

The Committee on the Rights of the Child – Does Size matter?¹

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Abstract: The Convention on the Rights of the Child celebrated its 30th birthday in November 2019. All Member States to the United Nations but one, have ratified the Convention during the thirty years of its existence. Three Optional Protocols were added to the Convention. In order to monitor progress, a treaty body was created, the Committee on the Rights of the Child, based in Geneva. This treaty body is regularly evaluating the reports of States Parties. The Committee published concluding observations regarding each State Party on the basis of the country report as well as the constructive dialogue with the Committee in order to assist Member States in implementing the Convention holistically. Another instrument that the Committee has used extensively concerns the issuing of General Comments on specific provisions of the Convention and/or specific children's rights issues. Under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, the Committee has the competence to receive individual communications coming from children or persons acting on their behalf.

Keywords: human rights, treaty bodies, optional protocols, general comments, individual complaint procedure

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1. We have come a long way...

Children's rights are human rights. That is internationally agreed. Children have human rights and fundamental freedoms as adults. In addition, they have rights that recognize children's vulnerability depending on their age and maturity, their right to be heard as well as their evolving capacities. Again, that is agreed. But is it so in practice?

The very first time a child was mentioned in a legal context was in the Codex Hammurabi (Harper 1904), a few thousand years ago. There, it was stipulated that '[i]f [the collapse of a house] causes the death of a son of the owner, they shall put to death a son of that builder' (Harper 1904: article 230). The 'eye for an eye'¹ principle is a concept which protects the weak in times when only the mighty had rights. However, the sons were just regarded as a legal tool without personality and or voice. Their interest were not considered.

It took quite a few thousand years of development to accept that a child is a person of its own, and many will still not accept children as rights holders. For multiple centuries, children have been commodities to sell, to bond, to rent out, to marry off for profit, to be used as labor or to be educated as heir. They were at best 'mini-adults' to be treated as such, and for example punished the same way as adults in any justice system. A 10-year-old child soldier, having stolen bread out of hunger, was hanged the same way as an adult for that reason.

It was only at the end of the 19th century that teachers in the United States mentioned that children had to be considered as adults-to be, needing assistance for becoming good, worthy citizens. This paternalistic approach prohibited a judge at the 'children's Court'² to send a child to prison as the child was not considered to be mature enough to understand the difference between right and wrong, but he could send the child to a closed 'educational institution' (closed institutions were then and are now a terrible place for children in most of the cases) for 'as long as it takes' at the discretion of the judge. No legal guarantees were given, the child was not heard. Remnants of this thinking are still to be found in several member States of the UN today.

¹ The rule of 'an eye for an eye' was part of God's Law given by Moses to ancient Israel and was quoted by Jesus in his Sermon on the Mount (Matthew 5:38, King James Version; Exodus 21:24,25; Deuteronomy 19:21). It meant that when dealing out justice to wrongdoers, the punishment should fit the crime.

² Juvenile Courts revolutionized the treatment of dependent, neglected, and delinquent children. The world's first juvenile court, located in Cook County, Illinois, opened in July 1899, and served as the model for this new social welfare approach that emphasized individualized treatment of cases instead of rigid adherence to due process, and probation over incarceration (Center on Juvenile and Criminal Justice 2020). The juvenile court also substituted the ideal of retribution for rehabilitation.

The answer to the multiple misuses of this so called ‘welfare’ system was ‘retributive’ justice³ approach, believing that a child knows the difference between right and wrong quite well to a certain extent, thus can be punished for breaking the law, albeit not as harsh as an adult. The protection of children was given to the family for better or worse, like it has been the case for so many centuries.

The 20th Century finally brought the insight that children have to be protected, have a personality of their own, have to be educated, provided with what they need and must only be punished as a measure of last resort and considering their mental capacity. It was the time of the drafting of different human rights conventions, welcomed by the UN Member States and ratified to varying extents. Treaty bodies were created for the compliance with duties as accepted through ratification of the human rights treaty. One of these conventions is the Convention on the Rights of the Child (CRC or Convention), which was adopted in 1989, entered into force in 1990 and has to date been embraced by 196 UN member states. Its creation needed lots of debates and compromises. It was Poland, under the influence of its most visionary teacher, writer and advocate for children’s rights, Janusz Korczak⁴, that lead the process and pushed for the finalization of the Convention and finally presented it to the General Assembly of the United Nations.

While the Convention contains 54 articles in total, four provisions of the CRC have been identified by the Committee on the Rights of the Child (CRC Committee or UN CRC; UN CRC 2003), in General Comment Nr.5 as the CRC’s general principles relevant for each children’s right and children’s rights issue. These principles are non-discrimination (article 2), the best interest of the child (article 3 (1)), the right to life, survival and development (article 6), and the right to be heard (article 12).

³ Different specialized systems of approach to children in conflict with the law emerged. One concept was the so- called ‘welfare’ model. The reasoning for offenses conceived under this model was that society was at fault, that a child was influenced by negative factors resulting from a dysfunctional system, and that the child was not yet a fully developed human being and could not understand his or her crime and therefore could not be held responsible for any wrongdoings committed (Pratt 1989). A completely different system, and one that could be described as being almost opposite to the welfare system, was established in most European and common law countries under the name of the ‘retributive model’. This system uses punishment as a solution to making the offender learn that rule breaking is wrong and argues that the offender’s punishment should be commensurate to the suffering caused to the victim (Winter 2009).

