

THE CRC THEORY OF CHILDREN'S RIGHTS: WORK IN PROGRESS

ABSTRACT

Tamar Morag*

The question of the ratification of the UN Convention on the Rights of the Child (CRC) has been a subject of public and academic debate in the US. Yet, most of this discussion has focused on the Convention's potential influence on a number of specific issues such as abortion, parental rights, and children litigating against their parents. Missing from this debate is an emphasis on a broader evaluation of the conceptual change in the meaning of childhood and children's rights embedded in the Convention.

The Convention is an encompassing instrument that formally establishes a wide range of rights. Since its adoption, however, a much more complex conception of children's rights has emerged, essentially different from the Convention's literal formulations. The interim summary presented here offers an original contribution to the development of a theory of children's rights, a significant topic on which little has so far been written.

The article outlines the role of compromises between Eastern- and Western-bloc countries in the formation of this theory. It next describes the interpretive processes that have shaped the Convention's meaning in the two decades since its adoption. Seen through this lens, the CRC stands as medium for ongoing development and interpretation of the evolving meaning of children's rights.

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Tamar Morag*

Who owns the child? If the parent owns him, –
mind, body, and soul, we must adopt one line of
argument; if, as a human being, he owns himself,
we must adopt another.¹

A. Introduction. B. Central conceptions of children's rights prior to the convention.
C. The international convention and its interpretation. D. Two decades later: An interim
summary. E. Epilogue: A critical perspective and a look ahead.

A. INTRODUCTION

When asked during his presidential campaign about the possibility of the United States
ratifying the International Convention on the Rights of the Child, Senator Obama
replied:²

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¹ KATE DOUGLAS SMITH WIGGIN, *CHILDREN'S RIGHTS: A BOOK OF NURSERY LOGIC*, 4 (Boston, Houghton, Mifflin & Co.; Cambridge, Riverside Press, 1892). This book by Wiggin, an American educator and children's author, was one of the first to deal with the recognition of children's rights.

² <http://fpc.state.gov/documents/organization/134266.pdf> LUISA BLANCHFIELD, *The United Nations Convention on the Right of the Child: Background and Policy Issues*. CONGRESSIONAL RESEARCH SERVICE, December 2, CRS Report prepared for members and committees of Congress available at: <http://fpc.state.gov/documents/organization/134266.pdf>.

It's important that the United States return to its position as a respected global leader and promoter of human rights. It's embarrassing to find ourselves in the company of Somalia, a lawless land. I will review this and other treaties and ensure that the United States resumes its global leadership in human rights.³

The International Convention on the Rights of the Child of 1989⁴ has been ratified by 193 countries, making it the most widely ratified convention to date. The only two countries that have not yet taken this step are Somalia and the United States, although the United States played a central role in formulating the Convention, and even signed it in 1995. The question of the ratification of the Convention has been a subject of public and academic debate in the US. Most of the discussion, however, has focused on the evaluation of the Convention's potential influence on a number of specific issues such as abortion, parental rights, and children litigating against their parents.⁵ Missing from this debate is an emphasis on the conceptual change in the meaning of childhood and children's rights embedded in the Convention.

The Convention is an encompassing instrument that formally establishes a wide range of rights. Since its adoption, however, a much more complex theory of children's rights has developed. Understanding this theory must therefore extend beyond the

³ Video available at: <http://debate.waldenu.edu/video/question-12>; BLANCHFIELD *id.* at 5.

⁴ Convention on the Rights of the Child, 31 TREATIES 221 (opened for signature in 1989) (ratified and enacted in 1991) (hereinafter: the Convention on the Rights of the Child or the Convention).

⁵ For an analysis of the central arguments against ratification of the convention by the U.S., see LAINIE RUTKOW & JOSHUA T. LOZMAN, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARVARD HUMAN RIGHTS REVIEW, Spring 2006. ISSN 1057-5057. See also JONATHAN TODRES, MARK E. WOJCIK & CRIS R. REVEAZ, THE U.N CONVENTION ON THE RIGHTS OF THE CHILD, AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION, 2006.

specific wording of the Convention to include concepts that preceded it as well as the interpretation processes that have developed in the two decades since its adoption, processes that have recurrently scrutinized its theoretical basis.

The purpose of this article is to present the theoretical foundations of the essence and uniqueness of children's rights under the Convention as a dynamic conception, drawing on previous approaches and subject to ongoing interpretation. Over the years, a complex approach has evolved, essentially different from the Convention's literal formulations. The interim summary presented here offers an original contribution to the development of a theory of children's rights..

The first part of the article is devoted to two key understandings of the notion of "children's rights" that preceded the Convention and have influenced its formulation in direct and indirect ways. One understanding concerned the rights of the child in American law as it developed until the end of the 1980s, and the other concerned the rights of the child in the UN Declarations that preceded the Convention. The actual wording of the Convention and the protracted interpretive process of its provisions are discussed in the second part of this article in reference to these previous understandings, which the Convention continues in some ways and contradicts in others. The third part of the article will attempt, in light of the previous discussion, to outline the chief elements of the theory of children's rights under the Convention.

B. CENTRAL CONCEPTIONS OF CHILDREN'S RIGHTS THAT PRECEDED THE CONVENTION

The recognition of children's rights in American law as it developed from the 1960s and until the end of the 1980s, and the recognition of children's rights in the UN Declarations

of Children's Rights that preceded the Convention, were the key initial attempts to grant wide recognition to children as rights bearers. Concern with children's rights is also evident in European law and in the literature published prior to the Convention.

Retrospectively, however, these emerge as the Convention's central reference points and constitute the background for the subsequent interpretation process.

1. Recognition of the Rights of the Child in American Law:

“The Children's Liberation Movement” and its Influence

Widespread engagement with the status of children in American law begins with the “Child Savers.” During the nineteenth century, these activists led statutory reforms designed to protect children from abuse and exploitation, resulting in prohibitions on child labor and in the adoption of compulsory education laws. Shortly afterwards, the first laws were enacted in the United States that prohibited child abuse and empowered states to protect children within the family. This period was characterized by the establishment of settings meant to protect children, including the juvenile court and young offenders' institutions. Underlying the nineteenth-century reforms in the area of parent-child laws were two central principles: the principle of *parental autonomy*, which concerned the parents' freedom to make decisions regarding their children, and the principle of *parens patriae*, which concerned the power of the state to ensure children's safety and wellbeing. Children were not yet recognized as rights bearers, and the principle of children's rights was not yet perceived as independent. Laws were predominantly focused on shielding children and on guaranteeing their right to an

education. The law portrayed the child primarily as weak and passive, and as a potential victim of injury and exploitation.

A comprehensive examination of questions relating to the recognition of children as rights bearers began only in the 1960s and 1970s. As a result of American society's extensive interest in human rights, equality, and oppression, questions were also raised for the first time regarding the justification of the restrictions placed on children and adolescents, leading to the first debates on issues related to children's liberties. A number of youth groups involved in the civil rights movement sought to further the rights of young people by applying the movement's principles to them.⁶ One of the first authors who defined the agenda for what became known as the "Children's Liberation Movement" was Richard Farson in *Birthrights*.⁷ According to Farson, the very definition of childhood as a separate period of life was a social construction aimed at promoting adult interests. The foundation of his writing was the recognition of children's right to self-definition, from which many other rights derive, such as the right to information, to privacy, to economic freedom (including the right to work), the right to choose an alternative home, and the right to self-education and freedom from compulsory education.

This line of thought was also developed by John Holt, an author and educator who is considered the founder of home schooling in the United States.⁸ In his

⁶ Keith Hefner, *Youth Rights*, 28(3) SOC. POL'Y 60 (1998).

⁷ RICHARD EVANS FARSON, *BIRTHRIGHTS* (1974). For other prominent writers of this period, see HOWARD COHEN, *EQUAL RIGHTS FOR CHILDREN* (1980) and Robert Ollendorff, who Freeman claims was the first to call for young people's right to autonomy. See Michael D.A. Freeman, *Laws, Conventions and Rights*, 7(1) CHILD. & SOC. 37, 38 (1993).

⁸ JOHN CALDWELL HOLT, *ESCAPE FROM CHILDHOOD: THE NEEDS AND RIGHTS OF CHILDREN* 16 (1975). Holt lists nine concrete rights that should be granted to children: the right to choose an alternative family framework, the right to information, the right to choose an educational framework and to self-education, the right to work and enter into and perform economic transactions, sexual freedom, the right to vote, the

book,⁹ Holt made a revolutionary call for the removal of all restrictions imposed on children and young people and for the granting of identical human rights to children and adults. Specifically, Holt called for the recognition of the right of children to vote, to work, to enter contracts, and even to leave the family—“the right to do, in general, what any adult may legally do.”

As Martha Minow notes, Farson, Holt, and other authors identified with the “Children’s Liberation Movement” resorted to a revolutionary rhetoric significantly influenced by that of other groups active at the time.¹⁰ The concern with children’s liberation was understood as part of a general debate on the oppression of weak groups such as women, blacks, and people with disabilities, and was clearly tied to contemporary themes that cast doubt on fundamental beliefs and turned the generation gap into a highly relevant matter.¹¹ The image of the child supported by writers prominently identified with the movement was that of a person belonging to an oppressed group denied the most basic human rights, as sharply reflected in the following comment by Farson: “Rights will be granted because without them children are incapacitated, oppressed, and abused.”¹²

Following the radical writings of Holt, Farson and other authors identified with the “Children’s Liberation Movement,” which reverberated widely in the United States,¹³

right to be educated in accordance with the child’s characteristics, the right to protection against corporal punishment, and the right to justice.

⁹ For a discussion of Holt’s book and an analysis of his views, see MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 5 (2005), as well as FREEMAN, *supra* note 7.

¹⁰ For a discussion of the rhetoric typical of the Children’s Liberation Movement see Martha Minow, *What Ever Happened to Children’s Rights?*, 80(20) MINN. L. REV. 267 (1995).

¹¹ GUGGENHEIM, *supra* note 9, at 5.

¹² FARSON, *supra* note 7, at 226.

¹³ On the impact of these books and on the extensive reporting on them in the American media, see Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights”*, 3 BYU L. REV. 605, n. 98 (1976).

scholarly writings sought to submit the justification for the restrictions imposed on children and young persons to critical examination. The central premise of these writers was that the primary justification for negating the rights of children was their lack of cognitive ability and of the capacity to understand and make the necessary judgments to realize these rights. The ability to make judgments and decisions was defined in this literature as a matter of competence.¹⁴ On the basis of this premise, psychology researchers reported at length on studies examining children's actual ability.¹⁵ These studies supported the claim that legal arrangements had to be adapted to the available knowledge regarding children's abilities, and in situations or matters where children's abilities resembled those of adults, they should be granted similar autonomy. This autonomy could be restricted in particular decisions or specific matters, in accordance with the competence to make the necessary relevant decisions. The competence test could be applied in accordance with age criteria or with individual tests seeking to distinguish between different children of the same age.

¹⁴ The position whereby children should not be granted rights given that they have not yet developed capacities was supported by John Locke and John Stuart Mill. Mill wrote in the introduction to *ON LIBERTY*: "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage [...] Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion." (Fourth ed., London, 1869). For a discussion of the positions taken by Locke and Mill as the basis of the discussion concerning incapacity as the central reason for negating the rights of children, see HAFEN, *supra* note 13.

¹⁵ For a review of studies carried out during this period in the field of behavioral sciences regarding the capacity of children, see, *inter alia*, Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989) (Hereafter Melton Taking Gault); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445 (1987) (Hereafter Melton Developmental Psychology); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53(6) CHILD DEVELOPMENT 1589 (1982); N. Dickon Reppucci & Catherine A. Crosby, *Law, Psychology, and Children: Overarching Issues*, 17(1) L. & HUM. BEHAV. 1 (1993).

