

CHILDREN'S LAW CENTRE
ANNUAL LECTURE
2013

*"The United Nations Convention on the Rights of the Child:
A Legally Binding Instrument.
Obligations of the States Parties."*



*Dr Jean Zermatten
Chairperson of the United Nations Committee
on the Rights of the Child*

*Chair
The Honourable Mr Justice McCloskey*

Belfast, Thursday 21st February 2013



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ANNUAL LECTURE WELCOME

Paddy Kelly

Director, Children's Law Centre

Lord Justices, members of the judiciary, colleagues, friends, on behalf of the Children's Law Centre I would like to welcome you to our 2013 Annual Lecture. On behalf of us all, Dr Zermatten, I would like to extend a very warm Belfast welcome to you. We are absolutely delighted that you are able to be with us today. As Chair of the UN Committee on the Rights of the Child I appreciate the huge demands placed on your time so we are very privileged that you agreed to visit us and deliver our 2013 Annual Lecture. Thank you.

I would also like to thank Mr Justice McCloskey for kindly agreeing to chair today's lecture. We are very honoured that he agreed so readily to make himself available to preside over this afternoon's event and to meet with Dr Zermatten yesterday evening.

Dr Zermatten, I am conscious of the huge responsibility which rests on your shoulders carrying as you do the unenviable task of holding the world's governments to account on behalf of millions of children. I am intimidated by your colossal workload and not least the fact that you have only recently completed the 62nd session of the Committee on the Rights of the Child in Geneva, when you not only examined reports from Guyana, United States, Malta, Guinea, Burkina Faso, Niue, Philippines and Slovakia but also produced and adopted the concluding observations and recommendations in respect of all reports. You and your committee also adopted four General Comments during the session on:

1. the right of the child to have his or her best interests taken as a primary consideration (article 3, para. 1);
2. the right of the child to the enjoyment of the highest attainable standard of health (article 24);
3. on state obligations regarding the impact of the business sector on children's rights;
4. and the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (article 31).

In addition, the Committee adopted the rules of procedure for the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. All of which was achieved during 9 working days.

This snapshot of your commitments focuses us on how privileged we are that you have made time to be with us, not just for CLC's Annual Lecture but also that you have taken time to meet with our Ministers for Health, Education, Justice and the two Junior Ministers who have lead responsibility for children, to discuss with them their responsibilities under the UNCRC, their imminent report to the UN Committee on the Rights of the Child and the subsequent examination.

In relation to the new General Comment on the right of the child to have his or her best interests taken as a primary consideration, our government should also take cognisance of your 2007 comments in respect of the duty which Article 3 of the UN Convention, the best interest of the child, imposes on the State and I quote:

“What is highly interesting in Article 3(1) is the element of the sentence which reads “or legislative bodies.” This addition, which was absent from the draft text of 1981, is of capital importance. It means that whenever national, regional, cantonal, or municipal governments draw up a law, they must verify that the rights of children are taken into account and that their interest is preserved. It is therefore, with the inclusion of these two words (legislative bodies), that the political or macrosocial dimension is introduced into the Convention. The best interest of the child thereby takes on a new function in that it serves to establish what is and what is not good for the child in any legislative program. The best interest of the child is enlightening politics! Isn't that also a revolution?”¹

I think CLC would like to be part of that revolution!

Dr Zermatten, it is particularly appropriate that you are visiting Belfast at this time. The UK government is scheduled to submit its Report to the UN Committee on the Rights of the Child in January 2014 in advance of its next examination by the Committee. The NI Executive is, or should, as we speak be compiling its report for inclusion in the State Party report. The CLC hope that your presence in Belfast and our meetings will focus political minds on the need for our government to critically examine how it has measured up to the promise it made to our children on the international stage when it signed up to the UNCRC.

Reflecting on our government's implementation of the UNCRC and its compliance with the Concluding Observations and associated recommendations made by you and your

1 Jean Zermatten, 'The Convention on the Rights of the Child from the Perspective of the Child's Best Interest and Children's Views' in Carol Bellamy and Jean Zermatten (eds), *The Swiss Human Rights Book Volume 2: Realizing the Rights of the Child* (Rüffer und Rub, 2007), 42

colleagues in 2008, when the Committee last examined the UK on its implementation of the UNCRC, their school report is far from encouraging. Sadly one would struggle to find even one grade A.

In October 2012 CHALKY, the CLC free legal advice line for children, dealt with the highest number of issues since its establishment. These calls reflect the ongoing breaches by government of their obligations under the UNCRC. By way of example in 2008 your Committee recommended:

*“additional resources and improved capacity be employed to meet the needs of children with mental health problems.”*²

The spend on child and adolescent mental health services in this jurisdiction where 20% of children under 18 suffer significant mental health problems was 2.65% of the total mental health budget which constitutes 0.16% of the overall health budget. CLC has repeatedly raised with government the unmet need for these critical services and has had to represent children with mental health needs in legal proceedings to secure services for them and vindicate their rights.

The very significant number of calls CHALKY receives in respect of the breach of the right to education of children with special educational needs is testimony to our government’s failure to give effect to UNCRC Articles 2, 23 and 28 and to address the Committee’s 2008 recommendation to:

*“Invest considerable additional resources in order to ensure the right of all children to a truly inclusive education..”*³

Sadly if time permitted I could provide evidence and commentary to demonstrate government’s failure to address most if not all the substantive and systemic breaches of the UNCRC highlighted by your Committee in its 2008 Concluding Observations. But time does not permit and being an optimist I live in hope that, perhaps, not least as a result of your presence with us today, government will do a last minute rally and live up to its promise to our children; so that by the time Save the Children and CLC present an alternative NGO report to the Committee in advance of the next UK examination in 2014 there will be a lot more As and maybe even a few A*.

2 Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland (20 October 2008) CRC/C/GBR/CO/4, para 57

3 Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland (20 October 2008) CRC/C/GBR/CO/4, para 67

In the interim inspired by your leadership Jean, through its legal work, training, the work of our youth advocacy group, youth@clc and when commenting on proposed policy and legislation, CLC will continue to work to vindicate the rights of children and seek to hold government to account for the promise it made to our children when it ratified the UNCRC.

Friends, you will find in your pack copies of the 2011 and 2012 CLC Annual lectures. You will be happy to know that you will not have to wait until next year to receive a copy of Dr Zermatten's lecture. He has kindly provided us with a copy of his lecture in advance. So as well as receiving the published lecture in due course you will be able to pick up a copy of Dr Zermatten's lecture at the registration desk straight after the lecture.

Before I hand over to Mr Justice McCloskey I would like to thank our friends and colleagues at the Bar for their support for the work of CLC by hosting today's lecture and the reception which follows. This is a very fitting venue for our lecture and we remain grateful to our colleagues at the Bar for allowing us to hold our Annual Lecture here.

