CRC Committee generally fail to acknowledge the significant resources, both financial and human, required by states to acquire such data.[116] The other treaty bodies have also failed to address this reality. The issue of resource allocation and the progressive nature of the obligation to secure economic, social, and cultural rights is discussed below. However, it is important to stress here that the obligation of states with respect to data collection is also resource dependent and thus progressive. In light of this constraint, the recommendations of the Committee should include a directive to states to prioritize the types of information they should collect in light of the issues that are of particular concern in their jurisdiction. With respect to the identification of such issues states would enjoy significant discretion subject to the caveat that their decisions are based on consultations with all relevant actors including medical professionals, NGOs, and community leaders and remain subject to oversight by the committee bodies.

The second concern with the Committee's calls for the collection of data is its reluctance to call on states to collect data to explain *why* children experience gaps in the enjoyment of their rights and the actual cost of measures to address these gaps. There is little practical benefit, for example, in gathering statistics on the number of children who are denied access to health care if a state does not also collect information on the factors that are causing this denial *and* the cost of the measures to ensure effective access. In this respect, commentators are now calling on states to embrace econometric analysis to identify those factors that limit access to health care goods and services *and* undertake costing measures to establish the level of resources required by a state to address any inhibiting factors.[117] The use of such quantitative methods and economic analysis tends to fuel anxieties among human rights advocates because of the fear of reducing rights to

[112] See eg: CO Guinea-Bissau, CRC/C/GC/GNB/CO/2-4 para 18; CO Madagascar, CRC/C/MDG/CO/3-4 para 19; CO Belize, CRC/C/15/Add.252 para 55; CO Palau, CRC/C/15/Add.149 para 48; CO United Kingdom and Northern Ireland—Overseas Territories, CRC/C/15/Add.135 para 37; CO Georgia, CRC/C/15/Add.124 para 46; CO South Africa, CRC/C/15/Add.122 para 31.

[113] See eg: CO Madagascar, CRC/C/MDG/CO/3-4, para 19; CO Lesotho, CRC/C/15/Add.147 para 45; CO South Africa, CRC/C/15/Add.122 para 31.

[114] See eg: CO Eritrea, CRC/C/15/Add.204 para 41; CO Lesotho, CRC/C/15/Add.147 para 45; CO Palau, CRC/C/15/Add.149 para 48; CO Georgia, CRC/C/15/Add.124 para 46; CO South Africa, CRC/C/15/Add.122 para 31.

[115] See eg: CRC Committee, 'General Comment No 3 (2003) HIV/AIDS and the Rights of the Child' (17 March 2003) CRC/GC/2003/3. See also: CO Rwanda, CRC/C/RWA/CO/3-4 para 8(a); CO Madagascar, CRC/C/MDG/CO/3-4 para 19.

[116] This observation is also consistent with the discussion of data collection and indicators in the CRC Committee's 'General Comment No 5' where no mention is made of the resources required for data collection: CRC GC 5 (n 7) paras 48–50.

[117] See eg: Edward Anderson and Marta Foresti, 'Assessing Compliance: The Challenges for Economic and Social Rights' (2009) 3 Journal of Human Rights Practice 469; Eitan Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realisation of Economic, Social and Cultural Rights' (2009) 3 Journal of Human Rights Practice 402.

a cost benefit analysis. However, a dose of pragmatism demands the need to undertake such analysis as it provides the evidence required to assess (a) what measures must be taken and (b) the resources required for this purpose. This is not a case of social science methods usurping or compromising children's rights; it is rather an acknowledgement that the effective implementation of these rights relies upon interdisciplinary engagement and dialogue.[118]

Indicators and Benchmarks

In addition to the need to *collect* data, the CRC Committee has called on states to ensure nationally appropriate indicators[119] as a measure by which to assess a state's progress towards the full implementation of children's rights.[120] This recommendation is increasingly heard with respect to a range of human rights.[121] For example, with respect to the right to health the Special Rapporteur on the Right to Health,[122] the OHCHR,[123] the WHO, and numerous commentators[124] have also advocated this approach. No such obligation arises directly from the text of the right to health or indeed any right. However, when read in conjunction with the general obligation under article 4 of the CRC to adopt all 'appropriate measures', it is arguable that indicators and benchmarks provide examples of such measures to the extent that they are able to provide practical and context sensitive mechanisms by which to monitor a state's progress with respect to the effective and progressive realization of the right to health.

An issue remains as to *which* indicators and benchmarks should be adopted by a state.[125] For its part the Committee has commended 'the existing OHCHR initiative to develop a comprehensive, disaggregated and common set of human rights indicators' and invited 'UNICEF to develop child-specific indicators, with a view to assisting States in improving their policy formulation, monitoring and evaluation for the implementation of child rights'.[126] Beyond these general exhortations, the

[118] Anderson and Foresti (n 117) 475.

[119] CRC GC 5 (n 7) para 48.

[120] ESCR Committee, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) E/C.12/20004 paras 56–58. The CRC Committee has simply stated that '[e]valuation requires the development of indicators related to all rights guaranteed by the Convention': CRC Committee, CRC GC 5 (n 7) para 48; CRC Committee, 'Report on the Forty-Sixth Session' (22 April 2008) CRC/C/46/3 ('Report on Forty-Sixth Session'), 'Report on the Day of General Discussion', 81 paras 79–80.

[121] See Ann Janette Rosga and Margaret Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) Berkeley Journal of International Law 253 (offering comprehensive discussion of development of indicators and associated challenges).

[122] See eg: Paul Hunt, 'Interim Report of the Special Rapporteur on the Right to Health' (10 October 2003) A/58/427 ('2003 Special Rapporteur Report') paras 5–37; Paul Hunt, 'Report of the Special Rapporteur on the Right to Health' (3 March 2006) E/CN.4/2006/48 ('2006 Special Rapporteur Report') paras 22–61.

[123] 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (6 June 2008) HRI/MC/2008/3, Annex 1, 25, para 8.

[124] See eg Gunilla Backman and others, 'Health Systems and the Right to Health: An Assessment of 194 Countries' (2008) 372 The Lancet 2047.

[125] See generally Gauthier de Beco, 'Human Rights Indicators for Assessing State Compliance with International Human Rights' (2008) 77 Nordic Journal of International Law 23.

[126] CRC Committee, Day of General Discussion (5 October 2007) http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx accessed 16 June 2017 ('2007 DOD') para 39.