The growth of the academic literature on children's rights was paralleled by a number of precedents set by the US Supreme Court recognizing the constitutional rights of children in American law. The first Supreme Court case that recognized children's constitutional rights was the *Gault* decision in 1967, which held that children facing criminal trials in juvenile courts were also protected by the right to due process anchored in the Fourteenth Amendment to the Constitution,¹⁶ and held: "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁷ Several decisions issued in the 1970s and 1980s further expanded the recognition accorded to children's constitutional rights.¹⁸ As was true of the literature, many Supreme Court decisions from this period established an explicit link between children's competence and their constitutional rights, with courts relying on assumptions about young people's capability of understanding and decision making to deny as well as to expand the recognition of their liberties.¹⁹ Conditioning the granting of rights to children upon proving their decision-making ability led to the development of a legal doctrine known as "the mature minor doctrine,"

¹⁶ *In re Gault*, 387 U.S. 4 (1967) (hereinafter: the *Gault case*).

¹⁷ *Gault case*, *id.* at 13.

¹⁸ On this issue, see *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), 514, where the court held that children in school are also entitled to free speech. See also *Goss v. Lopez*, 419 U.S. 565 (1975), where the court held that a pupil had the right to due process within the framework of the school disciplinary process.

¹⁹ Robert Mnookin, *Children's Rights: Beyond Kiddie Libbers and Child Savers*, 7(3) J. CLIN. CHILD PSYCHOL. 163 (1978). One of the first cases to place the question of children's capacity on the public agenda was *Parham v. J.R.*, 442 U.S. 584 (1979), dismissing a claim for the recognition of children's right to procedural review of their parents' decision to forcibly commit them to psychiatric hospitals. The court based its decision on the premise that minors did not have the capacity to make medical decisions: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." In contrast, see the position taken by Judge Douglas in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which dealt with the right of parents who belonged to the Amish sect to refuse to send their children to school. In his dissenting opinion, Judge Douglas criticized the majority view that there was no need to hear the children or enable them to decide the issue, and expressed the opinion that children had the necessary capacity to take a view on the proceedings: "The court below brushed aside the students' interests with the offhand comment that, '[w]hen a child reaches the age of judgment, he can choose for himself his religion.' [...] But there is nothing in this record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is beyond his capacity [...] Moreover, there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult." *Id.*, note 3 in Judge Douglas' decision.

whereby the age of maturity should be regarded as a rebuttable presumption. Under this doctrine, when young persons were able to prove that, despite their age, their capabilities resembled those of adults, they would be entitled to the same freedoms as adults. This doctrine was developed in the case law. And stated that a girl who could prove that she was a “mature minor” could consent to an abortion without parental consent. Subsequently, the doctrine was applied in a number of judgments dealing with consent to medical treatment in other contexts as well.²⁰

As a result of the intensive concern with children’s rights in American law during the 1970s and 1980s, the term “children’s rights” entered the legal discourse as a new basic principle that should be considered and discussed. The two fundamental principles that had characterized parent-child law so far—parental autonomy and *parens patriae*—were now joined by a third principle—“the rights of the child.” The importance of children’s rights in this period lies in the shift of emphasis from the protection of children to the recognition of their autonomy and their civil rights. For the first time, questions were asked regarding the justification for the restrictions imposed on children and young people. The criticism of behavioral scientists regarding the consistency of fundamental premises of the law with the existing knowledge on children’s competence led to the recognition that young people had far greater capacities than society and the courts tended to attribute to them.

1.1 The Critique of American Law

²⁰ For the doctrine of the mature minor, see *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

Rodham described the principle of the rights of the child as “a slogan in search of a definition.”²¹ This definition, formulated at the culmination of the process recognizing children’s rights in American law in the 1970s, seems an accurate description of the initial stage described above. The dramatic conceptual change that follows from the very recognition of children as rights bearers was not accompanied by a complex or comprehensive theory of children’s rights, adequate to the need to relate to children in special ways. Six main difficulties seemingly affect the concept of children’s rights as it developed in American law during this period:

(1) Limiting the discussion to the recognition of children’s freedoms

Most of the academic and legal discussion during this period focused on children’s freedoms, including the rights to free speech, to privacy, and to due process. References to the economic and social rights of children, such as the right to education, to a home, and to health are almost entirely absent from the contemporary discourse on children’s rights.

(2) Making adult rights the starting point

The central question was whether and when would children be entitled to the same human rights as adults. Very little consideration was given to rights unique to children (such as the right to development, to education, to a home, or to play), or to the need to adapt recognized rights of adults to the special characteristics of childhood.²²

²¹ Hillary Rodham, *Children Under the Law*, 43 HARVARD EDUCATIONAL REV. 478, 509 (1973)

²² EUGEN VERHELLEN, CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND, MOTIVATION, STRATEGIES, MAIN THEMES 19 (1994). Such criticism was voiced in connection with the decision in the *Gault case*, in which the US Supreme Court held that recognition had to be given to the right of adolescents to due process within the framework of criminal proceedings. According to this criticism, alongside the recognition of the right of adolescents to due process it would have been proper to ensure, insofar as minors were concerned, the existence of a special mechanism that would explain these rights to the minors and help them exercise them, as well as a differing approach to the possibility that minors might waive their right to be represented. Indeed, studies that examined the manner of implementing this judgment found that

(3) The best interest of the child and the rights of the child as clashing principles

The result of confining the legal discourse about children to one about their autonomy, and of viewing children's rights as identical or similar to adults' rights, was that granting rights came to be seen as largely conflicting with children's best interests, a conflict that Bruce Haften summed up as "abandoning children to their rights."²³ The result was a polarized discourse. On one side of the divide were supporters of granting rights to children, and on the other were supporters of granting protection to children or, as Mnookin described them, "Kiddie Libbers and Child Savers."²⁴

(4) Children's rights as inherently detrimental to parental autonomy

A built-in tension was assumed to prevail between children's rights and parental autonomy. A central argument raised in this context was that the perception of the child as an individual led to the focusing on potential conflicts between children and their parents and lessened recognition of their common interests.²⁵

(5) Competence tests as inadequate tools

The key test developed in the literature and in the case law for deciding whether to grant rights to children was a test of competence. Conditioning the recognition of children's

many children were left unrepresented because of ignorance regarding their rights, and because of pressure exerted on them to waive their right to representation. On this question, see Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda and the Right to Counsel*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 25 (Thomas Grisso & Robert G. Schwartz eds., 2000). For a similar discussion of the Gault case, see "Melton Taking Gault," *supra* note 15.

²³ HAFEN, *supra* note 13, at 650. The argument that the recognition of the rights of children might in practice cause them harm has two aspects. First, the change of emphasis in the public discourse to issues relating to the autonomy of children led to the public debate shifting away from the real primary need of children for protection. Second, granting autonomy to children at a young age compelled them to take a stand too early, in a manner that could cause them harm.

²⁴ See Mnookin's article, *supra* note 19. Mnookin criticized the narrow approach characterizing both the proponents of children's rights and the proponents of children's protection, and called for the development of a discourse integrating the different interests and rights of children, while relying on existing knowledge in the field of psychology.

²⁵ GUGGENHEIM, *supra* note 9, at 17.

rights on proof of decision-making competence was criticized mainly on the following counts:²⁶

- Children's abilities develop largely through social and cultural structuring.²⁷

According to this criticism, the more opportunities given to children to experience decision making and the more information available to them, the greater the decision making capabilities they will develop.

- Assessment difficulties. Criticism targeted the lack of adequate scientific tools for assessing children's competence.²⁸ A further argument was that excessive emphasis had often been placed on examining children's cognitive abilities, and insufficient weight had been assigned to more complex aspects such as peer pressure, children's perception of time, and lack of life experience.²⁹ It was also argued that individual competence tests discriminated between different children on the basis of gender, culture, and disability,³⁰ and that, in practice, the decision makers' assessment of children's competence depended largely on the stance adopted by the minors.³¹

(6) *Children as "Not Yet"*

The emphasis of American law at the time on whether and when children attain an adult capability for decision making resulted in a perception of childhood as largely a period of

²⁶ VERHELLEN, *supra* note 22, at 28. For a comprehensive critique of the competence test, see GERISON LANSDOWN, UNDERSTANDING THE IMPLICATIONS OF HUMAN RIGHTS TREATY: EVOLVING CAPACITIES OF THE CHILD (UNICEF Innocenti Research Centre 2005).

²⁷ LANSDOWN, *id.*, at 15. In the context of this discussion, criticism targeted *inter alia* the psychological literature in general and Piaget in particular, whose premise was that children's development was essentially predetermined and dismissed the notion that society played any role in it.

²⁸ *Id.*, at 26.

²⁹ For a critique of these studies' methodology, see Victoria A. Miller, Dennis Drator & Eric Kodish, *Children's Competence for Assent and Consent: A Review of Empirical Findings*, 14(3) ETHICS & BEHAV. 255 (2004).

³⁰ LANSDOWN, *supra* note 26, at 25.

³¹ See, Nigel Thomas & Claire O'kane, *When Children's Wishes and Feelings Clash with Their 'Best Interests'*, 6 INT'L J. CHILD. RTS. 137 (1998), Michael D. A. Freeman, *Rethinking Gillick*, in CHILDREN'S HEALTH AND CHILDREN'S RIGHTS 201 (Michael Freeman ed., 2006).

lack. The discussion did not hinge on the rights to which children *qua* children are entitled, that is, on their rights as people who do not have adult capabilities.³² Eugene Verhellen's formulation of "Not Yet" to describe the image of the child resulting from this approach succinctly summarizes the problem.³³ This image did not view childhood as a period of life in which a person has unique skills, abilities, needs, and viewpoints whose intrinsic value should be appreciated, but as a stage toward adulthood.

1.2 Children's Rights in American Law in the 1960s and 1970s: A Summary

Martha Minnow noted that, after the breakthrough in the realm of children's rights during the 1970s and 1980s, this issue became less significant in the American rights discourse.³⁴ She considers that the main reason for this development is the unique nature of law in the United States and, in particular, the strength of parental and family autonomy in American society, which acknowledges the family's broad freedom to act without state intervention. This explanation is rooted in deep cultural characteristics of the attitude of American law to the institution of the family. The difficulties pointed out above, hindering the development of a solid theory of children's rights, may also have contributed to the status of children's rights becoming a less dominant concern in American law since the beginning of the 1980s.³⁵

2. UN Declarations of Children's Rights that Precede the Convention

³² LANSDOWN, *supra* note 26, at 10.

³³ VERHELLEN, *supra* note 22 at 9.

³⁴ Martha Minnow, *What Ever Happened to Children's Rights?*, 80(20) MINN. L. REV 267 (1995).

³⁵ And yet, note that American law is continually developing in terms of its recognition of children's rights, even if these issues no longer attract the public attention they used to draw in the 1970s and 1980s. For a survey tracing these events, see Barbara Bennett, Woodhouse *The Changing Status of the Child* in Jonathan Tores et al, THE UN CONVENTION ON THE RIGHTS OF THE CHILD.

2.1 The Geneva Declaration of the Rights of the Child of 1924

Despite isolated references to children in earlier international documents, the Geneva Declaration of 1924³⁶ is the first international document primarily devoted to the regulation of children's rights. The Declaration, which was adopted in the aftermath of the First World War, was intended to express humanity's commitment to children in distress. The moving spirit behind the Declaration was an English teacher called Eglantyne Jebb, who was president of the English organization "Save the Children." Jebb sought international support for her activities on behalf of children in distress areas following the war.³⁷

The Declaration contains only five paragraphs, dealing with the obligation to ensure the child's normal development; providing suitable assistance to hungry, disabled, sick, or orphaned children; the obligation to ensure children's precedence in receiving emergency relief; the obligation to protect children against every form of exploitation, and the obligation to put children in a position to earn a livelihood.

