

Master's programs: Public Law and e-Government

COURSE

European Standards and Institutional Practices of Family and Child's Rights Protection

UNIT 1: The international normative framework for children's rights: a focus on the UNCRC

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Structure of today's session

- Introduction to childhood theories/children's rights theories
- Focus on the UNCRC ([link](#)) and its key features
- Monitoring & enforcement mechanisms
- Key sources of information on UNCRC
- Useful online resources

Exercise/point of reflection

- Why is it important that children should be accorded rights and recognized as ‘rights-bearers’ under international human rights law?

All Children?

- 10-year-old **Alfonso** has been a mineworker in Peru since he was very young
- **Aida** was married at the age of 11 according to local traditions in Ethiopia
- **Sophie** was 15 when she first sought medical advice on contraception in France
- 17-year-old **Arnav** has been working as service staff in Indian restaurants and hotels since he was 14
- **Rossella** was 15 when she dropped out of school to work at family's business in Italy

One universal definition of 'childhood'?

Newborn infants

Infants and toddlers (>28 days to 23 months)

Children (2-11 years)

Adolescents (12-18 years)

Youth (15-25 years)

- Physical
- Psychological
- Social
- Moral
- Legal (18?)

Childhood theories

- **Developmental theories:**

Childhood = staged process with phases marked by AGE & MATURITY

- **Cultural and social theories:**

Childhood = result of economic, social and cultural processes

- **Evolving nature of childhood:** it is not a single, fixed, universal experience. At different stages in their life children require **different degrees of protection, provision, prevention and participation**

Children's rights theories

--> What (what type of rights)

--> Who (what type of being)

- **Childhood = time requiring legal protection**
- Adulthood = time of full legal autonomy

Main schools of thought developed in relation to children's rights:

- Protectionists (as physical and mental capabilities of children are different from those of adults, they require protection)
- Liberationists (children's rights can only be realized when they have absolute autonomy to decide for themselves what is best for them)
- Liberal paternalists (limiting children's autonomy where the aim is to protect the child and develop her/his future capacity for self-determination)

A pluralist dynamic interpretation

-->What (what type of rights)

--> Who (what type of being)

- Need to combine Protectionist & Liberationist approaches, recognizing that **children have:**
 - **rights as every other human being**
 - **rights specific to their own nature of ‘developing’ human beings**

The **UNCRC** incorporates both the liberationist & protectionist concepts of children's rights

- E.g. the rights to be **free from poverty**, to **adequate health care**, to a **proper education**, to **adequate housing**, and to **adequate nutrition** *do NOT entail giving children autonomy to make decisions for themselves; instead, acknowledge that children are incapable of providing for themselves and require the protection, care, guidance and support of adults*
- E.g. the right to be **free from sexual or physical abuse** *reinforces the notion that children lack the capacity to care for themselves and require the protection of adults to ensure their proper growth and development*
- E.g. the rights to **make medical decisions**, to **legal counsel**, the freedom to **practice a religion of one's choice**, freedom of **expression and thought**, and the right to **information and privacy** *entail acknowledging children's capacity and maturity to make decisions having a significant impact on their lives*

Other international human rights **treaties**: specific provisions for children

- [UDHR](#) – Art. 25(2)
- [ICCPR](#) – Arts. 14(1), 18(4), 23(4) and 24
- [ICESCR](#) – Arts. 10(3), 12(2)(a)
- [CEDAW](#) – Arts. 5(b), 16(1)(d)
- [CMW](#) – Arts. 4, 12(4), 17(6), 29, 30, 44(2), 45(2)(3)(4)
- [CRPD](#) – Preamble (r) and Arts. 3(h), 4(4), 7, 8(2)(b), 16(5), 18(2), 23, 24(2)(a) and 24(3)(c), 25(b) and 30(5)(d)
- [CED](#) – Art. 25

On adopted **Views by UN Human Rights Treaty Bodies on individual communications** submitted by children or on behalf of children, see <https://opic.childrightsconnect.org/jurisprudence-database/>

FOCUS: UN Convention on the Rights of the Child (UNCRC)

- internationally agreed framework to assess the commitments of **states parties** towards the implementation of the rights enshrined therein to **all children under their jurisdiction**
- followed the 1959 Declaration of the Rights of the Child
- its *travaux préparatoires* began in 1979 following the celebration of the International Year of the Child (1979), with the initial proposal presented by Poland
- adopted by the UN GA on 20 November 1989, came **into force on 2 September 1990**
- almost universal ratification: 196 States parties, except the USA
- generally uncontested (though not fully implemented) standards

Key features of the UNCRC

- **Legal definition of the child and her/his rights**

- **Broader ‘non-discrimination clause’**

- **All rights (CPr+ESCr)→ it reinforces indivisibility**

see CRC-Comm’s GC No.5 (2003): “*no simple or authoritative division of human rights in general or of Convention rights into two categories*”

- **Child as subject of rights (not only protection)**

- evolving capacities
- participation

The **child** in the UNCRC

- UNCRC applies to “*every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.*” (Art. 1)

Two elements:

- any person under the age of **18**
 - under national law, **majority** can be attained earlier
-
- UNCRC does not restrict a state’s discretion to provide under national law the point in time when **childhood begins** (NOTE: most international rights of the child are inapplicable to the period in the womb)
 - UNCRC allows states to set under national law a *lower age* for the **end of childhood**: such end can be determined by *different factors* in different societies and cultures (e.g. the attainment of a certain age, the ability to perform specific acts or specific functions) (e.g. in some countries majority is attained with marriage, military service or economic independence).

UNCRC: Where to draw the line?