Committee has not sought to endorse specific indicators or benchmarks with respect to various rights. For example, within the context of the right to health there are indicators on a child's right to survival prepared by an inter-agency consultative process,[127] the OHCHR draft indicators on the right to health,[128] the 'Lancet Health Indicators'[129] and the 'Human Rights Based Approach to Indicators in Relation to the Reproductive Health Strategy' endorsed by the World Health Assembly in May 2004.[130] Instead the approach of the Committee has been more rudimentary and reflects a general concern at the lack of general and disaggregated data with respect to the right to health.[131]

Ultimately, states enjoy a level of discretion in the determination of what indicators and benchmarks will be relevant to the realization of children's rights within their jurisdiction. The difficulty of this task should not be underestimated and commentators have expressed concern as to 'how to determine what would be a realistic and reasonable pace of progress in light of available resources'.[132] At the same time, there should be no expectation that indicators or benchmarks are precise tools by which to measure implementation children's rights. Indeed the Committee itself has recognized 'the limits of statistical variables and the fact that human rights indicators cannot capture the complexity and specificity of individual human rights in different contexts'.[133] Thus such statistics will only ever be, at best, a guide and their identification will always be relative and contested. Their legitimacy however will be influenced by two factors. First, the process by which they are determined. This process must be collaborative and involve the various actors within the relevant interpretative community of a particular jurisdiction, professionals, researchers, policy makers, and NGOs. Second, their capacity to guide states in the identification of the extent to which they are complying with their obligation to implement children's rights *and* their utility as tools by which the CRC Committee and the broader interpretative community can hold states accountable.[134] From the perspective of this analysis they should therefore be seen as an example of *measures,* which are *appropriate* by virtue of their capacity to contribute to the effective implementation of the children's

[127] See eg the draft child survival indicators developed as part of an inter-agency consultative process outlined in Paul Hunt, 'Report of the Special Rapporteur on the Right to Health' (8 October 2004) A59/422 ('2004 Special Rapporteur Report') paras 62–68.

[128] 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (11 May 2006) HRI/MC/2006/7, annex, Table 4.

[129] Backman and others (n 124) 11–12.

[130] See Hunt, 2006 Special Rapporteur Report (n 122) annex ('A Human Rights-Based Approach to Indicators in relation to the Reproductive Health Strategy Endorsed by the World Health Assembly in May 2004').

[131] This may, however, change in light of its recent recommendation that UNICEF 'develop child specific indicators with a view to assisting States in improving their policy formulation, monitoring and evaluation for the implementation of child rights': CRC Committee, 'Report on Forty-Sixth Session' (n 120) 'Day of General Discussion', ch VII, para 80.

[132] Siddiqur Rahman Osmani, 'Human Rights to Food, Health and Education' (2000) 1 Journal of Human Development 273, 291.

[133] CRC Committee, 2007 DOD (n 126) para 38.

[134] Deteriorating indicators or a failure to achieve benchmarks does not necessarily provide evidence of a violation of a state's obligations. It remains necessary to assess the context in which the deterioration takes place especially the availability of resources before making such a determination: Hunt, 2006 Special Rapporteur Report (n 122) para 35.

rights.[135] Their articulation, however, must still satisfy the requirements of being practical, coherent, and context sensitive.[136]

Independent Monitoring Systems

Although 'self-monitoring and evaluation is an obligation for Governments',[137] the Committee has also stressed that states must 'facilitate independent monitoring mechanisms such as parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions.'[138] With respect to this last mechanism, the Committee dedicated its 'General Comment No 2' to the 'role of independent national human rights institutions in the protection and promotion of the rights of the child'[139] in which it 'considers the establishment of such bodies to fall within the commitment made by states parties upon ratification to ensure the implementation of the Convention and advance the universal realisation of children's rights'.[140] Within this context the Committee has also commended the establishment of Children's Commissioners and Ombudsman for Children.[141] Although there is no explicit obligation imposed on states to establish such positions, they represent an example of an *appropriate measure* that can be taken by a state under article 4 of the Convention.[142]

(vi) Awareness Raising, Training, and Capacity-Building

The effective implementation of any right is facilitated if the population of the relevant state internalizes the fact that the right is 'worthy of recognition, investment and

[135] This is not to overstate their significance. As the Special Rapporteur on Health has explained, 'it would be foolhardy to expect too much from right to health indicators' which can never provide a complete picture of the enjoyment of the right to health in a specific jurisdiction: Hunt, 2003 Special Rapporteur Report (n 122) para 37.

[136] See Sally Engle Merry, *The Seductions of Quantifications: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press 2016) (exploring how knowledge produced by indicators reflects the underlying theory of why the indicators were established. Finding that OHCHR's human rights indicators locate the origin of human rights problems in government failure to provide politics that support domestic violence, maternal health care, or policing, rather than in distribution of production and environmental degradation, corruption, and global supply chains. Arguing that the OHCHR's approach is an example of the rise in enthusiasm for the use of indicators, but that this approach inherently strips away the social world and has a tendency to homogenize, which privileges only the viewpoints of elites who design indicators around only their understandings of social problems and interventions.

[137] Hunt, 2003 Special Rapporteur Report (n 122) para 46. [138] ibid.

[139] CRC Committee, 'General Comment No 2 (2002): The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child' (15 November 2002) CRC/GC/2002/2.

[140] ibid para 1.

[141] See eg: CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 para 19; CO Cyprus, CRC/C/CYP/C)/3-4 para 13; CO Greece, CRC/C/GRC/CO/2-3 para 15; CO Timor-Leste, CCRC/C/TLS/CO/203 para 12; CO Luxembourg, CRC/C/LUX/CO/3-4 para 20.

[142] For a discussion of such mechanisms see: CO Slovenia, CRC/C/SVN/CO/3-4 paras 18–19 (recommending that the state take measures to ensure that the Ombudsman office complies with the Paris Principles, and that the state provide the Ombudsman with adequate human, technical, and financial resources for effective implementation of functions); CO Bosnia and Herzegovina (n 141) paras 19–20 (recommending that the state take measures to ensure that the Ombudsman office has immunities required to function effectively including with regard to dealing with complaints from children and for ensuring adequate follow up to recommendations); CO Canada, CRC/C/CAN/Co/3-4 para 23 (encouraging state party to raise awareness among children concerning the children's ombudsman in provinces and territories); CO New Zealand, CRC/C/NZL/CO/5 para 11 (recommending that the state ensure that the Children's Commissioner has adequate human, technical, and financial resources to receive, investigate, and address complaints from children).

regulation'.[143] This in turn provides the political mandate at the domestic level to allow for a state to undertake the measures necessary to secure the implementation of the right 'in the form of a redistribution of resources and related legislation and regulation'.[144] States must therefore take appropriate measures to stimulate and inspire the political, social, cultural, and moral commitment among their population to accept the idea that children are entitled to rights and that the state has an obligation to protect these rights.[145]

In the first instance this requires that states take appropriate measures to *raise awareness* of the Convention and its underlying values, and especially its shift from a welfarist model to an approach that values children's evolving capacity and agency. Article 42 provides that 'State Parties undertake to make the principles and provisions of the Convention widely known by appropriate and active means, to adults and children alike.' However, this same obligation can be derived from article 4. According to the Committee, states must develop a comprehensive strategy for disseminating knowledge of the Convention throughout society[146] including special measures for children to acquire knowledge of their rights with an emphasis on 'incorporating learning about the Convention into school curriculum at all stages'.[147] States must also comply with their obligation under article 44(6) to make their reports from the Committee widely available to the public within their own countries.

Second, the provision of information about the Convention and the idea of children's rights is necessary but not sufficient to ensure children's rights. Effective implementation also requires that all those individuals whose activities have the capacity to make an impact on the enjoyment of children's rights are provided with appropriate training and capacity building. It is within this context that the Committee has emphasized the obligation of states to 'develop training and capacity building for all those involved in the implementation process—government officials, parliamentarians and members of the judiciary—and for all those working with children' including for example, 'community and religious leaders, teachers, social workers and other professionals ... the police and armed forces, including peacekeeping forces, [and] those working in the media'.[148] The aim of such education must be to ensure recognition of the child as a rights holder and to 'increase knowledge and understanding of the Convention'. The Committee has therefore created an expectation that the Convention will be 'reflected in professional training curricula, codes of conduct and educational curricula at all levels'.[149]

[143] Jennifer Ruger, 'Toward a Theory of the Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law and Human Rights 273, 318.