Thank You

Paddy Kelly
DIRECTOR

CHILDREN'S LAW CENTRE ANNUAL LECTURE

The Hon Mr Justice McCloskey Royal Courts of Justice

An Aperitif

1. I am genuinely honoured to chair the annual lecture of the Children's Law Centre for Northern Ireland, which has become a fixture in the NI legal calendar. That this is so is a tribute to Paddy Kelly and her team. This is indeed an auspicious occasion, duly enhanced by the attendance of our most distinguished speaker (of whom more in a moment).
2. It is no exaggeration to suggest that in this jurisdiction there has been a strong affinity with both the cause of human rights, in the abstract, and those most in need of human rights protection for as long as one can remember. My strong conviction is that this is substantially attributable to our common law roots and traditions. To take one shining example, it is of no little significance that the common law recognised and protected the individual's right to life long before the advent of any of the international law instruments which progressively abounded following the Second World War. It was identified by Blackstone in 1876 as one of the three absolute rights of the people of England. In this respect, the common law was well ahead of the Human Rights Act 1998. This reflects one of its outstanding traits and virtues, namely its zealous concern to protect the rights of the citizen - particularly the weak, the vulnerable and the disadvantaged.
3. It is entirely appropriate, therefore, that Dr Jean Zermatten should deliver his address in a common law jurisdiction.
4. Children did not feature specifically in the most important landmark in the history of international human rights protection, the UN Declaration of Human Rights in 1948. They were, however, recognised implicitly in the opening words of the Preamble -

*"Whereas recognition of the inherent dignity and of the equal and inalienable rights of **all members of the human family** is the foundation of freedom, justice and peace in the world."*

[My emphasis.]

Moreover, the Declaration established a series of fundamental rights and freedoms to be enjoyed by all persons, without distinction “*of any kind*”. Notably, the rights of those intending to marry, parents and the family were specifically recognised, in Article 16, paragraph (3) whereof states:

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Children were, therefore, clearly in the frame.

5. Special recognition of the rights of children at international level, however, was already in existence. On 26th September 1924, the Geneva Declaration of the Rights of the Child was promulgated. This was the work of the League of Nations. It is a short, but remarkable, document, which proclaimed, inter alia:

“By the present Declaration Men and women of all nations, recognising that mankind owes to the Child the best that it has to give, declare and accept as their duty that, beyond and above all considerations of race, nationality or creed”

There followed a short menu, consisting of just five paragraphs. I draw attention to the second of these:

“The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.”

It is no irreverence to describe this as an international law Sermon on the Mount. Its flavour is unsurprising, given the influence of the Judeo-Christian traditions in the development of both international law and the common law.

6. The 1926 Declaration is of note for another reason. In the present era there is, quite properly, a heavy emphasis on the notions of duty and balance. The asserted rights and freedoms of the individual are frequently debated and calibrated against this background. Intriguingly, this concept was expressly articulated in paragraph 5 of the 1924 Geneva Declaration:

“The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.”

The vision and enlightenment which precipitated the Geneva Declaration should serve as a continuing source of inspiration. I suggest that, almost one century later, one can learn much from this compact, but fascinating, instrument.

7. The UN Declaration of the Rights of the Child followed, in 1959. At the heart of this instrument lay the following acknowledgement:

“Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”

The 1959 Declaration reiterated that:

“Mankind owes to the child the best it has to give.”

This was an exact replica of the Geneva Declaration. These simple words established an obligation of undeniable gravity. The purpose of this Declaration was framed in unequivocal language:

“..... to the end that [the child] may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth”

Herein, one can readily identify a notable evolution in the international regime for the protection of children. Furthermore, the concept of reciprocal responsibility, expressed in paragraph 5 of the 1924 Declaration, is repeated. There followed a comparatively modest list of rights - the right to a name, a nationality, free elementary education and so forth.

8. Fully 30 years were to pass until a comprehensive international charter of children's rights made its appearance, in the form of the UN Convention on the Rights of the Child (1989). This has achieved a remarkably high rate of ratification. However, almost 25 years later, it might be said that, in the domestic legal system of the United Kingdom, this measure has not attained its full potential, as it belongs to the domain of international law and is, therefore, embraced by the longstanding principle that international treaties and conventions are not self-executing. Notwithstanding, during this period, the impact and importance of the Convention have been judicially recognised. This is best illustrated in the words of one senior English judge who said, in 2002, that the UNCRC (and the European Charter) -

“can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations.....”

[Per Munby J in ***R (Howard League for Penal Reform) - v - Secretary of State for the Home Department*** [2002] EWHC 2497 Admin, paragraph 51.]

9. Accession by the United Kingdom to UNCRC did not, by reason of the aforementioned doctrine, give effect to the provisions of the Convention in domestic law. However, there have been significant advances in the municipal laws of the United Kingdom in the protection of children’s rights. I draw particular attention to five measures:

- (a) The Human Rights Act 1998, which establishes a human rights protection regime of which children (amongst others) are the beneficiaries.
- (b) The leading measure of statutory protection in this jurisdiction is contained in the Children (NI) Order 1995. Appropriately, the first provision of substance in this statutory measure provides:

“Where a Court determines any question with respect to:

- (a) the upbringing of a child, or*
- (b) the administration of a child’s property or the application of any income arising from it,*

the child’s welfare shall be the Court’s paramount consideration.”

[Article 3 (1) - emphasis added.]

This is followed swiftly by the so-called “delay” principle:

“In any proceedings in which any question with respect to the upbringing of a child arises, the Court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.”

There follows, in paragraph (3), the “welfare checklist”, to which the Court **must** have regard in defined circumstances.

- (c) Slightly less visible in daily practice, perhaps, is the statutory recognition and protection of the welfare principle in the specific field of immigration, asylum and nationality. The relevant statutory provision in this context is section 55 of the Borders, Citizenship and Immigration Act 2009, which obliges the Home Secretary to discharge specified functions -

“...having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.”

- (d) The more detailed outworkings of the Geneva Convention Relating to the Status of Refugees are the subject of Community law regulation in the “Qualification Directive” [No 2004/83/EC] which also (per Article 15) establishes a separate, or secondary, regime of “subsidiary” protection, designed to protect all persons against “serious harm”, as defined. Notably, in the recitals, it is stated:

“(12) The best interests of the child should be of primary consideration to member states when implementing this Directive

(20) “It is necessary, when assessing applications from minors for international protection, that member states should have regard to child specific forms of persecution.”

In domestic law, the “subsidiary protection” regime established by the Qualification Directive is given effect by paragraph 339C of the Immigration Rules.

- (e) The “Reception Directive” [No 2003/9/EC] establishes “*minimum standards for the reception of asylum seekers*”. It is specifically provided in Article 18(1) of this measure:

“The best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve minors.”

Where a minor is unaccompanied, there is a specific family tracing obligation imposed on the Home Secretary, per regulation 6 of the domestic transposing measure, the Asylum Seekers (Reception Conditions) Regulations 2005.