Although this was a non-binding declaration rather than a convention, it was of great importance at several levels:

- The Declaration laid the foundations for the recognition of an international commitment to children and the recognition of children as a unique group, the regulation of whose rights requires special and separate attention.
- The recognition of society's obligation to ensure children housing, health, food, and protection was apparently the first comprehensive acknowledgment of social rights in

³⁶ Geneva Declaration of the Rights of the Child of 1924, League of Nations O.J. Spec. Supp. 21, 43 (hereinafter: the Geneva Declaration on the Rights of the Child or the Geneva Declaration).

³⁷ VERHELLEN, *supra* note 22, at 65. For a discussion of the Convention's drafting, see GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 6 (1995); PHILIP E. VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* (1992).

international law. This early reference to the social rights of children laid the foundations for the continued recognition of the social rights of children in international law as unique and compelling.³⁸

- Underlying the recognition of the social rights of children was the recognition of the need to guarantee their full development, anchored in the opening paragraph of the Declaration.³⁹ The acknowledgement of development as a central characteristic of childhood imposing special duties on the state is one of the Conventions' key components.
- A significant change in the approach to children's rights expressed in the Declaration, to which Jebb herself referred when considering its wording, is that society's obligations toward children follows from the children's needs rather than from social interests. Referring to Article 2, which opens with the words: "The child that is hungry must be fed; the child that is sick must be nursed....," Jebb noted that, in the past, most public resources had been devoted to boys on the assumption that they would later become soldiers. The language of the Declaration, which focuses on children's distress, was meant to clarify that the premise for the recognition of the state's obligations towards the child are the needs of the child rather than the needs of society.⁴⁰

Together with the recognition of this Declaration's pioneering role in placing the issue of children's rights on the agenda of international law, note that the perceptions of

³⁸ For a discussion of the historic function of the Declaration in anchoring social rights in international law, See VAN BUEREN, *supra* note 37, at 6.

³⁹ Article 1 of the Geneva Declaration opens with the words: "The child must be given the means requisite for its normal development, both materially and spiritually."

⁴⁰ EGLANTYNE JEBB, INTERNATIONAL RESPONSIBILITIES FOR CHILD WELFARE 7 (Save the Children International Union 1927), cited by VEERMAN, *supra* note 37 at 157.

children's rights and of childhood emerging from it are rather narrow and incipient in a number of respects:

- The Declaration does not actually deal with the recognition of children's rights. The principles set out in the Declaration express a general, almost vague, obligation on the part of society to take care of certain needs of children, and refrains from clarifying who is responsible for their fulfillment and what is their scope.
- Despite its universal language, the Declaration considered children through a narrow prism, and its primary contexts involved children living in harsh circumstances that placed them at risk. The suffering caused to children during WWI is clearly the drafters' foremost motivation. The Declaration gives very little consideration to children *qua* children living and growing up in circumstances involving anything less than extreme distress.
- The image of children that emerges from the Declaration is passive—they must be protected and provided. This image is supported by the wording adopted in the Declaration: “The child must be given,” “The child that is hungry must be fed.”⁴¹

2.2 The UN Declaration of the Rights of the Child of 1959

In 1959, thirty-five years after the adoption of the Geneva Declaration, the UN General Assembly enacted the UN Declaration of the Rights of the Child.⁴² The Declaration of 1959 was initiated by the UN, and its main principles were formulated by the UN Social

⁴¹ Articles 1 and 2 of the Geneva Declaration of the Rights of the Child.

⁴² Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. (1959) (hereinafter: the UN Declaration on the Rights of the Child or the UN Declaration).

Commission, which took the Declaration of 1924 as its starting point.⁴³ After the UN Commission on Human Rights added a preamble to the Declaration, linking it to the UN Declaration on Human Rights, the document was unanimously adopted by the UN General Assembly.

This is a broader document comprising ten principles: equal provision of the range of rights; the right to protection; the right to a name and a nationality; the right to social security and health; the right of handicapped children to special treatment; the right to development; the right to education; the right to be the first to receive protection and relief; the right to protection from neglect, cruelty, exploitation, and special rules regarding the employment of children; and the right to protection from discriminatory and harmful practices.

To understand the historical role of this Declaration, two issues that emerge from the discussion that led to its adoption merit consideration:

(1) Should children's rights be part of general international documents dealing with human rights or should they be singled out in a separate document?

It bears emphasis that this Declaration was formulated after the adoption of the UN Declaration on Human Rights of 1948, and it was therefore argued that a unique document dealing with children was no longer necessary. Ultimately, however, the view that prevailed was that the weakness and vulnerability of children require a separate document.

(2) Should the Declaration have binding force?

In early drafts, the Declaration was called the "Children's Rights Charter." The proposal

⁴³ For an historical survey of the declaration, See VEERMAN, *supra* note 37, at 160; VAN BUEREN, *supra* note 37, at 6.

that the document be given a more binding title attracted great support from a number of countries, led by the government of Poland. In the end, the decision was not to support a change in name, *inter alia* in light of significant differences in the economic situation and in the religious and moral approaches of various countries.

2.3 Comparing the UN Declaration of 1959 and the Geneva Declaration of 1924

A comparison of the UN Declaration of the Rights of the Child of 1959 and the Geneva Declaration of the Rights of the Child of 1924 will discern significant developments:

- (1) The UN Declaration clearly shifts to a language of children's rights and entitlements, not only in the title of the Declaration but also in the formulation of all its principles.
- (2) The preamble to the UN Declaration, which refers to the Universal Declaration of Human Rights, creates for the first time a connection between the concern with human freedoms in general and the concern with children's rights, although the Declaration contains no concrete reference to children's freedoms.
- (3) The image of the child emerging from the UN Declaration differs from that emerging from the Geneva Declaration, in that the UN Declaration describes the child as active. Verhellen remarked on this difference when he pointed to the transition from the wording "the child must be given" (in the Geneva Declaration) to "the child must enjoy" (in the UN Declaration).⁴⁴ Beyond this change in the image of the child, changes are also evident in the life contexts of the children considered in the later declaration. Whereas the Geneva Declaration approached children through a narrow prism confined almost exclusively to circumstances of risk and distress, the UN Declaration deals broadly with children *qua* children and with all their needs.

⁴⁴ On this point, See VERHELLEN, *supra* note 22, at 67.

(4) The right to development, first acknowledged in the Geneva Declaration, was strengthened and assigned a central position in the UN Declaration. The Geneva Declaration had referred generally to the safeguarding of the material and spiritual needs required for the child's development.⁴⁵ The UN Declaration gave depth to this right by specifying various aspects of the child's physical, mental, spiritual, moral, and social development.⁴⁶

The UN Convention included the first important use of the principle of "the best interests of the child" as a guideline in decisions regarding children. Although the Declaration had not yet made this the dominant concern in all decisions concerning children, it was referred to as a paramount principle in the legislation bearing on child development, and as the proposition guiding the activities of parents and educators.⁴⁷ This initial reliance on the "best interest of the child" was a significant platform for its recognition as a guiding principle in the theory of children's rights under the Convention.

In conclusion, although the UN Declaration of 1959 reflected a significant development in the recognition of children's rights, and despite important changes since the formulation of the Geneva Declaration, the UN Declaration still failed to provide a full, nuanced, and comprehensive theory of children's rights. A central difficulty of the concept of rights emerging from the 1959 Declaration is that, notwithstanding the general reference to the UN Declaration on Human Rights in the preamble, the Declaration does not include clear recognition of the rights of children to civil liberties and freedoms and is still confined to protection and provision. The fact that the drafters rejected proposals to

⁴⁵ Article 1 of the Geneva Declaration of the Rights of the Child.

⁴⁶ Article 2 of the UN Declaration of the Rights of the Child.

⁴⁷ Articles 2 and 7 of the UN Declaration of the Rights of the Child; Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

accord the Declaration a more binding title shows that the international commitment to children's rights was not, as yet, sufficiently deep and broad for it to be reflected in a stronger acknowledgement of states' obligations.

C. THE INTERNATIONAL CONVENTION AND ITS INTERPRETATION

1. The Process of Drafting the Convention and its Provisions

In 1978, the Government of Poland submitted to the UN Committee on Human Rights a proposal to hold an international convention on the rights of the child to mark the Year of Children's Rights due to be celebrated in 1979.⁴⁸ The language of the draft Convention submitted by Poland was almost identical to the language of the UN Declaration of 1959. The UN Committee on the Rights of the Child submitted the Polish draft to the UN member states and to NGOs whose reactions, received by the UN Committee on Human Rights charged with handling this matter, bear witness to the shift in the thinking about children and children's rights. All respondents clearly supported adopting a binding convention although twenty five years earlier, as noted, reaching a similar agreement had proved impossible. Central questions raised by those who responded to the Polish draft touched on a broad range of issues, including the rights of children born out of wedlock, the civil and political rights of children and adolescents, and the right of children to take part in decisions affecting them.⁴⁹ Given the scope of the comments to the draft of the Convention, the Commission on Human Rights decided to set up a working group to

⁴⁸ For a discussion of the background to the drafting and enactment of the Convention, *See* VERHELLEN, *supra* note 22, at 72; VEERMAN, *supra* note 37 at 191; VAN BUEREN, *supra* note 37 at 13; SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 13 (1999).

⁴⁹ For the reactions of countries to the draft proposal and for a review of the issues they wished to deal with, *see* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD 21, sec. 34–36 (2007) SHARON DETRICK, *id* at 13

formulate the text of the Convention premised on the UN Declaration of 1959. NGOs established a parallel working group, which played a key role in the process of formulating the Convention and promoting its signing and ratification in various countries. The process of drafting the Convention took ten years, and the document was unanimously adopted by the UN on 20 November 1989.

In the process of drafting the Convention, the representatives of the United States played a prominent role in both the national and the NGO working groups. American representatives reiterated the need to recognize children's freedoms and incorporate provisions concerning their freedoms of expression, religion, and conscience.⁵⁰ Issues of children's freedoms were at the center of the dispute during the drafting process, and several proposals seeking to grant them sweeping recognition were rejected.⁵¹ Ultimately, the Convention reflects the attempts to reach compromise and consensus on these issues. Thus, for instance, Article 13 of the Convention establishes children's freedom of expression. The wording of this article, however, states that this right may be restricted in order to protect national security, public order, public health, or morality.⁵² Another

⁵⁰ For a discussion of the central role played by United States' representatives in the process of drafting the Convention on the Rights of the Child, see VEERMAN, *supra* note 37, at 184; Deirdre Fottrell, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 3 (Deirdre Fottrell ed., 2000). For a critical discussion of the manner in which American representatives furthered recognition of freedoms during the process of drafting the Convention, see Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J. L. & FAM. 1, 6 (1994). According to Alston, the support of President Reagan's administration for furthering recognition of children's rights in the Convention stemmed primarily from the Cold War and from the desire to lessen the importance of Poland's contribution to the advancement of children's rights.

⁵¹ Thus, *inter alia*, West Germany's proposal that the Convention should provide for children to be granted all the rights listed in international documents relating to human rights. See VERHELLEN, *supra* note 22, at 76.