⁴ For more information about Janusz Korczak’s Biography and Bibliography, please visit the following link: <http://www.januszkorczak.ca/biography.html> (referenced 24 November 2019).

This paper takes stock of the important work of the CRC Committee since the entry into force of the CRC in 1990 and reflects on the major challenges in overcoming the harsh realities children face across the globe standing in the way of the implementation of children's rights. It builds on the extensive experience of the author as member, former chair and vice-chair of the CRC Committee.

2. Taking Stock – The Work of the CRC Committee

Under the influence of the Convention and related international children's rights standards, 'no child should be left behind' became an important key message from the international community to States across the globe (UNICEF 2020). After the adoption of the CRC, it was expected that the work of the Committee on the Rights of the Child (UN CRC), which was established by the Convention (article 43) and whose task it is to evaluate States Parties' reports and give recommendations through concluding observations⁵, would help to achieve this goal. Despite children's harsh realities, both the CRC as well as its monitoring body have contributed to a world in which children's rights are taken more seriously, resulting among others in a wide variety of implementation efforts.⁶

In addition to the reporting system under the CRC, the Committee has adopted 25 General Comments in which it provides guidance on the interpretation and implementation of the CRC (2.1.). Moreover, it has adopted a number views under the individual complaints procedure laid down in the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC; 2.2.). The following sections elaborate on both instruments used by the CRC Committee to promote respect for children's rights around the world.

2.1. General Comments (GCs)

All 25 General Comments (GCs)⁷ are aimed at furthering the understanding of the CRC and at strengthening compliance with its norms. The GCs interpret legal definitions (or define issues, as

⁵ For more information on 'concluding observations', please follow the link: <http://crcreporting.childrightsconnect.org/convention-on-the-rights-of-the-child-concluding-observations/> (referenced 24 November 2019).

⁶ Article Karin Arts in Netherlands Law Review. See <https://www.researchgate.net/publication/271712216>, Twenty Five Years of the United Nations Convention on the Rights of the Child, Achievements and Challenges.

⁷ The Committee publishes its interpretation of the content of human rights provisions, known as General Comments, on thematic issues. For more information on 'General Comments', please follow the link: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (referenced 24 November 2019).

the case might be),⁸ provide instructions to States Parties on how to guarantee the respective (set of) right(s) (UN CRC 2011; UN CRC 2013c) and elaborate on indicators which help to assess progress – or gaps – in compliance and implementation (UN CRC 2013a).

Not surprisingly, the very first GC, GC 1 (UN CRC 2001), deals with education. Another highly problematic field which is covered by GCs is the field of freedom from bodily harm: GC 8 (UN CRC 2006) deals with the protection from corporal punishment, an issue that not many Member States have recognized as a problem for their children and GC 13 (UN CRC 2011) with freedom from all forms of violence, including violence in the family (UN CRC 2011: para. 17-32), a really heavily damaging form of violence. GC 12 (UN CRC 2009b), which concentrates on the child's right to be heard, and GC 14 (UN CRC 2013a) on the best interests of the child principles provide examples of GCs that are meant to assist States Parties in both understanding and implementing the Convention and its general principles, which are both important and complex. More recently, the Committee engaged with the right to leisure, recreation and play (art. 31 CRC; GC 31, UN CRC 2013c) and States Parties' responsibilities in light of the impact of the business sector on children's rights (GC 16; UN CRC 2013b).

The Committee acknowledges the differences in age and development of children and provides guidance to States Parties on how to accommodate these differences in their systems, for example in relation to health. GC 20 (UN CRC 2016) and 4 (UN CRC 2003b) deal specifically with adolescents and the specific challenges they encounter, such as early pregnancy (UN CRC 2016: articles 27, 61, 69) as well as their social and neurological development, among others affecting peer relations in both the offline and online world as mentioned later in detail in GC 25 2021. In GC 7 (UN CRC 2005b) the CRC Committee addresses early childhood and its completely different set of issues, including vaccination (UN CRC 2005b: article 17) and improvement of cognitive abilities (UN CRC 2005b: article 40).

Many GCs focus on special situations which need special consideration such as expressed in GC 21 (UN CRC 2017) concerning the plight of children living and working on the street, GC 11 (UN CRC 2009a) on indigenous children and their often automatic discrimination in every field of their lives, GC 9 (UN CRC 2006b) on children with disabilities, dealing with the widespread problems of exclusion, GC 3 (UN CRC 2003a) on HIV/AIDS and how to combat wrong perceptions and, another important GC, and GC 6 (UN CRC 2005a), explaining how to deal with

⁸ For instance, para. 8 of General Comment No. 24 (UN Committee on the Rights of the Child 2019): 'Important terms used in the present general comment are listed below: [...] Child Justice System: the legislation, norms and standards, procedures, mechanisms and provisions specifically applicable to, and institutions and bodies set up to deal with, children considered as offenders.'

unaccompanied and separated children, a matter that continues to remain highly relevant. Just recently, States Parties have to deal with children returning from countries affected by the so-called ‘Islamic State’. Many of these children have experienced and witnessed the most extreme violence and have been indoctrinated heavily. The physical and mental harm which these children have suffered is not only considerably high, it is long-lasting as well, especially in the case of very young children. The youngest of them, according to the United Nations, was four years old when recruited (United Nations Security Council 2018).⁹