[144] ibid 318.

[145] Thoko Kaime, '"Vernacularising" the Convention on the Rights of the Child: Rights and Culture as Analytic Tools' (2010) 18 International Journal of Children's Rights 637 (discussing how the success of the Convention is related to the level of appropriation of its principles within the local polities).

[146] CRC GC 5 (n 7) para 67. [147] ibid para 68. [148] ibid para 53. [149] ibid para 53.

III. The Obligation with Respect to Economic, Social, and Cultural Rights

A. The Special Obligation with Respect to Economic, Social, and Cultural Rights

1. The Definition of Economic, Social, and Cultural Rights

International human rights law insists on a distinction between civil and political rights and economic, social, and cultural rights. This distinction, which is reflected in the twin Covenants, is maintained under article 4 of the Convention, which provides that the implementation of economic, social, and cultural rights is subject to available resources. Interestingly the original Polish draft did not distinguish between the two categories of rights and made no reference to the availability of resources.[150] Moreover, the text of article 4 as adopted at the first reading recognized that the implementation of the rights should be subject to available resources but *did not* actually make any distinction between the two set of rights.[151]

During the Technical Review, UNICEF expressed its concern that this formulation, if adopted, 'would achieve a radical diminution of the standards contained in existing instruments and would run counter to all of the assumptions that have hitherto governed the recognition of civil and political rights in international law'.[152] It also recommended that the reference to available resources be deleted from the general obligation under article 4 as the relevance of resource availability to a right could be dealt with in specific articles.[153] Although this approach was favoured by several delegations from western states during the second reading,[154] it was rejected by a number of other states 'given their preoccupation with the economic difficulties faced by developing countries'.[155] The compromise solution was to include the reference to available resources but confine its application to economic social and cultural rights.[156] The result is that the orthodox position under international human rights law is maintained under the Convention: that is, economic, social, and cultural rights are subject to the availability of resources whereas civil and political rights are subject to immediate implementation. However, this orthodoxy, which has been maintained by the CRC Committee,[157] is problematic for two reasons. First, there is no definition of what constitutes an economic social and cultural right under the Convention or indeed international law and second, the effective implementation of what are traditionally understood as civil and political rights also requires resources.

With respect to the first issue, the Committee has recognized that '[t]here is no simple or authoritative division of human rights in general or of Convention rights into the

[150] E/CN.4/1349; *Legislative History* (n 1) 350.
[151] E/CN.4/1988/WG.1/WP.1/Rev.1; *Legislative History* (n 1) 352.
[152] E/CN.4/1989/WG.1/CRP/1; *Legislative History* (n 1) 354.
[153] E/CN.4/1989/WG.1/CRP/1; *Legislative History* (n 1) 354.
[154] E/CN.4/1989/48 para 172 (USA, Canada, Sweden, New Zealand, Argentina, Portugal, and the United Kingdom); *Legislative History* (n 1) 355.
[155] E/CN.4/1989/48 para 173; *Legislative History* (n 1) 355.
[156] E/CN.4/1989/48, para 177; *Legislative History* (n 1) 356.
[157] CRC GC 19 (n 7) para 25 (noting that state 'have the obligation to immediately realize civil and political rights and to implement economic social and cultural rights "to the maximum extent of their available resources" ').

two categories'.[158] It has further explained that although its reporting guidelines group articles 7, 8, 13–17, and 37(a) under the heading '"Civil rights and freedoms" ... these are not the only civil and political rights in the Convention'.[159] Moreover, according to the Committee 'many other articles including articles 2, 3, 6 and 12 ... contain elements which constitute civil/political rights, thus reflecting the interdependence and indivisibility of all human rights'.[160] This comment implies that there are certain elements that are peculiar to civil and political rights that cannot be found in economic social and cultural rights. As to what these elements are, however, remains unstated.

This lack of clarity creates a difficulty with respect to the implementation of the rights under the Convention. On one level, it could be said that an economic, social, or cultural right is a right that appears in the Covenant on Economic, Social and Cultural Rights. Thus the rights to health, housing, education, and social security as they appear under the Convention would be considered economic and social rights and subject to the availability of resources. As a corollary, a right under the Convention which also appears under the ICCPR would be classified as a civil and political right. However, the status of rights which are unique to the Convention such as articles 3, 6(2), and 12 and do not appear under either the ICCPR or ICESCR remains unclear.

2. *Civil and Political Rights and the Question of Resources*

A possible response to this dilemma is to acknowledge that the effective enjoyment of *all rights* will require the allocation of at least a certain level of resources.[161] This approach rejects the traditional libertarian position that civil and political rights can be reduced to negative rights which simply require states to refrain from interference with such rights. Instead it accepts that the effective implementation of these rights also requires states to take positive steps or active measures.[162] For example, as outlined in the commentary on the right to life under article 6(1) of the Convention, states are required to adopt legislative and other measures to protect a child's life against state and non-state threats; to undertake an investigation when a child's life has been taken and to prosecute and punish those who are responsible for the unlawful taking of a child's life before an independent and impartial court. These are all resource intensive measures. Moreover, as the commentary on article 6 also explains, states are not under an absolute obligation to protect a child against every conceivable threat to his or her life. Instead, legitimate resource constraints will be relevant in assessing whether a state has taken all reasonable measures to protect a child's right to life. Thus even where there is doubt as to the status of a right under the Convention, the reality is that the test to determine whether a state has fulfilled its obligation with respect to that right will, as a general rule, require an assessment as to whether the measures adopted by the state were reasonable in light of the available resources.

[158] CRC GC 5 (n 7) para 6. [159] ibid. [160] ibid.

[161] See: Sigrun Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as Well as Quantity' (2012) 12 Human Rights Law Review 393, 395; Maastricht Guidelines (n 4) (noting that full realization of both sets of rights can only be achieved progressively).

[162] Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.1326 (para 8).

It could be argued that there are, or at least should be, exceptions to this general rule. For example, the orthodox position is that a lack of resources will never justify a state's failure to protect a child from torture.[163] At the same time, it could also be considered unreasonable to impose an absolute burden on a state to protect a child from all forms of treatment that amount to torture especially if this treatment was administered by a private individual. Moreover, even if the offender were an agent of the state such as a police officer, is it still reasonable to expect a state to protect a child from *every* conceivable harm? As such, a more nuanced approach to the question of resources and the protection of civil and political rights is required. Such an approach could involve an application of the following principles.

First, the greater the consequences of an interference with a child's right, the greater the burden on a state to take the appropriate measures, including the allocation of scarce resources, to prevent the interference from occurring. Moreover, if the risk of the interference with the right occurring is high *and* the associated harm to the child is also high, a state should be under a greater burden to allocate the necessary resources to protect a child from that risk. Conversely if the risk is low and the associated level of harm is also low, the burden imposed on the state to prevent that risk from materializing should also be lower.