- < 18
- = 18
- > 18
- other?

* **18** = standard to which states parties should extend special protection for the greatest number of children under the UNCRC

* **Compromise:** by linking the international definition of childhood to the national law on majority, the UNCRC tries to accommodate existing cultural diversities reflected in national age limits

UNCRC: How to draw the line?

Some possible options

- more flexible (quality):
 - Maturity
 - Capacity
 - Puberty
- somehow more rigid (quantity):
 - Majority
 - Minimum ages
- **Examples of age thresholds?** (*see next slides*)

➤ On certain issues, clear lines in the UNCRC:

* **it prohibits capital punishment and life imprisonment without the possibility of release for all under-18s** (Art. 37)

* **no recruitment into the armed forces or direct participation in hostilities for those under the age of 15** (Art. 38), but subsequent OPAC establishes 18 as the minimum age at which an individual can be conscripted into a state's armed forces or participate directly in hostilities (Art. 2), and 16 as the minimum age for voluntary enlistment (Art. 3.1)

➤ On other issues, the UNCRC requires states parties to set minimum ages themselves:

- a minimum age for **admission to employment** (Art. 32(a))

- a minimum age below which children shall be presumed not to have the **capacity to infringe the penal law** (Art. 40(3)(a))

- in relation to states parties' duty to make **primary education compulsory** (Art. 28), it alludes to the need to set a minimum age for the end of compulsory education

General Guidelines for periodic reports by states parties CRC/C/58 (1996)

§ 24: “states parties are requested to **provide relevant information with respect to article 1 of the Convention**, including on:

- any **differences** between national legislation and UNCRC on the **definition of the child**;
- the **minimum legal age** under national legislation for:
 - Legal and medical counselling without parental consent;
 - Medical treatment or surgery without parental consent;
 - End of compulsory education;
 - Admission to employment or work, including hazardous work, part-time and full-time work;
 - Marriage;
 - Sexual consent;
 - Voluntary enlistment in the armed forces;
 - Conscription into the armed forces;
 - Participation in hostilities;

- *Criminal responsibility;*
- *Deprivation of liberty, including by arrest, detention and imprisonment, inter alia in the areas of administration of justice, asylum-seeking and placement of children in welfare and health institutions;*
- *Capital punishment and life imprisonment;*
- *Giving testimony in court, in civil and criminal cases;*
- *Lodging complaints and seeking redress before a court or other relevant authority without parental consent;*
- *Participating in administrative and judicial proceedings affecting the child;*
- *Giving consent to change of identity, including change of name, modification of family relations, adoption, guardianship;*
- *Having access to information concerning the biological family;*
- *Legal capacity to inherit, to conduct property transactions;*
- *To create or join associations;*
- *Choosing a religion or attending religious school teaching;*
- *Consumption of alcohol and other controlled substances; [...]"*

Why is it useful to draw the line?

“Minimum ages can be very useful in identifying the transition from childhood to adulthood, but one needs to be very careful and clear about their purpose” (Dr. [Angela Melchiorre](#))

Age thresholds balance two concepts:

1. the state’s obligation to provide **special protection**
2. the child as a subject of rights whose **evolving capacities** must be respected

Key Sources of Information on UNCRC

- **UNCRC Travaux Préparatoires:** reflect views of negotiating states on treaty provisions, may explain rationale for wordings, etc.
 - See, S. Detrick, S, *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 1999)
 - See, John Tobin (eds), *The United Nations Convention on the Rights of the Child: A Commentary* (OUP 2019)
- CRC-Comm's **General Comments** (GC) [link](#): non-binding but authoritative interpretations of UNCRC standards adopted by its treaty-monitoring body – *SOFT LAW!*
 - would frequently be relied on by lawyers, activists, government policymakers in seeking to provide detail on specific obligations imposed by UNCRC
- CRC-Comm's other sources:
 - **Concluding Observations** on state periodic reports [link](#) – *SOFT LAW!*
 - **Reporting Guidelines** [link](#)
 - **Reports of 'Days of General Discussion'** [link](#)
 - **Decisions** [link](#)
 - **Views and recommendations on individual communications** [link](#) (non-binding but authoritative and, to some degree, compelling)

all provide information on the substantive content of human rights standards and what may constitute a violation of a particular standard.

UNCRC General Principles (as substantive rights & procedural rights)

- Right to protection **against discrimination** (Art. 2)
- **Best interests** of the child (Art. 3.1)
- Right to **life**, and the state duty to ensure to the maximum extent possible the **survival** and **development** of the child (Art. 6)
- **Right to express his or her views** in “all matters” affecting the child (Art. 12)

UNCRC: a comprehensive approach (between protection & autonomy)

General Principles in Art.2, Art.3, Art.6, Art.12

- identified as 'lenses' to help state efforts (governments, parliaments and the judiciary) in the interpretation of the UNCRC as a whole and thereby guide its implementation;
- are relevant for the realization of all other rights enshrined in the UNCRC;
- in applying the other rights, it is important to determine whether these general principles are realized at the same time.

*Also important Article 5 on 'evolving capacities of the child'

Art. 2 Non-discrimination

*“2.1. States Parties shall **respect and ensure** the rights set forth in the present Convention to each child within their jurisdiction **without discrimination of any kind**, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”*

- ‘other status’ include grounds such as migration status ([GC No.22](#)), health status ([GC No.3](#)), sexual orientation or gender identity ([link](#))
- e.g., requires states to actively identify individual children or groups of children whose rights to be realized may demand special measures to eliminate conditions causing discrimination (e.g. children of minority groups, or from marginal communities): *differential treatments must be “lawful and proportionate, in pursuit of a legitimate aim and in line with the child’s best interests and international human rights norms”* (GC No.22, § 22)

*“2.2. 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.**”*

Art. 6 Life, survival & development

“6.1. States Parties recognize that every child has the inherent right to life.