⁵² Article 13 of the Convention on the Rights of the Child reads: "1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of

example of a compromise concerned recognition of children's freedom of thought, conscience, and religion as set out in Article 14. Many state representatives, and particularly those from the Vatican, opposed the American proposal for the wording of this article as too broad, on the grounds that it would impair parents' right to educate their children in accordance with their beliefs and religion. The wording that was finally adopted reflected a compromise between the different approaches: although the Convention recognized these rights, it subjected them to the parental right to provide direction in their implementation.⁵³

In the Convention, therefore, an unusual link was created. On the one hand were the economic and social rights that had been included in the prior Declarations and were promoted by Eastern bloc countries led by Poland, which had proposed the Convention. On the other were provisions related to children's freedoms and civil rights advocated by Western countries led by the United States and West Germany, both of which played a very active role in the drafting of the Convention.

Although the result of many compromises, the wording adopted in the 1989 Convention constituted a breakthrough in the recognition of children's rights, well beyond its being the first internationally binding instrument in this area. The very language of the Convention points to four central achievements or innovations: first, the Convention comprises fifty four articles and is a comprehensive document that refers to a

others; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

⁵³ *Id.*, at 444-453. Article 14 of the Convention on the Rights of the Child reads: "1. States Parties shall respect the right of the child to freedom of thought, conscience and religion. 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."

very broad range of rights in an attempt to embrace children's diverse life contexts; second, the Convention anchors rights that had not previously been ensured in an international document even in relation to adults, such as the right to preserve identity found in Articles 8 and 30, and the right to participate set out in Article 12; third, the Convention creates international standards for the protection of children's rights in areas that had not previously been regulated in international law, such as adoption and out of home placements;⁵⁴ fourth, and this is perhaps one of the Convention's most significant breakthroughs— for the first time in an international instrument, the Convention explicitly anchors children's freedoms including, *inter alia*, freedoms of expression, association, opinion, religion, conscience, and information.⁵⁵

One of the accepted classifications of rights set out in the Convention is known as “the four P's” (Protection, Participation, Provision, and Prevention). Whereas the rights to protection, prevention, and provision had already been incorporated in the Geneva and UN Declarations, the category of rights relating to participation was a significant innovation of the Convention. Indeed, as shown below, this right largely became the symbol of the Convention and of the change it represented in the thinking about children.⁵⁶

2. The Evolving Interpretation of the Convention

While the provisions of the Convention set the basis for new thinking, interpretation is

⁵⁴ Thus, for example, Article 21 of the Convention which provides that State Parties shall ensure that a child concerned by inter-country adoption shall enjoy safeguards and standards equivalent to those existing in the case of national adoption. For a discussion of the safeguards developed by the Convention, *See* VAN BUREN, *supra* note 37, at 16.

⁵⁵ *See* Articles 13-17 of the Convention.

⁵⁶ VAN BUREN, *supra* note 37, at 15.

what has preserved the Convention as a dynamic document, relevant to a changing reality, and enabling the development of a broad philosophy on the nature and characteristics of children's rights.

Various tools of interpretation were developed after the Convention's ratification, foremost among them the decisions of the UN Committee on the Rights of the Child, which are published as General Comments.⁵⁷ This Committee also conducts intensive hearings, which culminate in specific recommendations on implementation.⁵⁸ The Convention requires every member state to submit periodic reports on its ways of implementing it, and the Committee's "Concluding Observations" regarding the state reports constitute another significant interpretive tool. The Committee's decisions clearly indicate that it perceives itself as a body unbound by the intentions of the Convention's drafters, and as authorized to examine on an ongoing basis the adaptations required for the Convention's implementation in a changing reality.

Another body whose publications and website have emerged as increasingly significant in the interpretation of the Convention is UNICEF.⁵⁹ Many scholarly publications dealing with the Convention also engage in a dynamic interpretation process. These three venues—the UN Committee on the Rights of the Child, UNICEF forums,

⁵⁷ The interpretive work of the Committee is conducted in accordance with the procedural rules guiding the work of the Committee. *See* for this purpose: Provisional Rules of Procedure, U.N. Doc. CRC/C/4/Rev.1 (2005), available at: www2.ohchr.org/english/bodies/crc/discussion2008.htm. For a description of the process by which the UN Committee interprets the Convention *see* Judith Karp, *Matching Human Dignity with the UN Convention on the Rights of the Child*, in *THE CASE OF THE CHILD: TOWARDS A NEW AGENDA* 89, 124 (Ya'ir Ronen & Charles W. Greenbaum eds., 2008).

⁵⁸ For a summary of the hearings held so far by the Committee *see* www2.ohchr.org/english/bodies/crc/discussion2008.htm

⁵⁹ *See* publications by Unicef Innocenti Research Center at- <http://www.unicef-irc.org>. The primary tool for the interpretation of the Convention is a handbook produced by UNICEF on the implementation of the Convention. This handbook sets out the main decisions of the Committee regarding the interpretation of the Convention, and is the primary tool that assists states to implement the Convention and report to the UN. *See also* RACHEL HODGKIN & PETER NEWELL, *IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD* 30–35 (2002).

and the academic literature—complement and support one another. Without having reached full consensus, they do share many common lines of thought regarding the Conventions' fundamental concepts and principles.

3. The Principles of the Convention

At its very first session, the UN Committee on the Rights of the Child defined four overarching principles derived from the Convention that must be applied in the interpretation of all its provisions: the principle of equality; the principle of the best interest of the child; the principle of life, survival, and development, and the principle of participation.⁶⁰ An additional principle relates to the manner of implementing the rights enumerated in the Convention: the principle of evolving capacity.

The Convention's language does not require approaching these as overarching, supra-principles so that this definition, in and by itself, involved a significant interpretation process. Having defined them as principles, the Committee has devoted considerable efforts to clarifying them and scrutinizing the internal links between them, concluding that these principles complement, support, and strengthen each other and jointly express a holistic approach. Following is a review of the five principles and their interpretation.

⁶⁰ See Committee on the Rights of the Child, Overview of the Reporting Procedures, U.N. Doc. CRC/C/5, para. 13 (24.10.1994). The definition of these principles as guidelines was established in greater detail in 1996. See Committee on the Rights of the Child, General Guidelines for Periodic Reports, UN Doc. CRC/C/58, para. 40 (1996). For a discussion of the process whereby these principles were established as guidelines, see: MANFRED NOWAK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 6: THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT (2005). See also HODGKIN & NEWELL, *id.*, at 42.

3.1 The principle of equality

The principle of equality is embedded in Article 2 of the Convention on the Rights of the Child, which states:

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

The Convention does not confine itself to the application of the principle of equality to children but seeks to protect them against forms of discrimination unique to them. Article 2.2 prohibits discrimination against children on the basis “of the status... of the child's parents, legal guardians, or family members.”⁶¹ Article 2.2 bans the discrimination or

⁶¹ The Chinese representative, for example, proposed the following wording during the discussions: “The State Parties to the present Convention shall take all effective measures to ensure that a child born out of wedlock shall enjoy the same legal rights as those enjoyed by a child born in wedlock, in particular the rights enumerated in the present Convention.” For this proposal *see* SHARON DETRICK, JAAP DOEK & NIGEL CANTWELL, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES"* 148 (1992). This proposal was ultimately rejected, but the Swedish representative stated that the wording that was approved, which related to “status,” also prohibited discrimination against children born out of wedlock. During the discussion on the Declaration in 1959, Haim Cohn, the representative from Israel, proposed including an express prohibition on discriminating against children whose parents were not married, but this proposal was not accepted. For a discussion of the legislative history of this article, *See* DETRICK, *supra* note 48, at 76.

punishment of a child for the status, activity, opinions, or beliefs of the child's parents or legal guardian. The Geneva Declaration and the UN Declaration, as noted, had defined the right to equality in terms similar to those used in contexts relevant to adults. The main innovation in this article concerned the recognition of the right of children to be accepted by society as separate persons, who in no way ought to suffer from the implications of their parents' acts or legal status, or of society's attitudes towards them. During the discussions on the wording of the Convention, it was proposed that Article 2.1 expressly prohibit discrimination against children of unwed parents, a proposal that had already been raised during the drafting of the UN Declaration of 1959. This proposal was rejected in discussions on the Convention as well, though some Committee members declared that the prohibition of discrimination based on the parents' status included a prohibition of discrimination directed at a child whose parents were unwed.

Interpretation has filled the principle of equality relating to children with concrete contents and has deepened its significance. The work of the UN Committee on the Rights of the Child has gradually developed into a comprehensive and highly influential approach on the nature and characteristics of this principle. According to this approach, states' obligations under Article 2 are not limited to the avoidance of discrimination. In a series of responses to the states' reports, the Committee has established an unequivocal position whereby Article 2 requires member states to take proactive steps to eradicate all types of discrimination and rectify social and economic structures in which such

discrimination has taken root.⁶² This approach was expressed, *inter alia*, in the following comments by the Committee to Bolivia's report of 1993: "The committee emphasizes that the principle of non-discrimination, as provided for under Article 2 of the Convention, must be *vigorously applied*."⁶³

Two additional approaches the Committee adopted in its interpretation are that the right to equality is a right to substantive rather than formal equality, meaning there is room for examining the unique needs of different children and for adapting responses to these needs, and that the Convention binds state parties to implement this principle and to compel private parties to implement it as well.⁶⁴

Over the years, the Committee has also turned the expression "other status" in Article 2.1 of the Convention into a device for protecting specific groups of children. Apparently, these groups could not have been recognized as particularly vulnerable to discrimination when the Convention was enacted, be it because lack of awareness or because no agreement could be reached about the prohibition of discrimination in those contexts. Thus, for instance, the Committee held that Article 2.1 included prohibitions on discrimination on the basis of sexual orientation and against children with HIV.⁶⁵ One of the most interesting interpretive moves in this context concerns the prohibition on discrimination of children whose parents are not married. At the time of the Convention's drafting, as noted, no agreement could be reached on this matter, though some had noted that the prohibition on discrimination on grounds of "other status" included a prohibition

⁶² Committee on the Rights of the Child, Thirty-Eighth Session, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Bolivia, CRC/C/15/Add. 256, para. 14 (11.2.2005).

⁶³ *Id.*, (the emphasis was added). See also HODGKIN & NEWELL, *supra* note 59, at 21.

⁶⁴ HODGKIN & NEWELL, *supra* note 59, at 22.

⁶⁵ For the interpretive process see *id.*, at 26. See also Committee on the Rights of the Child, General Comment No. 3: HIV/AIDS and the Right of the Child, U.N. Doc. CRC/GC/2003/3, para. 8.

of discrimination against children of unmarried parents. In 2005, in the concluding observations to the Philippines report the Committee adopted a clear stand and stated so explicitly.⁶⁶

The literature devoted to Article 2 of the Convention, though limited, adopted the Committee's position and emphasized the need for interpreting the prohibition in broad terms. Judith Karp noted that implementing the principle of equality is particularly important regarding children, given their vulnerability and the fact that they are developing their sense of self-identity.⁶⁷ Samantha Besson has referred to the dual obligation at the basis of Article 2: to respect and ensure equality. Besson also finds grounds for the interpretation supporting a proactive duty to correct discrimination in the Convention's preamble, which clarifies that state parties to the Convention agreed to its provisions after "recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration."⁶⁸ Besson also refers to the need to identify discrimination where it is not immediately obvious, that is, to identify covert and indirect discrimination.

3.2 The principle of the best interest of the child

The principle of the best interest of the child is anchored in Article 3 of the Convention which states:

⁶⁶ See, for example, Committee on the Rights of the Child, Thirty-Ninth Session, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Philippines, CRC/C/Add. 259 (21.9.2005). A survey may be found at HODGKIN & NEWELL, *supra* note 59, at 31.

⁶⁷ KARP, *supra* note 57, at 123.