Particularly noteworthy from an institutional point of view is that the CRC Committee started to work together with other treaty bodies on special thematic issues, resulting in GC 3/22 and 4/23 (Committee on the Protection of the Rights of All Migrant Workers and Members of their Families [CMW]/UN CRC 2017a; 2017b) with the CMW and GC 31/18 (Committee on the Elimination of Discrimination against Women [CEDAW]/UN CRC 2014) with the CEDAW. The CRC Committee has worked with CEDAW on issues concerning female children, with the CMW concerning children on the move and is currently exploring possibilities to work with the Committee on the Rights of Persons with Disabilities (CRPD Committee) in order to secure the rights of children with disabilities, to combat their exclusion and to advocate for inclusion at school, at the workplace and in political life. Common General Comments as an outcome of such endeavors are appreciated by States Parties and UN partners alike. They are a signal that overlapping mandates of different treaty bodies are actually a plus and not an unnecessary difficulty. Although it must be acknowledged that treaty bodies do not always take the same position in human rights matters. This seems, for example, true when it comes to institutional care of children. Whereas the CRC Committee builds on article 20 of the CRC and acknowledges the use of institutional care as a measure of last resort, the CRPD Committee is squarely against the use of institutional care for children with disabilities, assuming that this amounts to deprivation of liberty and finding support for its position in article 14 which stipulates that that ‘the existence of a disability shall in no case justify a deprivation of liberty.’¹⁰

Since, according to article 43, the CRC Committee may establish its own rules of procedure which govern General Comments, the CRC does neither explicitly mention General Comments nor that they are binding. It thus seems difficult to assume that and if so, to which extent, the Committee’s General Comments are binding on States Parties (Borlini et al. 2020). Scholars as well as States Parties have had and continue to have differing opinions about the duty to adhere

⁹ See also Sandelowsky-Bosman and Liefwaard 2020, at: <https://www.tandfonline.com/doi/full/10.1080/18918131.2020.1792090>

¹⁰ See also Nowak UN Global Study, 2019, p. 193.

to what is mentioned in these General Comments, but here it should suffice to say that the Committee sees its most important duty in assisting through information and mentioning good practices, trying to convince rather than to enforce, which might not work anyway. It is nevertheless important to note that regional human rights courts have started to include General Comments in its case law, which hardens their legal meaning.¹¹ This could inspire the CRC Committee to promote the General Comments through the individual communications procedure under OPIC, which is addressed in the following section.

2.2. Individual Complaint Procedure

Another tool to use is provided by the 3rd Optional Protocol to the CRC, OPIC, which allows children or persons acting for them, such as caregivers or NGOs, to address the Committee directly by submitting an individual communication or complaint (OPIC article 5), albeit after fulfilling the admissibility criteria (OPIC article 7). In case the claim is admitted, the Committee has the possibility to try to reach an amicable solution (OPIC article 9) or to deal with the merits. Deliberations are obviously based on the CRC and its two substantive Optional Protocols, but also on other treaties (if there is more than one state involved in the case and the involved states are parties to the respective treaties), international humanitarian law, and national law, as well as on jurisprudence of international human rights courts.

Since the entry into force of OPIC in 2014, more than 40 Countries have ratified it and more than 100 communications have been admitted since the ratification of the protocol in 2014. A selection of the cases in which the Committee has adopted views will be further investigated in order to give an insight into the work of the committee, with particular regard to those views, which have officially been published in English (for more information on the cases under OPIC dealt with in English, Spanish or French see the Leiden Children's Rights Observatory, childrensrightsobservatory.nl). The first case revolves around the differences between *kafalah* in Islamic law and adoption in Western understanding and the implications of these differences (2.2.1). In the second case mentioned below, the Committee had to decide if an imminent possibility to be submitted to female genital mutilation (FGM) was a reason to deny deportation; building on the Committee's previous work concerning harmful cultural practices (2.2.2). Finally, case(s) concerning age determination in cases of illegal border crossing are of special

¹¹ See e.g., the case *M and M v. Croatia* by the European Court of Human Rights, application no. 10161/13 at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-156522"\]}](https://hudoc.echr.coe.int/eng#{)

interest to States receiving illegal immigration (2.2.3).¹² There is as well a steadily increasing number of disputes about visiting rights and rights for custody where it is claimed that the national courts have neglected rights enshrined in the Convention (mostly art. 3,6,12, the right to have contact to both parents and health issues). Lately decisions had to be made concerning the right of a child to have an identity,(nationality) and to be able to return to his/her country of nationality in the context of war and terror (ISIS)

2.2.1. *The Kafalah case (Y. B. and N. S. v. Belgium)*

The authors of the complaint, one Belgian, one Moroccan, are married to each other. Under a *kafalah* arrangement¹³, they took in a child of Moroccan nationality, who was born to an unknown father and was abandoned by her mother at birth. The child was put into an institution in Morocco and still lives there. The female claimant visits the girl regularly. The authors noted that, since *kafalah* does not entail a parent-child relationship, they were unable to apply for a visa on grounds of family reunification. The authors applied for a long-stay visa on humanitarian grounds in Belgium for the girl. In their application, they stated that the child was an abandoned child who had been placed in their care. They submitted certificates of good conduct and confirmed that they were in a situation that enabled them to care for the child and provide her with a home environment, stable both personally and financially.

