CHILDREN'S RIGHTS IN REGIONAL HUMAN RIGHTS SYSTEMS

Human Rights – Children's Rights II
ISSN 3058-0161
International and Comparative Children's Rights 2
ISSN 3058-0293

Children's rights in regional human rights systems

edited by
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Miskolc – Budapest | 2024

Children's Rights in Regional Human Rights Systems
ISBN 978-615-6474-66-7 (printed version)
ISBN 978-615-6474-67-4 (pdf)
ISBN 978-615-6474-68-1 (epub)

https://doi.org/10.71009/2024.ar.crirhrs

Published by
© Central European Academic Publishing
(Miskolc – Budapest, Hungary)
1122 Budapest, Városmajor St. 12 (Hungary)

Design, layout
PÁTRIA PRINTING HOUSE CO.
Chief executive officer: Katalin Orgován

Printed and bound by
PÁTRIA PRINTING HOUSE CO.
Chief executive officer: Katalin Orgován

HUMAN RIGHTS – CHILDREN'S RIGHTS ISSN 3058-0161

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Although the book series is essentially law-focused, it also allows for an interdisciplinary approach, and therefore also includes contributions from other disciplines.

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2024

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Introduction

Anikó RAISZ

'Safety and security don't just happen, they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear.' (Nelson MANDELA)

Human rights. A notion inherent to our lives. For our grandparents or even parents, however, this was not necessarily the case all the time. Despite all the suffering they have seen that the 20th century has brought to the world, an undoubtedly positive consequence was that human rights and the necessity of their protection became acknowledged worldwide. Step by step, *bien entendu*. And, as expected, not without debates.

Since the basic rules for society and human behaviour are also valid for the international community: the smaller the group of people/countries you want to agree on something, the more chances you have for them to actually agree. It is the same in the case of human rights. The first international human rights instrument was a regional one: a few months before adopting the Universal Declaration of Human Rights in December 1948, the American Declaration of the Rights and Duties of Man was adopted (in May 1948). The universal documents on human rights (apart from the Universal Declaration; let us focus first on the two International Covenants[1]) tend to have text versions which try to incorporate as many states as possible, which entails that their texts are, *per definitionem*, less concrete than the texts from communities where there is a broader understanding. Still, despite this tendency, the United Nations' texts are as concrete as possible, and have brought about a human rights revolution in the middle of the 20th century. Even though these texts boast only relatively effective control mechanisms, their wide acceptance has brought relevant changes to the world. They have become points of reference. They have come to the centre of interest. They have become alive.

The changes that came with the Second World War affected not only human rights and all other noble and/or abstract fields of international law but also the

1 International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966).

Anikó RAISZ (2024) 'Introduction'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 13–21. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_0

international working mechanisms, such as international cooperation. International organisations became more relevant than ever before, and hence it is no surprise that many major international organisations have included human rights, one way or another, into their mission. However, it is worth drawing attention to the differences at the universal and regional levels.

At the universal level, the most important actor, the United Nations has included human rights in its charter and later developed – partly following René Cassin's vision – legal institutions focused on human rights protection. As the two Covenants were adopted during the Cold War, ideological differences soon came to light, which explains why, to date, certain (and rather important) ratifications are missing.[2] Regardless, most states worldwide have accepted the obligations derived from these instruments. As expected, the control mechanisms attached to these instruments are either political (Universal Declaration) or expert-based, but do not feature real binding power (e.g. see the two covenants' committees or those of the specific documents).[3] This is however the furthest that global cooperation could get.

At the regional level, the picture is quite different, as there are regions where cooperation is strong or relatively strong (e.g. Europe, America, or Africa) and others where even an instrumental framework does not exist. Nevertheless, there are now numerous institutions and formations focused on human rights, including the Council of Europe, the Organization for Security and Co-operation in Europe, the European Union, the Organisation of American States, and the African Union, all of which have dedicated entire instruments to this issue. Meanwhile, other institutions have signalled the relevance of the topic within their own framework, such as the Community of Independent States, the Arab League, and the Islamic Conference. Despite the differences in these instruments, the mere existence of human rights instruments indicates that member states regarded it essential to address human rights in an institutionalised form. In fact, some of the regional forms of cooperation were even motivated to create instruments with binding power, implying that, in general, some of the international human rights instruments that can be regarded as the best-working ones, exist at the regional level.

But a question that emerges at this point is whether it is also valid for a special field of human rights protection, namely the protection of children's rights? Considering that the United Nations dedicated a whole international convention to the protection of the rights of the children, can something alike be found in every regional system?

2 See the USA and the International Covenant on Civil and Political Rights; China and the International Covenant on Economic, Social and Cultural Rights.

3 See the Convention on the Rights of the Child (New York, 1989) and its Committee; the UNESCO Convention against Discrimination in Education (Paris, 1960) and its Commission.

The answer to these questions can be found in another volume of this book series[4] that focuses on the universal protection of children's rights. The answer, just like the situation, is complex. While there is, for instance, an African Charter on the Rights and Welfare of the Child, the American system has rather devoted an institute to the protection of children and created specific documents on particular subtopics. In Europe, the protection of children appears in various forms, both directly (i.e. in the form of dedicated international treaties) and indirectly (i.e. in the form of international treaties not dedicated explicitly to children). The different chapters give an insight into the background of these solutions as well.

The present volume analyses the most important aspects of the regional protection of children's rights, focusing on specific issues and instruments in this regard. Two forms of international cooperation in Europe, the Council of Europe and the European Union, are especially addressed, and separate chapters explore children's rights protection in the Americas and Africa. Considering that other topics pertaining to children's rights must also be addressed, particular chapters have been devoted to the right to life, including the question as to where life begins. Furthermore, there are separate chapters dedicated to assessments, from the perspective of children's rights, of judicial and non-judicial proceedings, family life,[5] the non-discrimination of children, and their protection against violence and exploitation.

In this volume, *Erzsébet Szalayné Sándor* introduces the reader to the world of human rights, describing not only the general development of such rights but also their universal and regional protection within various international organisations.[6] *Veljko Vlaskovic* then turns our attention to the general framework of children's rights in the Council of Europe and enumerates the international conventions adopted within the Council of Europe framework that concern children's rights protection, ranging

4 The curriculum of the ICCR LL.M is based on an interdisciplinary and legal cross-border research of several countries (Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, etc.), and consists of the following eleven books: International Children's Rights, The Rights of the Child in Regional Human Rights Systems, Social and Personality Development is Childhood, The Rights of the Child in Private Law – Central-European Comparative Perspective, The Rights of the Child in Public Law – Central European Comparative Perspective, Religion and Children's Right, Child Protection Systems – Central European Comparative Perspective, Children in Digital Age – Central European Comparative Perspective, Child-friendly Justice – Central European Comparative Perspective, Interdisciplinary and Child-friendly Communication, and Children in Conflict with the Law.

5 General Comment No. 19, Protection of the family, the right to marriage and equality of the spouses (Art. 23), 27/07/90, CCPR General Comment No. 19. (General Comments). [Online]. Available at: https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2019.pdf. (Accessed: 30 July 2024).

6 Mertens, 2020, A philosophical introduction to human rights, Cambridge University Press; Domaradzki, Khvostova, and Pupovac, 2019, Karel Vasak's generations of rights and the contemporary human rights discourse, Human Rights Review, Vol. 20, pp. 423–443; Humphrey, 1976, The International Bill of Rights: scope and implementation, William & Mary Law Review, Vol. 17, pp. 527–541.

from family relations to general issues even mentioning soft law documents.[7] *Dubravka Hrabar*'s chapter describes the situation in the European Union, including the Union's general stance towards the other international documents, its own related legislation as well, (i.e. both in primary and secondary law), and its non-binding documents.[8] The chapter written by *Wojciech Lis* depicts into great detail the right to life (including prenatal life) and respect for private and family life from the perspective of children's rights. *Katja Drnovšek*'s chapter concerns children's rights in judicial and non-judicial proceedings, providing an overview and analysing landmark cases in this regard and paying due attention to the role of children in criminal proceedings.[9] The delicate and complicated question of non-discrimination is addressed in the chapter by *Martin Kornel*,[10] which enumerates basic documents and landmark cases. The family life- and identity-related rights of children are probed into in the chapter by *Agnieszka Wedel-Domaradzka*; the author analyses not only legal provisions but also pro-life solutions (e.g. baby-boxes) and discusses various aspects of identity issues.[11] *Szilárd Sztranyiczki*'s chapter concerns the protection of children against violence, addressing corporal

7 Choudhry and Herring, 2010, European Human Rights and Family Law, 1st ed., Oregon: Hart Publishing; Dolan, Žegarac, and Arsić, 2020, Family support as a right of the child, Social Work & Social Sciences Review, Vol. 21 no. 2, pp. 8–26; Kilkelly, 2010, Protecting children's rights under the ECHR: the role of positive obligations, North Ireland Legal Quarterly, Vol. 61 no. 3, pp. 245–261; Lowe, 2016, The impact of the Council of Europe on European family law, in: Scherpe (ed.), European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law, 1st ed. Northampton, MA, USA: Edward Elgar Publishing, pp. 95–123.

8 Stalford, 2012, Children and the European Union – Rights, Welfare and Accountability, Oregon.

9 Braithwaite, Harby, and Miletić (eds.), 2019, Children and the European Court of Human Rights – An overview of the jurisprudence; Daly, 2011, The right of children to be heard in civil proceedings and the emerging law of the European Court of Human Rights, The International Journal of Human Rights, Vol. 15 no. 3, pp. 441–461; Daly and Rap, 2019, Children's participation in the justice system, in: Kilkelly and Liefaard (eds.), International Human Rights of Children, Singapore: Springer, pp. 299–319; Lonardo, 2022, The best interests of the child in the case law of the Court of Justice of the European Union, Maastricht Journal of European and Comparative Law, Vol. 29 no. 5, pp. 596–614.

10 Besson, 2005, The Principle of Non-Discrimination in the Convention on the Rights of the Child, The International Journal of Children's Rights, Vol. 13 no. 4, pp. 433–461; Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

11 Jumakova, 2020, Content of the child's right to identity within the scope of the Convention on the rights of the child and the Latvian national framework, Miscellanea Historico-Iuridica, vol. XIX, 1; Marshall, 2022, An Overview of the Development of the Right to Personal Identity at the European Court of Human Rights in: Personal Identity and the European Court of Human Rights, New York.

punishment, abuse, and exploitation from a case law perspective.[12] Then, our interest shifts from Europe to other continents as *Katarzyna Zombory* treats, in two different chapters, the institutional framework and the practice concerning the protection of children's rights in the American human rights system (i.e. in the Organisation of American States). She first enumerates the relevant OAS documents, and then turns her attention to the institutions, not limiting herself to treaty-based solutions (i.e. the practice of the Inter-American Commission and Court of Human Rights) but rather approaching the topic from a wider perspective.[13] Thereafter, *Cocou Marius Mensah* brings us closer to the framework and institutions focused on the protection of children in the African system, highlighting relevant comparisons that give way for appropriate assessments of the African results in related protection efforts.[14] *Lilla Garayová* discusses the practice of the African system, treating the topic in a broader context, drawing attention to the special challenges of the continent, and assessing the practice of different institutions,

12 Barth, Bermetz, Heim, Trelle, and Tonia, 2013, The current prevalence of child sexual abuse worldwide: a systematic review and meta-analysis, International Journal of Public Health, Vol. 58 no. 3, pp. 469–483; Edwards, 1996, Corporal punishment and the legal system, Santa Clara Law Review, Vol. 36 no. 4, p. 984; Kaiser and Foley, 2021, Family law – the revictimization of survivors of domestic violence and their children: the heartbreaking unintended consequence of separating children from their abused parent, Western New England Law Review, Vol. 43 no. 1, p. 171; Weithorn, Carter, and Behrman, 1999, Domestic violence and children: analysis and recommendations, Hastings College of the Law UC Hastings Scholarship Repository, University of California, p. 11.

13 Guy, 1998, The Pan American Child Congresses, 1916 to 1942: Pan Americanism, child reform, and the welfare state in Latin America, Journal of Family History, Vol. 23 no. 3, pp. 272–291; Domingo, 2020, Spotlight on: The Inter-American Children's Institute, Children's Legal Rights Journal, Vol. 39 no. 2, pp. 178–183; Inter-American Commission on Human Rights, 2008, The Rights of the Child in the Inter-American Human Rights System, OEA/Ser.L/V/II.133, Doc. 34, [Online]. Available at: http://www.cidh.oas.org/countryrep/Infancia2eng/Infancia2Toc.eng.htm; Feria-Tinta, 2014, The CRC as a litigation tool before the Inter-American System of Protection of Human Rights, in: Liefaard and Doek (eds.), Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence, 1st ed. Springer Dordrecht. (Accessed: 30 July 2024).

14 Bösl and Diescho (eds.), 2009, Human rights in Africa: Legal perspectives on their protection and promotion. Macmillan Education Namibia; Chitsamatanga and Rembe, 2020, School related gender based violence as a violation of children's rights to education in South Africa: Manifestations, consequences and possible solutions. Journal of Human Ecology, Vol. 69 no. 1–3, pp. 65–80; Diallo and Boubacar Sidi (2018), The protection of the fundamental rights of the child in the light of the African Charter on the Rights and Welfare of the Child, Studia Edukacyjne, no. 49, pp. 175–184; Lloyd, 2002, A theoretical analysis of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child. African Human Rights Law Journal, Vol. 2, p. 11.

namely the African Committee of Experts on the Rights and Welfare of the Child and the African Commission and Court of Human and Peoples' Rights.[15]

In general, we find that children's rights protection has much in common with human rights protection, as both essentially share the same values as their starting points. However, time also brought forth the recognition that children are special, but not in the traditional sense by which they have been historically stripped away of the opportunity of being seen as subjects (i.e. they have long been seen as objects) of law. Rather, they are special in the sense that they, as the hope of humankind's survival, need better, different types of protection. Their lives, existence, dignity, integrity, pure hope, development, and primary shelter must be protected, and they should all have access to a loving family. The reasons for this are not only individual, sentimental, and philanthropic in nature, but instead encapsulate the fact that there is no other way for us, humans, to secure a, in every possible sense, prosperous future. As Herbert Hoover said, "*Children are our most valuable resource.*" The future is what we invest in our children – all children – now, and thus let it be wisdom, strength, mercy, hope, and faith. Wisdom, strength, mercy, hope, faith as well as humankind itself will only survive if we protect our children and give them the chance to build themselves. To achieve this, we need a solid framework of appropriate rules that do not merely exist in specific letterings and documents but that get practically implemented.

The motivation behind this volume is the belief that understanding children's rights will help implementing them. For children to grow up having the opportunity to become members of society and to care for generations to come, we must both declare and make children's rights integral to our daily life. Of course, every task must start closer to home. Hence, as is the situation for the different levels of international cooperation, regional levels of cooperation can become more efficient, making it relevant to pay particular attention to solutions at the regional level vis-à-vis the protection of children's rights.

Antoine de Saint-Exupéry wrote in The Little Prince:*"Children have to be very indulgent towards grown-ups."* Well, they probably are. It is nevertheless the adults' responsibility to create safe and secure circumstances for them to grow via, among other things, securing children's rights protection systems that are functional and effective.

15 Nyarko and Ekefre, 2016, Recent advances in children's rights in the African human rights system, The Law & Practice of International Courts and Tribunals, Vol. 15 no. 2, pp. 385–395; Benedek, 1989, The judiciary and human rights in Africa. The Banjul Seminar and the training workshop for a core of human rights advocates of November 1989, Human Rights Law Journal, Vol. 11 no. 1–2, 1990, p. 250; Stone, 2012, African Court of Human and People's Rights. Advocates for International Development. Legal Guide.

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UNESCO Convention against Discrimination in Education (Paris, 1960) and its Commission.

CHAPTER 1

Regional Human Rights Protection Systems – Introduction

Erzsébet SZALAYNÉ SÁNDOR

ABSTRACT

When discussing human rights, we specifically refer to the protection that international law guarantees to individuals (and groups) – including children – through international treaties and other mechanisms. It should be emphasised that the idea of limiting the power of the state over the individual is much older than these international legal mechanisms. Human rights are, therefore, a cross-cutting issue regulated not only by international law but also, and above all, by domestic law. International human rights protection differs from traditional international law in many ways and covers a wide range of issues. In addition to the development of international human rights protection, this article outlines the basis for understanding human rights, characteristics of human rights obligations, and possibilities for limiting them.

KEYWORDS

international law, concept of human rights, generations of human rights, universality of human rights, indivisibility of human rights, obligation to respect, obligation to protect, obligation to fulfil, The International Bill of Rights, leading human rights treaties, United Nations human rights bodies, Council of Europe, European Court of Human Rights, monitoring bodies, fundamental rights in the European Union, African Union, Organization of American States

1. Introduction

International human rights protection differs from traditional international law in many ways and covers a wide range of issues. For this reason, it has come to be regarded as a separate discipline, often taught independently of general international law.[1] Accordingly, this section provides an overview of the main instruments of international human rights protection and their institutionalised mechanisms.

In addition to the development of international human rights protection, the following section outlines the basis for understanding human rights, characteristics

1 Further reading: Mertens, 2020, see further about Klabbers, 2021, p. 119-137.

Erzsébet SZALAYNÉ SÁNDOR (2024) 'Regional Human Rights Protection Systems - Introduction'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 23–39. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_1

of human rights obligations, and possibilities for limiting them. It is followed by an overview of international and regional regimes for the protection of human rights.

When discussing human rights, we specifically refer to the protection that international law guarantees individuals (and groups) through international treaties and other mechanisms. However, it should be emphasised that the idea of limiting the power of the state over the individual is much older than these international legal mechanisms. Almost all states have a catalogue of fundamental rights in their constitutions – at least in letter – that can be enforced in the courts. Human rights are, therefore, a cross-cutting issue regulated not only by international law but also, and above all, by domestic law.

2. Short history and development of human rights

Human rights have their foundations in natural law considerations, especially those of rationalism and the Enlightenment. According to Immanuel Kant, they exist a priori, meaning they are inherent from the very beginning.[2] This implies that human rights do not need to be written into positive law to be valid. Every human being is born with them. In practice, it is necessary to regulate and enforce these rights. This first occurred at the national level. For example, they were postulated in the Virginia Declaration of Rights during the American Revolution of 1776[3] and in the Declaration of Human and Civil Rights during the French Revolution of 1789.[4] Subsequently, they declared the aims of the Bourgeois Revolution in Europe in 1848.

However, international law did not originally prescribe how states should treat their citizens. The assumption was that only the protection of non-citizens and national minorities required regulation at the international level. However, the Second World War demonstrated the need for external regulation and control by states concerning their citizens. Although the League of Nations had already conducted valuable work on the protection of minorities during the interwar period,[5] the development of human rights protections at the international law level primarily occurred after 1945. In this context, Article 1(3) of the UN Charter already postulates the promotion

2 See the critical interpretation of Immanuel Kant's concept: Aguinaldo Pavão, Faggion: Kant For and Against Human Rights, cited in: Andrea Faggion, Nuria Sánchez Madrid, Alessandro Pinzani (eds.): Kant and Social Policies, Palgrave Macmillan, 2016, pp. 49-64.

3 See full text: The Virginia Declaration of Rights, National Archives [Online]. Available at: https://www.archives.gov/founding-docs/virginia-declaration-of-rights. (Accessed: 29 October 2024).

4 See full text: The Editors of Encyclopaedia, 2024, Declaration of the Rights of Man and of the Citizen, Encyclopedia Britannica [Online]. Available at: https://www.britannica.com/topic/Declaration-of-the-Rights-of-Man-and-of-the-Citizen (Accessed: 29 October 2024).

5 More about the League of Nations: League of Nations, The Editors of Ecyclopaedia [Online]. Available at: https://www.britannica.com/topic/League-of-Nations. (Accessed: 29 October 2024).

of human rights 'without distinction as to race, sex, language or religion'[6] as an objective of the United Nations. Against this background, the first universal declaration of rights applicable to all human beings was proclaimed on 10 December 1948.[7] This was the birth of human rights protections under international law. Subsequently, several international treaties and "soft law" instruments have been developed at the international and regional levels to protect human rights.

3. The concept and the nature of human rights obligations

International law essentially assumes that individuals are mediatised. Accordingly, the primary addressees of the international legal order are states, while individuals are only indirectly covered by traditional international law. This is particularly evident in the fact that individuals typically depend on their home states for enforcement at the level of international law. The principle of the mediatisation of individuals is increasingly violated in international human rights protection. Individuals are the direct recipients of human rights guarantees and thus become bearers of international rights, in contrast to international criminal law, where obligations are primarily imposed on individuals. In some cases, individuals have even been given the opportunity to enforce their rights directly before international tribunals.

Human rights often conflict with state sovereignty and the principle of non-intervention because they dictate how states must treat people within their jurisdiction, including their own citizens. This creates challenges for enforcing human rights guarantees. For instance, the right to diplomatic protection is particularly ineffective when a state violates the human rights of its own citizens, because it can hardly exercise the right to diplomatic protection "against itself". Additionally, applying traditional enforcement methods in international law to human rights treaties is complicated by the lack of reciprocity; the rights of third parties and individuals are standardised rather than arising from a reciprocal contractual relationship. To ensure compliance with human rights, international protection mechanisms are needed and guaranteed by international organisations or treaty bodies.

According to the principle of the universality of human rights, all human rights are valid everywhere and apply equally to all people. This principle is opposed to the idea of relativism or regionalism. Relativism derives regional and ideological differences

6 Article 1(3) UN Charter: 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,' United Nations: United Nations Charter [Online]. Available at: https://www.un.org/en/about-us/un-charter/full-text. (Accessed: 29 October 2024).

7 See more about the circumstances of the proclamation of the universal declaration: Lynn, M., (2024) 'Eleanor Roosevelt in the UN Chronicle 1946-1949): On the Making of the Universal Declaration of Human Rights [Online]. Available at: https://www.un.org/en/un-chronicle/eleanor-roosevelt-un-chronicle-1946–1949-making-universal-declaration-human-rights (Accessed: 29 October 2024).

in the content and application of human rights from differences in the moral concepts of different cultures or religions. The Vienna Declaration and Programme of Action, adopted by the 171 states present at the 1993 World Conference on Human Rights,[8] states that all human rights are universal, indivisible, and interdependent. It emphasises that these rights to everyone, hold equal value, are interdependent and complementary, and should therefore be implemented as a "package". However, this declaration is non-binding soft law. The practices of many states, particularly regarding the so-called Sharia reservations, show relativistic positions regarding respect for human rights, contrary to the idea of universality.[9]

A particular problem is the commitment of international organisations to human rights, particularly given their extensive immunities. In most cases, commitment to human rights standards is only given under customary international law. However, bodies such as the UN Security Council have no regular reviews or enforcement mechanisms. An exception is the EU, which has established a comparatively strong internal protection mechanism and is negotiating to submit to external control under the European Convention on Human Rights (ECHR).[10]

Human rights can be roughly divided into three generations based on their developments in international law and the debates surrounding them. Although this categorisation is simplistic–especially with regard to the historical genesis of individual human rights it is helpful in better understanding the division of human rights into different treaties.[11]

The first generation includes so-called political and civil rights. These are primarily human rights, which were first enshrined in constitutions as fundamental rights in the 18th and 19th centuries. They limit the power of the state to interfere with the individual, and are therefore known as the "right of defence". These rights include the right to life, freedom of expression, and freedom of religion. At the international legal level, they are primarily found in the 1966 International Covenant on Civil and Political Rights (ICCPR).[12]

In the context of the development of international law related to communism and socialism, the focus was primarily on human rights where the state was seen as a

8 More about the conference: World Conference on Human Rights 14-25 June 1993, Vienna [Online]. Available at: https://www.un.org/en/conferences/human-rights/vienna1993 (Accessed: 29 October 2024).

9 For a more recent case connected to the Sharia-law in the practice of the European Court of Human Rights see the case of: Molla Sali vs. Greece [GC], no. 20452/14.

10 About the ECHR: European Convention on Human Rights [Online]. Available at: https://www.echr.coe.int/european-convention-on-human-rights. More about the current status of negotiations: EU accession to the ECHR ("46+1" Group), Council of Europe Portal [Online]. Available at: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights (Accessed: 29 October 2024).

11 Domaradzki, Khvostova, Pupovac, 2019, pp. 423-443.

12 See full text: International Covenant on Civil and Political Rights, United Nations Human Rights, 16 December 1966. [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (Accessed: 29 October 2024).

"provider" for individuals. This second generation includes economic, social, and cultural rights, also known as entitlement rights. These include the right to work, education, and health, and are primarily codified in the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR).[13]

Conversely, third generation human rights are applicable to entire (ethnic) groups and are mostly collective rights. In particular, they include the right to self-determination, development, and the use of natural resources. The rights of Indigenous people are also collective rights.

Initially, it was often assumed that states had different obligations based on their first- and second-generation rights. The primary basis for this distinction lies in the general obligation clauses found in Article 2(1) of the ICCPR and the ICESCR. While Article 2(1) of the ICCPR obliges States Parties to respect the rights in the ICCPR, Article 2(1) of the ICESCR establishes the obligation for states to 'take steps, (...) to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means'. In this context, a distinction is also made between "substantive" and "procedural" obligations. However, owing to the interdependence of all human rights, this distinction is now considered outdated. It is now assumed that all rights encompass both substantive and procedural obligations. For example, the right to health may include the development and implementation of a programme of action to reduce maternal mortality as a duty of conduct, while reducing maternal mortality to a certain internationally defined minimum serves as a duty of outcome.

States have a threefold obligation regarding all human rights: the obligations to respect, protect, and fulfil. In principle, the protection of each right requires the fulfilment of all three obligations, although one obligation may be more pronounced than the others depending on the nature of the right. The obligation to respect includes the classic prohibition of interference, which prohibits the state from interfering in the sphere of the individual protected by human rights. The obligation to protect requires states to protect individuals from interference with their human rights by third parties. The obligation to fulfil, on the other hand, involves positive measures by states to create the basic conditions for the unrestricted exercise of rights by each individual. These usually depend on available resources.

Depending on the nature of individual human rights, a distinction must be made between absolute and relative rights. Most rights are relative, allowing for interventions in protected areas as long as they are proportional. A good example of the principle of proportionality is Article 18(3) of the ICCPR, which addresses freedom of thought, conscience, and religion. The specific necessity of a state measure is particularly important, and the least restrictive means must always be chosen. However, for

13 See full text: International Covenant on Economic, Social and Cultural Rights, United Nations Human Rights, 16 December 1966. [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (Accessed: 29 October 2024).

certain human rights – such as the prohibition of genocide, slavery, and torture – no state intervention is permitted at all. Intervention cannot, therefore, be justified in emergency situations, by the behaviour of the victim of the violation, or by the need to protect the rights of third parties.

Many human rights can be suspended in exceptional situations, such as war or serious disturbances. Human rights treaties usually contain an emergency clause, such as Article 4 of the ICCPR. However, certain particularly important rights are usually excluded. These are called "non-derogable rights". In any case, absolute rights are considered non-derogable, but not all non-derogable rights are absolute. For example, freedom of thought, conscience, and religion cannot be suspended even in a state of emergency, as stipulated by the ICCPR and the American Convention on Human Rights. However, it should be noted that the emergency clause of the ECHR does not mention these rights.

Since the Second World War, institutions for the protection of human rights have been established at both universal and regional levels. At the universal level, the UN has taken on this responsibility, while at the regional level, several human rights treaties and protection mechanisms have been linked to regional international organisations. These include the Council of Europe, European Union, African Union, and Organization of American States (OAS).

4. Human rights and the United Nations[14]

a) The International Bill of Rights: The United Nations (UN) has developed numerous instruments for the protection of human rights. These include documents and binding treaties designed to protect human rights in general, certain categories of rights, or particular groups of people. Additionally, international protection mechanisms have been established. A distinction is made between institutions established based on the UN Charter (charter-based bodies) and treaty bodies, which are based in the respective human rights treaties. In both cases, various instruments are usually available to ensure that states comply with the outlined standards. These instruments include state and individual complaints, state reports and investigations, and periodic field-monitoring missions. To date, no state complaints have been made about the international human rights protection mechanisms of the UN system. However, individual complaints are playing an increasingly important role.

The Universal Declaration of Human Rights (UDHR) was published in 1948 as a resolution of the UN General Assembly.[15] It contains all the human rights of the

14 For a more detailed introduction, see Human Rights, United Nations [Online]. Available at: https://www.un.org/en/global-issues/human-rights (Accessed: 29 October 2024).

15 Detailed description of the history of the Declaration: History of the Declaration, United Nations [Online]. Available at: https://www.un.org/en/about-us/udhr/history-of-the-declaration (Accessed: 29 October 2024).

first and second generations, which are also found in later binding human rights treaties. Although it is often used as a starting point for discussions on human rights, as the Declaration is a non-binding decision of an international organisation and has a recommendatory character. However, the doctrine argues that its content is largely based on customary international law. Along with the two UN human rights covenants (ICCPR and ICESCR) and their additional protocols, the UDHR is informally referred to as the International Bill of Rights.[16]

Due to the ideological divide during the Cold War and the differing focuses on human rights on both sides, there are not one but two distinct UN human rights covenants: the ICCPR and the ICESCR. Unlike the UDHR, these covenants are binding international treaties.

As a protection mechanism, the ICCPR requires member states to report to the Human Rights Committee, which also allows for complaints by states. The Human Rights Committee is a treaty body established under the ICCPR and consists of 18 human rights experts. In the case of the ICESCR, the Committee on Economic, Social, and Cultural Rights, established by the Economic and Social Council, receives reports from states. Both committees provide feedback on states' reports through "concluding observations" and issue general interpretative statements known as "general comments", on the Covenants. The Optional Protocol to the 1966 ICCPR (in force since 1976) allows for individual complaints. A corresponding Optional Protocol to the ICESCR has also been open for signatures since 2008 and has been in force since 2013. An individual complaint is only admissible if the same matter is not already under consideration by another international investigative or conciliation body, and if the person has already exhausted all available domestic remedies. Exhausting all available domestic remedies does not need to be met if the relevant domestic procedure requires an unreasonable amount of time. Both Covenants have been signed and ratified by more than 160 countries.[17]

b) Leading human rights treaties under the UN: In addition to the two covenants, seven other core human rights conventions have been developed within the United Nations to protect specific groups of people or categories of rights. These include the[18] Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1966), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention Against Torture and Other Cruel,

16 Humphrey, 1976, pp. 527-541

17 See an interactive dashboard for the status of ratification of main international human rights treaties: Status of Ratification Interactive Dashboard, United Nations Human Rights Office of the High Commissioner [Online]. Available at: https://indicators.ohchr.org/ (Accessed: 29 October 2024).

18 Core international human rights treaties: The Core International Human Rights Instruments and their monitoring bodies, United Nations Human Rights Office of the High Commissioner [Online]. Available at: https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies.

Inhuman, or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC, 1990), the Convention on the Rights of Persons with Disabilities (CRPD, 2006), and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED, 2006).

These treaties usually require periodic reporting by state parties to the respective treaty bodies, which are composed of independent experts. There is usually no provision for state complaints, with the exception of the CERD. Some optional protocols occasionally provide for individual complaints. Additionally, the CAT allows for ex officio investigations in cases of alleged torture.

Two other important treaties are worth mentioning: the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG, 1948)[19] and the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA, 1973).[20]

c) UN Human Rights Bodies: The Human Rights Council[21] is a subsidiary body of the UN General Assembly, based in Geneva, and is composed of 47 member states. Created in 2006, it succeeded the Commission on Human Rights, which was established in 1946 under Article 68 of the UN Charter and was subordinate to the Economic and Social Council (ECOSOC). As a subsidiary body of the UN General Assembly, the Human Rights Council reports directly to the General Assembly. Its establishment was based on UNGA Resolution 60/251 (2006). The composition of the Human Rights Council is often viewed critically, as it includes some states that are not necessarily considered "role models" in human rights protection.

The Human Rights Council meets three times a year, with the possibility of holding special sessions. In cases of serious and systematic violations of human rights, a two-thirds majority of the UN General Assembly can exclude member states from the Human Rights Council. A major innovation compared to the Commission on Human Rights is the so-called "Universal Periodic Review" mechanism, which requires all UN member states to report on their human rights situations every four and a half years. This is in addition to the reports they must submit under the two human rights covenants (ICCPR and ICESCR) and other specialised human rights treaties. The Office of the UN High Commissioner for Human Rights also provides information on the situation in these states.

19 Background and ratification: https://www.un.org/en/genocide-prevention (Accessed: 29 October 2024).

20 Kattan, V., Johnson, D. (2023), The Crime of Apartheid beyond Southern Africa: A Call to Revive the Apartheid Convention's "Group of Three", EJIL:Talk!, Blog of the European Journal of International Law [Online]. Available at: https://www.ejiltalk.org/the-crime-of-apartheid-beyond-southern-africa-a-call-to-revive-the-apartheid-conventions-group-of-three/ (Accessed: 29 October 2024).

21 For more about the HRC, see United Nations Human Rights Council [Online]. Available at: https://www.ohchr.org/en/hrbodies/hrc/home (Accessed: 29 October 2024).

Previously, the Commission on Human Rights operated two procedures: the public 1235 procedure and the non-public 1503 procedure, both named after the resolutions of the ECOSOC that established them. Under the 1503 procedure, a special group of experts examined individual requests from individuals and NGOs to determine the existence of serious human rights violations. When such a situation was identified, the Commission held a closed meeting with representatives of the concerned state. The procedure was either closed, or it was decided that the country would continue to be monitored, if necessary, with the involvement of a special rapporteur or an ad hoc commission. If the state continued to refuse cooperation or if the situation did not improve, the situation could be made public through the 1235 procedure. This procedure involved the investigation, monitoring, and publication of the human rights situation in certain countries and regions or specific human rights violations by a special rapporteur, experts, or working groups. These two mechanisms continue to exist. However, the 1503 procedure is now referred to as the "complaints procedure", which includes a time limit for handling complaints and easier access. On the website of the Office of the High Commissioner for Human Rights, it is possible to download a complaint form that can be sent directly to the Complaints Section. If deemed acceptable, the complaint will be forwarded to the Situation Section for processing. The 1235 procedure is referred to as the "special procedure".[22]

The Office of the UN High Commissioner for Human Rights (UNHCHR) was established as part of the 1993 World Conference on Human Rights and reports directly to the UN Secretary-General. Based in Geneva, the Office supports the UN's work on human rights, including the Human Rights Council through the Universal Periodic Review (UPR) mechanism.[23]

22 The system and description of special procedures see: Special Procedures of the Human Rights Council, United Nations Human Rights Office of the High Commissioner [Online]. Available at: https://www.ohchr.org/en/special-procedures-human-rights-council. More in detail about the complaints procedures under the human rights treaties see: Complaints procedure under the human rights treaties, United Nations Human Rights Office of the High Commissioner [Online]. Available at: https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/complaints-procedures-under-human-rights-treaties (Accessed: 29 October 2024).

23 The Universal Periodic Review mechanism was established in 2006 by the UN General Assembly (Res.60/251). The UN Human Rights Council calls for each Member State to undergo a peer review of its human rights records every 4.5 years. The fourth cycle of review began in November 2022. For key documents and status see: [Online]. Available at: https://www.ohchr.org/en/hr-bodies/upr/upr-home (Accessed: 29 October 2024).

5. Human rights and the Council of Europe

The Council of Europe was founded on 5 May 1949 by the Treaty of London, which established its Statute.[24] Today, it has 46 member states, including all EU member states. The main organs of the Council of Europe, particularly regarding the protection of human rights, are the Committee of Ministers, the Parliamentary Assembly, and the European Court of Human Rights.

The Committee of Ministers[25] is the decision-making body of the Council of Europe, consisting of the foreign ministers from member states who meet annually. For day-to-day business, they are represented by their permanent diplomatic representatives, who meet weekly. The Parliamentary Assembly[26] was the first plenary body of an international organisation with a parliamentary character established at the European level. Among other responsibilities, it provides political impetus to the Committee of Ministers, prepares draft conventions, and makes recommendations to the Committee of Ministers and the Member States. It is composed of Members of Parliament and their substitutes, delegated by the national parliaments of the member states. The Assembly meets four times a year for sessions lasting several days. Recommendations and resolutions are already prepared in special standing committees that meet approximately every six to eight weeks. The European Court of Human Rights[27] monitors member states' compliance with the ECHR.[28] It consists of one judge per member state. The judges are not representatives of states, but are independent and serve on the Court in a personal capacity.

The Council of Europe is active in the field of human rights and has developed numerous conventions in this area.[29] Its most important instrument for the protection of human rights is the ECHR, signed in Rome on 4 November 1950 and in force since 1953. Although its preamble explicitly references the UDHR, adopted two years earlier, the ECHR mainly contains first-generation rights, that is, civil and political rights. All member states of the Council of Europe are parties to the ECHR. The unique feature of the ECHR, and the reason for its significant importance in the context of

24 See: Details of Treaty No.001., Council of Europe Portal [Online]. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=001 (Accessed: 29 October 2024).

25 See: Committee of Ministers, Council of Europe Portal [Online]. Available at: https://www.coe.int/en/web/cm (Accessed: 29 October 2024).

26 See: Parliamentary Assembly, Council of Europe Portal [Online]. Available at: https://pace.coe.int/en/ (Accessed: 29 October 2024).

27 See European Court of Human Rights [Online]. Available at: https://www.echr.coe.int/home (Accessed: 29 October 2024).

28 For a detailed description and further links to the ECHR and its protocols, see European Convention on Human Rights, European Court of Human Rights [Online]. Available at: https://www.echr.coe.int/european-convention-on-human-rights (Accessed: 29 October 2024).

29 Complete list of the Council of Europe's treaties, Council of Europe Portal, [Online]. Available at: https://www.coe.int/en/web/conventions/full-list (Accessed: 29 October 2024).

human rights protection in Europe, is its comparatively strong enforcement mechanism. The European Court of Human Rights (ECtHR), based in Strasbourg, monitors the implementation of the Convention by the state parties. Jurisdiction is not optional; all states that have signed the ECHR are subject to ECtHR jurisdiction.

The ECtHR[30] cannot act on its own initiative but can only proceed based on complaints addressed to it. There are two ways to initiate proceedings: a state application under Article 33 of the ECHR and an individual application under Article 34. However, applications by state are the exception; nearly all applications originate from individuals. The option for individual applications exists for all persons subject to the sovereignty of a state party, irrespective of their nationality. Citizens of a non-state party can also apply to the ECHR against a State Party. The 16th Protocol to the ECHR, adopted in 2013, created the possibility for last-instance courts and constitutional courts of member states to request an opinion from the ECtHR on the interpretation of the ECHR in ongoing proceedings.

The ECtHR began operations in 1959, functioning within a two-tier dispute-settlement system consisting of the Court itself and the ECHR. Until 1998, individuals could not apply directly to the ECtHR, but only to the Commission. It was essentially up to the Commission and the states concerned to decide whether a case would be referred to the ECtHR after the Commission had completed its proceedings. The 11th Protocol to the ECHR, which came into force in 1998, fundamentally changed this system. It abolished the Commission and transformed the ECtHR into a permanent body of full-time judges. Additionally, it made it possible for individuals to submit complaints directly to the ECtHR. Not surprisingly, this change has led to a significant increase in the Court's workload. Proceedings became lengthy, and the backlog grew year by year. To ensure the functioning of the ECtHR and improve its capacity to manage the enormous number of applications, another major restructuring was undertaken through the 14th Protocol, which entered into force in 2010. This included the introduction of a single-judge formation and an additional admissibility requirement.

An individual application must meet several admissibility criteria to be considered by the ECtHR. These criteria are as follows: the applicant must first exhaust domestic remedies; the applicant must be affected by the violation; a four-month period (originally six months) must have elapsed since the final domestic decision; and the applicant must have suffered a significant disadvantage as a result of the violation (a new criterion since the entry into force of the 14th Protocol). The application must not concern a matter that has already been decided or submitted to another international body for decision-making, must not be manifestly unfounded or abusive, and must be compatible with the ECHR. This compatibility requires that the application relates to a situation that occurred after the ECHR's entry into force and is directed against a state party under whose jurisdiction the violation occurred. The substance of the application must be based on the ECHR.

30 The case law of the ECtHR can be best accessed via HUDOC: https://www.echr.coe.int/hudoc-database. (Accessed: 29 October 2024).

One of the most important requirements is the exhaustion of domestic remedies, as the central basis of the dispute settlement system established by the ECHR is the principle of subsidiarity. This principle is based on the idea that it is primarily the responsibility of states to guarantee the rights enshrined in the ECHR. If these rights are violated, it is up to the states to remedy the situation. Only if the national system fails, despite the complainant having exhausted all legal remedies, can a complaint be lodged with the ECtHR. Another consequence of the principle of subsidiarity is the concept of the margin of appreciation, which the ECHR allows states during the implementation of Convention rights. The extent of this margin depends on several factors, such as which right is being interfered with and how central it is to the applicant. It also considers the degree of intervention, sensitivity of the issue, and the level of agreement between the Convention states.[31]

The ECtHR has four different configurations: a single judge, committee (three judges), chamber (seven judges), and a grand chamber (17 judges). A single judge may make a final decision on inadmissibility, if possible, without further examination of the application. The committees of three judges primarily decide on admissibility and, in exceptional cases, on the merits if the case is based on established ECtHR case law. In other cases, the chambers of seven judges decide upon appeals.

The Grand Chamber, composed of 17 judges, hears cases that raise serious questions regarding the interpretation or application of the ECHR or are of general importance, as well as cases in which the decision may depart from a previous judgment of the ECtHR. If this is apparent at the time the application is lodged, the Chamber will refer the case to the Grand Chamber before reaching a decision. Any party may also request that a case be referred to the Grand Chamber within three months of the Chamber's judgment. The Committee of Ministers monitors the implementation of ECtHR judgments according to a system designed for this purpose. A case is closed when the measures taken by the Member State to comply with the judgment are approved by the Committee of Ministers.[32]

6. Human rights and the European Union

Unlike other international organisations, the EU has a human rights protection system that is binding not only on Member States but also on the EU itself. It is also equipped with appropriate enforcement mechanisms. The central provision is Article

31 Molbaek-Steensig, 2023, pp. 83-107.

32 Simplified case-processing flow chart by judicial formation, European Court of Human Rights [Online]. Available at: https://www.echr.coe.int/documents/d/echr/case_processing_court_eng (Accessed: 29 October 2024).

6 of the Treaty of the European Union (TEU),[33] which makes the Charter of Fundamental Rights of the European Union[34] legally binding.

At the time of the founding of the European Communities in the 1950s, it was considered highly unlikely that this type of international organisation could violate the fundamental rights of the citizens of the member states. For this reason, the prevailing view at the time was that an organisation focused on economic integration did not need to include human rights guarantees. However, as the Communities' activities expanded and integration deepened, violations by the organisation itself – rather than its Member States – became more likely. In particular, the combination of the principles of direct effect and the primacy of EU law enabled the organisation to directly alter the legal position of individuals. However, by virtue of its primacy, Union law takes precedence over national law, including the constitutions of the Member States and their catalogues of fundamental rights.[35] At the same time, as an independent legal system, Union law cannot be measured against the standards of national law, meaning that the provisions of Union law cannot be repealed on the grounds that it violates national fundamental rights. Therefore, individuals can only be protected against the encroachment of EU law on their fundamental rights through the fundamental rights enshrined in EU law. It was only when the constitutional courts of the Member States, particularly those of Germany and Italy,[36] "threatened" to disregard the primacy of Union law for this reason that the Court of Justice of the European Union (CJEU) began to find creative solutions to this problem.

33 Article 6 of the TEU '1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title V of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, which set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

34 Charter of Fundamental Rights of the European Union (2012/C 362/02), Official Journal of The European Union, 26.10.2012. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT (Accessed: 29 October 2024).

35 The issue of primacy of EU law over national law was and still is a very much debated question. The number of related scientific publications is substantial, but this study does not aim to analyse the topic. As a starting point to the scientific debate see the paper of the former judge and Advocate General to the European Court of Justice, Trstenjak, 2013, pp. 71-76. See also the Report of the European Parliament on the implementation of the principle of primacy of EU law, 7.11.2023 – 2022/2143(INI), [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0341_EN.html (Accessed: 29 October 2024).

36 Hilpold, 2021, pp. 159-192.

In the Stauder case (1969),[37] the CJEU held that it was the Court's duty to ensure respect for the fundamental rights embodied in the general principles of the Community legal order. A year later, in Internationale Handelsgesellschaft (1970),[38] the Court confirmed this and stated that these fundamental rights were inspired by the common constitutional traditions of the Member States. In subsequent judgments, the CJEU noted that not only the national legal systems of Member States but also certain international treaties serve as sources of information, particularly emphasising the importance of the ECHR.

Building on the jurisprudence of the CJEU, fundamental rights have gradually become more important within the framework of EU law and have been more firmly enshrined with each treaty revision. Since the Treaty of Lisbon came into force, the EU's commitment to fundamental rights has been enshrined in Article 6 of the TEU. Article 6(1) makes the EU Charter of Fundamental Rights legally binding and explicitly grants it the status of primary law. Although it was proclaimed in 2000, it became legally binding only with the Treaty of Lisbon.[39] According to Article 6(3) of the TEU, the fundamental rights resulting from the ECHR and the common constitutional traditions of the Member States continue to apply as general legal principles in Union law. Article 6(2) of the TEU also provides for the accession of the EU to the ECHR, after which the ECHR will become binding on the EU under international law. This means that individuals will then be able to apply to the ECtHR regarding human rights violations within the EU. This would be the first time in the history of an international organisation that it submits to an international court for the protection of human rights.[40]

Although the ECHR is not currently binding on the EU under international law, it occupies a special position in Union law. On the one hand, the ECHR is a source of inspiration for fundamental rights as general legal principles in Union law. On the other hand, the EU Charter of Fundamental Rights explicitly refers to the ECHR as a minimum standard, and stipulates that rights in the Charter that correspond to those in the ECHR should be given the same meaning.

Fundamental rights in the EU are primarily addressed by the EU institutions and bodies. However, according to Article 51 of the Charter, the rights contained in it are also binding on Member States when they implement Union law. This formulation has led to controversial views regarding the situations in which Member States must respect the EU's fundamental rights in practice. In the Äkerberg Fransson case[41]

37 Case 29/69 – Erich Stauder vs. City of Ulm, ECLI:EU:C:1969:57.

38 Case 11/70 – Internationale Handelsgesellschaft, ECLI:EU:C:1970:114.

39 See more about reform of the EU: Lenaerts and Van Nuffel and Corthaut, 2021, pp. 40-49.

40 For more about the EU accession to the ECHR, see Krommendijk, J., (2023) 'EU Accession to the ECHR: Completing the Complete System of EU Remedies?'; https://dx.doi.org/10.2139/ssrn.4418811. and actual information about this issue: Lecerf, Completion of EU Accession to the European Convention on Human Rights – Q1 2017, 20 January 2024. [Online]. Available at: https://www.europarl.europa.eu/legislative-train/carriage/completion-of-eu-accession-to-the-echr/report?sid=7701 (Accessed: 29 October 2024).

41 Case C-617/10 - Åklagaren vs.Hans Åkerberg Fransson, ECLI:EU:C:2013:105.

(2013), the CJEU confirmed its broad interpretation of this wording by holding that EU fundamental rights apply whenever Union law is applicable.

7. Human rights and the African Union[42]

The African Union, formerly known as the Organisation of African Unity, adopted the African Declaration on Human and Peoples' Rights in 1981.[43] The Declaration, also known as the Banjul Charter, came into force in 1986 and, as its name suggests, includes several group rights that represent the third generation of human rights. For enforcement purposes, there is a group complaint procedure and a state complaint procedure before the African Commission on Human and Peoples' Rights, based in Banjul. Since 2004, the African Court on Human and Peoples' Rights, based in Arusha, Tanzania, has operated within the African Union, to which 27 of its 54 member states belong. Applications can be submitted by the African Commission on Human and Peoples' Rights or by any state party. Some states, such as Tanzania, Rwanda, and Ghana, have declared that they will also accept complaints from individuals and NGOs that have observer status with the African Commission on Human and Peoples' Rights.

8. Human rights and the Organization of American States[44]

The American Declaration of the Rights and Duties of Man was adopted in 1948 under the auspices of the Organization of American States.[45] The American Convention on Human Rights followed in 1969,[46] although the US and Canada abstained. This primarily contained fundamental civil and political rights. Basic economic, social, and cultural rights are included in the San Salvador Protocol. Additionally, several special human rights treaties exist.

42 For more information on the state of affairs in implementing human rights in Africa, see Anazor-Ugwu, (2018) 'Enforcement of Human Rights in Africa: A Case Study on the African Commission on Human and Peoples Rights'; https://dx.doi.org/10.2139/ssrn.3407770 (Accessed: 29 October 2024).

43 Text of the document as well as details about the institutional background and recent news can be found at: https://achpr.au.int/home as well as at: https://www.african-court.org/wpafc/ (Accessed: 29 October 2024).

44 Research sources to human rights in the Americas can be found at: Comparative Human Rights, Refugee, & Asylum Law: Human Rights in the Americas, Michigan Law Library University of Michigan [Online]. Available at: https://libguides.law.umich.edu/c.php?g=38129&p=6423870 (Accessed: 29 October 2024).

45 See the full text: American Declaration of the Rights and Duties of Man, OAS [Online]. Available at: https://www.oas.org/en/iachr/mandate/Basics/declaration.asp (Accessed: 29 October 2024).

46 See the full text: American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), OAS [Online]. Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (Accessed: 29 October 2024).

Within the OAS, two bodies are responsible for upholding human rights: the Inter-American Commission on Human Rights, based in Washington, D.C., and the Inter-American Court of Human Rights, based in San José.

The Inter-American Commission on Human Rights[47] was established in 1959 and has jurisdiction over individual complaints from the nationals of any state party to the American Convention on Human Rights. Regarding the San Salvador Protocol, individual complaints are only possible concerning the right to education and the right to form trade unions. Jurisdiction for non-state parties is limited to violations of the American Declaration of the Rights and Duties of Man and, in some cases, specific human rights treaties. Complaints by states are also permitted, provided that there is an explicit declaration of responsibility by the concerned state.