⁶⁸ Samantha Besson, *The Principle of Non-Discrimination in the Convention on the Rights of the Child*, 13(4) INT'L J. CHILDREN'S RIGHTS 433 (2005).

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

As the Convention's wording indicates, its overarching principle is that of "the best interest of the child." Besides its mention in this Article, the principle features in the Convention eight more times.⁶⁹ This principle, as noted, had already been established in the UN Declaration of 1959, which had stated that it would be paramount in legislation relating to children.⁷⁰ The Convention considerably expanded the application of this principle and stated it should be applied not only to legislation but to all decisions relating to children. And yet, whereas the Declaration had stated that the principle of the best interest of the child should be paramount, the Convention merely stated it would be a primary consideration. In decisions relating to adoptions, however, the Convention stated

⁶⁹ In Articles 9(a), 9(c), 18(a), 20(a), 21, 37(c) and 40(b)(2) of the Convention.

⁷⁰ Articles 2 and 6 of the UN Declaration of the Rights of the Child.

that this principle should be accorded paramount consideration,⁷¹ and decisions made by parents and guardians should make the best interest of the child “their basic concern.”⁷²

Unlike the “paramount consideration” formulation, the Convention adopted a wording making the best interest of the child “a primary consideration,” meaning it is *not* the decisive principle and should be balanced against other interests. The obligation set in the Convention, then, calls only for actively examining the best interest of the child *before* examining the interests and rights of others.⁷³ When drafting the Convention, consideration was given to the possibility of granting greater weight to the best interest of the child by recognizing the principle as paramount or, at least, recognizing it as *the* primary consideration. Ultimately, the choice was to adopt the milder test of “a primary consideration,” on the grounds that the application of this principle had been expanded to all decisions relating to children.⁷⁴

The two main issues that emerged in the interpretation of this principle relate to the manner of implementing the test of “a paramount principle,” and the relationship between the principle of the best interest of the child and the rights listed in the Convention.

3.2.1. Implementing the “paramount principle” test

Scholarly concern with the interpretation of the “paramount” standard has been relatively limited. A tendency may cautiously be noted among some writers to stretch the meaning of the test in the direction of granting greater weight to the best interest of the child when

⁷¹ Article 21 of the Convention.

⁷² Article 18(1) of the Convention.

⁷³ HODGKIN & NEWELL, *supra* note 59, at p. 38; MICHAEL FREEMAN, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 3: THE BEST INTERESTS OF THE CHILD 60 (2007).

⁷⁴ DETRICK, *supra* note 48, at 91.

this interest conflicts with the interests and rights of others. References to cases wherein the principle of the best interest of the child might yield before the interests and rights of others relate almost entirely to clashes between the interests of different children or to very extreme cases, wherein the interest opposed to the best interest of the child concerns the life or health of another person.⁷⁵ Another step in this direction is the interpretation adopted by both Alston and Geraldine Van Beuren, who claim that the proper implementation of the test of “a primary consideration” entails imposing the burden of proof on the person claiming that a certain interest has to be preferred over the best interest of the child.⁷⁶

3.2.2 The principle of the best interest of the child and the rights listed in the Convention

The relationship between this principle and the rights listed in the Convention has been extensively discussed in the literature. Prior to the Convention, the meaning assigned to the “best interest of the child” had been as a principle designed to protect children. This principle was largely regarded as conflicting with the principle of the rights of the child in general, and with the recognition of the rights of children to participation and to personal autonomy in particular.⁷⁷ As perceived and implemented prior to the Convention, this principle evoked dual criticism—for being paternalistic and for being implemented subjectively, that is, in a manner actually dependent on the values of the decision maker. Freeman notes that, when the Convention was enacted, hardly any

⁷⁵ Clear examples set out in the literature regarding situations in which the best interests of a particular child would retreat before the best interests of another person relate to the separation of Siamese twins; decisions to perform Caesarean sections of women that might endanger their lives, and decisions seeking to draw a balance between the best interest of parents who are themselves minors and the best interest of their child. See FREEMAN, *supra* note 73 at 62.

⁷⁶ VAN BUEREN, *supra* note 37, at 46; Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J. L. & FAM. 1, 13 (1994).

⁷⁷ VAN BUEREN, *id.*

attention had been paid to the meaning of the term. As Alston put it: "Its meaning seems either to have been taken for granted or to have been considered unimportant."⁷⁸

Shortly after the Convention's adoption, several writers noted a need for according new meanings to the best interest of the child principle. The claim was that this principle had been established within a Convention on the Rights of the Child, which is a human rights convention; its meaning should therefore be less paternalistic, and its implementation should adopt objective and egalitarian standards.⁷⁹

The complex question discussed by various authors concerned the relationship between the principle of the best interest of the child and the child's rights recognized in the Convention, focusing on ways of implementing the Convention so as to preclude a clash between them. This question arose mainly with regard to the relationship between the best interest of the child and the child's right to participate. The Convention's early drafts had expressly stated that children's wishes should be weighed when assessing their best interests.⁸⁰ This requirement was omitted from Article 3 of the final draft, on the grounds that it repeated the provisions of Article 12. The omission of this provision created some uncertainty as to the relationship between Article 3, largely regarded as paternalistic, and Article 12, which recognized the right to participation.

The evolving interpretation of the Convention, however, sought to reconcile these two concepts and present them as complementary. According to a key theory, the participation of children and the consideration given to their wishes would lead to better

⁷⁸ Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J. LAW & THE FAMILY 1, 11 (1994),

⁷⁹ VAN BUEREN, *supra* note 37, at 49.

⁸⁰ VAN BUEREN, *id.* at 47.

decisions, which would be in their best interest.⁸¹ When tensions or potential conflicts do prevail between the wishes and the best interest of the child, as perceived by adults, a number of approaches have sought to reconcile them. A clear stance to the effect that these principles must be seen as complementary was taken by the UN Committee on the Rights of the Child, within the framework of the General Comment on the Right to Participate, which stated: “There is no tension between Articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact there can be no correct application of article 3 if the components of article 12 are not respected.”⁸²

John Eekelaar and Freeman focused on the relationship between the wishes and the best interests of the child. Eekelaar presented a model of “dynamic self-determinism,”⁸³ stating that children must be guaranteed the right to participate as part of the process of building their personal autonomy. For this purpose, they must be ensured a strong supportive environment that will enable the best expression of their developing personalities and the ability to influence decisions affecting them. Eekelaar points out, however, that the emphasis in granting a right to participate is the development of the child’s personal autonomy, without implying that the decision making process is transferred to the child. Freeman’s position, developed many years prior to the adoption of the Convention, is close to Eekelaar’s. Freeman refers to his interpretation, which he

⁸¹ For the development of this argument, see GERISON LANSDOWN, *PROMOTING CHILDREN'S PARTICIPATION IN DEMOCRATIC DECISION-MAKING* (UNICEF Innocenti Research Centre, 2001).

⁸² See Committee on the Rights of the Child, General Comment No 12, *The Right of the Child to Be Heard* (2009) Para 74. (hereinafter: the General Comment on Participation). See- <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

⁸³ John Eekelaar, *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism*, 8 INT'L J. L. & FAM. 62 (1994).

claims must also be applied when interpreting the principle of the best interest of the child according to the Convention, as “liberal paternalism.”⁸⁴ He argues that, for some decisions, the correct course is to act according to the child’s wishes even if the adult’s view is that the decision is mistaken. This course shows recognition of the child’s right to make mistakes and of the importance of enabling children to genuinely experience decision making as part of their development. And yet, according to Freeman, children should not be allowed to make decisions that prima facie contradict their best interest in matters where they might suffer irreversible harm.

Inspiring most of the literature dealing with the principle of the best interest of the child is the desire to present a comprehensive theory that will avoid presenting this principle as conflicting with the rights of the child. This literature seeks to formulate a decision making model that takes into consideration the rights of the child, the balances that must be drawn between the various rights, and the limitations that must be imposed on the child’s rights when their implementation might impair the child’s best interest. Despite their different emphases, these approaches share the view that the child’s right to participate, like any other right, is subject to the principle of the child’s best interest.

3.2.3 The best interest of the child as a principle relating to children as a group

Contrary to the early years, when concern with this principle had touched on decisions involving individual children, the interpretation endorsed in recent years requires this principle to be applied to public policy relating to children as a group. According to this view, although children’s interests need not be overriding in every policy decision, they

⁸⁴ MICHAEL D.A. FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* 40–47 (1983). *See also* FREEMAN, *supra* note 73, at 6.

must be weighed before others. One of the first statements recognizing the best interest of the child as a principle applicable to children as a group appears in the UN Committee report concerning the Republic of Bénin, which draws attention to the importance of placing children at the center of policy thinking: “It is the Committee’s view that further efforts must be understood to ensure that the general principle of the convention are appropriately integrated in... projects programs and services which have an impact on children.”⁸⁵ Freeman and Ellston find support for this approach in the plural form of the language “all actions concerning children” in Article 3.⁸⁶

Most of the discussion relating to the principle of the best interest of the child in the UN Committee reports to the states, however, still deals with decisions bearing on concrete children rather than on considerations affecting the interests of children as a group, or touching on priorities in the allocation of resources.

3.3 The principle of life, survival, and development

The principle of life, survival and development is established in Article 6 of the Convention, which states:

- (1) States Parties recognize that every child has the inherent right to life.
- (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

⁸⁵ Crc/C/15/Add/ 106 para/ 14- 1999..

⁸⁶ M. Freeman, *Article 3 – The Best Interests of the Child*, in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds.) *A COMMENTARY ON THE UNITED NATION CONVENTION ON THE RIGHTS OF THE CHILD* (Leiden, 2007), 46.

This principle groups three central rights under one umbrella: the right to life, the right to survival, and the right to development. Even before the Convention, the right to life had been anchored in international instruments dealing with human rights, and the Convention's drafters had noted the need for stating explicitly that this right applies to children too. Increasing awareness of child mortality in preventable circumstances led to the proposal to expressly formulate a right to survival in the Convention. The right to development is unique to children and, as noted, was recognized for the first time in the UN Declaration of 1959. It appears from the Convention's preparatory documents that its drafters regarded the right to life, the right to survival, and the right to development as complementary rights that rely on one another and cannot be fully separated.⁸⁷

The UN Committee on the Rights of the Child has considered two operative aspects of the right to life and the right to survival. The first is the prohibition against taking life, such as the prohibition of violence against children and the prohibition of imposing the death penalty on children. The second is the duty to take measures so as to reduce the factors that contribute indirectly to the death of children by, for instance, promoting health and ensuring minimal living conditions.⁸⁸

Three main issues emerge in the literature commenting on the right to development:

(1) *The right to development as a broad right.* The wording of the Convention clarifies that the right to development is a broad right affecting many aspects—physical, mental, spiritual, moral, and social—of the child's life.⁸⁹ The UN Committee emphasized that the right to development is a holistic right that includes all the areas of development

⁸⁷ MANFRED NOWAK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 6: THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT 14 (2005).

⁸⁸ HODGKIN & NEWELL, *supra* note 59 at 83.