*6.2. States Parties shall ensure **to the maximum extent possible** the survival and **development** of the child.”*

- * It justifies the absolute ban regarding the death penalty for those below 18 years of age

- * “survival” includes the result of catastrophic events (natural disasters) and situations of distress (armed conflicts, chronic malnutrition, poverty, etc.)

- * “development” holistically includes the physical, mental, spiritual, moral, psychological and social one

(closely associated with the **evolving capacities of the child**)

(usual ‘development criteria’ are AGE & MATURITY: as the child grows the influence of parents diminish)

Art. 3.1 Best interests of the child

*“3.1. **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.**”*

- Very wide scope: all areas of policy and state action/inaction affecting children
- Directly applicable/self-executing, and so can be invoked before national courts
- Indeterminacy issue: what are the child’s best interests? see CRC-Comm’s *GC No.12 for more*

* obligation of states and relevant institutions, in all proceedings affecting the child, to take full account of her/his best interests

(i.e. considering how the child’s rights and interests will be affected by their decisions and actions; even the different degrees of vulnerability of each child, and so carrying out individualized assessment of each child history)

* two roles:

- on control (to ensure that rights and obligations towards children are properly implemented)
- on finding solutions (to oblige decision-makers to assess every possible solutions in a case, choosing that one in the child’s best interests)

Best interests is a ‘threefold concept’ (CRC-Comm, [GC No.14 \(2013\)](#), §6)

- as a ‘***substantive right***’

(right to have his/her best interests assessed and taken as a primary consideration when different interests are taken into account to reach a decision)

- as a ‘***fundamental, interpretative legal principle***’

(the interpretation of a legal provision which most effectively serves the child’s best interests should be chosen)

- as a ‘***rule of procedure***’

(‘the decision-making process must include an evaluation of the possible impact (positive/negative) of the decision on the child concerned’)

(the justification of a decision must show that the right has been explicitly taken into account; and what criteria it is based on)

Art. 12 - Right to be heard

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

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

- Lundy (2007): Art. 12 requires ‘**space**’, ‘**voice**’, ‘**influence**’ and ‘**audience**’
- The child’s right “to be heard” is referred to in all of the CRC-Comm’s GCs:
e.g. GC No.4 on adolescent health, GC No.7 on implementing child rights in early childhood, GC No.10 on children’s rights in juvenile justice
- Key analysis of the child’s right to be heard in **CRC-Comm’s GC No.12** (*next slides*)
- But who has the right to be heard? And who decides who has that right?

An adult mediator has a role in determining the **child capacity** and in deciding on the **ultimate weight** to be accorded to the child’s view

* **‘Child Participation’** has two components:

- procedurally, the right to be heard in all matters affecting the child (allowing him/her to demand to be heard or to refuse to exercise it)
- substantially, the child as ‘active social agent’ in the promotion, protection and monitoring of his/her rights

* Prerequisites for exercising it:

- the debated issue has a relation to the child
- the child must be capable of discernment (BUT no precise age limit to hear a child)
- the child must be able to *freely* express herself/himself
- no UNCRC indication of how to record the child’s opinions (adaptation to the age and the type of case)
- no UNCRC indication of the number of times a child can be questioned

- Read open access [chapter by Lansdown](#) (2022) on Article 12 UNCRC

- * UNCRC does not indicate the **weight of child's opinion**: her/his words will be one of the elements in the case
- * CRC-Comm's [GC No.12 \(2009\)](#) indicates **various settings** where the child has an effective right to express her/his opinion: in the family, in alternative care, in health care, in education & school, in play, recreation, sports and cultural activities, in the workplace, in situations of violence, in the development of prevention strategies, in juvenile justice, in immigration and asylum proceedings, in emergency situations
- * the child's right to express views is ***linked to*** the recognition of the child's ***right to have access to information of good quality and from different sources***
- * GC No.12: all **processes** where a child/children are heard and participate must be: transparent, informative, voluntary, respectful, relevant, child-friendly, supported by training, safe & sensitive to risk, and accountable.
- * the realization of the right to be heard is an immediate obligation of states.
- * increased efforts by states to involve children in public, political life, with 'junior parliaments', consultations amongst youth, television and radio programmes, etc.

Examples on children involved in legislative consultations: e.g. laws on education, health issues, environmental issues, development of action plans on the UNCRC. But still obstacles to have impact on adult-dominated law & policy processes.

Relationship between Arts. 3 and 12 UNCRC

“There is no tension between articles 3 and 12, only a complementary role of the two general principles:

one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children.

In fact, there can be no correct application of article 3 if the components of article 12 are not respected.

Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.”

CRC-Comm, [GC No.12 \(2009\), § 74](#)

Art. 5 Evolving capacities

“5. States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

CRC-Comm’s [GC No.20 \(2016\)](#) on the implementation of the rights of the child during adolescence:

- Addresses the process of maturation and learning
- Explicit recognition of children as ‘rights holders’: they progressively acquire competences, understanding and increasing levels of agency to take responsibility and exercise their rights
- BUT also their right to receive appropriate guidance and directions from parents and guardians to secure the enjoyment of their rights consistently with their evolving capacities

Questions? Reflections?

What rights?