The Inter-American Court of Human Rights[48] was created in 1979 based on the American Convention on Human Rights. It has jurisdiction over complaints from States and cases brought by the Inter-American Commission on Human Rights. In both cases, an explicit justification for jurisdiction is required. Additionally, members of the OAS and OAS bodies may request advisory opinions. However, individual complaints addressed directly to the Court are not permitted.

47 For details about composition, mandate, and functions, see What is the IACHR? Inter-American Commission on Human Rights [Online]. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp (Accessed: 29 October 2024).

48 For details about composition and case law, see Inter-American Court of Human Rights [Online]. Available at: https://www.corteidh.or.cr/index.cfm?lang=en (Accessed: 29 October 2024).

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CHAPTER 2

Children's Rights in the Council of Europe – Framework

Veljko VLAŠKOVIĆ

ABSTRACT

The Council of Europe aims to connect the countries of the European continent to promote the idea of human rights and liberties to achieve common social development and progress in the rule of law for all countries and their citizens. In this context, the Council of Europe provides a comprehensive normative framework for the implementation and protection of child rights as a distinct category of human rights. Under the auspices of the Council of Europe, a significant number of international treaties and soft law instruments have been created that are of direct or indirect importance to child rights. The rights of the child have been recognised, applied, and protected first in treaties on human rights in general, and then in family related conventions, and particularly within child-oriented treaties. In terms of child rights, the activities of various judicial or non-judicial bodies that monitor or supervise the implementation of these treaties or act separately within the Council of Europe's framework should be considered. The real engine of the Council of Europe is the European Court of Human Rights, which has been continuously developing case law for human rights. Such an approach by the Court influences the harmonisation of the substantive family law of member States, including the exercise of the rights of the child. Over the last few decades, other international and supranational organisations have increasingly suppressed the Council of Europe. However, the significance of its work in the fields of human and child rights cannot be easily diminished.

KEYWORDS

child rights, human rights, Council of Europe, treaties, child rights-oriented approach, soft law

1. Introduction

The Council of Europe was founded in 1949 with the aim of achieving legal, economic, and cultural connections and greater unity among the countries of the European continent devastated in the Second World War.[1] Throughout time, this organisation has been attempting to harmonise the national laws of European States, reaffirming

1 The Statute of the Council of Europe, 05 May 1949, ETS 001, art. 1(a). Hereinafter: the Statute.

Veljko VLAŠKOVIĆ (2024) 'Children's Rights in the Council of Europe - Framework'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 41–64. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_2

and applying the idea of human rights which by nature does not tolerate the borders between individuals, peoples, and countries.

The legal and political activities of the Council of Europe rest upon the Committee of Ministers and Parliamentary Assembly as two primary bodies, including the Secretariat as a key operational force headed by the Secretary-General who personifies the entire organisation. Under these bodies, there is a vast network of authorities, advisory, and technical committees or commissions in accordance with the Council of Europe's Statute. In this context, the Committee of Ministers established the Commissioner for Human Rights in 1999 as an independent, non-judicial authority to assist member States in implementing the Council of Europe's human rights standards. The final and essential pillar of the Council of Europe is the European Court of Human Rights.

The Committee of Ministers comprises the Ministers of Foreign Affairs of the member States as their permanent representatives acting on behalf of the Council of Europe with a decision-making mandate and a key role in guarding and maintaining the Council's principal bases and values.[2] The Parliamentary Assembly (The Consultative Assembly in the original text of the Statute) has been designated as a deliberating body comprising representatives appointed by member States with the mandate to debate matters within its competence and present adequate conclusions in the form of Recommendations to the Committee of Ministers.[3] Member States are entitled to different numbers of representatives depending primarily on their size and population.

Drawing power from the statute ratified by almost all European countries, the Council of Europe has provided a highly significant space for common action in legal matters pursuing the goals of human rights and liberties.[4] Therefore, legislative activity under the auspices of the Council of Europe is expressed at its most important level through conventions and other legally binding international treaties that serve as instruments for codifying human rights. Furthermore, the adoption of various recommendations is a significant driving force for human rights policy implementation. Although the latter legal instruments are non-binding in a strictly formal sense, they often precede conventions, enabling member States to gradually adjust their national legislation.[5]

The idea of fulfilling and protecting human rights within the Council of Europe's framework was achieved by establishing various monitoring expert bodies, groups, and organisations. They are mostly tied with the supervisory mechanism of a particular Council's treaty, although different examples can be found regarding this issue. Thus, to acquire a better insight into the exercise of human rights at national levels and ensure a more effective approach in combatting human rights violations, the

2 The Statute, arts. 13 – 14.
3 The Statute, art. 22.
4 Lowe, 2016, p. 97.
5 Ibid., p. 98.

Statute of the Council of Europe could serve as a direct instrument for establishing specialised monitoring expert bodies separated from the supervisory mechanism of any particular Council's treaty, such as the European Commission against Racism and Intolerance (ECRI).[6] In other cases, monitoring or supervisory bodies were established as part of the specific human rights treaty or by the Convention that has served solely as an instrument for the creation of such a monitoring authority and for defining its competence and role (e.g. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).[7]

However, the most significant activity in achieving common ground in legal matters among member States is adopting conventions regarding human rights and liberties. In this context, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the European Convention on Human Rights).[8] Heavily influenced by the United Nations Universal Declaration of Human Rights,[9] this treaty does not draw its true strength primarily from the content, but from the supervisory mechanism for the enforcement of the Convention, that is, the European Court of Human Rights (ECtHR), seated in Strasbourg. Thus, the ECtHR continues to make it a living instrument, preserving the vitality of this Convention through the evolutionary interpretation of human rights, considering the inevitable changes in social surroundings.

Somehow as expected and understandable, child rights were not the focus of the Council of Europe's early work.[10] Thus, child rights were not fully recognised as a distinctive category of human rights. Although the Council of Europe made valuable efforts to improve the position of children as vulnerable members of a family and the wider community, these legal instruments were not essentially child-oriented. Child rights only emerged with the adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989 as the most universally accepted treaty in human history.[11]

6 The Council of Europe, Committee of Ministers, Resolution Res (2002)8 on the statute of the European Commission against Racism and Intolerance (ECRI), adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers' Deputies, preamble. ECRI was created in 1993 at the Vienna Summit of Heads of State and government of the member States of the Council of Europe by adopting the Declaration and the Plan of Action. See Jacob-Owens, 2019, p. 5.

7 The Council of Europe, Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November, 1987, ETS 126, art. 1.

8 The Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 01 November, 1950, ETS 005. Hereinafter: ECHR.

9 The United Nations, Universal Declaration of Human Rights, 10 December 1984. Hereinafter: UDHR.

10 Fortin, 1999, p. 354.

11 The United Nations, Convention on the Rights of the Child, 20 November 1989. Hereinafter: CRC.

2. Development of the concept of child rights under the Council of Europe's normative framework

2.1. Child rights in broader context of human rights and family relations

The idea of child rights that gradually developed during the 20th century fundamentally changed the concept of family legal relations and the legal status of children.[12] The entire process culminated in the adoption of the CRC after a decade of drafting, intensive discussion, and negotiations among various States and non-governmental delegations within the United Nations framework. Derived from the idea of human rights, child rights comprise and recognise the particular interests of children that need to be pursued in their family surroundings and the wider community. In this context, a child must be treated as a rights-holder and not simply as a passive participant in legal relations that directly or indirectly concern her/him. Therefore, the decisive moment in creating child rights and reshaping the principle of the child's best interests was the introduction of the child's participation rights, that is, the right of the child to express views, which enabled the child to influence the decisions that affected them.[13]

As previously mentioned, the Council of Europe did not fully recognise child rights in the legal instruments it was producing, or at best, the idea of an independent category of child rights was not sufficiently visible in the Council's activities until the adoption of the CRC. Thus, the ECHR as probably the most important legal instrument created within the Council of Europe's framework, was not originally intended to serve children, but adults. Therefore, the term "child" is not mentioned at all in the original text of the ECHR, while the words "minor" and "juvenile" are used in only two cases.[14] This situation was improved in the European Social Charter as a treaty covering the second generation of human rights.[15] In this context, the ESC recognised that children collectively enjoyed some protection and provision rights in the fields of labour, working capacity and social and economic protection.[16] However, in the original text of the treaty, children's rights are mostly regarded together with the rights of single mothers as vulnerable persons, except for the employment status of children.

Furthermore, the Council of Europe has dealt with highly important family matters that inevitably affect the rights and interests of children. Considering that these treaties regulated a narrower field of family relations, the interests and legal positions of the children had to be significantly more visible. In this regard, conventions concerning the adoption of the child and parental affiliation had been adopted before the work on drafting the CRC began. Thus, the European Convention on the

12 Vlašković, 2014, p. 185.
13 The CRC, art. 12.
14 The ECHR, art. 5 (1d), art. 6 (1). See Alston and Tobin, 2005, p. 16.
15 The Council of Europe, European Social Charter, 18 October 1961, ETS 035. The treaty was partially revised in 1996, ETS 163. Hereinafter: ESC.
16 See the ESC (ETS 035), Part II, art. 7, art. 17.

Adoption of Children (1967) was the closest to the contemporary understanding of child rights.[17] It was one of the first European treaties that directly recognised the participation interests of a child that would later take the form of the child's right to express views in the broadest possible context.[18] The European Convention on the Legal Status of Children Born Out of Wedlock (1975) has contributed to the abandonment of discrimination against children based on birth, although this treaty primarily deals with the issue of establishing parental responsibility.[19]

By the end of the seventies of the last century, the collective awareness of the necessity of recognising and codifying children's rights and interests on a global level was maturing. This social climate was also noticeable in the activities of the Council of Europe. Thus, at the very beginning of the preamble of the Luxembourg Convention (1980), it is emphasised that the 'welfare of the child is of overriding importance in reaching decisions concerning his custody'.[20] This individualistic formulation and approach to the welfare of each and every child also redefined the principle of the child's best interests which would be fully embraced by the CRC. Previously, the ECtHR had developed "the doctrine of positive obligation" for the member States in the ground-breaking case of *Marckx v. Belgium* (1979) largely expanding the possibilities for the protection of children as the right-holders under the ECHR.[21] After the adoption of the CRC, a new stage was set to which the Council of Europe adapted and further developed activities concerning child rights.

2.2. The impact of the UN Convention on the Rights of the Child

The CRC influenced the Council of Europe to further adjust activities concerning children's rights in two primary directions. To respect and achieve the aims of child rights, the Council of Europe has been using the approaches of partial and full revision on one side, and the creation of more child-oriented instruments on the other. The first approach has been used so that some of the already existing treaties can be terminologically and substantially adapted to the idea of child rights. Thus, the ESC was partially revised in 1996, whereas the text of the original ECA was subjected to the complete revision two years later.

17 The Council of Europe, European Convention on the Adoption of Children, 24 April 1967, ETS 058. The treaty was completely revised in 1998, ETS 202. Hereinafter: ECA.

18 The ECA (ETS 058) provided that competent authority will not grant the adoption before making appropriate enquire on the views of the child as a prospective adoptee. See art. 9 (2f).

19 The Council of Europe, European Convention on the Legal Status of Children Born Out of Wedlock, 15 October 1975, ETS 085. Hereinafter: ECCoW. Lowe, 2016, p. 100.

20 The Council of Europe, European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, 20 May 1980, ETS, preamble, para. 1, ETS 105. Hereinafter: the Luxembourg Convention.

21 See Marckx vs. Belgium, App. No. 6833/1974 (13 June 1979), para. 31. The doctrine of positive obligations implies that member States do not only have the duty to refrain from interfering with the human rights and liberties from the ECHR, but some of the Convention rights may also impose the obligation to take active steps to ensure their protection and enforcement. See Fortin, 2009, p. 62; Choudhry and Herring, 2010, p. 7.

The partial revision approach had to be applied to the ESC text beginning in 1961, primarily because of the expectedly weaker monitoring mechanism that followed the implementation of economic, social, and cultural rights. Thus, most of the human rights from the ESC may be realised only progressively in the national legislation of the member States, making these provisions unsuitable for the supervision of the judicial authority. Therefore, unlike the ECHR, which can withstand the test of time through the ECtHR case law development, the ESC text needed to be partially revised.

In the case of the ECA, it was recognised that some provisions of the original text (1967) were outdated, contrary to the case law of the ECtHR. Moreover, the principle of the child's best interests was prioritised in the field of adoption, requiring a full adjustment of the former ECA to the CRC.[22]

The other course of action is shaped by the need for every future treaty or other legal and political instrument concerning child rights to be created within the Council of Europe framework to be child rights-oriented. A typical example is the European Convention on the Exercise of Children's Rights, which was adopted in 1996.[23] This treaty contributed to understanding the obligations that countries have under the CRC to achieve greater unity between the member States of the Council of Europe in the implementation of child rights in a manner that would be complementary to the CRC.

Simultaneously, the ECtHR continues to conduct an extensive and evolutive interpretation of ECHR provisions considering child rights. Although cases formally invoking the CRC are not so rare, it has been shown that the ECtHR sometimes does so reluctantly or without an in-depth analysis of the aims of child rights set by the UN treaty.[24] These outcomes are a consequence of the fact that the ECtHR does not interpret the treaty that is directly dedicated to child rights but to human rights in general, which often requires balancing the interests of several parties. However, the ECtHR, with its dynamic interpretation of ECHR rights, has the power to create space for more efficient protection and enforcement of child rights compared with the UN Committee on the Rights of the Child as a non-judicial monitoring body.

To summarise, treaties within the Council of Europe's normative framework concerning child rights may be divided into three basic groups: treaties on human rights, conventions referring to family relations, and child rights-oriented treaties. Although the first two categories of treaties protect child rights in the broader context of human rights or family relations, the latter conventions are entirely or dominantly focused on children, aiming to complement the CRC. This classification is far from ideal, considering that family law treaties are oriented towards children to some extent. However, child rights-oriented treaties are considered to offer a deeper, more

22 The CRC, art. 21 and the ECA (ETS 202), preamble.

23 The Council of Europe, European Convention on the Exercise of the Children's Rights, 25 January 1996, ETS 160. Hereinafter: ECECR.

24 Alston and Tobin, 2005, p. 19.

concrete meaning to member States' obligations arising from the CRC provisions. In the following section, we provide a brief overview of the treaties from all these categories.

3. The Council of Europe's treaties related to child rights

3.1. Human rights treaties

3.1.1. The European Convention on Human Rights and the pivotal role of the European Court of Human Rights

The ECHR was adopted in Rome in 1950 and came into force in 1953. The original text of the ECHR has been supported and supplemented so far by 16 protocols that add new rights, reorganise the supervisory mechanism, and increase the competence of the ECtHR. The list of mainly civil and political rights covered by the ECHR has expanded over time through appropriate protocols, including the right to education and the right to the protection of property.[25] Furthermore, Protocol No. 6 introduced the abolition of the death penalty in 1983.[26] Moreover, the supervisory mechanism for the implementation of the ECHR was fundamentally restructured in Protocol No. 11 by establishing the European Court of Human Rights as the single and permanent judicial authority.[27] In this context, the European Commission on Human Rights, which was used to assess the admissibility of applications submitted to court, has ceased to exist.

In the text of the ECHR, the duty of member States to respect human rights and liberties is formulated negatively; that is, member States are obliged to refrain from violating human rights. However, in the manner described earlier in this text, The European Court of Human Rights developed "the doctrine of positive obligations" according to which member States should not only not interfere in the exercise of the individual human rights, but must also enable these rights to be exercised.[28] This doctrine is a key instrument for harmonising the national laws of member States within the Council of Europe's normative framework, including child rights and family law provisions.

It is emphasised that children are considered holders of human rights granted by the ECHR equally as adults, regardless of whether this treaty recognises child rights

25 The Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 009, art. 1, 2.

26 The Council of Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 28 April 1983, ETS 114, art. 1.

27 The Council of Europe, Protocol No, 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, ETS 155, art. 19.

28 See footnote 21. earlier in the text.

as a distinctive category, making no reference to them in the text.[29] The child's equal entitlement is the outcome of the interpretation of the ECHR provisions that the rights and freedoms will be guaranteed to "everyone" combined with the prohibition of discrimination.[30]

Furthermore, some ECHR parts have tremendous potential for the protection of child rights, enabling the ECtHR to contribute significantly to these matters through the continuous development of case law.[31] These provisions primarily involve the prohibition of torture (Article 3), right to a fair trial (Article 6), right to respect for private and family life (Article 8), and prohibition of discrimination (Article 14). Thus, the ECtHR interpreted the right to protection from torture in a way that decisively contributed to the abolition of corporal punishment of children, both in school and within the family. Most of those applications were brought against the United Kingdom during the 1980s and 1990s where the common-law test of "reasonable chastisement" was deeply rooted.[32] However, the dynamic and very extensive interpretation of the concept of a person's private and family life (Article 8) "has borne the most fruit, so far as children are concerned".[33]

Unlike the right to protection from torture (Article 3), the right to respect for private and family life is a qualified human right. This means that public authority of a member State may justify interference with one's private and family life on certain legal grounds.[34] With respect to Article 8(2), the ECtHR developed a formula according to which it assesses whether there are justified reasons for interference with the private or family life of an individual. Thus, there will be no violation of the right to respect for private and family life from the Article 8 of the ECHR if the interference is done in "accordance with the law", to secure "legitimate aim" or such interference was "necessary in democratic society".[35] The latter ground involves the "test of proportionality" where the ECtHR determines if a fair balance has been struck between the various interests that may be at stake.[36] The doctrine of proportionality in a certain sense prevents the supremacy of the rights and interests of the child over those of other persons, particularly the child's parents. However, it enables a more nuanced interpretation of the best interests of a child who cannot be isolated from her/his family and a wider social environment.

The scope of the concept of private life is enormous and represents a source of continuous expansion of social relations that enjoy legal protection involving various aspects of the child's life, including the protection of the child's psychological, bodily,

29 ECtHR judgement in the case of Nielsen vs. Denmark, App. No 10929/84 (28 November 1988), para. 58.
30 ECHR, art. 1 in connection with the art. 14. See Kilkelly, 2001, p. 314.
31 Kilkelly, 2010, p. 248.
32 The landmark case was A vs. The United Kingdom, App. No. 25599/94 (23 September 1998). See Freeman, 2010, pp. 233-235.
33 Fortin, 2009, p. 61.
34 See the ECHR, art 8(2).
35 Choudhry and Herring, 2010, p. 28.
36 Ibid.

and moral integrity. Simultaneously, the notion of family life has served as a means of expanding, redefining, democratising, and protecting family relationships.

3.1.2. The European Social Charter

As stated earlier, the ESC was the second major human rights treaty adopted within the Council of Europe's normative framework. The original text of the ESC was adopted in Turin in 1961 and came into force four years later. The Treaty of Turin was partially revised in 1996. Furthermore, the ESC has been supplemented and amended so far with three protocols extending social and economic rights from the original Charter, reforming the supervisory mechanism of the treaty, and providing a collective complaints procedure.[37]

In the context of child rights, the Charter provisions are primarily devoted to the protection of children as a particularly vulnerable social group. The ESC ensures that the child's employment status and exercise of the right to work do not conflict with the right of the child to life, survival, and development, and the child's right to education. The special attention is paid to the appropriate implementation and protection of the child's right to education including obligations of the States Parties 'to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker'.[38] Thus, the revised ESC apparently recognises the importance of preserving the child's cultural identity as well. Similarly, children are entitled to special social, legal, and economic protection.[39] Such types of protection imply the obligations of the States Parties to provide children with free primary and secondary education, to protect them from negligence, violence, and exploitation, and to provide special aid for children deprived of their family support.[40] Regarding the obligations of the States Parties to provide particular aid for the child temporarily or definitively deprived of her/his family support, the ESC considers the family as a fundamental unit of society that deserves to be provided with the necessary conditions for its full development.[41] When these two provisions (Articles 16 and 17 (1c)) are interpreted together, it may be concluded that the ESC recognises the special social rights of the child to family support.[42]

Further, it is noteworthy that the revised ESC recognised and introduced the right to housing as a particular social right, which may be of significant importance for the protection of the best interests of the child.[43] However, it should be considered that

37 Council of Europe, Additional Protocol to the European Social Charter, 05 May 1988, ETS 128; Protocol amending the European Social Charter, 21 October 1991, ETS 142; Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 09 November 1995, ETS 158.

38 The ESC (Revised), art. 19 (12).

39 The ESC (Revised), art. 17.

40 The ESC (Revised), art. 17 (1 bc) and 17 (2).

41 The ESC, art. 16.

42 On the right of the child to family support arising from the UN normative framework, see Dolan, Žegarac, and Arsić, 2020, pp. 15-18.

43 The ESC (Revised), art. 31.

this is a typical social right that will be implemented gradually within States Parties depending on their available resources.

The implementation of the ESCR provisions is subject to the supervision of the Committee of Independent Experts, known as the European Committee of Social Rights. The Committee of Ministers elected these experts for a six-year period.[44] The supervisory mechanism functions through collective complaint procedures and a system of national reports.

Collective complaints may be lodged by various social partners, international and national trade unions, or non-governmental organisations, alleging that certain contracting parties apply ESC provisions in an unsatisfactory way.[45] The Committee may decide on the merits of the complaint and send it in the form of a report to the Committee of Ministers which then takes over the role of the monitoring body. Unfortunately, a significant number of the Council of Europe's member States has not yet ratified the Additional Protocol to the ESC from 1995 that introduced the mechanism of collective complaints procedure.[46]

Unlike the collective complaint procedure, a system of national reports was introduced into the original text of the ESC in 1961. According to the national reports system, States Parties submit reports on the implementation of the Charter to the Committee which then examines whether the situation described in the reports complies with the ESC provisions. Subsequently, the European Committee of Social Rights informs the particular State Party of its conclusions, and on that occasion, it may ask for additional clarification. A follow-up of the conclusions is further ensured by the Council of Europe's Committee of Ministers.

3.1.3. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the role of the Committee)

The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was adopted in 1987 and came into force two years later. The Convention was used solely as a formal instrument for establishing the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Thus, the Convention has no content beyond the provisions of the CPT. The members of the CPT are elected by the Committee of Ministers 'among persons of high moral character, known for their competence in the field of human rights' or having appropriate professional experience in this regard.[47]

The CPT was established as a result of efforts to prevent the violation of the right to protection from torture (Article 3 of the ECHR), with the particular aim of

44 The ESC, art. 25 (2) and the Protocol amending the European Social Charter, art. 3 (2).

45 Additional Protocol to the ESC Providing for a System of Collective Complaints, art. 1.

46 Chart of signatures and ratifications of Treaty 158, The Council of Europe Portal [Online]. Available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=158/ (Accessed: 20 July 2023).

47 The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art. 4(2).

strengthening the position of persons deprived of their liberty by the public authority.[48] For the purposes of the Convention, the notion of "deprivation of liberty" is to be interpreted within the meaning of the right to security and liberty (Article 5 of the ECHR) as explained by the case law of the ECtHR.[49] Furthermore, competent public authorities from the State Party must co-operate with the CPT, enabling this non-judicial body to visit any place within the national jurisdiction where people are deprived of their liberty.[50] Apart from periodic visits, the CPT mandate also includes the possibility of organising visits to places of detention (police stations, prisons, psychiatric establishments, and social care institutions) whenever the circumstances require it (*ad hoc* visits).[51] Based on insights received from visits to various places where persons are deprived of their liberty, the CPT sends a report to the government of the State Party providing concrete recommendations on the perceived shortcomings and possible ways to eliminate them. The weakest aspect of this mechanism is the unwillingness of some governments to implement the recommendations.[52]

The CPT pays special attention to the problems of persons from particularly vulnerable categories who are deprived of their liberty, including children. Detention, imprisonment, or the compulsory placement of children will be used only as a measure of last resort in cases where the deprivation of liberty cannot be avoided under national legislation. In such situations, child rights are inevitably jeopardised to a certain extent. The CPT indicates that the most common problems of children deprived of their liberty are the extent of detention in practice, lack of separation of children from adults, inadequate material conditions and ill treatment in detention, absence of appropriate social contacts, lack of the special measures aimed at preventing all forms of abuse, inappropriate levels of contact between children and their families, and insufficient number of trained staff to work with children.[53] In addition, the CPT publishes an annual General Report on its activities through which it develops certain standards for the treatment of persons deprived of their liberty, including children.[54]

48 The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, preamble and art.1.
49 Explanatory Report to the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art. 1, para. 24, p. 20.
50 The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art. 2.
51 Kilkelly, 2012, p. 4.
52 Ibid, p. 6.
53 Ibid, pp. 4 – 6.
54 The CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2010, Extract from the 9th General Report [CPT/Inf (99) 12], paras. 20 – 41, pp. 72 – 79.

3.2. Conventions related to family law relations

3.2.1. The European Convention on the Legal Status of Children Born Out of Wedlock

The ECCoW was adopted in Strasbourg in 1975 and came into force in 1978.[55] The primary goal of the Convention was to formulate common rules in the field of parental affiliation to help improve the legal position of children born out of wedlock.[56] Moreover, it provides equality between children born in and out of wedlock in terms of their succession rights.[57] Furthermore, both parents have the obligation to maintain the child born out of wedlock, as if that child were born in the marriage of her/his parents.[58]

The national family legislation of member States has always contained heterogeneous provisions on parental affiliation. Thus, some of these rules may come into conflict with particular child rights (e.g. the French institution of anonymous childbirth confronts a child's right to identity). However, the ECCoW has aimed to prevent the derogation of the '*mater semper certa est*' rule in another aspect, that is, to make the provisions on establishing maternity unaffected by family or civil status of the mother. Therefore, according to the ECCoW, maternal affiliation of a child born out of wedlock "will be based solely on the fact of the birth of the child".[59] National law must provide legal safeguards that enable childbirth integration into the family from the moment of birth. In this context, legal solutions according to which the maternity of a child born out of wedlock can only be established by voluntary recognition, court decisions, or by the bizarre use of simple adoption are not acceptable. This interpretation was soon affirmed and further developed by the ECtHR, which invoked the ECCoW in the landmark case of *Marckx vs. Belgium*.[60]

3.2.2. The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children

The Luxembourg Convention was adopted in 1980 and came into force in 1983.[61] Although this treaty was widely accepted by member States of the Council of Europe, circumstances were not favourable for the Luxembourg Convention to take root.[62]

The Luxembourg Convention provides the mechanism for recognition and enforcement of the decisions relating to parental responsibility (custody and access rights) among contracting States and for the restoration of custody of children

55 See footnote 19 in this text.
56 The ECCoW, preamble.
57 The ECCoW, art. 9.
58 The ECCoW, art. 6(1).
59 The ECCoW, art. 12.
60 Marckx vs. Belgium, para. 41.
61 See footnote 20.
62 Lowe, 2016, pp. 102 – 103.

in cases of "improper removal" of the child from one contracting State to another (international child abduction). Thus, the Convention enables any person who has obtained a decision relating to the custody of a child to have that decision recognised and enforced in another contracting State.[63] For the purposes of the Convention, a child is defined as a person under the age of 16, 'not because of the age of legal capacity, but because a decision on custody could not be easily enforced against the wishes of the child of that age'.[64] The mechanism of the Luxembourg Convention is based on mutual cooperation between contracting parties, which is achieved through the central authorities determined by every contracting State to enable the State to perform its part in the implementation of the Convention provisions.

However, in practice, the Luxembourg Convention has not achieved its desired effects. This outcome is a result of the emergence of counterpart legal instruments within other international or supranational normative frameworks that suppress or overrode this treaty, particularly the Hague Convention on the Civil Aspects of International Child Abduction[65] and the Brussels II bis Regulation (now replaced by the Brussels II ter Regulation).[66]

3.2.3. The European Convention on the Adoption of Children

The original ECA was adopted in Strasbourg in 1967 and came into force the following year.[67] At the time it was adopted, the Convention represented a step forward in the attempts to establish and legally shape principles and practices in the field of adoption that could stand as common ground among the member States, thus, reducing the differences between their national laws.[68]

The ECA applies solely to the full adoption of a child which is evident from the provisions on the effects of adoption.[69] The Convention is not designed to deal with the procedure of cross-border adoptions, and it only imposes a duty on contracting States to facilitate the acquisition of their nationality by children adopted from other States Parties.[70] Since a child has to be considered the central figure of the adoption

63 The Luxembourg Convention, art. 4(1).

64 Explanatory Report to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, art. 1, para. 13, p. 3.

65 Hague Conference on Private International Law, the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980.

66 Thus, in relation between the EU member States Brussels II ter Regulation will take precedence over the Luxembourg Convention, except in Denmark that is not bound by this Regulation in accordance with art. 1 and 2 of Protocol 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. See Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), known as Brussels II ter Regulation, art. 95.

67 See footnote 17.

68 The ECA (ETS 058), preamble.

69 The ECA (ETS 058), art. 10(1).

70 The ECA (ETS 058), art. 11(1).

provisions, there are noticeable efforts in the ECA text to have the best interests of the child protected, although the Convention uses weaker formulations of the mentioned principle, such as "the welfare of children", or "interest of the child".[71] However, the 1967 Convention failed to remove discrimination that existed in a certain number of member States in the domain of parental affiliation and the exercise of parental responsibilities. Thus, cohabitants are not allowed to adopt a child and the consent of the father of a child born out of wedlock is not required.[72] Consequently, some of the ECA provisions have become outdated over time at both national and international levels. The ECA could not keep up with later treaties such as the ECCoW, CRC, and the Hague Convention on Intercountry Adoption,[73] nor with the constantly evolving case law of the ECtHR.

The text of the completely revised ECA was adopted in 2008, and the fully revised Convention came into force three years later. The old text was updated in accordance with the evolution of family law relations and the provisions of the ECA were adjusted for the CRC and other relevant international legal instruments in this area. In this context, the revised ECA is a true reflection of the individualistic approach to family law, placing single-parent adoptions on an equal footing with cases in which the child is adopted by a couple. Furthermore, the ECA (revised) is open to the possibility of adoption by same-sex couples, allowing the contracting States to extend the scope of the Convention to same-sex couples who are married, who have entered into a registered partnership, or who are living together in a stable relationship.[74] Further, the ECA (revised) provisions reduce the possibility of the annulment of adoption in accordance with the best interests of the child. Thus, the 2008 Convention imposes a duty on contracting States to determine the period in which the application for the annulment of adoption must be made, regardless of the grounds of nullity.[75]

Despite these efforts, the revised ECA has only been ratified by a relatively small number of member States.[76] Harmonisation of the laws of member States in the field of adoption remains a demanding process.

3.3. Child rights-oriented Conventions

3.3.1. The European Convention on the Exercise of Children's Rights

The ECECR was adopted in 1996 and came into force in 2000.[77] The primary aim of the Convention is to facilitate 'the exercise of the substantive rights of children by

71 The ECA (ETS 058), preamble, art. 8(1).
72 The ECA (ETS 058), art. 6(1), art. 5(1a).
73 Hague Conference of Private International Law, The *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993.*
74 The ECA (ETS 202), art. 7(2). See Fenton-Glynn, 2014, p. 169.
75 The ECA (ETS 202), art. 14(3).
76 The ECA (ETS 202) has been ratified so far by: Belgium, Denmark, Finland, Germany, Malta, Netherlands, Norway, Romania, Spain and Ukraine.
77 See footnote 23 in the text.

strengthening and creating procedural rights which can be exercised by the children themselves or through other persons or bodies'.[78] The intention was to adopt a treaty that would not overlap with the CRC provisions, but would complement them. In that context, the legal ground for the adoption of the ECECR was found in the Article 4 of the CRC according to which 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention'.[79]

The ECECR is designed to facilitate the exercise of the child's right to express views from the CRC in family proceedings.[80] According to this, every contracting State must specify 'at least three categories of family cases before a judicial authority to which this Convention is to apply'.[81] For the purposes of the ECECR, the "judicial authority" is understood 'as a court or administrative authority having equivalent powers'.[82]

Generally speaking, the Convention rests on two main and complementary parts involving the procedural rights of the child and the roles of authorities and representatives in securing those rights.[83] Thus, a child considered by international law as having sufficient understanding, in the case of family procedures affecting her/him, is entitled to receive all relevant information about the case, to be consulted, to express her/his views, and to be informed about the possible consequences of such views.[84] Furthermore, a child considered to have sufficient understanding has the right to apply, in person or through other persons and bodies, to special representatives in those proceedings.[85]

The judicial authority may also appoint a special representative for the child when assessing whether there are conflicting interests between the child and the holders of parental responsibility in the proceedings.[86] Generally, judicial authorities ensure that, during the entire decision-making process, the rights of the child are adequately protected. A special representative assists the child in exercising her/his procedural rights provided to the child with sufficient understanding of relevant pieces of information and even presenting the child's views to the court in some cases.[87]

Although the ECECR aims to facilitate the exercise of a child's right to express views, it faces serious criticism from child rights experts. The chief criticism is that

78 Explanatory Report to the European Convention on the Exercise of Children's Rights, II Commentary on the provisions of the Convention, para. 7, p. 2.
79 Ibid, I Introduction, para. 4, p. 2.
80 The CRC, art. 12(2).
81 The ECECR, art. 1(4). Family proceedings may refer to cases regarding: custody, residence, access, question of parentage, adoption, legal guardianship, administration of property of children, care procedures, removal or restriction of parental responsibilities, protection of cruel and degrading treatment, medical treatment. See Explanatory Report to the ECECR, art. 1, para. 17, p. 3.
82 The ECECR, art. 2a.
83 The Explanatory Report to the ECECR, art. 2, para. 29, p. 5.
84 The ECECR, art. 3.
85 The ECECR, art. 4.
86 The ECECR, art. 9(1).
87 The ECECR, art. 10.

the ECECR narrows the scope of the child's right to express views from the CRC by granting procedural rights only to children with sufficient understanding. Such a formulation inspires States to arbitrarily set a fixed age at which a child would be considered to have sufficient understanding and consequently be entitled to procedural rights from the ECECR.[88] Thus, it is considered that the ECECR approach is not in accordance with the CRC which determines the scope of the child's right to express views in accordance with 'the capability of the child to form her/his own views', not allowing setting a minimum age for the exercise of this right.[89]

Despite these criticisms, the ECECR should be considered a useful and significant instrument.[90] Attempts to improve the effectiveness of a child's right to express views are highly valuable, particularly considering that the ideal implementation of the aforementioned child right is often difficult to achieve in practice.

3.3.2. The European Convention on Contact Concerning Children

The scope of the Luxembourg Convention was further reduced with the adoption of the European Convention on Contact Concerning Children in 2003.[91] The latter treaty came into force in 2005, although only nine member States have ratified it so far.[92]

The terminology used in the CCC was adapted to contemporary family law and the ideas of child rights and parental responsibilities. Therefore, the notion of "access to children" has been replaced by the notion of "contact concerning children", because it appeared more adequate 'to refer to contact concerning children with different persons rather just to the rights of certain persons to access children'.[93] Furthermore, the CCC provides a wide definition of contact involving three levels or forms of maintaining personal relations between the child and her/his parents or other persons with family ties.[94] The first level includes direct or face-to-face contact, usually implying staying for a limited period of time with the persons aforementioned or at least meeting them in person. The second level comprises other, less direct forms of contact, such as telephone or social networks. Finally, the third form is designed only to provide certain pieces of information about the child to those seeking contact with her/him. This level of contact is one-sided and cannot be considered as maintaining personal relations. Thus, it can only be used separately if the competent authorities assess that the first two forms of contact are contrary to the child's best interests.[95]

88 Fortin, 2009, p. 237.
89 The CRC Committee on the Rights of the Child, General Comment No 12 (2009) The right of the child to be heard, 01 July 2009, para. 21. In that context see Kovaček-Stanić, 2010, p. 161.
90 Lowe, 2016, p. 108.
91 The Council of Europe, Convention on Contact Concerning Children, 15 May 2003, ETS 192. Hereinafter: CCC.
92 The CCC has been ratified so far by: Albania, Bosnia and Herzegovina, Croatia, Czech Republic, Malta, Romania, San Marino, Türkiye and Ukraine.
93 Explanatory Report to the Convention on Contact Concerning Children, II Commentary on the provisions of the Convention, para. 6, p. 2.
94 Ibid, art. 2, para. 22, p. 5.
95 Ibid.

The CCC fully embraces the concept of child's participation from the CRC raising the child's right to express views to the level of one of the general principles to be applied in making of contact orders.[96] Moreover, it encourages parents and other persons with family ties to the child to resolve disputes concerning contact by reaching amicable agreements through family mediation, which additionally confirms the child-oriented goals of the Convention.[97]

The CCC addresses the problems of implementing orders regarding contact with children at both national and cross-border levels, providing contracting States with examples of possible safeguards and guarantees that they may undertake in this respect.[98] According to the Convention, each State Party is required to provide a system for the recognition and enforcement of contact orders made in another country that is a party to the CCC.[99] Furthermore, States Parties have the duty to provide procedures whereby orders relating to contact and custody rights made in one State Party can be recognised and declared enforceable in advance by the State where the contact is to occur.[100] The competent authority of the State Party where the cross-border contact order is to be implemented cannot review the substance of the foreign contract order. However, the judicial authority of the addressed State may adapt to the conditions of the implementation of the contact order made by another State Party, if it is necessary to carry out this order.[101]

The CCC seeks to establish common principles or grounds on which all contracting States make decisions regarding contact between children and their parents or other persons. However, the application of the Convention has been made difficult to a certain extent, considering the existing legal instruments in this field involving the Brussels II ter Regulation and the Hague Convention since 1996.[102]

3.3.3. The European Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse

The Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse was adopted in Lanzarote (Canary Islands, Spain) in 2007 and came into force in 2010.[103] The Lanzarote Convention was ratified by all member States of the Council of Europe.

The Convention comprehensively deals with the protection of children from all forms of sexual exploitation and abuse, having three fundamental aims: to prevent

96 The CCC, art. 6.
97 Ibid., art. 7.
98 Ibid., art. 10 (2a-b).
99 Ibid., art. 14 (1a).
100 Explanatory Report to the CCC, art 14, para. 111, p. 23.
101 Ibid, art. 15, para. 113 – 114, p. 24.
102 Hague Conference on Private International Law, Convention on Jurisdiction, Applicable Law, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996.
103 The Council of Europe, Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, 25 October 2007, ETS 201. Hereinafter: the Lanzarote Convention.

and combat sexual exploitation and sexual abuse of children, to protect the rights of child victims, and to promote cooperation both at the national and international levels in tackling these forms of exploitation and abuse of children.[104] Preventive measures include a vast network of activities involving training and raising awareness of persons working in contact with children, education for children, preventive intervention programmes (intended for persons who fear they may commit some of the offences covered by the Convention), raising awareness of the general public, enabling the participation of children in the creation of State politics regarding this issue, and encouraging the private sector, media, and civil society to participate in the struggle against sexual exploitation and abuse of children.[105] States Parties also have the duty to provide and take various protective activities involving organising helplines, encouraging persons to report the exploitation and abuse to competent authorities, ensuring the measures of assisting victims, and helping them particularly with their physical and psycho-social recovery.[106]

Furthermore, the Lanzarote Convention imposes a duty on States Parties to adjust their substantive criminal law, ensuring that the following intentional conduct is criminalised: sexual abuse of children, child prostitution, child pornography, the participation of a child in pornographic performances, the corruption of children (child witnessing sexual abuse and sexual activities without having to participate in those activities), and the solicitation of children for sexual purposes.[107]

The Lanzarote Convention provisions provide for establishing a Committee of the Parties, known as the Lanzarote Committee, as a special monitoring body that takes care of the effective implementation of the Convention. Furthermore, the Committee serves as a 'centre for the collection, analysis and sharing of information, experiences and good practice between States Parties in order to improve their policies for preventing and combatting sexual exploitation and abuse of children'.[108]

The mechanism for monitoring the implementation of the Convention includes the different roles of the Lanzarote Committee. Thus, the Committee conducts thematic monitoring of the implementation of the Convention by adopting reports which are based on previously replied questionnaires sent by the States Parties, contributions of non-governmental organisations, and various forms of child participation.[109] The implementation reports involve a general description of the relevant national legislations, case-law and other documentation, an overview of any problems in implementing the Convention and the conclusions containing recommendations to

104 The Lanzarote Convention, art. 1(1).
105 The Lanzarote Convention, arts. 4 – 9.
106 Ibid., arts. 11 – 14.
107 Ibid., arts. 18 – 23.
108 Explanatory Report to the Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, art. 41, para. 270, p. 39.
109 Rutai, 2020, p. 33.

improve the effective implementation of the Convention.[110] The recommendations from the implementation reports are mostly general in nature and they are rarely addressed to the particular States.[111]Furthermore, in cases 'where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention', the Lanzarote Committee may request the certain State to submit special report containing responses on urgent questions, including the measures the State intends to take regarding the problems that have arisen.[112]

Regarding the conclusions of the adopted implementation reports, the committee may also decide to issue general comments or opinions on the interpretation of the Convention.[113] For example, in the adopted Opinion on Article 23 of the Lanzarote Convention, the Committee holds that the solicitation of children for sexual purposes does not necessarily result in a meeting in person, but may nonetheless remain online, causing serious harm to the child.[114]

The various in-depth activities of the Lanzarote Committee have been significantly contributing to the implementation of the Convention. Furthermore, together with the Convention on Cybercrime,[115] the Lanzarote treaty adequately responds to the transnational nature of child sexual exploitation and abuse within the Council of Europe.[116]

4. The Council of the Europe's soft law regarding the child rights

4.1. Recommendations and other soft law instruments

The Statute of the Council of Europe allows for the production of soft law instruments within its normative framework. Numerous recommendations have been made concerning almost all aspects of private and family life. Recommendations are not legally binding in a strict formal sense and member States do not sign or ratify them. Therefore, these soft law instruments contain principles and guidelines instead of provisions. However, the effects of these factors should not be underestimated. Thus, recommendations are material sources of law, and member States are expected to comply with the standards contained in them.[117] Furthermore, the

110 The Lanzarote Committee, Rules of Procedure adopted by the Committee on 30 March 2012 and revised on 17 March 2016 and on 06 December 2022, Rule 27 (4).
111 Rutai, 2020, p. 33.
112 The Lanzarote Committee, Rules of Procedure, Rule 28(1).
113 The Lanzarote Committee, Rules of Procedure, Rule 30 (1a).
114 The Lanzarote Committee, Opinion on Article 23 of the Lanzarote Convention and its explanatory note, Solicitation of children for sexual purposes through information and communication technologies (Grooming), 17 June 2015, para. 17, p. 6. Grooming can be defined as "an act befriending minors and then inviting, including or coercing them into participating in or observing sexual acts and producing child pornography". Dornfeld, 2020, p. 571.
115 The Council of Europe, Convention on Cybercrime, Budapest, 23 November 2001, ETS 185.
116 Witting, 2021, pp. 741 – 743.
117 Lowe, 2016, p. 98.

recommendations are an expression of the Council of Europe's legal and social policy, and their content often shapes the provisions of forthcoming treaties.

A significant number of the Council of Europe's recommendations and other soft law instruments concern family relations and child rights. In this context, the recommendations and other soft law instruments adopted so far by the Committee of Ministers deal, *inter alia,* with the issues of child placement,[118] the protection of children against ill-treatment,[119] parental responsibilities,[120] foster care,[121] emergency measures in family matters,[122] family mediation,[123] the nationality of children,[124] access to child-friendly justice (2010), and[125] preventing and resolving disputes on child relocation.[126] The Parliamentary Assembly of the Council of Europe has produced numerous recommendations, resolutions, and opinions which directly or indirectly concern child rights. Recommendations include proposals addressed to the Committee of Ministers, the implementation of which is within the competence of the governments of member States.[127]

4.2. Review on the work of the European Commission against Racism and Intolerance in the field of child rights

The ECRI is a human rights expert body established within the Council of Europe's normative framework, separate from the monitoring mechanism of any specific treaty.[128] It has the task of combating racism, racial discrimination, xenophobia, antisemitism, and intolerance from the perspective of the protection of human rights, invoking all the relevant international instruments in this field, including ECtHR case

118 The Council of Europe, the Committee of Ministers, Resolution 77(33) on placement of children, 03 November 1977.
119 The Council of Europe, the Committee of Ministers, Recommendation No. R (79) 17 concerning the protection of children against ill-treatment, 13 September 1979.
120 The Council of Europe, the Committee of Ministers, Recommendation No. R (84) 4 on parental responsibilities, 28 February 1984.
121 The Council of Europe, the Committee of Ministers, Recommendation No. R (87) 6 on foster families, 20 March 1987.
122 The Council of Europe, the Committee of Ministers, Recommendation No. R (91) 9 on emergency measures in family matters, 09 September 1991.
123 The Council of Europe, the Committee of Ministers, Recommendation No. R (98) 1 on family mediation, 21 January 1998.
124 The Council of Europe, the Committee of Ministers, Recommendation CM/Rec(2009)13 on the nationality of children, 09 December 2009.
125 The Council of Europe, the Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010).
126 The Council of Europe, the Committee of Ministers, Recommendation CM/Rec(2015) 4 on preventing and resolving disputes on child relocation, 11 February 2015.
127 Assembly public documents, The Council of Europe Portal [Online]. Available at: https://pace.coe.int/en/pages/official-documents/ (Accessed: 30 July 2023).
128 See footnote 6.

law.[129] The ECRI comprises members appointed by member States, whereby each country appoints one person with high moral authority and recognises expertise in dealing with all forms of discrimination.[130]

The three primary activities of this international expert body are monitoring member States using a country-by-country approach, working on themes of general importance, and maintaining relations with civil society.[131] Country monitoring includes a previous visit to a particular country so that the ECRI can acquire insights into possible problems concerning discrimination. The ECRI then makes appropriate recommendations to the country to deal with the identified problems regarding racism, intolerance, and discrimination. The thematic work involves adopting General Policy Recommendations for all member States.

In its activities, the ECRI makes special efforts to combat racism and intolerance towards children belonging to various minority groups and communities. For example, the ECRI has recognised school education as a field that is particularly sensitive to racism and intolerance towards children and among them. Therefore, it issued a General Policy Recommendation to combat racism and racial discrimination in school education.[132]

5. Concluding remarks

The Council of Europe has attempted to achieve greater unity between countries of the European continent by connecting them through the idea of human rights. However, under the influence of the Hague Conference on Private International Law and the Brussels Regulations of the European Union, the role and importance of the Council of Europe has been increasingly suppressed. Nevertheless, the Council of Europe has much to offer, particularly regarding the harmonisation of substantive family law provisions and implementation of the idea of child rights. Simultaneously, the Council of Europe has demonstrated that it can create instruments with a significant impact on substantive criminal laws concerning the protection of children, such as the Lanzarote Convention. Furthermore, child rights are protected through the activities of various non-judicial bodies that function as part of the supervisory mechanism for the implementation of treaties or even separately, under the direct competence of the Council of Europe.

129 The Council of Europe, the Committee of Ministers, Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance, 13 June 2002, art. 1. Hereinafter: the Statute of the ECRI.
130 The Statute of the ECRI, art. 2 (1-2).
131 Ibid., art. 10 (1).
132 The European Commission against Racism and Intolerance, General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education, 15 December 2006.

The key driving force of the Council of Europe is the European Court of Human Rights which continuously develops case law and successfully adapts it to the test of time. Its influence on the harmonisation of member States' legislation in the field of family relations and the implementation of child rights remains important and valuable. Simultaneously, the European Court of Human Rights enables all participants in family proceedings to access international justice, which is particularly important for countries that are not EU members of the European Union.

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| CHAPTER 3 |

Children's Rights and the European Union – Framework

Dubravka HRABAR

ABSTRACT

According to the Principle of conferral, the European Union has no competences over family law, including the regulation of children's rights. Therefore, legally binding documents (Treaty on European Union, Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights of the European Union) refer to (some) children's rights and the principles of treatment of children at a generic level. This fact does not present a major obstacle because all the European Union Member States are parties to the Convention on the Rights of the Child and many other treaties that regulate children's rights in greater detail. Non-binding documents appear in a frenzy and show an ambition to resolve many children's problems typically observed in developed countries of the world, including those of the European Union. As their provisions often overlap and aim to achieve many objectives, the question arises as to the purposefulness of many soft law documents, such as strategies, guidelines, resolutions, communications, recommendations, and agendas. They reflect the significant and specific problems encountered by children in the European Union and indicate the need for children's rights to be exercised. Moreover, they are a signal to adults, not only parents, to do more for the protection of children and their rights. However, it is unclear to what extent soft law can provide an answer to related issues, especially because, as a rule and ever more frequently, new "values" are introduced in the name of the alleged non-discrimination of children, such as gender ideology. The Member States of the European Union have no unified position on this issue.

KEYWORDS

children's rights, European Union, Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union, soft law

1. Introduction

Deliberation on children's rights in Europe implies the evaluation of legal steps the European Union – as an important European organisation of 27 states – has undertaken. European legislation predominantly refers to public law because of the fundamental features of the European Union as an economic and political institution. Private law is of marginal interest, and family law, as one such legal area, and

Dubravka HRABAR (2024) 'Children's Rights and the European Union - Framework'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 65–86. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_3

children's rights within its framework have only recently become an area of interest to European institutions.[1] One gets the impression that in the scope of this broad interest in the protection of children's rights, there is a penetration of new ideas, such as gender ideology,[2] which are anything but compatible with children's rights. Therefore, it is with certain apprehension that we look upon the development of children's rights in the European legal area.[3] Efficient improvement of children's rights in response to the problems faced by children in Europe at the general level implies the following: fighting poverty;[4] providing quality education without ideological overtones; fighting violence against children (domestic violence and beyond); protecting children from drug abuse, child prostitution, pornography, trafficking, and paedophilia; a complete ban on surrogate motherhood;[5] protection of migrant children. Owing to children's dependence on adults – parents or third persons – it is clear that support and concrete protection from various harmful and pernicious behaviours of adults towards them are necessary at the level of European institutions and in related documents. Harmful behaviour and events sometimes affect all children regardless of age and sometimes target a specific children's age group. The fact remains that there are millions of

1 This is a process of Europeanisation of family law through its harmonisation and unification, for which interest has grown over the past ten years; Majstorović, 2013, pp. 1 and 7. Legal theoreticians distinguish three levels of convergence of national systems within the frameworks of "European" family law: rules on conflict of laws, procedural law, and substantive law, the latter giving rise to most doubts and misgivings; Ibid. p. 4.

2 Hrabar, 2020. The study report entitled Cross-Border Legal Recognition of Parenthood in the EU, on a study conducted at the request of the PETI Committee of the European Parliament by the Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies (PE 746.632- April 2023), is interesting in this regard [Online]. Available at: http://www.europarl.europa.eu/supporting-analyses (Accessed: 22 June 2023).