The other factor to consider is the level of resources required to protect a child against the interference. If a relatively low level of resources is required to protect against the interference with a child's right, a state will be under a greater burden to allocate the necessary resources to protect the child especially where the consequences of the interference are significant. Conversely if a high level of resources is required to protect a child against a remote risk which carries less severe consequences, the burden imposed on the state should be reduced. As a general rule, therefore, an assessment as to the reasonableness of a state's behaviour in allocating the resources necessary to protect a child's civil and political rights could require a consideration of three factors—the consequences for the child associated with an interference with the right; the likelihood of the interference materializing and the level of resources required to prevent the interference materializing.

B. The Obligation to Take Measures to the 'Maximum Extent of Available Resources'

1. Coherence with the ICESCR

Article 4 provides that with respect to the implementation of economic, social, and cultural rights, states must take all appropriate measures 'to the maximum extent of their available resources'. The first point to note about this phrase is that it differs from the formulation adopted under article 2(1) of ICESCR which requires a state 'to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means'. Article 4 of the Convention omits the obligation 'to take steps' and the explicit reference to progressive implementation.

Neither the drafting history nor work of the CRC Committee suggest that these disparities carry any significance. On the contrary, it would appear from both the drafting

[163] See chapter 37 of this Commentary.

history[164] and the work of the Committee that the phrase used in article 4 should be considered equivalent to the phrase used in the ICESCR. For example, the CRC Committee has explained that article 4 'introduces the concept of 'progressive realization' with respect to economic social and cultural rights[165] and that the formulation used in article 4 'is similar to the wording used in the ICESCR'.[166] It has also explained that it 'entirely concurs with the Committee on Economic Social and Cultural Rights in asserting that "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances" '.[167] Although the Committee's harmonization of the obligation under the Convention with the obligation under the ICESCR has been criticized by some scholars,[168] it is consistent with the principle of external system coherence[169] and is thus justifiable. Questions remain, however, as to the meaning of the phrases 'available resources' and 'progressive realization'.

2. The Meaning of Available Resources

(a) A Dynamic Understanding of Available Resources

When the CRC Committee dedicated its annual Day of General Discussion to the issue of 'Resources for the Rights of the Child' in 2007, it declared that 'resources must be understood as encompassing not only financial resources but also other types of resources relevant for the realisation of economic, social and cultural rights such as human, technological, organisational, natural and information resources'.[170] The work of the CRC Committee also indicates a willingness to adopt an open ended vision as to the scope of the phrase 'resources' which will allow for a context-sensitive understanding of this term. In relation to the right to health, for example, the CRC Committee has variously called upon states to '[e]nsure that *appropriate* resources are allocated for the health sector and develop and implement comprehensive policies and programmes for improving the health situation of children';[171] '[e]nsure the provision of *adequate* financial and human resources for the effective implementation of the health programmes';[172] '[i]ncrease efforts to allocate *appropriate* resources and develop and implement comprehensive policies and programmes to improve the health situation of children';[173] '[a]llocate *appropriate* resources for health and develop and implement comprehensive policies and programmes to improve the health situation of children';[174] and '[d]efine sustainable financing mechanisms for the primary health-care system and an effective utilization of resources, [including adequate salaries for child health-care professionals], in order to ensure that

[164] *Legislative History* (n 1) 354–56. [165] CRC GC 5 (n 7) para 7. [166] ibid para 8.

[167] ibid para 8 (citing ESCR GC 3 (n 3) para 11).

[168] See eg Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21 International Journal of Children's Rights 248, 258–62.

[169] Tobin, 'Seeking to Persuade' (n 19) 34–37 (The principle of external system coherence establishes that unless there is clear evidence to the contrary, the interpretation of a human rights treaty should as far as possible be interpreted in a way that is consistent with other human rights treaties).

[170] CRC Committee, 'Report on Forty-Sixth Session' (n 120) 'Day of General Discussion', ch VII, para 65. See also Skogly (n 161) (listing natural, human, educational, cultural, scientific, financial, and international resources).

[171] CO Philippines, CRC/C/15/Add.259 para 59(b).

[172] CO Equatorial Guinea, CRC/C/15/Add.245 para 47(d).

[173] CO Liberia, CRC/C/15/Add.236 para 47(a).

[174] CO Pakistan, CRC/C/15/Add.217 para 53(a).

all children, in particular children from the most marginalized vulnerable groups, have access to free basic health care of good quality'.[175]

In a similar vein the ESCR Committee has recommended that states 'increase public spending on health';[176] 'train and recruit . . . medical staff, in particular midwives, nurses, obstetricians and gynaecologists';[177] 'increase expenditure for health care and to take all appropriate measures to ensure universal access to health care at prices affordable to everyone';[178] ensure the commitment 'to primary health care is met by adequate allocation of resources';[179] and 'increase its budget allocation for health'.[180] The themes, which underlie such comments, are that states must ensure the allocation of 'adequate' and 'appropriate' resources that are 'effective' and 'sustainable' in securing the implementation of economic social and cultural rights. Thus there is need for a broad understanding of the term resources which takes account of both quantitative and qualitative considerations.[181]

Although the comments of the human rights treaty bodies reflect a significant degree of deference to states with respect to how they develop and allocate resources, it is not unlimited.[182] In its 'General Comment No 19', the CRC Committee reiterated the need for states to prioritize children's rights in budgets.[183] It has urged states in its concluding observations to ensure that expenditure on, for example, children's health remains a priority in state budgets at all times, and has also stated that investment in children should be made visible in state budgets through detailed compilation of resources allocated to them, and that states should carry out rights-based budget monitoring and analysis that serves the best interests of the child.[184] The ESCR Committee has also expressed its concern with respect to the distribution of resources to purchase weapons as opposed to investing in areas such as primary or preventive health services[185] and expressed its concern that 'health allocations are consistently diminishing',[186] and, 'in spite of high GDP growth rate, the national spending on social services such as . . . health . . . remains low'.[187]

Moreover, far from making empty and aspirational pleas, the CRC Committee has held states to account where they have failed to reach this standard. For example, it expressed concern in its report on Costa Rica 'at the cuts in social expenditure in the national budget, as a result of the recent economic reforms, and at their negative impact

[175] CO Czech Republic, CRC/C/15/Add.201 para 47(a); CO Romania, CRC/C/15/Add.199 para 45(a). See also CRC Committee, 'General Comment No 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24)' (17 April 2013) CRC/C/GC/15 ('CRC GC 15') paras 74, 94.

[176] ESCR Committee, CO Kazakhstan, E/C.12/KAZ/CO/1 para 40. See also: ESCR Committee, CO Brazil, E/C.12/BRA/CO/2 para 28(b); CO Iceland, E/2000/22 (1999) 26 para 86.

[177] ESCR Committee, CO Kazakhstan, E/C.12/KAZ/CO/1 para 40.

[178] ESCR Committee, CO Republic of Korea, E/C.12/KOR/CO/3 para 30.

[179] ESCR Committee, CO Ukraine, E/2002/22 (2001) 78 para 512.

[180] ESCR Committee, CO Poland, E/C.12/POL/CO/5 para 29. See also ESCR Committee, CO Philippines, E/1996/22 (1996) 30 para 123 (consider increasing the proportion of the national budget devoted to health programmes).

[181] Skogly (n 161).

[182] See Craven (n 4) 136–37 (makes a similar observation with respect to the ICESCR).

[183] CRC GC 19 (n 7) para 12.