UNCRC rights are commonly categorized as:

- **Protection rights** (e.g. Arts. 19, 32-37): e.g. against exploitation, torture, cruel and inhuman or degrading treatment, illicit transfer abroad, abduction and trafficking, hazardous labour, illicit drugs, arbitrary arrest or detention, recruitment into armed conflict and violations of privacy
- **Participation rights** (e.g. Arts. 12-16, 5): e.g. freedoms of expression and information, of thought, conscience and religion, of association and peaceful assembly; rights to rest, leisure and recreation, right to participate freely in cultural life and the arts; right to due legal process that prevents wrongful punishments and imprisonment
- **Provision rights** (e.g. Arts. 20, 24-29): e.g. to basic necessities that support wellbeing: health care, education, adequate standard of living, free services run by competent staff, support for families, resources to respect everyone's esc-rights, informative and respectful mass media, asylum, and services to aid recovery and reintegration after abuse and emigration
- **Survival rights** (e.g. Arts. 6(2), 24 and 26-29)

What rights?

- **CPr/ESCr** as a key division for the purposes of **state obligations** under UNCRC (see Article 4):
 - ESCr (e.g. Arts. 6(2), 24, 26, 27, 31)
 - CPr (e.g. Arts. 6, 7, 12, 13, 14, 15 16, 17, 19, 40)
- UNCRC also contains articles focused on **specific group of children** which include both categories, e.g.:
 - Art. 22 on refugee children
 - Art. 23 on disable children
 - Art. 30 on minority or indigenous children

Structured approach

CRC-Comm has grouped the UNCRC articles into **10 CLUSTERS** (in the reporting guidelines for states parties) to be used in the dialogue with States parties and its Concluding Observations:

- I General measures of implementation - Arts. 4, 42, 44(6)
 - II Definition of a child - Art. 1
 - III General principles - Arts. 2, 3, 6, 12
 - IV Civil rights and freedoms - Arts. 7, 8, 13, 14, 15, 16, 17, 39
 - V Violence against children - Arts. 19 and 39, 37(a) and 28(2)
 - VI Family environment and alternative care - Arts. 9, 10, 11, 20, 21, 25, 27(4)
 - VII Disability, basic health and welfare - Arts. 6(2), 24, 24(3), 26 and 18(3), 27(1-3), 33
 - VIII Education, leisure and cultural activities - Arts. 28, 29, 30, 31
 - IX Special protection measures (emergency, juvenile justice, exploitation, minorities and indigenous groups) - Arts. 22, 32, 33, 34, 35, 36, 37(a), 37 (b)-(d), 38, 39, 40
- + **Children's rights and the environment** (see *Decision No. 19 on "Implementation of GC No.26 (2023)"*)

e.g. Rights in the UNCRC to freedom from all forms of violence and exploitation

- prevention of abduction, sale or traffic (Art. 35)
- States must take all appropriate measures, including legislative, administrative, social and educational measures to protect children against:
 - all forms of physical and mental violence and ill treatment (Art. 19)
 - economic exploitation and hazardous work (Art. 32)
 - illicit use of narcotic drugs and psychotropic substances (Art. 33)
 - all forms of exploitation and sexual violence (Art. 34)
 - children victims of negligence, exploitation or armed conflict are entitled to physical and psychological recovery and social reintegration (Art. 39)

e.g. Rights in the UNCRC on the administration of justice (Arts. 37(a-d), 40)

- prohibition of torture or other cruel, inhuman or degrading treatment or punishment, including the death penalty
- prohibition of unlawful or arbitrary deprivation of liberty
- humane and respectful treatment of children deprived of liberty
- prompt access to legal and other assistance in the context of deprivation of liberty
- principles of juvenile justice (Art. 40) including the establishment of a minimum age for criminal responsibility (Art. 40)

Qualifications and Limitations on UNCRC rights

Qualifications

- Art. 4: difference in obligations imposed by CPr and ESCR on state parties, but does not include explicitly the concept of “progressive realisation”
- Arts. 24.4 (health) and 28.1 (education): textual reference to “progressively”
- Such concept contextualised by the CRC-Comm (e.g., GCs No. 5 and 19) - see next

No general limitations clause in the UNCRC

Limitations

- Established within children’s rights themselves:
 - Rights to freedom of expression, thought, conscience and religion and assembly - Arts. 13(2), 14(3), 15(2) UNCRC
 - Right to leave any country - Art. 10(2) UNCRC
- No equivalent of Art. 5 ICCPR/ICESCR, Art.17 ECHR

- UNCRC language of internal limitations on CP-rights is clearly influenced (in fact, wholesale adopted from) by the ICCPR. Therefore, the work of the UN **Human Rights Committee** may be instructive (and the *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*)
- As yet, there is very little guidance from the CRC-Comm on limitations on UNCRC rights,
but take a look at the CRC-Comm's **COVID-19 Statement...**

- *“The Committee recognises that **in crisis situations**, international human rights law exceptionally permits **measures that may restrict the enjoyment** of certain human rights in order to protect public health. However, **such restrictions must be imposed only when necessary, be proportionate and kept to an absolute minimum**. Additionally, while acknowledging that the COVID-19 pandemic may have a significant and adverse impact on the availability of financial resources, these difficulties should not be regarded as an impediment to the implementation of the Convention. Nevertheless, **States should ensure that responses to the pandemic, including restrictions and decisions on allocation of resources, reflect the principle of the best interests of the child.**”*

CRC-Comm’s COVID-19 Statement (8 April 2020) [link](#)

What **obligations** are imposed on states parties to the UNCRC?