10. As the short menu above demonstrates, EU law is progressively influential in the field of the protection of children's rights. Furthermore, the importance of the Strasbourg case law under Article 8 ECHR must be recognised. Under present arrangements, both domestic and international, these remain potent sources. Bearing in mind recent and current political debates, any dilution of their impact would undoubtedly be a retrograde step.
11. Children have, therefore, been singled out for special and specific attention in the field of asylum and humanitarian protection. In **ZH (Tanzania) – v – SSHD** [2011] UKSC4, the Supreme Court of the United Kingdom emphasised that the obligation on the UK is not confined to how children are looked after in this jurisdiction: rather, it extends to decisions concerning asylum, deportation and removal from the United Kingdom. Any failure to make such decisions without regard to the need to safeguard and promote the welfare of **any child involved** would not be "*in accordance with the law*" for the purposes of Article 8(2) ECHR. The duty is to first identify what the best interests of the child require and then to assess whether these are outweighed by the perceived strength of any other considerations, individually or cumulatively. In short, in cases of this kind, the best interests of the child are the dominant consideration. The UNHCR guidelines on determining the best interests of the child were fully recognised by the Supreme Court which, in doing so, readily acknowledged the distinction between decisions directly affecting the child's upbringing and those having more indirect effect.
12. In another recent decision of note, the suggestion that the duty under section 55 of the 2009 Act is merely procedural, rather than substantive, was briskly rejected by the Upper Tribunal (Immigration and Asylum Chamber) : see **AA (Unattended Children) Afghanistan CG** [2012] UKUT 00016 (IAC), paragraph [31].
13. My penultimate point of reference is the Charter of Fundamental Rights of the European Union [2007/C303/01], the *soi-disant* "Lisbon Charter". Its provisions are directly applicable to all EU institutions and agencies and all agencies and organs of Member States **when they are implementing Union law**: per Article 51(1). This landmark EU instrument of protection of human rights, now of over 3 years vintage, possesses a challenging architecture of rights, freedoms, principles and "explanations". Notably, it recognises rights, directly effective in national law, which are not a mirror image of ECHR or, indeed, UNCRC rights. It is more than simply a codifying instrument. Those practicing in the field of children's rights have a duty to be familiar with its provisions. Such awareness is of increasingly critical importance in this jurisdiction, given the reality that while the Charter is

positively flourishing in other Member States, including the Republic of Ireland, it appears to be entirely dormant here. In the present context, I draw attention to just two of its provisions. Firstly, Article 24, under the rubric “The Rights of the Child”, recognises specific rights quite distinct from and additional to those belonging to the sphere of Article 8 ECHR. It states, *inter alia*, that children:

“..... may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.”

Also of note is the intriguing “Right to Good Administration”, enshrined in Article 41. This provides:

“Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.”

The text continues:

“This right includes

(a) The right of every person to be heard, before any individual measure which would affect him or her adversely is taken.”

The Lisbon Charter jurisprudence of the CJEU is developing apace. One of its notable facets is the developing bilateral interaction with the Strasbourg jurisprudence.

14. Finally, I draw attention to an initiative of which practitioners in this field should be aware. There is a body of cases, possibly growing, containing both family and immigration elements. Increased co-ordination amongst the courts and tribunals concerned is plainly desirable and is the subject of a project initiated by the Upper Tribunal (Immigration and Asylum Chamber) and its President, the Honourable Mr Justice Blake. Exchange of information, fully and timeously, co-operation and co-ordination are important elements in such cases. This project is UK wide and its contributors include the Family Justice Council in London. It is to be hoped that CLC, kindred agencies and Northern Ireland practitioners will familiarise themselves with the project and, to such extent as may be appropriate, contribute to its outcome.

The Main Course

15. I apologise that this moderately lengthy preamble has delayed the main event. It will hopefully prove to be complementary. We are honoured by the presence of a truly distinguished speaker. Dr Jean Zermatten is no ordinary mortal. He is the Director of the International Institute for Children's Rights, **which he founded** and the Chairperson of the UN Committee for the Rights of the Child. His CV is positively intimidating. He is, in short, a towering figure in the field of international protection of the rights and freedoms of children, a writer and speaker of the utmost authority and distinction. This modest man is a simply inspirational figure. It seems appropriate that he is named after a mountain – Zermatten is a place, located at the base of The Matterhorn. We extend to him the warmest of welcomes from this corner of the European Union. The aperitif, to which you have been so politely attentive, will, assuredly, quickly fade to the point of evaporation.

The Hon Mr Justice Bernard McCloskey

*“The United Nations Convention on the Rights of the Child:
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Chairperson of the United Nations Committee
on the Rights of the Child

1. Introduction

Relatively little has been written on the subject of the obligations of States parties under the Convention on the Rights of the Child (CRC). The Convention is a binding agreement between the various parties, that is to say, between the 193 States which are parties to the Convention.

I sometimes have the impression, when speaking with governments, either in Geneva, or in follow-up missions abroad that because the Convention elaborates the rights of children, it can be applied "à la carte" and that the proposed menu is a Kid's menu. In other words, small rights (meals) for small persons (customers).

Nevertheless, it is clear from human rights theory that the Convention belongs to the human rights family and that the principles which apply to all the international human rights treaties are equally applicable to "our" Convention.

a) Obligations of the States: Human Rights in general

Since the adoption of the Universal Declaration of Human Rights in 1948, the international community has developed a comprehensive legal framework of international human rights. In addition, instruments have been adopted at the regional level (for example the European Convention on Human Rights), which reflect the particular human rights concerns of a region and provide for specific mechanisms of protection (the European Court of Human Rights). At the national level, the vast majority of States have

1 Director of the International Institute for Children's Rights (IDE), Sion, Switzerland,
Chairperson of the UN Committee for the Rights of the Child

adapted their constitutions to be compatible with the universal/regional human rights treaties. The Universal Declaration, together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966, constitute what has become known as the International Bill of Human Rights. To date, human rights and fundamental freedoms have been codified in hundreds of universal and regional, binding and non-binding instruments, touching almost every aspect of human life and covering a broad range of civil, political, economic, social and cultural rights.

But the core instruments of human rights are:

- CERD (1965)
- ICCPR (1966)
- ICESCR (1966)
- CEDAW (1979)
- CAT (1984)
- CRC (1989)
- ICRMW (1990)
- CPED (2006)
- CRPD (2006)
- and their respective Optional Protocols.

These are the core conventions which make up the foundation of human rights law and the Convention on the Rights of the Child (and its 3 Optional Protocols) is one of them.

All of these human rights treaties outline the obligations which States parties are obliged to respect. And the guardians of these treaties, the human rights treaties bodies, consistently remind them that by becoming parties to the international treaties, States assume a series of respective obligations and duties. For instance, human rights must be guaranteed by national law, which is something only States can do. This is the essence of human rights: not to establish humane ethics, but to impose obligations on States to observe certain minimum norms of conduct vis-à-vis vulnerable persons, including children, and all persons. Respect for human rights requires the establishment of the rule of law at the national and international levels.

The human rights community has attempted to clarify the meaning of obligations by breaking them down into the obligations **to respect, to protect and to fulfil** human rights. The obligation to **respect** means that States Parties must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to **protect** requires States parties to protect individuals and groups against human rights abuses. The obligation to **fulfil** means that States parties must undertake positive action to facilitate the enjoyment

of basic human rights. I will return to the content of these obligations in more detail.

