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As a legal commentary on the Convention on the Rights of the Child (CRC) and its Protocols, this work seeks mainly to situate and contextualise the legal content of the children’s rights provisions included in these documents in a comprehensive and concise fashion, all the while addressing the legal challenges and impacts of developments that have taken place in the last three decades since the adoption of the CRC. It also engages with other disciplines and fields, in particular international relations and childhood studies.

The CRC and its Optional Protocols are central to children’s rights law as it is globally codified.¹ No human rights treaties are as widely ratified as the CRC. Counting 196 States Parties, CRC has been ratified by all states with the exception of the United States. The CRC is therefore relevant universally as the foundational document that sets out the tenets of children’s rights law. The CRC espouses global normative standards on children’s rights that are binding for states and relevant for other actors in the children’s rights landscape, including inter alia parents, legal guardians, extended family, the broader community, institutions and organisations working with children.

In what follows, we first outline the historical origins of the CRC. Next, we provide a legal perspective on the CRC and its Protocols. The third section contextualises the CRC and its Protocols in human rights law, and the fourth section relates children’s rights to other disciplines such as the sociology of

childhood. The fifth section identifies gaps and invisibilities, and the sixth section explains the approach taken in this Commentary.

A. ORIGINS OF THE CRC

I.04 The CRC is often portrayed as a natural extension of the 1924 Declaration of the Rights of the Child and the 1959 UN Declaration of the Rights of the Child. Born out of the experience of World War I, the 1924 Declaration is quite concise in the way it focuses on children’s rights. It focuses on protection and provision rights: to be given the means requisite for children’s material and spiritual development, to be provided for with food, healthcare, assistance for disability, opportunity for rehabilitation in case of conflict with the law, assistance for orphaned or homeless children. It also gives priority to children in receiving emergency relief. The CRC is also a product of the post-World War II human rights era, that was hailed by the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. There are a number of provisions of the UDHR that have influenced the development of children’s right law down the road. Art. 25.2 UDHR on the right to a standard of living adequate for health and wellbeing pronounces childhood and motherhood as periods characterised by a right to special care and assistance. Art. 26 on the right to education specifies that everyone has the right to education and that it should be ‘free, at least in the elementary and fundamental stages’. Compulsory elementary education, available technical and professional education and accessible higher education are all required by art. 26 UDHR.

I.05 The 1959 UN Declaration of the Rights of the Child, which followed from both the 1924 Declaration of the Rights of the Child and the UDHR, balances protection and provision rights for children with accents on physical, mental, moral, spiritual and social development alongside freedom and dignity. It also introduces principles to guide children’s rights such as non-discrimination and best interests. It places the child in the nexus of the state, parents and the broader society. The 1959 Declaration, proclaiming that ‘mankind owes to the child the best it has to give’, (Preamble), contains ten principles outlining numerous rights of children. Principle 1 concerns the right to enjoy the rights contained in the Declaration without discrimination. Principle 2 centres on the right to enjoy special protection, facilities and opportunities for holistic development in freedom and dignity. The principle also introduces the idea of the ‘best interests of the child [which] shall be the paramount consideration’ and ‘the guiding principle of those responsible for
his education and guidance’. Subsequent principles include the right to a name and nationality from birth (Principle 3); the right to social security, the right to health pre- and post-birth, the right to adequate nutrition, housing and medical services (Principle 4); the rights of children with disabilities to ‘special treatment, education and care’ (Principle 5); the right to education that is free and compulsory at a minimum in the elementary levels, echoing art. 26 UDHR, and the right to play and recreation (Principle 7). The Declaration also underscores the importance of the family unit, particularly the responsibility of the parents and the uninterrupted relationship between mother and child, in the upbringing of children (Principle 6). In addition, Principle 6 also points to the duty of states to provide care for children without family and to assist children and families without adequate means. Several principles focus specifically on protection of children. For instance, Principle 8 states that children have the right to be among the first to receive protection and relief while Principle 9 focuses on the protection of children from neglect, cruelty and exploitation, including trafficking in children and exploitative labour. Principle 10 centres on the right of children to be protected from practices fostering racial, religious or any other form of discrimination and to be raised with values supporting understanding and peace among peoples. In many ways, the content of the 1959 Declaration forms the groundwork for the CRC. The year 1979, the 20th anniversary of the 1959 Declaration, was proclaimed the International Year of the Child by the UN General Assembly. On the occasion of the International Year of the Child, Poland called for the adoption of ‘an international, legally binding’ children’s rights convention ‘on the basis of principles and provisions contained in the United Nations Declaration of the Rights of the Child’. During the first discussions of the resolution at the then UN Commission on Human Rights in 1978, several delegations also referred to the 1959 Declaration, either hoping to retain it as a benchmark of international standards on children’s rights or calling for the new convention to go beyond the 1959 declaration, taking into account the developments in the recognition and protection of children’s rights since.

Of course, besides the historical evolution of children’s rights and their eventual codification, the CRC is also part of the history of international human rights law (see section B.2. below, ‘Children’s Rights as Human Rights’), as well as it is a product of an era characterised by the realities of the Cold War where two rival factions were competing politically, economically
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and socially for dominance, including over global normative agendas during the decades long process of increasing codification of human rights in international treaties in the post-World War II period. According to Alston, Poland, a part of the communist bloc at the time, submitted a draft for a children’s rights treaty in 1978, not only on the occasion of the International Year of the Child (1979) but also to counter the influence that the US was exerting on the human rights agenda through President Jimmy Carter’s involvement. In a similar vein, the proposed treaty on children’s rights would also serve as an avenue to advance economic, social and cultural rights that were prominently on the agenda of the communist bloc, especially at a time when the UN Convention against Torture, a civil and political rights based treaty was being negotiated. Alston notes that by mid-1980s, the widespread support for a children’s rights convention globally, including by UNICEF and by civil society actors eventually led to the Western bloc replacing its stalling tactics and seeking to include civil and political rights protections in the negotiated convention. Of course, by the time the CRC was adopted and was opened for ratifications, the Cold War was in the process of ending and the new treaty offered a promising combination by overcoming the civil and political versus economic, social and cultural rights divide and moving beyond Cold War constraints. The two sets of rights contained in the CRC are nonetheless recognised in art. 4, where a facility of progressive realisation, including through international cooperation, is also foreseen for economic, social and cultural rights in line with Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

I.07 In the same vein, the CRC has also been notable for its inclusive drafting process: not only states whose representatives sat at the then Human Rights Commission but also delegates from other UN Member States and States not member to the UN at the time as well as representatives of non-governmental organisations were given the opportunity to participate in the drafting process both at Geneva and at other conferences and workshops held regionally and sub-regionally. Whether it was also geographically inclusive is more open to debate. Alston credits ‘the beginning of the end’ of the Communist Bloc versus Western Bloc rivalry that characterised the initial negotiations and UNICEF’s facilitation of the involvement of developing countries in the

7 Ibid.
8 Ibid., 6–7.
drafting process for opening up the CRC to culturally diverse perspectives. Others have nonetheless argued that the global, Western image of childhood is dominant in the CRC. In fact, Kaime has pointed out that ‘[a]part from a limited reference in the preamble, the CRC does not generally extol culture or tradition as a positive value in the promotion and protection of children’s rights’. It is also noted that the Western image of childhood is at odds with the concrete lifeworlds of children in the global South, not only because of cultural reasons, but also and primarily due to fundamentally different socio-economic contexts. Supporting this reading is the fact that the CRC does not systematically accommodate different cultural formulations of family, community, development and care and only does so in the context of a select few issues such as adoption or indigenous children’s rights. The dominant Western orientation can also be seen, for example, in the protection rights given to children. Ansell has pointed out how protection rights for children in economic activities do not necessarily serve children’s best interests, since these rights may limit their chances for socio-economic improvement. Similarly, the homogenous child image within children’s rights has also been criticised from a Western perspective, since it excludes, for example, children living in poverty.

Another important fact regarding the CRC that must be underscored is that it came about without the participation of children in the drafting process. As Liebel puts it:

Although the CRC was the result of a normative struggle that expanded over many decades, involving conflicting conceptions of childhood and children, their needs, their appropriate place in family and society and, accordingly, competing conceptions of the rights they should obtain, the eventual document came into being without the

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active involvement of children. Seen from the perspective of children, the rights enshrined in the CRC constitute granted rights, in whose elaboration children had no role.17

The negotiations on the CRC took place over a period of ten years from 1978 to 1989. A first Polish draft was presented in 1978 and a revised draft presented in 1980.18 Based on this revised draft, the first reading took place between 1979 and 1988. Detrick credits the method of consensus used in the drafting process for the lengthiness of the negotiations as well as the ‘abandonment of certain proposals [such as the limitation of medical experimentation on children or upper age-limit for prohibition of children’s participation in armed conflict], notwithstanding the support of a clear majority’ but also in allowing for most issues to be resolved in the Working Group.19 On issues of contention, smaller drafting groups were set, ‘usually made up of the most interested delegations, whose task was to consider a controversial proposal thoroughly and agree upon a version that the Working Group could accept’.20

The technical review of the draft ‘in accordance with United Nations technical standards and practices regarding that kind of international instrument’ was requested by the chairman in a letter to the UN Secretary-General and undertaken in 1988.21 Subsequently, a second reading took place between 1988 and 1989, when the instrument was finalised. The finalised instrument was then submitted by the Working Group to the UN Human Rights Commission for discussion and approval.22

**B. A LEGAL PERSPECTIVE ON THE CRC AND ITS OPTIONAL PROTOCOLS**

The CRC consists of three parts. Part I offers a definition of the child, contains general principles and obligations, and a detailed list of specific rights and obligations. The CRC is fairly comprehensive in scope, and covers civil, political, economic, social and cultural rights. Part II deals with the CRC’s monitoring body, the Committee on the Rights of the Child. Part III holds general treaty law provisions.