The Immigration Office rejected the application for visa submitted by the authors on the grounds that *kafalah* was not adoption and did not confer any right of residence, that the authors had not sought recognition of the *kafalah* arrangement by the Federal Public Service for Justice (formerly the Ministry of Justice), that an application for a residence permit on humanitarian grounds could not replace an application for adoption and that there was no evidence that the child was really in the care of the applicants or that they had sufficient means of subsistence (*Y. B. and N. S. v. Belgium*: para. 3.2).

After many appeals and submissions, mostly procedural, the authors addressed the Committee of the Rights of the Child. They based their claim especially on article 3 (1) CRC, the best interests of a child, mentioning that in none of the decisions of the Belgian authorities this right was even mentioned. They further underlined that the child was never heard, which violated her rights under article 12 CRC. On top of that, they argued that the right of the child to live in a family according to article 10 CRC was violated as well.

¹² For more critical reflections on the CRC Committee's case law see the case notes published at the Leiden Children's Rights Observatory (childrensrightsobservatory.nl).

¹³ *Kafalah* is a commitment to take responsibility for the protection, education and costs of living of an abandoned child as a father would for his own child. *Kafalah* does not entail a parent-child relationship or inheritance rights.

The Committee recalled that

in all actions concerning children, the best interests of the child must be a primary consideration and that the concept should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in the light of the specific circumstances of the particular child. (*Y. B. and N. S. v. Belgium*: para. 8.3)

With regard to the authors' claims based on article 12 CRC, the Committee took note of

the State party's arguments that [the child] was 1 year old at the time of the first decision and 5 at the time of the second, that she was not capable of forming her own views and that the need to allow a child to express his or her views would not be justified for the purposes of applying the rules for granting residence permits. (*Y. B. and N. S. v. Belgium*: para. 8.6)

The Committee pointed out, however, that

article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice that would restrict the child's right to be heard in all matters affecting her or him. (*Y. B. and N. S. v. Belgium*: para. 8.7)

Thus, the Committee stressed that a very young child can already express an opinion and that it is the duty of a party to find ways to speak with and to a child in an appropriate way. Moreover, Belgium argued that *kafalah* did not entail complete family ties and did consequently not confer any right of residence. The CRC Committee rejected this formal argument. Concerning the notion of 'family life' and 'family',

in the Committee's view, article 10 of the Convention does not oblige a State party in general to recognize the right to family reunification for children in *kafalah* arrangements. The Committee is nonetheless of the opinion that, in assessing and determining the best interests of the child for the purpose of deciding whether to grant [the child] a residence permit, the State party is obliged to take into account the *de facto* ties between her and the authors [...] that have developed on the basis of *kafalah*. The Committee notes that, in assessing the preservation of the family environment and the maintenance of ties as factors that the term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5). (*Y. B. and N. S. v. Belgium*: para. 8.11)

Once again, the Committee places its focus on the individual circumstances in a child's life and not on a strict interpretation of legal terms (*Y. B. and N. S. v. Belgium*: para. 8.11-19). The response of Belgium is not yet known. Member States are not asked to respond to the merits of the case. They are sent the opinion of the Committee and asked to report within a given

timeframe which can vary according to the urgency of the case if they have implemented the suggestions of the committee completely, partially or if they have not done so at all.

2.2.2. *The FGM case (I. A. M. v. Denmark)*

Another important decision (in fact the first substantive decision by the Committee) concerns the question whether being threatened to be submitted to an FGM procedure would create a non-refoulement obligation. The author of the communication, a Somali national from the Puntland State of Somalia, was acting on behalf of her daughter, born in Denmark. The author and her daughter were subject to a deportation order. The author claimed that her daughter's deportation would violate her rights under articles 1, 2, 3 and 19 of the Convention. The Committee requested that the State party refrain from returning the author and her daughter to their country of origin while their case was under consideration and went into the merits of the case.

The author entered Denmark without valid travel documents and applied for asylum, which was denied. After several appeals, when the author was six months pregnant, her application for a visa was denied again. She appealed this decision arguing among other grounds that her daughter would be subjected to female genital mutilation if returned to the Puntland State of Somalia. The author's appeal was rejected again and her deportation to Somalia was ordered, without indicating the specific region. The authorities relied on a report by the Somali State, according to which female genital mutilation was prohibited by law throughout Somalia and stating that it was possible for mothers to prevent their daughters from being subjected to female genital mutilation. The Committee took note of the author's allegations that her daughter's return to the Puntland State of Somalia would expose her to a risk of being subjected to female genital mutilation, and that the State Party failed to take the best interests of the child into account when deciding on the author's asylum request, in violation of articles 3 and 19 of the Convention. The Committee recalled in that respect its General Comment No. 6, emphasizing that

States parties shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child and that such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-state actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner. (*I. A. M. v. Denmark*: para. 4.6)

The Committee recalled that 'when assessing refugee claims [...], States should therefore give utmost attention to such child-specific forms and manifestations of persecution as well as

gender-based violence in national refugee status-determination procedures' (*I. A. M. v. Denmark*: para. 11.3).