⁸⁹ See Articles 27 and 32 of the Convention on the Rights of the Child, which propose these five components of the right to development.

enumerated in the Article, and that member states must take measures to safeguard children's optimal development in all areas.⁹⁰ Arlene Bowers-Andrews notes that describing the right to development as a broad right expresses a new and fuller view of the child as a complete person,⁹¹ referring to what some authors have articulated as a perception of children as "human beings" rather than as "human becomings."⁹²

(2) *The division of responsibility between the state and the parents to ensure the development of children.* Emphasis has been placed on the need to read Article 6 concurrently with other articles in the Convention, particularly Articles 5, 18, and 27. The principle emerging from these articles is that the initial duty to ensure the development of children is incumbent on the parents, and the state must assist parents to fulfill this task. Kaufman and Blanco point out that the UN Declaration of 1959 had not specified that the primary responsibility for the child's development devolves on the parents, but this was included in the Convention following demands raised by various states and organizations seeking to strengthen parental status.⁹³

(3) *The scope of the state's duties towards children derived from this principle.* From the very definition of the right to development as unique to children, one may derive the existence of augmented state duties to safeguard the social and economic rights ensuring the development of children. And yet, according to Article 4, insofar as economic, social

⁹⁰ Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5, paras. 12, 16 (2003) (hereinafter: General Comment No. 5), *See also* NOWAK, *supra* note 87, at 16.

⁹¹ Arlene Bowers Andrews, *Securing Adequate Living Conditions for Each Child's Development*, in IMPLEMENTING THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A STANDARD OF LIVING ADEQUATE FOR DEVELOPMENT 1, 1–7 (Arlene Bowers Andrews & Natalie Hevener Kaufman eds., 1999).

⁹² For a discussion, see Bowers *Id.*, at 4. *See also, inter alia*, THOMAS & O'KANE, *supra* note 31. *See also* Sophie Debski, Sue Buckley & Marie Russell, *Just Who Do We Think Children Are? New Zealanders' Attitudes about Children, Childhood and Parenting: An Analysis of Submissions on the Bill to Repeal Section 59 of the Crimes Act 1961*, 34 SOC. POL'Y J. NEW ZEALAND 100 (2009).

⁹³ Natalie Hevener Kaufman & Maria Luisa Blanco, *Drafting and Interpreting Article 27*, in IMPLEMENTING THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A STANDARD OF LIVING ADEQUATE FOR DEVELOPMENT 17 (Arlene Bowers Andrews & Natalie Hevener Kaufman eds., 1999).

and cultural rights are concerned, state parties “shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” This fairly moderate test was set because of the fear that setting a higher standard would make the states’ duties impossible to implement, particularly in poor countries. More stringent tests were set with regard to the right to health and the right to education. With regard to the right to health, the provision states that it must be safeguarded at the highest possible level, and with regard to the right to education, it states clearly and unequivocally that elementary education must be free.⁹⁴ Attempts are discernible over the years both in the work of the Committee and in the literature to make the vague test set out in Article 4 more binding. Thus, according to the Committee’s guidelines, economic and social rights must be entrenched in legislation, high priority must be given to the funding of children’s issues in the state budget, and the state budget must be structured so as to give effect to children’s rights.⁹⁵

3.4 The right to participation

The right to participation is established in Article 12 of the Convention, which states:

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

⁹⁴ Articles 24 and 28 of the Convention on the Rights of the Child.

⁹⁵ HODGKIN & NEWELL, *supra* note 59 at 58.

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

The right to participation is one of the Convention's central innovations. This right had not been recognized previously in international treaties, neither in relation to children nor in relation to adults. According to the language of the article, this right includes three main elements: the right to be heard, the right for this process to take place freely, and the right for due weight to be given to the desires of the child.

In the extensive body of literature dealing with it, the principle of participation has emerged as a symbol of the shift in the thinking about children and their rights introduced by the Convention as, for instance, in the following remarks of the UN Committee on the Rights of the Child:

The new and deeper meaning of this right is that it should establish *a new social contract*. One by which children are fully recognized as rights-holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights holders.⁹⁶

⁹⁶ Committee on the Rights of the Child, Forty-Third Session, Day of General Discussion on the Right of the Child to be Heard 2 (29.9.2006), available at: www2.ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendations_after_DGD.doc (Emphasis in the original, hereinafter: summary of the discussion of children's participation in decisions).

The literature dealing with the principle of participation listed several reasons for making the right to participation the key symbol of the Convention.⁹⁷ First, the participation of children leads to their perception as concrete, human, and multi-dimensional persons, and enables a distinction between different children while recognizing each child's unique abilities and needs. Second, the right of participation promotes placing the best interests of children at the center of decision making processes affecting them. The right thereby contributes to the detachment from adult-centrism—an approach that emphasizes the interests and rights of adults, structures the debate from the perspective of adults, and premises decisions affecting children on the notion that adults know what children want. Third, the right to participation, as distinct from the right to autonomy, is one well suited to children. It may be implemented at almost any age and on a gradual basis, in accordance with the child's evolving capacities. Fourth, the right to participate recognizes both the individual child and children as a group as influential members of society. Fifth, the right to participation expresses respect for children. Karp pointed to this element when defining this right as “a statement of recognition” of the child as a human being.⁹⁸

Four central issues emerge in the literature dealing with the principle of participation formulated in the Convention, all centering on the deepening and expansion of this right.

3.4.1 The meaning of the term “freely”

Article 12 of the Convention provides that all children capable of giving their own opinion have a right to do so “freely.” According to the UN Committee on the Rights of the Child, the term “freely” appearing in this article must be interpreted as a substantive

⁹⁷ See LANDSDOWN, *supra* note 105.

⁹⁸ KARP, *supra* note 57, at 120.

condition requiring the building of special tools that will enable the participation of children.⁹⁹ Over the years, the recognition of the duty to ensure the free participation of children has led to the development of principles and standards for its regulation.¹⁰⁰ These principles and standards refer, *inter alia*, to the following matters: transparency and honesty regarding the purpose of the participation and the weight to be attached to the child's wishes; ensuring the child's freedom to choose whether or not to participate; ensuring the existence of an environment adapted to children; ensuring full freedom of opportunity for different children to implement the right to participation; providing children with information adjusted to their needs and capabilities; protecting children from harm in the course of participation or as a result of it; establishing clear rules about confidentiality and immunity concerning the child's statements; providing children with information on decisions affecting them; providing children with opportunities to initiate participation in ways respectful of the children and their culture. The literature dealing with this matter emphasizes the concept of participation as a process rather than a one-time action, and as an anchor for the involvement of children in a broad range of matters affecting them.¹⁰¹

3.4.2 To which children does the right to participate apply?

According to the language of Article 12, the right of participation is only granted to a child "capable of forming his or her own view."

⁹⁹ HODGKIN & NEWELL, *supra* note 59, at 155.

¹⁰⁰ See, General Comment on Participation *supra* note 82 Paragraphs 22-25, 41, 45, 132-136 For standards that were developed by these organizations, see for example, the standards of the Save the Children organization, available at: www.savethechildren.net/alliance/about_us/accountability/practicestandardscp.doc.

¹⁰¹ General Comment on the Participation of Children *supra* note 82.

In a far reaching process of interpretation, the meaning that was ascribed to this restriction greatly limited its scope. For instance, the UN Committee on the Rights of the Child stated that no age threshold should be set for the implementation of the right to participate in legal proceedings. According to the Committee's General Comment on Article 12, whenever possible, participation should also be allowed to very young children by relying on non-verbal means of communication, including body language, facial expressions, and drawing, through which very young children demonstrate choices and preferences.¹⁰²

3.4.3 Ensuring significant participation

The third issue considered in the literature relating to Article 12 of the Convention refers to the statement that merely allowing children to participate in the decision making process is not sufficient, and care must also be taken to ensure that participation be effective and significant. The person perhaps most closely identified with this line of thinking is Roger Hart, who developed an eight-rung ladder for classifying situations involving the participation of children as a group in decision making processes.¹⁰³ Hart defines the first three rungs, referring to situations wherein children only seem to participate or are even manipulated, as "non-participation." The top five rungs cover a continuum from providing information to children, through consulting with them, and up to complete partnership with them. According to Hart, all these rungs of participation are legitimate but they must be used consciously and after inquiry as to which is the best and most effective for reaching a decision or setting policy on the matter at hand. Hart, as

¹⁰² *Id.* At Para . 21.

¹⁰³ Roger A. Hart, *Children's Participation: From Tokenism to Citizenship*, in INNOCENTI ESSAYS 4 (1992).

noted, deals with the participation of children as a group in policy formulation processes, but his ladder, following some adaptations, also became the standard for examining models of children's participation in concrete decisions affecting them as individuals.¹⁰⁴

The question of what constitutes significant participation also requires attending to the interpretation of the terms in Article 12 regarding the weight to be attributed to the child's statements—"in accordance with the age and maturity of the child." To date, the interpretation of this test has received relatively little attention from the UN Committee.¹⁰⁵ The Committee has clarified its position that the test concerning the weight of the child's words must combine age and maturity and no stringent age tests should be imposed, emphasizing the need for recognizing different abilities among children of the same age. It has also noted that the child's view, when the child is capable of forming her or his own views, merits serious consideration.¹⁰⁶ So far, however, the Committee has not developed clear guidelines regarding the degree to which the child's statements should actually be taken into account, and the test set out in the Convention regarding the weight to be assigned to the child's statements has been criticized as overly vague. Studies that examined the implementation of this principle show that it has led to lack of uniformity regarding the weight and significance attached to children's statements.¹⁰⁷

¹⁰⁴ A number of years later, Shier published an article developing a slightly different model regarding the definition of significant participation: Harry Shier, *Pathways to Participation: Openings, Opportunities and Obligations*, 15 *CHILD. & SOC.* 107 (2001).

¹⁰⁵ As distinctly conveyed in the discussions regarding the participation of children in decision-making processes. GERISON LANSDOWN, *PROMOTING CHILDREN'S PARTICIPATION IN DEMOCRATIC DECISION-MAKING* (UNICEF Innocenti Research Centre, 2001), dealing primarily with the hearing of children and less with the impact that the child's words ought to have.

¹⁰⁶ See General Comment regarding the Participation of Children, *supra* note 82, para.28-31.

¹⁰⁷ For an analysis of the weight to be accorded to the participation of the child in the context of the best interest of the child, See THOMAS & O'KANE, *supra* note 31.

3.4.4 The participation of children as a group

The fourth direction where the interpretation of the Convention adopted a far-reaching approach regarding the right of participation touches on the perception of this right as referring to the right of children to constitute a social group, present and influential in all matters affecting children. An examination of various drafts of Article 12 and of the discussions preceding the final version¹⁰⁸ shows that the Convention's drafters had apparently intended to enable girls and boys to participate in specific decision making processes concerning them as individuals. Thus, the first versions of the article stated that a child had the right to participate in "matters concerning his own person."¹⁰⁹ The first versions included a list of issues that required involving children in decisions. All these issues relate to concrete decisions bearing on the child's life, such as consent to undergo medical treatment, marriage, or change of residence. After the list became progressively longer, it was decided to replace it with a general statement to the effect that the right to participate extends to "all matters affecting the child."

In the first years after the Convention's adoption, the literature had also focused on the participation of children in concrete matters concerning them. Marie-Françoise Lücker-Babel, who wrote one of the first articles interpreting Article 12 of the Convention,¹¹⁰ took a clear position stating that the right to participate provided in this article refers solely to the participation of children in decisions personally affecting them,

¹⁰⁸ For a review of the drafts of this article and the discussions that led to these drafts, *see* DETRICK, *supra* note 48, at 213.

¹⁰⁹ *Id.*, at 214.