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19 ibid., 22.
21 Ibid., 167.
22 Detrick, note 18, 1.
The CRC is often said to contain the ‘three P’s’ of children’s rights, namely protection, provision and participation. Hammarberg first suggested in 1990 that the articles in the CRC may be more easily understood when grouped into the ‘three P’s’:

Provision – the right to get one’s basic needs fulfilled – for example, the rights to food, health care, education, recreation and play.

Protection – the right to be shielded from harmful acts or practices – for example, to be protected from commercial or sexual exploitation, physical or mental abuse, or engagement in warfare.

Participation – the right to be heard on decisions affecting one’s own life.  

In 1994, Lansdown suggested that these three principles of provision, protection and participation underlie the CRC’s relevant articles, with provision articles denoting social rights, participation articles outlining civil and political rights and protection articles denoting rights to be ‘safe from discrimination, physical and sexual abuse, exploitation, substance abuse and conflict’. Over time, the terminology of ‘three P’s’ became a widely used and rarely challenged concept in children’s rights research and policy. The use of ‘three P’s’ to denote a typology of rights under the CRC has not gone without criticism. Quennerstedt believes that using broader human rights language and typologies such as that of civil, political, economic, social and cultural rights instead of using specific models such as the ‘three P’s’ in relation to children’s rights, is more appropriate for mainstreaming children’s rights. She argues: ‘Approaching children’s rights with human rights concepts augments the autonomy/self-determination part of children’s rights’. Vandenhole has criticised the three P’s typology on legal technical grounds:  

the term ‘provision rights’ tends to confirm the outdated misunderstanding or misrepresentation that economic and social rights are exclusively about provision. It has meanwhile been widely accepted that the obligations relating to economic, social and cultural rights are to be understood as obligations to respect, to protect and to fulfil, and that the latter obligation consists of sub-obligations to facilitate, to promote

26 Ibid., 630.
27 Ibid., 631.
and to provide. Only the sub-obligation to fulfil-provide requires considerable mobilisation of resources.  

In fact, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified that the fulfil-provide obligation is triggered only when ‘individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal’. Thus, ‘[p]rovision, and the concomitant need for the mobilisation of resources’ corresponds to a very limited part of socio-economic rights.

The CRC is also said to embody general principles of children’s rights as reflected in various provisions of the treaty. These general principles are non-discrimination and the right to equality (art. 2); the best interests of the child (art. 3); right to life, survival and development (art. 6) and respect for the views of the child, also dubbed the participation principle (art. 12). In fact, the so-called general principles were first introduced by the CRC Committee as a guidance on the implementation of the CRC’s various provisions, giving the four principles the heading of ‘General Principles’ whereas other provisions were grouped under other headings such as ‘Civil rights and freedoms’ or ‘Basic health and welfare’. The CRC Committee later also identified these general principles as general measures of implementation under GC 5. Abramson has criticised the use of the notion ‘General Principles’ and suggested ‘Umbrella provisions’ instead. The same author also argues that ‘the four general principles’ has become a vacuous cliché. Comparing the four general principles with ‘the trainer-wheels on a child bicycle’ (that is a simplification for didactic reasons), he laments that ‘leaving the trainers on for so long’ has led to problems.

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B. A LEGAL PERSPECTIVE ON THE CRC AND ITS OPTIONAL PROTOCOLS

The two children’s rights specific principles among the general principles are the best interests of the child and the right to life, survival and development.\(^\text{33}\) The principle of the best interests of the child far predates the CRC and has a long history, particularly in family law courts in the US legal system.\(^\text{34}\) Although the principle of best interests does not have a universal definition, the CRC Committee has noted that the best interests rule requires states to prioritise children’s interests when they are balancing different interests.\(^\text{35}\) The substantive content of this prioritisation, on the other hand, is not well-defined. Zermatten considers, for instance, that the principle of survival and development may provide guidance on how the best interests principle can be put into action in concrete terms.\(^\text{36}\)

The focus on a child’s survival and development is a central tenet of the CRC, which is heavily influenced by the developmental vision based on a ‘fictitious universal child’.\(^\text{37}\) The primarily biological model of ‘a gradually maturing organism’ is said to underlie the way in which the CRC sketches the child.\(^\text{38}\) The developmental model is made explicit in art. 6 on right to life and survival and development as well as art. 5 referring to the child’s evolving capacities. In addition, it influences the rights to an adequate standard of living (art. 27) and education (arts 28–29).\(^\text{39}\) Mayall argues that the focus on the child as a ‘becoming’ informed by the developmental model risks monopolising policy, implementation and academic debates due to its unquestioned uptake.\(^\text{40}\) The alternative model proposed, especially by the sociology of childhood approach, focuses on childhood as a 'historically and culturally contingent construction' and on children as active and meaningful social agents in their own right.\(^\text{41}\)


\(^{35}\) Committee on the Rights of the Child (CRC Committee), GC 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), para. 40.


\(^{37}\) Ashleigh Barnes, ‘CRC’s Performance of the Child as Developing’ in Invernizzi and Williams (eds), The Human Rights of Children. From Visions to Implementation, 392.


Non-discrimination and participation principles inform human rights law more generally and are not particular to children’s rights law. Many core human rights conventions include the principle of non-discrimination as a central element and focus on participation rights. Tobin has, for instance, argued for an elevation of two other principles, namely due deference to parents and evolving capacities of the child, both found in art. 5 to the status of general principles to guide the implementation of the CRC. Evolving capacities has been considered a balancing principle that allows children to be accorded more protection when they are younger and more active exercise of their rights as they get older.

Hanson and Lundy note that despite the frequent reference to arts 2, 3, 6 and 12 as the ‘general principles’, ‘it is not always the whole of the Article that is engaged’. For instance, the focus is generally on the first paragraphs of arts 2, 3 and 12.

The CRC Committee’s practice of referring to the so-called general principles within its general comments (GCs) has also been uneven. GCs 6, 7, 9, 10, 12, 14, 16, 17, 18, 19 and 20 of the CRC Committee refer to or dedicate a section to the general principles. On the other hand, there is no mention of the general principles in GCs 8, 11, 13 and 23. Other GCs offer alternative formulations. For instance, the 2013 GC 15 refers to ‘Principles and premises for realizing children’s right to health’, where it makes a reference to ‘The indivisibility and interdependence of children’s rights’ and to ‘Evolving capacities and the life course of the child’ in addition to the general principles. The 2017 GC 21 defines a child rights approach in line with the UNICEF

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42 See: arts 24 and 26 ICCPR, arts 2 and 10 ICESCR, arts 1, 2 and 5 Convention on the Elimination of All Forms of Racial Discrimination; arts 1 and 2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); art. 5 Convention on the Rights of Persons with Disabilities, art. 7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.


45 Lansdown, Evolving Capacities of the Child, 3.


47 Ibid.

48 CRC Committee, General comment (GC) 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.
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definition as being guided by ‘child rights standards and principles from the
Convention and other international human rights instruments ‘...’ particularly: non-discrimination; the best interests of the child; the right to life, survival and development; the right to be heard and taken seriously; and the child's right to be guided in the exercise of his or her rights by caregivers, parents and community members, in line with the child’s evolving capacities’. ⁴⁹ GC 22 refers to the so-called general principles as ‘overarching principles’. ⁵⁰ Hanson and Lundy’s review of a number of Concluding Observations by the CRC Committee has led the authors to conclude that there is considerable overlap in the Committee’s treatment of state obligations linked to the so-called ‘general principles’. In fact, while the four arts 2, 3, 6 and 12 are listed separately under a sub-heading of general principles, they are treated ‘with similar issues and phrasing reoccurring throughout’. ⁵¹ This may carry the risk of confounding the content and even discounting the various obligations under these different articles as they might end up treated only as parts of a broader whole.

In sum, the four general principles serve an indisputable didactic purpose, but there is growing need for consistent language and a clear theory: On which grounds can general/overarching/umbrella principles be identified? What role do they play in the interpretation and application? What is their legal status? A critical engagement with the notion of ‘general principles’ is necessary and useful to discern what relevance overarching or general principles may have with respect to the realisation of children’s rights globally and the implementation of the CRC in policy-making, litigation as well as the elaboration of new normative frameworks to respond to contemporary challenges such as the advances in information and communication technologies or medical technologies or the rise of non-state actors as global political and economic players.

1. A Multi-tiered Approach

Ordinarily, human rights law as codified in international treaties regulates the relationship of states to individuals and vice versa. The same is true for children’s rights law as codified in the CRC, with one difference: children’s rights law designates a multi-tiered approach, where parents and caregivers of

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⁴⁹ CRC Committee, GC 21 (2017) on children in street situations (21 June 2017), CRC/C/GC/21, para. 11(b).
⁵¹ Hanson and Lundy, ‘Does Exactly what it says on the Tin?’, 294.
children feature at a middle tier between individual children and the state. Thus, both parents or caregivers and states have children’s rights duties, as is also recognised in the CRC: parents or legal guardians ‘have the primary responsibility for the upbringing and development of the child’ while states have an obligation to give them ‘appropriate assistance . . .’ in the performance of their child-rearing responsibilities and [to] ensure the development of institutions, facilities and services for the care of children’. (art. 18.2 CRC) On the whole, the CRC is not clear on the division of duties between the parents/legal guardians and the state. The ‘hierarchical’ approach of art. 18 CRC that creates two levels of duties (parental and state) ‘for children’ has been criticised for entrusting to parents power over how children may or may not enjoy their children’s rights depending on parental sensitivities or views.