The Committee also recalled

its General Comment No. 18 that female genital mutilation may have various immediate and/or long-term health consequences; and that the legislation and policies relating to immigration and asylum should, in particular, recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum; and that consideration should also be given to providing protection to a relative who may be accompanying the girl or woman. (*I. A. M. v. Denmark*: para. 11.4)

The Committee noted that

although the prevalence of female genital mutilation appears to have declined in the Puntland State of Somalia according to reports submitted by the parties [...] its practice is still deeply engrained in its society. (*I. A. M. v. Denmark*: para. 11.6)

The Committee dealt as well with the argument of the State party that the mother claimed asylum for her daughter only to get asylum herself, but rejected this argument, as the best interest of a child, in this case to live with her mother, would override the fact that asylum was sought for the mother. Furthermore, the Committee underlined the following in response to the argument of the State party that not all girls are subjected in all cases to FGM:

The evaluation of a risk for a child to be submitted to an irreversible harmful practice such as female genital mutilation in the country to which he or she is being returned should be adopted following the principle of precaution, and where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from returning the child. (*I. A. M. v. Denmark*: para. 11.8c)

The conclusion to be drawn from this decision is that in cases of doubt if a State Party can offer the necessary protection for a child, this child cannot be returned to such a State. Denmark reacted to the opinion of the Committee by stating that mother and daughter do not reside in Denmark any more. Their whereabouts are unknown.

2.2.3. The age determination cases (D. D. v. Spain; M. T. v. Spain; R. K. v. Spain; J. A. B. v. Spain)

The Committee has addressed in several cases of age determination concerning persons who claimed to be a child while transgressing irregularly the border of a state. In essence, all of them dealt with the way a person claiming to be an unaccompanied minor was treated by State authorities. The issue always was to find out if such treatment was compatible with the rights of

children as enshrined in the Convention, namely if all necessary measures had been used in the best interest of the child.

The Committee upheld the importance of the benefit of the doubt in favor of the child, meaning that in case of doubt, one has to consider the person to be a child. As the most used methods of determination (x-rays, teeth development, etc.) have a margin of exactitude of approximately two years, and as the persons in question mostly claim to be 16 or 17 years old, these methods cannot grant a correct conclusion. Therefore, the Committee, based on expert studies, stressed that individual interviews done by experts trained on dealing with children should take place in the presence of a guardian *ad litem* or any other person who has been appointed right from the beginning to assist the child, including as well an interpreter translating any documents presented to the presumptive child for signature. The following cases mentioned below might shed light on some difficulties of factual (such as no access to legal assistance) and legal nature, such as acceptance of validity of documents.

In *D. D. v. Spain*, the applicant crossed the border between Morocco and the Spanish enclave of Melilla. He was apprehended by the Spanish authorities and immediately sent back to Morocco. He was neither given the chance to identify himself as a minor nor to express his willingness to apply for asylum and to seek legal assistance. After the applicant entered Spain for a second time, he gained access to legal assistance and the case was brought before the Committee.

In *J. A. B. v. Spain*, a Cameroonian national who arrived in Ceuta had official documentation from the authorities of Cameroon and declined an age assessment. He was denied representation by a guardian or lawyer. The prosecutor refused to accept the validity of the documents and the applicant received a removal order. The question here was which kind of documents are to be accepted: Official ones without further checking, even if doubts suggest a falsification but the documents are not obviously faked, or if in case of doubt other means of age determination could be used.

The Committee noted in this regard that the State party did not respect the identity of the applicant as they failed to analyze the validity of the documents provided and did not check the data with the authorities of the country of origin. This constituted a violation of article 8 CRC. On top of that, the assistance of a lawyer and/or guardian can never be denied, as representatives are an essential guarantee during the age assessment process. (*J. A. B. v. Spain*: para. 13.7– 13.10).

Concerning the Spanish cases one can observe already the impact of the OPIC procedure, as the Spanish government started to act upon certain complaints related to age determination and the



right to education already after cases have been accepted, even before the committee adopted its decisions on the merits.

2.3. The CRC's Achievement Despite the Children's Harsh Realities

Today millions of children have been trafficked, millions of children are on the move (as migrants, asylum seekers, refugees or internally displaced people), millions of children have been sexually abused or forced to work under slavery conditions, millions of children have been abandoned or sent to a life on the streets, millions of children are targeted by armed conflicts, millions of children with disabilities are excluded from social life, children of minorities are with almost no rights and thousands of girls are submitted to female genital mutilation, just to mention a few of the plagues children are faced with. Last but not least, millions of children across the globe are affected by the COVID-19 pandemic. Sometimes, one could get the impression that not much has changed since Hammurabi's time, especially when representatives of States Parties officially declare that children are their future (certainly not their present as they would have to do something then), the treasure of their country and the like, but only because it is a diplomatic no-go to admit that one has no real interest in investing in children.