[184] See eg CO Togo, CRC/C/15/Add.83 para 34; CRC Committee, 'Report on Forty-Sixth Session' (n 121) para 71(a). See also CRC GC 19 (n 7) para 106.

[185] See eg ESCR Committee, CO Philippines, E/C.12/1995/7 para 21.

[186] ESCR Committee, CO Nigeria, E/1999/22 (1998) 27 para 124. See also: ESCR Committee, CO Mongolia, E/2001/22 (2000) 53 para 273; ESCR Committee, CO Kenya, E/C.12/1/Add.59 para 9.

[187] ESCR Committee, CO Philippines, E/C.12/PHL/CO/4 para 17.

on health, education and other traditional welfare areas for children'.[188] It therefore recommended 'that the state party take effective measures to allocate the maximum extent of available resources for social services and programmes for children, and that particular attention be paid to the protection of children belonging to vulnerable and marginalized groups'.[189] Such comments are considered to have a principled basis given that they are directed to ensuring that states take effective measures to secure the realization of children's right to health. If states' decisions with respect to the allocation of their available resources were not subject to any monitoring by the Committee, it would be possible for budgetary decisions to undermine the realization of the Convention.

In terms of the resource allocation process at the national level, the CRC Committee has also highlighted the need for states to adopt political, institutional, and administrative structures and processes that ensure the transparent, equitable, efficient, and effective use of available resources.[190] Thus, for example, in its concluding observations for Togo, the CRC Committee expressed its concern at 'reports of widespread corruption, which has a negative impact on the level of resources available for the implementation of the Convention',[191] and in its report on Bosnia and Herzegovina it expressed concern at the 'significant difference in public expenditure between the two Entities in the areas of social security, education and healthcare and that the complex structure of the state party is not conducive to an optimal realization of the limited resources available'.[192] It therefore recommended 'that the State party pay particular attention to the full implementation of article 4 of the Convention, by prioritizing budgetary allocations to ensure implementation of the economic, social and cultural rights of children, in particular those belonging to economically disadvantaged groups, "to the maximum extent of . . . available resources and, where needed, within the framework of international cooperation" '.[193] Moreover, it further recommended 'that the State party harmonize the expenses for the purpose of children's rights protection between the Entities so that a minimum level of social and health protection for all children throughout the country is guaranteed'.[194]

Such observations demonstrate a significant degree of sensitivity to the specificities of local contexts. The CRC Committee is acutely aware of the reality that many states, especially developing states, will often lack the necessary financial and human resources to secure the full enjoyment of even the essential elements of children's economic social and cultural rights. At the same time, they are not prepared to allow a lack of resources to justify inertia on the part of states. Thus, the CRC Committee in its comprehensive 'General Comment No 19' on budgets and children's rights has recommended that states encourage public dialogue on state budgets, develop effective resource-tracking systems, and provide statistical information on the allocation of resources towards the realization of children's rights.[195] It has also recommended that states must address matters such as corruption, discriminatory expenditures, and budgetary allocations, and must actively

[188] CRC Committee, CO Costa Rica CRC/C/15/Add.117 para 14.

[189] ibid. See also: CO Brazil, CRC/C/BRA/CO/2-4 para 5; CO Greece, CRC/C/GRC/Co/2-3 para 18(a); CO Iceland, CRC/C/ISL/CO/3-4 paras 18–19.

[190] CRC Committee, 'Report on Forty-Sixth Session' (n 120), ch VII, paras 73–75.

[191] CO Togo, CRC/C/15/Add.255 para 17.

[192] CO Bosnia and Herzegovina, CRC/C/15/Add.260 para 16.

[193] ibid para 17. [194] ibid para 17.

[195] CRC GC 19 (n 7) paras 62, 76, 83, 90, 94–96; CRC Committee, 'Report on Forty-Sixth Session' (n 120) 'Day of General Discussion', ch VII, para 75.

seek to develop internal systems of fiscal management (including a review of the taxation system) and governance that will generate the resources necessary to enable effective implementation of economic and social rights.[196] Such demands are considered to be realistic and feasible and to be justified by the need to secure the effective implementation of children's rights.

Importantly, the position advanced by the CRC Committee reflects a dynamic understanding of the meaning of phrase 'maximum available resources'. It rejects the blunt assertion often made by states that they simply lack the resources necessary to undertake the various measures required to secure children's rights.[197] It attempts to pierce this veil and demands an inquiry as to the way in which existing resources within a jurisdiction are *accumulated, distributed*, and how they can be *redistributed* so as to secure children's rights. Thus, for the CRC Committee the resources of a state are never fixed or determinate. On the contrary states remain subject to an ongoing burden to remain actively seized of ways in which they can mobilize the resources required to implement children's rights through the adoption of appropriate and sustainable policies with respect to fiscal and general governance matters.[198]

(b) Developing Social Measures

Strengthening the capacity of a health, education, or housing sector to deliver appropriate services to children requires more than the creation and allocation of adequate financial resources to construct the necessary institutional structures. It also requires the development of appropriate *social resources*. In the first instance this includes the family unit—a point which is reflected in the statement of the CRC Committee as to 'the importance of systematically supporting parents and families *who are among the most important available resources for children*' (emphasis added).[199] Beyond the family unit, however, the provision, training, and funding of adequately trained professionals are also critical.[200] Indeed a lack of such social resources has repeatedly been identified by the CRC Committee especially, for example, in relation to developing states in which there is a significant shortage of health workers,[201] exacerbated by the migration of such personnel to developed states—the so-called skills or brain drain.[202]

[196] CRC Committee, 'Report on Forty-Sixth Session' (n 120) 'Day of General Discussion', ch VII, paras 74–80; Henry Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals* (3rd edn, OUP 2008), 305–07 (notes that fiscal dimension of determining available resources has traditionally been neglected with human rights scholarship and advocacy and provides brief discussion of what this might mean).

[197] See WHO, 'Spending on Health—A Global Overview' (WHO Fact Sheet, 2012) http://www.who.int/mediacentre/factsheets/fs319/en/> accessed 23 June 2017 (noting that according to 2010 data, there were 34 WHO member states where health spending by government, households, and the private sector, and funds provided for by external donors was lower than USD$50 per person per year).

[198] CRC GC 19 (n 7) paras 75–80.

[199] CRC Committee, 'Report on Forty-Sixth Session' (n 120) 'Day of General Discussion', ch VII, para 66.

[200] Lynn P Freedman and others, UN Millennium Project Task Force on Child Health and Maternal Health, *Who's Got the Power: Transforming Health Systems for Women and Children* (Earthscan 2005) 9.

[201] ESCR Committee, 'Report of the Special Rapporteur on the Right to Health to the General Assembly 2005' (12 September 2005) A/60/348 ('ESCR Health Rapporteur Report') paras 27–28.

[202] ibid paras 29–90 (examines scope of problem, reasons for its existence, human rights implications, and possible strategies to address the issue). See also: World Health Assembly, 'International Migration of Health Personnel: A Challenge for Health Systems in Developing Countries' (22 May 2004) Resolution WHA57.19; World Health Assembly, 'International Migration of Health Personnel: A Challenge for Health Systems in Developing Countries' (25 May 2005) Resolution WHA58.17.