- UNCRC contains CPr and ESCr, but Article 4 provides that:

*“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 co-operation.**”*

Art. 4 does not include the concept of ‘progressive realization’, BUT this has been contextualized by the CRC-Comm’s, see NEXT SLIDES with examples on:

- [GC No.5 \(2003\)](#) on general measures of implementation for the UNCRC
- [GC No.19 \(2016\)](#) on public budgetting for the realisation of children’s rights

UNCRC obligations (Art. 4) according to the CRC-Comm

- In addressing ESCR under the UNCRC, the CRC-Comm has relied on the ComESCR's work:
- GC No.5, §5: *"there are articles similar to art. 4 ... such as art. 2 of the International Covenant on Economic, Social and Cultural Rights"*
 - GC No.5, §6: the ComESCR *"has issued General Comments in relation to these provisions which should be seen as complementary to the present general comment"*, specifically referring to the ComESCR's General Comments Nos. 3 and 9 on the nature of states parties' obligations and the domestic application of the ICESCR
 - GC No.5 (2003), §7: the second sentence of Article 4 reflects *"a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of 'progressive realisation' of such rights: States need to be able to demonstrate that they have implemented 'to the maximum extent of their available resources' and, where necessary, have sought international cooperation."*
 - GC No.19 (2016), §25: the reference to the language of "to the maximum extent of their available resources" in Art. 4 *"implies that the full realization of those rights will necessarily be achieved progressively"*. Progressivity has been deliberately read into Art. 4 UNCRC

UNCRC obligations (Art. 4) according to the CRC-Comm

- Recommendations from the [2007 Day of General Discussion on resources](#), §§ 24-25:
 - ‘**resources**’ are to be understood in **qualitative and quantitative terms**: not simply financial in nature but include technological, economic, human and organisational resources
 - ‘**available resources**’ are not just limited to those available in the national context but include those available from the international community through international assistance
 - **states should ‘assess “available resources” beyond financial measures’**, emphasising the importance of systematically supporting ‘parents and families which are among the most important “available resources”’ for children
- GC No.19 (2016), §28: Article 4 requires states “to mobilize, allocate and spend sufficient financial resources” and funds allocated to policies and programmes that further the realization of UNCRC-rights should be spent optimally and in line with the general principles of UNCRC.

(in contrast to the ComESCR) in GC No.19, the CRC-Comm appears to treat the “maximum extent of their available resources” obligation as two-fold in nature, stating that **states are required to ensure “the availability and maximization of resources for the rights of all children”**

UNCRC obligations according to the CRC-Comm

CRC-Comm has also used the 'respect, protect, fulfil' tripartite typology of state obligations

- UNCRC rights impose a range of **positive and negative obligations**, repeating reference to the tripartite typology, e.g.:
 - GC No.4 (2003), § 3, on adolescent health and development in the context of the UNCRC;
 - GC No.16 (2013), §§ 26-31, on state obligations regarding the impact of the business sector on children's rights;
 - GC No.17 (2013), § 54, on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts;
 - GC No.15 (2013), §§ 1 and 71-74, on the right of the child to the highest attainable standard of health (Art. 24).
- UNCRC imposes a **duty on the state to fulfil rights** ("to take action to ensure the full realization of the rights of the child"), including that states must facilitate, promote and provide children's rights (see GC No.19, § 27(c))
- the tripartite typology has been located in the section of Art. 4 focused on "for the implementation of the rights recognized in the present Convention" (or "the implementing of children's rights") (see GC No.19, § 27(c)), and therefore considering **the 'respect, protect and fulfil' analytical tool as applying to all rights**

States' immediate obligations under the UNCRC

CRC-Comm has interpreted immediate obligations under the UNCRC in relation to ESCR similarly to another UN treaty body (CommESCR):

- *to take steps*
- *not to take retrogressive measures*
- *to ensure core content of rights*
- *to protect against discrimination (which is extended to age discrimination in the context of esc-rights enjoyment; priority to marginalized & disadvantaged groups of children)*

-> CRC-Comm on states' **immediate obligation to take steps**

- Recommendations from DGD 2007, § 47: “*progressive realization in terms of art. 4 CRC imposes an immediate obligation on States to undertake **targeted measures** to move as expeditiously and effectively as possible towards the full realization of child economic, social and cultural rights*”

(similarly, the CommESCR described it as requiring states to adopt and implement a national strategy or plan of action to realize esc-rights)

->CRC-Comm on states' **immediate obligation not to take retrogressive measures**

- CRC-Comm, GC No.19, §31: “... *In times of economic crisis, **regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations. States parties shall demonstrate that such measures are necessary, reasonable, proportionate, non-discriminatory and temporary and that any rights thus affected will be restored as soon as possible. ...***”
- CRC-Comm, GC No.17, §55: “... *no regressive measures in relation to the rights under article 31 are permitted. Should any such deliberate measure be taken, the State would have to prove that it has carefully considered all the alternatives, **including giving due weight to children’s expressed views on the issue**, and that the decision was justified, bearing in mind all other rights provided for in the Convention.*”

(similarly to the CommESCR, but the added requirement of children’s expressed views)

E.g.

- cuts to children’s esc-rights related programming
- withdrawal of funding for children’s esc-rights related services
- cancellation of policies focused on advancing children’s esc-rights achievement

-> CRC-Comm on states' **immediate obligation to ensure the core content of rights**

- Recommendations from [DGD on Resources \(2007\)](#): *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.***
- Similar approach of the CommESCR on the 'minimum core' obligation on esc-rights:
 - to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights (as per CommESCR's GC No.3 (1991))
 - is not dependent on the availability of resources

E.g.