3 Stalford, 2012, pp. 5 and 11., claims: '... it is fair to say that EU seems an unlikely context within which to pursue children's rights'.

4 According to 2021 estimates, 24.4% of children in the EU live at risk of poverty and social exclusion. Romania has the highest rate (41.5), and Slovenia the lowest (11%) [Online]. Available at: https://ec.europa.eu/eurostat/statis-explained/index.php?title=Children_at_risk_of_poverty_or_social_exclusion. (Accessed: 24 April 2023). Save the Children reports that one in five children in the EU, or 19.6 million children, live in poverty. Over 200,000 more children are at risk of poverty in the European Union: Save the children report, 7 March 2023. [Online]. Available at: https://www.savethechildren.net/news/over-200000-more-children-are-risk-poverty-european-union-save-children-report (Accessed: 24 April 2023).

5 Although the ban on surrogate motherhood implies the protection of the unborn child, such a child, should he or she be born as a result of such procedure, indirectly faces the violation of many of his or her rights; cf. Hrabar, 2021.

children[6] already or potentially exposed to various forms of violations of their rights. This gives reason to think about how much the European Union is prepared to protect children through its legislative procedures and concrete actions and to what extent it is authorised to do so.

In its legal and legislative actions, the European Union is restricted by three principles: conferral of competences, subsidiarity, and proportionality. According to the Principle of conferral (according to Art. 5 Para. 2 of the Treaty on European Union[7]), the European Union's (hereinafter: EU or Union) action is drawn from the competences 'conferred upon it by the Member States' to attain the objectives set out in Art. 3.[8] Linked to this Principle is the doctrine of implied competences that provides a possibility for intervention through regulation, even in the area of private law, if this is 'necessary for the proper functioning of the internal market'.[9] The principle of subsidiarity (Art. 5 Para. 3 of the Treaty on European Union) enables the Union to act if the objectives of Union action cannot be achieved at the national level, which, already at the principle level, presents a problem due to the possible abuse of the definition of the objective.[10] The principle of proportionality is a limiting factor in the sense of introducing measures that must not exceed what is necessary to achieve the objectives of the Treaty.[11]

For the European Union to be able to regulate substantive law, its Member States should confer competences on it, which has not yet happened, and the Founding Treaties should specify the competence of the Union to govern the situation with an

6 Data on the number of children in the EU differ in terms of the year of the data and the source. Thus, it is stated that there are slightly fewer than 80 million children in the EU (2020) or that children account for 18.3% of the population; in 2021, 4.09 million babies were born in the EU; 22.2% live at risk of poverty; one-third of asylum seekers are children, 33% of girls and 20% of boys have experienced violence on the Internet. cf. https://ec.europa.eu/eurostat/web/products-eurostat-news/w/DDN-20230309-1. Data refer to 90 million children in the EU; therefore, it should be assumed that the risks are similar to those in 2020. The European Parliament Resolution P9_TA(2019)0066 refers to 100 million children living in the European Union accounting for more than 20% of the EU population. cf. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divorces.

7 Consolidated version of the Treaty on European Union, OJC 326, 26.10.2012.

8 Majstorović, 2013, p. 14.

9 Ibid. Majstorović explicitly opposes the possibility of the Union's action in the field of substantive family law.

10 Thus, Majstorović, 2013, p. 14. mentions the objectives related to family law, including 'combating social exclusion and discrimination'. These objectives can be interpreted in line with gender ideology and imposed as a new European "value" in spite of the fact that half of the EU Member States, for example, do not recognise same-sex marriage. In this regard, very sinister deliberations may lead us to conclude that at some point in time, paedophilia may also be declared something not harmful for children, that sex change in children may be a matter of the free expression of children's views, etc.

11 Thus, Majstorović, 2013, p. 15. refers to Protocol no. 2 to the Founding Treaties elaborating the principles of subsidiarity and proportionality.

international element. The foothold for this is Art. 81 of the Treaty on the Functioning of the European Union[12] *(cf. infra).*

When weighing the legal status of children on European soil, one should mention the Council of Europe (CE) primarily concerned with human rights,[13] and children's rights are part of the system of human rights.[14] As all the European Union Member States are equal members of the CE, this is the CE's indirect influence on the European Union, as all the documents of the CE apply to the European Union Member States. If the courts of every European organisation (Court of Justice of the European Union and European Court of Human Rights) are added to this, it becomes clear that half a billion Europeans move within this legal area.[15]

European international private law, although inconsistent,[16] relies on the need for full exercise of people's freedom of movement as one of the four fundamental freedoms in the European Union. Therefore, European international private law is a competence of the European Union, which, by means of the Hague Conference on Private International Law, 'encourages unification of rules for conflict of law, as well as procedural rules'.[17] Such rules – conventions – can influence substantive law;

12 Consolidated version of the Treaty on the Functioning of the European Union/Lisbon Treaty, OJ C 326, 26.1.2012.

13 Majstorović, 2013b, p. 77-92. The EU has not yet become a member of the CE. The negotiations on accession of the European Union to the European convention for the protection of human rights and fundamental freedoms started in 2010, the legal basis for such an endeavour being Article 6 Para. 2 of the Treaty on European Union which reads: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties., as well as the Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. After three years, the first provisional agreement was reached. However, the Court of justice of the EU found that 'The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms'. (Opinion of 18 December 2014, ECLI:EU:C:2014:2454 [Online]. Available at: http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN)_ (Accessed: 24 April 2023). The negotiations were resumed in 2020, and it is believed that the 46+1 Group (all members of the Council of Europe plus the European Union) has made significant progress during it meeting in 2023, and it is expected that new steps are to follow. The CE is the largest European political organisation founded with the objective of realising a common heritage and economic and social progress. Among other goals, its Statute refers to the advancement of human rights and fundamental freedoms in its Member States; cf. Lapaš 2013, p. 178.

14 Hrabar, 1989, p. 871. With reference to special legal acts referring to political strategy towards children, the Council of Europe Strategy for the Rights of the Child (2022-2027) certainly has its value; however, this is not the object of our analysis because it does not derive from the EU.

15 cf. Hrabar, 2019, p. 135.

16 Thus, Majstorović, 2013b, p. 15, refers to a "normative labyrinth", and Bouček, Ibid. to a "regulatory jungle".

17 Majstorović, Ibid. p. 16. For the activities of the Council of Europe and the Hague Conference on International Private Law cf. amplius Majstorović, 2013b.

therefore, additional caution is necessary to avoid overstepping the competences of the European Union[18] and infringing on national family laws without authorisation.[19]

2. Convention on the Rights of the Child and the European Union

Discussion on European law addressing children's rights necessarily gives rise to the issue of relations between European documents and the Convention on the Rights of the Child and the possible ratification of the Convention by the European Union. First, the European Union is a subject of international law[20] and is free to accede to different international treaties. Legal theory believes that 'the legal order of the European Union, in spite of its exceptional level of development and unique supranational features, can hardly be identified with the concept of "European law"'[21]. However, the European Union is not a party to the Convention on the Rights of the Child and is not expected to become one. The question is whether this is necessary at all because all its Member States are simultaneously parties to the Convention on the Rights of the Child. The Union is a supranational organisation, especially regarding issues where the Member States conferred their competences to the Union.[22] Primary legislation of the European Union (cf. *infra*) makes modest and generic references to just some of the many rights contained in the Convention on the Rights of the Child because, at the time of their adoption, children's rights were not the focus of the European Union's interest. Subsequently, secondary legislation made, and is making, a major turnaround towards an abundant number of documents to protect children's rights in the European Union.

Owing to its universal significance, the Convention on the Rights of the Child is the backbone and benchmark for the development of children's rights. A fact contributing to this is that the Convention is a catalogue of all children's rights, which are theoretically divided into several groups and categories,[23] setting four general principles sometimes appearing as clear rights: non-discrimination (Art. 2); the best

18 For example, the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993), which has been ratified by all the EU Member States. Currently, a convention containing rules on conflict of laws with regard to surrogate motherhood is being drafted, which may cause major divisions among the Member States of the Hague Conference and the EU.

19 Theoreticians of family law rightly doubt the justification of further encroachment upon the essence of national family laws cf. Majstorović, 2013b, p. 15.

20 This status was recognised by Art. 47 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

21 Lapaš, 2013, p. 176. Reference is made to the interfering legal circles of different European organisations within international law, unlike a "pyramid construction" of legal norms within internal legal order; Ibid. p. 177.

22 Ibid. p. 179. In this sense, the European Union 'like its Member States, participates in different international treaties'; Ibid. p. 187.

23 For distribution of rights within the Convention itself, cf. amplius Hrabar, 2021b, p. 199-205.

interests of the child (Art. 3); the right of every child to life, survival, and development (Art. 6); and the rights of the child to express views and take part in making decisions affecting the child in accordance with their age and maturity (Art. 12). Although the European Union is not a party to the Convention and there is no mechanism for the time being for its accession to the Convention, there is still a certain symbolic influence 'by the power of universal principles of European law'[24] with modest attempts by the Court of Justice of the European Union to invoke the Convention on the Rights of the Child in its case law. Thus, the Court invoked the Convention in one case,[25] giving it crucial importance.[26] This, of course, does not mean that children's rights and corresponding European documents are not violated in the European Union. Nevertheless, this fact has heretofore not been raised to the level of attention it deserves. Accession of the European Union to the Convention on the Rights of the Child would make legal sense only if a special court for children's rights, similar to other courts of the European Union,[27] was established, which could protect all the children's rights in the European Union.

3. Documents of the European Union Related to Children's Rights

The number of legal acts of the European Union increases annually, including those on family law and, to some extent, children's rights. There are an increasing number of legal acts within the secondary law (comprising regulations, directives, decisions, recommendations, and opinions), whereas primary legislation made up of the Founding Treaties contains a smaller number of provisions. Substantive family law is beyond the scope of European Union regulation; however, the issue of judicial cooperation in civil matters that have a cross-border impact falls under shared competence, that is, about creating the area of freedom, security, and justice to guarantee the security, law, and free movement of citizens within the Union.[28]

Legal and political measures in the European Union with regard to children's rights must primarily be based on the Founding Treaties, especially the Treaty on EU and the Treaty on the Functioning of the European Union, due to the limited competences that the Member States agreed upon when founding the European Union.

24 Stalford, 2012, p. 33.

25 A lack of special provisions on children and their rights in European documents can be offset by invoking the Convention on the Rights of the Child and thus increase its legal force.

26 This is the case C-244/06 Dynamic Medien Vertriebs GmbH vs. Avides Media AG (2008) where the Court invoked Art. 17 of the Convention on the Rights of the Child with reference to justifying the restriction of free flow of goods (in this specific case, of DVDs and video recordings by means of an electronic order). The article encourages the states to develop appropriate guidelines to protect children from information spread by the media that can have a harmful influence on their well-being.

27 cf, more on this in Hrabar, 2014.

28 cf. Majstorović, 2013, p. 7.

The Charter of Fundamental Rights of the European Union[29] is equally important as it systematises the existing principles of the Union's legal order.[30]

3.1. The Treaty on European Union (2009)

The Treaty on European Union stipulates that the European Union shall promote the protection of children's rights; however, it does not provide for European bodies that would be competent for this and does not specifically define children's rights or their well-being. Therefore, this Treaty can be characterised as a declaration of fundamental values and objectives.[31] Art. 3 Para. 3 of the consolidated version of the Treaty on European Union reads as follows:

'It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'.

In the same article, in Para. 5, it emphasises that the Union '... shall contribute ... to the protection of human rights, in particular the rights of the child'.

3.2. The Treaty on the Functioning of the European Union (2009)

The Treaty on the Functioning of the European Union focuses on various areas of family law and children's rights. A broad range of relevant provisions refer to the prohibition of discrimination and judicial cooperation in civil matters aimed at ensuring the proper functioning of the internal market. Thus, Art. 19 confers powers on the Council to 'take appropriate actions to combat discrimination' on different bases, including age, which would imply children (as well).[32] The provision of Art. 81 specifies that the Union shall develop judicial cooperation in civil matters (Para. 1), and in Para. 3, authorises the Council to establish measures concerning family law with cross-border implications.[33] Judicial cooperation between the states takes

29 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10. 2012.

30 cf. Rodin, S. according to Majstorović, 2013, p. 8.

31 Hrabar, 2013, p. 54.

32 The provision of Art. 19 reads: 'Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

33 'Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament'.

place through different measures,[34] of which judicial decisions on parental care (child custody) and alternative methods of amicable conflict resolution are considered the most important. Other decisions are in the domain of procedural law that refers to all civil proceedings, including family law. The fact is that based on Art. 81 Para. 3, two regulations of crucial importance for children's rights were adopted as 'measures concerning family law with cross-border implications': Brussels II ter[35] and Maintenance Regulation[36] that fulfil the goal of ensuring '(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction' (Art. 81 Para. 2).

Notably, no definition of the concept of "child" exists in the European Union either in the treaties, secondary legislation, or case law of European courts.[37] In European Union law, the concept of "child" varies and depends on the context: sometimes, the context is biological (origin), sometimes based on age (years), and sometimes according to dependency (economic or social dependency on parents and legal representatives).[38]

3.3. The Charter of Fundamental Rights of the European Union (2009)

The Charter of Fundamental Rights of the European Union is a document designed to protect human rights.[39] It is a declaration of the fundamental principles and rights of

34 ' ... a) the mutual recognition and enforcement between Member States of judgements and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff. (art. 81 par. 2)'.

35 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Official Journal of the European Union L 178, 2.7.2019.

36 Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal of the European Union L 7, 10.1.2009.

37 The only attempt to provide a definition has been made by the Directorate General of Justice - DG Justice invoking the Convention on the Rights of the Child; cf. '06508 Rights of the Child' [Online]. Available at: www.ec.europa.en/justice. (Accessed: 24 April 2023).

38 Stalford, 2012, p. 21 f. Such distinctions are present in many legislations.

39 Majstorović states that the Charter is 'a crown of efforts made by the European Union in its commitment to protect human rights ...' cf. Majstorović, 2013b.

citizens of the European Union that present their common values,[40] and in terms of legal force, it is on an equal footing with the Treaty on EU.[41] The fact of the matter is that its significant contribution to children's rights (in reality, their needs and interests) highlights (and thereby recognises) children's rights independently and separately from the rights of other (adult) European citizens and families in general. A further value of the Charter with respect to children is its influence on European law and the process of policy-making towards children, thereby becoming '"evidence" that will enable institutions to critically review legislative proposals and national procedures in order to ensure their alignment with fundamental rights'.[42] Furthermore, the Court of Justice of the European Union invoked the right of the child protected by the Charter.[43] Nonetheless, one should not expect too frequent invocations of the Charter in the future, since rights other than children's rights fall within the scope of this Court's judicial review.

Several articles of the Charter are important for the legal status of children. Some refer to every individual, including children, whereas others refer strictly to children.

Provisions affecting the legal status of children are as follows: those on the rights of children (Art. 24), education (Art. 14), prohibition of discrimination based on age (Art. 21), and prohibition of exploitation of children (Art. 32).

Some provisions of the Charter govern the family, implying the rights of children: right to respect for private and family life, home, and communications (Art. 7) and right of the family to enjoy legal, economic, and social protection (Art. 33).

Some provisions not strictly linked to age and therefore applied to adults and children alike are the provisions[44] on human dignity (Art. 1); the right to the integrity of the person (Art. 3); the prohibition of torture and inhuman or degrading treatment (Art. 4); and the prohibition of slavery, forced labour, and trafficking in human beings (Art. 5). Moreover, among rights and freedoms are the right to liberty and security (Art. 6); right to protection of personal data (Art. 8); right to freedom of expression and information (Art. 11); right to freedom to choose an occupation and right to engage in work (Art. 15); right to property (Art. 17); right to asylum (Art. 18); and right to protection in the event of removal, expulsion, or extradition (Art. 19).

40 The concept of "common values" (from the Preamble) is important for the sake of recognisability of children's rights as part of the public policy (*ordre public*) not only in the EU, but also in national states. It is true that most of the Charter's 54 articles correspond to the rights and principles contained in the constitutions of EU Member States and international documents. Recently, there has been an issue of "values" that are gender-intoned. They are not shared values of all legal orders, and the Charter makes no reference to them, although they are becoming ever more often a part of the EU agenda. Moreover, EU Member States do not share the same values regarding euthanasia, surrogate motherhood, etc.

41 Thus, T. Hickman, Beano No More: The EU Charter of Rights After Lisbon, Judicial Review, 2011, 6, p. 113, cit. according to Stalford, 2012.

42 Stalford, 2012, p. 41.

43 With regard to Art. 24 of the Charter; cf. e. g. C-149/10 Zoi Chatzi vs. Ypourgos Oikonomikon (2010), C-491/10 Joseba Andoni Aguirre Zarraga v. Simone Pelz (2011) OJ C63; Case C-200/10 PPU J McB vs. LE (2011) WLR 699 etc.; cf. www.curia.europa.eu.

44 More on them cf. Korać Graovac, 2013, p. 30.

In addition to this division, rights to marry and found a family within the framework of "family law rights" can refer to children (Art. 9) in the sense of marriages of minors.

In addition to freedoms and rights, the Charter emphasises the principles of equality[45] and solidarity.[46] For the legal status of children, the provision in Art. 32 prohibiting child labour and protecting young people at work is important, as is the provision in Art. 33 protecting the family (in the legal, economic, and social sense) and maternity (in the sense of prohibition of dismissal, maternity benefits, and maternity leave).[47]

A special chapter in the Charter on citizens' rights (Chapter V Citizens' Rights) predominantly refers to adults and their electoral right, right of document access management, and so on. Although one should expect that provisions on justice (VI Justice) will be interesting primarily to adults, they also refer to children when they are involved in court proceedings.[48]

Below, the Charter's most important rights that impact the rights of children, or are specifically children's rights, are presented.

Freedom of Thought, Conscience and Religion (Art. 10)

> Freedom of thought, conscience and religion: 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2.The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

This provision applies to every human being, including children. This provision, contained in many international (especially UN) documents, guarantees freedoms without which a democratic society is unthinkable. Freedom of thought, conscience, and religion is also contained in the Convention on the Rights of the Child (in Art. 14[49]).

45 Equality before the law, Art. 20; non-discrimination, Art. 21; cultural, religious and linguistic diversity, Art. 22; equality between women and men, Art. 23; rights of the elderly, Art. 25; integration of persons with disabilities, Art. 26.

46 They mostly refer to adult persons/workers.

47 Social security and social assistance (Art. 34) and healthcare (Art. 35), environmental protection (Art. 37) indirectly refer to children as well.

48 The right to an effective legal remedy and a fair trial, presumption of innocence and the right to defence, the *ne bis in idem* principle in criminal proceedings, etc.

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

This right should not be identified with the right of the child to express his or her views, as protected and intended for children in Art. 24 of the Charter, as freedom of thought is freedom to reflect on things (events, people, phenomena) around oneself, and is closely linked to freedom of conscience and freedom of religion. Conversely, the right to free expression of views from the Convention (in Art. 12) is closely linked to the child's view on things that concern himself or herself.

Over the past few decades in Europe, there has been a stronger awareness of the rights of children, especially adolescents. Children are increasingly demanding that their views be respected by adults.[50]

Right to Education (Art. 14)

> Right to education: 1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

The right to education primarily relates to children, although the Charter does not specify it as such, but rather recognises it with respect to every citizen. Family law theory considers it, at least with regard to children, as one of the original and fundamental rights of the child,[51] since it presupposes two facts: First, that education (of the child) means an investment in their development and one of the distinctions with respect to the rest of the living world. Second, it is difficult to imagine a child who would not acquire diverse knowledge in the most appropriate time, meaning from the moment he or she is mature enough to start school, but would begin to acquire diverse knowledge as an adult. However, among some marginal groups and individuals (because of their culture or way of life), there is an aversion towards the education of children, especially girls, and women too. The European view on education implies the progressive acquisition of knowledge, accessible to every individual according to their abilities.

The fact that the Charter guarantees the right to free compulsory education (Para. 2) is important for children's rights. The Convention on the Rights of the Child also refers to the right to the education of children (Arts. 28 and 29) and regulates more content with regard to the education (and teaching) of children.[52]

50 cf. '2.5. Giving a voice to every child', Council of Europe Strategy for the Rights of the Child (2022-2027) p. 39.
51 Thus, Hrabar, 1994.
52 cf. Hrabar, 2021b, p. 226 f.

In Para. 3, the Charter emphasises that parents are the dominant persons who decide on the selection of education (and teaching) they want their children to receive. The European context of multiculturality (in terms of faith, religion, worldview, and philosophy) and democratic society is evident in the respect of the authors of the Charter for the parents as the primary child-raisers. The upbringing that parents give their children (and that arises from their philosophical and religious convictions and worldviews) must not be in opposition to the education that children obtain in school. Educational convictions, that is, parents' views as to what children should be taught in school and how, are explicitly emphasised in this provision of the Charter, which is in accordance with the provision of Art. 2 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which reads as follows:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

To this could be added Resolution 1904(2012) of the Parliamentary Assembly of the Council of Europe on the Right to Freedom of Choice in Education in Europe,[53] which, in Pnt. 2, associates the right to freedom of choice in education with the freedom of conscience. Consequently, children's education and teaching within the school system must not clash with parents' convictions. This primarily refers to school subjects that contain content influenced by underlying values.[54] The right of the parents' influence on the education of their children is not exhausted only in the aforementioned condition, but also refers to a broader influence that an educational system can exert on children, prescribing a potential compulsory full-day school for children, which is one of the most recent proposals. It is clear that schools are primarily educational institutions and that children's upbringing rests upon parents (according to the explicit provision of Arts. 5 and 18 of the Convention on the Rights of the Child). A reduction in the time that children spend with their parents directly clashes with the right to respect for family life, since an absence of children from their families that is too lengthy and continuous breaks the bond between children and their parents as well as the parents' influence on their children's upbringing.[55]

Children's Rights (Art. 24)

53 Resolution 1904(2012) of the Parliamentary Assembly of the Council of Europe on the Right to Freedom of Choice in Education in Europe 1.2.2013. [Online]. Available at: http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=18983&Language=EN, 1.2.2013 (Accessed: 22 June 2023).

54 This primarily refers to subjects where children are taught about human sexuality, religious issues, ethics (e.g. conscientious objection), surrogate motherhood, gender roles, etc.

55 This is partially the reason for the emergence of the issue of the home-schooling, which the Member States of the European Union treat differently in their national regulations.

> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

This provision of the Charter presents a selective approach to children's rights, or a simple excerpt from the multitude of rights, through an explicit introduction of only three rights of children, which is (critically) explained by an attempt to merge several principles and substantive rights contained in the Convention on the Rights of the Child.[56] This is the right of children to protection and care, the right to free expression of their views, and the right to have regular personal relations and direct contact with both parents. When it comes to the application of these rights, there are the criteria of the child's well-being and interests, as well as the child's age and maturity vis-à-vis the child's right to express views, constituting a sort of guidance for the treatment of children, and today, a usual standard in international treaties.[57] The child's right to protection and care is a kind of "umbrella" covering various other rights that may be threatened (e.g. use of narcotics, alcohol, violence against children, health issues). At the same time, there is a need to engage European society and institutions, as well as national institutions, to support children as they grow up.

The right to free expression of one's views is a participatory right in the broadest sense, since it refers to all the situations that pertain to the child and is a legal standard in response to the idea of the child as a legal subject.

The Charter refers to the right to regular personal relations and direct contact of the child with both parents given the increasing number of separated families and children who have difficulty growing up without one parent, while at the same time legal systems, institutions, and the other parent do not always allow the child to have different forms of contact with the separated parent.[58] Highlighting this right is in line with the major fluctuation of European citizens within the borders of the European Union, guaranteeing them the freedom of movement and the freedom to change their domicile or residence. The issue of how to protect, in everyday life, the child's right to

56 McGlynn, Rights for Children: The Potential Impact of the European Union Charter of Fundamental Rights, 2002, p. 70, criticises this provision as an ill-advised and heavy compromise between different concepts of children's rights as contained in different international documents; cit. according to Stalford, 2012, p. 42.

57 From the Convention on the Rights of the Child to the Convention on Contact, the Revised Convention on Adoption, etc.

58 In 2021, there were 1.7 million marriages and 700,000 divorces in the European Union. Naturally, this often gives rise to issues of personal relations between children and the separated parent. cf. https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divorces.

have regular contact with the separated parent at the level of European institutions and legislation remains outstanding.[59]

If one considers that all European Union Member States are parties to the Convention on the Rights of the Child, then there is no objection to excessive simplicity of the wording in Art. 24 of the Charter.

In terms of content, the binding documents analysed here do not significantly encroach upon national substantive family rights, either in terms of their wording and scope or the non-contentious content they protect. Since there is no binding secondary legislation that would be relevant for substantive family law and such legislation cannot exist on account of the issue of competences, it follows that it is up to the Member States' willingness to accept (or reject) non-binding documents related to children's rights. However, as will be seen further, their number, the lack of overview, and interference give the impression of their non-contentious importance, something that the states easily "succumb to" in the sense of their acceptance without reservation.

4. European Union Non-Binding Documents Related to Children's Rights

In addition to primary legislation, documents that make up the secondary legislation are significant for children's rights within the European Union. They include regulations, directives, decisions, recommendations, and opinions with a varying level of legally binding or non-mandatory nature.[60]

There are important, although sometimes considerably similar, soft law instruments that deal with children's rights in the sense of substantive law.

4.1. EU Strategy on the Rights of the Child (2021) and the European Child Guarantee (2021)

The EU Strategy on the Rights of the Child[61] reflects the need to create a framework and designate goals to which European society should aspire to protect children and their rights, indicating the need for recognition of children's rights as self-standing and not incorporated into human rights (of adults). The EU Strategy on the Rights of the Child has been developed for children and with children. It provides a framework for European Union action aimed at better promotion and protection of children's

59 The Council of Europe Convention on Contact concerning Children defines children's contacts with parents in more detail; however, the Convention is not in force in all the Member States of the European Union. For more on this, cf. Jakovac-Lozić, D., 2014.

60 cf. Treaty on the Functioning of the European Union, Chapter 2, Legal Acts of the Union, Adoption Procedures and Other Provisions, Section 1 The Legal Acts of the Union.

61 Full name: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The EU Strategy on the Rights of the Child (2021-2024).

rights, together with recommendations for action by other EU institutions and the European Union Member States. It lays emphasis on the rights of most threatened children, the rights of children in the digital age, prevention and combating violence, and fostering child-friendly justice.

The thematic fields of the Strategy are participation of the child in political and democratic life, socio-economic inclusion, health and education, combating violence against children and ensuring child protection, child-friendly justice, digital and information society, and embedding a child perspective in all EU actions (mainstreaming). The abundance of information on children in this Strategy and requirements for concrete steps have resulted in the following statements: children's rights are human rights; the protection and promotion of the rights of the child is a core objective of the European Union; the Strategy's overarching ambition is to build the best possible life for children in the European Union; never before have children across the EU enjoyed the rights, opportunities and security of today; this progress was hard won but should not be taken for granted; the COVID-19 pandemic has exacerbated existing challenges and inequalities and created new ones; the EU needs a new, comprehensive approach to reflect new realities and enduring challenges; and children's rights should be mainstreamed across all relevant EU policies.

In this document, the European Commission offers a strategy for protecting children as part of European home and foreign policy.

A document linked to it – the European Child Guarantee (2021)[62] – aims to break the circle made up of poverty and social exclusion, conditions that have an impact on school performance (e.g. increasing school dropouts) and health, affecting subsequent employability.

Regardless of how comprehensive and exhaustive a document the Strategy is and how ambitious its goals are, the impression is that this is an inconsistent and unclear instrument of protection in the sense of its implementation and some of its goals that, from a global perspective, cannot be acceptable to all states because of the great variety in customs and culture worldwide.

4.2. EU Guidelines on the Promotion and Protection of the Rights of the Child of 2017 – Leave no Child Behind

The EU Guidelines on the Promotion and Protection of the Rights of the Child of 2017 – Leave no Child Behind[63] are a framework for action on protecting children's rights and a reflection of the commitment of the European Union to enforce different children's rights according to European and global documents. They replaced the

62 European Child Guarantee [Online]. Available at: https://ec.europa.eu/social/main.jsp?catId=1428&langId=en (Accessed: 20 April 2023).

63 The EU Guidelines on the Promotion and Protection of the Rights of the Child of 2017 – Leave no Child Behind [Online]. Available at: https://www.eeas.europa.eu/sites/default/files/10_hr_guidelines_protection_en.pdf (Accessed: 20 April 2023).

2007 Guidelines due to the multiple changes in the world[64] and in the policies of the European Union.

In their introduction, the Guidelines refer to numerical indicators of violations of children's rights in the world by category. The purpose is to provide practical guidance to officials of EU institutions and EU Member States to strengthen their role in promoting and protecting the rights of all children in EU external action and strengthen their cooperation with international and civil society organisations. The Guidelines invoke the UN Convention on the Rights of the Child and its three Optional Protocols as the universal legal standard in the protection of children, emphasising four principles of the Convention. Priorities that can be singled out in the actions of the European Union are to support and encourage partner countries to fulfil their legal obligations, raise awareness and promote better understanding of the principles and provisions of the most important instruments of the child's rights, pursue a rights-based approach to the implementation of the General Measures of Implementation of the UNCRC (as set out in General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child)[65], raise awareness and promote gender equality between all boys and girls, complement and strengthen ongoing EU efforts in multilateral fora, and support the implementation of the 2030 Agenda for Sustainable Development. The following are enumerated as EU tools to promote and protect the rights of the child: political dialogues, human rights dialogues, statements and démarches, EU Human Rights and Democracy Country Strategies activities, bilateral and multilateral co-operation, and the Trade for All strategy. Regarding the operational part of the Guidelines, the emphasis is on a wide range of measures identified by the Committee on the Rights of the Child, such as legislation and policy; national strategies/documents and action plans; bilateral and multilateral cooperation; mobilisation of financial resources; coordination mechanisms for the implementation of the rights of the child; human resources and capacity-building; data, evidence, and knowledge; and finally, oversight and accountability.[66]

It could be stated that these Guidelines abound in a multitude of Euro-bureaucratic expressions, and it is difficult to understand them in a simple manner.

4.3. European Parliament Resolutions

The European Parliament adopted two resolutions on children's rights that have legal force, and that, in relatively clear terms, present goals that could better achieve the

64 Emphasis is especially laid on the adoption of the 2030 Sustainable Development Agenda stressing the obligation to make stronger efforts towards equal opportunities of especially the vulnerable and marginalised as well as a link to the New York Declaration for Refugees and Migrants (2016).

65 General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child [Online]. Available at: https://www.refworld.org/legal/general/crc/2003/en/36435 (Accessed: 22 April 2023).

66 Guidelines, pp. 11-17.

protection of children in the European Union. Certainly, as is always the case with the inflation of legal acts, the question is how much will truly be achieved.

4.3.1. Resolution of the European Parliament of 26 November 2019 on Children's Rights on the Occasion of the 30th Anniversary of the UN Convention on the Rights of the Child

The Resolution on the Occasion of the 30th Anniversary of the Convention on the Rights of the Child[67] relies on many international instruments,[68] and emphasises facts, standard settings, and foundations[69] for "general remarks" and "home policies". Among the general remarks, the Resolution includes the following in its 10 points: need to apply the Convention on the Rights of the Child to all children, institutionalisation of a European Union representative for children's rights and establishment of a centre for the protection of children in the European Union, encouragement of the application of the child's best interest, call to the Commission to better protect children, possible accession of the European Union to the Convention on the Rights of the Child, implementation of the Sustainable Development Goals and a healthy environment, reminder of gender inequality that causes imparity, exclusion and violence against children, identification of dangers that children face in "aggressive, misleading and intrusive advertising", and exploitation of children for commercial purposes; finally, support to the Commission in all efforts aimed at eradicating child labour. Home policy implies the following topics: ending all forms of violence against children (Pts. 11–19), investment in children (Pts. 20–26), education (Pts. 27–31), child-friendly justice (Pts. 32–33), migrant children (Pts. 34–38), threatened children (Pts. 39–46), and participation of the child (Pts. 47–50). Foreign policies (Pts. 51–58) are focused on the actions of the Commission and third countries aimed at raising awareness and better respect for children's rights, combating inter-generational poverty, and enabling greater financing of services, among other such efforts. The topic "children and armed conflicts" speaks at a general level of principled and difficult issues of children in war conflicts, their rehabilitation and reintegration, and the need for stronger involvement of the European Union in the support provided to children.[70]

67 Resolution on the Occasion of the 30th Anniversary of the Convention on the Rights of the Child (P9 TA(2019)0066) [Online]. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0066_EN.html (Accessed: 22 April 2023).

68 The Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, directives, other resolutions, general remarks, UNICEF reports.

69 Such as: definition of the child, violation of different rights of children, European goal of promoting children's rights, existence of discrimination of children, the need to respect the child's views, parental roles, the existence of new threats of the modern age (digitalisation, climate change, etc.), abuse of children in all forms, child trafficking; new forms of abuse and exploitation of children are identified such as "revenge pornography" and sextortion.

70 Special reference is made to children of foreign fighters in Syria. It is to be expected that some new resolution will tackle the issue of children in the war in Ukraine and taking children from Ukraine to Russia.

4.3.2. Resolution of the European Parliament dated 11 March 2021 on the Rights of Children with Regard to the EU Strategy on the Rights of the Child

The second resolution – the Resolution of the European Parliament dated 11 March 2021 on the Rights of Children with Regard to the EU Strategy on the Rights of the Child[71] – is equally extensive and is the European Parliament's response to the EU Strategy on the Rights of the Child *(*cf. *infra).* In a usual fashion, the Resolution invokes various documents.[72] In 25 points of its recitals, the Resolution speaks of facts that determine the position of children in the European Union[73] (and, to some extent, in the world). Based on them, in 40 points of its operative part, competent bodies are called upon to prompt action, with emphasis on the action of the Commission through a comprehensive strategy on children's rights and adoption of legislative and non-legislative proposals and binding and non-binding instruments of the European Union.

4.4. An EU Agenda for the Rights of the Child (2011)

This document precedes the aforementioned Strategy, which is founded on it, and is a communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (An EU Agenda for the Rights of the Child. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2011)0060.[74] It appeared as an appeal by the Commission addressed to European institutions and Member States

71 Resolution of the European Parliament dated 11 March 2021 on the Rights of Children with Regard to the EU Strategy on the Rights of the Child (P9_TA(2021)0090). [Online]. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0090_EN.html (Accessed: 22 April 2023).

72 For example, the Convention on the Rights of the Child, the General Comments of the UN Committee on the Rights of the Child, EU Guidelines on the Rights of the Child, Global UN Study on Children Deprived of Freedom, political reports on COVID-19, directives, recommendations, resolutions, etc.

73 Mentioned are: existence of children's rights and their best interests, need for education with emphasis on neglect of girls in this regard, a large number of children living in poverty, the impact of the COVID-19 pandemic on the status of children, need for stronger formal care for children and unacceptability of home-schooling, more recent health problems of children in the field of mental health, deficiencies in national legislations in the protection of children from social exclusion, exploitation of children, discrimination, worrying numbers of child trafficking, unacceptability of child labour, mutilation of female reproductive organs and marriages of minors, increase of domestic violence and sexual abuse and exploitation of children on the Internet, social exclusion of children with disabilities, children asylum seekers, unaccompanied children and children detained in the context of migration, the influence of environmental disasters on children, risks of statelessness, lacking participation of children in policy-making, issues of children in institutions, insufficient digital literacy of children.

74 An EU Agenda for the Rights of the Child. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2011)0060. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0060 (Accessed: 23 April 2023).

for the better protection and promotion of children's rights.[75] The Agenda includes general principles of action in the sense of emphasis on the statement that children's rights are an integral part of the European Union's policy on fundamental rights, recognises the need to create a database on children and their position in the European Union, and emphasises the need for cooperation among all stakeholders who deal with children. In this sense, the Agenda calls for concrete actions to protect children in the judicial system and especially protect vulnerable children, underlining the problem of poor and socially excluded children, children with disabilities, children who are victims of trafficking and sexual abuse, child asylum seekers, unaccompanied children, and Roma children. The Agenda considers the principle of the child's best interest to be the leading and overarching principle and, on several occasions, stresses the importance and need for the application of the Convention on the Rights of the Child in all the EU Member States.

A requirement of special importance for every national family law in the European Union is the creation of child-friendly justice. Specifically, difficulties have been identified in maintaining personal relations between children and separated parents (especially in transnational disputes), a consequence of divorce or legal separation, which restricts the child's rights. The Agenda requires national systems to facilitate the accessibility of information and enable children and parents to be informed about their rights in family disputes that concern national and European law and are related to parental responsibility, so that children would not become hostage to intricate cross-border legal procedures. The Commission intends to pay special attention to parental child abduction, especially in situations with an international dimension. Furthermore, a flow of people within the borders of the European Union can have an impact in terms of jeopardising children's rights with regard to their civil status. Therefore, the Commission has begun to propose measures to facilitate the recognition (translation and proof of authenticity) of documents from state registers.

After a series of goals related to children who participate in criminal proceedings,[76] the Agenda specifies the protection of unaccompanied children arriving in the European Union as one of its goals. It points to special measures and procedural guarantees for the protection of such children, especially from their potential disappearance (for different markets – drugs, prostitution, organs, slavery, etc.). The Agenda attaches great importance to the training of professionals to communicate with children who have experienced any kind of trauma.

75 Children from all the Member States of the European Union took part in the creation of the Agenda, talking about the obstacles they face in the exercise of their rights. Essentially, children want adults to have greater trust in them, to better respect their views, to involve them more in decision-making that concerns them and to have more regard for their views; cf. Children's Rights as They See Them, European Commission Justice, 2010, p. 3.

76 The Agenda enumerates different situations in which children in Europe may find themselves and which require special programmes and actions. They include: early dropout from school, Roma children, escape from home, criminal abduction of children, a dedicated hotline for missing children and their parents, cyber-bullying, violence in school, dangers/addiction of children to mobile phones and excessive use of social networks.

Furthermore, the Agenda focuses on children in situations outside the family, such as violence, child labour, children in armed conflicts, and sex-tourism. The European Union aims to resolve such situations through political dialogue with third countries, bilateral and multilateral cooperation, international negotiations, and humanitarian assistance.

Finally, the Agenda requires efficient action enabling children to express their views and participate in decision-making on matters concerning them. In accomplishing this goal, the Agenda sees a major role of the European Forum on the Rights of the Child and national Ombudspersons for children.

4.5. Recommendations of the Council for the Establishment of the European Child Guarantee

As previously mentioned, the European Commission produces many documents through which it intends to elaborate on or supplement previous documents. Often, it repeats the same matters or designs tasks for European and national bodies in a slightly confusing manner.

In March 2021, the Commission presented a proposal for Council Recommendation Establishing a European Child Guarantee[77] to reduce the risk of poverty and social exclusion. This is a multidimensional phenomenon that is more prevalent among children than in the total population,[78] and in addition to an unfavourable position *per se*, it creates obstacles for inclusion and participation in society, thus requiring the European Union and Member States to take efficient steps to curtail it for the sake of social progress. As one of its goals, the European Pillar of Social Rights provides for the reduction of the risk of poverty or social exclusion for at least 5 million children. The objective of the European Guarantee is to provide access to key services for children who need help, and this Recommendation specifies the forms and manners in which Member States should achieve it. The European Child Guarantee is aligned with the European Pillar of Social Rights Action Plan and the European Union Strategy on the Rights of the Child, and the European Union will allocate funds to help children.

The European "activity" may be seen through certain other documents too. The Council adopted the Recommendation on High-Quality Early Childhood Education and Care Systems (2019) and the Resolution on a Strategic Framework for European Cooperation in Education and Training towards the European Education Area and Beyond (2021–2030). The European Commission published communications titled 'Achieving the European Education Area by 2025' and 'The Digital Education Action Plan 2021–2027 Setting Education and Training for the Digital Age'.

77 Council Recommendation Establishing a European Child Guarantee (EU) 2021/1004 of 14 June 2021. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2021:223:FULL (Accessed: 24 April 2023).

78 It speaks of 22.2% (almost 18 million) children in relation to 20.9% (approximately 91 million) of the total population; cf. Proposal of Recommendation, p. 1.

With regard to gender equality, the 'Gender Equality Strategy 2020–2025' was created, and with regard to LGBTIQ persons, the 'LGBTIQ Equality Strategy 2020–2025' was adopted.

The following documents were also included in deliberations and proposals: 'EU Anti-Racism Action Plan 2020–2025'; 'EU Roma Strategic Framework for Equality, Inclusion and Participation 2020–2030; (with a special Recommendation of the Council); followed by the communications 'A Renovation Wave for Europe - Greening Our Buildings, Creating Jobs, Improving Lives' and 'Strategy on the Rights of Persons with Disabilities 2021–2030', etc.

The European Union soft law in the area of children's rights primarily comprises multiple actions and non-binding documents that have bureaucratically "swollen" to confusing proportions. The fact of the matter is that children's problems in Europe are not only various but also specific in relation to the problems of children in underdeveloped and developing countries, and are characteristic of Western society. The features of "European" problems are threefold and require legal reaction. We encounter social issues underlying legal issues (integration of asylum-seeking children, immigrant children, Roma children, etc.); psychological issues that are a follow-up to legal issues (e.g. children separated from their parents because of family dissolution); and finally, children in the judicial system as an issue (children who are victims of paedophilia and other pathological desires of adults, children exposed to violence, children who have no opportunity to express their views before competent bodies). All of these questions require a specific response in the sense of binding documents for all the European Union Member States. This means that it would be necessary to prepare a corresponding convention (or a treaty, as is customary in the European political and legal system), which would, per the model of the Convention on the Rights of the Child, elaborate on the rights of children who are most threatened in the European area, based on their needs, with a simultaneous binding character (and sanctions) for the Member States. In our view, this should be the first step towards the better protection of children's rights.[79] Furthermore, such a document should not have ideological overtones, but should be gender-neutral and guided by the child's best interest.

79 cf. Hrabar, 2013, p. 70.

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CHAPTER 4

The Right to Life and Other Fundamental Civil Rights of the Child in the Case Laws of the Council of Europe Bodies

Wojciech LIS

ABSTRACT

Life is a condition of human existence and of all freedoms and rights belonging to human beings from conception. These values lose their meaning when there is no reference subject, which is a human being, regardless of the stage of life – prenatal or postnatal. Although not without reservations, this truth has been confirmed in the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights, and is regarded as an important element in shaping contemporary standards for the protection of human rights. The member States of the Council of Europe are obliged to effectively safeguard and protect the right to life. Closely linked to the right to life is the right to respect private and family life, which raises a number of specific issues concerning both the child and its relationship with its parents. This study aims to identify how the right to life of a child from conception and selected rights falling within the concepts of private and family life are understood by convention bodies.

KEYWORDS

human life, conceived child, private and family life, child welfare, biological identity, parental authority

1. Introduction

The right to life is a fundamental right and value of every human being, regardless of nationality, gender, age or social status. This is a condition for the existence and enjoyment of all other rights. Hence, it is not surprising that it has been accorded special prominence in the domestic laws of individual States and inter-state organisations. In Europe, a special role falls on the legal system of the Council of Europe, organised around the European Convention for the Protection of Human Rights and

Wojciech LIS (2024) 'The Right to Life and Other Fundamental Civil Rights of the Child in the Case Laws of the Council of Europe Bodies'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 87–109. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_4

Fundamental Freedoms of 4 November 1950[1] (ECHR). This study aims to determine the understanding of the right to life of a child from conception and selected rights falling within the concepts of private and family life by the Convention bodies. This is important because of the law-making and culture-building impact of case laws on the process of law-making and understanding of law by the member States of the Council of Europe, narrowing down the considerations to an analysis of selected judgements of its bodies, which will help outline the European model of the right to life and several other closely related fundamental civil rights of the child.

2. The right to life as a fundamental right

The right to life is guaranteed by Article 2 ECHR:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The list of situations in which life deprivation is justified is closed. The essence of this provision is to establish an injunction to respect and protect life and, in particular, to prohibit the arbitrary deprivation of life by the State or its officers. It follows that the right to life is universal in nature and equally applicable to every human being. The importance of the right to life is reflected in the non-derogable character accorded to it by Article 15(2) ECHR, which states that the obligations under Article 2 ECHR cannot be suspended even in the event of war or other public dangers threatening the life of the nation, except in cases of death resulting from lawful acts of war, and the obligations contained in Articles 3 (prohibition of torture), 4(1) (prohibition of slavery), and 7 (prohibition of punishment without legal basis).

The protected good is life, which is understood as the existence and continuity of human beings. The placement of the provision in Article 2 ECHR at the beginning confirms the uniqueness of the right to life. The provision of Article 2 ECHR is a fundamental provision of the Convention and enshrines a fundamental value of the democratic society that constitutes the Council of Europe. It follows from the systematic nature of the Convention that the provision of Article 2 ECHR is the benchmark

1 European Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5, and 8 and supplemented by Protocol No. 2, Dz. U. 1993, No. 61, Item 284.

for decoding the meaning of other provisions and determines how they should be interpreted. This implies that the interpretation of all provisions of the Convention must be based on the recognition of the primacy of the protection of life, and any deviation from this is exceptional, and as such, is subject to a restrictive interpretation.[2] The jurisprudence of the Convention bodies – the European Commission of Human Rights and the European Court of Human Rights – has always affirmed the special prominence of the protection of life and, consequently, the special place of Article 2 ECHR among other provisions of the Convention. The jurisprudence of these bodies is considered an important element in shaping contemporary standards of human rights protection. Each human life has the same weight and the introduction of any differentiation into the lives of individuals may lead to dangerous consequences for the rule of law. Another issue is the determination of the point in time from which human life is protected, and the resulting disputes regarding the protection of human life from the moment of conception.[3]

Although the right to life is a necessary condition for the existence and continuity of human beings, it is not absolute. Article 2 ECHR allows for the possibility of life deprivation through the imposition of the death penalty, although the death penalty has been virtually eliminated from the legal orders of the member States of the Council of Europe owing to human rights developments, which has led to the transformation of the territory of the member States of the Council of Europe into a zone free of the death penalty. Therefore, this punishment has been declared unacceptable in peacetime.[4] This was first reflected in Protocol No. 6, adopted in 1983, providing for the abolition of the death penalty (but allowing it to be retained for acts committed in times of war or imminent threat of war), and then in Protocol No. 13, adopted in 2002, providing for the general and definitive abolition of the death penalty. However, not all member States of the Council of Europe have ratified this Protocol. Thus, death penalty can be imposed for acts committed during wartime or a period of imminent threat of war.

The guarantees under Article 2 ECHR oblige member States to effectively safeguard and protect the right to life. The statement, 'everyone's right to life shall be protected' implies not only the State's obligation to refrain from acts of deliberate deprivation of life (negative obligation), but also imposes on it an obligation to adopt measures to protect life (positive obligation), referring to any situation where there is an attempt to deprive or threaten it. Simultaneously, these situations do not have to be caused by the direct actions of the State (its organs or officers); they may also result from random events and actions of third parties. Every case of loss of life that

2 Judgement of the ECtHR in McCann and Others vs. the United Kingdom of 27.09.1995, Application no. 18984/91.

3 See more: A. Jończyk, Aksjologiczne podstawy prawnej ochrony życia dziecka poczętego, "Kościół i Prawo" 2018, vol. 7, no. 1, pp. 201-219; P. Kuczma, Prawna ochrona życia, [w:] Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym, M. Jabłoński (red.), Wrocław, 2014, pp. 35-41.

4 Judgement of the ECtHR in Öcalan vs. Turkey of 12.05.2005, Application no. 46221/99.

is clearly not owing to natural causes requires adequate investigation by the State to clarify its causes and circumstances and entails a reaction of a legal and penal nature. At the most general level, it is accepted that the State has an obligation to: 1) establish a system of legal regulations enabling effective protection of human life in the face of all threats; 2) ensure proper implementation of these regulations by administrative and law enforcement bodies; and 3) take preventive measures to exclude potential threats, both of a specific and general nature.[5]

The legitimate subject is "every human being". As both the concept of life and that of a human being are constructed differently and have a different content depending on religious or philosophical views, a question arises regarding the initial moment of applicability of Article 2 ECHR. This question relates to a human being at the earliest stage of life – the conceived child – and the extension of protection to its life or the refusal to recognise it as a human being and the consequent deprivation of the legal protection of life. The lack of temporal scope for the protection of the right to life raises significant difficulties in unequivocally defining when a human being becomes a human being, and consequently, when he or she is subject to protection under Article 2 ECHR.

3. Protection of the life of the unborn child

The Convention or Convention bodies have not clarified when the legal protection of human life begins. It is a question that prejudges either the legal protection of the conceived child or the refusal to recognise it as an autonomous subject of the right to life (to recognise it as a human being), which opens the way for the legalisation of abortion. Undoubtedly, the moment from which life begins can be interpreted differently, even within a single scientific field (for example, philosophy, law, or medicine), which definitely does not simplify it for the Convention bodies to settle disputes about the possibility of abortion.

The beginning of life concerns the period of prenatal life, including the embryo and foetus. According to the Catholic Church, from the moment the egg is fertilised, a new life begins, which is not the life of the father or the mother, but of a new human being developing independently of them. It would never have become a human being if it had not been one from the beginning. Modern genetic knowledge provides valuable confirmation for this self-evident thesis, which has always been accepted. It has been established that from the first moment, it has a fixed programme of what this living being will be: a human being, concrete existing with its characteristics already well defined. From the moment of fertilisation, the history of an individual's new human life begins, each of which requires time for development and action. This truth has been confirmed by the most recent advances in human biology, which recognise that

5 Judgement of the ECtHR in Osman v. the United Kingdom of 28.10.1998, Application no. 23452/94.

the biological identity of the new human individual is already formed in the zygote formed from fertilisation.[6] Human life, linked to the development and transformation of the human organism, is a continuum, which means that the birth of a child does not constitute him or her as a new being, but opens a new page of his or her life, which is a continuation of the life of a human being already developing in the womb, who gradually acquires the capacity to live independently outside her organism.