Through the ratification of international human rights treaties, a State becomes a party to the treaty and commits itself to put in place a number of measures, in particular implementation measures that are required to domesticate the treaty and the adoption of legislation which is in conformity with the content, obligations and duties of the treaty. Each State party is also urged to establish individual (or in some cases collective, i.e. in the European Social Charter) complaints mechanisms and procedures to address rights violations to ensure that international human rights standards are respected, implemented, and enforced at all levels.

Yet not all of the international instruments related to human rights are binding. For instance, we also have Recommendations, Minimum Standards, Declarations, Guidelines and Principles which help us to understand and implement the binding instruments and are used to develop relevant jurisprudence. The General Comments issued by the different treaty bodies are similarly applicable. The CRC Committee has now published 17 General Comments to guide States parties regarding their obligations in specific fields.

b) The Convention on the Rights of the Child: obligations of the States

Rights enshrined in the Convention are more than just an exhaustive list of rights; they also enumerate the obligations that States parties have towards children from the moment they ratified the CRC. The act of ratifying the Convention is an expression of the commitment of States to accept these obligations.

It is worth mentioning that we are in a unique position with the CRC. Specifically, it is the only convention to have achieved near universal ratification as 193 States have agreed to be bound by obligations towards all persons under 18 years of age. Moreover, it is the first time in modern history that all States are speaking the same language when dealing with children.

As we have seen, these obligations sometimes conflict with the traditions of societies, what we call social norms, even in countries with a liberal approach to the rights of the child. One example is violence against children. While the Committee thinks that this form of violence is prohibited under the Convention, a large number of countries tolerate a certain degree of violence at home, in the schools, or in facilities. Another example is early and forced marriages which are prejudicial to girls and women and are widely practiced in different parts of the world.

Conflicts frequently arise when obligations of States parties clash with societal desires to

preserve traditional values. This may be more obvious in some spheres of life than in others. In family matters, State intervention against practices that are harmful to children, such as institutionalization, is difficult to implement. The Convention recognizes the primary responsibility of parents or legal guardians for the upbringing and development of the child, and obliges States parties to “*use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.*”² The Convention also gives States parties a mandate to intervene when necessary.³ But the essential of the States parties’ obligations lies in art. 4 of the CRC, since States parties are required to “*...undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention...*”⁴ This same provision further requires that “*...with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*”

In addition to the obligations to ensure the full enjoyment of the rights of the child, States parties are obliged to submit regular reports on their achievements and challenges in the implementation of the Convention to the Committee on the Rights of the Child.⁵

c) Specific rights for the children

The Convention is a uniquely broad instrument, covering children’s civil, political and economic, social and cultural rights. Many of the rights safeguarded by it are not covered by provisions in the International Covenants or other international instruments. Some articles in the Convention mirror guarantees established for “everyone” in other instruments, underlining that these rights apply equally to children. But many other provisions in the Convention provide unique rights for children. I will not go into all of the details, but it is important to mention rights that are specific to children, and the concomitant obligations of States parties, as they are not found under other treaties:

- Obligation to protect the child from all forms of discrimination or punishment on the basis of status, activities, expressed opinions or beliefs of the child’s parents, guardians or family members; also added disability and ethnic origin to specifically prohibited grounds for discrimination against children (article 2)
- Obligation to respect the right of the child to have her/his best interests taken as a primary consideration in all actions (article 3(1))
- Obligation to respect the principle of evolving capacities (article 5)
- Obligation to ensure maximum survival and development of the child (article 6)

2 Art 18.

3 See for example Art 9, 19 and 20.

4 Art 4.

5 Art 44.

- Right of the child to know and be cared for by her/his parents (article 7)
- Obligation to preserve the child's identity (article 8)
- Obligation not to separate children from parents unless it is in their best interests, subject to judicial review (article 9)
- Obligation to protect the children and parents entering or leaving a State for purposes of family reunification, etc. (article 10)
- Obligation to give due weight to children's expressed views in all matters affecting the child; also to provide an opportunity for a child to be heard in any judicial or administrative proceedings affecting the child (article 12)
- Obligations to support parents in their child-rearing responsibilities, including through the provision of child care services; and that the child's best interests should be a basic concern of parents (article 18)
- Obligation to protect children from "all forms of physical or mental violence while in the care of parents or others" (article 19)
- Special obligation to protect the rights of children deprived of family environment (article 20), including adoption (article 21)
- Obligation for disabled children (article 23)
- Obligation to take specific measures for health; harmful practices (article 24)
- Obligation to detail aims related to the education of the child (article 29)
- Obligation to provide specific protection from economic exploitation, hazardous/harmful work (article 32)
- Obligation to provide specific protection from sexual exploitation and abuse, including child pornography (article 34)
- Obligation to prohibit the imposition of the death penalty and life imprisonment of children without the possibility of release (article 37)
- Obligation to limit recruitment and involvement of children in armed conflict (article 38)
- Obligation to put in place measures for child victims for recovery and social reintegration (article 39).

Moreover, it should be underlined that the two Optional Protocols to the CRC – on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict – stipulate further unique rights and safeguards.

d) Limitations, Derogations and Reservations

Human rights are not absolute. Limitations on human rights go hand in hand with freedoms. In addition to limitations imposed by the provisions of the Conventions, States parties have the discretion to invoke derogations from rights. Derogations from

certain human rights allow States parties to adjust their treaty obligations in exceptional circumstances.⁶ Various lists of rights that cannot be derogated from can be found in most of the international human rights treaties. The Convention on the Rights of the Child, however, does not contain such a list.⁷ A national constitution often defines the possibility of derogations from rights in special situations such as war, internal unrest, riots, accidents, natural disasters and the like. However, there are rights such as the right to life, the prohibition of torture and the prohibition of the death penalty that can never be derogated from or limited.⁸ These are absolute rights and freedoms.

A reservation is “*a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.*”⁹ For all international agreements, there is the possibility for the State to make reservations regarding certain provisions. Reservations usually serve to distance States from the obligation to apply certain provisions. This procedure is justified by the need for an internal legal system and the society’s customs. Therefore, it is possible for States to make reservations to the Convention on the Rights of the Child. Parties to the Convention are required to submit their reservations to the UN Secretary General, and the Secretary General must inform all parties to the Convention about these reservations. Reservations may be withdrawn at any time, applying the same procedure.¹⁰ The Convention does not specify which reservations are permissible and instead ambiguously notes that it is not permitted to make a reservation that is “incompatible with the object and purpose of the Convention.”¹¹

States parties have made reservations to several provisions of the Convention. Most of these reservations are to the provisions concerning the right to religion, the right to acquire citizenship, adoption, and separation from parents. Reservations are a particularly limiting factor which seriously hinders the realization of the Convention.¹² The Committee on the Rights of the Child encourages States parties to gradually change their legal systems in order to allow the withdrawal of reservations.¹³

6 http://www.adh-geneva.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php

7 It is particularly interesting here to note that the Art 27, Para 2 of the American Convention on Human Rights prohibits derogation from, inter alia, the rights of the child.