However, something important has happened: with the assistance of advocates for children's rights, the Committee has contributed to the recognition that a child is perceived as a rights holder and not as a mere object of rights (cf. OPIC preamble and article 2). The slogan 'nothing for a child without a child', giving children a voice, has also gained momentum. The participation of children in political activities, in decisions concerning them, has covered ground, at least in some parts of the world. Issues such as the problems of children with disabilities and children on the move are in plain sight, even at budgetary discussions of national parliaments. In more and more States Parties, the fact that child marriage (article 34, 19 of General Comment No. 24/3) is acknowledge as a terrible problem for the married girl standing in the way of her enjoyment of rights and her offspring is officially recognized with legislation changed accordingly. FGM is another such issue that is not falling under a taboo anymore, as is corporal punishment. It is fair to say that the Committee has played a critical role in these developments, as one of the most active treaty bodies resulting in a limited backlog and many different additional activities including the bi-annual Days of General Discussions.

The Committee on the Rights of the Child is not only special as regards size (i.e. it has 18 members) and size matters indeed, not always positively for the Committee with its 40 topics and its almost 'universal' clients and not sufficient resources and time to address all of them, but it also has a very special mandate, namely to deal with children and not only to work for



them. Article 12 CRC asks for children to be heard – and the Committee has to adhere to that article as well. Therefore, the Committee has developed a strategy to involve children in pre-sessions to ask for their opinions, to accept their reports and to prepare guidelines on how to deal with children in a meaningful and child-friendly way (Child Rights Connect 2014). Children are no adults, but rights holders nevertheless, as has been mentioned. Extra work was therefore needed to get them informed and involved. The same had to happen concerning OPIC. The rules for the admissibility of a communication are in line with the rules of other treaty bodies with the exception that, if a child is sending a request, this request has to be answered in a child-friendly language always, notwithstanding formal mistakes.

The composition of the Committee also takes note of our main stakeholders, the children. There are 18 members, currently nine females and nine males from different continents and different regions within continents, with different professions, but all of them dealing with children or child issues.

Given the fact that due to financial constraints the assistance of staff of the Secretariat for preparation of necessary information for concluding observations is limited, inviting civil society, National Human Rights Institutions, ombudspersons and children to send information becomes vital. They play a significant role as counterparts to the official State report, allowing for in-depth questioning of the State delegations. Assistance through information by other UN bodies (UNICEF, UNODC, WHO and others) as well as by specialized NGOs like Child Rights International Network (CRIN), Global Child, Child Rights Connect,¹⁴ Terre des Hommes (TdH)¹⁵, Penal Reform International (PRI), Defence for Children International (DCI)¹⁶, to name a few, becomes as crucially important as information by NHRIs and ombudspersons. It is really necessary to get all available information in order to be able to draft meaningful recommendations for effective implementation.

3. Shortcomings¹⁷

The CRC's achievements notwithstanding, children's rights face many difficulties. Some of these, like the ineffective monitoring process or the issue of traditional and religious laws

¹⁴ Independent, non-profit network made up of more than 80 national, regional and international organisations.

¹⁵ The leading Swiss organisation for children's aid.

¹⁶ A leading child-rights-focused and membership-based grassroots Movement.

¹⁷ The following section is written on the basis of the author's vast experience as member, chair and vice-chair of the CRC Committee.

standing in the way of children's rights reaching their full potential, shall be highlighted in the following sub-sections.

3.1. Legacy of the Past

First of all, the Committee has to grapple with the 'legacy of the past'. Even though it is at least universally accepted that children are human beings, this is not so with the fact that children are rights holders. Discrimination is a huge issue as State politics (e.g. regarding ethnic or religious minorities or sexual orientation) can run counter to the rules of the Convention. The 'best interest of the child' can on purpose or by neglect be interpreted as the best interest of the family or best interest of justice, or State, or communities, running contrary to rights of children or to the real best interests of a child in a given difficult situation. The right to life and development is not secured everywhere, as still seven States Parties allow for and *de facto* practice the death penalty for children¹⁸ and several more life long prison sentences without parole.¹⁹ Meaningful development is not granted in many, especially closed, institutions, such as prisons, medical institutions, educational centers and administrative detention places (Nowak 2019). The right to be heard is by far the least accepted right of a child, as still in many countries a child should be 'seen but not heard'. If the notion of a child as member of society is either not accepted or not implemented in a society, this society is confined to its past in which children indeed were seen as objects of care rather than as subjects of rights. Progress in implementing children's rights will then not be easy, if possible at all. There is some hope, though, that at least some States Parties will 'break with their past' and accept a child as a full-fledged human being with rights and freedom, and not as one 'in the making'.

3.2. Recurring Substantive Issues on the Committees' Agenda

There are issues that stay constantly on the agenda of the Committee, like birth certification (article 7 CRC) as a basis for access to all civil rights, to education, health services etc. There are, however, issues that change in terms of their importance according to the conditions of a country at a specific moment in time as well (FGM²⁰, for example) or because of certain

¹⁸ Since 1990 Amnesty International has documented 145 executions of child offenders in 10 countries: China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, South Sudan, the USA and Yemen (Amnesty International 2019). In the meantime, the United States abolished abovementioned practices, whereas Nigeria and South Sudan called for a moratorium.

¹⁹ Antigua and Barbuda, Cuba, Dominica, Israel, Nigeria, Saint Vincent and the Grenadines, the Solomon Islands, Sri Lanka, Tanzania and the United States.