Vandenhole has suggested that the CRC may be read to surpass a vertical state to individual relationship, even with the insertion of parents/legal guardians as an intermediary level within, to ‘create space for bringing in other duty-bearers than the state in human rights law’. Different actors are recognised in various articles of the CRC as having ‘responsibilities, rights and duties’: Art. 5 CRC points to ‘members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child’ in addition to parents, and art. 27 on the right to an adequate standard of living points to a division between the primary responsibility parents have within their financial capabilities and auxiliary obligation of the state to ensure that primary responsibility is fulfilled. Eide links such division of primary and auxiliary responsibilities in the CRC to the imagery of an ideal setting for the childhood-long upbringing as ‘a family with the will and the capability to care for the child during its many years, starting with the pregnancy and from birth to full maturity at the age of eighteen’. Especially with respect to the right to adequate standards of living, the ability of parents to ensure this right for their children depends inextricably on their financial and non-financial capabilities. Whether parents in turn have the requisite capabilities is affected by many factors and many actors, including whether their own economic and social rights are respected not only in general but also with respect to when they work to ensure financial capabilities. The state’s auxiliary obligation under art. 27 is meant to assist parents who are unable to ensure the conditions necessary

for the wellbeing and adequate development of their children.56 Such assistance is of course limited to the available resources of the state in question and linked in art. 27 to the material needs of children such as nutrition, clothing and housing.57 Vandenhole believes that the introduction of auxiliary duties under art. 27 CRC can ‘also be read as opening up the duty-bearer side of human rights law, in order to include other actors than the state’.58

The CRC and its Protocols enumerate children’s rights obligations that apply to states and ordinarily, the state in question is understood as the state that has jurisdiction over the territory that a child is on. Yet:

Globalization, and in particular economic globalization, as a process of dispersion of power, has made it increasingly difficult to understand and tackle social challenges at a local or national level alone. These developments challenge the legal concept of children’s rights as entitlements towards the territorial state, and necessitate the ‘widening of the duty-bearer side of children’s rights’59 if they are to function as a leverage for social change.60

The CRC, as an instrument, creates the possibility for bringing in duty-bearers beyond the state.61 There are nascent academic and civil society discussions on how that possibility may be translated into international law or its implementation.62 More attention is being paid to children’s rights, for instance in the context of the debates on business and human rights63 through non-binding initiatives such as the OECD Guidelines on Multinational Enterprises (MNE), the International Labour Organization (ILO) MNE Declaration or the Children’s Rights and Business Principles initiative, but the overarching conceptual framework of what the children’s rights duties of non-state actors are and how they are to be shared with states is still to be clarified.

56 Ibid., 3 and 26.
57 Ibid., 2.
61 Ibid.
63 Erdem Türkelli, ‘Children’s Rights in Business and Human Rights: from the Sidelines to the Centre Field?’ in Brems, Desmet and Vandenhole (eds), Children’s Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?
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I.24 The CRC Committee recognises in its GC 16 on state obligations regarding business activity that ‘duties and responsibilities to respect the rights of children extend in practice beyond the state and state-controlled services and institutions and apply to private actors and business enterprises’ but has thus far been reluctant to interpret CRC’s provisions in light of the obligations of non-state actors (individual or institutional) in the context of specific rights. CRC Committee’s GC 15 on the Enjoyment of the Highest Attainable Standard of Health is an outlier as it points to non-state actors, including inter alia health service companies, pharmaceutical companies, private health insurance companies, mass media organisations and researchers as having specific duties with regards to children’s right to health.66

2. Children’s rights as human rights

I.25 Children’s rights refer, as many scholars reiterate time and again, to the human rights of children; namely, ‘fundamental claims for the realization of social justice and human dignity for children’. Scholarship from general human rights law as well as litigation and social movements allow us to draw insights that are equally pertinent to children’s rights law.68

I.26 There are various conceptions of human rights as well as numerous critiques that remain equally valuable when talking about the human rights of children. Marie-Bénédicte Dembour conceptualises four schools of thought on human rights as ‘Weberian ideal-types’: natural, deliberative, protest and discourse schools. In reality, variations in the conceptualisation of human rights mean that ideal-types often dissolve into hybrids. The natural school of human rights, which Dembour believes to be at the ‘heart of the human rights orthodoxy’, views rights as inherent: ‘human rights as those rights one

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64 CRC Committee, GC 16 (2013) on State obligations regarding the impact of the business sector on children’s rights (17 April 2013) CRC/C/GC/16, para. 8.
66 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, paras 75–85.
68 Ibid., 5–7.
possesses simply by being a human being’.70 Because they are inherent, rights exist independently of social or legal recognition.71 The deliberative school, on the other hand, focuses on the societal adoption of human rights norms as the point of existence of those rights. It is only when societies embrace human rights norms legally and socially, that they become meaningful.72 The third school, the ‘protest school’, focuses on the necessity to continuously fight for human rights and to demand rights on behalf of individuals and groups experiencing injustice in the form of poverty, marginalisation or oppression.73 Finally, the discourse school questions the idea of human rights as a panacea to injustice, points to the limitations of human rights while recognising the importance that human rights language has acquired and some of the benefits accrued thanks to that language.74 For the discourse school, the legitimate claims surrounding emancipation and redress for injustices may be advanced more appropriately by other means.75 It should be noted that, while Dembour does not undertake an analysis based on children’s rights, traces of ideas from the four schools of thought may also be discerned in the field of children’s rights.

The idea that rights are possessed inherently by children by virtue of being human beings underlies much of the discourse from agencies and institutions that work on children’s rights or with children. The Preamble of the CRC starts with the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world’, in line with the natural school views on human rights. The idea of social and legal recognition as an important driver in making rights meaningful that is put forth by the deliberative school is also a part of the push to have children’s rights codified into international law and the frequent mention that the CRC is the most widely ratified human rights treaty. In addition, children’s rights from below and living rights bridge the deliberative and protest schools by inspecting ‘children’s rights as a living practice’, especially from an anthropological perspective.76 The traces of the protest school may be found in the idea of children’s rights as empowerment77

70 Ibid., 2.
71 Ibid., 3.
72 Ibid.
73 Ibid.
74 Ibid., 4.
75 Ibid.
and as liberation. Wall argues that the three approaches are not only mutually inclusive but also complementary. According to Wall, ‘top-down, developmental, and bottom-up rights are really different sides of a holistic and dynamic human rights circle’. Finally, some scholars have taken issue with the usefulness of children’s rights for children’s wellbeing and suggested that other concepts, such as duties incumbent on adults, may be better at achieving positive results for children.

Technically, children’s rights as human rights are a part of the global UN human rights system as well as the various regional human rights systems. Within the nine core UN human rights treaties, there are specific references to children or particular issues of central interest to children. The International Covenant on Civil and Political Rights (ICCPR) prohibits death penalty for persons under the age of 18 (art. 6.5), accords special attention to fair trial guarantees for juveniles (art. 14.1 and 14.4) and ensures the right to protection without discrimination as well as the right to name and nationality for every child (art. 24). The ICESCR creates obligations to provide special protection and assistance to all children, including protection from economic and social exploitation (art. 10.3). Article 29 of the Convention on the Protection of the Human Rights of All Migrant Workers and Members of their Families (CMW) also reiterates the right to a name, registration at birth and a nationality for children, in line with art. 24 ICCPR. Art. 30 CMW focuses on the right to education of children of migrant workers and art. 45.2–4 CMW entails the equal rights of children of migrant workers to integration in the local school system and to facilitation of learning in their mother tongue. Children-specific protection measures are envisaged under Article 7 of the Convention on the Rights of Persons with Disabilities (CRPD) for children with disabilities as well as under Article 25 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICED) for children affected by enforced disappearance of one or both of their parents or legal guardians. On the other hand, the specific rights and protections accorded to children under the CRC are also relevant for the broader human rights field. For instance, the UN Human Rights Committee has referenced

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81 On the interplay between the CRC and other UN human rights treaties, see Brems, Desmet and Vandenhole (eds), Children’s Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?.
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art. 37 CRC as a key provision in an almost universally ratified treaty that is ‘a valuable source in informing the interpretation of the [ICCPR]’ in the case of life sentences imposed on juvenile offenders.\(^82\)

Among the regional human rights systems, the African regional system is the only one that has a general children’s rights convention similar to the CRC. The 1990 African Charter on the Rights and Welfare of the Child (ACRWC) contains provisions on all aspects of children’s rights, comparable to the CRC, but sensitive to the African context, for instance, through including references to ‘positive African morals, traditional values and cultures’ as well as ‘the promotion and achievement of African Unity and Solidarity’ within the aims of education (art. 11.2). The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) acts as the monitoring body and has thus far rendered six decisions on ten complaints.\(^83\) The African regional system’s flagship human rights document, the African Charter on Human and Peoples’ Rights also includes a provision on the protection of children’s rights ‘as stipulated in international declarations and conventions’, which also thus makes an implicit reference inter alia to the CRC (art. 18).