- essential primary healthcare for children
- most basic forms of education for children

Other immediate obligations imposed by ESr under UNCRC

- Right to be protected from economic exploitation and from performing any work that is likely to be hazardous or harmful to child's development (Art. 32)*
- Obligation to provide free and compulsory primary education to all (Art. 28(1)(a))*
- The liberty of individuals and bodies to establish and direct educational institutions (Art. 29(2))*

* *Adapted from Committee on Economic, Social and Cultural Rights' General Comment No. 3 on the Nature of States Parties' Obligations (1990)*

CRC-Comm on **states' obligation of international cooperation** (Art. 4 UNCRC)

- Art. 2 refers to states' responsibility to all children "within their jurisdictions"
- Art. 4 does not refer to jurisdiction, apparently resulting in the imposition of extraterritorial obligations

For the CRC-Comm:

- *'Art. 4 emphasizes that the implementation of the UNCRC is a cooperative exercise for States'*
- *the UNCRC should form the framework for international development assistance*
- International cooperation is referred in some esc-rights in the UNCRC:
 - rights of children with disabilities, Art. 23(4)
 - refugee children's rights, Art. 22(4)
 - right to health, Art. 24(4)
 - right to an adequate standard of living, Art. 27(4)

What are the **key strengths** and **weaknesses** of the standards set out in the UNCRC?

Initial Concerns about the UNCRC

- Northern bias and the ‘infantilization of the South’ (Pupavac)
- Many issues fudged, e.g.:
 - No minimum age
 - No right to choose a religion
 - No prohibition on physical punishment
 - No absolute prohibition on children taking a direct part in armed conflict
- Many states only ratified the UNCRC subject to, sometimes significant, generalised, and vague, reservations

Key Omissions from UNCRC

- Does not pay adequate attention to some groups of children
 - Girl children
 - Street children
 - LGBTIQ+ children
 - The environment...
- No general prohibition on age discrimination

(see A. Daly, R. Thorburn Stern, and P. Leviner 'UN Convention on the Rights of the Child, Article 2 and Discrimination on the Basis of Childhood' (2022) [link](#))

UNCRC weaknesses

- **Child marriage**
 - not per se reflected in the UNCRC, but Art. 24(3) calls for the abolishment of traditional practices prejudicial to the health of children;
 - possible connection to other rights (freedom of expression/protection from abuse/from harmful traditional practices);
 - Art. 16(2) of [CEDAW](#) prohibits states parties from permitting or giving validity to a marriage between persons who have not attained their majority.
- **Healthy environment**
 - only implicitly protected under Art. 6 (life, survival and development), Art. 24 (health, food, water), Art. 27 (adequate standard of living), Art. 31 (play and culture)
 - [GC No.26 \(2023\)](#) on children's rights and the environment with a focus on climate change
- **Children with HIV/AIDS**
 - only [GC No. 3 \(2003\)](#) on HIV and the right of the child (connection with some rights)
- **Sale of children** (only subsequent OPSC)
- **Children in armed conflict** (only subsequent OPAC)
- **Complaint mechanism** (only subsequent OPIC)

UNCRC strengths

- **Protection under law:** it is a legal instrument with a universally agreed set of non-negotiable obligations and standards.
- **Role of the family:** parental responsibilities are directly referenced (Arts. 5, 18 and 27), and references to parenting and the role of families are made throughout in no less than 23 of the articles of the convention (*see next slide*)
- **Views of the child** (Art. 12)
- **Right to education and play** (Arts. 28, 29)
- **Freedom of thought, conscience and religion**
- **Identity** (Art. 8)
- **Role of state** (Art. 44)
- **Role of NGOs and NHRIs** (Art. 45)

UNCRC references to the role of parenting and families [link](#)

Article 3 Best Interests of the Child

Article 5 Parental Guidance

Article 7 Registration, Name, Nationality, Care

Article 8 Preservation of Identity

Article 9 Separation of Parents

Article 10 Family Reunification

Article 14 Freedom of Thought, Belief and Religion

Article 16 Right to Privacy

Article 18 Parental Responsibilities; State
Assistance

Article 19 Protection from all forms of violence

Article 20 Children deprived of a family

Article 21 Adoption

Article 22 Refugee Children

Article 23 Children with disability

Article 24 Health and health services

Article 26 Social Security

Article 27 Adequate Standard of Living

Article 29 Goals of Education

Article 30 Children of Minorities

Article 37 Detention

Recommendations/points of reflection

- Make use of what we already have!
- Childhood as process, not fixed status
- Children as 'being' and 'becoming'
- Not only the 'right' age, but also the 'right' approach
(Protection? Autonomy? Link with other rights?)

First and Second Optional Protocols to the UNCRC

- Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC)
- Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict (OPAC)

The provisions of these OPs are binding **hard law**.

OP-CRC on the sale of children, child prostitution and child pornography (OPSC)

- [link](#)
- Entry into force: 18 January 2002 / States parties: 178
- Ratification [status](#) update of OPSC

➤ Obligations on states parties:

- prohibit and criminalize the sale of children and child prostitution and pornography (Arts. 1 and 3) as defined in the OPSC (Art. 2) with adequate penalties
- establish jurisdiction over the offences (Art. 4)
- ensure international assistance & cooperation in investigations and criminal or other procedures (Arts. 5 and 7)
- protect child victims (Art. 8) and provide assistance for their physical and psychological recovery, social integration and repatriation (Art. 10.2)
- prevent such phenomena (Art. 9), combat its root causes (Art. 10.3)

OP-CRC on the involvement of children in armed conflict (OPAC)

- [link](#)
 - Entry into force: 12 February 2002 / States parties: 173
 - Ratification [status](#) update of OPAC
- Obligations on **state armed forces**
- direct participation in hostilities and compulsory recruitment only for persons over 18 (Arts. 1 and 2)
 - voluntary recruitment minimum age – over 15 (Art. 3.1)
 - genuinely voluntary, with the informed consent of parents or guardians (Art. 3.3)
- Obligations on **non-state armed forces**
- absolute prohibition of recruitment or use of children in hostilities (Art. 4)