¹¹⁰ Marie-Françoise Lücker-Babel, *The Right of the Child to Express Views and to be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child*, 3(3) INT'L J. CHILD. RTS. 391, 396 (1995). Lücker-Babel expressly states that the article does not require the participation of children in every policy matter capable of affecting them, such as transportation planning or consumer policy.

or to the participation of groups of children in decisions specifically relating to those groups.¹¹¹

The catch-all formulation that was adopted, “all matters affecting the child,” provided the foundation for a process led by the UN Committee for the Rights of the Child that resulted in an understanding of the article as referring also to the right of children as a group to participate in decision making processes bearing on their lives.¹¹² In General Comment No. 5 to the Convention, the Committee notes the importance of the participation of children in policy and legislation, and makes the participation of children as a group a new challenge that states must deal with.¹¹³ The Committee interprets the expression “all matters affecting the child” as also referring to matters affecting groups of children, such as juvenile offenders or adopted children. A further significant extension of the Committee’s position regarding the rights of children as a group to participate in decision making processes may be found in the summary of the day’s proceedings on the right to participate held by the Committee in 2006. The Committee decided that children should be allowed to participate in the formulation of policies on a range of matters affecting them and not only on specific issues, and that mechanisms should be developed to ensure that the children’s perspective would form a permanent component of all policy making affecting them.¹¹⁴

Landsdown, who examines models of child participation in policy making in various countries, points to a huge range of matters on which she considers that the right to

¹¹¹ For a similar view which focused mainly on the application of the principle on the individual child see VAN BUEREN, *supra* note 37, at 137.

¹¹² HODGKIN & NEWELL, *supra* note 59, at 162.

¹¹³ See General Comment No. 5, *supra* note 90, at 57.

¹¹⁴ See Summary of Day’s Proceedings on Participation of Children in Decision-Making, *supra* note 105, para. 25.

participation under Article 12 should be implemented.¹¹⁵ She analyzes examples of children's participation in research, planning and management of institutions, assessing children's services, developing children's projects, shaping policy, and preparing conferences dealing with children.

The interpretation process that extended the application of Article 12 to children as a group led to growing concern with the question of whether such a broad definition of the right did not require redefining the term "citizenship." One of the primary arguments raised in the literature is that the constitutional meaning of the right to citizenship should be restated so as to recognize children as influential citizens. Jeremy Roche notes: "The demand that children be included in citizenship is simply a request that children be seen as members of society too, with a legitimate and valuable voice and perspective."¹¹⁶

3.5 The evolving capacities of the child as an interpretive principle

The notion of the "evolving capacities of the child" has been recognized as an interpretive principle relating to the manner of implementing the rights enumerated in the Convention.¹¹⁷

The main provision presenting this principle is Article 5 of the Convention:

¹¹⁵ LANSDOWN, *supra* note 105, at 9.

¹¹⁶ Jeremy Roche, *Children: Rights, Participation and Citizenship*, 6(4) CHILDHOOD 475 (1999). For the development of a theory that recognizes children as citizens, as well as a derivative theory on the perception of children at risk as partners in the decision-making process, see Sharon Bessell & Tali Gal, *Forming Partnerships: The Human Rights of Children in Need of Care and Protection*, 17 INT'L J. CHILD. RTS. 283 (2009).

¹¹⁷ HODGKIN & NEWELL, *supra* note 59, at 78.

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

The principle appears in several other articles, including Article 12, which states that the views of the child must be given due weight in accordance with the age and maturity of the child, and Article 14, which states that parents have the right to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. The formulation “evolving capacities of the child” appeared in international law for the first time in this Convention, and constitutes one of its central innovations.¹¹⁸

The distinction between the test of evolving capacity and the test of competence adopted in American law as the determinative test for granting freedoms to children bears emphasis in this context.¹¹⁹ The emphasis on the gradual development of children inherent in the evolving capacity test has turned it into a primary tool for connecting the Convention’s various principles and enabling its holistic and harmonious implementation.

¹¹⁸ VAN BUEREN, *supra* note 37, at 50.

¹¹⁹ For a comprehensive critical discussion of the competence test, see GERISON LANSDOWN, UNDERSTANDING THE IMPLICATIONS OF HUMAN RIGHTS TREATY: EVOLVING CAPACITIES OF THE CHILD (UNICEF Innocenti Research Centre 2005).

3.5.1 Interpreting the principle of the evolving capacities of the child

The main issues emphasized in the interpretation of this principle, are:

(1) The principle establishes a framework for recognizing children's freedoms without exposing them prematurely to an excessive responsibility inconsistent with their capacities.¹²⁰

(2) The principle is perceived as expressing the approach whereby children should be accorded rights regardless of their age. The significant of the child's age relates to the scope of rights that children can implement, and to the ways of implementing them in accordance with their evolving capacities.¹²¹

(3) The principle has an important protective function: children must be protected from actions inconsistent with their abilities. In this context, emphasis was placed on the need for legislation prohibiting child marriages and child labor.¹²²

(4) The implementation of rights according to the test of evolving capacities does not exempt the state or the parents from their duties towards young people in general and minors in particular. For this purpose, the Committee has emphasized that recognition of children's abilities should not entail lowering the age of maturity or evading their rights to protection and security.¹²³

¹²⁰ LANSDOWN, *supra* note 26, at 3.

¹²¹ LANSDOWN, *supra* note 105, at 4. For this matter, *see also* Committee on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (2003) (hereinafter: General Comment No. 4): "Babies and infants are entirely dependent on others, but they are not passive recipients of care [...] They are active social agents."

¹²² HODGKIN & NEWELL, *supra* note 59, at 78.

¹²³ *Id.*, at 4-5. For a critical discussion of stringent age rules, *See* LANSDOWN, *supra* note 26. *See also* General Comment No. 4, *supra* note 121, para. 1. For a discussion of this, *see* HODGKIN & NEWELL, *supra* note 59, at 78.

(5) In the interpretation of the principle, emphasis has been placed on the need to allow for individual distinctions between children.¹²⁴ Indeed, the UN Committee has eliminated the requirement to report age rules from its guidelines for the preparation of state reports,¹²⁵ and has referred in various contexts to the need to recognize differences in the capacities of different children of the same age.¹²⁶

(6) Implementing rights in accordance with the evolving capacities of children imposes a duty on the state and on parents to assist the child to develop those capacities. According to this interpretation, parents must be encouraged and given the appropriate tools to support the child to acquire these capacities in a healthy and appropriate manner. The UN Committee has emphasized that the recognition of the evolving capacities of children must be seen as a constructive process and has criticized the widespread use of information on children's development to negate their rights: "Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy ... Parents (and others) should be encouraged to offer 'direction and guidance' [...] in ways that enhance young children's capacities."¹²⁷

3.5.2 Parental responsibility and the evolving capacities of the child

The literature interpreting the term "parental rights" in the Convention underscores that, rather than rights of the children themselves, these are rights vis-à-vis the state designed to ensure the best interest of the child. Bennett Woodhouse offers an interesting

¹²⁴ LANSDOWN, *supra* note 27, at 50.

¹²⁵ HODGKIN & NEWELL, *supra* note 59, at 4.

¹²⁶ For this *see* Committee on the Rights of the Child, General Comment No. 7: Implementing child rights in early childhood, U.N. Doc. CRC/C/GC/7/Rev.1, para. 17 (2005).

¹²⁷ *Id.*

illustration of this approach, suggesting that the parental role according to the Convention should be viewed as similar to that of a trustee. The rights are the children's, and the parents' role is to implement them on the children's behalf.¹²⁸ Other writers note the need to shift to a discourse based on parental responsibility rather than on parental rights.¹²⁹ This trend has come to the fore in terminological changes in the legislation of a growing number of states.¹³⁰

Following the transition from the terminology of parental rights to parental responsibility, the literature on this Article emphasizes the changing character and scope of parental responsibility in the course of childhood. Changes in the character of parental responsibility in the light of children's evolving capacities have two aspects: first, the parent's responsibility to direct and guide the child set out in Article 5 changes character in accordance with the development of the child, so that the parent must ensure full participation of the child and consideration of the child's wishes; second, insofar as legal capacity and decisions relating to the child are concerned, some of the decision making powers must be transferred from the parent to the child.¹³¹

Beside the trend stressing recognition of the child's rights within the family and subordination of parental rights to the best interests of the child is one stressing the centrality of the family and the importance of the parental role. According to the UN Committee, recognition of the child's rights is actually meant to strengthen the family, and to view its harmonious and autonomous functioning as an essential component of the

¹²⁸ Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. FIGHTING POVERTY 313 (1998). Barbara Bennett Woodhouse, *The Family Supportive Nature of the U.N Convention on the Rights of the Child*, in Jonathan Tores et al, THE UN CONVENTION ON THE RIGHTS OF THE CHILD *supra* note at p. 35.

¹²⁹ BRENDA M. HOGGETT, PARENTS AND CHILDREN: LAW OF PARENTAL RESPONSIBILITY (1993).

¹³⁰ See, for example, the Children (Scotland) Act 1955.

¹³¹ For the interpretation given by the UN Committee regarding the principle of evolving capacities, see General Comment No. 4, *supra* note 121.

protection of children's rights. According to this approach, parents have broad autonomy to make decisions about their children, but the justification for recognizing this autonomy is the protection of the best interests and rights of the children.¹³² The growing recognition of parent-child relations as a central component of the protection of children's rights was accompanied by increasing awareness of the need to restrict parental autonomy in cases of harm to children within the family. Subordination of parental autonomy to the principle of the best interest of the child has been accomplished through broad use of the term "appropriate direction" in Article 5 of the Convention. According to this interpretation, the state has a right to interfere with parental autonomy when parents fail to give their children appropriate guidance or make improper use of their parental powers.

D. TWO DECADES LATER: AN INTERIM SUMMARY

This article examined the development of a theory of children's rights under the Convention. The drafters of the Convention adopted central elements of the theory of children's rights originating in American law, which supported recognition of children's freedoms and were proposed by the US representatives. The Convention also adopted key components on children's rights from preceding Declarations, including recognition of the economic and social rights of children. The link between the children's rights theory in American law and the Declarations that had preceded the Convention was indeed innovative and constituted a breakthrough at the time of its adoption, but the Convention

¹³² See, for example, the emphasis placed on the importance of the family and the recognition of the central function of the parents in promoting children's rights, in the explanatory notes appearing in the UNICEF site, under the heading "Understanding the Convention on the Rights of the Child" – "The Convention expressly recognizes that parents have the most important role in the bringing up of children," available at: www.unicef.org/crc/index_understanding.html

was still far from presenting a systematic, comprehensive theory. At that stage, many questions about the relationship between the various rights and the potential clashes between them remained unanswered. The formulation of a comprehensive interpretation of the Convention was launched on the basis of this partial platform.

The first significant step of the UN Committee in its early sessions was to define a series of principles for interpreting the provisions of the Convention, which have since constituted the primary foundation for its ongoing work in this regard. Though at times disputed, the interpretation processes that have evolved since the Convention's ratification have given rise to a comprehensive theory. This theory is probably different from the one that would have been endorsed had an attempt been made to formulate it at the time the UN adopted the Convention.

Two decades later, the following features can be said to characterize this theoretical approach:

(1) *A holistic approach.* The overarching characteristic of the entire interpretation process has been a desire to develop a holistic theory of children's rights, where the various rights of children are mutually complementary rather than placed in a built-in conflict. One of the primary aspects of this approach is the deliberate attempt of the Convention's drafters to draw away from a dichotomous division between social and civil rights. The elements of the Convention's approach, which are viewed as complementary principles, are known in the literature as the "the four P's"—protection, provision, participation, and prevention. Van Bueren eloquently described the importance of these four elements as follows:¹³³

¹³³ Geraldine Van Beuren, *Combating Child Poverty – Human Rights Approaches*, HUMAN RIGHTS QUARTERLY 21 (1999) 680, 684.

Breaking down the CRC in this way is useful because it points to the four complementary principal approaches to children's rights.... A duty which is expressly placed upon governments ...is not a question of prevention or protection or of children's salvation or children's liberation. All are equally necessary when applied appropriately.