²⁰ For statistical information on FGM provided by UNICEF, please follow the link: https://www.unicef.org/protection/files/00-FMGC_infographiclow-res.pdf (referenced 26 November 2019).

common developments worldwide, such as the increase of violence in the family (article 19 CRC) to which States Parties have no pertinent answer. Climate change and digital technologies are currently typical subjects of discussion with States Parties and have also led to the development of general comments, one of which was published in 2021 (UN CRC 2021; GC 25). In that context, the UN Special Rapporteur on special procedures David Kaye spoke about the mentioned dangers of online hate speech and other negative influences on children as well as positive effects on them -all mentioned in the GC- in New York on 21 October 2019 (United Nation Human Rights (Office of the High Commissioner, 2019a).

3.3. Ineffective Monitoring Process

Due to the fact that that the mandate of the treaty bodies (with the exception of the Committee against Torture (Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 11)) does not contain the possibility to monitor the implementation of the recommendations inside a State Party and that a five year-cycle until the next visit of that State seems very long for an effective follow-up (some States even advocate for a period of eight years!), an effective monitoring is not possible without anything else. The only way how treaty bodies can put pressure on reluctant States is to repeat recommendations several times, hoping that ‘naming and shaming’ will work and that other treaty bodies as well as the Universal Periodic Review (UPR)²¹ will mention the issue as well. In addition, the role of domestic monitoring mechanisms should be mentioned as well as the significance of civil society in the follow up of the CRC Committee’s monitoring, together with UNICEF mandated to provide technical advice and assistance (article 45 CRC). Unfortunately, both domestic national human rights institutions as well as civil society are not present in each State Party.

3.4. Money Issues

Very often, one could come to the conclusion that States Parties only invest in children when ‘more important’ issues, such as arms, pensions, clientele wishes etc. have been satisfied. Furthermore, it seems that such investments will take place only if some kind of pay-back is to be expected during an election cycle as otherwise these investments cannot be ‘sold’ to political parties who need money for voters, and thus not for children. Investment in children of the very poor, in children with disabilities, in children in conflict with the law, among others, is mostly

²¹ UPR is a unique process which involves a review of the human rights records of all UN Member States (United Nations Human Rights Council 2020).

seen as non-profitable, maybe as a charity issue, if one can afford it. Rich Western European countries with approximately two children per family are able to carry this financial burden and consequently might invest 'in humanity'. Developing countries mostly count on financial and/or technical assistance from the international community (hence article 4 CRC's reference to states parties' available resources concerning the implementation of economic, social and cultural rights). Even if this assistance is rendered, it might not be sustainable. If foreign assistance stops, usually in-country programs stop as well. For example, when social workers were trained and paid to assist protecting children, in quite some countries these social workers were sacked as soon as the international community stopped paying for them. Investment policy depends on legal culture and social norms as well. States with common law²² systems (e.g. UK, Australia) very often have framework laws on the protection of children and leave the practical and financial part to communities that are accustomed and willing to take over. In continental law²³ countries with often very detailed laws on protection, people tend to wait for the government to act, being less willing to take over responsibilities for children who are not their own.

3.5. The Issue of Traditional and Religious Laws

There are other problems, connected to the type of laws in use. For example, concerning tribal law, traditions that are not in line with human rights have to be reconsidered, even if the tribes have reasons for them. It is for example not acceptable that a seven-year-old girl is handed over to another family as compensation for a damage caused, even if this is the only way to keep peace in the tribe as argued by a village elder in Afghanistan. The Indigenous and Tribal Peoples Convention states that traditions have to be respected (an argument put forward very often by States Parties), if they are not in contradiction with human rights (article 8 (2) CRC). This second part of the sentence, that traditions contradicting Human Rights cannot be accepted as an excuse for acting against them, is not mentioned as often as the first one.

If one considers countries with dominant religious laws, children mostly do not have very much to say. According to most religions, the family has rights, especially concerning children, but not the children themselves. The reason for this is that it is the duty of the family to care for the child and its right to decide over it. The caveat is stated in the CRC (articles 5, 9 and 18). But what to do if the family's view of the best interest of a child is very different from the child's view or if a

²² Common law, also called Anglo-American law, the body of customary law, based upon judicial decisions and embodied in reports of decided cases, that has been administered by the common-law courts of England since Middle Ages (Encyclopædia Britannica 2019b).

²³ Civil law, also called Romano-Germanic law, the law of continental Europe, based on an admixture of Roman, Germanic, ecclesiastical, feudal, commercial, and customary law (Encyclopædia Britannica 2019a).

decision by parents is made according to beliefs and not according to the interest of children, not to speak of the best interest of children...? What to do if it is decided that a nine-year-old girl who has been brought to the family by *kafalah* can be married by the *kafalah*-father in order to protect her from indecent harassment (cf. The Guardian 2013)?²⁴ And what to do in countries where religious law, tradition or tribal law takes precedence over State law in family matters? In such cases, the Committee has to patiently advocate over and over again, trying to convince religious and tribal leaders by showing that respecting children's rights does not damage their culture, quite on the contrary, as strong and un-broken children will strengthen the future of their country and of their society respectively (Joint General Recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No.18 of the Committee on the Rights of the Child on harmful practices).