There is no consensus on the definition of the beginning of life in the European Council countries. The European Court of Human Rights (ECtHR), in its judgement in the case *Vo vs. France of 8.07.2004*[7] *stated that the question of defining the beginning of life falls within the freedom of States to determine independently in their domestic law the moment from which the right to life and related protection guaranteed by Article 2 ECHR arise. In Vo vs. France*, the mother alleged a violation of the right to life because the actions of the doctor responsible for the death of her child *in utero* did not qualify as involuntary deprivation of the life of the conceived child. The Court stated that it is not desirable or even possible at present to provide an abstract answer to the question of whether the conceived child can be considered a human being within the meaning of Article 2 ECHR. There is no consensus in the practice of States Parties to the Convention regarding the status of the embryo and foetus, although they are beginning to obtain some protection as a result of scientific developments and the potential impact of research in the fields of genetic engineering, medically assisted procreation, and biomedical experimentation. Considering this, the Court found that the embryo and foetus could be considered to belong to the human race. However, this is insufficient to consider a conceived child a human being within the meaning of Article 2 ECHR. The potentiality of this being and its possibility of becoming a person require protection in the name of human dignity without making it a person with the right to life guaranteed by Article 2 ECHR. The conceived child is not considered to be a "person" directly protected by Article 2 ECHR – and even if one were to assume that he or she has a right to life – this is subject to limitation owing to the rights and interests of the mother. Thus, the conceived child cannot be considered directly subject to the protection guaranteed by Article 2 ECHR. Nevertheless, the Court did not exclude *a priori* the possibility that the guarantees of Article 2 could be extended to the conceived child.[8] The Court emphasised that the determination of which moment is to be considered the beginning of life lies within the competence of the States Parties to the Convention, and it is for them to determine from when they will protect that life.

The Court reiterated its position on the determination of the initial moment of life in its judgement in *Evans vs. UK* on 12.04.2007.[9] The case concerned the right to life of embryos, which owing to the withdrawal of the donor's consent to *in vitro* fertilisation

6 Sacra Congregatio pro Doctrina Fidei, Declaratio de abortu procurato Quaestio de abortu procurato (18.11.1974), "Acta Apostolicae Sedis" 1974, nr 12-13, s. 738.

7 Judgement of the ECtHR in Vo vs. France, 8.07.2004, Application no. 53924/00.

8 Ibid.

9 Judgement of the ECtHR in Evans vs. the United Kingdom of 10.04.2007, Application no. 6339/05.

using his genetic material under UK law, had to be destroyed. The applicant alleged that the destruction of embryos violated Article 2 ECHR. The Court emphasised the lack of consensus on the legal and scientific definition of the beginning of life. Moreover, it unequivocally determined that an embryo remaining outside the mother's body is not a subject of the right to life within the meaning of Article 2 ECHR.

This position was upheld in the *Costa and Pavan vs. Italy judgement of 28.08.2012*, which prohibits access to a preimplantation diagnosis. The applicants, a woman and a man who were healthy carriers of a genetic disease, intended to use artificial procreation and preimplantation diagnosis to select embryos so that the child the woman would give birth to would not be affected by the genetic disease. Italy argued that the prohibition of access to a preimplantation diagnosis serves to protect the health of both the child and woman. The Court stated that the Italian legislation "is inconsistent", in that it allows abortion when the conceived child is found to be affected by a disease, while simultaneously prohibiting diagnostics to avoid implantation of the embryo in the event of such a disease. The Court emphasised that the concept of a child should not be equated with that of an embryo.

The most extensive analysis of the status of unborn children was conducted in *X vs. United Kingdom*. The European Commission of Human Rights analysed the general use of the word "every-one" in the provisions of the Convention, as well as 'the context in which the word appears in Article 2' considering whether 'the unborn child falls within the scope of Article 2'. The Commission noted the lack of a Convention definition of the word "*every*" (*every one*; *toute personne*), and identified the provisions of the Convention in which the word is used. In addition to Article 2, Articles 1 (obligation to respect human rights), 5 (right to liberty and security of a person), 6 (right to a fair trial), 8 (right to respect for private and family life), 9 (freedom of thought, conscience, and religion), 10 (freedom of expression), 11 (freedom of assembly and association), and 13 (right to an effective remedy) are included. According to the Commission, in principle, in all these cases the use of the word "everyone" applies only to the postnatal period of life. None of them explicitly indicates that it is also possible to apply it to the prenatal period of life. Referring to the exceptions to the right to life indicated in Article 2(2) ECHR, the Commission stated that the limitations indicated, by their very nature, apply to persons already born and cannot be applied to the conceived child, which supports the conclusion that the conceived child is not a "person" and cannot enjoy the absolute right to life. However, it is noteworthy that references to exceptions to the right to life are unconvincing. The clause indicates who, under certain circumstances, may be deprived of life without violating the provisions of Article 2(1), Sentence 1, ECHR. The identification of the circle of persons who may be deprived of life without violating the provisions of the ECHR (a person sentenced to death, a person using unlawful violence against any person, a person lawfully deprived of liberty to be detained or whose escape is to be prevented, or persons participating in a riot or insurrection) cannot serve as an argument for defining the circle of persons entitled to the right to life. It is difficult to agree with the argumentation adopted, in particular the conclusion that 'abortion would also have to be considered prohibited

when the continuation of the pregnancy would involve a serious risk to the life of the pregnant woman. (...) the "unborn life" of the foetus would be considered to have a higher value than the life of the pregnant woman'. Recognising the right to life of the conceived child would by no means imply recognition of the superior value of its life to that of the mother but would emphasise their equal value. Resolving the possible conflict in the realisation of the right to life of the conceived child and its mother in the case of a 'serious threat to the life of the mother' does not necessarily entail assigning a lower rank to one of these lives.

Convention bodies have addressed the issue of the subjectivity of the conceived child by confronting its right to life with the mother's right to respect for private and family life, as guaranteed by Article 8 ECHR. The position of conventional bodies is most clearly reflected in the *Brüggemann and Scheuten vs. Germany* judgement.[10] At issue were abortion restrictions permitting the termination of pregnancy up to 12 weeks. It should be added that German law also allowed abortions after the 12th week of pregnancy, either in situations where the pregnancy could endanger the woman's life or in cases of severe foetal impairment. Two women, who by no means 'claimed to be pregnant, or to have been denied an abortion, or to have been prosecuted for unlawfully terminating a pregnancy', challenged the compatibility of the existing regulations criminalising abortion with the right to respect for private life. The Commission considered that pregnancy did not belong exclusively to the sphere of private life, as every time a woman became pregnant, her private life was directly linked to that of the conceived child. Therefore, Article 8(1) ECHR cannot be understood as treating pregnancy and its termination exclusively as a sphere of a woman's private life. Considering this, not every regulation concerning the restriction of the possibility to have an abortion automatically constitutes an interference in the sphere of a woman's private life.[11] Moreover, the right to life cannot be restricted to values not equivalent to life. Considering a woman's dignity, she undoubtedly has the right to be shown respect to herself and her choices. However, when comparing the values of these two rights, the right to life must be prioritised. It is clear that taking a human being's life is not only a restriction of his right, but also a complete and irreversible deprivation of his right.

This position was upheld by the Court in its judgement in *A.B.C. vs. Ireland of 16.12.2010*[12] The applicants A.B.C. were residents of Ireland who wished to undergo an abortion. The first (A) was for economic and social reasons, the second (B) was because she was not mentally ready for motherhood, and the third (C) was because her life was threatened by cancer. Each of these women travelled to England to terminate their pregnancy. The women alleged that Irish law, through its restrictive abortion regulation, placed their health and financial well-being at risk, which they claimed

10 Decision of the ECtHR in Brüggemann and Scheuten vs. Germany of 19.05.1976, Application no. 6959/75.
11 Ibid.
12 Judgement of the ECtHR in A.B.C. vs. Ireland of 16.12.2010, Application no. 25579/05.

violated Article 8 ECHR. The Court stated that Article 8 ECHR cannot be interpreted as meaning that pregnancy and its termination belong exclusively to the sphere of a woman's private life. Undoubtedly, the issue of abortion touches the sphere of a woman's private life, however, it goes beyond it, owing to the need to balance this right with other rights protected by the Convention, which does not grant a right to "abortion on request". Although a general European consensus on the legal and scientific definition of the beginning of life cannot be established, there is a clear consensus on the minimum abortion standards necessary to ensure a woman's health and well-being (well-being), which de facto broadens the rationale for the permissibility of abortion to a much wider extent than the health and life of the woman.

With respect to adequate guarantees of the possibility of a lawful abortion, the Court emphasises that the need for such guarantees becomes particularly important in the event of disputes between a pregnant woman and her doctor or between doctors themselves as to whether the preconditions for an abortion have been met in the circumstances of the case. Legislation must ensure that the pregnant woman's legal position is clear as the legal prohibition of abortion, coupled with the risk of criminal liability, may also influence doctors when deciding whether the prerequisites for an abortion have been met. If a legislator authorises an abortion, it is not allowed to shape the legal framework in such a way as to limit the actual possibility of performing an abortion. Moreover, the State is not permitted to prescribe legislation that would block actual access to the performance of an abortion if the State, in acting within the margin of appreciation, regulates the conditions for its performance. States Parties to the Convention are obliged to ensure that a woman's right to a legal abortion is accessible and effectively realised, and failure to comply with this obligation may result in inhuman and degrading treatment,[13] particularly where it may result in serious harm to health or even constitute a threat to life. In its judgement in *R.R. vs. Poland of 26.05.2011*,[14] the Court considered the obstruction of access to abortion by hindering access to examinations and unduly protracting these procedures to prevent the performance of an abortion as sufficient to establish a violation of Article 3 ECHR, according to which 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

4. Right to respect for private and family life

The right to life is closely linked to the right to respect for private and family life in terms of making the most important decisions concerning parenting, which is having children. The right to respect for private and family life is guaranteed by Article 8 ECHR:

13 Judgement of the ECHR in Tysiąc vs. Poland of 20.03.2007, Application no. 5410/03.
14 Judgement of the ECtHR in R.R. vs. Poland of 26.05.2011, Application no. 27617/04.

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This means that any interference by public authorities can only be conducted through a restrictive application of the criteria indicated in Article 8(2) ECHR. It is noteworthy that Article 8 ECHR opens up a group of provisions formulating classical human rights, including respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10) and freedom of assembly and association (Article 11). Their subject matter, formulation, and rules of interpretation are similar and clearly distinguishable from other provisions of the Convention.

The widest and most diverse sphere protected by Article 8 ECHR is private life, which is linked to the idea of the individual's freedom to shape the way he or she lives. However, the injunction to respect private life cannot be confined to the Anglo-American concept of *privacy*. The Court provides broader meaning to the notion of private life by including the social dimension of an individual's functioning; that is, by referring to the development of contact with other people and the outside world. This "external dimension of private life" has long been confirmed in the Court's case law.[15] Nevertheless, an expansive interpretation of private life must not include activities of an essentially public nature under this concept.[16] A broad interpretation of private life links the concept to other spheres protected under Article 8 ECHR. On the one hand, additional protection derives from the place (home, understood as the primary residence or abode) or form (correspondence) of the realisation of private life. On the other hand, it stems from the nature of contact with other people because once the contact takes on a permanent character based on blood ties or legal settlements (as in the case of adoption), the sphere of family life opens up. Therefore, it is neither possible nor necessary to encapsulate the concept of private life in exhaustive definitions.[17] The advantage of such an approach is its flexibility; the scope imprecision of the concept of private life facilitates the development of jurisprudential precedents and an evolutionary approach to the application of law.

The concept of private life includes the right to have a name. Forenames and surnames are basic determinants of the identity (individual, family, and social) of every human being. Simultaneously, it is one of the few elements of identity that is

15 Judgement of the ECtHR in Sidabras and Džiautas vs. Lithuania of 27.07.2004, Application no. 554800/00.

16 Decision of the ECtHR in Friend and Countryside Alliance vs. the United Kingdom of 24.11.2009, Application no. 16072/06 and 27809/08.

17 Judgement of the ECtHR in Niemietz vs. Germany, 16.12.1992, Application no. 13710/88.

fully subject to human control because it is based only on convention and tradition. The Court's jurisprudence takes for granted that the determination of one's forename and surname is an element of private life as well as family life and thus belongs to the sphere protected by Article 8 ECHR.[18] However, simultaneously, the State has a legitimate interest in regulating the use of surnames because public policy considerations require them. Anyone has the right to a family name and cannot be deprived of it without consent. Public interest dictates the regulation of the use of surnames, inter alia, because of the need to ensure registration of the population or protect the means of identifying persons and their links to families bearing a particular name.[19] A first name, unlike a surname, is not stipulated, which means that the determination of the names of newborn children is the right of the parents. Restrictions on this right are permissible to protect the child's interests, particularly when they concern excessively eccentric names or names which merely express a whim.[20] There must always be a fair balance between the rights of parents and the protection of the interests of their child.[21] The State must respect the original transcriptions of names in its official documents. However, a conflict may arise with the protection of the official language because transcription cannot be divorced from the language policy of the State, particularly since the freedom to use one's own language is not one of the freedoms guaranteed by the provisions of the ECHR.[22]

However, an individual's identity is primarily linked to the establishment of ancestry. Therefore, it is the duty of the State to ensure the proper functioning of civil status documentation and the adequacy of this documentation with regard to biological facts. Therefore, the right to know one's own identity is linked to the protection of one's personal interest in knowing and understanding oneself. One element of humanity's essence is anthropological self-awareness, which is the ability to know one's own origin.[23] Self-awareness and knowledge of biological and cultural roots are important elements in the psychophysical development of every human being. Case law related to this issue focuses on three issues. The first relates to the right to information about one's biological origins and is expressed in the belief that people have the right to know their origins and that this right derives from a broad interpretation of the concept of private life,[24] also being part of a broader right to know about one's own person. This is particularly true for the establishment of paternity. The State has an obligation to create procedures that allow the child (those acting on his/her behalf) to establish his/her origin. In the substantive dimension, respect for family life requires that biological and social realities take precedence over legal

18 Judgement of the ECtHR in Burghartz vs. Switzerland of 22.02.1994, Application no. 16213/90.
19 Judgement of the ECHR in Stjerna vs. Finland of 22.11.1994, Application no. 18131/91.
20 Judgement of the ECtHR in Guillot vs. France of 24.10.1996, Application no. 22500/93.
21 Judgement of the ECtHR in Johansson vs. Finland of 6.09.2007, Application no. 10163/02.
22 Decision of the ECtHR in Mentzen vs. Latvia of 7.12.2004, Application no. 71074/01.
23 L. Bosek, Prawo osobiste do poznania własnej tożsamości biologicznej, "Kwartalnik Prawa Prywatnego" 2008, nr 3, s. 948.
24 Judgement of the ECHR in Odièvre vs. France of 13.02.2003 r., Application no. 42326/98.

presumptions.[25] In the procedural dimension, a reasonable balance must be struck between protecting the privacy of the alleged father and the child's right to establish his/her origins.[26] In addition, it should be noted that the problem of the identity of a child conceived as a result of medically assisted procreation should be signalled in a situation where at least one person other than those seeking to conceive the child is involved in the assisted fertilisation procedure. In the context of the way in-vitro procedures are conducted, treating the human embryo in an object-like manner, it is possible to point to a common ideological basis for abortion procedures. Unfortunately, both are characterised by a lack of respect for human life in the earliest phase of human existence.

The second problem concerns a man's right to be certain about the biological origin of his child. Although the law must create the possibility for a man to deny or establish paternity, it may also establish legal presumptions and impose procedural restrictions, inter alia as to time limits.[27] However, procedural obstacles must not go too far and must not block the establishment of the truth when they 'no longer serve anyone',[28] particularly when the establishment of the truth is unanimously demanded by all concerned and – owing to the passage of time – the argument of the protection of the rights of the child has fallen away.[29] This issue has become particularly important with the advent of DNA testing, which was once unavailable. Thus, new relevant evidence emerged in the case. Assuming that there is no need to protect the interests of the child, it can be assumed that depriving the interested party of the possibility of initiating or reopening proceedings to establish paternity violates Article 8 ECHR. However, the Court did not prejudge whether Article 8 ECHR gave interested parties the right to request DNA testing when other persons refused to do so. In its decision in *Darmoń vs. Poland of 17.11.2009,* the Court held that the refusal to initiate proceedings to deny the paternity of a now adult daughter born in wedlock did not violate Article 8 ECHR. Considering the daughter's and mother's refusal to undergo DNA testing, there was a lack of evidence to justify revising the state of the presumption of paternity. Medical advances do not provide sufficient justification for reviewing established filiation relationships. Furthermore, States may adopt various legal solutions to address situations in which the alleged father of a child refuses to comply with a court order to submit tests to establish paternity. The Court considers that a system which does not provide for the possibility of compelling compliance with DNA tests may, in view of the margin of appreciation enjoyed by the State, be compatible with its obligations under Article 8 ECHR, provided that the interests of the person claiming paternity are adequately safeguarded. The impossibility of forcing a person to undergo DNA

25 Judgement of the ECtHR in Kroon and others vs. the Netherlands, 27.10.1994, Application no. 18535/91.
26 Judgement of the ECtHR in Mikulić vs. Croatia, 7.02.2002, Application no. 53176/99.
27 Judgement of the ECtHR in Rasmussen vs. Denmark of 28.11.1984, Application no. 8777/79.
28 Judgement of the ECtHR in Shofman vs. Russia of 24.11.2005, Application no. 74826/01.
29 Judgement of the ECtHR in Paulik vs. Slovakia of 10.10.2006, Application no. 10699/05.

testing is considered proportional if there are alternative ways to establish paternity.[30] However, the principle of proportionality requires that the system at stake must provide the possibility of legal consequences for the alleged father's refusal to submit for DNA testing, and for the prompt adjudication of such cases.[31]

The third issue concerns the child's right to establish the identity of the mother, particularly in systems allowing "anonymous childbirth", where the mother immediately relinquishes her parental rights after giving birth and places the child for adoption, reserving the concealment of her identity. Undoubtedly, there may be a conflict of interests between mother and child, although the institution of "anonymous childbirth" serves the public interest by providing an alternative to abortion. Considering this, the exclusion of access to information on the mother's identity was found to comply with Article 8 ECHR.[32]

Anyone, including incapacitated persons, has a vested interest in obtaining the information necessary to understand their childhood and early development, as well as their biological identity. This information is an important aspect of personal identity. Nevertheless, in its judgement, in *Odièvre vs. France of 13.02.2003*, the Court held that a mother's wish to remain anonymous could not be disregarded. Additionally, the disclosure by the authorities of the biological mother's data without her consent could entail serious risks not only for her but also for the adoptive family that raised the child and the biological father and siblings. They also claim respect for their private and family lives.[33]

Private life is intertwined with family life, which refers to interpersonal relationships. The provision of Article 8(1) ECHR guaranteeing respect for family life is the broadest Convention norm related to the institution of the family. It is complemented by Article 12 ECHR (right to marry and to found a family), complemented by Article 5 of Protocol No. 7 (equality of rights and duties of spouses), and Article 2 of Protocol No. 1, which touches on a specific aspect of parental authority: the right to raise and educate children. However, these provisions are specific, whereas Article 8, inter alia, is treated as a general norm referring to all aspects of family life because of the flexibility of its formulation. Thus, if an area of interpersonal relations is included in the sphere of family life, it enjoys the protection of Article 8 ECHR. Simultaneously, the concept of family life is treated in a dynamic manner. The traditional image of the family as a union of a man and woman based on marriage and having children, as assumed by the authors of the Convention, does not correspond to today's social reality. Hence, the decisive criterion for determining the existence of family life is the factual situation. The existence or nonexistence of family life is primarily a question of fact, depending on the practical existence of close human ties.[34]

30 Judgement of the ECtHR in Mikulić vs. Croatia, 7.02.2002, Application no. 53176/99.
31 Judgement of the ECtHR in Ebru and Tayfun Engin Çolak vs. Turkey of 30.05.2006, Application no. 60176/00.
32 Judgement of the ECtHR in Odièvre vs. France of 13.02.2003, Application no. 42326/98.
33 Ibid.
34 Judgement of the ECtHR in K. and T. vs. Finland of 12.07.2001, Application no. 25702/94.

The appearance of a child always creates a new quality of family life, regardless of the child's status (marital or non-marital), the form of the relationship in which the parents remain, or other family entanglements. It is only necessary for national law to allow all concerned people to lead normal family lives.[35] The essence of family life is invariably the mutual enjoyment of being with one another.[36] Living in a community is a fundamental part of family life for the parent and his/her child, and measures that prevent or impede this constitute interference with the rights protected by Article 8 ECHR. In any such case, a fair balance of competing interests – that of the child and that of his/her parents – is required, however, the best interests of the child may prevail over those of the parents. The breakup of the family is a serious interference, therefore, the measures that would lead to it should have a sufficiently serious and solid basis, determined by the interests of the child. The removal of a child from his or her family environment is an exceptional measure that authorities may use only as a last resort to protect the child from imminent danger.[37] Family life also exists between parents and adopted children[38] or entrusted in adoption proceedings.[39]

Family life implies close personal ties however, does not require family members to live together. Regular contact and a certain degree of dependence are sufficient.[40] This also applies to the bonds between grandparents and grandchildren, which play an important role in family life. However, the relationship between grandparents and grandchildren differs in nature and degree of intimacy from the relationship between parents and children, and therefore, requires weaker protection. The right to respect the family life of grandparents in their relationship with their grandchildren includes, first and foremost, the right to maintain the normal grandparent-grandchild/grandchild bond through mutual contact, even when this usually occurs with the consent of the person exercising parental authority.[41] However, grandparents cannot invoke their right to descendants from their own son who has died, leaving properly preserved genetic material.[42]

The presumption of family life is strongest in relation to relationships with the mother,[43] however, also exists in relation to the father, regardless of whether he is the mother's spouse,[44] whether he has acknowledged his paternity, or whether he lives

35 Judgement of the ECHR in Marckx vs. Belgium of 13.06.1979, Application no. 6833/74.
36 Judgement of the ECtHR in Eriksson vs. Sweden of 22.06.1989, Application no. 11373/85.
37 Judgement of the ECtHR in Barnea and Caldararu vs. Italy of 22.06.2017, Application no. 37931/15.
38 Judgement of the ECtHR in Söderbäck vs. Sweden of 28.10.1998, Application no. 24484/94.
39 Decision of the ECtHR in J. Ł. and M. H.-Ł. vs. Poland of 23.01.2007, Application no. 16240/02.
40 Judgement of the ECtHR in Berrehab vs. the Netherlands of 21.06.1988, Application no. 10730/84.
41 Judgement of the ECtHR in Mitovi vs. the former Yugoslav Republic of Macedonia, 16.04.2015, Application no. 53565/13.
42 Decision of the ECtHR in Petithory Lanzmann vs. France, 12.11.2019, Application no. 23038/19.
43 Judgement of the ECtHR in Kearns vs. France, 10.01.2008, Application no. 35991/04.
44 Judgement of the ECtHR in Johnston vs. Ireland of 18.12.1986, Application no. 9697/82.

with the child.[45] Breaking this presumption requires demonstrating that there has never been an actual relationship between the father and the child, in particular, where the father has never sought to recognise the child and maintain contact with him[46] or that these relationships have irretrievably broken down. Certainly, it is in the best interests of the child to maintain equal contact with both parents, in addition to lawful restrictions justified by his or her interests.[47]

One of the fundamental elements of family life is the exercise of parental rights, which implies the possibility of deciding on fundamental issues concerning the child, such as the place of residence and medical care,[48] extent and nature of the education received, religious direction of upbringing, relations with other persons, including sexual life,[49] and subjecting the child to educational penalties. The scope and imperativeness of parental authority change with the development of the child, however, it always involves interference in the child's life. In this context, it should be emphasised that the child, once he or she has reached a certain level of maturity, should be heard on matters that affect him or her. The detailed design of the hearing procedure, including the possibility of using expert psychologists, is a matter for the national authorities.[50]

The principle of family autonomy delimits a sphere of parental discretion into which public authorities may not encroach, as doing so would violate the autonomy of family life. However, family functioning must be subordinate to prioritising the child's interests. The provision of Article 8 ECHR cannot be interpreted as authorising parents to adopt measures that are detrimental to their child's health or development.[51] Where there is a conflict between the interests of the child and those of the child's parents, consideration of the child's interests is decisive and may justify interference by public authorities in the autonomy of the family, the most drastic manifestation of which is the child's custody. This is confirmed by Article 5 of Protocol No. 7, according to which the rights of parents do not prevent the State from taking the necessary measures to safeguard the welfare of children.

The assumption of custody of a child by public authorities and the placement of the child in a foster family or in a children's home and, possibly, the termination of parental authority, represent the most drastic form of interference with family autonomy, which means that it must always comply with the requirements formulated in Article 8(2) ECHR. Case law has developed various principles of a more specific nature, where the child's interest must be prioritised over both the interests of the parents[52] and

45 Judgement of the ECHR in Berrehab vs. the Netherlands of 21.06.1988, Application no. 10730/84.
46 Decision of the ECtHR in Lebbink vs. the Netherlands of 30.09.2004, Application no. 45582/99.
47 Judgement of the ECtHR in Nowakowski vs. Poland of 10.01.2017, Application no. 32407/13.
48 Judgement of the ECtHR in Nielsen vs. Denmark of 28.11.1988, Application no. 10929/84.
49 Report of the ECHR in X. and Y. vs. the Netherlands of 19.12.1974, Application no. 6573/74.
50 Judgement of the ECtHR in Sommerfeld vs. Germany of 8.07.2003, Application no. 31871/96.
51 Judgement of the ECHR in Johanson vs. Finland of 6.09.2007, Application no. 10163/02.
52 Judgement of the ECHR in Scozzari and Giunta vs. Italy of 13.07.2000, Application no. 3922/98 and 41963/98.

considerations of an administrative or logistical nature.[53] The child's interest must be considered in two ways: on the one hand, it is necessary to ensure that the child grows up in a normal environment,[54] and on the other hand, to ensure that the child maintains contact with his or her natural family, as the severance of this relationship means that the child is detached from his or her roots.[55] Strong emphasis is placed on the principle of subsidiarity, from which it follows that national authorities (courts) are primarily called upon to assess what will serve the interests of the child in the given circumstances, as only they have direct and continuous contact with all parties concerned. The Court's role is not to step in the shoes of the national authorities and replace them in the exercise of their powers, either to regulate the situation of the child or the rights of the child's parents, but only to assess, from the perspective of the Convention, the decisions taken by those authorities within their margin of appreciation.[56] However, simultaneously it is emphasised that in family matters, the margin of appreciation has a wide scope, since views on the permissibility of the intervention of public authorities in the sphere of parental authority vary from country to country, depending on the traditions defining the role of the family and the State in family matters and on the extent of public resources to be used in this sphere.[57]

Deprivation of parental custody can only occur in cases of particularly unworthy behaviour by one or both parents. Custody deprivation cannot be automatic or permanent without the proper consideration of the circumstances and interests involved. Depriving parents of their child's custody constitutes such a drastic interference with their rights that high standards must be set in determining whether such interference is necessary in a democratic society. It is insufficient to establish that national authorities acted in good faith; it is necessary to establish that their assessments and decisions were based on sufficient and relevant arguments.[58] Taking custody is inadmissible if alternative measures of less drastic nature could have been sufficient.[59] Moreover, the taking of custody is intended to be temporary; it should last for a period as short as possible[60] because the passage of time is decisive for the development of the child and to provide him/her with a sense of stability. National authorities must consider children's best interests in this sphere. Thus, as time passes, it may be more beneficial for a child to remain in a new family environment.[61] Therefore, protracted adjudication in custody cases may, owing to often-irreversible consequences, constitute a violation of Article 8 ECHR regarding the child's parents.[62]

53 Judgement of the ECHR in Olsson vs. Sweden of 24.03.1988, Application no. 10465/83.
54 Judgement of the ECHR in K. and T. vs. Finland of 12.07.2001, Application no. 25702/94.
55 Judgement of the ECtHR in Gnahoré vs. France of 19.09.2000, Application no. 40031/98.
56 Judgement of the ECHR in K. and T. vs. Finland of 12.07.2001, Application no. 25702/94.
57 Judgement of the ECHR in Johanson vs. Finland of 6.09.2007, Application no. 10163/02.
58 Judgement of the ECHR in Scozzari and Giunta vs. Italy of 13.07.2000, Application no. 3922/98 and 41963/98.
59 Judgement of the ECHR in K. and T. vs. Finland of 12.07.2001, Application no. 25702/94.
60 Decision of the ECHR in J. Ł. and M. H.-Ł. vs. Poland of 23.01.2007, Application 16240/02.
61 Judgement of the ECHR in Keegan vs. Ireland of 26.05.1994, Application no. 16969/90.
62 Judgement of the ECtHR in H. vs. the United Kingdom of 8.07.1987, Application no. 9580/81.

The ultimate consequence of public authorities taking custody of a child may be that the foster family is provided the option to adopt it. This is permissible if the interests of the child support this, and in determining whether the arguments of the national authorities were of a "sufficient and substantial" nature, account is taken, inter alia, of the conditions in the foster family and the period of time the child has been in it.[63] An important factor in making such a decision is considering the child's opinion if the child has reached a certain degree of maturity and is able to speak with discernment about his or her situation. Although the right to adoption is not among the rights guaranteed by the Convention, the relationship between adopters and adoptees is essentially of the same nature as a family relationship, and is therefore protected under Article 8 ECHR. The only condition for an adoption judgement is considering the welfare of the child. The Court has repeatedly emphasised that adoption means providing a family to a child, not a child, to a family,[64] particularly since the provision of Article 8 ECHR does not create a right to adoption. Therefore, public authorities are under no obligation to allow adoption, even when it is the only way of creating a complete family, while refusal to consent to adoption is not regarded as interference with the sphere protected by Article 8 ECHR. Problems may arise if discriminatory criteria are used in the drafting or application of the laws governing adoption. One such criterion is the treatment of sexual orientation as a factor in the refusal of consent for adoption. In such cases, the violation of Article 14 in conjunction with Article 8 of the ECHR may be considered.[65] In the *Fretté vs. France judgement of 26.02.2002*,[66] the Court had to decide whether the public authorities could refuse a homosexual person permission to adopt a child. The State should ensure that adoptive parents are able to offer the best possible care to their child. The best interests of the child should also be considered. Child specialists, psychiatrists, and psychologists differ in their views on the possible effects of homosexual care. To this end, profound variations in public opinion on this issue must be considered from country to country. The insufficient number of children for adoption also argues against the right to adoption by homosexuals. Considering this, national authorities are entitled to consider that limiting the right to adoption is in the interests of the child regardless of the aspirations of homosexuals wishing to adopt.

This is a condition of public order, in which the origin of the child is properly established. Therefore, completely preventing a man claiming to be the biological father from establishing paternity is simply because another man has already acknowledged that the child violates Article 8 ECHR. In its judgement in *Różański vs. Poland of 18.05.2006*, the Court reaffirmed that when deciding on the need to initiate a procedure allowing for the challenge of a child's previous acknowledgement, national authorities are entitled to exercise their own judgement. However, it stressed that

63 Judgement of the ECHR in Johanson vs. Finland of 6.09.2007, Application no. 10163/02.
64 Judgement of the ECHR in Pini and Bertani and Manera and Atripaldi v. Romania of 22.06.2004, Application no. 78028/01 and 78030/01.
65 Judgement of the ECHR in E. B. vs. France of 22.01.2008, Application no. 43546/02.
66 Judgement of the ECtHR in Fretté vs. France of 26.02.2002, Application no. 36515/97.

the lack of direct access to a procedure by which such a man could seek to confirm his paternity, the absence of guidelines indicating the required manner in which the national authorities exercise their discretion in matters of acknowledgement of paternity, and the superficial manner in which they examine applications seeking to challenge a previous acknowledgement of a child by another man constitute a violation of Article 8 ECHR.[67] However, a refusal to consider a paternity suit does not always amount to a violation of Article 8 ECHR. Such a situation is possible not only when the child has already maintained a family relationship previously established by an acknowledgement or presumption of paternity, but also when the existing social and familial relationship between the child and his legal parents[68] or the courts' assessment that, in specific circumstances, the child's interests militated against agreeing to establish paternity.[69]

Children are also interested in establishing their paternity. In national legal systems, this possibility is limited by various factors. The Court emphasised that a rigid time limit, which implies that only the passage of time is decisive, irrespective of the child's knowledge of the circumstances concerning the father in question, is unacceptable. The chief problem in such cases is the absolute nature of time limits. Indeed, a distinction must be made between situations in which the applicant is objectively unable to find relevant facts concerning the father and others in which the applicant is certain or has reason to believe that a particular person is his father but, for non-legal reasons, chooses not to initiate the relevant proceedings within the statutory time limit. The application of a strict time limit in such cases, regardless of the circumstances relating to the possibility of knowing the facts relating to paternity, even considering the margin of discretion held by the State, goes to the heart of the right to respect for private life.[70]

Similar principles apply when the mother's husband, recognised as the child's father as a result of a legal presumption, cannot bring paternity denial either at all or after the expiry of a legally defined time limit. The Court acknowledged that, in certain circumstances, a time limit for bringing an action for the denial of paternity provides legal certainty in family relations and the interests of the child, and that restrictions on the alleged father's access to court are not incompatible with the provisions of the ECHR.[71] In the *Shofman vs. Russia judgement of 26.11.2005*, the Court held that preventing the denial of paternity to a married man who only became aware of doubts about his paternity one year after the registration of the child, naming him father, was not proportionate to the legitimate objectives of ensuring legal certainty in family relations and protecting the interests of the child.[72] The Court reached a similar conclusion in the case of refusal to reopen proceedings as a result of scientific

67 Judgement of the ECHR in Różański vs. Poland of 18.05.2006, Application no. 55339/00.
68 Judgement of the ECHR in Ahrens vs. Germany of 22.03.2012, Application no. 45071/09.
69 Judgement of the ECtHR in Tóth vs. Hungary of 12.02.2013, Application no. 48494/06.
70 Judgement of the ECtHR in Phinikaridou vs. Cyprus of 20.12.2007, Application no. 23890/02.
71 Judgement of the ECtHR in Mizzi vs. Malta, 12.01.2006, Application no. 26111/02.
72 Judgement of the ECtHR in Shofman vs. Russia of 24.11.2005, Application no. 74826/01.

advances (DNA testing) which would have made it possible to challenge previous findings of paternity. Courts should interpret legislation on this matter by considering scientific progress and its social implications.[73]

Family life, in terms of relationships with children, does not cease with divorce or the actual break-up of the family. Although the breakup of the family always means leaving the child with only one parent, the other parent continues to be the subject of the rights protected by Article 8 ECHR. This means that violations of its provisions can arise both in making a decision on which parent will have permanent custody of the child and in the process of implementing the decision. The principle of subsidiarity and the wide margin of appreciation left to the national authorities in family matters means that the Court only exceptionally intervenes in the merits of the decisions taken by the national authorities, focusing on assessing whether those decisions are arbitrary, that is, discriminatory; whether the procedural guarantees were respected when they were taken; and whether their effective implementation was ensured. The provision of Article 8 ECHR cannot be understood as an obligation to grant one parent exclusive custody or unrestricted access to the child. Here, the Court's jurisprudence imposes a wide range of positive obligations on national authorities, and thus requires them to take measures to protect the rights and interests of both parents.[74]

The decision to entrust permanent custody of a child is made by national authorities. The Court is not called upon to review its merits, although it reserves the right to assess whether the national decision strikes a fair balance between the divergent interests at stake[75] – the interests of the child, which are always treated as a priority, and the interests of both parents. In practice, the Court limits its examination to determining whether the national decision is not based on the application of criteria of an inadmissible nature, above all the criterion of religion[76] or the criterion of sexual orientation,[77] the extent to which it is ensured that the other parent has the possibility of maintaining contact with the child and thus of continuing family life. The total exclusion of the right of access may imply arbitrariness of the decision as a result of a lack of fair balance, unless it is justified by reference to the specific circumstances of the case; whether the procedural rights of both parents have been safeguarded, which requires examining, in particular, whether the decision was not made based on a superficial assessment of evidence or insufficient evidence.[78]

73 Judgement of the ECtHR in Tavli vs. Turkey of 9.11.2006, Application no. 11449/02.
74 Judgement of the ECHR in Zawadka vs. Poland of 23.06.2005, Application no. 48542/99.
75 Judgement of the ECtHR in Nuutinen vs. Finland of 27.06.2000, Application no. 32842/96.
76 Judgement of the ECtHR in Hoffmann vs. Austria of 23.06.1993, Application no. 12875/87.
77 Judgement of the ECtHR in Salgueiro da Silva Mouta vs. Portugal of 21.12.1999, Application no. 33290/96.
78 Judgement of the ECHR in Elsholz vs. Germany of 13.07.2000, Application no. 25735/94.

5. Summary

In the declaratory layer, ECHR bodies have not taken an unequivocal position on the right to life of the conceived child; however, the resolution of incoming complaints indicates that they have ruled out the possibility of treating it in a subjective manner and guaranteeing the legal protection of life as a human being. Crucial to avoid taking an unequivocal position appears to be the awareness of significant divergences in the reflection on the question of the beginning of human life and the circumstance that there is no consensus at the European level on the nature and status of the embryo and foetus, and on the scientific and legal definition of the beginning of human life. It follows from the Court's jurisprudence that the embryo and the foetus are not "persons" and therefore cannot enjoy the full protection of the right to life guaranteed by Article 2 ECHR.

The Court has stressed that this issue is one of sensitivity and the subject of fierce debate. States Parties to the ECHR have yet to develop a universally accepted position. It appears that in such contentious issues, which depend on the system of professed values and the specific sensitivities of the societies of individual States, such a consensus is almost impossible. Consequently, it is not possible to formulate a universal standard for the right to life of the unborn child. Considering this, the Court decided that the question of when the right to life begins lies within the margin of appreciation that individual States should enjoy, regardless of the evolutionary interpretation of the Convention.[79] The margin of appreciation doctrine involves the Court examining in a particular case how the issues in question have been regulated by various States Parties to the ECHR to grant them an appropriate margin of appreciation based on these observations. The more the regulations in question differ from State to State, the wider is the margin of appreciation.[80] However, Judge G. Ress, hearing the case of *Vo vs. France*, noted that there could be no margin of appreciation for the legal protection of the life of the conceived child.[81] However, the determination of the point at which the protection of life order begins to operate is left to the discretion of individual States, which may adopt different or even completely opposite solutions. Therefore, clarification regarding the beginning of life must be sought from the legal systems of each State Party in the ECHR. This means that similar complaints against different States will result in diametrically different judgements; consequently, the conceived child will be protected in Ireland or Poland, but not in Great Britain or France.[82]

Incidentally, it is noteworthy that most European countries allow abortion on request or for social reasons. Of the 48 European countries, only 6 do not allow

79 Łącki, and Wróblewski, Status nasciturusa w orzecznictwie organów Konwencji o ochronie praw człowieka i podstawowych wolności, "Państwo i Prawo" 2016, nr 3, punkt 3.
80 A. Wiśniewski, Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka, Gdańsk 2008, p. 101.
81 Judgement of the ECtHR in Vo vs. France of 8 July 2004, Application no. 53924/00.
82 Kapelańska, 2011, p. 173.

abortion on request or for social reasons, whereas of the 27 European Union countries, abortion on request and for social reasons is illegal in only 2 countries: Poland and Malta.[83] This means that access to abortion is extremely broad and that the laws of the individual States Parties to the ECHR can be considered liberal.

Although there is no consensus among States Parties to the ECHR on the intensity of the protection of the right to life of the conceived child, most States recognise the need to ensure, at least to a minimum extent, the protection resulting from the dignity inherent in every human being. The need to respect every human being and his or her inherent dignity led to the enactment of the Convention for the Protection of Human Rights and Dignity of the Human Being in the Context of the Application of Biology and Medicine (European Bioethics Convention, EKB) on 4 April 1997. Unlike the ECHR, the EKB distinguishes between a "person" and a "human being", which includes the conceived child within its scope. According to Article 1, the purpose of the ECHR is to protect the dignity and identity of the human being and to guarantee to every person, without discrimination, respect for his or her integrity and other fundamental rights and freedoms vis-à-vis the applications of biology and medicine. In the context of this study, it is important to highlight the close relationship between the ECHR and EHRC. According to Article 29, the Court has the competence to interpret its provisions. Thus, the provisions of the ECHR influence the development of the Court's line of jurisprudence, including the right to life.

There is a civilisational dimension of attitude towards human beings and their right to life. Considering the values professed by Christian Europe, protection of life is prioritised considering the humanistic value of Europe, the right to choose. It should be emphasised that the above dispute is not simply a philosophical or legal discourse. It is a real political problem recurring in public spaces of varying intensities and in various forms. This dispute over values has a fundamental dimension not only because it concerns fundamental human rights, but also because it is a dispute over the nature of civilisation, and its final result will determine the shape of European civilisation.[84]

83 European Abortion Law: A Comparative Overview, 3.03.2021, [Online]. Available at: https://reproductiverights.org/european-abortion-law-comparative-overview-0/ (Accessed: 4 December 2021).

84 Gajda, The right to the protection of the unborn child in the context of the Judgement of the Polish Constitutional Tribunal of October 22, 2020 in the case K 1/20, "Politeja" 2021, no 2, s. 237.

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| CHAPTER 5 |

Children in Judicial and Non-Judicial Proceedings: The ECHR and CJEU Jurisprudence

Katja DRNOVŠEK

ABSTRACT

Historically, the procedural rights of children participating in judicial and other proceedings have received limited attention in the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The European Convention on Human Rights (ECHR) does not explicitly address the special protection of children involved in court proceedings, and while the Charter of Fundamental Rights of the European Union (the Charter) does, the CJEU rarely deals with the rights of underaged participants in proceedings as the primary consideration of the case. Consequently, the case law that examines relevant children's rights is somewhat fragmented and narrowly focused. However, in recent decades, the shift towards a child-centric approach and the impact of numerous international instruments dedicated to safeguarding children's rights, especially the Convention on the Rights of the Child, have heavily influenced the practice of both Courts. This paper provides an overview and analysis of landmark cases and other significant cases adjudicated by the ECtHR and the CJEU that focus on defining the following rights of a child: to be heard in family matters, as derived from Art. 8 of the ECHR and Art. 24 of the Charter; selected aspects of the right to a fair trial under Art. 6 of the ECHR (i.e. the right to effective participation and access to a lawyer); the representation of a child in proceedings before the ECtHR. Acknowledging the varying competencies and objectives of both courts, greater emphasis is placed on the more comprehensive ECtHR case law, all while duly considering the relevant CJEU jurisprudence.

KEYWORDS

children's rights, minors in judicial proceedings, the right to be heard, the right to effective participation, access to a lawyer

1. Introduction

Historically, the procedural rights of children participating in judicial and other proceedings have received limited attention in the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

Katja DRNOVŠEK (2024) 'Children in Judicial and Non-Judicial Proceedings: The ECHR and CJEU Jurisprudence'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 111–129. Miskolc–Budapest, Central European Academic Publishing.
https://doi.org/10.71009/2024.ar.crirhrs_5

Furthermore, the European Convention on Human Rights (ECHR)[1] does not explicitly address the protection or special status of children involved in court proceedings. Importantly, this is despite the Charter of Fundamental Rights of the European Union (the Charter)[2] addressing the rights of the child in Art. 24, including the right to be heard and the protection of their best interests. Meanwhile, the CJEU rarely deals with the rights of underaged participants in proceedings as the primary consideration of the case. Consequently, the case law examining children's rights in judicial and other proceedings is somewhat fragmented, and often focuses on specific issues within the broader framework of procedural guarantees and fair trials.

However, in recent decades, the shift towards the child-centric approach and the impact of numerous international instruments dedicated to safeguarding children's rights have heavily influenced the practice of both the ECtHR and the CJEU. The evolution of European and international legislation now tends towards acknowledging that while children have the same rights as adults and must be recognised as full rights holders, they are also entitled to additional rights because of their special needs and vulnerability to exploitation and abuse, especially when they are involved in judicial proceedings.[3]

The ECtHR has produced a comprehensive and extensive body of jurisprudence on issues related to the participation of children in family law proceedings (enshrined in the child's right to be heard as part of the right to respect for private and family life under Art. 8 of the ECHR), the treatment of minor defendants in criminal cases (enshrined in the right to effective participation and access to a lawyer as part of the right to a fair trial under Art. 6 of the ECHR), the representation of children before the ECtHR (i.e. able to lodge a complaint on behalf of a child), and the protection of underaged immigrants and asylum seekers, children in detention, and children improperly removed across borders.[4] The ECtHR is the sole interpreter of all matters on the ECHR, and has no obligations towards any other international law or jurisprudence, including the United Nations Convention on the Rights of the Child.[5] Officially, there is no connection between the ECHR and the aforementioned Convention. Nevertheless, the ECtHR has acknowledged a reciprocal, harmonious relationship between the two conventions, and frequently refers to both when addressing the rights of the child. It even holds that, concerning children, certain positive obligations of contracting states must be interpreted in light of the Convention on the Rights of the Child.[6]

1 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, of 4 November 1950.

2 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

3 Durandelle, Enslen, and Thomas, no date, p. 2.

4 See also European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 31; Braithwaite, Harby, and Miletić, 2019, p. 11.

5 Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989.

6 See also Helland and Hollekim, 2023, pp. 213–214; European Court of Human Rights (ECtHR), Harroudj vs. France, no. 43631/09, 4 October 2012, para. 42.

The CJEU has primarily addressed issues related to the protection of children's rights through preliminary references in various areas such as free movement,[7] European Union (EU) citizenship, migration, habitual residency, family life, and non-discrimination.[8] Only rarely has it focused on how EU law should be interpreted regarding children participating in judicial and non-judicial proceedings. When it has addressed related issues, it has referred to the principles enshrined in both the Charter and the Convention on the Rights of the Child, particularly in the context of cross-border child abduction cases and the area of migration.[9]

The following text provides an overview and analysis of landmark cases and other significant cases adjudicated by the ECtHR and the CJEU that focus on defining the rights of a child to be heard in family matters as derived from Art. 8 of the ECHR and Art. 24 of the Charter; the selected aspects of the right to a fair trial under Art. 6 of the ECHR; the representation of a child in proceedings before the ECtHR. Acknowledging the varying competencies and objectives of both courts, a greater emphasis is placed on the ECtHR case law, but with constant due consideration of the relevant CJEU jurisprudence.

2. The Right to be Heard

2.1. ECtHR

The right of the child to be heard is not explicitly expressed in the ECHR, but the ECtHR has adopted an evolutionary approach to interpreting the ECHR. This provides great potential for the development of the right of the child to be heard through unenumerated rights (i.e. rights not explicitly stipulated in the ECHR but that can be derived from it). In the ECtHR case law, the right of the child to be heard is derived from Arts. 8 (family proceedings) and 6 (criminal proceedings) of the ECHR.[10] Under Art. 8 of the ECHR, everyone has the right to respect for their private and family life, their home and their correspondence. No public authority may interfere with the exercise of this right, except when such interference is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

While Art. 8 contains no explicit procedural requirements, the decision-making process must be fair and such as to afford due respect to the interests safeguarded

7 See for example Court of Justice of the European Union (CJEU), C-244/06, Dynamic Medien Vertriebs GmbH vs. Avides Media AG, 14 February 2008.

8 Especially in relation to family reunification or child abductions, for example, CJEU, C-540/03, European Parliament vs. Council of the European Union, 27 June 2006; CJEU, C-112/20, M. A. vs. État belge, 11 March 2021; CJEU, C-400/10 PPU, J. McB. vs. L. E., 5 October 2010; CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga vs. Simone Pelz, 22 December 2010.

9 See also European Union Agency for Fundamental Rights and Council of Europe, 2022, p. 31.

10 Daly, 2011, pp. 442–443.

by this article. To that end, the ECtHR case law established that children must be sufficiently involved in the decision-making related to their family and private life, as guaranteed by several international legal instruments. These instruments include Art. 12 of the Convention on the Rights of the Child, Arts. 3 and 6 of the European Convention on the Exercise of Children's Rights, and Art. 24 of the Charter. For children of a certain age, the ECtHR favours the national judge hearing them in person in any proceedings affecting their rights under Art. 8; however, depending on their age and maturity, interviews with experts and subsequent reports for the judges referred to in the judicial decisions could be considered sufficient. The case law has thus incorporated the international and European standards that children must no longer be considered as their parents' property.[11]

The right to personal autonomy, which is inherent to the notion of "private life", signifies the right to make choices as to how to lead own life, provided that this does not unjustifiably interferes with the rights and freedoms of others. This right has a different scope in the case of children who, unlike adults, lack the full autonomy of adults but are still subjects of rights. Children exercise their limited autonomy, which gradually increases with their maturity, through their right to be consulted and heard.[12] Thus, in any judicial or administrative proceedings affecting children's rights under Art. 8 of the ECHR, children capable of forming their own views must be provided with opportunities to be heard and express their views. Otherwise, it cannot be said that they were sufficiently involved in the decision-making process.[13] As children mature and, with the passage of time, become able to formulate their own opinions, the courts should give due weight to their views and feelings, and to their right to respect for their private life.[14] The situation is different for very young children, as they are still unable to form or express their wishes,[15] and this is especially if their behaviour does not demonstrate sufficient maturity for their opinion to be considered properly autonomous – and not influenced by one of the parents.[16] In cases involving young children, domestic authorities should seek expert opinions on whether it is possible, given the child's age and maturity, to interview the child in court, and if the assistance of a child psychology specialist is needed.[17] If domestic authorities consider that the child is not capable of the discernment necessary to be heard, reports from experts providing an account of their opinion regarding the situation in dispute should be obtained to compensate for the failure to hear the child.[18] Similarly, in the

11 ECHR-KS, 2022a.
12 ECtHR, M.K. vs. Greece, no. 51312/16, 1 February 2018, paras. 74 and 91.
13 ECtHR, M. and M. vs. Croatia, no. 10161/13, 3 September 2015, paras. 171 and 181; ECtHR, C vs. Croatia, no. 80117/17, 8 October 2020, paras. 73 and 78; ECtHR, M.K. v. Greece, no. 51312/16, 1 February 2018, paras. 74 and 91.
14 ECtHR, N. TS. and others vs. Georgia, no. 71776/12, 2 February 2016, para. 72.
15 ECtHR, Petrov and X vs. Russia, no. 23608/16, 23 October 2018, para. 108.
16 ECtHR, Gajtani vs. Switzerland, no. 43730/07, 9 September 2014, para. 107.
17 ECtHR, Petrov and X vs. Russia, no. 23608/16, 23 October 2018, para. 108; ECtHR, Zelikha Magomadova vs. Russia, no. 58724/14, 8 October 2019, para. 116.
18 ECtHR, Neves Caratão Pinto vs. Portugal, no. 28443/19, 13 July 2021, para. 138.

case of traumatised children, an expert should be appointed to determine whether the child's best interests might be better protected if the child is not compelled to participate in court proceedings and not questioned repeatedly. Considering the margin of appreciation enjoyed by the domestic authorities, who are better placed than the Court for related assessments, the domestic courts would be more able to reasonably consider the appropriateness, given the expert advice, of hearing the child in person, especially if the child is caught up in a conflict of loyalty. Such hearings can have traumatic effects for a child and considerably delay the proceedings.[19]

The views of a child are not necessarily immutable, and their objections, which must be given due weight, are not necessarily sufficient to override the parents' interests, especially when they have regular contact with their child (e.g. in cases where a child refuses to have contact with a parent with which it has regular contact). That is, the right of a child to express his/her own views should not be interpreted as effectively giving unconditional veto power to children without any other factors being considered, and without an examination being carried out to determine their best interests. Such interests normally dictate that a child's ties with the family must be maintained, except in cases where this would harm the child's health and development. In addition, if a court bases a decision on the views of a child who was palpably unable to form and articulate an opinion as to own wishes (e.g. because of a conflict of loyalty, or exposure to the alienating behaviour of one parent), such a decision could run contrary to Art. 8 of the ECHR.[20] At the same time, it is generally accepted that courts must consider the wishes of children of a certain age and maturity. On the practical level, there may also come a stage where it becomes pointless, if not counterproductive and harmful, to attempt to force a child to conform to a situation which, for whatever reason, he/she resists.[21] In the case of children of divorced parents caught in a custody battle, the children may need special guardians *ad litem* to protect their interests, explain to them court proceedings and decisions and their consequences, and generally liaise between the competent judge and the child. This may also be necessary if the child is not formally a party to the custody proceedings.[22]

2.2. CJEU

The CJEU has mainly addressed the procedural aspects of the protection of children's rights in the context of cross-border child abduction cases and migrations.[23]

19 ECtHR, R.M. vs. Latvia, no. 53487/13, 9 December 2021, para. 117; ECtHR, Gajtani vs. Switzerland, no. 43730/07, 9 September 2014, paras. 107 and 111.