8 The shortest list of these rights is in the European Convention in Art 15, Para 2 of the Protocol, Arts 3, 4, 6 and 7.

9 Vienna Convention on the Law of Treaties. 1969, Art 2 (1) (d).

10 Art 51.

11 In addition Art 19(c) of the Vienna Convention on the Law of Treaties prohibits reservations to a treaty that are “incompatible with the object and purpose of the treaty.”

12 For more see UN Doc CRC/C/20.

13 In addition to the Committee on the Rights of the Child, the Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, 1993 in Para 46 says “The World Conference on Human Rights urges States to withdraw reservations to the Convention on the Rights of the Child contrary to the object and purpose of the Convention or otherwise contrary to international treaty law.”

For example, in the Concluding Observations for the UK in 2008,¹⁴ the Committee has observed:

Reservations and declarations

8. The Committee, while welcoming the announced withdrawal of the reservations under articles 22 and 37 (c) of the Convention, regrets that the State party maintains its reservation with regard to the applicability of article 32 to its Overseas Territories and Crown Dependencies.
9. **The Committee encourages the State party to withdraw its reservation to article 32 with respect to the Overseas Territories and Crown Dependencies.**

2. The obligation to respect, protect and fulfil

In this section, I will try to explain State party human rights obligations through the use of examples drawn from the Convention on the Rights of the Child.

Under international human rights law, States are duty-bearers and States' obligations may be classified in three categories: the obligation to respect, the obligation to protect and the obligation to fulfil. In turn, the obligation to fulfil includes an obligation to facilitate and an obligation to provide. This classification has been endorsed by many General Comments of the CRC Committee and by the CESCR in its General Comment 12. As this classification provides a useful analytical framework for the consideration of obligations under all relevant branches of international law, it will be followed in this analysis.

Although in principle human rights can be violated by any person or group, and in fact human rights abuses committed against the backdrop of globalization by non-State actors are on the increase (i.e., transnational corporations, organized crime, international terrorism, guerrilla and paramilitary forces and even intergovernmental organizations), under international law, **only States** assume direct obligations in relation to human rights.

By becoming parties to international human rights treaties, States, as mentioned above, have three broad obligations: the duties to **respect, to protect and to fulfil**. Moreover, States parties have a duty to provide a remedy at the domestic level for human rights violations.

What does the “obligation to respect” mean?

The State “obligation to respect” means that the State is obliged to refrain from interfering

¹⁴ CRC/C/GBR/CO/4, 20.10.2008

directly or indirectly with the enjoyment of rights. It entails the prohibition of certain acts by governments that may undermine the enjoyment of rights. Such obligations are sometimes also called negative obligations, since they tell States Parties what they must *not* do, for example, the use of violence, recruitment of children in armed conflict, tolerance of harmful practices or conducting unfair trials. For example, the CRC Committee, in its recent General Comment No. 16 “On State obligations regarding the impact of the business sector on children’s rights” noted:¹⁵

“The obligation to respect”

26. *The obligation to respect means that States should not directly or indirectly facilitate, aid and abet any infringement of children’s rights. Furthermore, States have the obligation to ensure that all actors respect children’s rights, including in the context of business activities and operations. To achieve this, all business-related policy, legislation or administrative acts and decision-making should be transparent, informed and include full and continuous consideration of the impact on the rights of the child.*

27. *The obligation to respect also implies that a State should not engage in, support or condone abuses of children’s rights when it has a business role itself or conducts business with private enterprises. For example, States must take steps to ensure that public procurement contracts are awarded to bidders that are committed to respecting children’s rights. State agencies and institutions, including security forces, should not collaborate with or condone the infringement of the rights of the child by third parties. Furthermore, States should not invest public finances and other resources in business activities that violate children’s rights.*

What does the “obligation to protect” mean?

The “obligation to protect” requires States to protect individuals against abuses by non-State actors. In short, States have to take positive action. With regard to persons enjoying human rights standards, States have to ensure that children are not prevented from attending school (for example, by their parents) and prevent children from being victims of corporal punishment or other forms of violence by their parents or caregivers. For example, the Committee, in the same General Comment “On State obligations regarding the impact of the business sector on children’s rights”¹⁶ noted:

15 General Comment no 16 (2013), *On State obligations regarding the impact of the business sector on children’s rights*, CRC/C/GC/16 para 26-27

16 *op. cit.*, para 28

“The obligation to protect”

28. *States have an obligation to protect against infringements of rights guaranteed under the Convention and the Optional Protocols thereto by third parties. This duty is of primary importance when considering States' obligations with regards to the business sector. It means that States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights. Such measures can encompass the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children's rights. States must investigate, adjudicate and redress violations of children's rights caused or contributed to by a business enterprise. A State is therefore responsible for infringements of children's rights caused or contributed to by business enterprises where it has failed to undertake necessary, appropriate and reasonable measures to prevent and remedy such infringements or otherwise collaborated with or tolerated the infringements.*

What does the “obligation to fulfil” mean?

Under the “obligation to fulfil”, States are required to take positive action to ensure that human rights can be exercised. This is another positive obligation of States to implement human rights. This obligation requires appropriate measures be taken to make sure that the human rights standard is attained.

For example, in its recent General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, the Committee has written:¹⁷

71. *...In accordance with article 4 of the Convention, States parties shall fulfil the entitlements contained in children's right to health to the maximum extent of their available resources and, where needed, within the framework of international cooperation.*
72. *All States, regardless of their level of development, are required to take immediate action to implement these obligations as a matter of priority and without discrimination of any kind. Where the available resources are demonstrably inadequate, States are still required to undertake targeted measures to move as expeditiously and effectively as possible towards the full realization of children's right to health. Irrespective of resources, States have the obligation not to take any retrogressive steps that could hamper the enjoyment of children's right to health.*

¹⁷ General Comment no 15 (2013), *On the right of the child to the enjoyment of the highest attainable standard of health* (Art. 24) CRC/C/GC/15, para 71-74.

73. *The core obligations, under children's right to health, include:*
- (a) *Reviewing the national and subnational legal and policy environment and, where necessary, amending laws and policies;*
 - (b) *Ensuring universal coverage of quality primary health services, including prevention, health promotion, care and treatment services, and essential drugs;*
 - (c) *Providing an adequate response to the underlying determinants of children's health; and*
 - (d) *Developing, implementing, monitoring and evaluating policies and budgeted plans of actions that constitute a human rights-based approach to fulfilling children's right to health.*
74. *States should demonstrate their commitment to progressive fulfilment of all obligations under article 24, prioritizing this even in the context of political or economic crisis or emergency situations. This requires that children's health and related policies, programmes and services be planned, designed, financed and implemented in a sustainable manner.*

The principle of progressive realization

The principle of progressive realization applies to the positive State obligations to fulfil and to protect. Progressive realization means that governments should establish targets and benchmarks in order to measure the progressive achievement of these goals.