Such a situation seriously undermines the capacity of a state to secure its obligations under the right to health and requires measures to mitigate the problem[203] and to develop local capacities to take care of the health needs of children within a state's jurisdiction. Thus, while the right to health in international law does not expressly impose an obligation on states to ensure that there are appropriate social and human resources available to ensure the right to health, the failure to imply such an obligation would leave a serious 'effectiveness gap' in the implementation of the right to health.

Moreover, the relevant human resources must be provided with adequate training and education in relation to children's rights. Such information and skills are necessary to ensure not only an awareness of children's rights but also to ensure that such personnel deliver their services in a manner consistent with children's rights—a form of system coherence—and are in a position to document and identify when a child's rights have been violated.

Finally, the social resources available to a state are not confined to those resources over which the state has direct control. As commentators have recognized, 'available resources refers to resources available within the society as a whole, from the private sector as well as the public'.[204] Thus, there is an obligation on states to 'mobilize these resources', to the extent that it is reasonably practicable to do so, for the purpose of securing the realization of children's economic, social, and cultural rights.[205]

(c) Seeking International Cooperation as a Source of Resources

The CRC Committee in its Discussion Day on 'resources available for the rights of the child' affirmed 'that it is the responsibility of States in the first place to allocate resources for the implementation of the rights of the child as defined by the Convention'.[206] However, it added that '[t]he term "available resources" includes also resources available from the international community through international assistance, which should complement the resources available at national level'.[207] This position is consistent with the approach adopted by the ESCR Committee[208] and can be justified in light of the inclusion in article 4 of the Convention that states implement economic, social, and cultural rights within the 'framework of international co-operation'. As a minimum, this phrase imposes an obligation on states to actively seek international assistance. As the CRC Committee has explained, where a state lacks resources it is 'obliged to seek international cooperation'.[209] It is for this reason that the Committee routinely encourages states to use, as appropriate, the technical assistance offered by organizations such as UNICEF, the Office of the High Commissioner for Human Rights, and other UN agencies in the

[203] ESCR Health Rapporteur Report (n 201) paras 61–89; Eric A Friedman, 'Action Plan to Prevent Brain Drain: Building Equitable Health Systems in Africa' (Physicians for Human Rights 2004) https://s3.amazonaws.com/PHR_Reports/Africa-prevent-brain-drain-report-2004.pdf accessed 23 June 2017; WHO, 'International Recruitment of Health Personnel: Draft Global Code of Practice' WHO Doc EB124/13 (4 December 2008); World Health Assembly, Res WHA57.19 (n 203).

[204] Ssenyonjo (n 4) 62, citing Audrey Chapman and Sage Russell, 'Introduction' in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 1, 11.

[205] ibid.

[206] CRC Committee, 2007 DOD (n 126) para 24.

[207] CRC Committee, 'Report on Forty-Sixth Session' (n 120) 'Day of General Discussion', ch VII, para 24. See also CRC GC 19 (n 7) para 75.

[208] ESCR GC 3 (n 3) para 3.

[209] CRC GC 19 (n 7) para 35.

process of implementing the Convention.[210] As a corollary, it follows that states are under an obligation not to unreasonably refuse assistance offered by these agencies or by appropriate civil society groups that are committed to assisting states implement children's rights.

A more complex question arises with respect to the nature of the obligation imposed on a state whose assistance is requested by another state. This issue is addressed below in the context of the discussion of the meaning of the phrase 'framework of international cooperation'.

3. The Obligation of Progressive Implementation

(a) A Blend of Pragmatism and Principle

In its 'General Comment No 3', the ESCR Committee declared, with respect to the obligation of progressive realization, that it 'constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'.[211] This approach is consistent with the intention of the drafters of the ICESCR who, despite concerns that a progressive obligation could be used as a loophole by some states, recognized that such a qualified obligation was inevitable.[212] Indeed, the drafting history records that it was claimed that, 'the use of the term "progressively" in fact placed upon signatories a duty to achieve ever higher and higher levels of fulfilment of rights'.[213] In fact it is within this context that the ESCR Committee has explained that the progressive obligation 'imposes an obligation to move as expeditiously and effectively as possible towards' full realization of economic, social, and cultural rights.[214] Moreover, according to the ESCR Committee, 'any deliberate retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of rights provided for in the Covenant'.[215] The CRC Committee has affirmed this principle in the context of the Convention[216] and explained that: 'In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last affected, especially children in vulnerable situations.'[217] Moreover it has added that 'States parties shall demonstrate that such measures are necessary, reasonable, proportionate and non-discriminatory and temporary'.[218]

Such an approach seeks to inform the obligation of progressive implementation with an appropriate blend of pragmatism, principle, and local context sensitivity. In terms of operationalization, it imposes a substantial onus on states to justify the measures they have or have not taken to secure economic, social, and cultural rights in light of their

[210] CRC GC 5 (n 7) para 64. See also: CO Saint Vincent and the Grenadines, CRC/C/VCT/CO/2-3 para 6; CO Bahrain, CRC/C/BHR/CO/2-3 para 17; CO Cambodia, CRC/C/KHM/CO/2-3 para 19; CO Egypt, CRC/C/EGY/CO/3-4 para 22; CO Belarus, CRC/C/BLR/CO/3-4 para 17.

[211] ESCR GC 3 (n 3) para 9.

[212] United Nations Secretary-General, 'Annotations on the Text of the Draft International Covenants on Human Rights (1 July 1955) A/2929 ('UNSG Annotations') paras 23–24.

[213] ESCR GC 3 (n 3) para 9. [214] ibid.

[215] ibid. See also: 2007 DOD (n 126) paras 46–48; CRC GC 5 (n 7) para 7, adopting the earlier work of the ESC Committee, 'Report on Forty-Sixth Session' (n 120) 'Day of General Discussion', ch VII, paras 87–88; CRC GC 19 (n 7) paras 28–34.

[216] CRC GC 5 (N 5) para 7; CRC Committee, 2007 DOD (n 126) para 47; CRC GC 19 (n 7) para 31.

[217] CRC GC 19 (n 7) para 31. [218] ibid.

available resources. As the ESCR Committee in its General Comment on the right to health declared:

> If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy as a matter of priority, the obligations imposed on States under the right to health.[219]

In light of this comment, an assessment as to whether a state has complied with the progressive nature of its obligation will always remain relative to the circumstances prevailing within a state.[220] This obligation does not seek to mandate that certain levels of realization of an economic, social, and cultural right must be secured (obligations of result), or that certain measures must be taken by a state (obligations of conduct), given the existing level of resource availability. Instead it operates to facilitate and frame a dialogue within a state with respect to the direction and speed at which the state should pursue measures to secure the implementation of economic, social, and cultural rights.

The principles that shape this dialogue were outlined in the approach which the ESCR Committee undertook to adopt in response to communications under the Optional Protocol to the ICESCR, adopted by the General Assembly in 2008.[221] In evaluating the extent to which states have complied with their obligation to achieve the relevant rights progressively, the ESCR Committee indicated that it would consider factors such as:

(a) the extent to which the measures taken were deliberate, concrete, and targeted towards the fulfilment of economic, social, and cultural rights;
(b) whether the state party exercised its discretion in a non-discriminatory and non-arbitrary manner;
(c) whether the state party's decision (not) to allocate available resources is in accordance with international human rights standards;
(d) where several policy options are available, whether the state party adopts the option that least restricts Covenant rights;
(e) the time frame in which the steps were taken; and
(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.[222]

Significantly, this model has been endorsed by the CRC Committee[223] as an appropriate methodology by which to assess compliance with the progressive nature of a state's obligation to secure children's economic, social, and cultural rights under the Convention.