The Inter-American system does not have a children’s rights instrument but contains children-specific provisions similar to the ICCPR in the 1969 American Convention on Human Rights: rights of the family (art. 17), children’s right to a name (art. 18), children’s right to protection (art. 19) and to a nationality (art. 20). The 1988 Protocol of San Salvador (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights) contains a general children’s rights clause (art. 16) on the right to grow up under the protection and responsibility of parents, non-separation from mother, and the right to free and compulsory education. In addition, children’s specific rights under the protection rights of families such as to adequate nutrition (art. 15.3(b)) are enumerated. The treaty is monitored by a dual mechanism through the Inter-American Commission and the Inter-American Court, which can also receive individual complaints and has decided some landmark cases of global significance with respect to children’s rights.\(^84\)

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82 Bronson Blessington and Matthew Elliot v. Australia (UN HRC) 2014 para. 7.11.
83 For the specific cases, see: ACERWC, Table of Communications, https://www.acerwc.africa/table-of-communications/ [last accessed 29 April 2019]. (Three complaints were deemed inadmissible while one complaint was still pending at the time of writing.)
84 The children’s rights case law of the Organization of American States (OAS) through the Inter-American Commission and the Inter-American Court may be found at: http://www.oas.org/en/iachr/children/ [last accessed 6 April 2019].
The pan-European human rights system rests on two pillars: the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, dubbed the European Convention on Human Rights (ECHR) and the 1996 Revised European Social Charter (RESC). While the ECHR does not have any child-specific provisions or references to children’s rights, the European Court of Human Rights (ECtHR), which monitors compliance with the ECHR routinely deals with children’s rights issues. The RESC, on the other hand, does contain specific children’s rights provisions on the right of children to protection, especially in work (art. 7.10) as well as the right of children to social, legal and economic protection (art. 17). The European Committee of Social Rights (ECSR), which monitors compliance with the RESC, has also handled collective complaints on alleged violations involving children’s rights. Treaties on thematic issues concerning children have also been adopted through the Council of Europe and include the 1996 European Convention on the Exercise of Children’s Rights, the 2007 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the 2008 European Convention on the Adoption of Children (Revised). At the European Union (EU) level, the EU Charter of Fundamental Rights, adopted in 2000 and readopted in 2007 and binding for all EU Member States, contains two children’s rights clauses: art. 24 as a general children’s rights provision and art. 32 as a provision prohibiting child labour and providing protection at work.

Case law from regional human rights systems features in this Commentary with respect to the interpretation of substantive provisions of the CRC by regional human rights courts and global or regional monitoring bodies. Of course, the usefulness and limits of litigation in generating social change should be assessed candidly. Nolan has found, for instance, that although not completely non-existent, the transformative impact of judicial intervention is limited with regard to socio-economic rights of children. Of course, more empirical work is needed to draw more conclusive insights from the practice of courts and the general usefulness of litigation.85

The body of children’s rights case law at the regional and global human rights systems is uneven in its reach with some issues being rather extensively covered and others completely invisible. The Commentary also reflects this real-life situation: case law is covered in detail whenever available from all regional systems in existence as well as from UN human rights treaty bodies in some chapters while it is absent from others.

3. Situating the CRC in international law

The developments in children’s rights law have taken place alongside developments in other sub-fields of the law such as labour law, criminal law, environmental law and law on development cooperation, to name a few. The developments in these various fields have a strong bearing on how substantive children’s rights are understood. For instance, the body of international labour law developed under the auspices of the ILO has by and large defined debates on child labour and the state obligations. Humanitarian law principles have strong links to debates on children in armed conflict. Likewise, criminal law instruments have a bearing on issues linked to child sexual abuse and exploitation as well as children in armed conflict. The issues of international cooperation that are found in the CRC and its Optional Protocols (OPs) are affected by legal frameworks that govern development cooperation such as the Organization for Economic Cooperation and Development (OECD) Development Assistance Committee rules and procedures.

Children and environment, while by-and-large omitted from the CRC, as an issue is gaining more importance in an era where the impacts of climate change are imminent and action urgent to halt its catastrophic fallout on the world and on communities. The vitality of the issue to children is well evidenced given the increasing involvement of children as activists in calling for drastic change or in becoming claimants in climate change litigation, by citing their rights to a healthy environment (See Commentary on art. 22 CRC). From the viewpoint of environmental law, the ‘developmental and environmental needs of present and future generations’ were recognised as early as 1992.

Children’s rights have found themselves incorporated into various development agendas. The eight Millennium Development Goals (MDGs) which hailed a new development era in the new millennium included two goals that were directly linked to children’s rights: MDG 2 on achieving universal primary education and MDG 4 on reducing child mortality. Other goals on eradicating extreme poverty and hunger (MDG 1), promoting gender equality (MDG 3), improving maternal health (MDG 5), combating

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86 These are evidenced by the findings of the October 2018 report of the UN Intergovernmental Panel on Climate Change: Intergovernmental Panel on Climate Change, Global warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, 2018.
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HIV/AIDS, malaria and other diseases (MDG 6) and ensuring environmental sustainability (MDG 7) also contained elements linked to children’s rights to an adequate standard of living and health as well as to the principle of non-discrimination.

I.37 The global framework currently governing development policy, namely the 2030 Agenda and the accompanying 17 Sustainable Development Goals (SDGs), also include targets on children’s rights issues linked to the right to education (SDG 4) including both primary and secondary education, the right to health including nutrition (SDG 2), clean water and sanitation (SDG 6), and clean environment (SDG 11), the right to adequate standards of living through the eradication of poverty (SDG 1), affordable energy (SDG 7) and affordable and safe housing (SDG 11) as well as protection from exploitative labour (SDG 8). Resolution 34/16 of the Human Rights Council of 24 March 2017 on a children’s rights-based approach to the implementation of the 2030 Agenda for Sustainable Development, calls upon states parties to mainstream children’s rights into ‘all legislation, policies, programmes and budgets … aimed at implementing the 2030 Agenda’ (para. 4), to pay special attention to children ‘in marginalized and vulnerable situations’ (para. 5) and encourages them ‘to promote a child rights-based approach in the implementation of the 2030 Agenda’ (para. 6). One possible point of intersection in states’ implementation of their children’s rights obligations under international law and the implementation of their commitments to sustainable development lies in the development of child rights-sensitive indicators at the local, regional and national levels for tracking progress. Of course, child rights-sensitive indicators alone are not sufficient in tracking progress and performance and should be coupled with the collection of ‘comprehensive and comparable disaggregated data and information on children’. Criticism has been voiced on the SDGs from a children’s rights perspective for at least two reasons. One, the SDGs apply too much a linear growth model, in which development is still seen as linear and mimicking the Western development pattern. Second, investment-based thinking features prominently: children are seen as becoming rather than as being.

89 Ibid., para. 12.
90 Ibid., paras 13 and 15.
C. REALISATION OF CHILDREN’S RIGHTS AND THE IMPLEMENTATION OF THE CRC

The first step in the implementation of the provisions under the CRC and its Protocols is the adaptation of domestic legal frameworks to respect, protect and fulfil children’s rights. (See Commentary on art. 4 CRC) Depending on whether a State Party has a monist or dualist legal system, the CRC may be directly incorporated into a State Party’s domestic legal system or may need to be transposed into domestic law by legislation. Thus, the fact of a treaty’s ratification may not always automatically equate to the ability to invoke this treaty domestically. Incorporation into domestic law is necessary in dualist systems for the treaty to be invokable in domestic law. There is no such need in monist systems and treaties are considered to be directly applicable, which ‘does not mean that it can also be directly invoked by individuals in legal proceedings’. In fact, provisions may need to fulfil other criteria in order to have such ‘direct effect’, such as ‘a clear and unequivocal meaning’.

The implementation of the CRC at the domestic level is tracked on the international arena by the CRC Committee, which issues concluding observations on a given State Party’s periodic report, the first of which is to be submitted two years after ratification and every five years subsequent to that. Under the simplified reporting procedure introduced for states reporting from September 2019 onwards, the CRC Committee sends the State Party a request containing up to 30 questions, known as ‘List of Issues Prior to Reporting (LOIPR)’. The replies to the LOIPR are considered the State Party’s report to the Committee. (See Commentary on art. 44 CRC)

The CRC Committee collaborates with UN specialised agencies and bodies and these institutions may be invited ‘to provide [the CRC Committee] with expert advice (…) in areas falling within their respective mandates’. In addition, relevant stakeholders such as NGOs, National Human Rights Institutions (NHRIs), children’s own organisations, academics and researchers have been invited to provide information to the Committee on the situation of children in a given reporting State Party either in general or in thematic

94 Ibid.
areas. The state periodic reports, as well as the Concluding Observations of the CRC Committee are made public. (See Commentary on art. 45 CRC)

I.41 Beyond the CRC Committee, the implementation of children’s rights is tracked by studies and thematic reports undertaken by the Special Rapporteur on the sale and sexual exploitation of children, Special Representative for Children and Armed Conflict and Special Representative on Violence against Children. UNICEF’s Innocenti Research Centre undertakes major thematic research projects and publishes research papers on children’s rights-related issues. In addition, the Centre publishes an annual ‘Innocenti Report Card’, focusing on different themes linked to children’s wellbeing in industrialised countries. Child Rights International Network (CRIN) runs a website that tracks the implementation of the substantive rights under the CRC, providing a Legal Database that contains relevant international and regional children’s rights standards, domestic legislation from States Parties as well as a case law database of legal complaints on children’s rights violations at the international, regional and national levels.