20 ECtHR, Zelikha Magomadova v. Russia, no. 58724/14, 8 October 2019, para. 115; ECtHR, K.B. and others vs. Croatia, no. 36216/13, 14 March 2017, para. 141; ECtHR, Raw and others vs. France, no. 10131/11, para. 117, 7 March 2013; ECtHR, Suur vs. Estonia, no. 41736/18, 20 October 2020, paras. 89 and 97; ECtHR, Gajtani vs. Switzerland, no. 43730/07, 9 September 2014, para. 107.

21 ECtHR, C. vs. Finland, no. 18249/02, 9 May 2006, para. 57; ECtHR, Płaza vs. Poland, no. 18830/07, 25 January 2011, paras. 71 and 86.

22 ECtHR, C vs. Croatia, no. 80117/17, 8 October 2020, paras. 76 and 77; ECtHR, A.L. vs. Poland, no. 28609/08, 18 February 2014, para. 74.

23 See also Lonardo, 2022, pp. 600–607.

When determining how EU law should be interpreted in relation to the child's best interests and right to be heard, the CJEU draws inspiration from the constitutional traditions common to EU member states and from the guidelines supplied by international instruments for the protection of human rights on which EU member states have collaborated or to which they are signatories. The specific instruments which the CJEU takes into account in applying the general principles of EU law include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and especially the ECHR, which has special significance in that respect.[24] The protection of the child is also enshrined in instruments drawn up within the framework of the EU, such as the Charter; for example, its Art. 24(1) provides that children have the right to such protection and care as necessary for their well-being, and Art. 24(2) provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Furthermore, EU member states' right to take the necessary measures for reasons relating to the protection of young persons is recognised by several EU law instruments.[25]

The CJEU also attaches great importance to the opinions and interpretations adopted by the ECtHR in its case law. It follows from Art. 52(3) of the Charter that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meanings and scope are the same as those laid down by the ECHR. However, this provision does not preclude the grant of wider protection by EU law. Under Art. 7 of the Charter, 'everyone has the right to respect for his or her private and family life, home and communications'. The wording of Art. 8(1) of the ECHR is identical to that of Art. 7, except that it uses the expression "correspondence" instead of "communications". Thus, it is clear that Art. 7 contains rights corresponding to those guaranteed by Art. 8(1) of the ECHR. Therefore, Art. 7 of the Charter must have the same meaning and scope as Art. 8(1) of the ECHR, as interpreted by the case law of the ECtHR.[26] The opinions summarised above (see Section 2.1.) are thus also relevant to the CJEU case law.

Concerning the right of the child to be heard, the CJEU clarified that it is a requirement of Art. 24(1) of the Charter that children should be able to express their views freely, and that the views expressed should be considered on matters which concern the children, solely 'in accordance with their age and maturity'. It also clarified that Art. 24(2) of the Charter describes that in all actions relating to children, account shall be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. It also refers to Art. 12 of the Convention on the Rights of the Child for further justification, as all EU member states are signatories.

24 CJEU, C-244/06, Dynamic Medien Vertriebs GmbH vs. Avides Media AG, 14 February 2008, para. 39; CJEU, C-540/03, European Parliament vs. Council of the European Union, 27 June 2006, paras. 37 and 57.

25 CJEU, C-244/06, Dynamic Medien Vertriebs GmbH vs. Avides Media AG, 14 February 2008, para. 41; CJEU, C-112/20, M. A. vs. État belge, 11 March 2021, paras. 26 and 35–43.

26 CJEU, C-400/10 PPU, J. McB. vs. L. E., 5 October 2010, para. 53.

Thus, in matters of parental responsibility, it is for the court that has to rule in the case to assess whether such a hearing is appropriate, since the conflicts requiring judgment that awards custody of a child to one of the parents (and the associated tensions) create situations in which the hearing of the child, particularly when the physical presence of the child before the court is required, may prove to be inappropriate and even harmful to the psychological health of the child. The CJEU inferred that while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed with regard to what is required in the best interests of the child in each individual case, in accordance with Art. 24(2) of the Charter. Therefore, it is not necessary for a hearing to take place before the court, but the right of the child to be heard requires that legal procedures and conditions are available for the child to express his/her views freely, and that those views are obtained by the court in some manner. In other words, while it is not a requirement of the applicable EU instruments that the views of the child are obtained in every case through a hearing, and the court retains a degree of discretion, the court that does decide to hear the child is required to take all measures which are appropriate to the arrangement of such a hearing, with regard to the child's best interests and the circumstances of each case, to ensure the effectiveness of those provisions and to offer the child a genuine and effective opportunity to express his/her views.[27]

3. Children in criminal justice systems

3.1. General considerations

The ECtHR asserted in *Blokhin vs. Russia* that, given his/her status as a minor, a child's procedural rights must be guaranteed upon entry into the criminal justice system, and his/her innocence or guilt with respect to the specific act he/she has allegedly committed must be established in accordance with the requirements of due process and the principle of legality. On no account may a child be deprived of important procedural safeguards solely because the proceedings that may result in his/her deprivation of liberty are deemed under domestic law to be protective of his/her interests as a child and juvenile delinquent rather than penal. Furthermore, particular care must be taken to ensure that the legal classification of a child as a juvenile delinquent does not lead to the focus being shifted to their status, and thus does not lead to the neglect of the examination of the specific criminal act of which he/she has been accused and the need to adduce proof of his/her guilt in conditions of fairness. Processing a child offender through the criminal justice system on the sole basis of their status as a juvenile delinquent cannot be considered compatible with due process or the principle of legality. Discretionary treatment based on someone being a child, juvenile, or juvenile delinquent is acceptable only when their interests and those of the state are

27 CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga vs. Simone Pelz, 22 December 2010, paras. 60–66.

compatible. Otherwise, proportionate substantive and procedural legal safeguards do apply.[28]

Importantly, the reasons why special treatment of minors is required, such as the person's level of maturity and intellectual and emotional capacities, do not cease immediately once legal age is reached. It follows from the ECtHR case law that if the person concerned was a minor at the time of committing the criminal offence but has reached legal age during subsequent proceedings, the considerations based on those factors could maintain some of their relevance, although their importance decreases as time passes.[29]

3.2. The right to effective participation

In the landmark cases of *T. vs. the United Kingdom* and *V. vs. the United Kingdom*, the right to effective participation was recognised as part of the child's right to a fair trial under Art. 6 of the ECHR. Because of its importance as a precedent, the reasoning of the ECtHR in these cases is worth an extended exploration. The applicants in the respective cases were convicted of murder and abduction in a highly publicised trial after, at the age of 10, they abducted a two-year-old boy, took him on a journey of over two miles, battered him to death, and left him on a railway line to be run over. The ECtHR was called upon to consider how the guarantee in Art. 6(1) applies to criminal proceedings against children and, in particular, whether procedures which are generally considered to safeguard the rights of adults on trial, such as publicity, should be abrogated with respect to children to promote their understanding and participation. The ECtHR established that there is no clear common standard among Council of Europe member states regarding the minimum age of criminal responsibility, and that the attribution of criminal responsibility to a child of such age does not in itself give rise to a breach of the ECHR. Likewise, it cannot be said that a trial on criminal charges of a child as such violates the fair trial guarantee under Art. 6(1). However, it is essential that a child charged with an offence is dealt with in a manner which fully considers the child's age, maturity, and intellectual and emotional capacities, and that steps are taken to promote their ability to understand and participate in proceedings. Thus, in the case of a young child charged with a grave offence attracting high levels of media and public interest, the hearing should be conducted in such a way as to reduce as far as possible their feelings of intimidation and inhibition. While public trials may serve the general interest in the open administration of justice, where appropriate in view of the age and other characteristics of the child and the circumstances surrounding the criminal proceedings, this general interest could be satisfied by a modified procedure providing for selected attendance rights and judicious reporting.

In such cases, even special measures, taken in view of the child's young age, to promote the child's understanding of the proceedings (e.g. having the trial procedure be explained to them, taking them to see the courtroom in advance, and shortening

28 ECtHR, Blokhin vs. Russia, no. 47152/06, 23 March 2016, para. 196.
29 ECtHR, Martin vs. Estonia, no. 35985/09, 30 May 2013, para. 92.

the hearing times) and the representation by skilled and experienced lawyers might not be sufficient. If it is highly unlikely that the child would have felt sufficiently uninhibited in the tense courtroom and under public scrutiny to have consulted with the lawyers during the trial or, given their immaturity and their disturbed emotional state, to have cooperated with them outside the courtroom, a conclusion has to be drawn that the child was unable to participate effectively in the criminal proceedings against oneself and was, in consequence, denied a fair hearing, breaching Art. 6(1).[30]

In other cases concerning the rights of juvenile defendants, the ECtHR further reasoned that criminal proceedings must be organised in a way that respects the principle of the best interests of the child. The right of a juvenile defendant to effectively participate in his/her criminal trial requires that the authorities deal with him/her with due regard to his/her vulnerability and capacity from the first stages of his/her involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce, as far as possible, the child's feelings of intimidation and inhibition, ensure that the child has a broad understanding of the nature of the investigation, of what is at stake for the child (e.g. the significance of any penalty which may be imposed), the child's rights of defence, and particularly his/her right to remain silent.[31]

Art. 6(1) does not require a child on trial for a criminal offence to understand or be capable of understanding every point of the law or evidential detail. Given the sophistication of modern legal systems, many adults with normal intelligence are unable to fully comprehend all the intricacies and exchanges which take place in the courtroom, which is why Art. 6(3)(c) of the ECHR emphasises the importance of the right to legal representation. However, "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and what is at stake for him/her, including the significance of any penalty that may be imposed. This means that he or she, if necessary with the assistance of an interpreter, lawyer, social worker, or friend, should be able to understand the general thrust of what is said in court. Furthermore, the defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his/her own lawyers his/her version of events, point out any statements with which he/she disagrees, and make them aware of any facts which should be put forward in his/her defence.[32]

In particular, where the child risks not being able to participate effectively because of their young age and limited intellectual capacity (e.g. the child has little comprehension of the importance of making a good impression on the jury, or does not seem to have grasped the fact that him/her risk a custodial sentence), it is essential

30 Summarised from ECtHR, T. vs. the United Kingdom, no. 24724/94, 16 December 1999; summarised from ECtHR, V. vs. the United Kingdom, no. 24888/94, 16 December 1999.

31 ECtHR, Blokhin vs. Russia, no. 47152/06, 23 March 2016, para. 195; ECtHR, Adamkiewicz vs. Poland, no. 54729/00, 2 March 2010, para. 70; ECtHR, Martin vs. Estonia, no. 35985/09, 30 May 2013, para. 92; ECtHR, S.C. vs. the United Kingdom, no. 60958/00, 15 June 2004, paras. 28 and 29.

32 ECtHR, S.C. vs. the United Kingdom, no. 60958/00, 15 June 2004, para. 29; ECtHR, Panovits vs. Cyprus, no. 4268/04, 11 December 2008, para. 67.

that he/she is tried in a specialist tribunal which can give full consideration to, and make proper allowance for, the handicaps under which the child labours, and adapt its procedure accordingly.[33]

3.3. Access to a lawyer

Another fundamental feature of the fair trial, which has been discussed extensively in ECtHR case law concerning children, is the right of everyone charged with a criminal offence to be effectively defended by a lawyer, which should be assigned officially if needed.[34] Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Art. 6 (i.e. securing the equality of arms between the investigating or prosecuting authorities and the accused). Art. 6(3)(c) does not specify how to exercise the right of access to a lawyer or its content. While it leaves the states to choose the means of ensuring that this right is secured in their judicial systems, the scope and content of that right should be determined in line with the aim of the ECHR, namely to guarantee rights that are practical and effective.[35]

The ECtHR holds that in order for the right to a fair trial to remain sufficiently "practical and effective", Art. 6(1) requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify the denial of access to a lawyer, such restrictions, whatever their justification may be, must not unduly prejudice the rights of the accused under Art. 6. Importantly, the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during a police interrogation without access to a lawyer are used for a conviction.[36]

However, assigning counsel does not in itself ensure the effectiveness of the assistance he/she may afford an accused. To that end, the following minimum requirements must be met: (1) suspects must be able to enter into contact with a lawyer from the time they are taken into custody, which means that it must be possible for a suspect to consult with their lawyer prior to an interview or even where there is no

33 ECtHR, S.C. vs. the United Kingdom, no. 60958/00, 15 June 2004, para. 35.

34 The ECtHR has defined the scope and importance of the right to access to a lawyer (not limited to the rights of a child involved in judicial proceedings) in great detail in its extensive case law referring to this topic. For a summary and further references, see ECHR-KS, 2023.

35 ECtHR, Salduz vs. Turkey, no. 36391/02, 27 November 2008, para. 51; ECtHR, Beuze vs. Belgium, no. 71409/10, 9 November 2018, para. 131; ECtHR, Ibrahim and others vs. the United Kingdom, nos. 50541/08, 50571/08, 50573/08, and 40351/09, 13 September 2016, para. 272.

36 ECtHR, Salduz vs. Turkey, no. 36391/02, 27 November 2008, para. 55; ECtHR, Blokhin vs. Russia, no. 47152/06, 23 March 2016, para. 198.

interview; (2) suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in subsequent pre-trial proceedings. In addition, in assessing the overall fairness of proceedings on a case-by-case basis, an account must be taken of the entire range of services specifically associated with legal assistance (i.e. discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention). One factor that should be considered is whether the applicant is particularly vulnerable, for example, because of age or mental capacity.[37]

Given the particular vulnerability of children and considering their level of maturity and intellectual and emotional capacities, the ECtHR emphasises the fundamental importance of providing access to a lawyer where the person in custody is a minor. This emphasis is made while referring to a significant number of relevant international law materials concerning legal assistance to minors in police custody. Even the fact that domestic law does not provide legal assistance to minors under the age of criminal responsibility when interviewed by the police is not a valid reason for failing to comply with that obligation. A systematic restriction on the right to access legal assistance based on statutory provisions is sufficient in itself to constitute a violation of Art. 6.[38]

While a waiver of a right guaranteed by the ECHR is permissible, it must not run counter to any important public interest, must be established in an unequivocal manner, and must be attended to with minimum safeguards commensurate with the waiver's importance. Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Art. 6, it must be shown that he/she could reasonably have foreseen what the consequences of their conduct would be. Given the vulnerability of an accused minor and the imbalance of power to which he/she is subjected by the very nature of criminal proceedings, a waiver by him/her or on his/her behalf of an important right under Art. 6 can only be accepted when it is expressed in an unequivocal manner, and after the authorities have taken all reasonable steps to ensure that he/she is fully aware of his/her rights of defence and can appreciate, as far as possible, the consequences of his/her conduct. These requirements cannot be considered to be satisfied in the case of an underaged applicant taken for questioning without his/her legal guardian and without being informed of his/her right to seek and obtain legal representation before him/her was questioned if, given the applicant's age, it is unlikely that he/she was aware of being entitled to legal representation before making any statement to the police, and if he/she could not have reasonably appreciated the consequences of his/her proceeding to be questioned without the assistance of a lawyer. In such cases, a mere caution in the words

37 ECtHR, Beuze vs. Belgium, no. 71409/10, 9 November 2018, para. 132–136 and 150; ECtHR, Ibrahim and others vs. the United Kingdom, nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 274.

38 ECtHR, Salduz vs. Turkey, no. 36391/02, 27 November 2008, paras. 54 and 55; ECtHR, Beuze vs. Belgium, no. 71409/10, 9 November 2018, para. 140.

provided for in domestic law would likely not be enough to enable them to sufficiently comprehend the nature of their rights, especially the right to remain silent.[39]

4. Representation of children before the ECtHR

As holders of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. It remains, nonetheless, that only a few applications have been brought directly by minors before the ECtHR, and the main obstacles for children to take legal action are a lack of information about their rights and a lack of legal capacity to act in domestic law.[40] Thus, the ECtHR has not only addressed the rights of children involved in judicial proceedings before national courts in their respective states, but also their position and rights in proceedings before the ECtHR itself. In laying down the criteria on who can represent the child before the ECtHR, it adopted a pragmatic approach, stressing the importance of effective protection of the children's interests and rights.[41]

The object and purpose of the ECHR as an instrument for the protection of individual human beings require that its provisions, both procedural and substantive, be interpreted and applied so as to render its safeguards both practical and effective. In this context, the position of children as applicants claiming to be the victim of a violation by one of the High Contracting Parties (under Art. 34) deserves careful consideration, as they must generally rely on other persons to present their claims and represent their interests, and may not be of an age or capacity to authorise any steps to be taken on their behalf in any real sense. Therefore, a restrictive or technical approach in this area should be avoided, and the key consideration in such cases is that any serious issues concerning respect for children's rights should be examined.[42]

The conditions governing individual applications under the ECHR are not necessarily the same as the national criteria related to *locus standi*. National rules in this respect may serve purposes different from those contemplated in Art. 34, even if they are sometimes analogous.[43] In principle, a person not entitled to represent another under domestic law may, in certain circumstances, act before the ECtHR in the name of the other person. In particular, minors can apply to the ECtHR even, or indeed especially, if they are represented by a person who is in conflict with the authorities

39 ECtHR, Panovits vs. Cyprus, no. 4268/04, 11 December 2008, paras. 68–74.
40 Durandelle, Enslen, and Thomas, no date, p. 12.
41 ECHR-KS, 2022b.
42 ECtHR, T.A. and others vs. the Republic of Moldova, no. 25450/20, 30 November 2021, para. 31; ECtHR, Hromadka and Hromadkova vs. Russia, no. 22909/10, 11 December 2014, para. 118; ECtHR, Strand Lobben and others vs. Norway, no. 37283/13, 10 September 2019, para. 156; ECtHR, A.K. and L. vs. Croatia, no. 37956/11, 8 January 2013, para. 47; ECtHR, N.TS. and others vs. Georgia, no. 71776/12, 2 February 2016, para. 54; ECtHR, C vs. Croatia, no. 80117/17, 8 October 2020, para. 55.
43 ECtHR, Strand Lobben and others vs. Norway, no. 37283/13, 10 September 2019, para. 156; ECtHR, A.K. and L. vs. Croatia, no. 37956/11, 8 January 2013, para. 46.

and criticises their decisions and conduct as not being consistent with the rights guaranteed by the ECHR. In the event of a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the attention of the ECtHR and that the minor will be deprived of effective protection of his/her rights under the ECHR.[44]

In its case law, the ECtHR thus refers to three criteria which must be met for a person to have the standing to lodge a complaint in the name of a minor: (a) a sufficiently close link between the minor and the person lodging the complaint before the ECtHR in the name of the minor; (b) the risk that in the absence of this complaint the minor will be deprived of effective protection of his/her rights; (c) the absence of any conflict of interests between the minor and the person representing him/her.[45] The adoption of these criteria in practice has resulted in several important precedents in ECtHR case law, some of which are presented below.

Whether a natural parent has standing to complain on behalf of their minor children depends on whether the party that opposes the natural parent and is entitled to represent the child under domestic law can be deemed to effectively protect the child's rights under the ECHR.[46] Normally, a natural parent has the requisite standing in a case such as the transfer of custody of the child to foster parents, although there may be exceptions such as conflicting interests (e.g. where serious parental child neglect has occurred, and the mother has failed to protect the child she seeks to represent before the ECtHR from domestic abuse).[47] This also applies to natural parents who have been deprived of their parental rights.[48] Therefore, the severance of legal ties between the parent and the child (e.g. resulting from the deprivation of parental responsibilities and the authorisation of adoption) is not decisive for whether a parent may have *locus standi* to lodge an application on behalf of the child before the ECtHR. In such cases, the child's only representatives under national law with respect to any issues concerning facts that occurred after the adoption became final would be his/her adoptive parents. However, with respect to adoption proceedings conducted at a time when the first applicant still had full responsibility for the child, it

44 ECtHR, T.A. and others vs. the Republic of Moldova, no. 25450/20, 30 November 2021, para. 32; ECtHR, E.M. and others vs. Norway, no. 53471/17, 20 January 2022, para. 64; ECtHR, Scozzari and Giunta vs. Italy, nos. 39221/98 and 41963/98, 13 July 2000, para. 138; ECtHR, Strand Lobben and others vs. Norway, no. 37283/13, 10 September 2019, para. 157; ECtHR, M.D. and others vs. Malta, no. 64791/10, 17 July 2012, para. 27.

45 ECtHR, T.A. and others vs. the Republic of Moldova, no. 25450/20, 30 November 2021, para. 33.

46 ECtHR, Eberhard and M. vs. Slovenia, nos. 8673/05 and 9733/05, 1 December 2009, para. 86.

47 ECtHR, Roengkasettakorn Eriksson vs. Sweden, no. 21574/16, 19 May 2022, para. 61; ECtHR, E.M. and others vs. Norway, no. 53471/17, 20 January 2022, para. 64; ECtHR, Strand Lobben and others vs. Norway, no. 37283/13, 10 September 2019, paras. 156–159.

48 ECtHR, Scozzari and Giunta vs. Italy, nos. 39221/98 and 41963/98, 13 July 2000, para. 138.

is in principle in a child's interests to preserve family ties, save where weighty reasons exist to justify severing those ties.[49]

In addition, the ECtHR has accepted on several occasions, in the context of Art. 8 of the ECHR, that parents who did not have parental rights could lodge an application on behalf of their minor children. The key criterion for the Court in these cases was the risk that some of the children's interests would not be brought to its attention and that the children would be denied effective protection of their ECHR rights.[50] This is particularly true in litigation between a parent and a state.[51] However, in cases arising out of disputes between parents, it is the parent entitled to custody who is entrusted with safeguarding the child's interests.[52] Such conflicts concerning parental rights other than custody do not oppose parents and the state on the question of deprivation of custody, where the state, as the holder of custodial rights, cannot be deemed to ensure the children's ECHR rights. In such situations, the position of a natural parent cannot be regarded as sufficient to bring an application on behalf of a child.[53]

The ECtHR also held that relatives other than the natural parents may have standing to represent the child. For example, it was determined that grandparents had standing to lodge the complaint on behalf of their grandson, who had been cared for and educated by them and with whom they had close emotional ties, meaning that there was a sufficiently close link between them. As the child's biological father prevailed in the domestic proceedings, was granted custody, and obviously had no interest in complaining, the child might have been deprived of effective protection of his rights if the grandparents did not stand to do so on his behalf.[54] Similarly, the aunt was determined to have standing to lodge an application on behalf of her nephews, who had lost their mother and had a complicated, if not hostile, relationship with their father, whereas the aunt had actively participated in the upbringing of the boys, cared for them, and provided a home for them.[55] In contrast, grandparents who did not have custody and had conflicts of interest with their grandchildren, while their parents had never been deprived of their parental responsibility, were considered to

49 ECtHR, Strand Lobben and others vs. Norway, no. 37283/13, 10 September 2019, paras. 156 and 157; ECtHR, A.K. and L. vs. Croatia, no. 37956/11, 8 January 2013, paras. 48 and 49; ECtHR, Eberhard and M. vs. Slovenia, nos. 8673/05 and 9733/05, 1 December 2009, paras. 86 and 87; ECtHR, M.D. and others vs. Malta, no. 64791/10, 17 July 2012, para. 27.

50 ECtHR, Strand Lobben and others vs. Norway, no. 37283/13, 10 September 2019, para. 157; ECtHR, Scozzari and Giunta vs. Italy, nos. 39221/98 and 41963/98, 13 July 2000, para. 138; ECtHR, Lambert and others vs. France, no. 46043/14, 5 June 2015, para. 94; ECtHR, Eberhard and M. vs. Slovenia, nos. 8673/05 and 9733/05, 1 December 2009, para. 87, and others.

51 ECHR-KS, 2022b.

52 ECtHR, C vs. Croatia, no. 80117/17, 8 October 2020, para. 55.

53 ECtHR, Eberhard and M. vs. Slovenia, nos. 8673/05 and 9733/05, 1 December 2009, para. 88; ECtHR, Moog vs. Germany, nos. 23280/08 and 2334/10, 6 October 2016, paras. 41 and 42; ECtHR, K.B. and others vs. Croatia, no. 36216/13, 14 March 2017, para. 109.

54 ECtHR, T.A. and others vs. the Republic of Moldova, no. 25450/20, 30 November 2021, paras. 34 and 35.

55 ECtHR, N.TS. and others vs. Georgia, no. 71776/12, 2 February 2016, para. 55.

have no standing to represent their grandchildren.[56] The ECtHR also denied standing to a couple with no biological ties to the child born as a result of a surrogacy agreement because of the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, as they themselves created a legal situation by engaging in conduct that was contrary to national law.[57]

It is also possible for a non-governmental organisation to be recognised as having standing to act as a *de facto* representative of a direct victim of alleged violations, even without the power of attorney or written authority from the applicant, the legal guardian, or any other competent person. However, the following "exceptional circumstances" must be considered: the victim's vulnerability; the nature of the allegations brought before the ECtHR; whether the direct victim has a next of kin or a legal guardian likely to lodge an application with the ECtHR; whether there has been contact between the direct victim and the representative; whether the representative was involved in any relevant domestic proceedings and recognised as having standing in those proceedings. In general, this would be the case with highly vulnerable persons who are manifestly incapable of expressing any wishes or views regarding their own needs and interests, and who have no other representatives to pursue their interests on their behalf (e.g. a child abandoned at birth or a child who died as a result of abuse inflicted by their parents).[58]

5. Conclusions

An examination of recent case law of the ECtHR and CJEU clearly demonstrates that more attention is being paid to the protection of children participating in various judicial and non-judicial proceedings. While their rights in the past were interpreted equally to those of adults or through the prism of their parents' rights, modern child-centric approaches have contributed to treating children as vulnerable actors who require a distinct interpretation of traditional legal concepts. Undoubtedly, this shift in perspective is at least partially due to the great influence of widely-adopted international instruments (e.g. especially the Convention on the Rights of the Child and the Guidelines on Child-Friendly Justice) over national and international authorities. They also have an increasing impact on the development of the jurisprudence of the ECtHR and CJEU, both of which refer to these acts when interpreting either the ECHR or EU law and justifying their decisions on children's rights.

However, the case law interpreting the procedural rights and guarantees of minors remains fragmented and focused on particular topics instead of the bigger

56 ECtHR, Kruškić and others vs. Croatia, no. 10140/13, 25 November 2014, paras. 101 and 102.
57 ECtHR, Paradiso and Campanelli vs. Italy, no. 25358/12, 24 January 2017, paras. 156 and 157.
58 ECtHR, L.R. vs. North Macedonia, no. 38067/15, 23 January 2020, para. 47; ECtHR, Affaire Association Innocence en Danger et Association Enfance et Partage vs. France, nos. 15343/15 and 16806/15, 4 June 2020, paras. 122 and 131. ECtHR, Centre for Legal Resources on Behalf of Valentin Câmpeanu vs. Romania, no. 47848/08, 17 July 2014, paras. 104–112.

picture. In most cases, the rights of the child to be heard, to effectively participate in court proceedings, or to access a lawyer are addressed only as stepping stones to the final decision on the core issue of the case, and not the main focus of the case. An even longer list of rights of minors remains unchallenged, meaning that it has not yet been the subject of interpretation before the ECtHR or CJEU. Given the recent trends in the area of children's rights, it is expected that the case law will continue to develop in a way to increasingly recognise children as needing special adjustments in the course of proceedings to be able to successfully pursue their rights and interests (e.g. better opportunities to participate in proceedings, better communication with adults involved in proceedings, adjustments to the courtroom, manner of speech, protocol, assistants of lawyers, social workers, psychologists).[59] Further implementation of policies concerning child-friendly justice (e.g. the Guidelines on Child-Friendly Justice of the Committee of Ministers of the Council of Europe), which are more focused on children's rights, sensitive to children's interests, and responsive to children's participation in formal and informal decision-making, should significantly contribute to such outcomes.[60]

59 See Daly and Rap, 2019, p. 315.
60 See Liefaard, 2016, pp. 905–928.

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CHAPTER 6

Non-Discrimination of Children

Martin KORNEL

ABSTRACT

This chapter discusses the historical roots of discrimination against children, including explorations about factors such as origin, gender, race, and birth status, and highlights the persistent forms of discrimination in areas such as education, gender-based practices, and social and economic rights. It provides a general outline of the evolution of the principle of the non-discrimination of children in international and regional instruments. The text outlines key discrimination concepts such as the distinction between accessory and autonomous rights, the state's negative and positive obligations to combat discrimination, formal versus substantive equality, prohibited grounds for discrimination, and various forms of discrimination, including direct, indirect, and discrimination by association. The application of the discrimination test according to Art. 14 of the ECHR in cases involving minors is explained in detail. First, the method used to assess the differences in treatment is clarified, and then it is explored how the European Court of Human Rights examines whether such differences are objectively justified (based on the legitimate aim and proportionality criteria).

KEYWORDS

Non-Discrimination of Children; Discrimination Test; Prohibited Grounds; Difference in Treatment; Legitimate Aim; Proportionality

1. Introduction

The non-discrimination of children is a fundamental principle in international human rights law and is enshrined in various international treaties and conventions. It stems from the demand for equality as a central commitment to human rights, and emphasises that all children, regardless of characteristics or background, should be treated equally and have equal access to their basic rights and protections. However, non-discrimination is not limited to being a mere principle, but rather is conceived as both a substantive and procedural right.[1] This involves the obligation of the state to prevent discrimination and the right to take action to address and rectify discrimination when it occurs.

1 Abramson, 2008, p. 2.

Martin KORNEL (2024) 'Non-Discrimination of Children'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 131–146. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_6

Sadly, discrimination against children has a long history, strong roots, and is marked by various forms of mistreatment and inequality. While there has been significant progress in recent decades on the protection of children's rights, it is important to acknowledge the historical discrimination that children have faced. Examples include discrimination based on origin, gender, nationality, race, property, and birth status. For a significant part of history, children born out of wedlock have been subjected to legal and societal discrimination, facing limitations in terms of establishing paternity, securing maintenance, and inheriting property. Gender-based discrimination against children, particularly girls, has also been a widespread phenomenon, potentially manifesting even before birth through practices such as female foeticide, infanticide, and malnutrition. Discrimination against girls can also extend to their access to education, healthcare, and other opportunities, leading to a significant gender gaps in many societies. The same goes for children from marginalised "racial or ethnic" backgrounds across various societies as they face discrimination, segregation, particularly in educational settings, denied equal access to quality education and subjected to systemic racism. As Samantha Besson points out, it is evident that the evolution of children's rights has been a gradual process, initially focused on achieving equality in relation to adults and then on extending such equality in relation to young adults and eventually to other children.[2]

Regardless of the advancements, it is disheartening that discrimination against children persists in various forms and sectors, including in education,[3] birth status,[4] through female genital mutilation, forced marriage,[5] social and economic rights, and the status of refugees, as evidenced by the literature and case law of the European Court of Human Rights (ECtHR). These practices not only violate the fundamental rights of children but also underscore the pressing need for continued efforts to eradicate such harmful traditions and protect the rights of children. The state's obligations to address and prevent discrimination are fundamental to its role in upholding the principles of justice and equality in society. At the national level, the main approaches and principles for combating discrimination include the adoption of relevant legislation (e.g. anti-discrimination laws), establishing regulatory bodies to oversee and enforce anti-discrimination laws (e.g. ombudspersons), implementing education programmes, policies (e.g. affirmative actions), robust judicial review procedures, and data collection and research initiatives. These approaches should be consistently implemented in efforts to combat discrimination against children, which must also remain a priority, with governments, international organisations, and civil society working collectively to address these issues, enforce legal protection, and ensure the well-being and safety of all children. Notwithstanding, despite all these measures that can and should be taken, there are still examples in ECtHR case law of violations of the right of children to not to

2 Besson, 2005, p. 458.
3 Peleg, 2018, pp. 113–114.
4 Maldonado, 2011, pp. 1–5.
5 Rafferty, 2013, pp. 1–23.

be discriminated against, such as the violations made by the Czech Republic,[6] Poland, [7] and Hungary.[8] These cases document that there is still much to be done in this field.

In this chapter, we first discuss the evolution of international and regional human rights instruments on the non-discrimination and promotion of equality, particularly in the context of children's rights. We then define the key concepts of discrimination law that prohibit different forms of discrimination, such as direct and indirect discrimination and discrimination by association. Subsequently, we delve into the operational dynamics of the discrimination assessment framework as established by the ECtHR, particularly in the context of cases involving minors in areas such as education, adoption, inheritance and testaments, and citizenship. The examples cover discrimination against children based on grounds such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a (national) minority, birth status, age.

2. International human rights instruments

During the 20th century, the protection of individuals, including children, against discrimination and the promotion of equality have both seen gradual strengthening, and human rights-related discussions and instruments have also witnessed progress. Throughout this period, national laws have increasingly reinforced protections against discrimination specifically targeting children, and several international instruments have marked significant milestones in the global context of human rights protection, as is explored hereinafter.

The United Nations Universal Declaration of Human Rights (1948): Although not child-specific, the Universal Declaration of Human Rights laid the foundation for the protection of human rights. Accordingly, many of its principles apply to children, implying that it did play a pivotal role in shaping the subsequent development of instruments specific to children's rights. With respect to protection against discrimination, Art. 2 plays a pivotal role, and is described herein:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The United Nations Declaration of the Rights of the Child (1959): This is the first international instrument to specifically address children's rights, outlining the basic

6 D.H. and Others vs. the Czech Republic [GC], 2007.
7 Grzelak vs. Poland, 2010.
8 Szolcsán vs. Hungary, 2023.

rights and protections to which all children are entitled. Principle 10 specifically provides that:

The child shall be protected from practices which may foster racial, religious, and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace, and universal brotherhood, and in full consciousness that his energy and talent should be devoted to the service of his fellow men.

The United Nations International Covenant on Civil and Political Rights (also known as ICCPR): as one of the core international human rights treaties, it places a strong emphasis on protection against discrimination (e.g. in Arts. 2 and 26), and specifically addresses the prohibition of discrimination towards children under Art. 24 (1), as shown herein:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property, or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Furthermore, discrimination within the meaning of the Covenant, according to the United Nations Human Rights Committee, should be understood to imply the following:

> any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on an equal footing, of all rights and freedoms.[9]

The elements of the prohibited discrimination as outlined above are (a) differentiation of similar situations, (b) absence of legitimate aim, (c) lack of proportionality of means to the aim, (d) use of suspect classifications.[10] In general, the meaning of equality is also promoted by Art. 26, stating that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

9 Human Rights Committee, General Comment 18, Non-discrimination (37th session, (1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).
10 Besson, 2005, pp. 435–437.

The United Nations Convention on the Rights of the Child (CRC, 1989): The CRC is a landmark treaty that comprehensively outlines the rights of children and covers a wide range of rights. The principle of non-discrimination has been identified as one of the four general principles of the CRC, and the protection against discrimination is specifically embedded in Art. 2, which prohibits any discrimination against children, provided the following:

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

There are also universal international human rights instruments focusing on the non-discrimination of specific groups of children, such as the United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000; Art. 9 (4)) and the United Nations Convention on the Rights of Persons with Disabilities (2006; Arts. 5 and 7). In addition to these, regional human rights instruments also protect against discrimination and promote equality. Those relevant in Europe are expounded upon below.

The Council of Europe – European Convention on Human Rights (ECHR, 1950): this is a pivotal international treaty that establishes a framework for protecting and promoting human rights across member states of the Council of Europe. The general non-discrimination provision is Art. 14, which provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Additionally, Art. 1 of Protocol 12 to the ECHR, which entered into force in 2005 and had been ratified by 20 member states by 2023, introduced a general prohibition of discrimination to any right set forth by national law:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. Any public authority shall discriminate against no one on any ground such as those mentioned in paragraph 1.

The European Union Charter of Fundamental Rights (2000): this document provides a fundamental outline of the rights and freedoms of individuals within the European Union, and also addresses the principle of non-discrimination in Art. 21:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Moreover, a series of European Union directives specifically targeting protection against discrimination have been adopted in various areas and are relevant to children.[11] Furthermore, the principle of non-discrimination and equal treatment is also contained in other regional human rights instruments, including Art. 2 of the American Declaration, Art. 24 of the American Convention on Human Rights, and Arts. 2 and 3 of the African Charter on Human and Peoples' Rights. It is clear, even from the mere wording of the respective articles, that the approaches taken to the prohibition of discrimination may differ, with variations in definitions, the scope of prohibited grounds, the mechanisms for individual complaints, and the accessibility or autonomy of the right. In the following section, we highlight these differences and similarities in a more detailed manner, with a special focus on the CRC and the ECHR, as these are of the utmost importance. Specifically, the importance of the CRC lies in its universal nature, its comprehensive framework for the protection and promotion of children's rights, strong monitoring mechanism based on reporting to the Committee on the Rights of the Child (CRC Committee), observation reports, and individual communications (complaints) mechanism. The importance of the ECHR lies in its use by the ECtHR when playing its crucial role of the protection and enforcement of human rights in Europe.

3. Key concepts in non-discrimination and equality of children

Definition of the child: the definition of who qualifies as a child varies across international instruments dedicated to children's rights. According to the CRC, a child refers to every human being below the age of 18 years, unless, under the law applicable to the child, the majority is attained earlier. Meanwhile, the ECtHR has accepted

11 For example, Citizenship Directive, Family Reunification Directive, Racial Equality Directive, and Gender Directive. See: European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child. pp. 51–53.

applications by and on behalf of children irrespective of their age,[12] albeit it has also accepted the CRC's definition in its jurisprudence, endorsing the "below the age of 18 years" notion.[13]

Accessory vs. autonomous right: the non-discrimination provisions in many international instruments (e.g. CRC, the International Covenant on Civil and Political Rights, Art. 12 to the ECHR) are considered accessory (subordinate rights), meaning that they prohibit discrimination only in the enjoyment of the rights outlined in the respective convention. Although the CRC Committee elevated the right to non-discrimination to "an umbrella right" in the context of the CRC, it still does not provide full and autonomous application.[14] However, Art. 1 of Protocol 12 to the ECHR establishes non-discrimination as an autonomous, freestanding right.[15] This means that non-discrimination is guaranteed in a broader sense and is not limited to the specific rights protected by the instrument.

The negative and positive obligation of the state: non-discrimination might entail both a negative (to refrain from actions that violate the rights of the child) and a positive obligation (to protect, fulfil, or even take positive action under some circumstances). The positive obligation of the state arising out of Art. 2 of the CRC encompasses, according to CRC Committee, the obligation to collect disaggregated data to identify children experiencing discrimination, provision of recommendations on developing comprehensive strategies, conduction of research into discrimination, introduction of information, and implementation of awareness raising campaigns. According to the ECtHR, Art. 14 to the ECHR may imply the obligation of states to prevent, stop, and/or punish discrimination (*Pla and Puncernau vs. Andorra*, 2004, § 62), take "positive measures" (*Horváth and Kiss vs. Hungary*, 2013, § 104), or apply "reverse discrimination" or "affirmative action" to correct factual inequalities. For example, in *Horváth and Kiss vs. Hungary*, in 2013, which was a case concerning the systemic placement of Roma children in special schools in Hungary, the ECtHR concluded that, in the context of the right to education of members of groups that suffered past discrimination in education with continuing effects, the structural deficiencies called for the implementation of positive measures in order, *inter alia*, to assist the applicants with any difficulties they encountered in following the school curriculum. Therefore, some additional steps were needed to address these problems, such as active and structured involvement of the relevant social services.

Formal and substantive equality: international human rights bodies (e.g. the CRC Committee) and scholars distinguish between formal and substantive equality. The formal approach is based on the perception that a person's characteristics should be viewed as irrelevant when determining whether they have a right to a benefit. The substantive approach requires the "equality of results" and the "equality of

12 European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child. p. 19.
13 Ibid.
14 Abramson, 2008, p. 4.
15 Moeckli, 2010, p. 196.

opportunity", or the primacy of dignity for peoples and groups that are disadvantaged and marginalised in society. Thus, the central question of substantive equality is not whether the law makes distinctions or the state is motivated by prejudice, but whether the effect of the law, policy, or practice perpetuates disadvantage, discrimination, exclusion, or oppression. Some scholars such as Freeman ask for a reconceptualisation of substantive equality to a four-dimensional concept of recognition, redistribution, participation, and transformation.[16] Importantly, the ECtHR jurisprudence surrounding Art. 14 of the ECHR has evolved, shifting from a formal model of equality to a more substantive one.[17]

Prohibited Grounds: The list of prohibited grounds for discrimination varies across the human rights instruments, with some being commonly featured (e.g. race, sex, religion, and origin) and others feature only in specific instruments (e.g. the CRC features disability and ethnic origin). Furthermore, while some instruments may not provide a specific list, some provide a non-exhaustive list (e.g. ECHR), and others provide an exhaustive list (e.g. Convention on the Elimination of All Forms of Discrimination Against Women, International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities) of prohibited grounds. Importantly, some international bodies like the ECtHR have qualified some prohibited grounds as particularly invidious; accordingly, in cases involving them, these bodies require particularly solid justification. The CRC Committee does not make this differentiation, but tends to pay special attention, in its practice, to grounds such as gender, disability, race, and birth status.

Direct discrimination: this form of discrimination occurs if one child is treated less favourably than another child in analogous, or relevantly similar situations, and 'based on an identifiable characteristic, or status' (*Biao vs. Denmark* [GC], 2016, § 89; *Carson and Others vs. the United Kingdom* [GC], 2010, § 61; § 175; *Burden vs. the United Kingdom* [GC], 2008, § 60).

Indirect discrimination: this form of discrimination occurs when a seemingly neutral rule or requirement disproportionately affects specific groups of children. An ECtHR case that clearly illustrates this concept is *D.H. and Others vs. the Czech Republic* [GC], 2007. In this landmark case, Roma children brought their complaint contesting a practice rooted in neutral statutory regulations, which in turn led to the over-representation of Roma children in special schools designed for children with intellectual disabilities. Despite the rule's apparent neutrality, its impact resulted in discriminatory outcomes that significantly disadvantaged the Roma children.

Discrimination by association: this form of discrimination occurs when the protected ground relates to another person somehow connected to an applicant. The case *Guberina vs. Croatia* (2016) is a clear example of such discrimination, as he applicant, a man who had a child with a severe disability, lived in an inaccessible flat area and requested a tax exemption for buying accessible housing. He argued that his

16 Fredman, 2016, pp. 712–738.
17 O'Connell, 2009, p. 133.

current flat did not meet his family's "housing needs", a request to which the Croatian authorities denied without considering the son's disability. The ECtHR found that the authorities had applied the law too restrictively and failed to consider the applicant's family's specific needs.

4. ECtHR discrimination test and case examples of Art. 14

While the CRC has a broad and extraterritorial scope of application, that is, it is applicable to every child, regardless of their location, nationality, or immigration status, including international waters and refugee situations, the ECHR is much more limited. The latter's applicability is closely related to its admissibility criteria, which in turn serves to limit the scope of cases that can be brought before the ECtHR. In this context, personal, temporal and jurisdictional incompatibility are specifically paramount. More specifically, in adjudicating cases involving allegations of a violation of Art. 14 of the ECHR, the ECtHR employs a structured test to assess the claims. This section expounds upon this test and delivers examples of ECtHR case law relevant to children's discrimination.

First, for Art. 14 of the ECHR to be applicable, the facts of the case must fall within the broader material scope of one or more of the ECHR's substantive articles (*E.B. vs. France* [GC], 2008, § 47;), which does not necessarily mean that the substantive article must have been violated. For example, in the case *Genovese vs. Malta,* 201, the ECtHR explained that although the right to citizenship was not an ECHR right and its denial in the applicant's case did not give rise to a violation of Art. 8, its impact on the applicant's social identity (i.e. as a part of private life) had been such as to bring the right within the general scope of Art. 14 of the ECHR. This gave way for further infringement review from the perspective of non-discrimination.

Therefore, if the facts of the case fall within the ambit of the substantive ECHR article, the Court applies the following test: 1. Has there been a difference in the treatment of persons in analogous or relevantly similar situations, or a failure to treat differently persons in relevantly different situations? 2. If so, is such difference, or absence of difference, objectively justified? In particular, a. Does it pursue a legitimate aim? b. Are the means employed reasonably proportionate to the aim pursued?

4.1. Difference in treatment and prohibited grounds

The applicant must demonstrate that they have been treated differently from another person or a group of persons who are in a relevantly similar situation, or that they have been treated equally to a group of persons who are in a relevantly different situation. The other person or group of persons to whom the applicant is compared is commonly referred to as the "comparator". The following cases highlight various instances of differential treatment according to ECtHR's assessment.

1. *Cusan and Fazzo vs. Italy*, 2014: The applicants were a married couple disproving Italian law that allows only the husband's surname, and thus not the

wife's, to be given to a legitimate child. The comparator was an unmarried couple. The Court found this to be discriminatory.[18] Ground for discrimination: parent gender (a similar case is that by *León Madrid vs. Spain*, 2021)

2. *D.H. and Others vs. the Czech Republic* [GC], 2007: The applicants were Roma minors complaining that they were treated less favourably than non-Roma minors in comparable situations. The national legislation applied in practice resulted in a disproportionate number of Roma children being placed in special schools without justification, meaning that these children were placed at a significant disadvantage. the ECtHR scrutinized the tests used to evaluate the children's intellectual capacities as "general policy or measure" used to decide whether to place thee children in normal or in "special" schools for children with learning disabilities. Ground for discrimination: race and colour (ethnicity) (similar cases are *Sampanis and Others vs. Greece*, 2008; *Oršuš and Others vs. Croatia* [GC], 2010).
3. *Terna vs. Italy*, 2021: The applicant, a Roma woman, filed a complaint because her granddaughter was taken into public care because she had lived in a criminal environment and the applicant had been unable to care for her. The comparator was non-Roma children (and caring persons). Despite the available data showing that many Roma children were taken into public care in Italy, in the present case, the domestic courts had not used arguments concerning the child's ethnic origin; instead, their actions were based on the child's best interests. Therefore, the ECtHR did not conclude that the domestic court decisions were motivated by the children's ethnic origin. Alleged ground for discrimination: race and colour (ethnicity).
4. *Palau-Martinez vs. France*, 2003: The applicant, a Jehovah's Witness and mother of two children, complained that she had been treated differently based on her belief – the comparator was other parents – when national courts established the residence of their children with their father. Ground for discrimination: religion.
5. *Fabris vs. France* [GC] 2013: In this case, children born out of wedlock were treated differently from legitimate children because of the possibility of claiming only half the share of their deceased parents' estate.[19] Ground for discrimination: birth status.
6. *Yocheva and Ganeva vs. Bulgaria*, 2021: The ECtHR held that the applicant, a single mother whose children were not recognised by their father, asking for a monthly allowance was in a relevantly similar situation to the single parents of children whose legal ties to both parents had been established

18 European Court of Human Rights. Registry. Guide on Art. 14 of the European Convention on Human Rights and on Art. 1 of Protocol No. 12 to the Convention, p. 16 [Online]. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_14_art_1_protocol_12_eng (Accessed: 8 August 2024).
19 Ibid.

before the other parent's death by their father.[20] Ground for discrimination: birth status.

7. *Mazurek vs. France*, 2000: The applicant, a child born in adultery, was treated differently by national inheritance laws compared to children born in wedlock or even children born out of wedlock but not of an adulterous relationship. Ground for discrimination: birth status.
8. *Pla and Puncernau vs. Andorra*, 2004: In this case, the applicant was an adopted child who could not inherit from his paternal grandmother. This was because the grandmother would leave the estate to her son on the basis that he was to pass on his inheritance to a child or grandchild "from a legitimate and canonical marriage". The domestic courts held that an adopted child did not fit this description because, by choosing not to include adopted children expressly, she must have intended to exclude them. The ECtHR noted that adopted children were in the same position as biological children in all respects.[21] Ground for discrimination: birth status.
9. *Genovese vs. Malta*, 2011: This case concerned the refusal to grant Maltese citizenship to a child born out of wedlock and whose mother was not Maltese. The applicant was treated differently compared to other children with a father of Maltese nationality and a mother of foreign nationality, and the only distinguishing factor that rendered him ineligible for citizenship was that he was born out of wedlock. Ground for discrimination: birth status
10. *Çam vs. Turkey*, 2016: the applicant filed the application following the Turkish National Musica Academia's withdrawal of an entrance offer upon insufficient facilities to care for her special needs. Ground for discrimination: other status - disability (blindness).