3.6. Access to Justice

Another big issue is access to justice for child offenders, child victims and child witnesses alike (article 39 and 40 CRC). If a child is mistreated by its family, it is in many countries very difficult for it to speak about it, as state organs are usually reluctant to get involved in family matters. Not to speak of member States where it is stipulated that violent behavior to 'correct' children is a head of the family's right and a right of State institutions (article 19 CRC includes corporal punishment as well). In many countries, a child is not heard by the justice system or only after a certain age (usually between 10 and 13 despite the Committee advising against the use of age limits; UN CRC 2009), his/her legal representatives are heard only, notwithstanding the fact that the protection of a child in such situation should be granted (article 12 CRC). What if the child is mentally or physically challenged and no assistance is provided for listening to such a child? What if the rule of the burden of proof demands that a prosecutor has to bring all evidence that a man, having allegedly abused a 10-year-old boy, did know that the child was under the age of sexual consent? What if a girl, raped at six, is not allowed by her parents to speak to therapists or justice organs? What about the many raped children who cannot speak about what has happened to them out of fear to be punished themselves and to bring shame to the family? Very often, children are punished for being victims, but not assisted. They are told that what happened was their fault, because of indecent behavior from their side. There are countries

²⁴ No such case has been brought to the attention of the UN CRC yet.

where raped girls are in prison (not the rapist, often a family member) as otherwise they would be killed by their family.²⁵

3.7. Corruption

And finally, the biggest problem worldwide: corruption! Corruption hampers access to justice, hampers justice as such, hampers assistance to children in need when financial donations or international assistance do not end up where they should, hampers possibilities for education when bribes have to be paid to teachers, hampers health when medicaments provided by the state are privately sold to the ‘rich’, when food is not provided in institutions but sold at the marketplace, when social services for children are cut down as they cannot pay the extra money, and so on and so forth.²⁶ Corruption really stands in the way of the implementation of children’s rights, while leaving no one behind. Moreover, it can be a challenge to discuss corruption with members of State delegations and to address remedies against it, realizing that the counterpart maybe involved in corruption as well.

4. Outlook

In the light of the universal shortage of resources of the UN measures have to be taken to save time, money and human capital. Concerning the treaty body review in this context, a strategy has been developed by all treaty bodies together, using chair meetings and elected focal points in order to address the problems of the States Parties with the treaty bodies, such as multiple reporting, too many recommendations, or time constraints, as well as the problems of the treaty bodies with the States Parties, such as late or no reporting, no compliance, not enough financial and human support. Several statements and discussion papers have been drafted by the chairs of the treaty bodies, others by members, NGOs and even Member States and UN institutions. They are not yet published, as their final versions will be submitted to the General Assembly of the UN during the 2020 review. It is certainly worth reading the strategy and finding common ground between UN Member States and treaty bodies to improve input and output alike, to discuss whether overlapping mandates are an unnecessary burden or a possibility to strengthen

²⁵ None of these problems have been brought to the attention of the Committee, but some of them have been discussed during the dialogues with the delegations of Member States during State Report Meetings.

²⁶ For detailed information on detrimental consequences of corruption on children, please see Child Rights Governance Programming Guidance: Save the Children's Child Rights Governance Global Initiative (CRGI) under the following link: https://resourcecentre.savethechildren.net/node/8039/pdf/programmeguidance_screen1.pdf (referenced 29 November 2019).

the importance of similar observations. It is certainly not helpful to hear from some States that treaty bodies are not needed anymore or should be limited in their possibilities to act.

In a situation where the financial crisis of the UN will not allow to ask for providing funds to tackle investigation, monitoring, follow-up, for more staff to deal with backlogs – more than 1,000 communications are pending – for more translators to quickly publicize long awaited documents, decisions, General Comments, and for more interns to do research, treaty bodies cannot wait for assistance from the headquarters or for internal budget shifting. They have to find their own solutions concerning collaboration, information and working methods with no or very limited costs for as much work as feasible. It is possible that treaty bodies inform each other about common issues ‘unofficially’, as they have already started to do. It must be possible to strengthen civil society (which is rather absent in some countries) for in-country monitoring and it might be possible that several States Parties invite a treaty body to sit in session in their region. It seems that the offer of a simplified reporting procedure²⁷ is more and more accepted by States Parties, allowing for more evaluation in a given time. This might create a win-win situation, helping States Parties and treaty bodies alike. It is difficult to assist a State not willing to accept assistance for a change notwithstanding the negative outcome for children, but it might be possible to convince professionals working with children to try new methodologies for better results. Discussing with judges the benefits of restorative justice²⁸ for children could be such a way. Many members of the different treaty bodies would know how to react to a challenging situation, to give guidance, to collaborate with the States in question. However, this is not always possible, and one gets the feeling of window-dressing, but one has nevertheless to continue as long as possible.²⁹

We still have a long way to go...

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²⁷ In 2014, the United Nations General Assembly adopted resolution A/RES/68/268 entitled ‘strengthening and enhancing the effective functioning of the human rights treaty body system’ in which it encourages the human rights treaty bodies and States parties to use a simplified reporting procedure to facilitate the preparation of States parties’ reports and the constructive dialogue on the implementation of their treaty obligations.

²⁸ Restorative Justice is an approach of addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired and justice achieved (National Institute of Justice 2020).

²⁹ The General Assembly will discuss the different proposals of treaty bodies and NGOs alike during their 2020 session. The outcome (consent or disagreement) will be important for the further development of the treaty bodies.

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