I.42 Another additional complexity lies in the implementation of the recommendations of monitoring bodies based on their findings with respect to state performance, because these recommendations are not legally binding unless the monitoring bodies in question are international courts. The CRC as an international treaty establishes a remarkably comprehensive legal framework on children’s rights buttressed by a monitoring system that allows for a dynamic interpretation of its norms and effective evaluation of state performance. In practice, however, the system on paper does not correspond to the

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97 Ibid.
98 The UN Treaty Body Database allows users to access these documents and documents from other UN Human Rights Treaty Bodies: https://tbinternet.ohchr.org/SitePages/Home.aspx [last accessed 6 April 2019].
99 The work of the Special Rapporteur and Special Representatives may be found online. (Special Rapporteur on the sale and sexual exploitation of children: https://www.ohchr.org/EN/Issues/Children/Pages/ChildrenIndex.aspx; Special Representative for Children and Armed Conflict: https://childrenandarmedconflict.un.org/about-us/mandate/history/; Special Representative on Violence Against Children: https://violenceagainstchildren.un.org) [last accessed 6 April 2019].
102 The CRIN Legal Complaints database may be found at https://www.crin.org/en/home/law/complaints [last accessed 6 April 2019].
resulting situation in practice, where many principles embodied by the CRC remain insufficiently implemented and the human rights of children inadequately realised.\textsuperscript{104}

The concern with compliance and implementation, or more acutely, the so-called ‘implementation gap’ is an important thread in the legal literature on children’s rights. In fact, for many scholars as well as institutions working on children’s rights, the problems linked to the realisation of the human rights of children are linked to the unsatisfactory implementation of standards legally codified in the CRC and its Protocols as opposed to the standards themselves.\textsuperscript{105} The assumption that children’s rights in their current legal framing always offer the best outcomes for children, while being put to test by a strand of critical interdisciplinary scholarship in children’s rights, remains very much mainstream.\textsuperscript{106} The critical challenge to this mainstream assumption addresses three distinct issues of how legal norms have been made, what role legal norms play in bringing about social change and finally, whether existing legal norms are able to cope with the changing global socioeconomic landscape.\textsuperscript{107}

First, the critical challenge that calls for ‘Children’s Rights from Below’ takes issue with the top-down and adult-driven approach that characterised the elaboration of legal norms on children’s rights.\textsuperscript{108} The ‘children’s rights from below’ approach seeks to contextualise and localise the meaning of children’s rights, including their legal meaning, in different social and cultural contexts\textsuperscript{109} and accords importance to ‘living rights’, which children demand based on their real-life experiences.\textsuperscript{110} Liebel argues that the divergence

\textsuperscript{104} Vandenhole, ibid., Simmons has empirically established some impact of CRC (and OPAC) ratification in the areas of child labour in middle-income countries and of child recruitment in armed forces, but not with regard to immunisation (Beth A Simmons, Mobilizing for Human Rights: International Law in Domestic Policies (Cambridge University Press 2009) 307–48.)

\textsuperscript{105} Vandenhole, ibid., 38–9.

\textsuperscript{106} Ibid.

\textsuperscript{107} Ibid.

\textsuperscript{108} Liebel and others Children’s Rights from Below: Cross-cultural Perspectives.

\textsuperscript{109} Ibid.

between children’s interests that are ‘diverse, rooted in the lives of children, different from culture to culture and from child to child ‘…’ [and] changing constantly in space and time’ and children’s rights that are ‘general and generalising, usually far removed from’ children’s experiences, feelings and opinions is a historical and systemic product.111 What underlies this history is the formulation of legal rights under the CRC not ‘by, but for children’ in line with the protectionist streaks found in the two previous declarations as well as the necessity of expressing children’s interests in the ‘abstract and generalised’ language of legal rights to render to encompass the interests of all children and to render them valid anywhere in the world.112 As long as children remain unable to partake in the codification of their rights to bridge the apparent divide between children’s real-life experiences and their legal rights, Liebel suggests an interim panacea: ‘those rights which are not (yet) legally recognised as international conventions or national laws, should at least be recognised socially as children’s rights. This is especially true of such rights that children expressly want, invent, or even formulate themselves’.113 In fact, children themselves are found to be concerned not just about protection necessarily but also about ‘their rights while in employment, education, the need for transport, access to health’ and beyond, without necessarily considering the right to protection as the most topical concern.114

Secondly, a critical appraisal necessitates questioning the assumption that standards as embodied in legislation and litigation will translate into social change and necessarily alter attitudes preventing the full realisation of children’s rights. In fact, social attitudes that condone discriminatory or patriarchal practices towards children may be resistant to change even in the face of extensive legislative reform, creating limitations on the role of law in instigating social change.115 Based on a literature review, Corradi and Desmet

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112 Ibid., 609–10.
113 Ibid., 611.
115 One notable case is explored in the commentary of art. 19 on corporal punishment where a group of Swedish parents take the Swedish government to the European Commission of Human Rights after the introduction of legislation in Sweden banning the use of corporal punishment, arguing that the State is impinging upon the rights of parents to educate their children in the manner they deem appropriate. Research has demonstrated in fact that legal reform banning corporal punishment did not automatically and unequivocally change public attitudes or translate into decreased support for corporal punishment in Sweden (H Roberts and I Roberts, ‘Smacking’ (2000) 26(4) Child: Care, Health and Development 259–62).
C. REALISATION OF CHILDREN’S RIGHTS AND THE IMPLEMENTATION OF THE CRC

concluded that the interaction of normative orders with socioeconomic conditions is often decisive for the realisation of children’s rights. Children’s rights realisation will often require a change in power relations.116

Thirdly, the existing children’s rights legal framework should be put to critical test in order to uncover children’s rights protection gaps, especially arising from the increasing involvement of non-territorial states and non-state actors in the global economic landscape. As Den Heijer and Lawson point out, the concept of jurisdiction is closely linked to the concept of sovereignty under public international law, denoting the confines of a state’s right to regulate the conduct of other actors and has traditionally been understood as territorial.117 In human rights law, more specifically, the duties owed by States Parties to individuals may be considered to be delimited by jurisdiction. Den Heijer and Lawson assert that ‘jurisdiction under human rights law is not about whether a state is entitled to act, but primarily about delineating as appropriately as possible the pool of persons to which a state ought to secure human rights’.118

Art. 2 CRC refers to jurisdiction but does not tie jurisdiction to territory (compare to the ICCPR). The legislative history demonstrates that the initial draft for the CRC made a reference to children ‘in [States Parties’] territories’. During the Technical Review, UNICEF suggested the inclusion of a reference to jurisdiction, since jurisdiction was broader in terms of coverage and was included in the ICCPR in addition to territory.119 It is also telling that art. 4, which espouses the general obligation of States Parties to undertake all appropriate measures to implement rights contained in the CRC does not refer to jurisdiction or to territory.120

The Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) and the Optional Protocol on a Communications Procedure (OPIC) likewise refer to implementation within the jurisdiction of States Parties without referring to territorial jurisdiction.121 Under its art. 4.2, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

118 Ibid., 163.
120 Türkelli, Children’s Rights and Business: Governing Obligations and Responsibility.
121 OPAC, art. 6 and OPIC, arts 4 and 5.
(OPSC) allows States Parties to establish their extraterritorial criminal jurisdiction over offences enumerated in the OPSC on two conditions: if the victim is a national of that state (passive personality principle) or if the alleged offender is a national or a habitual resident of that state (active personality principle). This provision is considered to be a catalyst for domestic legislation by States Parties ‘making it an offence for their nationals to carry out sexual offences against children abroad’. The reference to jurisdiction in art. 4.2 OPSC is in line with the meaning of the term under public international law, which denotes the power to regulate and not specifically human rights law, which denotes an obligation to regulate instead.

In fact, in response to the serious systematic child sexual abuse revelations within the ranks of the Catholic Church around the globe, the CRC Committee’s 2014 Concluding Observations on the periodic report of the Holy See argued that the jurisdiction of the Holy See comprised not only its own territory but also extended to persons and institutions under its authority:

The Committee is aware of the dual nature of the Holy See’s ratification of the Convention on the Rights of the Child as the Government of the Vatican City State and also as a sovereign subject of international law having an original, non-derived legal personality independent of any territorial authority or jurisdiction. While fully aware that bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff, the Committee notes that subordinates in Catholic religious orders are bound by obedience to the Pope, in accordance with Canons 331 and 590 of the Code of canon Law. The Committee therefore reminds the Holy See that in ratifying the Convention, it made a commitment to implement it not only within the territory of Vatican City State, but also, as the supreme power of the Catholic Church, worldwide through individuals and institutions under its authority.

As far as states are concerned, the Committee has thus recognised that jurisdiction may be constituted more broadly than a state’s own territory and obligations to implement the rights of the child may extend beyond that territory to places and situations where it exerts authority. Of course, this

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122 For an illustration of how the duty-bearer side of children’s rights may be broadened by using the provisions in the OPSC, see: Erdem Türkelli, ‘Putting an End to Victims Without Borders: Child Pornography (Committee on the Rights of the Child)’ in Mark Gibney and Wouter Vandenhole (eds), Litigating Transnational Human Rights Obligations: Alternative Judgments (Routledge 2014).
125 CRC Committee, Concluding observations on the second periodic report of the Holy See (25 February 2014) CRC/C/VAT/CO/2, para. 8.
D. NEW ISSUES AND AMBIGUITIES

1. New issues and gaps

The three decades that have elapsed since the proclamation of the CRC have brought new topical issues to the debate such as the rights of children in migration, children in street situations, adolescents, LGBTQI+ children, children in surrogacy situations and children as a part of the broader discussion on sustainability. One case in point is ‘children and the environment’, which is a striking omission in the CRC, a reference in passing in art. 29 CRC notwithstanding. There is now undoubtedly an increasing awareness of the additional impact of environmental pollution in all its forms on children. Likewise, climate change and its long-term impacts disproportionately


127 Vandenhole, ibid., 61.

affect children. Nonetheless, with the exception of some attention to inter-
genерational justice, the take-up of sustainable development principles, includ-
ing those linked to the environment, in children’s rights is slow and uneven.129

In addition, new challenges to the implementation of the CRC have arisen
with technological advances such as the widespread use of information and
communication technologies (ICT) giving rise to benefits for children as well
as new risks of exploitation and abuse as well as new and successful methods of
assisted reproduction or procedures such as gene editing.