Monitoring and Enforcement Mechanisms for the UNCRC

➤ **Committee on the Rights of the Child (CRC-Comm)**

- instituted by Art. 43 UNCRC
- composed by 18 independent experts in charge of:
 - ✓ **receiving state reports** on implementation of the UNCRC and its three Optional Protocols (OPSC, OPAC, OPIC), and adopting related **Concluding Observations**
 - ✓ **drafting General Comments** (interpretation of treaty provisions and thematic issues)
 - ✓ **promoting** thematic debates & studies (e.g. **Days of General Discussion** to foster a deeper understanding of contents & implications of the UNCRC in relation to specific articles or topics) [link](#)
 - ✓ **considering individual and inter-state Communications** and **issuing Views** under the OPIC
 - ✓ **carrying out Inquiries** into allegations of grave or systematic violations of the rights enshrined in the UNCRC and its OPSC and OPAC, under the OPIC
 - ✓ **holding three sessions per year** (a three-week plenary and a one-week pre-sessional working group) in Geneva

•

A Brand New Dawn for Children's Rights Protection: OP-CRC on a communications procedure (OPIC)

- A milestone for children's rights, and the first UN-level mechanism aimed at children's communications
- Adopted in 2011 and in force since April 2014 (see [text](#))
 - ratification [status](#) update of OPIC: 52 state parties, 15 have signed but not yet ratified it, and 131 have taken no action.
 - ratification trends: 54% Europe and Central Asia; 22% Latin America and the Caribbean; 12% East Asia and Pacific; 6% Sub-Saharan Africa;
more data at <https://opic.childrightsconnect.org/ratification-status/>
- OP-ICESCR was a key development leading to OPIC development
- OPIC largely follows the format of other complaints mechanism to HRs treaties

OPIC

➤ Obligations of states parties to the OPIC:

- allow the presentation of **individual communications** by persons under 18 years of age or their legal representatives to the CRC-Comm *in case of alleged violations by the state, of the rights enshrined in the UNCRC and the other Optional Protocols, after the exhaustion of domestic remedies*

➤ CRC-Comm's competences under OPIC:

- **receive** communications (Art. 5)
- **apply interim measures** in exceptional circumstances to avoid imminent irreparable damages to the child victim(s) of the alleged violation(s) (Art. 6)
- **consider** the admissibility communications (Art. 7)
- **make available** its **good offices** for a friendly settlement (Art. 9)
- **initiate inquiry procedures** for grave or systematic violations ([link](#)) (Art. 13)
- **publish views and recommendations** on the communications (Art. 10)

* State party involved must give such views and recommendations “due consideration” (Art. 11) and submit a written response on the actions and measures taken in light of them. Thus, CRC-Comm’s decisions under OPIC impact domestic laws and policies relating to children and can potentially bring changes to the national legal regime!

OPIC key features

- establishes a **complaints procedure**
- includes an **inquiry procedure** for systematic violations (Arts. 13, 14)
- permits **inter-state communications** (Art. 12)
- The [rules of procedure](#) for using the complaints mechanism are to be **child-sensitive** (Art. 3)
- **Safeguards** must be introduced **to prevent potential manipulation of children**, and the CRC-Comm can decline to consider communications that are not in the **child's best interests** (Art. 3)

OPIC key issues

Art. 10.4

*“When examining communications alleging violations of economic, social and cultural rights, the CRC-Comm **shall consider the reasonableness of the steps** taken by the state party in accordance with article 4 of the UNCRC. In doing so, the Committee shall bear in mind that **the state party may adopt a range of possible policy measures for the implementation** of the economic, social and cultural rights in the Convention.”*

Activities carried out under the OPIC

- Art. 44(5) UNCRC: the CRC-Comm must report every two years to the UNGA on the operation of the UNCRC
- CRC-Comm's work under OPIC so far:
 - most cases were presented in 2021
 - around 71 pending cases (<https://opic.childrightsconnect.org/crc-pending-cases/>)
 - around 92 sets of views adopted (<https://opic.childrightsconnect.org/crc-trends/>)
 - around 31 cases (merits) with violations
 - around 1 case (merit) with no violation
 - around 30 complaints declared inadmissible on a range of grounds
 - around 30 discontinued cases

OPIC trends

- Over 300 individual communications received.
- Around 71 pending cases: (on deportation, separation from parents, unaccompanied child migrant, right to education, children in the justice system, detention, alternative care, right to adequate standard of living, environment, family reunification, removal of children abroad by one parent, visiting rights & custody)

(**countries:** Switzerland, Spain, France, Finland, Denmark, Argentina, Chile, Georgia, Ireland, Belgium, Czech Rep, Luxemburg, Paraguay, Peru)
- Around 92 sets of Views adopted: (on asylum claim or deportation, discrimination, protection of family, children deprived of liberty, protection against all forms of violence, right to health, torture, right to identity, visiting rights & custody, rights of persons with disabilities, right to education, sexual violence, privacy, juvenile justice, child abduction, access to justice, right to adequate standard of living, enforced disappearance)

(**countries:** Spain, Denmark, Chile, Slovakia, Georgia, Belgium, Switzerland, France, Germany, Brazil, Argentina, Turkey, Finland, Costa Rica, Panama, Paraguay)
- Emerging strategy to address the backlog of work faced by CRC-Comm: consideration of **multiple cases together within individual decisions**
- For critical updates on existing communications, see [leidenchildren'srightsobservatory](#) (e.g., for Case Notes, CRC-Comm's 5 follow-up progress reports on individual communications adopted so far)