Therefore, differences in treatment (*D.H. and Others vs. the Czech Republic* [GC], 2007) or failure to treat differently (*Çam vs. Turkey*, 2016) can result in any form of discrimination, such as direct, indirect, or by association. However, Art. 14 of the ECHR does not prohibit all the different treatments, only those that are not justified and thus do not pursue a legitimate aim and are not proportionate.

4.2. Justification: legitimate aim

The ECtHR acknowledges certain legitimate aims that may justify differences in treatment, which are provided in the following list (even if it is not exhaustive): 1. protection of national security (e.g. *Konstantin Markin vs. Russia* [GC], 2012, § 137); 2. facilitation of rehabilitation of juvenile delinquents (e.g. *Khamtokhu and Aksenchik vs. Russia* [GC], 2017, § 80); 3. protection of a tradition (e.g. *Mazurek vs. France*, 2000); 4. protection of acquired rights, such as the stability of completed inheritance arrangements (e.g. *Fabris vs. France* [GC], 2013); 5. protection of the well-being and

20 Ibid, p. 17.
21 Fenton-Glynn, 2021, p. 209.

rights of the child (e.g. *Schwizgebel vs. Switzerland*, 2010; *Palau-Martinez vs. France*, 2003); 6. adapting the education system to the specific needs of the child (e.g. *D.H. and Others vs. the Czech Republic* [GC], 2007; *Oršuš and Others vs. Croatia* [GC], 2010).

Importantly, there also exist unacceptable aims that cannot justify differences in treatment without the necessity to explore proportionality further. For example, general assumptions or prevailing social attitudes in a particular country were considered to be insufficient justification for a difference in treatment on the grounds of sex (e.g. *Ünal Tekeli vs. Turkey*, 2004, § 63; *Konstantin Markin vs. Russia* [GC], 2012, § 127; *Cusan and Fazzo vs. Italy*, 2014, § 67). Furthermore, in some cases, the government is not even able to present any reasonable legitimate aim (e.g. *Genovese vs. Malta*, 2011; *Pla and Puncernau vs. Andorra*, 2004). A lack of a legitimate aim necessarily leads to the ECtHR finding a violation of Art. 14 without the need to explore proportionality.

4.3. Justification: proportionality

If a difference in treatment is legitimised by its aim, then such difference has to strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms of the individual (e.g. *the Belgian linguistic case*, 1968, § 10 of "the Law" part). States enjoy some margin of appreciation when its scope varies according to the circumstances, subject matter, and background of the case. For example, the scope might be wide (e.g. in matters related to general measures of social strategy: *the Belgian linguistic case*, 1968, § 10 of "the Law" part) or reduced (e.g. in matters related to ethnic origin: *D.H. and Others vs. the Czech Republic* [GC], 2007). Importantly, the ECtHR considers that very weighty reasons must be advanced before a distinction on the grounds of birth outside marriage can be regarded as compatible with the ECHR (e.g. *Fabris vs. France* [GC], 2013), including when the difference in treatment affects the parents of children born in or out of wedlock (e.g. *Sahin vs. Germany* [GC], 2003; *Sommerfeld vs. Germany* [GC], 2003).

1. *D.H. and Others vs. the Czech Republic* [GC], 2007: the ECtHR found unproportionate and insufficient the means used to pursue a legitimate aim. In particular, there was a lack of safeguards to ensure that the special needs of Roma children, as members of a disadvantaged class, were considered in their schooling arrangements. For instance, the test for "sorting out" children was designed in a way fitting to the mainstream Czech population, and its results were not analysed in light of the particularities and special characteristics of the Roma children who were tested. Accordingly, there was a violation of Art. 14 of the ECHR in conjunction with Art. 2 of Protocol No. 1.
2. *Palau-Martinez vs. France*, 2003: the ECtHR considered that the national court did not inquire sufficient information on the children's lives with each of their parents to ascertain the impact, if any, of their mother's religious practices on their lives and upbringing. That is, the ruling had been based only on general considerations without establishing a link between the children's living conditions with their mother and their real interests sufficient to being

reasonably proportionate. Accordingly, there was a violation of Art. 8 of the ECHR in conjunction with Art. 14.

3. *Fabris vs. France* [GC], 2013: in this case, when considering proportionality, the ECtHR found that the protection of the inheritance rights of the applicant's half-brother and -sister was not sufficiently weighty to override the applicant's claim to a share in his mother's estate, especially because of the grounds for discrimination and previous actions of the applicant. Therefore, there was a violation of Art. 14 of the ECHR in conjunction with Art. 1 of Protocol No.1.
4. *Yocheva and Ganeva vs. Bulgaria*, 2021: the ECtHR argued that:
   states are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy (...) and the resources which the authorities may devote to family benefits are inevitably limited. Moreover, widely different systems for social benefits exist in the States Parties to the Convention. However, the lack of a common standard does not absolve those States which adopt family allowance schemes from the obligation to grant such benefits without discrimination (...).
   Therefore,
   the argument that making the applicant's category eligible for the benefit because it would result in the authorities having to pay more than they currently do is unacceptable and not in itself sufficient for justifying such a difference in treatment.
5. *Mazurek vs. France*, 2000: similar to *Fabris vs. France* [GC], 2013, the difference in the treatment of children born out of wedlock was not proportionate to achieving the aim of protecting tradition, which inevitably led to the ECtHR finding a violation of the ECHR in this case.
6. *Çam vs. Turkey*, 2016: although the commission originally (i.e. in *Dahlberg and Dahlberg vs. Sweden*, 1994) held that states have a wide margin of appreciation as to how to make the best possible use of the resources available to them in the interests of children with disabilities, the approach in this case has shifted towards a more protective one. The ECtHR found that the reasonable accommodation of applicants' needs imposes a proportionate obligation on governments, and that refusal to provide such accommodation constitutes discrimination and is contrary to the ECHR.

5. Conclusions

Combating all forms of discrimination is a top priority for international and European institutions promoting and protecting human rights. Thus, many international conventions, European Union law, and national law instruments include specific provisions for protection against discrimination in general or in respect of children. In the European jurisprudence context, the ECtHR case law plays a critical role because it

provides a comprehensive toolkit to test discrimination cases employed, for instance, by national constitutional courts.[22]

The test comprises the following steps: 1. Has there been a difference in the treatment of children in analogous or relevantly similar situations, or a failure to treat differently persons in relevantly different situations? 2. If so, is such difference, or absence of difference, objectively justified? In particular, a. Does it pursue a legitimate aim? b. Are the means employed reasonably proportionate to the aim pursued?

The tricky part of this test lies mainly within the proportionality criteria and mostly because it relies on the concept of the margin of appreciation, which many commentators criticise for its seemingly lack of a uniform or coherent application.[23] In light of this, it is not surprising that in cases of some prohibited grounds (e.g. birth status) or aims (e.g. protection of tradition) the outcome is more predictable, whereas in the cases of other grounds (e.g. disability) or aims (e.g. measures of economic or social strategy) the ECtHR is seemingly more open to find a violation of Art. 14 of the ECHR. Notwithstanding, and as explained above, it seems that the ECtHR is recently tending to find a violation even in those cases where a wider margin of appreciation applies (e.g. *Çam vs. Turkey*, 2016; *Yocheva and Ganeva vs. Bulgaria*, 2021).

22 Czech Constitutional Court, III. ÚS 1068/22.
23 Letsas, 2006, pp. 705–706.

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CHAPTER 7

Family Life- and Identity-Related Rights of the Child

Agnieszka WEDEŁ-DOMARADZKA

ABSTRACT

This study addresses the issue of family life in the context of private life – the issue of identity. The study aims to provide insights regarding the challenges associated with ensuring the right to family life and identity prevalent today. The analysis is conducted based on regional standards of the Council of Europe, mainly the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights case law, which has developed from it. The scope of the analysis includes the right to family life and right to identity in the European Court of Human Rights, the origin of the child and its relation to the right to family life and identity, child registration and its relation to the right to family life and identity, the child's name and surname as elements shaping the child's identity, nationality, and identity, parent-child contact, and the right to maintain identity. The study highlights key trends and challenges related to respect for identity in the context of existing and new phenomena occurring in the societies of Central European countries.

KEYWORDS

family life, child, best interests of the child, right to privacy, identity, European Court of Human Rights, European Convention of Human Rights, parental rights

1. Introduction

The right to family life and rights related to identity are firmly linked, mainly because identity is formed at an early stage of an individual's life and develops throughout life within the framework of considerably strong links with members of the immediate family. Hence, in the context of the child, the relationship between these two rights takes precedence as the most fitting and legitimate in terms of the scope of consideration.

From the perspective of human rights, as understood under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the right to family and private life and the right to identity are closely related. However,

Agnieszka WEDEŁ-DOMARADZKA (2024) 'Family Life- and Identity-Related Rights of the Child'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 147–168. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_7

while the former is articulated in the wording of Article 8 of the ECHR, the latter is not explicitly mentioned in the wording of the Convention but is an immanent part of the right to private and family life and is so considered by the European Court of Human Rights (ECtHR) in its case law.

This study situates the issue of the right to family life and the right to identity in the context of the rights and situation of the child and the right to identity. This is particularly significant at this stage because most identity issues are shaped precisely during childhood and develop and change with age. In this context, several issues related to the child's situation in the family must be considered.

First, it will be necessary to address the question of identity in the context of a child's descent from each parent and situations in which the child is not genetically descended from either or both parents. Such a situation may arise when adopting a child, as well as when using specific assisted procreation methods. Second, the issue of the child's registration must be addressed. Such a procedure does not pose a problem when the child is born in the country of registration and of the particular country's nationals. Nevertheless, it can generate difficulties in the case of migrant children or when parents wish to register a child born abroad. Third, the issue of giving the child a name and a surname must be considered. While the former situation will be more of an administrative control, the latter (i.e. the surname) may carry broader complications concerning whether there are grounds for the child to bear the surname of both or one of the parents. It also seems necessary to analyse the child's identity in the context of contact with the parents – those raising the child and, in foster care cases, the natural parents. Notably, apart from the right to the child's identity in the family context, the question of the right to preserve and nurture this identity (relevant from the perspective of adoption or migration) will be relevant.

The issues addressed will be based on an analysis of the guarantees typical of the Council of Europe system, particularly regarding the existing case law practice concerning Central European countries, the general case law practice concerning the countries of the Council of Europe system, and universal standards, albeit only to the extent that they are used in the case of conflicts concerning the right to family life and the right to identity being the subject of ECtHR decisions. The analysis presented will allow for the formulation of conclusions and *de lege ferenda* postulates that may, in the future, form the basis for considerations accepted by European countries.

2. Right to family life and right to identity in the ECHR

The protection of the right to private and family life, place of residence, and correspondence are regulated in Article 8 of the ECHR. According to the text of this article, '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic

wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'[1]

From the perspective of the considerations made, it is necessary to examine the protection of private life, which has – as one of its constituents – an element of the right to identity and the protection of the right to family life. Notably, the ECtHR, in its jurisprudence, often refers to Article 7 of the Convention on the Rights of the Child (hereinafter CRC). According to this article, the child 'shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'.[2] Reference can also be found to Article 8 of the CRC, which contains a regulation indicating that 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference'. This regulation obligates States Parties to the CRC (including all Council of Europe member states) to act to restore elements of identity. Over time, understanding the right to family life and private life in the context of identity has taken on a broader context.

When ruling in the context of the concept of family life, the ECtHR addressed this issue broadly and independently of the legal regulations adopted by member states of the Council of Europe.[3] A broad approach to the concept of "family life" allows it to encompass a wide range of parent-child relationships,[4] far broader than merely the relationship of spouses with their children.[5] According to the findings of the ECtHR in deciding cases relating to family life, it has been established that family life includes relationships between parents in a de facto relationship only and not in marriage and their children,[6] relationships between parents and their children after the end of the marriage,[7] relationships between same-sex couples,[8] relationships between children and their grandparents,[9] relationships between siblings,[10] irrespective of their age,[11] and relationships occurring between an uncle or aunt and his/her nephew or niece.[12] There are also cases in the ECtHR case-law where the term "family life" is extended to

1 Article 8 of the Convention on the Rights of the Child (CRC) United Nations, Treaty Series, vol. 1577, p. 3.
2 Art 7, CRC.
3 Piech, 2009, p. 149.
4 Schabas, 2015, p. 389.
5 Although these are considered the most obvious: case Berrehab vs. the Netherlands, no. 10730/84, 21 June 1988, § 21.
6 Case X, Y and Z vs. United Kingdom [GC], no. 21830/93, 22 April 1997, §34; case Johnston and others vs. Ireland, no. 9697/82, 18 December 1986, §56; case Van der Heijden vs. the Netherlands [GC], no. 42857/05, 3 April 2012, §50; case Keegan vs. Ireland, no. 16969/90, 26 May 1994, §44.
7 Case Ilya Lyapin vs. Russia no. 70879/11, 30 June 2020, §44.
8 Case Schalk and Kopf vs. Austria, no. 30141/04, 24 June 2010, §§ 90-95.
9 Case Marckx vs. Belgium, no. 6833/74, 19 June 1979, § 45-46.
10 Case Olsson vs. Sweden, no. 10465/83, 24 March 1988, §59.
11 Case Boughanemi vs. France, no. 22070/93, 24 April 1996, §32-35.
12 Case Terence Boyle vs. United Kingdom, no. 16580/90, 28 February 1994, §13-14, also Lazoriva vs. Ukraine, no. 6878/14, 17 April 2018, § 65.

relationships between parents and children born in a second relationship or between children born out of wedlock, particularly where paternity has been acknowledged, and the parties have a close personal relationship,[13] as well as between adoptive or foster parents established for children deprived of their natural parents.[14] Moreover, some circumstances justify extending the scope of "family life" beyond the age of majority where there are "additional elements of dependency".[15] Notably, the mere existence of a biological relationship between parents and the child is considered insufficient to confer protection under Article 8 of the ECHR. Other elements would also be necessary, particularly cohabitation. However, in some situations, a relationship based on blood ties is supported by factors demonstrating that the relationship is sufficiently durable.[16] Conversely, the mere will, desire, or determination to have a family is not protected under the right to family life.[17]

Concerning the right to family life, it should also be stated that the ECtHR decides possible violations of this right with a wide margin of appreciation.[18] The more comprehensive this margin, the smaller the consensus of the Council of Europe member states on a given issue.[19] Decisions must also be made to guarantee that States ensure the child's best interests.[20] Thus, it must be emphasised that ensuring the child's best interests takes precedence over parental decisions and that state intervention need not take place only in extreme circumstances, but when it is, in the opinion of the state authorities, justified.[21]

About the consideration of the right to privacy, which is often considered together with the right to family life, it should be pointed out that the ECtHR has not chosen, as in the case of the right to family life, to indicate a concrete definition of what is protected as privacy,[22] recognising its broad protective scope[23] and thus impossible to define.[24] Certainly, ECtHR case law indicates that the concept of private life is broader than that of privacy. Simultaneously, it is a sphere in which an individual can freely

13 Decision on the admissibility of the application X vs. the Netherland no. 8427/78, 13 March 1980.

14 Decision on the admissibility of the application Jolie and others vs. Belgium no. 11418/85, 14 May 1986.

15 Case Belli and Arquier-Martinez vs. Switzerland no. 65550/13, 11 December 2018, § 65; case Emonet and Others vs. Switzerland no. 39051/03, 13 December 2007, § 80.

16 Case Katsikeros vs. Greece, no. 2303/19, 14 November 2022, §43.

17 Case E.B. vs. France [GC], no. 43546/02, 22 January 2008, §41; case Petithory Lanzmann vs. France, no. 23038/19, 12 November 2019, §18.

18 Case Sommerfeld vs. Germany [GC], no. 31871/96, 8 July 2003, §63.

19 Case Paradiso and Campanelli vs. Italy [GC], no. 25358/12, 24 January 2017, §184.

20 Case Zaunegger vs. Germany, no. 22028/04, 3 December 2009, § 60.

21 Case Vavřička and Others vs. the Czech Republic [GC], no. 47621/13, 8 April 2021, §§ 286-288.

22 Theory and Practice of the European Convention on Human Rights, 2006, p. 664-665.

23 Case Niemietz vs. Germany, no. 13710/88, 16 December 1992, § 29; case Pretty vs. the United Kingdom, no. 2346/02, 29 April 2022, § 61; case Peck vs. the United Kingdom, no. 44647/98, 28 January 2003, § 57.

24 Case Costello-Roberts vs. the United Kingdom, no. 13134/87, 25 March 1993.

develop and realise his or her personality internally[25] and in relation to other people and the outside world.[26] Analogous to family life, private life is identified before the ECtHR from the perspective of the various situations that fall within its scope. Thus, issues relating to name,[27] image protection,[28] family background,[29] descent from specific persons,[30] ethnic identity,[31] physical and social aspects of a person's identity,[32] the right to establish and develop relationships with other people and the outside world,[33] physical and moral integrity,[34] reputation,[35] or sexual orientation[36] and identity are identified as private life.[37]

The right to identity as an element of the right to private life[38] covers a relatively broad conceptual scope. Identity, as such, is identified as complex. First, it includes what we think and feel about ourselves and how we imagine ourselves. Second, it is associated with relationality, by which it identifies us in terms of the relationships we have with other people and society and the effects of these relationships. Third, temporality allows us to identify what we are at a given moment and the fact that we will change.[39] Notably, the issue of identity is also linked to issues such as our relationships, nationality, belonging to a religious group, image of oneself, or the issue of how other people perceive us. It is also emphasised that the most critical aspects of identity are formed during childhood and remain with the individual throughout his or her life.[40]

25 Case Bărbulescu vs. Romania [GC], no 61496/08, 5 September 2017, § 71.
26 Roagna, 2012, p. 12; case Denisov vs. Ukraine [GC], no. 76639/11, 25 September 2018, § 95.
27 Case Szabó and Vissy vs. Hungary, no. 37138/14, 12 January 2016. However, the identity connection that a person has with his family is indicated here, by: Schabas, 2015, p. 375.
28 Case of Dupate vs. Latvia, no. 18068/11, 19 November 2020, § 40.
29 The Court had previously held that the determination of the father's legal relationship with the alleged child concerned his "private life", see: case Rasmussen vs. Denmark, 8777/79, 28 November 1984, §33; case R.L. and others vs. Denmark, no. 52629/11, 7 March 2017, § 38.
30 Case Mikulić vs. Croatia no. 53176/99, 7 February 2022 and Kutzner vs. Germany, no. 46544/99, 26 February 2002, § 66; case Odièvre vs. France [GC], no. 42326/98, 13 February 2003, §42-44; case Jäggi vs. Switzerland, no. 58757/00, 3 July 2003, § 38.
31 Case Ciubotaru vs. Moldova, no. 27138/04, 27 April 2010, § 53.
32 Case Mile Novaković vs. Croatia, no. 73544/14, 14 December 2020, §42.
33 Case S. and Marper vs. United Kingdom [CG], no. 30562/04 and 30566/04, 4 December 2008 § 66; case Gillberg vs. Sweden [GC], no. 41723/06, 3 April 2012, § 66; case Bărbulescu vs. Romania [GC], no. 61496/08, 5 September 2017, § 70.
34 Case F.O. vs. Croatia, no. 29555/13, 22 April 2021, §59; case Dubská and Krejzová vs. the Czech Republic [GC], no. 28859/11 and no. 28473/12, 15 November 2016.
35 Dissenting opinion of judge Zagrebelsky in case of Armonienė vs. Lithuania, no. 36919/02, 25 November 2008, case Pfeifer vs. Austria, no. 12556/03, 15 November 2007, §35; case Petrina vs. Romania, no. 78060/01, 14 October 2008, §§27-29 and 34-36; case Timciuc vs. Romania, no. 28999/03, 12 October 2010, § 143, case of Ion Cârstea vs. Romania, no. 20531/06, 28 October 2014, §29; case of L.B. vs. Hungary [GC] no. 36345/16, 9 March 2023, §102.
36 Case Dudgeon vs. the United Kingdom, no. 7525/76, 22 October 1981, §41.
37 Case of A.P., Garçon and Nicot vs. France, no. 79885/12, no. 52471/13 and no. 52596/13, 6 April 2017, §92.
38 Jumakova, 2020, p. 240.
39 Identity and Migration in Europe: Multidisciplinary Perspectives, 2014, p. 78.
40 Marshall, 2022, p. 25.

The CRC also provides aspects relating to freedom of thought, conscience, and religion, as well as what this means for identity. It presupposes the protection of these values[41] and indicates how they fit into the protection of the right to respect for identity.[42] From the perspective of ECtHR jurisprudence, which always considers a broader context than just ECHR regulations and national law, guaranteeing these rights under the CRC is also essential.

Evidently, the right to private family life and the protection of correspondence are among the types of rights guaranteed by the ECHR, which may be subject to limitations by public authorities. Simultaneously, it should be stressed that the ECtHR has repeatedly pointed out that any interference by public authorities with an individual's right to respect for private life, family life, home, and correspondence must be lawful.[43] Article 8 also requires that the interference be necessary for a democratic society[44] and determined by the interests of national security, public safety, or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[45]

3. Origin of the child and its relation to the right to family life and identity

Awareness of our origins and knowledge of our parents and birth history are essential to respect private and family life. However, these relationships and associated situations are extremely complex and varied. The question of the child's origin and the child's knowledge of that origin will be dealt with differently in the case of adoption, the situation of assisted procreation procedures, and the relationship between the child and the father of an out-of-wedlock child. Further, the right to know one's origin may compete with the rights of others, the public interest, or the child's best interests.[46] To conduct the "balancing of interests test", it is also necessary to consider the general interest of legal certainty.[47] Additionally, it is necessary to examine these findings from a procedural perspective. From the perspective of the ECHR, it is also necessary to pay attention to aspects such as the point in time at which a person who does not know his or her origin became aware of his or her biological reality, whether requests relating to the possibility of establishing this identity were made before the expiry of the time limit[48] laid down in national law, and whether there are alternative

41 Article 14 CRC.
42 Article 8 CRC.
43 Case Vavřička and others vs. Czech Republic [GC], §§ 266-269.
44 Case Piechowicz vs. Poland, no. 20071/07, 17 April 2012, §212 (CHECK).
45 Article 8 of the ECHR.
46 Besson 2007, p. 138., also: case Boljević vs. Serbia, no. 47443/14, 16 June 2020, § 50.
47 Case Backlund vs. Finland, no. 36498/05, 6 July 2010, § 46.
48 Case Mizzi vs. Malta, no. 26111/02, 12 January 2006 §§109-11; case Shofman vs. Russia, no. 74826/01, 24 November 2005, §40 and §43.

legal remedies in the case of time-barring[49] or exceptions to the application of the time limits when a person becomes aware of his or her presumed biological origin after the expiry of the time limits allowing for its establishment.[50]

In its jurisprudence, the ECtHR has been clear about the importance of the early period of life in establishing one's identity and has emphasised that individuals 'have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development'.[51] The ECtHR recognised the childhood stage as crucial and emphasised that '(...) people have a right to know their origins, that right is derived from a wide interpretation of the scope of the notion of private life. The child's vital interest in its personal development is also widely recognised in the general scheme of the Convention'.[52] Similarly, this means that knowledge of one's background may be necessary to ensure the realisation of other individual rights under the ECHR. The guarantees provided by the ECHR are so far-reaching that even the fact of death from one of the alleged parents or the age of the person seeking this information does not prevent them from being realised. In *Jäggi vs. Switzerland*, it was pointed out that 'persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity'.[53]

Turning to specific issues concerning determining a child's origin in the context of identity, it is necessary to start with the most settled issue – adoption. The ECtHR jurisprudence on adoption has been primarily concerned with domestic adoption, which is the predominant form in CoE member states. Usually, foreign adoptions are combined with the need to fulfil additional procedural requirements and are thus rare. The fact that foreign adoptions are restricted has its justification in possible abuses (corruption, financial benefits, and procedural deficiencies) that may be beyond the control of the domestic legal system. Conventional solutions prove helpful in this respect. Within the circle of CoE countries, the document that organises and guarantees the provision of adoption standards is the European Convention on the Adoption of Children (Revised).[54] In its content, the Convention provides regulations relating to the fact that adoption must be granted by a competent judicial or administrative authority (Article 3), the assurance that the adoption process will take place with respect for the best interests of the child (Article 4), the voluntary consent of the biological parents to the adoption (Article 5), as well as the guarantee that any undue financial advantage resulting from the adoption of the child is prohibited (Article 17).

49 Case Boljević vs. Serbia, no. 47443/14, 16 June 2020, §50.
50 Case Shofman vs. Russia §43; case Backlund vs. Finland §47.
51 Case Gaskin vs. the United Kingdom, no. 10454/83, 7 July 1989.
52 Case Odièvre vs. France [GC], no. 42326/98, 13 February 2003, §42-44, case Johansen vs. Norway, no. 10600/83, 7 August 1996, §78; case Mikulić vs. Croatia, §64; case Kutzner vs. Germany §66.
53 Case Jäggi vs. Switzerland, §38.
54 European Convention on the Adoption of Children (Revised), Council of Europe Treaty Series – No. 202, Strasbourg, 27 November 2008.

From the perspective of preserving the child's identity, the most significant aspects are the attention paid to the participation of state authorities in the adoption process and the principle of protecting the child's best interests. Adoption issues in Europe are also influenced by the Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption.[55]

Following the provisions of the Convention, the authorities dealing with adoption must take steps to collect, store, and exchange information on the child's situation[56] to prepare appropriate adoption documents containing data on the child's identity, adoptability, background, social environment, family history, and medical history, including the child's family and any special needs.[57] From an identity perspective in the broader context, Article 16(1)(b) is considerably relevant; it stipulates that the child's upbringing and ethnic, religious, and cultural background must be considered in adoption procedures.[58] The Convention also imposes an obligation on member states to ensure that the child and the child's representative have access to information regarding the child's background, particularly on the identity of the parents and the child's medical history.[59]

Family relationships and their link to identity have yet to address aspects of identity often but the mere existence or not of a right to adoption as such or the procedural safeguards during adoption, including the recognition of foreign court decisions.[60] However, the identity aspect will appear in domestic and intercountry adoption cases. According to Article 7 of the CRC, the child has 'the right to know and be cared for by his or her parents'. Conversely, Article 8 of the CRC guarantees the fulfilment by States of their obligation 'to respect the right of the child to preserve his or her identity'. These rights should be exercised broadly.

As far as Central European States are concerned, they have all implemented national arrangements for adopting children. As a general rule (as they are bound by the provisions of the CRC), these adoptions are not anonymous, which is further underlined by the binding of these States to the mechanisms mentioned above of the Adoption Conventions and the conclusions of the ECtHR's jurisprudential practice

55 Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption [Online]. Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=69 (Accessed: 18 July 2023).

56 Art 9, Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

57 Art 16.1 (a) Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

58 Art 16.1 (b) Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

59 Art 30, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993.

60 Case Fretté vs. France, no 43546/02, 22 January 2008; case Wagner and J.M.W.L. vs. Luxembourg no. 76240/01, 28 June 2007; case Pini and Others vs. Romania, no. 78028/01 and 78030/01, 22 June 2004, case Kearns vs. France, no. 35991/04, 10 January 2008, E.B. vs. France [GC], no. 43546/02, 22 January 2008, case Gas and Dubois vs. France, no. 25951/07, 15 March 2015; case X and Others vs. Austria [GC], no. 19010/07, 19 February 2013.

concerning Western European States. First, it is essential to highlight the tendency to provide access to data to establish a child's descent from specific parents, which replaces anonymity in adoption procedures. These data may be made available to a limited extent (to limited entities), but the child is to be given access to them if he wishes. This access is to be provided before the child reaches the age of majority and after. As the ECtHR noted in *Odièvre vs. France,*[61] it was not the aim of the applicant, who was an adopted child, to question her relationship with her adoptive parents. However, it is 'to discover the circumstances under which she was born and abandoned, including the identity of her biological parents and brothers'.[62] The ECtHR decided to examine this case based on the right to private life because, as indicated, her claim was based on the right to know one's personal history and the impossibility of obtaining information about one's origin and identifying data. Although no violation of Article 8 has been established in this case, the court has ruled in favour of the mother due to a conflict of interests between the mother's wish to remain anonymous and the child's claim. In adoption procedures, which, in principle, provide complete information concerning the natural parents, the right of access to data should be recognised. This thesis is also confirmed in the aforementioned conventions dedicated to adoption procedures.

The issue of establishing the child's origin outside the adoption mechanisms also involves the possibility of establishing a relationship with one of the parents. In this case, the analysis will require the possibility of establishing a man's paternity in the case of an unmarried child and the existence in national law of the admissibility of anonymous births or "baby boxes".

Regarding establishing the paternity of a male child, this type of case will have a broader scope of analysis, as situations where children have undetermined paternity are more frequent than the other two. Regarding the establishment of paternity, the leading case in this area is *Mikulić vs. Croatia*.[63] This case concerned a girl who complained about the length of time it took to process a paternity determination case and the lack of measures in Croatian law to force her and her mother to compel the alleged father to comply with a court order to conduct DNA testing. In the ECtHR's view, such requests should be addressed respecting the principle of the best interests of the child. The procedure provided for by Croatian law did not sufficiently safeguard this interest. Moreover, the balance between the applicant's right to remove doubts about her personal identity without undue delay and the right of her alleged father not to undergo DNA testing was not respected. Consequently, the applicant was left in a state of prolonged uncertainty as to her identity.

Concerning the issues of anonymous deliveries and the question of "baby boxes", it should be pointed out that we are dealing here with considerably similar mechanisms aiming to safeguard the interests of the child to provide care in cases where the

61 Case Odièvre v. France [GC], no. 42326/98, 13 February 2003, §42-44.
62 Case Odièvre v. France, §28.
63 Case Mikulić vs. Croatia, §§64-66.

mother or both parents are unwilling or unable to fulfil this duty and ensure the exercise of the right to privacy of those persons (mainly mothers) who, for various reasons, cannot take care of the child themselves. Regarding the previously mentioned case of *Odièvre vs. France*, the institution of anonymous childbirth should, in addition to the generation of interests, also secure the possibility of knowing one's identity if both parties so wish. This is precisely the direction taken by the changes in French law.[64] Furthermore, it is crucial to bear in mind the existence of a necessary period that would allow the mother to benefit from this type of birth and change her decision. In view of the best interests of the child in finding a family environment, this period must not be too long, although States have a wide margin of appreciation.[65]

An argument that is sometimes made when considering "baby boxes" is that it is not always just the mother or the father or the parents acting together (and perhaps someone without the knowledge and consent of either or both of them) who will leave the child. Nevertheless, given the child's interest in surviving and securing subsequent adoption opportunities, the protection of the mother's hypothetical interest should not outweigh it. Given the lack of jurisprudential practice in this area, it seems reasonable to consider that analogous solutions to "baby boxes" could be applied here.

The second group of issues to which attention should be drawn is respect for identity in medically assisted procreation, in the broadest sense. Here, we can point to the issues of artificial insemination, in vitro fertilisation with genetic material originating, not originating, or partially originating from the intended parents, embryo adoption, and, in some cases, surrogacy, which is linked to the issues mentioned above. As these issues are only intensifying in the indicated area, extensive case law is yet to be established. In this context, there are two reasons to note. Firs, wealthier societies use assisted procreation techniques more easily (given their costs). However, Central European countries are gradually joining this group. Second, cases of this kind often require action by the interested party himself, and given the availability of these forms of procreation, the resulting children are too young and often unaware of possible infringements. Such cases will have a more significant impact on identity aspects in the future.

Some observations can be made based on the ECtHR's emerging cases on surrogacy. Owing to its controversial nature,[66] this issue is regulated differently in national legal systems. This broad variation ranges from regulations that prohibit surrogacy entirely to those that allow commercial and voluntary surrogacy. While surrogacy situations within one legal system do not cause significant difficulties, those that involve a cross-border element appear to be more complex. The cases dealt

64 However, Italian law did not contain such regulations, which was the reason for recognising a violation of art. 8 in case Godelli vs. Italy, no. 33783/09, 25 September 2012.

65 Case Kearns vs. France, §77.

66 A Comparative Study on the Regime of Surrogacy in EU Member States, Citizens' rights and constitutional affairs, legal affairs, *A Comparative Study on the Regime of Surrogacy in EU Member States*, Brussels EU 2013, [Online]. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf (Accessed: 18 July 2023).

with by the ECtHR mainly concerned situations where parents from countries that do not recognise surrogacy decided to use this type of practice abroad. Nonetheless, over time, they wanted to legalise their relationship with their child within the legal system of their country of origin. It was this legalisation aspect that primarily generated difficulties.[67]

However, the aspect related to the genetic relationship between at least one of the persons who benefited from surrogacy and the child born as a result is considered integral. In the absence of such a genetic relationship, settlements do not recognise the parental relationship and do not allow the born child to be raised by the intended" parents. According to the advisory opinion issued by the ECtHR, in the case of the existence of a genetic relationship with at least one parent, practice should move in the direction of recognising the relationship between parents and the child.[68] Nevertheless, the country's legal system must remain the same in terms of the need for the direct transcription of birth certificates. A relationship between the child and parents must be established that allows them to fulfil their parental responsibilities. In its consideration of surrogacy cases, the ECtHR did not directly address respect for identity, access to data on surrogates, or even the use of this form of procreation support. It should be recognised that, by analogy, the truth about origins should be rendered knowable by the child. Whether this truth will require the indication of the data of the surrogate mother or the donors of genetic material remains an open question, on which the states will conduct their regulations, and the possible practice of the ECtHR ruling will be focused on the examination of whether there has been a proper representation of the interests of the parties to the surrogacy relationship (the donor of genetic material, the surrogate, the intended parents).

4. Child registration and its relation to the right to family life and identity

The issue of child registration is one of the elements necessary for a child to exercise his or her rights in a given legal system. Certainly, the lack of registration does not deprive the child of the possibility of exercising his/her fundamental human rights. However, concerning children and their particular situation of dependency, remaining at the level of the exercise of fundamental rights of the individual, and to their minimum

67 Case Mennesson vs. France no 65192/11, 26 June 2014, case Labassee vs. France no. no 65941/11, 26 June 2014; D. and Others vs. Belgium, no. 29176/13 8 July 2014, case Paradiso and Campanelli vs. Italy [GC] no. 25358/12, 24 January 2017; case Valdís Fjölnisdóttir and Others vs. Iceland, no 71552/17, 18 May 2021; C and E vs. France no. 1462/18 and 17348/18, 19 November 2019.
68 Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, request no. P16-2018-001.

extent, seems too narrow.[69] The wording of the Resolution adopted by the Human Rights Council indicates that registration protects against serious human rights violations such as marginalisation, exclusion, discrimination, violence, statelessness, abduction, sale, exploitation, and abuse, child labour, human trafficking, child, early, and forced marriage, and unlawful child recruitment.[70] It is also important to ensure standards for the registration of children, such as the existence and implementation of specific policies and programmes dedicated to registration, the development of a comprehensive registration system with adequate funding and ensuring its full accessibility, taking action against obstacles to registration, such as 'poverty, disability, gender, age, adoption processes, nationality, statelessness, displacement, illiteracy and detention contexts, and to persons in vulnerable situations'.[71]

In most cases, the issue of child registration is a procedure governed by domestic law. As a general rule, the legal systems of the member states of the Council of Europe assume that the right to register a child is vested in the parents. The child is subject to registration in the country of birth or nationality of at least one of his or her parents. Such arrangements aim to ensure the "visibility" of the child by the legal system of the country concerned.

Some legal problems related to registration may arise when the registration concerns a child born abroad or a child whose parentage generates some doubts from the perspective of the legal system of the country concerned. As suggested in the report of the High Commissioner for Human Rights, the registration of a child involves declaring the child's birth, notifying official authorities, and issuing a document confirming that the child's legal existence is recognised in the country.[72]

As the ECtHR's jurisprudential practice indicates, the issue of child registration can be problematic when the basis for the registration is a document whose content reflects the state of affairs contested by the national law of the state concerned. This was the case against France.[73] In this case, the registration of birth, marriage,

69 As: Resolution adopted by the Human Rights Council, Birth registration and the right of everyone to recognition everywhere as a person before the law, April 2013, A/HRC/RES/22/7, preamble [Online]. Available at: https://www.refworld.org/pdfid/53bfacfa4.pdf, (Accessed: 18 July 2023).

70 Resolution adopted by the Human Rights Council on 24 March 2017, Birth registration and the right of everyone to recognition everywhere as a person before the law, 11 April 2017, A/HRC/RES/34/15, p. 12. [Online]. Available at: https://undocs.org/A/HRC/RES/34/15 (Accessed: 18 July 2023).

71 Resolution adopted by the Human Rights Council on 24 March 2017, Birth registration and the right of everyone to recognition everywhere as a person before the law, 11 April 2017, A/HRC/RES/34/15, p. 12. [Online]. Available at: https://undocs.org/A/HRC/RES/34/15 (Accessed: 18 July 2023).

72 Office of the High Commissioner for Human Rights "Report on best practices on birth registration for vulnerable and marginalized children", Report of the United Nations High Commissioner for Human Rights, [Online]. Available at: https://undocs.org/A/HRC/39/30 (Accessed: 18 July 2023).

73 Case D vs. France, no 11288/18, 16 July 2020; previously, similar arguments presented in the cases C and E vs. France no. 1462/18 and 17348/18.

and death data of a child born under a gestational surrogacy procedure (where the intended mother was also the genetic mother) was refused. An official from the French embassy in Kiev refused to make such an entry. This refusal arose because French law did not allow for the transcription in civil registers of birth certificates of children born abroad due to surrogacy.[74] In analysing this issue, the ECtHR stressed, referring to the Mennesson judgement, that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship' and that 'an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned'.[75] It also pointed out that 'the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect their private life - which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship - is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the children's best interests, respect for which must guide any decision in their regard'.[76] The ECtHR also cited its advisory opinion,[77] emphasising that it is for the State, within its margin of appreciation, to decide what measures to take to allow for the recognition of the relationship between the child and the intended parents. The need for more consensus among the Council of Europe member states on how to establish the relationship between the child and the intended parents was also pointed out. According to the ECtHR, identity is not at risk when it is not a question of the principle of establishing or recognising its origin, but it is more at risk in terms of the means to be used to do so. While these measures may be distinct from the mere transcription of the birth certificate, they may lead to the establishment of a parent-child relationship through adoption.[78] Thus, there is no disproportionate interference by the national authorities with respect for private life here, and the State itself, in refusing to transcribe the third applicant's Ukrainian birth certificate into French civil status records, has not exceeded its margin of appreciation.[79]

74 Case D vs. France §43.
75 Case of Mennesson vs. France, §96.
76 Ibid., §99.
77 Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, request no. P16-2018-001, §51; Wedeł-Domaradzka, 2019, p. 64–83.
78 Case D vs. France, §54 and 55, also Mulligan 2018, §. 27.
79 Case D vs. France, §71.

5. The child's name and surname as elements shaping the child's identity

For every person, his or her name is the element that most clearly identifies him or her and allows him or her to be distinguished from other persons in private and official relations. This makes attributing a name considerably vital for an individual. As a rule, the attribution occurs with the birth registration or shortly after the same and is also permanent. Possible changes may concern adoption procedures, marriage, or other legitimate reasons (return to a name changed after marriage or change to a name that has been used in practice, although it has not been given since registration). The ECtHR dealt with the issue of children's names in the context of the parent's right to give them. Therefore, the identity aspect is only indirectly addressed here. The case against Spain[80] considered the question of naming the child after the father. The child was born out of wedlock; the father initially disputed his paternity and had no interest in his offspring. However, in time, he led to proceedings to recognise his paternity. Consequently, the child who had hitherto borne the mother's surname was added as the father's first surname. Such action followed national law but was challenged as discriminatory by the mother. In the ruling, the ECtHR recalled the 1995 Parliamentary Assembly Recommendation stressing that 'a name is an element which determines the identity of individuals and that, for this reason, the choice of name is a matter of considerable importance'.[81] Consequently, it must be considered that automaticity in the attribution of names, in the absence of a real relationship between the parent and child, must be considered an over-reaching interference likely to affect the sense of identity, as the child bears the name of a person whom he does not know and a name with which he does not identify.

6. Nationality and identity

For the sense of identity, the question of citizenship is also relevant. In this regard, the legal systems of countries worldwide generally follow two precepts: *ius soli* and *ius sanguinis*. The former refers to the situation where nationality is acquired by birth on the state's territory, and the latter to the situation where nationality is acquired as a consequence of being born to a parent(s) who is a state national. To eliminate the possible negative coincidence of citizenship acquisition, states should provide alternative mechanisms to those considered fundamental in their legal arrangements. In particular, in the case of negative coincidence, to prevent statelessness, states that

80 Case León Madrid vs. Spain, no. 30306/13, 26 Octobre 2021.

81 Recommendation 1271 (1995) Parliamentary Assembly, Discrimination between men and women in the choice of a surname and in the passing on of parents' surnames to children, Assembly debate on 28 April 1995, 16th Sitting [Online]. Available at: https://pace.coe.int/en/files/15305/html (Accessed: 18 July 2023).

prefer the *ius sanguinis* principle should apply the *ius soli* principle in a complementary manner.[82]

The situations known in ECtHR practice relating to the impossibility of acquiring nationality in a family context concern those where the failure to acknowledge the paternity of the child generated such an effect. In *Genovese vs. Malta*,[83] the child of a British national was deprived of the possibility of acquiring Maltese nationality because of the non-recognition of paternity and, subsequently (once the father had been identified), due to national legislation not allowing for the possibility of granting nationality to children out of wedlock if it was not their mother, who was a Maltese national. The Court pointed out that although the right to nationality itself is not indicated in the ECHR, its impact on the applicant's social identity was sufficiently significant to lead to a violation of Article 8.

The ECtHR faced a similar situation in the case against Romania.[84] Nevertheless, in this case, it was not a question of citizenship but based on the ethnic identity attributed (still by the Soviet authorities) to his parents. The applicant, living on Romanian territory, was attributed an ethnic Moldovan origin while failing to provide the legal mechanisms available (in light of political and historical realities) to obtain an identity alert related to his sense of ethnicity, which was Romanian. The applicant's inability to examine his 'claim to belong to a particular ethnic group in the light of objectively verifiable evidence presented in support of that claim'[85] constitutes a failure on the part of the authorities to comply with the positive obligation of Article 8 of the ECHR to ensure the applicant's adequate respect for his private life.

7. Parent-child contact and the right to maintain identity

The question of identity in Articles 7 and 8 is also linked to the existence of family relationships. According to the Committee on the Rights of the Child, the family environment is the best place for a child's upbringing, and it is the responsibility of states to ensure that children can grow up in families.[86] It is also the environment where

82 Council of Europe: Committee of Ministers, Recommendation CM/Rec (2009) 13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children, 9 May 2009, CM/Rec (2009) 13 [Online]. Available at: https://www.refworld.org/docid/4dc7bf1c2.html (Accessed: 18 July 2023).

83 Case Genovese vs. Malta, no. 53124/09, 11 October 2011.

84 Case of Ciubotaru vs. Moldova, no. 27138/04, 27 April 2010.

85 Case of Ciubotaru vs. Moldova §59.

86 General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses, Art. 23, 27/07/90, CCPR General Comment No. 19. (General Comments) p. 5. [Online]. Available at: https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2019.pdf (Accessed: 18 July 2023).

'the preservation of cultural identity, traditions, morals, heritage and the values system of society'[87] occurs.

The issue of the right of contact between parents and the child in the context of the right to identity and its preservation should be analysed multi-dimensionally. First, we can point to the contact between parents and a child born and raised in marriage. Second, we can point to the question of maintaining contact during the break-up of a marriage. A third situation concerns the relationship between a child and parents who do not have a regulated relationship with each other (whether they have never had such a relationship or whether their relationship has effectively ended). The ECtHR, in its jurisprudence, as already mentioned, takes a comprehensive approach to capture the concept of "family life"; thus, all such relationships will remain within the concept's scope and be protected.

Concerning the situation of a child raised in marriage, his or her relationship with his or her parents, and the impact of this relationship on identity, there are no significant risks. As a general rule, parents exercise their rights concerning the child based on equality of their rights so that each of them has the right to co-determine the upbringing and essential matters concerning the child. One of the issues that may affect the child's situation in the marriage and the development of his or her sense of identity is the restriction of contact with one parent, resulting, for example, from that parent serving a custodial sentence. A situation of imprisonment has the effect of limiting contact with a parent to specific days and hours. For instance, the judgement against Poland indicates the following: 'The Court would note that, by the nature of things, visits from children or, more generally, minors in prison require special arrangements and may be subjected to specific conditions depending on their age, possible effects on their emotional state or well-being and on the personal circumstances of the person visited. However, positive obligations of the State under Article 8, in particular an obligation to enable and assist a detainee in maintaining contact with his close family (see paragraphs 123-124 and 129 above), includes a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment'.[88]

Notably, it is the State's responsibility to ensure that contact is maintained to the fullest extent possible. The absence of an adequate standard[89] of such contacts or their severe limitation may result in a lesser influence of the incarcerated parent on the upbringing of the child and a distorted sense of identity associated with the absence

87 Resolution adopted by the Human Rights Council on 3 July 2015 29/22. Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development, 22 July 2015, A/HRC/RES/29/22, [Online]. Available at: https://documents.un.org/doc/undoc/gen/g15/163/18/pdf/g1516318.pdf?OpenElementhttps://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/163/18/PDF/G1516318.pdf?OpenElement,%20 (Accessed: 18 July 2023).

88 Horych vs. Poland, no. 13621/08, 17 April 2012 §131.

89 More: Wedeł-Domaradzka, 2016, pp. 301-318.

of a sense of parental presence. However, the State's obligations in this respect are not absolute and do not extend to the right to choose the place of detention, even if that place would facilitate contact with children.[90]

Regarding the exercise of the right of access and its impact on the sense of identity, the end of a marriage does not affect the exercise of this right. Nonetheless, this may modify the manner in which it is exercised.[91] In the ECtHR jurisprudence, we are often confronted with situations in which the question arises as to how contact with the child is regulated, whether there are conflicts between the parents in this respect, and how contact is to be exercised.[92] Such situations must be analysed and resolved, considering the child's best interests.[93] Furthermore, the rights and arguments of both parents must be analysed and, as far as possible, considered.

The ECtHR jurisprudence has taken the approach of respecting the wide margin of appreciation of the State concerning parental responsibility and contact arrangements.[94] Such an approach should be considered valid, as the national authorities are best positioned to understand the specificities, traditions, or approaches to family relationships in a given country. Nevertheless, it is worth ensuring that there is no discrimination in establishing access. Such discrimination could occur if it is based on the religion of one of the parents. A difference of religion or approach to the practice of religion may be relevant. However, it must be considered from the perspective of respect for parents' beliefs and the possibility of shaping those beliefs in the process of raising the child.[95] The condition, of course, is that it is established that religion or beliefs do not have a negative impact on the child and his or her development.[96]

Another example of discrimination can be found in the case of basing the decision to limit contact and, thus, the possibility of influencing the child's development and identity solely on the sexual orientation of the parents.[97] As in the case of religion, the decisive criterion will be to consider the whole situation more broadly from the perspective of ensuring that the child's best interests are pursued and that any possible conflict with the child's best interests may influence the determination of the parent-child relationship. Finally, it is essential to examine the aspect relating to whether the child's parents have previously been married or unmarried. In such cases, the fact of not remaining may affect the exercise of the parent's rights vis-à-vis the child. Subsequently, when it is not justified in protecting the best interest of the child, it should also

90 Case Serce vs. Romania, no. 35049/08, 30 June 2015, §§ 55-56.
91 Case K. and T. vs. Finland, [GC] no. 25702/94, 12 July 2001; case R.I. and Others vs. Romania, no. 57077/16, 4 December 2018, §53.
92 Case Raw and others v. France, no. 10131/11, 7 March 2013, §95; case Vorozhba v. Russia, no. 57960/11, 16 October 2014, §91; case Malec v. Poland, no. 28623/12, 28 June 2016, §69-77; case Strumia vs. Italy no. 53377/13, 26 June 2016, §122-125.
93 Case Buchs vs. Switzerland no. 9929/12, 27 May 2014, §49.
94 Case Glaser vs. United Kingdom no. 32346/96, 19 September 2000, §64.
95 Case Vojnity vs. Hungary no. 29617/07, 12 February 2013, §37.
96 Case Vojnity vs. Hungary, §38.
97 Case Salgueiro da Silva Mouta vs. Portugal no. 33290/96, 21 December 1999, §28.

not be allowed.[98] This last aspect can, however, be extended to consider the birth of a child from a non-marital relationship. When a child from such a relationship is born during the marriage, the law points to the mother's husband as the father, and the child has a stable family situation; it is not in the child's best interests to interfere in this relationship.[99] Nevertheless, this should not affect the child's ability to establish his or her origin and, thus, identity at a later age, when the child's degree of maturity will allow him or her to know the situation without compromising his or her best interests.

The aspect of identity preservation in the context of parental access rights may also generate a need for protection due to formal aspects such as the length of contact determination proceedings. Proceedings that extend for too long may lead to a lack of or significant weakening of the relationship with the parent.[100] An important aspect relates to cross-border contact; here, situations may arise where a child is detained by his or her parent, and the national authorities do not always adequately and effectively discharge their duty to guarantee the return of the children.[101]

8. Conclusions

Concerning the right to family life in the context of identity, several problems can be identified, which have been presented above.

Regarding the cases dominating the ECtHR jurisprudence, one can certainly notice the predominance of paternity and contact cases. These cases are predominantly noted in Central European countries. An important aspect that is emerging and likely to intensify shortly is the issue of cross-border child custody, including the need to recognise the decisions of courts other than the court of the country where the child is currently present. The intensification of this trend for Central European countries was due to frequent labour migration, which occurred after they acceded to the European Union. The marriages or partnerships that Central European migrants entered into at the time often did not stand the test of time and broke up after a few years. Subsequently, in many cases, some of the spouses or partners decided to return to their country of origin and attempted to regulate contact with their children.