I.53 Art. 45(c) CRC speaks to the need to deal with new problems or develop-
ments which are not covered by the Convention. This need to interpret the
provisions of the CRC and its Protocols in light of recent developments is
reflected in the various Days of General Discussion held on thematic issues as
well as the GCs of the CRC Committee that have been issued in the last
decade. These thematic areas have included the impact of business on
children’s rights, rights of adolescents, children in street situations, children in
migration, digital media and children, and children and the environment. The
CRC Committee’s interpretation of the CRC and the work of regional human
rights has by and large caught up with the developments in children’s rights
although many of these issues remain blind spots in the CRC itself. Although
many of the issues were not dealt with explicitly in the CRC’s provisions, the
legal approach based on children’s rights has been formed by interpreting the
CRC in a teleological fashion.

2. Ambiguities: limitations and derogations

I.54 The CRC continues to face some challenges in order to mature into a solid
legal instrument. Unlike many other human rights treaties, the CRC does not
contain general provisions on the permissibility of limitations nor on deroga-
tion in times of emergency. Some specific provisions on civil rights such as arts
13 (freedom of expression), 14 (freedom of thought, conscience and religion)
and 15 (freedom of association and peaceful assembly) do have a limitations
clause but others (in particular art. 16 on the right to private life) do not. The
limitation clause in arts 13–15 is very similar to the one typically found in
other human rights treaties. It allows for restrictions or limitations that meet
the requirements of legality (‘provided by law’), legitimacy (serve a legitimate
aim as listed in each specific provision, such as public order, public health or

129 The Special Rapporteur on human rights and the environment, John Knox, includes in his 2018 report on
children’s rights educational and procedural rights of children, as well as heightened obligations for States to
pursue precautionary measures to protect children against environmental harm, see Report of the Special
Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and
morals, or the fundamental rights and freedoms of others), and necessity/proportionality. This leaves many questions for interpretation: does the CRC contain stricter standards than other human rights treaties with similar provisions or rights? Were these kinds of provisions left out on purpose, or rather accidentally? Can none of the rights in the CRC be derogated from in times of emergency?

A reading of the CRC in harmony with international human rights law suggests the following with regard to derogation. First, given the absolute nature of the right to life and the prohibition of torture in general human rights law, the right to life as guaranteed in art. 6.1 CRC and the prohibition of torture as contained in art. 37(a) CRC are equally absolute, with no possibility for derogation. Likewise, the prohibition on punishment without law in art. 40.2(a) CRC and the prohibition of slavery or servitude which may be read into art. 32.1 CRC can be assumed to be non-derogable (compare art. 4 ICCPR; art. 27 of the American Convention on Human Rights (ACHR); art. 15 ECHR). The derogation clauses in the three mentioned treaties do not hold an identical list of non-derogable provisions though, whereby art. 4 ICCPR ‘exceeds the small catalogue of just four essential rights in art. 15 para. 2 ECHR, but ‘...’ lags behind the extensive catalogue of art. 27 para. 2 ACHR’. A harmonious reading with art. 4 ICCPR would as a minimum add the freedom of thought, conscience and religion (art. 14 CRC), and arguably extend to the right to liberty and the right to a fair trial (art. 37(b)–(d) and art. 40 CRC). It is questionable whether such a reading in line with art. 27 ACHR could also be said to be mandatory, since the latter is only a regional treaty. In such an expansive reading, the right to a name and nationality (art. 8 CRC), and more generally protection rights of children (in analogy with art. 19 ACHR on the right to measures of protection of minors) would all be non-derogable. It is unclear whether derogations from ESC rights are permissible under the ICESCR, which does not contain a derogation clause either. Müllner has suggested that the Committee on Economic, Social and Cultural Rights may allow for derogation from labour rights.

As to limitations, a harmonious reading with international human rights law results in a long list of CRC rights as relative rights. Since art. 4 ICESCR

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131 See also Human Rights Committee, General Comment No. 29: States of Emergency (Article 4) (31 August 2001) UN Doc. CCPR/C/21/Rev.1/Add.11.
appliestoallESCrightsintheCovenant, all parallel provisions in the CRC can be said to contain relative rights, including art. 24 (right to health), art. 26 (right to social security), art. 27 (right to an adequate standard of living) and art. 28 CRC (right to education). It should be noted, however, that the ICESCR is stricter in relation to limitations than the ICCPR, since it only recognises one legitimate aim, that is, the promotion of general welfare. The CRC Committee has accepted retrogressive measures, but only as temporary measures in times of economic crisis. Given their exceptional and temporary nature, these retrogressive measures are more akin to derogations than to limitations. So far, the Committee has not taken a position on the permissibility of limitations to ESC rights in the CRC. The same goes for civil rights that are subject to limitations in the ICCPR or the ECHR: whereas the CRC Committee has been silent on this question so far, a harmonious reading with international human rights law would result in accepting limitations for the right to private life or the right to information (arts 16–17 CRC). The permissibility of limitations remains nonetheless unclear for a number of more CRC specific rights. For instance, is the protection against all forms of violence in art. 19 CRC subject to limitations? If it is considered to be closely related to the prohibition of torture, it may well be argued to be absolute rather than relative.

Another issue that has not yet been satisfactorily addressed is whether children can waive (some of their) rights under the CRC. In general human rights law, rights holders can waive some of their rights under certain conditions. A waiver of rights is not deemed acceptable by the ECtHR if it runs counter to an important public interest, such as non-discrimination on grounds of ethnic origin. So, could children, as an expression of their self-determination, waive certain CRC rights? Lansdown suggested they cannot, not so much because of lack of capacity, but because of the public interest involved: ‘Children, however competent, cannot elect to deny their own rights, as these are, or should be, universal protections extending to all children.’ It is debatable whether each and every right under the CRC is of such a public interest that no waiver can be allowed in an individual case.

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134 Ibid.
135 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, para. 31.
E. CONTEXTUALISATION: CHILDREN’S RIGHTS BEYOND THE LEGAL FIELD

Two schools of thought or approaches to children have informed the CRC. On the one hand, there is the view that children need special protection and priority care. That was the almost exclusive theme of the 1924 and 1959 Declarations, which should be understood in light of the two World Wars. On the other hand, there are proponents of recognising children as autonomous individuals and ‘fully-fledged beneficiaries of human rights’. The CRC has therefore been hailed as a ‘paradigm shift’ from paternalism to the acknowledgement that children are both ‘becomings’ and ‘beings’. This reading has been criticised from at least two perspectives. Some have argued that the CRC has failed to introduce that paradigmatic shift, and keeps focusing on the developing child, that is as ‘becomings’. Compared to other major struggles for emancipation, it has been argued that children’s rights have failed to debunk the ideology of development:

Jenks argues that while social sciences have critically addressed and debunked dominant ideologies of, for example, capitalism in relation to social class, colonialism in relation to race, and patriarchy in relation to gender, the ideology of development in relationship to childhood had remained relatively intact.

Children have been construed as developing in a similar linear way as developing countries, in terms of growth stages. Similar ideas of the child have informed Piaget’s developmental psychology and Parsons’ functionalist socialisation model. Childhood is a transitional stage, that is not considered valuable in and out of itself. Children are typically depicted as human becomings rather than human beings. This idea of linear growth and becoming (‘developmentalism’) has been challenged in childhood studies in particular. Vanobbergen summarises Jenks’ and James’ and Prout’s alternative paradigm as follows:

(1) Childhood is understood as a social construction and thus provides a framework for the interpretation of the first years of life, (2) childhood cannot possibly be

138 Ibid., 27.
considered as a natural or universal characteristic among a group of people, but rather appears as a specific structural and cultural component within diverse societies, (3) children’s social relations and cultures are worth studying in themselves, independent of the perspective and concerns of adults, and (4) children are active in determining their social life, the life of those they live together with and the society in which they reside, and are consequently not the passive subjects of social structures and processes.143

I.59 The two approaches are nowhere more divergent than when debating the issue of ‘vulnerability’. Even the terminology when referring to children who may be considered in need of protection is hotly disputed. Depicting children as vulnerable is problematic. For some, vulnerability is an inherent human characteristic, not specific to children.144 For others, the notion needs to be deconstructed.145 Focusing on children’s needs or vulnerability has the compounding effect of reinforcing their dependency on adults and their perceived powerlessness.146 Recognising children as ‘beings’ as opposed to ‘becomings’ shines a much-needed light on children’s agency, self-determination and resilience.147

I.60 Contextualisation and recognition of children as agents is also relevant with respect to the issues that cut across different rights considerations such as participation, best interests, health, education and others. An example is early or forced marriages, sometimes referred to as child, early or forced marriages. Global campaigns to end marriage of persons under the age of 18 refer to such marriages as serious violations of human rights.148 The CRC does not refer to the issue of marriage but the CEDAW and CRC Committees have included it within the definition of ‘harmful traditional practices’ in the CRC and CEDAW Committees Joint General Recommendation/Comment 31/18. (See also Commentary on art. 24 CRC on the right to health) Nonetheless, in the various international instruments, the accent is first and foremost on ‘free and full consent’ (art. 16.2 UDHR, art. 1.1 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and art.

143 Ibid., 66.
16.1(b) CEDAW). Of course, full and free consent presupposes that the person giving such consent is a mature and capable individual. Art. 16.2 CEDAW echoes Article 2 of the 1962 Convention on Consent to Marriage and states that ‘the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory’. In the joint general comment, there is no indication that this minimum age should be 18 although the CRC Committee’s Concluding Observations on States Party periodic reports have noted that this age should be no lower than 18.\(^{149}\) On the other hand, the reality is that girl children are disproportionately impacted, frequently married without their free and full consent to much older men, resulting in negative health, educational and social outcomes as recognised in the CRC and CEDAW Committees Joint General Recommendation/Comment 31/18. In this respect, State Parties must strike a balance between the maturity of a child and their wishes with protections afforded to children who are seen as ‘vulnerable’, taking into account the cultural and social contexts that may differ across countries.