For example, in the recent General Comment No. 17¹⁸ on article 31: the right of the child to rest, leisure, play, recreational activities, cultural life and the arts, the CRC Committee has written:

55. While the International Covenant on Economic, Social and Cultural Rights provides for the progressive realization of economic, social and cultural rights and recognizes the problems arising from limited resources, it imposes on States parties the specific and continuing obligation, even where resources are inadequate, to “strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances”¹⁹. As such, no regressive measures in relation to the rights under article 31 are permitted. Should any such deliberate measure be taken, the State would have to prove that it has carefully considered

18 General Comment No. 17, *On the right of the child to rest, leisure, play, recreational activities, cultural life and the arts* (art.31), CRC/C/GC/17 para. 55.

19 Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), *On the nature of States parties obligations*, para. 11.

all the alternatives, including giving due weight to children's expressed views on the issue, and that the decision was justified, bearing in mind all other rights provided for in the Convention.

What does the “obligation to provide domestic remedies” mean?

The very notion of rights entails, in addition to a substantive claim, the possibility to have recourse to a national - judicial, administrative, legislative or other - authority in the event that a right is violated. Every person who claims that her/his rights have not been respected must therefore be able to seek an *effective remedy* before a competent domestic body vested with the power to provide redress and to have its decisions enforced. In that regard, it is crucial for the CRC Committee to underline that the rights enshrined in the Convention must be justiciable. In fact, the justiciability of rights, the ability to claim rights through judicial means, is the basis for redress of violations. In relation to children, this also means that States parties must ensure that there are effective, child-sensitive procedures available to children and their representatives.

For example, in its recent General Comment “On State obligations regarding the impact of the business sector on children's rights”, the Committee has written:²⁰

Remedies and reparations

30. *States have an obligation to provide effective remedies and reparations for violations of the rights of the child, including by third parties such as business enterprises. The Committee states in its general comment No. 5 that for rights to have meaning, effective remedies must be available to redress violations.²¹ Several provisions in the Convention call for penalties, compensation, judicial action and measures to promote recovery after harm caused or contributed to by third parties.²² Meeting this obligation entails having in place child-sensitive mechanisms - criminal, civil or administrative - that are known by children and their representatives, that are prompt, genuinely available and accessible and that provide adequate reparation for harm suffered. Agencies with oversight powers relevant to children's rights, including labour, education and health and safety inspectorates, environmental tribunals, taxation authorities, national human rights institutions and bodies focusing on*

20 General Comment No. 16 (2003), *On State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16 para. 30-31.

21 General Comment No. 5 (2003), para. 24. States should also take into account the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by General Assembly resolution 60/147 of 2005.

22 For example, see Convention on the Rights of the Child, arts. 32, para. 2; 19; and 39.

equality in the business sector can also play a role in the provision of remedies. These agencies can proactively investigate and monitor abuses and may also have regulatory powers allowing them to impose administrative sanctions on businesses which infringe on children's rights. In all cases, children should have recourse to independent and impartial justice, or judicial review of administrative proceedings.

31. *When determining the level or form of reparation, mechanisms should take into account that children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in lifelong damage. They should also take into account the evolving nature of children's development and capacities and reparation should be timely to limit ongoing and future damage to the child or children affected; for example, if children are identified as victims of environmental pollution, immediate steps should be taken by all relevant parties to prevent further damage to the health and development of children and repair any damage done. States should provide medical and psychological assistance, legal support and measures of rehabilitation to children who are victims of abuse and violence caused or contributed to by business actors. They should also guarantee non-recurrence of abuse through, for example, reform of relevant law and policy and their application, including prosecution and sanction of the business actors concerned.*

The right to recourse to a supranational court

The right to have recourse to an international human rights court once all avenues of seeking redress at the domestic level have been exhausted has been accepted, however not in all parts of the world and not in relation to all kinds of rights.

It is important to note that with the adoption of the Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure (OPIC), the children of the world are entitled of the possibility to submit individual communications.²³ To date we have 2 ratifications and 35 signatures. This treaty will allow individual children to submit complaints regarding violations of their rights under the Convention and its first two optional protocols.

The introduction of an optional protocol to allow for an individual complaints procedure is an important improvement in the international protection of children's rights. The absence of such a monitoring or quasi-monitoring system under the Convention was

23 Adopted on 2011 December 19 and opened for signature in 2012 and will come into force upon ratification by ten UN Member States. This Protocol is also familiarly called OPIC - Optional Protocol on a Communications Procedure.

a serious shortcoming of the international system of legal protection for children. The existing individual complaints mechanisms of the treaty body system are of limited focus and scope in relation to child rights and the CRC does not envisage a particular procedure for the submission of individual petitions in the event that a child's rights have been violated. Before the adoption of the new Optional Protocol, there was no possibility to ensure more efficient, direct and expeditious protection through the petitions system than the one provided by the regular monitoring of implementation.

OPIC will also enhance children's access to remedies at the local and national levels. As States Parties are generally not enthusiastic about being judged by an international committee, they are more likely to establish local and national mechanisms of remedies in order to deal with violations of the rights of the child domestically. Some countries provide for such possibilities, but in many States Parties, it is difficult for children to have direct access to the courts and to appeal court decisions, let alone complaints mechanisms.

Considerable progress has been made in relation to the system of ombudspersons, yet many ombudspersons are only mandated to promote children's rights and have no judicial capacity to receive and consider complaints. It will be interesting to see how this new mechanism will provide impetus for States Parties to establish the possibility for children to obtain redress and justice at the domestic level.

In Europe, individuals, including children, may appeal to the permanent European Court of Human Rights, whose judgments are legally binding. The same right exists for individuals (including children) to file petitions with an international human rights court under the American Convention on Human Rights and under the African Charter for the Rights and Welfare of the Child.

The right to reparations, rehabilitation and recovery

The right to an effective remedy implies that the victim of a human rights violation is entitled to reparations for the harm suffered. The obligation of States parties entails, *inter alia*:

- bringing to justice those responsible for the violation, including public officials or State agents,
- offering to child victims the possibilities of recovery and rehabilitation (art. 39 CRC)
- adopting measures to protect the child victims in criminal proceedings, and
- taking measures to prevent the recurrence of violations.

3. General Measures of Implementation

As noted above, by ratifying the CRC, States have committed themselves to undertaking all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention. With regard to economic, social and cultural rights, States parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

The CRC does not provide a definition of the *measures of implementation* that a State party must take in order to ensure the full respect of both the principles and the substantive rights enshrined in the Convention. Both of the International Covenants include an article similar to Article 4 of the CRC which establish overall implementation obligations²⁴ to take “*all appropriate legislative, administrative and other measures.*” The task of implementation – of making the human rights of children a reality - needs to engage all sectors of society, including children.