These attempts were made initially at the national level and subsequently through proceedings before the ECtHR to support parents who felt the national system was ineffective in regulating these contacts. The lack of these contacts can affect the upbringing and the formation of a child's sense of identity, who is deprived of contact with one parent. Thus, the intervention of the ECtHR seems to be necessary in many

98 Case Zaunegger vs. Germany no. 22028/04, 3 December 2009, §59 and 60.
99 Case Fröhlich vs. Germany, no. 16112/15, 26 July 2018, §42 and 63.
100 Case Ribić vs. Croatian, no. 20965/03, 19 October 2010, §92 and included cases Eberhard and M. vs. Slovenia no. 8673/05 and 9733/05, 1 December 2009, §127; case S.I. vs. Slovenia, no. 45082/05, 13 October 2011, §69; case H. vs. United Kingdom, no. 9580/81, 8 July 1987, §89.
101 Case Ignaccolo-Zenide vs. Romania, no. 31679/96, 25 January 2000, § 113; case Zawadka vs. Poland, no. 48542/99, 23 June 2005, §67 and 68; also: Szubert, 2015, pp. 185-194.

cases. However, it should not be forgotten that the issue of contact is a far-flung margin of appreciation,[102] which is a good thing because it is a considerably individualised matter that depends on the traditions, culture, and legal peculiarities of the country concerned.

Another important aspect relates to procedural safeguards for the possibility of bringing proceedings as indicated '(...) rigid limitation periods or other obstacles to actions contesting paternity that apply irrespective of a putative father's awareness of the circumstances casting doubt on his paternity, without allowing for any exceptions, violated Article 8 of the Convention'.[103]

In the procedural aspect, the active participation of children throughout the procedure is also significant. The European Convention on the Exercise of Children's Rights[104] is relevant to the RE regulation, emphasising the need for children's participation in proceedings, especially when these are family proceedings concerning the child's residence and access rights. In this context, the Convention implies the need to be informed, express one's views during the proceedings, and appoint representatives where the representation of the person with parental responsibility could lead to a conflict of interests and the right to exercise all or some of the rights of a party in such proceedings. The Convention also imposes an obligation on judicial authorities to both seek complete information to enable them to act following the principle of the best interests of the child and ensure that complete information is provided to the child and that the child is allowed to make his or her views known. Further, from the perspective of the judgements discussed in the text, a noteworthy aspect is the Convention's requirement for judicial authorities to act expeditiously to avoid undue delay and ensure that provisions are in place to ensure the immediate enforcement of judgements.

A much smaller trend can be observed in Central European countries regarding assisted procreation cases, including surrogacy. Given the predominance of cases from Western Europe, this originates in the societies' affluence and the model of assuming a later procreative age adopted in this area. However, it is to be expected that in Central Europe, too, with the increasing affluence of societies and the shifting upward boundary of the reproductive age, cases of assisted procreation, including surrogacy, will emerge. Even if there are cases of surrogacy practices due to their unusual nature, they do not need to bed by the legal system. Nevertheless, in time, with their increase, this will undoubtedly require an appropriate response from the legal system of the specific state. These systems will have to prepare themselves for the pending proceedings and decide whether a rigorous understanding of Articles

102 Case Sommerfeld vs. Germany [CG] no. 31871/96, 8 July 2003, §63.

103 Case Boljević vs. Serbia, no. 47443/14, 16 June 2020, §52 and citated cases: Mizzi vs. Malta, §80 and §111-113 and Shofman vs. Russia, no. 74826/01, 24 November 2005, §80, and Backlund vs. Finland, no. 36498/05, 6 July 2010, §48.

104 European Convention on the Exercise of Children's Rights, European Treaty Series - No. 160, Strasbourg, 25 January 1996.

7 and 8 of the CRC (as in the case of the German court judgement in Hamm)[105] or, rather, the more balanced approach suggested by the ECtHR will prevail in these proceedings.

Some demands associated with the need to review legal systems may also relate to the child registration mechanisms.[106] In this regard, it is also recommended that good practices in registration be exchanged and that allowing someone other than the parents to register a child be absolved.[107] Such a practice may be essential in the event of an increase in the influx of migrants (including those to Central European countries) in a situation where the migrants will be children without any guardians and whose country of origin (and thus nationality) cannot be established.

Indeed, the issue of identity in the future and the prevalence of situations of insecurity will require more attention from European states. In dealing with family life and identity issues, the ECtHR often draws on the provisions of Articles 7 and 8 of the CRC, considering it to be the primary document shaping the standard for realising children's rights. Simultaneously, the ECtHR is aware of the aforementioned wide margin of appreciation in matters concerning family and private life. Balancing these two aspects is the most serious challenge in the future.

105 Oberlandesgericht Hamm, I-14 U 7/12, 6 February 2013, [Online]. Available at: http://www.justiz.nrw.de/nrwe/olgs/hamm/j2013/I_14_U_7_12_Urteil_20130206.html (Accessed: 18 July 2023). The effect of court proceedings was, for example, a reception in Germany Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen (Act to Regulate the Right to Know One's Heritage in Cases of Heterological Use of Sperm), 17 July 2017, BUNDESGESETZBLATT [BGBl], p. 960.

106 The result of this recommendation was the development by the Office of the High Commissioner for Human Rights "Report on best practices on birth registration for vulnerable and marginalized children", Report of the United Nations High Commissioner for Human Rights [Online]. Available at: https://undocs.org/A/HRC/39/30, (Accessed: 18 July 2023).

107 Applying for birth registration [Online]. Available at: https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/applying-birth-registration (Accessed: 18 July 2023).

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CHAPTER 8

Protection Against Violence

Szilárd SZTRANYICZKI

ABSTRACT

Violence against children includes all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, and exploitation, including sexual abuse.[1]

Under international law, States have an obligation to protect children from various forms of violence. The United Nations Convention on the Rights of the Child is the primary international human rights instrument addressing children's protection against violence. The Convention came into force in September 1990 and has been ratified by 195 countries, making it 'the single most ratified treaty in existence'.[2] However, only two countries, the United States and Somalia, have not yet ratified the Convention.

This chapter analyses the specific types of violence against children and the response of the major regional human rights systems: the African, the Inter-American and the European [human rights system], the Inter-American and the African human rights systems.

KEYWORDS

physical violence, mental violence, injury, abuse, neglect, negligent treatment, maltreatment, exploitation, Convention on the Rights of the Child, regional human rights systems

1. Corporal punishment in schools

1.1. Overview

Regional human rights systems have different regulations regarding corporal punishment in schools. Under international human rights law, the practice of corporal punishment breaches three of the most basic human rights principles: the right to human dignity, physical integrity, and equal protection. States are obligated to enact legislation prohibiting corporal punishment.

The African Human Rights System also explicitly bans school corporal punishment of children.

1 Convention on the Rights of the Child, art.19 (1).

2 Children's Rights [Online]. Available at: https://www.hrw.org/legacy/wr2k/Crd.htm (Accessed: 1 February 2023).

Szilárd SZTRANYICZKI (2024) 'Protection Against Violence'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 169–190. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_8

However, in the U.S. legal system, corporal punishment in schools is legal in all States.

What is the definition of corporal punishment in regional human rights systems?

The United Nations Committee on the Rights of the Child defines corporal punishment as 'any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light'.[3]

The Resolution on the Rights of the Child adopted by The United Nations General Assembly[4] extends the meaning of corporal punishment beyond the physical realm and states that 'mental, psychological…violence' against children also constitutes corporal punishment.

In the U.S., corporal punishment is defined in a physical sense, strictly as a means of disciplining a child. An example of State definition of corporal punishment is the one provided by the Texas Education Code,[5] according to which corporal punishment is 'the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline'.

In Africa, corporal punishment is defined similarly as in the U.S., as 'any deliberate act against a child that inflicts pain or physical discomfort to punish or contain him/her'.[6]

Is corporal punishment legal in regional human rights systems?

In the U.S., corporal punishment in schools is legal in almost every private school, with the only two exceptions being New Jersey and Iowa. Moreover, it is legal in the public schools of 19 US States.[7] Even if corporal punishment is legal in the State, school district superintendents and individual school principals within districts can decide whether to discipline children using corporal punishment.[8] Moreover, local school districts can set limits on corporal punishment. For example, in the Covington County school district, teachers receive a student handbook containing a chapter called 'Corporal Punishment', which sets some limits on school corporal punishment. It can

3 UNCRC Committee, General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, CRC/C/GC/8, 2 June 2006. [Online]. Available at: https://www.ohchr.org/sites/default/files/english/bodies/crc/docs/co/CRC.C.GC.8.pdf (Accessed: 2 February 2023).

4 According to Resolution on the Rights of the Child, A/RES/62/141.

5 According to Texas Education Code Title 2§ 37.0011 (2013).

6 Veriava and Power, 2017, p. 333.

7 Gershoff and Font. 2016 [Online]. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/ (Accessed: 9 February 2023).

8 Ibid.

be 'applied only to the student's buttocks in such a manner that there will be no permanent effects',[9] and there can be 'no more than three licks and one paddling a day'.[10]

In the European Human Rights System, the United Nations Convention on the Rights of the Child is the primary instrument that addresses the protection of children against corporal punishment in schools.[11] The Convention came into force in September 1990 and has been ratified by 195 countries, making it 'the single most ratified treaty in existence'.[12] According to the provisions of the Convention, 'States Parties must take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with that Convention'.[13]

As all European countries have ratified the Convention and subsequently implemented legislation prohibiting school corporal punishment, it is illegal in every European country.

Corporal punishment is also expressly prohibited in the African human rights system, and South African law states that 'no person may administer corporal punishment at a school against a learner'.[14] However, this legislation is not supported by local educators or parents, resulting in several cases of corporal punishment being administered throughout the continent.[15]

The 2012 National School Violence Study surveyed 6000 children, and 49.8% admitted to being victims of school violence.

1.2. Case laws regarding corporal punishment

The benchmark case for corporal punishment in the US is *Ingraham vs. Wright*.[16] In this case, the Supreme Court ruled that there was no prohibition of corporal punishment in schools, at the federal level. Each US State has the power to decide whether to allow corporal punishment. However, the Supreme Court set an important limit: corporal punishment that is being applied must be reasonable.

The reasonableness limit set by the Supreme Court was not new, in the sense that corporal punishment had its limits throughout history. In common law, punishment was not allowed to exceed what was required for disciplinary purposes, that is, to exceed moderation.[17]

9 Mathewson (2022) State-sanctioned violence: Inside one of the thousands of schools that still paddle students, The Hechinger Report, 6 June 2022 [Online]. Available at: https://hechingerreport.org/state-sanctioned-violence-inside-one-of-the-thousands-of-schools-that-still-paddles-students/ (Accessed: 19 February 2023).
10 Ibid.
11 Ghandhi, 1984, pp. 488-494.
12 Children's Rights [Online]. Available at: https://www.hrw.org/legacy/wr2k/Crd.htm (Accessed: 19 February 2023).
13 According to Art. 28 (2) of the Convention on the Rights of the Child.
14 According to South African School Act, section 10(1).
15 According to South African School Act, section 10 (1).
16 Ingraham vs. Wright, 498 F.2d 248 (5th Cir. 1974).
17 Edwards, 1996, p. 984.

Nowadays, it is generally accepted by State Statutes and related Court Decisions that corporal punishment must be 'reasonable and justifiable'.[18] A few examples of unreasonable school corporal punishment are as follows: conducting a strip search of a student to check her underwear for drugs,[19] holding a nine-year-old upside down by her ankle while beating her with a wooden paddle, and creating a two-inch bleeding cut on her leg.[20]

The European Court of Human Rights first delivered a judgement condemning corporal punishment 45 years ago. In the case of *Tyrer vs. UK*[21] the Court ruled that the judicial birching of a 15 year-old from the Isle of Man constituted 'degrading punishment' and breaches Article 83 of the Convention. This judgement was followed by a series of other judgements that condemned corporal punishment.

Examples can be found in the case law of the European Court of Human Rights, in which verbal abuse was found to be a breach of Article 8 of the Convention. For example, in the case of *F.O. vs. Croatia*,[22] the European Court of Human Rights found that a teacher calling a pupil 'a moron, an idiot, a fool, hillbilly' on more than one occasion was an act of 'verbal abuse amounting to humiliation, belittling and ridicule'.

2. Sexual abuse of children

2.1. Overview

Sexual abuse of children is a serious public health concern worldwide. The estimated global prevalence of child sexual abuse ranges from 8%-31% in girls and 3%-17.6% in boys.[23]

Definition of child sexual abuse: the World Health Organization defines child sexual abuse as

> the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society.[24]
>
> U.S. Law defines child sexual abuse as:
>
> the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually

18 Edwards, 1996, p. 985.
19 See Safford, 557 U.S. pp. 375–77.
20 United States Court of Appeals, Tenth Circuit, Garcia vs. Miera, 817 F.2d 650., 1987.
21 European Court of Human Rights, Tyrer vs. UK, 1978.
22 ECtHR, F.O. vs. Croatia, No. 29555/13, 22 April 2021.
23 Barth et al., 2013, pp. 469-483.
24 WHO, Report of the consultation on child abuse prevention, Geneva, World Health Organization, 1999, p. 15.

explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or the rape, and in cases of caretaker or inter-familial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.[25]

2.2. Child sexual abuse laws in regional human rights systems

In the European Union law, the primary legal instrument on combating sexual child abuse, sexual exploitation of children, and child pornography is Directive 2011/93/EU[26] and Convention 201/2007/CETS Protection of Children against Sexual Exploitation and Sexual Abuse. These instructions oblige States to criminalise various forms of sexual abuse and seek to harmonise the minimum criminal sanctions granted by member States against various offences of child sexual abuse. These directives also require States to adopt measures to prevent sexual abuse of children.

EU law has accorded special consideration to online child sexual abuse material. Under Directive 2011/93/EU, member States are obligated to remove webpages containing child sexual abuse material.

In South Africa, the most important legislation addressing sexual abuse among children is the Sexual Offences Act.[27] It not only criminalises sexual abuse against children but also requires the obligation to report such offences; failure to do so may result in a conviction of up to five years in prison.[28]

The US also criminalises the sexual abuse of a minor through its federal law.[29]

2.3. Case laws regarding the sexual abuse of children

In the case of *Guzmán Albarracín and Others vs. Ecuador,*[30] as a teenager, Paola was repeatedly sexually abused by her school's vice principal, and she later committed suicide. School officials were aware of the situation and of the vice principal's similar interactions with other students. The Inter-American Court of Human Rights found that the State had violated Paola's rights to life, humane treatment, protection of honour and dignity, and education under the American Convention on Human Rights and Protocol of San Salvador in connection with its obligation to respect the rights of the child.

In the case of *R.B. vs. Estonia*,[31] the applicant claimed that she was sexually abused by her father when she was nine years old. She reported the abuse to the police, after

25 Federal Child Abuse Prevention and Treatment Act, 42 U.S.C.A § 510g.

26 Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1.

27 South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

28 South Africa's Criminal Law (Sexual Offences and Related Matters), Section 54, Amendment Act 32 of 2007.

29 18 U.S. Code § 2243.

30 Inter-American Court of Human Rights, Paola del Rosario Guzmán Albarracín et al. vs. Ecuador, Court Decision-Case C No. 405 (June 24, 2020) [Online]. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_405_esp.pdf (Accessed: 21 February 2023).

31 Case of R.B. vs. Estonia, application 22597/16.

which criminal proceedings were initiated. The applicant was not called to testify because, under domestic law, child victims could not appear in court to avoid victimisation. However, two previously recorded interviews conducted in the presence of her mother, a lawyer, and a psychologist were presented during the trial. These video recordings were later dismissed by the Estonian Supreme Court owing to a breach of procedure because prior to questioning R.B. was not informed by her investigator of her procedural rights, that is, the duty to tell the truth and the right not to testify against a member of her family. The European Court of Human Rights ruled that Estonia violated Articles 3 and 8 of the ECHR because it failed to consider the child's vulnerability and corresponding needs in a child-friendly justice system.

3. Domestic violence

3.1. Overview

Domestic violence is a simultaneous attack on children's and women's human rights.[32]

It denies children the right to safe and stable home environments. Studies have estimated that between 3.3 million and 10 million children are exposed to domestic violence annually.[33]

Definition of domestic violence: The Istanbul Convention defines domestic violence as: 'all acts of physical, sexual, psychological, or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with them.'[34]

The South African Violence Act defines domestic violence as physical, emotional, sexual, verbal, psychological or economic abuse; intimidation; harassment; stacking; damage to property; entry into a person's property without consent; and any other form of abusive or controlling behaviour where such conduct causes or can cause harm to a person's well-being, health, or safety.[35]

According to the provisions of the US Violence Against Women Act,

> the term "domestic violence" means a pattern of behaviour involving the use or attempted use of physical, sexual, verbal, psychological, economic, or technological abuse or any other coercive behaviour committed, enabled, or solicited to gain or maintain power and control over a victim, by a person who: (A) is a current or former spouse or dating partner of the victim, or other

32 Morrison, and Houghton, 2022, [Online]. Available at: https://www.tandfonline.com/doi/full/10.1080/13642987.2022.2057963 (Accessed: 21 February 2023).

33 Children And Youth Exposure To Domestic Violence [Online]. Available at: https://nccadv.org/domestic-violence-info/children (Accessed: 21 February 2023).

34 The Council of Europe Convention on Preventing and Combating Violence against Women, art. 3(b).

35 South African Domestic Violence Act 116 of 1998, section 1.

person similarly situated to a spouse of the victim; (B) is cohabitating with or has cohabitated with the victim as a spouse or dating partner; (C) shares a child common with the victim; (D) is an adult family member of, or paid or nonpaid caregiver in an ongoing relationship of trust with, a victim aged 50 or older or an adult victim with disabilities; or (E) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.[36]

3.2. Legislation regarding the protection of children exposed to domestic violence in regional human rights systems

The United Nations Convention on the Rights of the Child (UNCRC) and the Istanbul Convention are the primary instruments for protecting children from domestic violence in Europe.

Article 19 of the UNCRC guarantees the right to live free from the threat of violence to every child and obliges States to implement appropriate measures to protect children from all forms of violence.

The Council of Europe's Convention on Preventing and Combating Violence against Women (known as the Istanbul Convention) strongly focuses on different forms of gender-based violence, including domestic violence. The Convention contains provisions regarding children witnessing violence at home between their parents, as well as when they are direct victims of violence in their homes. Child-specific provisions of the Convention include obligations for States to adopt measures to address the needs of child victims, raise awareness among children, and protect witnesses.

The Violence Against Women Act and the Adoption and Safe Families Act are the primary federal laws of the U.S. that address violence against women.

The Violence Against Women Act provides support services for battered women, better law enforcement, and prosecution of cases involving domestic violence; however, it has limited reference to the needs of children exposed to domestic violence.[37]

The primary goal of the Adoption and Safe Families Act is to promptly place foster children in permanent homes. The timely services addressing the needs of children exposed to domestic violence are commendable, however, the swift nature of these services leave battered women limited time to improve their circumstances (find a new job and a new home, recover from the trauma that they have experienced), which often leads to the termination of their parental rights. Although federal laws significantly influence State child protection laws and practices, States have substantial freedom to define specific child protection laws.

An example of such laws is failure to protect laws, according to which the non-abusive parent, who is also the victim of domestic violence, is charged with 'failure to protect' the child from witnessing domestic violence or experiencing abuse at the

36 34 USC § 12291(a)(12).
37 Weithorn et al., 1999, p. 11.

hands of the other parent. If the child is only a witness to domestic violence, many States have instituted a policy of temporarily removing the child from the custody of the non-abusive parent and charging the parent with neglect.[38] However, if a child becomes a victim of physical or sexual abuse, the non-abusive parent is charged with the same crime as the abuser.[39]

The Constitution and Domestic Violence Act 116 of 1998 are the primary laws protecting victims of domestic violence in South Africa.

The Constitution of South Africa poses a direct obligation on the State to protect victims of domestic violence and also provides that when interpreting the Bill of Rights, the Court must consider international law, and when the Court is interpreting legislation, a law that is consistent with international law must be preferred.[40] This Act is in accordance with the United Nations Convention on the Right of the Child and the United Nations Convention on the Elimination of All Forms of Discrimination against Women that was ratified by South Africa.

South African legislation does not recognise domestic violence as a crime of its own; it is currently being reported as an assault, sexual assault, damage to property and so on.[41] However, the Domestic Violence Act enables victims of domestic violence to obtain protective orders against abusers.

3.3. Protection orders

Courts can issue protective orders prohibiting a batterer from approaching an adult victim and children at various locations such as the home, the victim's workplace, or the children's school. If a batterer violates an order, victims of domestic violence may contact the police.

Protective orders can be obtained by women in all regional human rights systems.

Moreover, the EU has implemented a mechanism for the mutual recognition of protection measures. If a victim of domestic violence has a criminal protection order issued by an EU Member State, the victim may request a European Protection Order. Moreover, if a victim has a civil law protection order issued in the Member State of their residence, the EU grants access to the mutual direct recognition of protective measures in civil matters between member States.

3.4. Domestic violence case laws in regional human rights systems

In Europe, many domestic violence cases presented to the ECtHR were filed under Article 2 of the European Convention of Human Rights.

38 Trepiccione, 2001, p. 1491.
39 Mahoney, 2019, p. 435.
40 Gadinabokao 2019 p. 13, [Online]. Available at: https://repository.up.ac.za/bitstream/handle/2263/53127/Gadinabokao_Comparative_2016.pdf?sequence=1&isAllowed=y (Accessed: 23 February 2023).
41 Ibid.

For example, in *Kurt vs. Austria*,[42] an applicant's son was murdered by his father. The father came to his son's school, asked his teacher if he could speak to him in private, and later shot him in the school basement. The applicant had previously reported domestic violence against her husband. The Court found that there had been no violation of Article 2 of the Convention. There had been no obligation on the authorities to take further preventive operational measures, as there was no immediate risk of an attack that could put the child's life in danger.

The Court's reasoning is based on a test first developed by the ECtHR in the case of *Osman v United Kingdom*.[43] This applies to cases where it is alleged that the victim was killed or subjected to inhumane or degrading treatment.

> It must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[44]

In another case *Kontrová vs. Slovakia*,[45] the Court held that the State should have known that there was an immediate risk to the lives of the applicant and her children, as the applicant had previously complained to the police about having been physically assaulted by her husband on several occasions and a relative had reported an incident to the police that the husband had threatened to murder the children.

In the U.S. class action case of *Nicholson vs. Williams*,[46] a group of women, who were victims of domestic violence, and their children challenged the New York City's Administration for Children's Services policy of removing children from homes after having been exposed to domestic violence when the children suffered no physical harm. The plaintiff was brutally beaten by her child's father, while her child was sleeping in another room, in her crib. Although she arranged for a babysitter for her daughter before going to the hospital, New York City's Administration for Children's Services removed the child from the babysitter's home on the grounds of a failure to protect her child from being exposed to domestic violence. The mother and child spent a total of 21 days apart. The U.S. District Court for the Eastern District of New York found that removing children from their mothers solely because they had been exposed to domestic violence constituted an unconstitutional infringement on mother's and children's due process rights.

In the case of *Custody of Vaughn*,[47] Vaughn witnessed his father physically and verbally abuse his mother. The day after the mother obtained a restraining order against

42 ECtHR, Kurt vs. Austria [GC], No. 62903/15.
43 Osman vs. the United Kingdom - 23452/94, Judgment 28.10.1998 [GC].
44 Osman (App. No.87/1997/871/1083) at para. 116.
45 ECtHR, Kontrová vs. Slovakia, No. 7510/04.
46 Nicholson vs. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).
47 Custody of Vaughn, 664 N.E.2d 434, 440 (Mass. 1996).

Vaughn's father, the father filed for custody of Vaughn. The Probate and Family Court awarded the father the primary custody of Vaughn. The mother appealed to this decision. The appellate court reversed the decision on the grounds that it had committed an error by not considering Ross's abusive acts and the impact of the abuse on Vaughn. 'Following Vaughn, courts must make specific "Vaughn findings" about the extent of domestic violence, its effect on children, and how it impacts the abuser's parenting'.[48]

In South Africa, in *State vs. Baloyi*,[49] Baloyi's wife obtained an interdict that prevented him from assaulting her and their child. Later, he was convicted of violating the interdict because he had assaulted his wife and threatened to kill her. Baloyi appealed to the Transvaal High Court, where he claimed that the prevention of Family Violence Act 133 of 1993 allowed his wife to obtain the interdict, which unconstitutionally infringed on his right to be presumed innocent. The Constitutional Court found that the purpose of an interdict was to protect the victim of domestic violence and that the fairness of the complainant required that the enquiry proceedings be speedy; however, this would not affect the presumption of the innocence of the accused.

4. Exploitation and Forced Labour

4.1. Overview

Child labour is a serious issue, particularly in developing countries. UNICEF estimates that almost one in ten children is subjected to child labour worldwide.[50] Africa has the highest number of child labourers in the regional human rights system, and it is estimated that 72.1 million African children are involved in child labour.[51]

Definition: The International Labour Organization (ILO) Convention No. 138 on the Minimum Age for Admission to Employment and Convention No. 182 on the Worst Forms of Child Labour define child labour as employment below the minimum age as

48 Kaiser and Foley 2021, p. 171.
49 State vs. Baloyi (CC168/17) [2018] ZAGPPHC 19 (1 October 2018).
50 UNICEF: What is child labour? [Online]. Available at: https://www.unicef.org/protection/child-labour (Accessed: 25 February 2023).
51 ILO: Child labour in Africa [Online]. Available at: https://www.ilo.org/africa/areas-of-work/child-labour/lang--en/index.htm (Accessed: 25 February 2023).

established in national legislation, as well as child labour that is considered hazardous[52] or a part of the worst forms of child labour.[53]

4.2. Legislation regarding exploitation and forced labour in regional human rights system

International Labour Organization Convention No. 138 on Minimum Age and Convention No. 182 on the Worst Forms of Child Labour[54] Are the two primary international human rights instruments regulating child labour. The first was ratified by all ILO member States, including Africa, and the second by most States.

The Minimum Age Convention sets the general minimum age for work at 15 years (13 years for light work), and the general minimum age for hazardous work at 18 years (16 years under certain strict conditions). In less-developed States, the general minimum age can be reduced to 14 years (12 years for light work).

The Worst Forms of Child Labour Convention requires States that have ratified the Convention to eliminate the worst forms of child labour, including forced labour.

In accordance with the ILO Conventions, EU Law prohibits forced and compulsory labour.[55] According to Article 32 of the EU Charter of Fundamental Rights, children can only be employed if they reach the minimum school-leaving age. The minimum school-leaving age varies from country to country across the EU; however, it is between the ages 14-18 years.[56]

Most African Countries have ratified the ILO Conventions. Additionally, the African Constitution expressly prohibits forced labour.[57] The minimum employment age for children in Africa is 15 years.[58]

52 ILO Recommendations 190, art. 3 'work which exposes children to physical, psychological or sexual abuse; work underground, under water, at dangerous heights or in confined spaces; work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health; work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer'.

53 ILO Convention 182 art. 3 'all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children'.

54 ILO Conventions on child labour [Online]. Available at: https://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang--en/index.htm (Accessed: 1 March 2023).

55 EU Charter of Fundamental Rights, art. 5 (2).

56 European Commission: Compulsory education in Europe, 2022. [Online]. Available at: https://.eacea.ec.europa.eu/media/2837/download (Accessed: 1 March 2023).

57 Children's Amendment Act, art. 141.

58 Basic Conditions of Employment Act, art. 43.

The US has not yet ratified the ILO Convention No. 138, however the US did ratify Convention No. 182.[59]

The US federal law governing child labour is the Fair Labor Standards Act (FLSA). According to its provisions, the minimum age for most non-agricultural types of work is 14 years, which also limits the number of hours that minors under the age of 16 may work. It also prohibits minors under the age of 18 years from working in any occupation deemed hazardous.

4.3. Case laws regarding child labour in regional human rights systems

In Europe, the case of *C.N. and V. vs. France*[60] concerns the forced labour claims of two sisters of Burundi origin. They lived with their aunt and her family in France after the death of their parents. They lived in the basement of their aunt's house under allegedly bad conditions. The older sister did not attend school and had to take care of her aunt's disabled son while helping with housework. The younger sister attended school and helped around the house after doing her homework. Both sisters lodged a complaint with the ECtHR, stating that they had been held in servitude and subjected to forced labour. The ECtHR found that the first applicant had indeed been subject to forced labour, as she had to work seven days a week with no remuneration or holiday. The Supreme Court's ruling acknowledged that parental authority was not above State limitations. The State has the power to restrict parental control, including the regulation of child labour.

In the US, in the case of *Prince v. Massachusetts*[61] *Betty Simmons, a 9 year-old child was taken by her aunt, who had her custody, to sell religious pamphlets* produced by Jehovah's Witnesses. This violated the Massachusetts regulations that prohibited boys younger than age 12 years and girls younger than age 18 years from selling newspapers in the streets and public places. The aunt argued that Massachusetts law was in violation of the Fourteenth Amendment's free exercise of religious clauses. The Supreme Court rejected the aunt's challenge of a State statute and argued that parental authority was not above State limitations. This is a substantial legal precedent that limits State regulation of parental authority involving child labour.

Is the work of the child influencers a form of child labour? "Kidfluencers" are children who have a large following on their own social media platforms or who regularly appear on their influencer-family members' social media platforms. These child influencers generate income through sponsored content and/or the monetisation policies of social media platforms.

Most social media platforms require users to be at least 13 years old to sign up for their platform; however, in many cases, parents manage children's accounts before

59 ILO: U.S. ratifies ILO Convention against the worst forms of child labour [Online]. Available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_071320/lang--en/index.htm (Accessed: 3 March 2023).

60 ECtHR, C.N. and V. vs. France, No. 67724/09, 11 October 2012.

61 Prince vs. Massachusetts, 321 US158.

they become 13 years old. Among the key legal concerns regarding child influencers are forced labour, child exploitation and loss of privacy.

Presently, the issue of child influencers is not regulated in African and the U.S. Regional human rights systems. However, the State of Washington is currently working on legislation that will protect children who heavily feature on online platforms and receive monetary compensation for their work.[62]

In Europe, France is the first and only country to pass new child labour laws that protect "Kidfluencers" under the age of 16 years, who earn income through posting on social media platforms. The provisions of the law state that any income these children earn will be safeguarded in a bank account they can access only when they turn 16 years. Moreover, the law establishes a "right to be forgotten", which forces social media and other internet platforms to remove any videos or content at the request of the child.[63]

5. Child trafficking

5.1. Overview

'Human trafficking is modern day slavery in which individuals, including children, are compelled into service and exploited'.[64]. Worldwide, only 0.5% of victims have been identified.[65] Human trafficking is the most serious issue in the African human rights system. It is a major region of origin for victims trafficked to other parts of the world, such as Western Europe.[66]

The definition of child trafficking in Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims:

> the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[67]

62 Collins (2023) The US Is Finally Dealing With the Exploitation of Child Influencers [Online]. Available at: https://www.cnet.com/news/politics/the-us-is-finally-dealing-with-the-exploitation-of-child-influencers/ (Accessed: 8 March 2023).

63 France passes new law to protect child influencers (2020) BBC, 7 October 2020. [Online]. Available at: https://www.bbc.com/news/world-europe-54447491 (Accessed: 8 March 2023).

64 Carr, 2012, p. 77.

65 Carr, 2012, p. 79.

66 Country Narratives on Human Trafficking in U.S. Department of States, Trafficking in Persons Report 2016, [Online] Available at: https://2009-2017.state.gov/j/tip/rls/rm/2016/262585.htm (Accessed: 10 March 2023).

67 Directive 2011/36/EU, art. 2(1).

5.2. Legislation regarding child trafficking in regional human rights systems

The primary human rights instrument regulating child trafficking is Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting their victims. The directive is addressed to the Member States of the European Union. It provides minimum standards for preventing and combating human trafficking offences, and high standards of protection and support for victims. The Directive also applies to children and contains several child-specific provisions.

The Palermo Protocol is another important human rights instrument. It is a United Nations protocol to prevent, suppress, and punish the trafficking of human beings, particularly women and children, and supplements the UN Convention against Transnational Organized Crime and its Protocols.

Inter-American Convention on International Traffic in Minors is the primary instrument regulating child trafficking in the Inter-American Human Rights System. States Parties must designate one or more central authorities to oversee criminal and civil matters related to international traffic among minors. They must provide mutual assistance in judicial and administrative proceedings and establish mechanisms for information exchange.

The Trafficking Victorian Protection Act (TVPA)[68] is the primary US Federal Law that establishes human trafficking and related offences as federal crimes. The law contains provisions for prevention, protection, and prosecution. The law is applicable to children as well and considers children who are trafficked to be 'victims of severe forms of trafficking' and therefore eligible for 'enhanced benefits'.[69] Moreover, the law distinguishes legal procedures for unaccompanied children who are residents or nationals of non-contiguous and contiguous countries (Mexico and Canada).

In the African human rights system, 45 States have ratified the African Charter on the Rights and Welfare of the Child. The Charter requires States to implement appropriate measures to prevent 'abduction, the sale of, or traffic of children for any purpose or in any form, by any person including parents or legal guardians of the child'.[70]

Fifteen West African States ratified the Palermo Protocol[71] and since then have adopted legislation consistent with the Protocol. Some African States have enacted legislations in this regard. One of the first African laws to address child trafficking originated from Benin and is called 'the 5 July 1961 Act'. The law prohibits any displacement of a child outside the country prior to written authorisation from the chief of his/her district of origin. Anyone who infringes on this provision will be sentenced to two to five years of imprisonment or a fine of between 25,000 and 150,000 CFA whenever found within ten kilometres away from national boundaries.[72] The Benin

68 Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7105 (2011).
69 Trafficking Victims Protection Act (TVPA), 22 U.S.C. 7105(b)(1)(C)(II)(I).
70 The African Charter on the Rights and Welfare of the Child, art. 29.
71 Ogunniyi, Idowu, 2022.
72 1961 Act of Benin, art. 3.

Penal Code criminalises child trafficking, and the sentence for this offence is broadly the death penalty.[73]

5.3. Case laws regarding child trafficking

In the case of *Nestle, Cargill*[74] six individuals sued Nestlé USA and Cargill, Inc., claiming that they were victims of child trafficking. They claimed they were trafficked to the Ivory Coast as slaves to harvest cocoa beans. Although they were promised to pay for their labour, they were never paid; moreover, they were threatened with starvation if they did not work, and they were forced to work for up to 14 hours per day, six days per week, in hazardous conditions. They accused the companies with aiding and abetting child slavery because Nestlé and Cargill 'knew or should have known' that the cocoa farms were exploiting child slaves, and they 'continued to provide those farms with resources'. The United States Supreme Court dismissed the lawsuit owing to a lack of jurisdiction.

In the case of *Rantsev vs. Russia and Cyprus*[75] the applicant was seeking justice for the death of his daughter. Oxana Rantseva was a young woman from the Soviet Union who travelled to Cyprus and received an artist visa. She died by falling off the balcony of an apartment belonging to her employer's acquaintances, in what was believed to be an escape attempt. The father claimed that the authorities from Russia and Cyprus did not conduct proper investigations regarding his daughter's death. The Court found that Russia and Cyprus both violated Article 4 of the European Convention on Human Rights. This clearly demonstrates that the European Court of Human Rights interprets Article 4 of the European Convention on Human Rights as including a prohibition of trafficking. Further, the Court concluded that considering the special circumstances of the case, the Cypriot authorities should have known that the applicant's daughter was at risk of being trafficked.

5.4. The use of child soldiers: a form of child trafficking

The use of children in armed combat is a contemporary manifestation of child trafficking.

The international definition of the trafficking of child soldiers involves three necessary elements: consent (forced recruitment, lack of consent from legal guardians, and lack of information about what military service would involve), exploitation, and movement (within a country or across a border).[76]

According to the provisions of the ILO Convention, child soldiering is 'one of the worst forms of child labour'.[77] By the same convention, child soldiers are included in the form of slavery.

73 Benin Penal Code, art. 355.
74 Nestlé United States, Inc. vs. Doe, 141 S. Ct. 1931.
75 ECtHR, Rantsev vs. Cyprus and Russia, No. 25965/04, 7 January 2010.
76 Tiefenbrun, 2007, pp. 418-419.
77 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. No. 182), arts. 1-3.

Another international legal instrument that addresses the issue of child soldiers is the Children in Armed Conflict Protocol, an Optional Protocol to the Convention on the Rights of the Child. According to its provisions, the minimum age for compulsory recruitment by non-governmental armed groups into the armed forces is 18 years.[78] The protocol allows voluntary recruitment beginning at the age of 16 years; however, States have to ensure that the recruitment is genuinely voluntary, which is done with the consent of the parents/legal guardians, who were informed about their military duties and provided proof of age prior to recruitment.[79]

The second major international criminal proceeding to focus on the use of child soldiers is the case of *Prosecutor vs. Dyilo.*[80] Thomas Lubanga Dyilo, former president of the Union of Congolese Patriots, was accused of war crimes comprising conscripting and enlisting child soldiers and using them to further the armed conflict in the Ituri region of the Democratic Republic of Congo. The Chamber confirmed that there was substantial evidence that Lubanga was indeed responsible for the aforementioned crimes as a co-perpetrator.

6. Sexual exploitation

6.1. Overview

Child sexual exploitation is a serious global issue that is becoming increasingly widespread owing to the use of technology and internet. Modern information and communication technologies have made children increasingly vulnerable to evolving forms of sexual exploitation.

Definition of the sexual exploitation of children in regional human rights systems: according to EUROPOL, 'child sexual exploitation refers to the sexual abuse of a person below the age of 18, as well as to the production of images of such abuse and the sharing of those images online'.[81]

The Optional Protocol on the Sale of Children, Child Prostitution and Child pornography defines child pornography as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes'.[82]

US Federal law defines child pornography as any visual depiction of sexually explicit conduct involving a minor.[83]

78 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, art. 1.
79 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, art. 3(3).
80 Prosecutor vs. Dyilo, Doc. No. ICC-01/04-01/06.
81 EUROPOL: Child Sexual Exploitation [Online]. Available at: https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/child-sexual-exploitation (Accessed: 15 March 2023).
82 The Optional Protocol on the Sale of Children, Child Prostitution and Child pornography, art. 2 (c).
83 Unites States Code, Section 2256, Title 18.

South African legislation defines child pornography to include any image which is created, or any description of a person real or simulated who is depicted as being under the age of 18 years, engaged in sexual conduct, assisting or assisting another to participate in sexual conduct exhibiting or describing body parts in a manner which amounts to sexual exploitation or in a manner which is capable of being used for the purposes of sexual exploitation.[84]

6.2. Child sexual exploitation legislation in regional human rights systems

Directive 2011/93/EU is the primary legal instrument addressing sexual exploitation of children and child pornography under EU law.

The Directive defines the term exploitation in an extensive and explicit manner: recruiting, coercing, and forcing children to participate in pornographic performances or child prostitution and profiting from them; attending pornographic performances involving children; and engaging in sexual activities with a child forced into prostitution.[85]

The directive also criminalises intentional production, acquisition, possession, distribution, dissemination, transmission, offering, supplying, or making available child pornography, as well as obtaining access to this type of content.[86]

In the US, federal law prohibits the sexual exploitation of children, which includes employing or using children to produce sexually explicit materials.[87] Child pornography is a serious federal crime that involves the production, distribution, importation, reception, and possession of images of child pornography.

The African Charter on the Rights and Welfare of the Child, which has been ratified by 43 States, requires States to protect children from all forms of sexual exploitation and sexual abuse and to take preventative measures.[88]

In South Africa, the Films and Publication Act is the primary legislation regulating the criminalisation of Internet pornography.[89] According to the provisions of the Act, the production, possession, and distribution of child pornography ARE illegal in South Africa.

84 Films and Publications Act 65/1996, section 1.
85 Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, art. 4.
86 Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, art. 5.
87 18 US Code § 2251.
88 The African Charter on the Rights and Welfare of the Child, art. 27.
89 Films and Publications Act 65/1996.

6.3. Child sexual exploitation cases in regional human rights systems

In *K.U. vs. Finland,*[90] someone placed an advertisement on a dating website in the name of a 12 years old boy without his knowledge or consent. The advertisement was of a sexual nature and contained the contact details of the boy (his telephone number). The internet provider could not divulge the identity of the person who placed the advertisement because of the legislation in place. The European Court of Human Rights found there was a breach of Article 8 of the European Convention on Human Rights as 'both the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require the availability of a remedy enabling the actual offender to be identified and brought to justice'.

In the case of *Ashcroft vs. The Free Speech Coalition*[91] the US Supreme Court struck down the expanded definition of child pornography under The Child Pornography Prevention Act. According to these provisions, child pornography included explicit sexual images which were meant to represent minors, but did not use any real children as subjects, and were produced by other means, such as computer imaging. The Court reasoned that by expanding the definition of child pornography, it would criminalise images that are neither obscene nor produced with any actual children, such as a picture in a psychological manual and award-winning theatrical films.

In the case of *De Reuck vs. Director of Public Prosecutions (Witwatersrand Local Division) and others*[92] De Reuck was charged with possessing child pornography. He claimed that the provisions of the Films and Publications Act were unconstitutional as they violated his right to freedom of expression. The African Court rejected De Reuck's claims and held that the Films and Publications Act constituted a reasonable and justifiable limitation on the right to freedom of expression.

7. Conclusions

In conclusion, there is a high level of harmony between regional human rights systems and children's rights.

All major regional human rights systems – the African, the Inter-American and the Council of Europe – have enacted explicit legislation to protect children's rights.

The main common element between the regional human rights system legislation regarding children's rights is the United Nations Convention on the Right of the Child, as it is the only international human rights instrument that has been ratified by all United Nations member States, except the U.S.

Currently, the U.S. is under considerable pressure to ratify the Convention, and there are numerous newspaper article titles such as 'Is America holding out on

90 ECtHR, K.U. vs. Finland, No. 2871/02, 2 December 2008.
91 535 US 234 (2002).
92 2003 (12) BCLR 1333 (CC).

protecting children's rights?',[93] academic opinions, articles, and reviews with titles such as 'Why the United States Should Ratify the United Nations Convention on the Rights of the Child'[94] which are pro-ratifying the Convention.

We believe that the harmonisation of regional approaches to children's rights will continue in the future, and it is likely that the U.S. will also succumb to tremendous international and national pressure to ratify the United Nations Convention on the Right of the Child.

93 Rothschild (2017) The Atlantic, 2 May 2017 [Online]. Available at: https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/ (Accessed: 15 April 2023).

94 Gardiner (2017) Children's Rights: Why the United States Should Ratify the United Nations Convention on the Rights of the Child [Online]. Available at: https://educate.bankstreet.edu/independent-studies/191 (Accessed: 15 April 2023).

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CHAPTER 9

Children's Rights in the Inter-American System of Human Rights: Framework and Institutions

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ABSTRACT

The need to protect children has been a long-standing concern in the American Hemisphere, where child poverty, high rates of violence, and economic and social inequalities, particularly those affecting indigenous children, justify increased efforts to protect children and adolescents. These have led to the enshrining of children's rights in the major human rights instruments adopted within the Inter-American system, and to the development of Inter-American private international law on children. Alongside various normative efforts, a comprehensive institutional framework, encompassing institutions specifically dedicated to protecting children's welfare (e.g. the Inter-American Children's Rights Institute of 1927 and the Rapporteur on the Rights of the Child of 1998), has been established. Other bodies with a general mandate to ensure the states' compliance with human rights include the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. This paper presents a brief overview of the normative and institutional frameworks for children's rights protection in the Inter-American human rights system.

KEYWORDS

children's rights, child welfare, Inter-American system of human rights, Inter-American Children's Rights Institute, Inter-American Commission on Human Rights, Inter-American Court of Human Rights

1. Introduction

In the Western Hemisphere, the protection of children and adolescents has long been a great concern. International cooperation in this field dates to the early 20th century and is connected to Luis Morquio's initiative of creating the Inter-American Office for the Protection of Children, proposed at the Second American Congress

Katarzyna ZOMBORY (2024) 'Children's Rights in the Inter-American System of Human Rights: Framework and Institutions'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 191–209. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_9

on Children's Issues in 1919.[1] Following that initiative, in 1927, ten countries of the Western Hemisphere (i.e. Argentina, Bolivia, Brazil, Cuba, Chile, Ecuador, the United States of America, Peru, Uruguay, and Venezuela) signed the Founding Charter of what is nowadays known as the Inter-American Children's Institute (IIN).[2] Today, the IIN forms an inherent part of the Inter-American human rights system, serving as a specialized organisation of the Organization of American States (OAS).[3]

The long-standing concern about children's welfare in the Americas is not surprising. Approximately 272 million children[4] live in the 35 member states of the OAS, all of which struggle with child poverty regardless of their level of development and economic growth. In Latin America and the Caribbean alone, over 80 million children and adolescents live in poverty, 32 million of whom live in extreme poverty.[5] The most affected are indigenous and Afro-descendant children, with two out of every three living in poverty and one out of every three living in extreme poverty. In Canada, nearly 14% of children live in poverty (albeit the poverty index reaches 40% for indigenous children), while approximately 22% of children (16 million children) in the United States of America live in families with income below the federal poverty threshold, with these numbers being especially prominent in the Afro-descendant population.[6]

The consequences of child poverty are manifold and long lasting. In the Americas, poverty is a primary reason for parents to decide to give up their guardianship or abandon their children.[7] Poverty does not only prevent children from accessing the basic standards of welfare (e.g. quality education, decent housing, physical safety,

1 Professor Luis Morquio was a Uruguayan paediatrician who later became the first Honorary Director of the International American Institute for the Protection of Children. See the History of the Inter-American Children's Institute [Online]. Available at: http://www.iin.oas.org/en/historia.html (Accessed: 12 July 2023).

2 Founding Charter of the International American Institute for the Protection of Children (Acta Fundacional del Instituto Internacional Americano de Protección a la Infancia), adopted in Montevideo on 9 June 1927 [Online]. Available at: http://www.iin.oea.org/pdf-iin/Acta-fundacional-del-IIN.pdf (Accessed: 12 July 2023).

3 In the Americas, human rights protection is overseen and coordinated by the Organization of American States, which is a regional international organisation comprising 35 member states. It came into being in 1948 with the signing of the Charter of the OAS, and aims to achieve, among its member states, 'an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence', as stipulated in Art. 1 of the Charter of the Organization of American States, adopted at Bogotá on 30 April 1948 by the Ninth International Conference of American States, UN Treaty Series, No. 1609 ('Charter of the OAS'). The 35 OAS member states are, as of 1 April 2023, Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

4 Domingo, 2020, p. 178.

5 Inter-American Commission on Human Rights (IACmHR), 2017, para. 340.

6 Ibid, para. 341.

7 Ibid, para. 345.

and adequate family care) but also puts them at risk of entering the cycle of intergenerational poverty, such as by hindering their physical and mental development and ability to develop skills to access future opportunities.[8] Furthermore, while child poverty is the most frequent challenge that children and youth in the Western Hemisphere face every day, it is sadly far from the worst danger. The region is known for having the highest rates of violence and crime in the world, where the age group most exposed to violence is the 15–29 years group.[9] According to the Inter-American Commission of Human Rights (IACmHR), in the Americas, 14% of all children and adolescents have suffered some form of sexual violence,[10] there is the second highest adolescent pregnancy rate in the world, and it is the only region worldwide with rising trends in the number of births to girls below the age of 15 years.[11]

This chapter presents a brief overview of the institutional and normative framework for the protection of children in the Inter-American human rights system. This exploration is important because the political and social reality of the region, including the long-lasting effects of historical inequalities, have made the protection of the rights of boys, girls, and adolescents (*derechos de niños, niñas y adolescentes*) an urging and particularly challenging issue.

2. Normative framework for children's rights in Americas

2.1. Human rights instruments

The principal human rights documents adopted under the auspices of the OAS are the 1948 American Declaration of the Rights and Duties of Man (ADRDM),[12] and the 1969 American Convention on Human Rights (ACHR),[13] complemented by two additional Protocols.[14] They provide a general framework for the protection of individual rights and freedoms that applies equally to adults and children without discrimination.[15]

8 Ibid, para. 343.

9 IACmHR, 2015, paras. 41–42. In Latin America and the Caribbean, the advances made, through successful public policies protecting children, in the rate of surviving early childhood are reversed in adolescence owing to homicide rates in that age group. Ibid, para. 9.

10 IACmHR, 2022a.

11 IACmHR, 2022b.

12 American Declaration of the Rights and Duties of Man, adopted at Bogotá in 1948 by the Ninth International Conference of American States [Online]. Available at: https://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf (Accessed: 12 July 2023).

13 American Convention on Human Rights "Pact of San José, Costa Rica", adopted at San José on 22 November 1969, UN Treaty Series, vol. 1144, No. 17955.

14 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador", adopted at San Salvador on 17 November 1988, No. A-52; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted at Asunción on 8 June 1990, OAS Treaty Series, No. 73.

15 Art. II of the ADRDM and Art. 1 para. 1 of the American Convention on Human Rights (ACHR).

Furthermore, in the Inter-American human rights system, children enjoy, in addition to the aforementioned guarantees enjoyed by every person, complementary protection through specific provisions designed to safeguard their rights.

The ADRDM establishes in its Art. VII the right to special protection for mothers and children, according to which 'all women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid'. In addition, Art. VI guarantees the right to the protection of the family, Art. XII provides for the right to education, Art. XXX determines the duties of society towards children, and specifies the children's duties towards their parents, something that has no parallel in the universal or the European human rights system. Art XXX describes that, 'It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honour their parents always and to aid, support and protect them when they need it'. The drafters of the ADRDM have thus considered a caring approach towards children, perceiving them as human beings who deserve assistance and care because of their status as minors and not rights holders.[16]

Regarding the ACHR, its adoption catalysed numerous changes in the Inter-American human rights system regarding child protection, coinciding with the general paradigm shift in international children's rights law marked by the adoption of the United Nations Convention on the Rights of the Child.[17] The ACHR drafters recognised children as persons with legal rights and treated them as subjects of rights, not merely as objects of protection.[18] The rights of the child are established in Art. 19 of the ACHR, according to which 'every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. Although the drafters did not explicitly define the term "child", the Inter-American Court of Human Rights (IACtHR) has accepted that any person under 18 years should be considered a child.[19] The ACHR contains several other provisions referring to children in specific contexts, such as the right to special protection of minors under criminal proceedings (Art. 5, para. 5 of the ACHR) and the equal rights of children born out of wedlock and those born in wedlock (Art. 17, para. 5 of the ACHR). The adoption of the ACHR in 1969 created new avenues for children's rights protection in the Americas. By incorporating provisions securing the rights of

16 IACmHR, 2008, para. 20.

17 Convention on the Rights of the Child, New York, 20 November 1989, UN Treaty Series, vol. 1577, No. 27531. The United Nations Convention on the Rights of the Child recognises the child as a subject of rights, which is manifested in that the child holds rights which have an influence on her or his life (participatory rights under Art. 12 of the CRC), and not only rights derived from her or his vulnerability or dependency on adults, see: UN Committee on the Rights of the Child, General comment No. 12 (2009) on The right of the child to be heard, 20 July 2009, CRC/C/GC/12.