Sandberg admits that the CRC Committee identifies particular groups/subgroups of children as vulnerable, in order to have states identify and implement special measures for these groups.\(^{150}\) She also warns of the risk of not identifying children in particular vulnerable situations: they may be simply overlooked.\(^{151}\) The use of ‘children in vulnerable situations’ or ‘children prone to marginalisation’ is increasingly considered preferable over ‘vulnerable children’.

Rather than doing away with vulnerability, the real question may be how to balance vulnerability and agency. Lansdown provides the bridging narrative of childhood as a ‘period of relative vulnerability’,\(^{152}\) noting that such vulnerability is linked much more to the effects of ‘their lack of power and status with which to exercise their rights and challenge abuses’ as opposed to any inherent lack of capacity.\(^{153}\) The ECtHR talks about ‘circumscribed autonomy’: ‘[t]hey lack the full autonomy of adults but are, nevertheless, subjects of rights …’.\(^{154}\)

\(^{149}\) See for instance, CRC Committee, Concluding observations on the combined third to fifth periodic reports of the United Republic of Tanzania, 3 March 2015, CRC/C/TZA/CO/3-5, para. 24. (The Committee also invoked Tanzania’s obligations under the African Charter on the Rights and Welfare of the Child.)  
\(^{151}\) Ibid., 237.  
\(^{152}\) Lansdown, The Evolving Capacities of the Child, 31.  
\(^{153}\) Ibid., 32.  
\(^{154}\) M and M v. Croatia (application no. 10161/13) ECtHR (Judgment) 3 September 2015, para. 171.
Honwana has introduced the notion of ‘tactical agency’ with regard to child soldiers, in a similar attempt not to depict children as exclusively vulnerable.\textsuperscript{155} CRC Committee’s GC 2 notes, for instance, that the vulnerability experienced by children is not only a result of their inherent ‘developmental state’ but also a result of their constructed lack of political, social and judicial voice due to limited or inexistent opportunities to have their opinions taken into account.\textsuperscript{156} In sum, what Ensor and Goździak note for migrant children is also true more generally:

Focusing exclusively on children’s weakness, on the one hand, may harm their self-esteem and undermine their efforts to overcome the challenges they might face. An excessive emphasis on resilience and coping, on the other hand, could obscure individual vulnerabilities or even result in blaming those individuals who appear more vulnerable for their failure to cope.\textsuperscript{157}

I.63 In fact, resilience and vulnerability coexist and this coexistence requires a holistic approach to children’s rights that takes both vulnerabilities experienced by children and their agency and resilience into account.

I.64 Sociological and ethnographic work into childhood has also made clear that ‘childhood cannot be totally separated from other variables: class, gender, ethnicity, disability, sexual orientation (though this is less discussed)’.\textsuperscript{158} This shows the importance of the fairly recent debate on intersectionality in children’s rights law. Intersectionality is particularly an issue under art. 2 CRC on non-discrimination but is also important in the context of specific provisions of the CRC that have a ‘sectional’ focus such as on children with disabilities, refugee children and children in alternative care. Childhood Studies has warned about the dangers of fragmenting the child in its various identities. Not only the child may be fragmented in his or her identities, childhood may as well. There is an important discussion within childhood studies, that is also of particular relevance to children’s rights, that is, whether to recognise a plurality of childhoods or to stick to the ‘one childhood’ thesis.\textsuperscript{159}

\textsuperscript{155} Alcinda Honwana, ‘Innocent and Guilty. Child-soldiers as Interstitial and Tactical Agents’ in Alcinda Honwana and Filip De Boeck (eds), Makers and Breakers: Children and Youth in Postcolonial Africa (James Curry 2005) 32.


\textsuperscript{157} Marisa O Ensor and Elżbieta M Goździak, ‘Migrant Children at the Crossroads: Introduction’ in Marisa O Ensor and Elżbieta M Goździak (eds), Children and Migration: At the Crossroads of Resiliency and Vulnerability (Palgrave Macmillan UK 2010) 7.


\textsuperscript{159} Ibid., 7–8.
Corradi and Desmet note, based on their study of the literature, that the interrelationship of ‘global children’s rights standards’ with ‘local norms and practices’, has taken place either through the use of global standards or local norms as starting points. In addition, while traditional legal conceptions continue to presume the ‘key role of state law’, it is neither found to be ‘the most dominant normative order determining children’s fate, nor necessarily the most supportive one of children’s rights’. As such, ‘any children’s rights strategy needs to be grounded in a deep understanding of children’s realities and the normative orders at play’, which has led Corradi and Desmet to conclude that ‘more sustained ethnographic fieldwork’ is needed to uncover such realities.

Anthropology’s ‘renewed interest in children … is especially motivated by the desire to document and analyse their lifeworlds, the ways in which they perceive social life, as well as their ability for resistance and symbolic creativity’. A fine example of the study of the lived experiences of children’s rights can be found in a collection on Africa, in which it is argued that ‘for children’s rights to be realized in Africa there is a need to work with the cultural values that remain important to communities instead of work against them or overlook their existence’. This raises the challenging universality versus particularity debate. There are basically two schools: those who argue that the CRC is universal and inclusive (and/or has the ability to accommodate cultural difference), and those who suggest that more is needed to achieve that inclusiveness and hence universalism. In this context, Quennerstedt has suggested to deal with the CRC as a political document rather than as a legal instrument. Rights cannot be seen as ‘pre-political’: they are ‘open to renegotiation and reinterpretation’. Children as rights holders are not seen as abstract humans, but as humans ‘embedded in specific social and status circumstances’.

161 Ibid.
162 Ibid.
168 Ibid., 107.
169 Ibid., 106.
In her theoretical approach to the process of transformation and contextualisation, she borrows from Benhabib the notion of democratic iterations, that is the processes of ‘re-creation and re-interpretation of meaning that takes place in public conversations in various arenas, for example law, policy, and culture’.\(^{170}\) Merry and Levitt have introduced the notion of vernacularisation of human rights to highlight a similar process of recreation at the micro-level: they emphasise the social role of the vernaculariser as a key factor\(^{171}\) on the continuum of replication and hybridisation.\(^{172}\) Kaime puts an accent on ‘concrete opportunities for participation’ in children’s rights agenda-setting as a driver, noting that their denial ‘only serves to alienate many capable individuals from the process of “vernacularizing” children’s rights’.\(^{173}\) When children and their parents have these opportunities, families and communities are ‘empow[er]d’\(…\)to take on the challenge of promoting and protecting children’s rights’.\(^{174}\) From a legal perspective, the thorny question is whether and which red lines there are for these democratic iterations and vernacularisation processes.

Child citizenship is a notion that is quite often linked to children’s rights outside the legal community. The underlying idea is that of membership of children of a political community, in which they have rights and responsibilities.\(^{175}\) Child citizenship should not be reduced to voting and election. In an edited volume on children and citizenship, Lister submits that ‘a child-sensitive theorization and practice of citizenship’ is needed.\(^{176}\) She identifies membership, rights, duties, and equality as the four building blocks of citizenship, and submits that ‘some of the building blocks of citizenship are more compatible with childhood than others’.\(^{177}\) Lister concludes that children’s ‘participation as political and social actors’, their recognition and rights other than participation rights is at stake in the notion of child citizenship.\(^{178}\) But she also warns for the ‘adult template’ underpinning (traditional) meanings of citizenship, in addition to the ‘male template’.\(^{179}\) Cockburn argues that

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170 Ibid., 108.
174 Ibid.
175 Constance Flanagan, Teenage Citizens: Political Theories of the Young (Harvard University Press 2012) 2.
177 Ibid., 10.
178 Ibid., 11–13.
179 Ibid., 14.
‘it is necessary to reclaim children’s right to be considered citizens’ by ‘challenging previous constructions of children that have served to exclude them from being considered worthy or capable of having responsibilities or laying claim to rights’.180

Engagement with disciplines beyond the law is beneficial in a legal commentary such as the present one because it allows an appraisal of legal norms embodied in the CRC and its OPs against the backdrop of political, social, economic and anthropological realities as well as the plethora of children’s experiences across the globe. Such an engagement may also allow for ‘questioning, often disciplinary-specific, assumptions and constructions’ and thus enhance a critical analytical approach to the legal discipline through the use of ‘insights and methodologies developed in other disciplines’.181

F. OUR APPROACH

The present Commentary seeks to first provide a legal interpretation of each article of the CRC as well as its three OPs, focusing on the substantive rights and obligations contained therein and is therefore based first and foremost on the text of the CRC and its Protocols. In addition, the travaux préparatoires are consulted in cases where the intentions of the drafters are important in interpreting a provision, especially in the cases of contentious issues. Particularly contentious points resulting in long negotiations included the definition of the child (art. 1), the right of the child to express his or her views (art. 12), right to freedom of expression (art. 13), right to freedom of thought, conscience and religion (art. 14), role of mass media (art. 17), adoption (art. 21), the right to education (art. 28) as well as children in armed conflict (art. 38).182 When analysing the travaux préparatoires, the input from UN departments and agencies such as UNICEF, UNESCO and WHO during the technical review in 1988 were taken into account in addition to the perspectives taken by negotiating state representatives. In assessing the travaux préparatoires, it is worth noting the considerable influence of the representatives from the United States on the language adopted in the treaty during the negotiations, even though the US did not eventually ratify the treaty.