This approach is clearly reflected in the work of the UN Committee on the Rights of the Child, which has emphasized the need to read the Convention as a whole through an interpretation involving two distinct processes. The first entails a persistent effort to present the right to participation and the best interest of the child as complementary rather than clashing principles. The second implies reluctance to present the principle of children's rights as conflicting with the principle of parental autonomy, and emphasizes that strengthening the status of the parents can proceed from the recognition of the rights of the child.

(2) *Recognizing the rights of children qua children.* Recognizing the rights of children as children and as different from the rights of adults involves three key aspects. The first is the recognition of certain rights as unique to children. Some of them—such as the right to development, the right to play, and the right to parents and to a family—are already specified in the Convention. The most significant step in the context of recognizing children's rights as unique was the recognition the child's right to development as an overarching principle, indeed as *the* central premise for identifying the special duties of the state and of the parents to ensure children's rights. A second aspect,

of particular importance in regard to children's freedoms, is the adaptation of rights that are not unique to children to their characteristics and capacities. The two prominent moves in this connection are the shift from a focus on the right to autonomy in American law to one on the right to participation according to the Convention, and the shift from the test of competence in American law to the test of the evolving capacities of the child according to the Convention. These two developments enable the granting of freedoms to children of different ages in a manner compatible with their characteristics, and create the basis for the development of the overarching conception whereby the rights of children are not inconsistent with their best interest. The third aspect concerns the recognition that children have the full range of rights at every age. A gradual and persistent interpretation process is evident in this regard, seeking to acknowledge the rights of even very young children.

(3) The child as a rights bearer here and now. A further feature connected to the recognition of the rights of children as children is the fundamental conception that children have rights, first and foremost so as to ensure their best interest in the present. The literature has defined this shift as a transition from the concept of children as "human becomings" to their recognition as human beings. A prominent example is the recognition of the right to development as one that applies to children during childhood and is not solely intended to ensure their development

(4) Inclusion of the child's perspective and rights in the legal discourse. The interpretation process was accompanied by increasing awareness of the existing legal and cultural discourse as focused largely on adults. "Adult-centrism" implies that the definition of the questions and the analysis of the rights often emphasize adult interests

and do not really attempt to understand the perspective of children. The change, as Deirdre Fottrell notes, is that the Convention has been able “to inject a child centered perspective into international human rights law.”¹³⁴ Promoting this process, both in the Convention as such and in its interpretation, have been the definition of the best interest of the child as a primary consideration and of the right to participation as one applying also to very young children.

(5) *The child's image.* The conception of children's rights under the Convention reflects a profound shift in the image of the child. Conceptions of children's rights that had preceded the Convention presented the child in narrow terms, as suffering from discrimination or oppression, a victim of abuse or exploitation. By contrast, the theory that emerges from a Convention that deals with all aspects of the child's life, and particularly from its interpretation, is that of the child as a complete and multi-dimensional person. The interpretation's emphasis on broad aspects of child development and on the need to draw distinctions on a personal basis rather than on age-based criteria highlight this change. The most significant change, then, both in the Convention's depth structure and in its interpretation, appears to be the transition from the child's image as passive to one of the child as a person who acts, thinks, feels, and bears a right to exert influence.

(6) *From the right of the child as an individual to the rights of children as a group.* The interpretation of the Convention has placed increasing emphasis on the rights of children as a group, as reflected in the broader reading of the best interest of the child

¹³⁴ Deirdre Fottrell, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 3 (2000).

principle as one applying to policy, and in the growing application of the principle of participation to children as a group.

(7) *Human dignity as a guiding principle.* Recognition of children's dignity appears in the preamble to the Convention and in six of its articles. Even though dignity was not included in the list of supra-principles of interpretation, several authors have pointed out the need to recognize human dignity as the Convention's organizing principle. Thus, in 1991, Gary Melton stated: "Underlying the Convention is the belief that children should be taken seriously and that their dignity should be respected."¹³⁵ Judith Karp, who was a member of the UN Committee, notes that over the years the Committee made the principle of the child's dignity the normative umbrella of all its work.¹³⁶ Karp points out that the function of the Committee is to ensure that the Convention's Articles are consistent with this principle. Thus, for example, the Committee makes frequent use of this principle even in relation to Articles where it does not appear at all. The increasingly important role of human dignity in the interpretation of the Convention epitomizes the interpretation process described in this article. The principle of human dignity in regard to children's rights reflects both the perception of children as individuals entitled to have their special needs and characteristics taken into account, and the need to refrain from a perception of the child as an incomplete human being. The key role that the value of human dignity plays in the interpretation of the Convention appears to ensue from increasing awareness of the need to discard the artificial, inflexible attempt to adapt children's rights to the value of freedom, which had been the basis for the recognition of children's rights in American law in the 1980s. The approach to children's rights through

¹³⁵ GARY B. MELTON, *SOCIALIZATION IN THE GLOBAL COMMUNITY: RESPECT FOR THE DIGNITY OF CHILDREN* 4 (1991).

¹³⁶ KARP, *supra* note 57.

the prism of human dignity is one of the crucial keys to the creation of a more comprehensive and harmonious theory of children's rights under the Convention.

E. EPILOGUE: A CRITICAL PERSPECTIVE AND A LOOK AHEAD

The complex process of the Convention's interpretation, which is still ongoing, has resulted in a multidimensional theory of children's rights. Several lines of inquiry have emerged in the literature, focusing on issues that will probably be at the heart of the discourse on children's rights in the coming years:

(1) Separating the concern with children's rights from that with human rights. The outcome of the decision to opt for a Convention specifically concerned with children's rights has been generally positive and has enabled the development of broad thinking regarding these rights' unique characteristics. In particular, it has made a significant contribution to the formation of a community of professionals who view the rights of the child as their area of expertise. Twenty years after the ratification of the Convention, however, some questions have been raised as to the wisdom of this separation, arguing that isolating the issue has to some extent diminished recognition of the rights of children as an integral part of the struggle to protect human rights, and that advocates for broader aspects of human rights have left the protection of children's rights to the small group of experts focused on this issue. An additional critique connected to the separation between children's rights and human rights is that the concern with children's rights in isolation from broader social issues actually precludes examination of the deep social elements that lead to children's distress. As Jude Fernando notes: "Isolating children's

rights issues from issues of class, race, and gender has become a convenient means of avoiding direct engagement with the political and economic realities.”¹³⁷

These trends, seeking to link the concern with children’s rights to struggles to advance human rights are evident in the activities of children’s rights organizations in Europe, which seek to include children’s rights in new constitutions and in general conventions on human rights.¹³⁸

(2) *Difficulties in implementing the children’s rights discourse within the family.* As part of the general critique of the reliance on a rights discourse within the family,¹³⁹ a specific critique in recent years has targeted the use of a rights discourse to regulate parents-children relations. The discourse of rights is claimed to place excessive emphasis on the boundaries between individuals in the family, at the expense of strengthening and preserving significant relationships and allowing expression to unique aspects of parents-children relations such as dependence, concern, the sense of belongingness, connection, and mutual responsibility. Guggenheim points to the difficulties entailed in this framing: “It is highly problematic to discuss the rights of children in a wide variety of contexts without simultaneously considering the rights of the people on whom they are dependent.”¹⁴⁰

(3) *The need to expand the right to participate and recognize the right to dialogue.*

Studies about children’s needs and their desire to participate in processes affecting them

¹³⁷ Jude L. Fernando, *Children's Rights: Beyond the Impasse*, 575 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 8, 12 (2001).

¹³⁸ For a description of the activities of the organizational network EURONET, aimed at including the provisions dealing with children’s rights in constitutions and international human rights documents, see crin.org/euroenet.

¹³⁹ Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4 (1996); Ruth Zafran, *Children’s Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER, SOC. POL’Y & L. 163 (2010).

¹⁴⁰ GUGGENHEIM, *supra* note 9, at 13.

suggest that the right to participate must be interpreted even more widely so as to ensure children not only the ability to be heard and exert an influence, but also the opportunity to engage in a significant and ongoing dialogue with adults and decision makers.¹⁴¹

These views are consistent with the emphasis placed on the importance of preserving and developing relationships in the child's life and the need to avoid a formalistic and procedural approach to the implementation of children's rights.

(4) Insufficient emphasis on weak, excluded, and vulnerable groups of children.

Unlike the preceding Declarations, the Convention shifted the emphasis from children at risk to a concern with children in general and their full range of rights. Some critics now argue that the Convention has gone too far in this regard, resulting in too great an emphasis on relatively strong groups of children and leaving the weakest groups at the margins of the public debate and insufficiently protected. Freeman argues that the rights of some groups of children who require special protection have not been anchored in the Convention in a sufficiently clear and explicit manner. Thus, the rights of street children, very poor children, and disabled children are not adequately regulated. The Convention does not expressly prohibit discrimination of children on grounds of sexual orientation,¹⁴² and the protection of girls under the Convention is only minimal – female circumcision is not banned, nor are there explicit provisions regarding the minimum marriage age.¹⁴³ Freeman also criticizes the minimal concern with social and economic rights of children under the Convention.¹⁴⁴

¹⁴¹ Anne Graham & Robyn Fitzgerald, *Taking Account of the 'To and Fro' of Children's Experiences in Family Law*, 31(2) CHILDREN AUSTRALIA 30 (2006).

¹⁴² See Article 2 of the Convention on the Rights of the Child which prohibits "discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

¹⁴³ Michael Freeman, *The Future of Children's Rights*, 14 CHILD. & SOC. 277 (2000). For the absence of any reference to street children, see also Judith Ennew, *Why the Convention is Not About Street Children*,

(5) *The need to strengthen the political commitment to ensure social rights.* Further to the previous argument, the vague compromise formulations in the Convention on state responsibility for ensuring the economic and social rights of children¹⁴⁵ are claimed to be insufficient to improve in any significant fashion the plight of children living in poverty and harsh circumstances in many places around the world. The critique claims there is room for a much clearer definition of the scope of state responsibility for ensuring children's rights in general, and their right to development in particular, and for setting measurable goals that states will be compelled to attain.

(6) *The need to protect children's rights from attrition and paternalism.* Contrary to interpretations seeking to soften rigid aspects of children's rights on the grounds that they are substantively different from those of adults, other voices seek to re-emphasize the importance of recognizing children's liberties. Proponents of this approach warn that the emphasis on a holistic approach recognizing family ties could ultimately restore overly paternalistic and protective conceptions toward children.¹⁴⁶

My attempt in this article was to show that the conception of children's rights in the Convention is dynamic, and has evolved over the years on the basis of a critical debate and a changing reality. This debate is still ongoing, and the questions raised here, together with many others, will probably continue to be at the center of the discourse on children's rights in general, and on the theory of children's rights in the Convention in

in REVISITING CHILDREN'S RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 169 (Deirdre Fottrell ed., 2000).

¹⁴⁴ FREEMAN, *id.*, at 283. See also Geraldine Van Bueren, *Combating Child Poverty – Human Rights Approaches*, 21 HUM. RTS. Q. 680 (1999).

¹⁴⁵ See, for example, Article 24 of the Convention, which refers to “the right of the child to the enjoyment of the highest attainable standard of health”; and Article 6 of the Convention which establishes the right of children to develop “to the maximum extent possible.” For criticism of this vague formulation of economic and social rights, See VAN BUEREN, *supra* note 37, at 321.

¹⁴⁶ See, Michael D.A. Freeman, *Taking Children's Rights More Seriously*, 6 INT'L & FAM. 52 (1992).

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particular, leading not only to a continued process of interpretation but also to reflections on the need to amend the Convention or to anchor children's rights in other international treaties.