[219] ESCR GC14 (n 11) para 47.
[220] ESCR Committee, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources"' (n 45) para 10 (noting that the ESC Committee will take into account (a) the country's level of development; (b) the severity of the alleged breach; (c) the country's current economic situation; (d) the existence of other serious claims on the state party's limited resources such as a recent natural disaster or armed conflict; (e) whether the state party has sought to identify low cost options; and (f) whether the state party has sought cooperation from the international community).
[221] UNGA Res 63/117 (10 December 2008).
[222] ibid para 8.
[223] CRC Committee, 'Report on Forty-Sixth Session' (n 120), 'Day of General Discussion', ch VII, para 90.

The approach would appear to meet the criteria of being principled, practical, coherent, and context sensitive.[224] The ESCR Committee has acknowledged that when applying this model it will always respect 'the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances'.[225] However, this deference is qualified by the core principles set out in the ESCR Committee's Statement which are drawn from international human rights law.

(b) Addressing the Resource Allocation Dilemma

A question remains as to whether the methodology outlined by the ESCR Committee is sufficient to address the perceived failure of international human rights law to resolve the resource allocation dilemma and the need for states to prioritize their expenditures. However, the blending of pragmatism and principle within the Statement has enabled the ESCR Committee to provide a suitable methodology to scrutinize the process by which states resolve the resource allocation dilemma.[226] This methodology is essentially a test of reasonableness,[227] the assessment of which is informed by the factors outlined in the Statement (and the additional considerations outlined below).[228]

The application of this test defers primary responsibility for the resolution of the resource allocation dilemma to states and only seeks to specify the *principles* that must inform this process. As such, it *should not* be seen as a methodology to resolve the resource allocation dilemma in a precise and determinate way. Instead, international human rights law imposes a burden on states to adopt a *framework* to facilitate an evaluation of whether a process of reasonable priority setting[229] has been followed, thus establishing an obligation of conduct rather than result.

The application of this model can be demonstrated in the context of the following scenario contemplated in the report of the National Consultation on Human Rights in Australia.[230] The legitimacy of socio-economic rights were measured, in part, against the capacity of this class of rights to resolve a dilemma whereby a decision had to be made as to whether a remote Aboriginal community retained a primary school or a health clinic.[231] The view taken by those who authored the report was that the idea of economic, social, and cultural rights was unable to assist in the resolution of this dilemma.[232] However, no attempt was made to apply the test of reasonableness as outlined by the ESCR Committee. Had this been done, the following inquiries would have been

[224] Tobin, Seeking to Persuade (n 19) 20.

[225] ESCR Committee, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources"' (n 45) para 11.

[226] ibid para 8.

[227] Indeed, article 8(4) of the Optional Protocol to the ICESCR provides that, '[w]hen assessing communications under the Present Protocol, the Committee shall consider the reasonableness of the steps taken by the State party'.

[228] The test of 'reasonableness' is commonly used to assess the legitimacy of a state's act or omissions in various contexts whether it be tort or administrative law in the common law system or reasonableness review under the South African Constitution. See Liebenberg, *Adjudication under a Transformative Constitution* (n 51). Although the standard of reasonableness under the ICESCR shares characteristics with these other tests, it remains an autonomous test.

[229] Liebenberg, Adjudication under a Transformative Constitution (n 51) 173.

[230] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (Australia Government, 2009).

[231] ibid 355–56. [232] ibid 355–56.

required. First, an assessment to determine whether the mooted closing of the health clinic was an interference with the right to health.[233] On the facts, this is patently the case as it affects the availability and accessibility of health services, which are central elements of the right to health. Having established the interference with the right to health, the assessment to determine whether the closure of the clinic would be reasonably justified is informed by the following questions:

(i) Was the decision to reduce funding for the relevant community based on discriminatory grounds?

(ii) Did Australia have an evidence-based program to address the systemic health problems of indigenous Australians in the short, intermediate, and long term which was informed by appropriate indicators and benchmarks and developed in consultation with all relevant parties including indigenous people, health professionals, NGOs, and children consistent with article 12?

(iii) On the evidence available, did Australia actually lack the resources to fund both the clinic *and* school?

(iv) If there was a genuine lack of resources, was the decision to withdraw resources from the community the result of a decision to *redistribute* resources into other initiatives that were considered necessary and appropriate, based on the available evidence, to realize the right to health for other indigenous or non-indigenous groups *or* the realization of other human rights obligations assumed by the state in international law?

(v) Did the authorities consider the availability, appropriateness, and reasonableness of alternative policies that would have minimized the impact of closing the health clinic on the indigenous community, such as the provision of mobile health services or the provision of access to alternative health services in nearby communities?

(vi) Did the authorities engage in genuine, effective, and transparent consultation with the local indigenous community *and* broader community, including experts on indigenous health, children, and their families (to the extent that this was reasonably practicable), to assess their views and preferences as to whether to retain the school or health clinic?

(vii) Did the final decision of the authorities involve a genuine consideration, and reasonable integration, of the views expressed by the community?

(viii) Was the community effectively advised as to the reasons for the decision of the relevant authority?

(ix) Was genuine provision made to ensure that those affected by the decision were entitled to have the decision reviewed by another body if they were dissatisfied with the decision?

(x) Was an effective system put in place to monitor and evaluate the impact of the decision on the availability, accessibility, acceptability, and quality of health services available to the indigenous community?

If the relevant authority complied with the principle of non-discrimination, and answered 'yes' to each of other questions, its decision would be deemed reasonable irrespective of whether it decided to close the health clinic (or alternatively the school).

[233] Liebenberg, Adjudication under a Transformative Constitution (n 51) 175 (warning of the tendency to overlook the normative discussion as to the scope of the right).

Neither the right to health nor the right to education demands that the clinic or school must necessarily remain open. Rather, subject to realizing the minimum core of a right (discussed below), it demands that states undertake progressive and appropriate measures to secure the effective realization of these rights for every child within their jurisdiction in accordance with a process that will determine the reasonableness of its actions. The fact that a state will often struggle to secure the highest attainable standard of health or the right to education will not, of itself, constitute a violation of these rights as long as the process adopted by a state to balance competing rights in the context of limited resources is reasonable.

The assessment of what constitutes reasonableness will remain subject to ongoing debate. As a minimum however, it is suggested that for a decision-making process to be considered reasonable it must be:

- *principled* (that is, consistent with the principles identified by the ESCR Committee and informed by the rights under the Convention, especially the four guiding principles of non-discrimination, best interests, survival and development, and participation);
- *evidence-based* as opposed to speculative (to ensure the effective enjoyment of all rights);
- *consultative* and participatory including with children consistent with article 12 (to the extent that this is reasonably practicable);
- *transparent* (in the sense that there is an awareness and understanding of the process to be adopted); and
- *evaluative* (in the sense that, whatever decisions are made, they remain subject to review and monitoring).