The CRC Committee has clarified the concept of general measures and the concomitant requirements of States parties in:

- The Guidelines for Periodic Reporting related to the form and content of periodic reports to be submitted by States Parties under article 44, Paragraph 1 (b) of the Convention on the Rights of the Child;
- General Comment No. 5²⁵; and
- The new treaty-specific guidelines for reporting.²⁶

In its General Comment No. 5²⁷, the CRC Committee enumerates a series of measures of implementation including reservations, ratification of other human rights instruments, legislation, coordination, comprehensive data collection, development of policies, programmes, services and plans of action, allocation of resources, training, an independent monitoring body, awareness-raising, collaboration with civil society and international cooperation. Without going into too much detail, I will emphasize the principal measures of implementation that constitute obligations for States parties and will try to illustrate them with examples taken from the Concluding Observations (COBs) issued by the CRC Committee in relation to the United Kingdom in 2008.²⁸

24 For example see ICCPR, Art 2, CESCR, Art 2 and its related General Comment.

25 GC No. 5, para 2.

26 Adopted by the Committee in its fifty-fifth session on 13 September 1 October 2010.

27 GC No. 5, paras. 9-11.

28 CRC/C/GBR/CO/4, 20.10.2008

a) Legislative measures

The CRC Committee recommends that States parties adopt legislative measures to be in conformity with the obligations under the Convention. This requires that States parties ensure that national laws, including any local or customary laws, are fully compatible with the Convention. To do so effectively, States parties should undertake a systematic review of domestic legislation, practices and related administrative guidelines to ensure full conformity with the principles and provisions of the Convention. The review needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights.

As a minimum, the CRC Committee requests that States parties incorporate the Convention into their domestic legislation. Furthermore, a State party should ensure that the provisions of the Convention are given legal effect within their domestic legal system.

For example in the Concluding Observations for the United Kingdom in 2008, the Committee has issued the following considerations:

Legislation

10. *The Committee appreciates the State party's efforts to harmonize its legislation with the Convention, particularly with the adoption of the Children's Act 2004 for England and Wales which, inter alia, created the Children's Commissioner for England, and the Childcare Act 2006. However, the Committee remains concerned that the principles of the Convention are not duly taken into account in all pieces of legislation throughout the country and that the State party has not incorporated the Convention into domestic law nor has ensured the compliance of all legislation affecting children with it.*

11. *The Committee recommends that the State party continue to take measures to bring its legislation into line with the Convention. To this aim, the State party could take the opportunity given in this regard by the development of a Bill of Rights in Northern Ireland and a British Bill of Rights, and incorporate into them the principles and provisions of the Convention, e.g. by having a special section in these bills devoted to child rights.*

b) Administrative measures

Coordination

The CRC Committee requires governments to put in place an intersectorial **coordination** to ensure that all Ministries, Offices, Departments and Services apply different rights of the child in a concerted manner. This coordination should not only be encouraged between the different services of the public authorities, but should also be implemented in cooperation with civil society, and where possible, with children themselves. This is horizontal coordination. But the Committee also requires vertical coordination between the central, regional and municipal authorities, bearing in mind that children live at the local level. Coordination is also necessary between official and non-official entities, including between government and public and private bodies (i.e., non-governmental organizations) who deal with human rights and children's rights.

In most cases, when States parties present their reports, the CRC Committee notes the absence of effective coordination within the government. The Convention is a holistic text and the rights of the child undoubtedly pervades all sectors of administrative activity; many ministries are in charge of various matters related to children and are required to take action to implement the CRC. Without strong coordination, implementation is inconsistent and inefficient.

In the Concluding Observations for the UK in 2008, the Committee has issued the following considerations:

Coordination

12. *The Committee notes that the State party functions with devolved government arrangements and that this system makes it difficult to have a single body coordinating implementation of the Convention. In this respect, the recent coordinating efforts, such as the concentration of responsibilities in the office of the Minister for Children, Young People and Families in England and similar developments within Scotland and Wales, are welcome. Nonetheless, the Committee remains concerned at the lack of a body mandated to coordinate and evaluate a comprehensive and effective implementation of the Convention throughout the State party, including at local level.*
13. *The Committee reiterates its previous recommendation that the State party ensure effective coordination of the implementation of the Convention throughout the State party, including locally, especially where*

local authorities have significant powers to determine their priorities and allocate budgets. To this end, the State party – in addition to ensuring that each of the jurisdictions has a well resourced and functioning coordinating body – could allocate responsibility for the coordination and evaluation of the Convention across the State party to a single, high-profile mechanism.

Strategy for children

The result of coordinated action and collection of sound statistical data provides an opportunity for a government to build an effective **policy for children's rights**, programmes for the different needs of children, actions of prevention and protection services and a national and global strategy to implement the CRC. For this reason, the CRC Committee asks States Parties to develop a national and global policy reflecting the implementation of the CRC, and not only its different provisions. This global policy has a name: *A National or Global or Comprehensive Strategy*, materialized in a *National Plan of Action*.

The development of a plan of action is a positive action and requires that this strategy is made public. All stakeholders, both public and private, must be made aware of its existence, including children, and it should be translated into child-friendly versions, as well as into appropriate languages and forms. This requires concerted dissemination efforts.

For example, in the Concluding Observations for the UK of 2008, the Committee has issued the following considerations:

National Plan of Action

14. *The Committee welcomes the fact that the Convention has been referred to in the Children's Plan for England, the Seven Core Aims for Children and Young People in Wales and the strategy developed by Northern Ireland. It also welcomes the Every Child Matters set of reforms in England. However, the Committee remains concerned that the Convention is not regularly used as a framework for the development of strategies throughout the State party and at the lack of an overarching policy to ensure the full realization of the principles, values and goals of the Convention.*
15. *The Committee encourages the State party to adopt comprehensive plans of action for the implementation of the Convention in all parts of the State party, in cooperation with the public and private sectors involved*

in the promotion and protection of children's rights and based on a child right approach. In doing so, the State party should take into account the outcome document of the 2002 Special Session of the General Assembly of the United Nations "A world fit for children" and its Mid-Term Review in 2007. The Committee also recommends that the State party ensure adequate budget allocations and follow-up and evaluation mechanisms for the full implementation of the plans of action to regularly assess progress achieved and identify possible deficiencies. These plans should pay special attention to children belonging to the most vulnerable groups.

Resources for children

In order to implement the rights enshrined in the Convention, children must be made visible in budgets, and States parties must allocate adequate **resources for children**. The Committee has emphasized that the obligations of States parties to implement economic, social and cultural rights "to the maximum extent of their available resources" implies the importance of an effective budgetary analysis. States parties are therefore required to "identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly." In that regard, the CRC Committee has welcomed the practice of legally incorporating budget allocations for children in national legislation and assigning a specific percentage of a State's budget to children.

The worldwide financial and economic crisis has had a negative impact on the development of strategies, as well as on national plans of action. Other problems, such as climate change and its effects on the environmental life of families, also need to be taken into account. In these difficult circumstances, it is necessary to have a clear picture of what governments are doing and where it is placing its priorities to prevent the deterioration or regression of CRC implementation measures.

Regressive measures are measures undertaken in a certain field which have the (un)intentional effect of reducing the level of protection already in place when the treaty was ratified. The CRC Committee consistently notes that regressive measures cannot be allowed.

Resources refer not only to financial resources, but also to technical and human resources. One of the most important challenges in States Parties is the absence of appropriately trained personnel working in professions that relate to the rights of the child, including police officers, judges, prosecutors, immigration officials, social workers, educators, teachers, medical personnel, psychologists, community leaders, religious leaders, journalists and many others.