The approach to legal interpretation espoused by the authors stays true of Article 31 of the Vienna Convention on the Law of Treaties (1969), which states:

Article 31. General rule of interpretation

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

In distinguishing the ‘object and purpose’ of the CRC and its OPs, the Commentary also takes note of semantic distinctions in modal verbs used in the treaty to infer the type of obligation contained therein. For instance, ‘shall’ used to describe obligations contained in articles is understood to denote ‘as [must], a mandatory intent even if the latter is used above all to establish requirements or conditions’.\(^{183}\) Williams notes that should is also used in prescriptive texts, such as international treaties, ‘for example when enunciating general guidelines and principles which often have strongly moral or ethical overtones’ and references art. 27.2 CRC as an example: ‘The benefits should, where appropriate, be granted, taking into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.’ [original emphasis]\(^{184}\) Williams posits that the use of the ‘medium-strength’ modal verb ‘should’ is informed by


\(^{184}\) Christopher Williams, Tradition and Change in Legal English: Verbal Constructions in Prescriptive Texts (Peter Lang 2007) 128 and 129, respectively.
the desire to draft international conventions ‘broad enough to cover an almost infinite range of situations’. In this Commentary, CRC provisions that use the modal verb shall or must are considered to contain a strong obligation for duty-bearers while provisions using the modal verb should are considered weak obligations. A strict obligation, on the other hand, is where no discretion is given to the State Party.

The Commentary relies on GCs of the CRC Committee as well as of other UN treaty bodies, where relevant, in providing a teleological interpretation of treaty provisions, especially as regards topical issues that have emerged since the drafting of the Convention and its Protocols. The GCs provide interpretative guidance on specific provisions of the CRC as well as the content of specific rights by ‘distil[ling] its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises’. In addition, GCs have been used by the Committee to provide guidance on issues that have not been explicitly referenced in the CRC such as the situation of children in migration or street situations, state obligations as regards budgeting or with respect to business activities.

In cases where there are no other sources of interpretation on an issue, the authors have looked at the reporting process, primarily the various versions of the Reporting Guidelines which have been revised since the adoption of the CRC. The Concluding Observations have not been systematically used as sources of interpretation for the substantive provisions of the CRC or the Protocols given that Concluding Observations are written in response to a State Party’s children’s rights performance at a given point in time and that the agenda items in vogue may have a bearing on what issues are specifically problematised or flagged in any given assessment of periodic reports. In contrast to GCs that are written with a view to clarifying issues linked to the substance of rights or of obligations, Concluding Observations tackle the

185 Ibid., 129.
187 The most recent guidelines date from 2015: 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 (3 March 2015) CRC/C/58/Rev.3. The initial reporting guidelines, issued in 1991 (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: Convention on the Rights of the Child (15 October 1991) CRC/C/5 and various updates (CRC Committee, General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties, under Article 44, Paragraph 1 (B), of the Convention (11 October 1996) CRC/C/58; CRC Committee, CRC Treaty Specific Reporting Guidelines, Harmonized According To The Common Core Document (1 October 2010) CRC/C/58/ Rev.2) have also been used in the Commentary.
question of state performance in implementing the CRC and its Protocols. With respect to state reporting, the CRC Committee states that:

[t]he treaty-specific report should contain additional information specific to the implementation of the Convention and its Optional Protocols, taking into account the relevant general comments of the Committee, as well as information of a more analytical nature on how laws, legal systems, jurisprudence, the institutional framework, policies and programmes impact on children within the jurisdiction of the State Party.\textsuperscript{188}

Where relevant, the Commentary also inspects perspectives from other fields of law, such as labour law, private law or criminal law and general human rights law, in providing a concise but comprehensive interpretation of any given provision. Such perspectives are explored in the context inter alia of issues such as child labour, child abduction and the sexual exploitation of children. Insights from other disciplines are included in so far as they bear on the legal interpretation of a provision or its implementation. Finally, the Commentary engages with contemporary issues and questions in relation to respective provisions of the CRC and its Protocols. In order to contextualise the provisions in the contemporary setting, the Commentary relies on reports produced by UN Special Rapporteurs, academic literature and grey literature from intergovernmental organisations as well as non-governmental organisations. The United Nations has a Special Rapporteur on the sale and sexual exploitation of children, the Office of the Special Representative of the Secretary General for Children and Armed Conflict and the Office of the Special Representative of the Secretary General on Violence against Children. The Special Rapporteur and the two Special Representatives have been undertaking studies and producing both annual and thematic reports, some of which illuminate contemporary issues in relation to their mandates such as surrogacy, cyberbullying, the responsibilities of the private sector, and the impact of information and communication technologies.

The basis of the conceptual framework used in this Commentary with respect to children’s rights obligations is informed by Eide’s tripartite typology of human rights obligations: respect, protect and fulfil.\textsuperscript{189} The typology, originally used in the context of Eide’s work as the then UN Special Rapporteur on

\textsuperscript{188} 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 (3 March 2015) CRC/C/58/Rev.3, para. 13.

the Right to Food, is not without critics and criticism.\textsuperscript{190} Nonetheless, it has since become a universally recognisable framework that provides a common metric in communicating with States Parties, UN institutions and agencies, the civil society as well as academics. In this context, the obligation to respect is understood as the obligation to abstain from violating a right, commonly called ‘do no harm’. The obligation to protect is the obligation to prevent third parties from violating a right, while the obligation to fulfil means an obligation to ensure the realisation of the right, through provision, facilitation or promotion.\textsuperscript{191} The normative content of the tripartite typology of obligations as expounded by the CESCR as well as the CRC Committee especially with respect to ESC rights, may be illustrated in Figure I.1 below:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{The tripartite typology of obligations}
\end{figure}

The Commentary also makes references to negative and positive obligations. Negative obligations are understood as obligations to refrain from violating a right. Positive obligations are understood as obligations to take action through measures to realise a right.

There are certain limitations of the Commentary. The Commentary seeks to achieve a comprehensive but succinct treatment of children’s rights law as it is embodied in the CRC. Therefore, it does not purport to present a literature

\textsuperscript{190} For an overview of the different typologies as well as a critique, see: Ida Elisabeth Koch, Human Rights as Indivisible Rights: The Protection of Socioeconomic Demands under the European Convention on Human Rights (Brill 2009) 14–20.


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review of children’s rights or children’s rights law. It takes first and foremost a legal technical perspective and purposefully presents the selection of most notable scholarship, case law and transdisciplinary insights in interpreting the provisions of the CRC and its OPs.

I.79 Many issues treated in the relevant chapters of the Commentary are cross-cutting, such as non-discrimination, contemporary challenges to children’s rights in light of the digital revolution, assisted procreation and migration. Where the CRC foresees a lead provision with respect to an issue, such as art. 2 on non-discrimination, the Commentary also follows the CRC. When the issue is not explicitly included in the CRC but has been tied subsequently to the content of an article, such as migration and its link to refugee children, the issue is tackled in the Commentary of that article, in this case art. 22 CRC. Likewise, the chapter on art. 6 CRC is the lead chapter on issues about the beginning and end of life, including abortion and euthanasia, even though abortion as an issue features in the chapter on art. 24 on the right to health and euthanasia is also covered in the chapter on art. 5 CRC in the context of evolving capacities. The situation of LGBTQI+ children is covered under art. 2 on non-discrimination as well as art. 24 on the right to health, in the context of right to health information. The issue of children in street situations is covered in various articles, including art. 19 on protection from violence and art. 33 on protection from drugs. The issue of children and the environment is covered in art. 24 in relation to the right to health. As a multifaceted issue, surrogacy is covered in arts 7, 8 on nationality and identity as well as art. 35 in relation to the sale of children. The impact of ICTs on access to information is tackled in art. 17, sexual exploitation through ICTs in art. 34 and cyberbullying is tackled in art. 19. In issues linked to armed conflict, the Commentary first sets out the stage through the chapter on art. 38 and offers a more specific analysis of state obligations linked to OPAC on the chapter on OPAC. On sexual exploitation of children and sale of children, chapters on arts 34 and 35 offer a broader legal context around the issues and the chapter on OPSC analyses additional state obligations under that optional protocol linked to jurisdiction and prosecution as well as rehabilitation and recovery.

I.80 The Commentary surveys case law from international courts, international bodies and regional human rights systems but does not delve into domestic case law given that the opportunities to extrapolate legal interpretative insights from domestic case law is at best limited due to the particularities of each domestic jurisdiction with its own rules and procedures.

I.81 Each chapter on a substantive article commences with an overall introductory summary of the article, moves on to interpret the substance of the article in
terms of obligations and key issues incorporating the drafting history, interpretation of treaty bodies and case law as relevant. Where pertinent, the chapter then addresses contemporary legal debates as well as considerations beyond the law.

While this Commentary can be read cover to cover, it has been conceptualised as a work that will primarily be consulted. As such, each chapter serves as a stand-alone commentary on the topic. For this reason, various chapters reiterate key concepts and issues such as, inter alia, best interests, participation, progressive realisation, retrogressive measures, balancing of interests. Where such key concepts and issues have been tackled in multiple chapters, cross-references have been provided.

The manuscript was drafted over a two-year period, and finalised on and updated until 1 May 2019. To each chapter, a lead author was assigned. Each of the chapters was subsequently reviewed by the other two authors. The authors held regular meetings every two to three months to discuss drafted chapters and outstanding substantive issues. Consecutive rounds of revisions were undertaken. Gamze Erdem Türkelli took the lead in drafting the Introduction, which was co-authored with Wouter Vandenhole. Wouter Vandenhole authored the commentary on arts 1, 2, 4, 5, 7, 8, 14, 18, 20, 21, 23, 25, 26, 27, 28, 29, 41, 43, 44, 45, 46-51 as well as OPAC. Gamze Erdem Türkelli authored the Commentary on the Preamble, arts 10, 19, 22, 24, 30, 31, 32, 33, 34, 35, 36, 38, 39, 42 as well as OPSC. Sara Lembrechts authored the commentary on arts 3, 9, 11, 12, 13, 15, 16, 17. The Commentary on arts 6, 37 and 40 and OPIC were co-authored by Sara Lembrechts and Gamze Erdem Türkelli. This being said, we, each and all, take full responsibility for the entire manuscript.