Importantly, the requirement of reasonableness also applies to decisions made by relevant state authorities with respect to the adoption of a particular strategy from among a range of potential strategies that could all contribute to the realization of children's rights.[234] The concept of progressive realization recognizes that states must make decisions that involve prioritization in the allocation of resources to secure children's rights *and* the other obligations a state may have assumed under international law. However, a heavy burden is cast upon states to justify their decisions regarding the distribution of scarce resources. Moreover, this obligation to take reasonable measures to secure the effective enjoyment of a child's right, remains subject to two additional obligations—the obligation to 'take steps' immediately and the obligation to satisfy the minimum core of each right.

(c) The Obligation to 'Take Steps' Immediately

Unlike article 2(1) of ICESCR, there is no express obligation under article 4 of the Convention to 'take steps' with a view to implementing the rights under the Convention. Such an obligation, however, is necessarily implied into the obligation under article 4 to *undertake* all appropriate measures. Anything less would undermine the substantive content of the obligation to undertake appropriate measures. It would also render article 4 of the Convention inconsistent with article 2(1) of ICESCR which, as discussed above, was never the intention of the drafters of the Convention.

[234] See Sofia Gruskin and Norman Daniels, 'Justice and Human Rights: Priority Setting and Fair Deliberative Process' (2008) 98 American Journal of Public Health 1573 (the authors illustrate a process called accountability for reasonableness, which has four conditions—publicity; relevance; revision; and appeals and regulation—to the decision of a state to adopt one of five possible strategies to improve maternal health).

By way of background, when article 2(1) of the ICESCR was being drafted, concern was expressed that the formulation 'provided too many loop holes for states parties wishing to evade their obligations'.[235] Among the potential loopholes identified, was the obligation to 'take steps' towards the 'progressive realization' of economic and social rights.[236] Despite this concern, it was accepted that the reality of resource constraints meant that states were unable to guarantee such rights and the adoption of a progressive obligation was therefore appropriate.[237] However, the obligation to 'take steps' is not dependent on resources and, according to the ESCR Committee, 'is not qualified or limited by other considerations'.[238]

This position has been affirmed by the CRC Committee which has explained 'that the principle of progressive realization is often misunderstood and interpreted to mean that those rights *are not immediately* applicable and are merely of aspirational character' (emphasis added).[239] Moreover, like the ESCR Committee, the CRC Committee has recommended 'that progressive realization be understood as imposing an *immediate obligation* for States parties to the Convention to undertake targeted measures to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights of children' (emphasis added).[240]

This obligation to take immediate steps reflects the general obligation under international law that a state party to a treaty must take measures to perform the obligations assumed under that treaty in good faith.[241] Having ratified a treaty, a state cannot sit idle and do nothing. Indeed, as the ESCR Committee, in its 'General Comment No 3' on the nature of States Parties' obligations under the ICESCR explained, 'the full meaning of the phrase ["to take steps"] can also be gauged to noting some of the different language versions … in French it is "to act" ("s'engage a agir") and in Spanish it is "to adopt measures" ("a adopter medidas")'.[242] It continued, 'while the full realization of the relevant rights may be achieved progressively, steps must be taken within a reasonably short time after the Covenant's entry into force for the states concerned'.[243] Moreover, '[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations under the Covenant'.[244] The obligation to 'take steps', therefore, represents what is often described as an 'obligation of conduct', that is, an obligation to take actions with a view to achieving an 'obligation of result', namely the full realization of economic, social, and cultural rights.[245]

[235] UNSG Annotations (n 212) para 23. [236] ibid. [237] ibid.

[238] ESCR GC 3 (n 3) annex III, para 2. Ssenyonjo (n 4) para 2.08; Craven (n 4) 114.

[239] CRC Committee, 2007 DOD (n 126) para 46. [240] ibid para 47.

[241] Vienna Convention on the Law of Treaties (adopted, 23 May 1969, entered into force 7 January 1980) 1155 UNTS 331 art 26. See also Craven (n 4) 114 (making a similar observation but relying on the decision of the PCIJ on *Exchange of Greek and Turkish Populations under the Lausanne Convention VI* [1925] PCIJ ser B No 10, 20, in which the PCIJ held that 'a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken').

[242] ESCR GC 3 (n 3) para 2.

[243] ibid. The Limburg Principles (n 4) which were adopted by a group of distinguished experts in international law, provide that '[a]ll parties have an obligation to begin immediately to take steps towards the full realisation of the rights contained in the Covenant': International Commission of Jurists, 'Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights', contained in (1987) 9 Human Rights Quarterly 122, para 16. The ESC Committee also stated in its 'General Comment No 3' that the obligation to 'take steps' was of immediate effect: ESCR GC 3 (n 3) para 1.

[244] ESCR GC 3 (n 3) para 1. [245] ibid para 1.

(d) Minimum Core Obligations

The CRC Committee has explained that '[s]tanding parallel to the concept of progressive realization is the idea of "minimum core obligations" of States'.[246] Although the utility or viability of this concept have been debated,[247] it was developed by the ESCR Committee[248] and has been endorsed by the CRC Committee to 'guarantee at all times, the minimum level of protection (the minimum core content) in the provision of: essential foodstuffs, equal access to primary health care, basic shelter and housing, social security or social assistance coverage, family protection, and basic education'.[249] According to the CRC Committee it requires that:

> All States, regardless of their level of development, are required to take immediate action to implement these obligations, as a matter of priority. Where the available resources are demonstrably inadequate, the State concerned is still required to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Thus, complying with obligations relating to the core of a right should not be dependent on the availability of resources.[250]

What constitutes the minimum core of each right remains contentious. The question is addressed separately in this Commentary in relation to each of the individual economic, social, and cultural rights recognized in the Convention. For present purposes it is sufficient to note that this concept represents an attempt to develop an additional tool by which to measure and assess the extent to which a state is complying with its obligations with respect to economic, social, and cultural rights.

(e) The Need for Prioritization to Achieve Substantive Equality

Although all children are entitled to human rights under the Convention, the CRC Committee has made it clear that when allocating scarce resources, states must prioritize the rights of some children. More specifically, it has stressed 'the need for identifying and giving priority to marginalised and disadvantaged groups of children, while not neglecting or diluting in any way the obligations which States parties have accepted under the Convention'.[251] It has therefore recommended:

> that States parties consider establishing national priorities guided by the four general principles of the Convention in the allocation of resources in their efforts to prioritise the implementation of the rights of children in their respective national contexts. These priorities should be established using rights-based approach, paying special attention to the most marginalized and disadvantaged groups of children.[252]

According to the CRC Committee, this obligation to prioritize implementation of the rights of the most marginalized and disadvantaged groups of children derives from the obligation to protect children against discrimination with respect to the enjoyment of their rights under article 2 of the Convention.[253] It reflects the need for states to remain committed to substantive rather than formal equality and the requirement that the

[246] CRC Committee, 2007 DOD (n 126) para 48.

[247] See eg: Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Meaning' (2008) 33 Yale Journal of International Law 113; Tobin, *The Right to Health in International Law* (n 41) 238–52; Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic Social and Cultural Rights* (Intersentia 2002).

[248] ESCR GC 3 (n 3) para 10.

[249] CRC Committee, 2007 DOD (n 126) para 48.

[250] ibid. See also: CRC GC 19 (n 7) para 31; ESCR GC 3 (n 3) para 10.

[251] CRC Committee, 2007 DOD (n 126) para 40.

[252] ibid para 41.

[253] ibid para 40.