For example, in the Concluding Observations for the UK of 2008, the Committee has issued the following considerations:

Allocation of resources

18. *The Committee notes with appreciation the increase in expenditures on children in recent years. Nevertheless, the Committee is concerned that the increases are not sufficient to eradicate poverty and tackle inequalities and that the lack of consistent budgetary analysis and child rights impact assessment makes it difficult to identify how much expenditure is allocated to children across the State party and whether this serves to effectively implement policies and legislation affecting them.*

19. *The Committee recommends that the State party, in accordance with article 4 of the Convention, allocate the maximum extent of available resources for the implementation of children's rights, with a special focus on eradicating poverty and that it reduce inequalities across all jurisdictions. In this endeavour, the State party should take into account the Committee's recommendations issued after the day of general discussion of 21 September 2007 devoted to "Resources for the rights of the child - responsibility of States." Child rights impact assessment should be regularly conducted to evaluate how the allocation of budget is proportionate to the realization of policy developments and the implementation of legislation.*

I could continue making reference to different administrative measures, but I think that what we have covered is sufficient for understanding the obligations of the States parties.

4. The core obligation of the Convention: to respect, protect and fulfil the new status of the child as a subject of rights!

The Convention includes a number of articles which constitute 'umbrella provisions'; provisions that are applicable to all of the other provisions, as well as other articles which contain substantive rights granted to every child. For instance, article 1 defines the notion of the "child". This is a basic provision and does not elaborate a substantive right. It indicates who is a child from the point of view of the CRC and therefore who is an object of the Convention.

On the other hand, as an example of a substantive right, article 7 (the right to be registered after birth, the right to a name, a nationality, the right to know her/his parents and not

to be separated from them) recognizes real substantive rights held by every child from birth, rights which lead to immediate and clear obligations for States Parties: for instance to establish birth and civil status registers, to provide nationality and identification documents, to register the identity of parents and provide family care services in order to avoid separations, fostering and abandonment.

Further to the general principles of the CRC provisions, there are four articles which constitute the mechanisms of the CRC, the keys which make the locks of the system turn:

- Article 2: the right of the child not to be discriminated against;
- Article 3: the right to have her/his best interests taken as a primary consideration;
- Article 6: the right to life, survival and development; and
- Article 12: the right of the child to be heard.

For me, these rights are an expression of the new status of the child as a rights holder. In fact, with the adoption of the Convention, the international community recognizes that while the child has individual needs, the collective group of children must also be specifically taken into account, separately from adults. Although children have always had opinions to express, prior to the Convention, they were frequently ignored and silenced. Yet their views are of interest to all, not only to their peers. We must hear and listen to their words.

I believe that this is why these four articles constitute the “core” of the CRC. States parties have the primary obligation to recognize the new status of the child and therefore must refrain from limiting the possible enjoyment of the substantive rights by children both in direct actions or when undertaken by their representatives. They are obliged to protect this new status and take positive action to promote the child as a rights holder and facilitate the exercise of these rights. Specifically, this obligation should be observed in all measures of implementation, including legislative and administrative measures, by raising awareness among adults, training professionals working with and for children and ensuring that children are the agents of change and actors of their own lives.

These four articles apply to both *substantive rights* (the right not to be discriminated against, to have one’s interests taken into account, to live, to survive and develop harmoniously, to be heard and to have one’s word taken into account) and *procedural rights*. This means that certain compulsory steps must be followed so that the decisions taken pursuant to the CRC respect the spirit and letter of the rights of the child. I express this idea in the following way:

- Without analyzing whether children in similar circumstances are subject to discrimination or treated in the same manner, it is difficult to determine if all children are enjoying their rights. The CRC is a universal instrument and should therefore be equally applicable in all circumstances (which is not of course an arithmetical equation). In light of the universal ratification of the Convention, the assertion of a common and equal definition of the child takes on particular importance.
- The right of the child to have her/his best interests assessed and taken as a primary consideration in all actions concerning her/him is the demonstration that the child is at the centre of any decision and decisions cannot be made without asking what is/are the impact(s) of the decision on this child or group of children? In doing so, the best interests of the child also constitute a strong procedural rule since it compels decision makers to ensure that decisions related to a child respect their best interests. Equally, when decisions are taken concerning a collective group of children, decision makers must also ensure that decisions promote the harmonious development of the children concerned and ensure their participation, integration and fulfilment.
- Article 6 highlights States parties' obligations to ensure the survival, growth and development of the child. The CRC Committee outlines its understanding of the development of the child in General Comment No. 5 as a "*holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development.*"²⁹ The issue of life and survival of the child is of course essential for the enjoyment of her or his rights. It seems to me that the crucial element of article 6 is the progressive development of the child. Complete and holistic development constitutes a fundamental aim of all of the other rights provided in the CRC.
- The views and opinions of the child/children are an obligatory step for administrative, judicial and political authorities, meaning that no decision may be taken about a child without first having heard her/his views. Passively hearing the child, however, is not enough. Her/his opinion must be seriously taken into account "in accordance with the age and the maturity of the child." With the entry into force of the new Optional Protocol to the CRC, the possibility for children to submit individual complaints is consistent with the right of the child to be heard and allows children to act directly before the CRC Committee.

If we apply these four provisions in accordance with the age, maturity and evolving capacities of the child (as the CRC requires us to do), we recognize that it is impossible to fully implement any specific State party obligations under the CRC (specifically substantive rights) without first examining the question of fair treatment, listening

²⁹ GC No. 5 (2003), para. 12.

to the child's views in order to determine her/his best interests and finally, aiming for harmonious and holistic development.

5. Conclusion

Child rights, like all other rights, are based on a relation between two parties. The two parties are the owners of the right (in this case, the child) and the entity that is obliged to ensure that the rights claims are met (the State). It is important to identify the beneficiaries of a right and the corresponding obligations of the entity that must fulfil that claim. For this reason, we must never forget that children are the holders of all the rights and the beneficiaries of the related services and protective measures. And the States parties to the CRC are the duty bearers!

What are the steps involved in applying a rights-based approach to determine if a State party to the Convention ensures the enjoyment of children's rights?

The first step is to look at what the State party has done to respect the rights of the child, in terms of not restricting the scope of the rights and manifesting a political will to refer to the Convention.

The second step is to determine if the State party has taken positive action to promote the CRC, facilitate the knowledge of the different principles, guarantees and substantive rights, raise awareness among the public at large and train all relevant stakeholders (including parents and caregivers).

The third step is to evaluate the measures of implementation at the different levels of the government, particularly in the administration and the judiciary, determine the availability of funds and infrastructure and the degree of coordination between the diverse actors responsible for the implementation of the CRC (both public and private actors). In the fourth step, if there are breaches of State party obligations, States shall ensure that children have access to remedies, redress, recovery and rehabilitation.

Application of the preceding analysis of obligations is necessary to draw conclusions on the extent to which children are able to enjoy their rights under the Convention on the Rights of the Child.*

* At the date of delivery of Dr Zermatten's lecture the UN Committee on the Rights of the Child's General Comments 14, 15, 16 and 17 were in draft. The text of Dr Zermatten's lecture has been edited to reflect the final wording of these published General Comments and will therefore differ from the text distributed on 21st February 2013.