EXERCISE/points of reflection

- Overall, does OPIC constitute a major step forward in terms of the effective protection of children's rights at the international level?
- What requirements do children's rights impose vis-à-vis such a complaints mechanism in terms of:
 - the drafting/design of such a mechanism
 - the content/operation of such a mechanism
- see forthcoming conference in April 2024 **'10 years of OPIC - Pathways of Access to Justice for Children'** [link](#)

Other relevant UN Monitoring Bodies and Procedures

Appointed by the UN SG:

- **UN Special Representative of the SG on Violence against Children** (since 2007) [link](#)
- **UN Special Representative of the SG for Children in Armed Conflict** (since 1997) [link](#)

Appointed by the UN Human Rights Council:

- **UN Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography** (since 1990) [link](#)

Mandate: visits, awareness-raising, recommendations, cooperation with UN entities, states & others, and reports to the UN GA or the UN Human Rights Council

- Other [UN Treaty Bodies](#) and [UN Special Procedures](#)
- Other General UN bodies (e.g. UN SC's WG on Children in Armed Conflict [link](#))
- UNICEF – autonomous, specialized agency www.unicef.org

Useful Online Resources

Useful websites:

- **UN Committee on the Rights of the Child**, <https://www.ohchr.org/en/treaty-bodies/crc>
- **OPIC official documents**, <https://opic.childrightsconnect.org/official-documents/>
- **Children's Rights Information Network (CRIN)**: <http://www.crin.org>
- **UNICEF Innocenti Research Centre**: <http://www.unicef-irc.org/>
- **Child Rights Connect** (formerly ad hoc NGO Group for the drafting of UNCRC): <http://www.childrightsconnect.org>

Recommended **journals** to consult periodically:

- ***The International Journal of Children's Rights*** (Brill) [link](#)
- ***Child Protection and Practice*** [link](#)

Readings available in the course platform:

Required:

- Nolan, Ch. 17 'Children's Rights' in D. Moeckli, S. Shah, S. Sivakumaran and D. Harris (eds), *International Human Rights Law*, 4th Edn, (Oxford: OUP, 2022), pp. 339-358.
- H. Steiner & P. Alston, 'Children' in *International Human Rights in Context* (2nd ed., 2000), pp. 511-524.
- G. Van Bueren, 'The Definition and Status of the Child in International Law' in *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff, 1995), pp. 32-51.
- Vandenhoe W. 'The Convention on the Rights of the Child' in F. Gomez Isa & K. de Feyter (eds) *International Human Rights Law in a Global Context* (Bilbao: University of Deusto 2009), pp. [451-472](#).
- ComCRC, *General Comment No. 5 on General measures of implementation for the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/5. [link](#)
- N. Peleg, 'International Children's Rights Law: General Principles' in T. Liefaard, U. Kilkelly & S. Hoadley (eds), *International Law on the Rights of the Child* (Amsterdam: Springer, 2018), pp. 135-153. [link](#)
- ComRC, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc. CRC/C/GC/14 (2013) [link](#)
- ComRC, *General Comment No. 12 on the child right to be heard*, UN Doc. CRC/C/GC/12 (2009) [link](#)
- Varadan S. 'The Principle of Evolving Capacities Under the UN Convention on the Rights of the Child' in 27 (2019) *International Journal of Children's Rights*, pp. [93-116](#).
- S. Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children' (2014) 22(1) *International Journal of Children's Rights*, pp. 205-225.

Recommended:

- Lansdown G. *The Evolving Capacities of the Child*. Florence: UNICEF Innocenti Research Centre, 2005, pp. [1-61](#).
- 'Article 12. The Right to Respect for the Views of the Child' in Tobin J. (ed.) *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019), pp. 397-434.
- Lundy L. (2007) "'Voice" is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child' in 33(6) *British educational research journal*, pp. 927-942.
- Lundy L. (2018) 'In defence of tokenism? Implementing children's right to participate in collective decision-making' in 25(3) *Childhood*, pp. 340-354.
- N. Fairhall and K. Woods 'Children's Views on Children's Rights: A Systematic Literature Review' in (2021) *The International Journal of Children's Rights*. [link](#)
- J. E. Doek, Report on the Decisions of the Committee on Admissibility: Summary and Comments, October 2020.
- J. E. Doek, Updated Report on the Decisions of the Committee on Admissibility: Summary and Comments, May 2022. [link](#)
- A. Nolan & U. Kilkelly, 'Children's Rights under Regional Human Rights Law – A Tale of Harmonisation?' in C. Buckley et al (eds), *Harmonisation of International Human Rights Law* (The Hague: Martinus Nijhoff, 2016), pp. 296-322.
- A. Nolan, 'Children's Economic and Social Rights' in T. Liefaard, U. Kilkelly & S. Hoadley (eds), *International Law on the Rights of the Child* (Amsterdam: Springer, 2018), pp. 239-258.
- L Lundy, K Orr & C Marshall, 'Children's rights budgeting and social accountability: Children's views on its purposes, processes and their participation' in (2020) 4 *Global Campus Human Rights Journal*, pp. 91-113. [link](#)
- C. Altafin (ed) [Special focus: Selected developments in the area of children's rights](#) in (2020) 4.1 *GCHRI*.
- C. Altafin, 'Child rights strategic litigation on deprivation of liberty for migration-related reasons: Review of selected cases in Asia and Europe' in (2022) 6.2. *Global Campus Human Rights Journal*, pp. 253-286. [link](#)

THANK YOU!

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