18 IACmHR, 2008, para. 63.

19 The definition of the child in the Inter-American Human Rights System is based on the provisions of Art. 1 of the Convention on the Rights of the Child, see: IACtHR, 'Street Children' (Villagran-Morales et al.) vs. Guatemala, Judgment of 19 November 1999 (Merits), Series C, No. 63, para. 188; IACtHR, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002 of 28 August 2002, para. 42.

the child into an international instrument endowed with a compliance monitoring mechanism, children's rights have gained a treaty-binding and enforceable character. As Feria-Tinta argues, the IACtHR has material jurisdiction and power to deal with individual complaints about children's rights violations in a way that no other international judicial body is empowered to (i.e. by issuing binding decisions and ordering state reparation measures, which the states are bound to implement).[20]

Art. 19 of the ACHR has been subject to extensive interpretation in the IACtHR's case law. It is accepted as a complementary right established by the ACHR, implying the reinforced protection of children and adolescents in addition to the protection and rights enjoyed by all persons.[21] The 'measures of protection', within the meaning of Art. 19, may refer to several different aspects of children's protection, such as non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of children, the right to an adequate standard of living, or the social rehabilitation of all children who are abandoned or exploited.[22] The underlying principle of children's rights protection stemming from Art. 19 is the best interest of the child, which in turn is based 'on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential'.[23] To determine the duties of states under Art. 19, the IACtHR has referred to both the rules of interpretation stemming from international law[24] and Art. 29 of the ACHR. These rules allowed the IACtHR to establish that the scope of children's rights under Art. 19 should be determined in line with the *corpus juris*, which is the international framework for the protection of the child that encompasses the 1989 United Nations Convention on the Rights of the Child,[25] the decisions of the Committee on the Rights of the Child, and Protocol II to the Geneva Conventions.[26] Accordingly, the children's rights guaranteed in Art. 19 of the ACHR enjoy the highest level of protection, as manifested in the fact that they cannot be suspended even in times of public emergency. Furthermore, the provisions of Art. 27 of the ACHR allowing for the limitation of human rights in times of war, public danger, or other emergencies explicitly prohibit the suspension of children's rights secured in Art. 19, as well as of the judicial guarantees essential for the protection of such rights. Consequently, even during states of emergency, judges should always process legal actions brought for the protection of children's rights,

20 Feria-Tinta, 2014, p. 234.
21 Aguilar Cavallo, 2008, p. 240.
22 IACtHR,'Street Children' (Villagran-Morales et al.) vs. Guatemala, para. 196.
23 Advisory Opinion OC-17/02, paras. 56–61; See Aguilar Cavallo, 2008, pp. 238–244.
24 In particular, from the Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, UN Treaty Series, vol. 1155, No. 18232.
25 Convention on the Rights of the Child, adopted in New York on 20 November 1989, UN Treaty Series, vol. 1577, No. 27531.
26 For example, 'Street Children' (Villagran-Morales et al.) vs. Guatemala, paras. 192-195; IACtHR, 'Mapiripán Massacre' vs. Colombia, Judgment of 15 September 2005 (Merits, Reparations, and Costs), Series C, No. 134, para. 153. See IACmHR, 2008, para. 53.

and exercise judicial control based on the reasonableness and proportionality of the restricted act.[27]

Special provisions for children's rights are also enshrined in the Additional Protocol to the ACHR on Economic, Social, and Cultural Rights (also known as the Protocol of San Salvador). Art. 16 of the Protocol of San Salvador states that:

> Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his/her parents, except in exceptional, judicially recognised circumstances, a young child ought not to be separated from his/her mother. Every child has the right to free and compulsory education, at least in elementary school, and to continue training at higher levels of the educational system.

Unlike the right to complementary protection established in Art. 19 of the ACHR, which is enforceable before the IACtHR, the rights set forth in Art. 16 of the Protocol of San Salvador are not justiciable within the system of individual petitions. The right to education, listed among the rights guaranteed under Art. 16, can be enforced, albeit based on the normative content of Art. 13 of the Protocol of San Salvador, and not Art. 16.[28]

2.2. Inter-American private international law framework

Over the last few decades, the protection of children has been the focus of Inter-American international private law, and been codified under the auspices of the Inter-American Specialised Conferences on Private International Law (Conferencia Especializada Interamericana sobre Derecho Internacional Privado, also known as CIDIP).[29] The development of Inter-American international private law on children began in the 1980s, and has been landmarked by the adoption of four major conflict-of-law treaties, which are the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors,[30] the 1989 Inter-American Convention on International Return of

27 IACmHR, 2008, para. 51.

28 In accordance with Art. 19 para. 6 of the Protocol of San Salvador.

29 The process of codification of private international law in the Inter-American context has been one of the ongoing legal activities of the American states since the closing decades of the 1800s. It has taken different institutional forms and is currently being carried out within the framework of the Specialized Conferences on Private International Law, WHICH have resulted in 26 international instruments. see more on https://www.oas.org/dil/PrivateIntLaw-HistDevPri-Law-Eng.htm. According to Art. 122 of the Charter of the OAS, the Specialized Conferences are intergovernmental meetings to deal with special technical matters or to develop specific aspects of inter-American cooperation.

30 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, adopted on 24 May 1984 at La Paz under the auspices of the 3rd Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 62.

Children,[31] the 1989 Inter-American Convention on Support Obligations,[32] and the 1994 Inter-American Convention on International Traffic in Minors.[33]The 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors applies to the adoption of children and other procedures that confer a legally established filiation where the domicile of the adopter is in one state party and the habitual residence of the adoptee is in another.[34] This 1984 Inter-American Convention establishes the applicable law to govern the capacity to be an adopter, the relations between the adopter and adoptee, and succession rights.[35] It guarantees the secrecy and irrevocability of adoption.[36]

The 1989 Inter-American Convention on International Return of Children seeks to secure the return of children habitually residing in a state party who have been wrongfully removed or retained in another state party, and secure the enforcement of visitation and custody rights of the parties entitled to them.[37] This 1989 Inter-American Convention is modelled on, and shares the same principles and objectives as, the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[38] The 1989 Inter-American Convention creates a cooperative mechanism between the state parties with the view of obtaining the prompt return to the country of habitual residence of abducted or wrongfully retained children, where the cooperation takes place through the Central Authority designated by each state party. The main difference between the 1989 Inter-American Convention and the 1980 Hague Convention relates to the state authorities' jurisdiction to receive and process the application for the return of a child. Under the 1989 Inter-American Convention, the authorities of the state party in which the child habitually resided immediately before removal or retention have jurisdiction to consider a petition for the child's return, and only in case of urgency may the application be submitted to the Central Authority of the

31 Inter-American Convention on International Return of Children, adopted on 15 July 1989 at Montevideo under the auspices of the 4th Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 70.

32 Inter-American Convention on Support Obligations, adopted on 15 July 1989 at Montevideo under the auspices of the 4th Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 71.

33 Inter-American Convention on International Traffic in Minors, adopted on 18 March 1994 at Mexico City under the auspices of the 5th Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 79.

34 Art. 1 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors. As of 1 April 2023, nine states members of the OAS have ratified the 1984 Inter-American Convention.

35 Arts. 8–11 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors.

36 Arts. 7 and 12 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors.

37 Art. 1 of the 1989 Inter-American Convention on International Return of Children.

38 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, adopted at the Hague on 25 October 1980, UN Treaty Series, Vol. 1343, No. 22514. See Blanco-Rodríguez and Santacruz-López, 2009, pp. 262–263.

state to which the child was wrongfully removed or retained.[39] In contrast, the 1980 Hague Convention establishes that a person claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or that of any other contracting state.[40] The 1989 Inter-American Convention applies only to member states that ratified the OAS.[41] Among the OAS member states parties to both the 1989 Inter-American Convention and the 1980 Hague Convention, the 1989 Inter-American Convention prevails unless a bilateral agreement prioritises the application of the 1980 Hague Convention.[42]

The 1989 Inter-American Convention on Support Obligations establishes a cooperative mechanism between state parties to provide broad protection for child support, encourage the enforcement of support between spouses, and facilitate the extension of the Convention's benefits to all forms of family support.[43] The Convention applies to situations in which the support creditor is domiciled or habitually resident in one state party and the debtor is domiciled, habitually resident, has property, or income in another state party (Art. 1). The 1989 Inter-American Convention treats three conflict-of-laws topics, as follows: (i) grants jurisdiction on specified grounds to the courts of states parties to the Convention; (2) provides choice-of-law rules for the resolution of those cases; (3) structures the recognition and enforcement of qualifying decisions.[44]Among member states of the OAS parties to both the 1989 Inter-American Convention and the 1973 Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations,[45] the 1989 Inter-American Convention applies and prevails, unless a bilateral agreement gives priority to the application of the 1973 Hague Convention.[46]

The 1994 Inter-American Convention on International Traffic in Minors was adopted to protect the fundamental rights of children and their best interests by preventing and punishing international traffic in minors and regulating its civil and penal aspects.[47] The international traffic in minors refers to the abduction, removal, or retention or attempted abduction, removal, or retention of a minor for unlawful purposes or by unlawful means.[48] The term "unlawful purpose" includes prostitution,

39 Art. 6 of the 1989 Inter-American Convention on International Return of Children. Nonetheless, this Inter-American Convention does not specify the term 'in case of urgency' nor determines situations considered urgent.

40 Art. 8 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

41 As of 1 April 2023, 14 OAS states members have ratified the 1989 Inter-American Convention on International Return of Children.

42 Art. 34 of the 1989 Inter-American Convention on International Return of Children.

43 Bruch, 1992, p. 820.

44 Ibid, p. 819.

45 Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted at the Hague on 23 November 2007, UN Treaty Series, vol. 2955, Registration No. 51361.

46 Art. 29 of the 1989 Inter-American Convention on Support Obligations. As of 1 April 2023, 14 OAS states members have ratified the 1989 Inter-American Convention on Support Obligations.

47 Art. 1 of the 1994 Inter-American Convention on International Traffic in Minors.

48 Art. 2 b) of the 1994 Inter-American Convention on International Traffic in Minors.

sexual exploitation, servitude, or any other purpose unlawful in either the state of the minor's habitual residence or the state party where the child is located. Meanwhile, the term "unlawful means" includes kidnaping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons, or institutions having the care of the child, or any other means unlawful in either the state of the minor's habitual residence or the state party where the child is located.[49] The state parties to the 1994 Inter-American Convention undertook to create a system of mutual legal assistance dedicated to the prevention and punishment of international traffic in minors, and adopt related administrative and legal provisions to that effect. The international cooperation takes place through Central Authorities designated by each state party. Importantly, the 1994 Inter-American Convention refers to crimes involving international traffic in minors (Arts. 7–11) and parallelly regulates the civil aspects of the international traffic of children related to the proceedings for locating and returning a child (Arts. 12–17). The 1994 Inter-American Convention also contains provisions related to the illegal adoption of children, as it falls within the definition of trafficking in minors.[50] According to Art. 18, adoptions and other similar legal proceedings shall be subject to annulment if they had their origin or purpose in international traffic in minors, under the condition that in such an annulment the child's best interests are considered at all times. Similarly, Art. 19 of the 1994 Inter-American Convention states that the care or custody of a child may be revoked whenever it has its origin or purpose in international traffic in minors, providing that in such an annulment, the child's best interests are duly considered.

3. Institutional framework

3.1. Inter-American Commission on Human Rights

The IACmHR is the principal and autonomous organ of the OAS, and aims to promote and protect human rights. It was created in 1959 and formally became one of the main organs of the OAS in 1967.[51] Its position within the OAS is regulated in Art. 53 and 106 of the Charter of the Organization of American States, and by ratifying the Charter, every OAS member state accepted the competence of the IACmHR to consider individual complaints concerning alleged human rights violations occurring in their

49 Art. 2 c)-d) of the 1994 Inter-American Convention on International Traffic in Minors.

50 The 1994 Inter-American Convention does not establish the requirement of an exploitative purpose for trafficking in children to exist; this is unlike Art. 3 a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime). Still, the 1994 Inter-America Convention provides two optional elements instead (trafficking 'for unlawful purposes' or 'by unlawful means') that are met in illegal adoption cases. See de Boer-Buquicchio, 2017, pp. 7–8.

51 With the adoption of the Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), signed at Buenos Aires on 27 February 1967, OAS Treaty Series, No. 1-A.

jurisdiction.[52] In parallel, the IACmHR has also become a treaty body of the ACHR as part of its compliance–monitoring mechanism. As an organ of the OAS, the IACmHR performs its functions in accordance with the Charter in relation to all its member states; as an ACHR treaty body, it exercises its mandate in relation to the state parties to the ACHR.

In the exercise of its mandate to promote and protect human rights, the IACmHR has numerous functions and powers, including developing an awareness of human rights among the peoples of America, making recommendations to the member states of the OAS for the adoption of progressive measures in favour of human rights, and requesting information from the member states.[53] As Rodríguez-Pinzón emphasised, the term "protection of human rights" necessarily involves the power to receive and consider human rights cases,[54] implying that the IACmHR is empowered to receive individual complaints concerning alleged violations of human rights both in relation to OAS member states that have ratified the ACHR and those who are not parties to the ACHR.[55] While dealing with such complaints, the IACmHR's double affiliation (i.e. a Charter-based OAS organ and a treaty body of the ACHR) translates into different competences and reference points for legal considerations depending on the state's status. For states that are members of the OAS but have not ratified the ACHR, complaints can be brought before the IACmHR based on the ADRDM.[56] Although the ADRDM was not initially adopted as a legally binding treaty, it has become a source of legal obligations for all OAS member states.[57] Regarding states which have ratified the ACHR, contentious cases are brought before the IACmHR under the ACHR.[58]

The IACmHR is competent to examine the complaints to verify the facts, and if it finds that there has been a violation of human rights (either guaranteed in the ADRDM or in the ACHR), it has the power to make recommendations for the respondent state to take appropriate measures to remedy the wrongful situation.[59] If the state party does not comply with the recommendations, the IACmHR may submit the case to the

52 Rodríguez-Pinzón, 2013, p. 13.

53 Art. 41 of the ACHR. The structure, competence, and procedure of the IACmHR are regulated in the Statute of the Inter-American Commission on Human Rights, approved through Resolution No. 447 adopted by the OAS General Assembly during its ninth period of sessions, held at La Paz in October 1979. They are also regulated in the Rules of Procedure of the Inter-American Commission on Human Rights, approved by the IACmHR at its 137th regular period of sessions and held from 28 October to 13 November 2009. These Rules of Procedure were modified in 2011 and 2013 [Online]. Available at: https://www.oas.org (Accessed: 12 July 2023).

54 Rodríguez-Pinzón, 2013, p. 13.

55 Under Art. 20 (b) of the Statute of the IACmHR (in relation to those OAS member states not parties to the ACHR) and under Art. 41 (f) of the ACHR (in relation to OAS member states that have ratified the ACHR).

56 Pursuant to Art. 20 (b) of the Statute of the IACmHR.

57 Rodríguez-Pinzón, 2013, p. 13. See IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art. 64 of the American Convention on Human Rights, Advisory Opinion OC-10/90 of 14 July 1989, Series A, No. 10, paras. 35–45.

58 Pursuant to Art. 41 (f) of the ACHR.

59 Art. 20 (b) of the Statute of the IACmHR; Art. 51 para. 2 of the ACHR.

IACtHR for a binding judgment.[60] However, if the complaint has been brought under the ADRDM, the state has not recognised the IACtHR's jurisdiction, or the parties have reached a friendly settlement, the case is not submitted to the IACtHR and remains at the IACmHR's level.[61]

Within its adjudicatory function in individual cases, the IACmHR has the power to adopt precautionary measures, constituting an important instrument to prevent continued human rights violations.[62] This mechanism applies to all OAS member states regardless of having ratified the ACHR, and allows the IACmHR to request from states, in serious and urgent cases which amount to a breach of human rights, the adoption of urgent measures to prevent irreparable harm. Similarly, in cases of extreme seriousness and urgency and when it becomes necessary, the IACmHR may resort to the IACtHR for an order of provisional measures to avoid irreparable damage to persons and prevent ongoing violations.[63]

Finally, its monitoring and investigation of the situation of human rights in the Americas requires the IACmHR to draft and submit annual reports to the General Assembly of the OAS, and to prepare thematic and country reports on human rights status.[64] The IACmHR's Rules of Procedure empower it to create special and thematic "rapporteurships" with mandates linked to the promotion and protection of human rights in thematic areas of special interest (e.g. the rights of children, indigenous peoples, and women).[65]

3.2. The Office of the Rapporteur on the Rights of the Child

The Office of the Rapporteur on the Rights of the Child of the Inter-American Commission on Human Rights was created in 1998 to bolster respect for the human rights of children and adolescents in the Americas.[66] Its mandate is based on Art. 41, para. 2 of the ACHR and Art. 18 of the IACmHR Statute, which together establish specific functions in the sphere of promoting human rights. The primary mandate of the Rapporteur on the Rights of the Child is to promote the human rights of children and

60 Art. 61 of the ACHR; Villalta Vizcarra, 2015, p. 676.

61 Feria-Tinta, 2014, p. 234.

62 Art. 25 of the Rules of Procedure of the IACmHR. Precautionary measures are urgent requests, directed to an OAS member state, to take immediate injunctive measures in serious and urgent cases and whenever necessary to prevent irreparable harm to persons. As cited in Rodríguez-Pinzón, 2013.

63 Art. 25 para. 12 and Art. 76 of the Rules of Procedure of the IACmHR. See IACmHR, 2008, paras. 14–15.

64 Arts. 59 and 60 of the Rules of Procedure of the IACmHR.

65 Based on Art. 15 para. 3 of the Rules of Procedure of the IACmHR.

66 IACmHR, 2008, para. 5. Rapporteur on the Rights of the Child is one of thirteen Rapporteurships currently operating within the IACmHR, which include also Rapporteurships for People of African Descent, Rights of Older Persons, Indigenous Peoples, LGBTI Persons, Human Mobility, Human Rights Defenders. Persons Deprived of Liberty, Persons with Disabilities, Women, Memory, Truth and Justice, as well as Special Rapporteurships for Freedom of Expression and on Economic, Social, Cultural, and Environmental Rights [Online]. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/composition.asp#2 (Accessed: 12 July 2023).

adolescents within the jurisdiction of OAS member states.[67] The Rapporteur has the following duties and responsibilities: (I) providing specialised advice to the IACmHR in the proceedings of petitions regarding violations of the rights of children and adolescents; (II) conducting studies on the rights of children and adolescents, including recommendations to encourage states' compliance with international human rights standards; (III) undertaking on-site visits to countries in the region and meeting with governmental authorities and civil society organisations; and (IV) conducting promotional activities on the protection of the rights of children.[68] At least annually, the Rapporteur on the Rights of the Child reports to the IACmHR and presents his/her work plans to the IACmHR for approval.[69] The Rapporteur advises the IACmHR with respect to all issues he/she has become aware of and which may be considered matters of controversy, grave concern, or special interest for the IACmHR.[70]

3.3. Inter-American Court of Human Rights

The IACtHR, formally envisaged by the ACHR in 1969, was established in 1979 as the sole judicial organ involved in the Inter-American human rights system.[71] Although Art. 33 of the ACHR empowers both the IACtHR and the IACmHR to ensure state parties' compliance with the ACHR, only the IACtHR has formal powers to issue decisions which the states are bound to comply with.[72] The IACtHR performs its functions as a treaty body of the ACHR, meaning that its purpose is connected primarily with its application and interpretation.[73]

The IACtHR is composed of seven judges, all of whom are nationals of OAS member states and are elected for a six-year term from among jurists of the highest moral authority and recognised competence in the field of human rights.[74] The IACtHR seat is located in San José, Costa Rica; however, it may also convene in any OAS member state.[75] It is not uncommon for the IACtHR to hold sessions in other countries, through which it increases public awareness of the Inter-American human rights system, develops a more cooperative working relationship with the local governments and

67 IACmHR, 2008, para. 8.
68 Ibid, paras. 10–13.
69 Art. 15 para. 6 of the Rules of Procedure of the IACmHR.
70 Art. 15 para. 8 of the Rules of Procedure of the IACmHR.
71 Villalta Vizcarra, 2015, p. 677. The IACtHR's first hearing was held in June 1979.
72 See Art. 68 para. 1 of the ACHR.
73 The IACtHR exercises its functions in accordance with the provisions of the ACHR. Its functions and procedures are regulated in detail in its Statute and Rules of Procedure, as follows: Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz in October 1979, Resolution No. 448; Rules of Procedure of the Inter-American Court of Human Rights, which were approved by the IACtHR during its LXXXV Regular Period of Sessions held on 16–18 November 2009 [Online]. Available at: https://corteidh.or.cr (Accessed: 12 July 2023).
74 Art. 52 para. 1 of the ACHR, restated in Arts. 4–5 of the Statute of the IACtHR.
75 Art. 3 para. 1 of the Statute of the IACtHR and Art. 13 of the Rules of Procedure of the IACtHR.

judiciary, and fosters a better understanding of human rights among civil society and the general public.[76]

The IACtHR exercises contentious (regulated in Arts. 61–63 ACHR) and advisory (regulated in Art. 64) jurisdictions. Under its contentious jurisdiction, the IACtHR rules on whether a state party has violated the human rights guaranteed in the ACHR,[77] and it can exercise its adjudicatory functions in relation to OAS member states that are parties to the ACHR and have accepted the IACtHR's optional jurisdiction as binding.[78] Only the IACmHR and state parties to the ACHR have the right to submit cases to the IACtHR.[79] While victims, as individuals, do not have the right to submit an individual complaint to the IACtHR, they enjoy *locus standi* in proceedings before the IACtHR. If the IACtHR finds that there has been a violation of the human rights guaranteed in the ACHR, it has expansive formal powers to order the state to make reparations for the victims.[80] The IACtHR considers that the reparation of the damages caused by the infringement of human rights shall aim, whenever possible, at the full restitution and removal of the effects of the violation.[81] Where this is not possible, other measures may be implemented to guarantee the observance of human rights and remedy the consequences of the breaches. The IACtHR supervises the states' compliance with the ordered reparation measures through various methods (e.g. written processes, hearings, and visits), and monitoring compliance with judgments is an element of the jurisdictional function of the IACtHR. Regarding the IACtHR's advisory jurisdiction, OAS member states and its organs may consult the IACtHR regarding the interpretation of the ACHR or other treaties concerning the protection of human rights in American states.[82] The IACtHR's advisory opinions, unlike its judgments in contentious cases, are not binding to states. Nonetheless, as Pasqualucci emphasised, they have undeniable legal and moral effects on both national and international law.[83]

76 Pasqualucci, 2013, p. 9.

77 Feria-Tinta, 2014, pp. 678–679; Pasqualucci, 2013, pp. 10–11.

78 See Art. 62 para 1. Of the ACHR. As of 1 April 2023, 20 states have recognised the IACtHR's contentious jurisdiction, namely Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.

79 Art. 61 para. 1 of the ACHR. Nevertheless, Art. 44 of the ACHR entitles any person or group of persons and any legally recognised non-governmental entity to lodge an individual petition with the IACmHR, from where it might by transmitted to the IACtHR.

80 According to Art. 63 para 1. of the ACHR, 'if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party'. For more on the reparations in the case law of the IACtHR, cited in: Pasqualucci, 2013, pp. 188–250.

81 See IACtHR, Sawhoyamaxa Indigenous Community vs. Paraguay, judgment of 29 March 2006 (Merits, Reparations and Costs), Series C, No. 146, para. 197.

82 The IACtHR's advisory jurisdiction can be exercised without the express consent of states, and even OAS member states not parties to the ACHR may request an advisory opinion from the IACtHR. See Pasqualucci, 2013, p. 11; Villalta Vizcarra, 2015, p. 679.

83 Pasqualucci, 2013, p. 11.

To prevent continued human rights violations, the IACtHR is empowered to order provisional measures when they are necessary to avoid irreparable damage to people in cases of extreme gravity and urgency.[84] The IACtHR may resort to provisional measures in cases it already has under consideration and equally in cases not (yet) *sub judice*; in the latter case, it acts at the request of the IACmHR.[85] The IACtHR's orders concerning provisional measures are binding on states.

Importantly, during its first two decades of functioning, the IACtHR did not develop significant jurisprudence over children's rights. Since its first judgment in a contentious case involving children's rights (*'Street Children' (Villagran-Morales et al.) vs. Guatemala*) was delivered in 1999, the IACtHR embarked on an evolutionary interpretation of the ACHR to provide children in the Americas with far-reaching protection. The IACtHR's approach stems from the recognition that children should be treated as genuine rights holders, endowed with legal and procedural capacity, who need to be granted full access to justice.[86] Moreover, the scope of children's rights and the correlated duties of the family, society, and state have been determined by the IACtHR in light of international standards (*corpus juris*) applicable to children.[87] The recurring themes in the IACtHR's children-related case law include gross and systematic violations of children's rights, such as the following: wrongful deaths, illegal detention, torture, and killing of children by law enforcement officers, sexual violence, inhumane detention conditions, forced displacement of adults and children, and violence against indigenous children and their ethnic communities.

Also within the scope of its advisory functions, the IACtHR has performed, over the years, standard-setting activities in the field of children's rights and has, accordingly, issued several advisory opinions concerning children. These include the Advisory Opinion OC-17/2002 on Juridical Conditions and Human Rights of the Child (2002),[88] the Advisory Opinion OC-21/14 on Rights and guarantees of children in the

84 Art. 63 para. 2 ACHR.

85 Ibid.

86 Cançado Trindade, 2007, pp. 56–57; Aguilar Cavallo, 2008, pp. 234 and 241.

87 Landmark decisions of the IACtHR for the children's rights protection include the following: IACtHR, 'Street Children' (Villagran-Morales et al.) vs. Guatemala, Judgment of 19 November 1999 (Merits), Series C, No. 63; IACtHR, Bulacio vs. Argentina, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C, No. 100; IACtHR, 'Juvenile Reeducation Institute' vs. Paraguay, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 112; IACtHR, Gómez-Paquiyauri Brothers vs. Peru, Judgment of 8 July 2004 (Merits, Reparations and Costs), Series C, No. 110; IACtHR, 'Mapiripán Massacre' vs. Colombia; IACtHR, Girls Yean and Bosico vs. Dominican Republic, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 130; IACtHR, Vargas-Areco vs. Paraguay, Judgment of 26 September 2006 (Merits, Reparations and Costs), Series C, No. 155. For a more detailed analysis of the IACtHR's case law on children's rights, please refer to Chapter 11 of this book.

88 IACtHR, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002 of 28 August 2002, Series A, No. 17.

context of migration and/or in need of international protection (2014),[89] and the Advisory Opinion OC-29/22 on Differentiated approaches with respect to certain groups of persons in detention (2022).[90] These advisory opinions have significantly contributed to clarifying the scope of states' obligations towards protecting children's rights.

3.4. Inter-American Children's Institute

The IIN was created in 1927 following a resolution of the Fourth Pan-American Child Congress.[91] Since 1949, the IIN has been a specialised organisation of the OAS responsible for promoting the study of issues relating to children and the family in the Americas, as well as for designing technical instruments contributive to solving the problems affecting them.[92] All 35 OAS members states are members of the IIN. The composition, functions, and competencies of the IIN are set out in its Statute and Rules of Procedure.[93] The principal purpose of the IIN is to cooperate with the governments of member states to promote the development of technical activities and instruments that contribute to the integral protection of children and the improvement of their families' quality of life.[94] The functions of the IIN, stipulated in Art. 3 of its Statute, include those outlined herein: (I) providing technical assistance for raising awareness on all issues relating to children, the family, and the community; (II) promoting actions aimed at favouring the best interests of children as full rights holders; (III) cooperating with member state governments, other agencies within the Inter-American system, other international institutions, and civil society organisations; (IV) watching over the creation of spaces that secure the free expression and participation of children on every matter of their concern; (V) promoting research on various problems affecting children and the family in the Americas.

The IIN is composed of three organs, namely the Directing Council, the Pan American Congress on Children, and the Secretariat of the Institute, and is directed by the Director General.[95] The Directing Council comprises representatives from OAS member states, and its main task is to formulate the general policy of the IIN and

89 IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14 of 19 August 2014, Series A, No. 21.
90 IACtHR, Differentiated approaches with respect to certain groups of persons in detention, Advisory Opinion OC-29/22 of 30 May 2022, Series A, No. 29.
91 The Pan American Child Congresses provided an incentive for child-focused welfare policies in Latin America. for more on the Pan American Child Congresses, see Guy, 1998.
92 Art. 1(a) of the Statute of the Inter-American Children's Institute, approved during the 79th Regular Meeting held 25-26 October 2004 in Mexico City through Resolution CD/RES. 06 (79-04), considered at the Regular Session of the OAS Permanent Council held on 2 February 2005, CP/doc. 3964/04.
93 Rules of Procedure of the Inter-American Children's Institute, approved during the 79th Regular Meeting held 25–26 October 2004 in Mexico City through Resolution CD/RES. 06 (79-04), considered at the Regular Session of the OAS Permanent Council held on 2 February 2005, CP/doc. 3964/04.
94 Art. 2 of the Statute of the IIN.
95 Art. 4 of the Statute of the IIN.

exercise supervision over the fulfilment of its responsibilities.[96] The Pan American Congress on Children is an Inter-American ministerial meeting aimed at promoting the exchange of experience and knowledge among people in the Americas on issues within the competence of the IIN, and proposing relevant recommendations.[97] The Secretariat of the Institute is the permanent administrative organ of the IIN, providing support for all its activities.[98] The Director General is the IIN's legal representative, which in turn is appointed by the OAS Secretary General and responsible for implementing the Directing Council's decisions.[99]

The Statute of the IIN and its Rules of Procedure contain provisions allowing children to participate in the works of the IIN, aiming to secure that the Institute holds a '*view of the reality of children*'.[100] Children under 18 years old may, through their representatives, become members of the official delegations of member states to the Directing Council and Pan American Congress on Children, such that they may be heard on all matters concerning them and advise their respective delegations accordingly.[101] Member states should facilitate the participation of children in the IIN so that those children can provide the Directing Council with a new and constantly updated view of the reality of children in the region, and be directly informed of the IIN's policies, programs, and actions. When they return to their home countries, representatives of the children who are members of official delegations are expected to share their experiences with diverse groups of children in their countries.

The IIN works according to the goals set in its Action Plan, which are assessed every four years. In 2019–2023, the priority issues included the rights of adolescents in conflict with criminal law, early childhood, children deprived of parental care (in the context of the right to family life), migrant children, and international child abduction.[102] Previous works have encompassed the rights of children in different areas and life circles, violence, sexual violence and exploitation, juvenile justice systems, and child participation.[103] The IIN is one of the main organisations in the Inter-American human rights system responsible for promoting children's rights, and its political role has significantly helped OAS state members in building uniform actions to protect children's welfare.[104]

96 Arts. 8–9 of the Statute of the IIN.
97 Art. 19 of the Statute of the IIN.
98 Art. 28 of the Statute of the IIN.
99 Arts. 24–25 of the Statute of the IIN.
100 Art. 10 of the Rules of Procedure of the IIN and Art. 7(d) of the Statute of the IIN.
101 Art. 10 of the Rules of Procedure of the IIN.
102 Inter-American Children's Institute, Action Plan 2019-2023, adopted at the 94th Regular Meeting of the Directing Council of the IIN, pp. 38-53 [Online]. Available at: http://iin.oea.org (Accessed: 12 July 2023).
103 Domingo, 2020, pp. 179–182.
104 Ibid, p. 182.

4. Conclusions

The need to protect children is a long-standing issue of concern in the Americas that has led to the enshrining of children's rights in the major human rights instruments of the Inter-American system, and to the development of Inter-American private international law on children. The major human rights documents, the ADRDM and the ACHR, contain specific provisions that secure the right of children to special measures of protection along with the rights and freedoms enjoyed by every person. Importantly, the children's rights guaranteed in Art. 19 of the ACHR can be directly invoked and enforced before the IACtHR.

The Inter-American private international law on children consists of four conflict-of-laws conventions that were inspired by pressing family law problems in the Americas and the increasing problem of child trafficking. They are the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, the 1989 Inter-American Convention on International Return of Children, the 1989 Inter-American Convention on Support Obligations, and the 1994 Inter-American Convention on International Traffic in Minors. All these conventions establish different forms of cooperative mechanisms between OAS member states.

The institutional framework for the protection of children's rights in the Americas consists of bodies with a general mandate to ensure state compliance with human rights and institutions specifically dedicated to child welfare protection. The compliance monitoring institutions are the IACmHR and the IACtHR, the latter being endowed with contentious and advisory jurisdiction. The Inter-American Children's Rights Institute (1927) and the Rapporteur on the Rights of the Child (1998) are institutions specifically dedicated to protecting children's welfare. Their activity allows for coordinated actions to protect and promote children's welfare and monitor their rights in the Americas.

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CHAPTER 10

The Practice of Children's Rights Protection in the Americas

Katarzyna ZOMBORY

'A BIG COUNTRY'

I live in a country so big that everything is far away:
education,
food,
housing.

So vast is my country,
that there is not enough justice for everyone.

(Lina Zerón[1])

ABSTRACT

In the Inter-American Human Rights Protection System, children are entitled to special protection measures guaranteed in the principal human rights instruments adopted under the auspices of the Organization of American States (OAS). These include the 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights. State compliance with human rights is overseen by the Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR), which are empowered to receive and consider complaints of human rights violations. This chapter presents an overview of the IACmHR's and IACtHR's case law on children's rights, as well as the main conceptual framework relating to children's rights protection in the Americas, such as the right to complementary protection or the best interests of the child. It also addresses the treatment of children in different vulnerable situations (e.g. street children, Indigenous children, children deprived of liberty, and girls) as developed in the jurisprudence of the main Inter-American human rights treaty bodies.

KEYWORDS

children's rights, Inter-American System of Human Rights, Inter-American Commission on Human Rights, Inter-American Court of Human Rights

1 Lina Zerón (Mexico) 'UN GRAN PAÍS' from 'Poesia Reunida: 1975-2010'. English translation by the author.

Katarzyna ZOMBORY (2024) 'The Practice of Children's Rights Protection in the Americas'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 211–234. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_10

1. Introduction

The protection of children and adolescents in the Americas falls under the mandate of various institutions operating under the auspices of the Organization of American States (OAS), the regional agency for the Western Hemisphere.[2] The Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR) are the two bodies with a general mandate to oversee states' compliance with human rights, and they play a primary role in promoting respect for and ensuring the observance of children's rights in the Americas.[3] Both bodies are empowered to receive and consider individual complaints of alleged human rights violations. The IACmHR is an autonomous organ of the OAS, responsible for monitoring the implementation of human rights by all member states. Every American state has accepted the IACmHR's competence to consider individual complaints by ratifying the OAS Charter. The IACtHR, as the judicial treaty body of the American Convention on Human Rights (ACHR),[4] is competent to consider individual cases against OAS members who have ratified the ACHR and accepted the IACtHR's contentious jurisdiction.[5] Although only the IACtHR is empowered to issue binding judgements, the IACmHR's decisions have considerable moral and legal value, especially when addressing human rights compliance in OAS member states outside the IACtHR's jurisdiction.

The normative contours of children's rights frameworks in the Americas are shaped by the provisions of the 1948 American Declaration on the Rights and Duties of Man (ADRDM)[6] and the 1969 ACHR, both of which guarantee the right to special protective measures for children. While Article VII of the ADRDM states that 'all women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid', Article 19 of the ACHR guarantees that 'Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. Article 19 of the ACHR, which can be

2 In the Americas, human rights protections are overseen and coordinated by the Organization of American States, which is a regional international organisation of 35 member states. It came into being in 1948 with the signing of the Charter of the OAS, with the view to achieve among its member states 'an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence', as stipulated in Article 1 of the *Charter of the Organization of American States,* adopted at Bogotá on 30 April 1948 by the Ninth International Conference of American States, UN Treaty Series No. 1609 ('Charter of the OAS').

3 For a detailed description of institutional and normative frameworks for children's rights protection in the Americas, as well as for the background information about the situation of children in the Western Hemisphere, please refer to Chapter 10 of this book.

4 American Convention on Human Rights "Pact of San José, Costa Rica", adopted at San José on 22 November 1969, UN Treaty Series vol. 1144, No. 17955 (hereinafter: 'ACHR').

5 Pursuant to Articles 61-62 ACHR. See also Feria-Tinta, 2014, p. 233; Villalta Vizcarra, 2015, p. 676.

6 American Declaration of the Rights and Duties of Man, adopted at Bogotá in 1948 by the Ninth International Conference of American States (hereinafter: 'ADRDM').

asserted and enforced directly before the IACtHR, is the principal normative basis of states' obligations vis-à-vis children in the Inter-American Human Rights System.

This chapter presents an overview of the IACmHR's and IACtHR's case law on children's rights, developed under the ADRDM and ACHR. It discusses the main conceptual framework relating to children's rights protection in the Americas, such as the right to complementary protection and the best interests of the child. It also examines the IACmHR's case law concerning the United States of America's compliance with children's rights, as it cannot otherwise be held accountable for violations of children's human rights, having neither ratified the ACHR nor joined the international framework for children's rights protection under the 1989 UN Convention on the Rights of the Child (UN CRC).[7]

Although modelled on the European system of human rights protection, the Inter-American system has developed its own principles and regulations relevant to human rights litigation. These principles are embedded in the region's social, cultural, and legal traditions, and allow the compliance-monitoring bodies to address the specific human rights issues prevalent in the Western Hemisphere, including gross and systemic violations of children's rights.[8]

2. The IACmHR's practice on children's rights protection

2.1. The development of children's rights protection within the IACmHR

Since its creation in 1959, the IACmHR's approach to protecting children's rights has constantly been evolving towards a more substantial and far-reaching protection that considers the universal standards set out by the UN Convention on the Rights of the Child. The IACmHR has emphasised the welfare of children while drafting country and thematic reports on the situation of human rights in OAS member states, as well as in its decisions on individual cases. During the 1960s and 1970s, the IACmHR issued recommendations regarding general human rights violations and assessed whether the human rights of a child were violated in individual cases, without developing the substantive content of children's rights.[9] The IACmHR's early country and thematic reports focused on the protection of children concerning their rights to life, personal liberty, and humane treatment in the context of arbitrary detention, state-sponsored murders by private militias, kidnappings of the children of political opponents, and

7 Convention on the Rights of the Child, adopted in New York on 20 November 1989, UN Treaty Series vol. 1577, No. 27531 (hereinafter: 'UN CRC').

8 As Rodríguez-Pinzón noted, the Inter-American system was the first system of human rights protection to function in a region where gross and systematic violations of human rights – involving extra-judicial killings, torture, and forced disappearances – were prevalent, Rodríguez-Pinzón, 2013, p. 13. The main challenges faced by OAS state members include social, economic and political oppression, political instability, extremes of wealth and poverty, misery, injustice, violence, and exploitation, Pasqualucci, 2013, pp. 4-6.

9 Inter-American Commission on Human Rights, 2008, para. 63.

the conditions faced by children living with their incarcerated parents.[10] Similarly, most cases involving children heard by the IACmHR during that period concerned violations of the rights to life, personal liberty, or humane treatment. Initially, the IACmHR issued recommendations on general human rights violations and assessed individual complaints using the ADRDM as the sole legal framework and point of reference for states' protective duties vis-à-vis children.[11]

The ACHR's entry into force in 1978 has brought new avenues for children's rights litigation in the Americas by including specific provisions on children's rights into a binding human rights treaty. This was accompanied by a growing recognition of the legal personality of children and their status as rights holders. In its 1991 Annual Report, the IACmHR explicitly recognised that children should not be viewed merely as objects of the right to special protection but as subjects of all the rights recognised by international law as 'rights of persons'.[12] The IACmHR has recognised that respect for children's rights constitutes a fundamental value for society, which requires not only providing care and protection as basic parameters but also recognising, respecting, and guaranteeing the individual personality of the child as a rights and duty holder.[13] Concurrently, the IACmHR acknowledges the prevailing role of the principle of the best interest of the child and recommends that OAS member states ensure that children's best interests are considered in all decisions affecting their life, freedom, physical or moral integrity, development, education, health, or other rights.[14]

Individual complaints concerning alleged violations of children's rights have been brought before the IACmHR under two frameworks: the ADRDM against OAS member states that have not ratified the ACHR, and the ACHR against OAS member states that are parties to the ACHR.[15] In cases where complaints are submitted against member states that are parties to the ACHR, the procedure before the IACmHR is the first step and a *sine qua non* condition for the case to be decided in a binding manner by the IACtHR. In this context, the role of the IACmHR must not be underestimated;

10 See, for example, IACmHR, Report on the Procedures of the Inter-American Commission on Human Rights in the Dominican Republic, 1965, OEA/Ser.L/V/II.13, doc. 14 Rev; IACmHR, Report on the Human Rights Situation in Haiti, 1969, OEA/Ser.L/V/II.21 doc. 6 Rev. 21; IACHR, Report on the Human Rights Situation in Chile, 1974, OEA/Ser.L/V/II.34, doc. 21; IACmHR, Second IACHR Report on the Situation of Political Prisoners and their Families in Cuba, 1970, OEA/Ser.L/V/II.23, doc. 6; IACmHR, 1978 Annual Report of the Inter-American Commission on Human Rights, Case 2271, 1979, OEA/Ser.L/V/II.47 Doc. 13 rev. 1.

11 Inter-American Commission on Human Rights, 2008, para. 63.

12 IACmHR, Annual Report of the Inter-American Commission on Human Rights 1991, 14 February 1992, OEA/Ser.L/V/II.81 Doc. 6 rev. 1, Part IV. II.

13 See, for example, IACmHR, Report No. 76/04, Case No. 12.300, Gerardo Vargas Areco v. Paraguay, 11 October 2004.

14 IACmHR, Annual Report of the Inter-American Commission on Human Rights 1997, 13 April 1998, OEA/Ser.L/V/II.98 doc. 6 rev., Chapter VII, para. 5.

15 Under Article 20 (b) of the Statute of the Inter-American Commission on Human Rights, Resolution No. 447 of the OAS General Assembly, October 1979 (in relation to those OAS member states who are not parties to the ACHR), and under Article 41 (f) ACHR (in relation to OAS member states who have ratified the ACHR).

the ground-breaking and landmark decisions of the IACtHR on children's rights were made possible by the IACmHR's initial recognition of human rights violations and the submission of cases to the IACtHR.[16]

Compliance with children's rights, as outlined in Article 19 of the ACHR, has been an inherent element of the IACmHR's examination of complaints based on the ACHR since the 1990s.[17] However, for OAS member states that have not ratified the ACHR, the normative basis for protecting children's rights relies entirely on the provisions of the ADRDM. Although it was not initially adopted as a legally binding treaty, the ADRDM has nevertheless become a source of legal obligation for all OAS member states.[18] For non-state parties to the ACHR, the IACmHR is the sole body competent to receive and consider individual complaints concerning alleged human rights violations.

The IACmHR's contribution to protecting children's rights extends beyond its mandate to monitor human rights situations and receive individual complaints. The IACmHR has explicit powers to take a proactive role in protecting and promoting respect for children's rights in the Americas, based on its authority to request advisory opinions from the IACtHR (Article 64, para. 1 of the ACHR). The Advisory Opinion OC-17/02, in which the IACtHR elaborated on the legal status of children, was issued at the IACmHR's request.[19]

The IACmHR has an important instrument at its disposal to achieve one of the main goals of the Inter-American system of human rights: preventing ongoing human rights violations through the adoption precautionary measures.[20] The IACmHR grants precautionary measures in serious and urgent situations to protect individuals from

16 See, for example, IACmHR, Report No. 33/96, Case 11.383, "Street Children" (Villagrán Morales et al.) vs. Guatemala, 16 October 1996; IACmHR, Report No. 72/00, Case No. 11.752, Walter David Bulacio vs. Argentina, 3 October 2000; IACmHR, Report No. 126/01, Case 11.666, Case of the "Juvenile Reeducation Institute" vs. Paraguay, 3 December 2001; IACmHR, Report No. 30/03, Case No. 12.189, Dilcia Yean and Violeta Bosico vs. Dominican Republic, 6 March 2003; IACmHR, Report No. 76/04, Case No. 12.300, Gerardo Vargas Areco vs. Paraguay, 11 October 2004.

17 See, for example, IACmHR, Report No. 33/96, Case 11.383, "Street Children" (Villagrán Morales et al.) vs. Guatemala, 16 October 1996; IACmHR, Report No. 41/99, Case No. 11.491, Detained Minors vs. Honduras, 10 March 1999, both cases concerning the arbitrary conduct of state authorities vis-a-vis children living in the streets; IACmHR, Report No. 72/00, Case No. 11.752, Walter David Bulacio vs. Argentina, 3 October 2000, concerning the arbitrary detention, torture and killing of a 17-year-old boy by police officials; IACmHR, Report No. 30/03, Case No. 12.189, Dilcia Yean and Violeta Bosico vs. Dominican Republic, 6 March 2003, concerning the state's refusal to register the birth of two girls, which placed them under an imminent threat of expulsion from their country of residence, and deprived them of the access to education.

18 Rodríguez-Pinzón, 2013, p. 13. See also IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/90 of 14 July 1989, Series A No. 10, paras. 35-45.

19 IACtHR, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002 of 28 August 2002, Series A No. 17.

20 Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November 2009. Precautionary measures are urgent requests, directed to an OAS member state, to take immediate injunctive measures in serious and urgent cases, and whenever necessary to prevent irreparable harm to persons, see Rodríguez-Pinzón, 2013, p. 13.

the grave and imminent danger of injury to rights recognised under the ADRDM or ACHR. The IACmHR's practice demonstrates that it has not hesitated to grant precautionary protective measures in situations that pose a risk to children.[21]

Similarly, the IACmHR can also request the IACtHR to adopt provisional measures to avoid irreparable damage when a situation of extreme gravity and urgency justifies it. An example of such action was the IACmHR's request to adopt provisional measures in the *Case of the children and adolescents deprived of liberty in the 'Tatuapé Complex' in São Paulo.* Following this request, the IACtHR ordered Brazil to immediately implement the necessary measures to protect the life and personal integrity of all the children and adolescents residing in the juvenile detention facility, who were threatened by outbursts of violence.[22]

2.2. The IACmHR's case law on the protection of children's rights in the USA

The IACmHR, as the principal organ of the OAS, is competent to be held accountable for violations of children's rights in the USA, the only country that has not committed itself to the international protection of children's rights by ratifying the UN CRC. Over the years, the IACmHR has received and considered several complaints about alleged violations of children's rights brought against the USA under the ADRDM. Their analysis revealed that sentencing young people to capital punishment and insufficiently protecting women and children against domestic violence are the

21 Among many, see, for example IACmHR, Resolution No. 93/20 of 9 December 2020, PM 1100-20. The IACmHR granted precautionary measures in favour of six migrant children at imminent risk of being deported by Trinidad and Tobago to Venezuela, where they faced serious risk to their rights to life and personal integrity. The IACmHR requested the state to adopt the necessary measures to guarantee the rights to life and personal integrity of six migrant children, in particular, by refraining from deporting or expelling them to Venezuela until the domestic authorities had duly assessed the alleged risks faced, in accordance with applicable international standards. In its resolution PM 340-10 of 22 December 2010, the IACmHR granted precautionary measures for displaced women and children living in camps for internally displaced persons in Port-au-Prince, Haiti, in the wake of an earthquake. The request for precautionary measures alleged a pattern of sexual violence and a series of acts of violence against the women and girls residing in the camps. The IACmHR urged the state to ensure the availability of adequate medical and mental health care for the victims of sexual violence; to provide adequate security at the camps for internally displaced persons, including the lighting of public spaces, regular patrols within the camps as well as outlying areas, and to increase the presence of female police officers assigned to patrol details and local police precincts; to ensure that the law enforcement agencies tasked with responding to incidents of sexual violence receive the necessary training to respond appropriately. See also: IACmHR, Resolution No. 35/23 of 21 June 2023; IACmHR Resolution No. 66/16 of 22 December 2016; IACmHR, Resolution No. 34/16 of 23 May 2016; IACmHR, Resolution No. 28/14 of 3 October 2014.

22 IACtHR, Matter of the children and adolescents deprived of liberty in the "Tatuapé Complex" of the "Fundação Estadual do Bem-Estar do Menor" vs. Brazil, Order of 17 November 2008 on Provisional Measures with regard to Brazil. The state had not complied with the precautionary measures adopted by the IACmHR, which justified the IACmHR's request on provisional measures submitted to the IACtHR.

two issues of greatest concern from the perspective of children's rights protection in the USA.[23]

The United States has faced several complaints under Article I of the ADRDM (the right to life) regarding the capital punishment of young persons for acts committed when they were minors, sometimes followed by their execution.[24] By continuing the practice of executing minor offenders, the USA stands alone among traditional developed world nations and countries of the Inter-American system, all of which have rejected the imposition of capital punishment on minors, either through the ratification of the UN CRC or the ACHR.[25] Despite the lack of a formally binding international obligation for the USA, the IACmHR has declared that the prohibition of imposing capital punishment on juvenile perpetrators is a *jus cogens* norm and, as such, is binding on the entire international community of states, including the USA.[26] Consequently, the IACmHR has held that the United States violated the convicted adolescents' right to life, liberty, and security as outlined in Article I of the ADRDM by sentencing them to death for crimes committed while they were minors, and by executing them pursuant to that sentence.[27] In this context, the IACmHR reiterated that there is a broadly recognised international obligation for states to provide enhanced protection to children. This obligation includes ensuring the well-being of juvenile offenders and working towards their rehabilitation. This obligation, reflected *inter alia* in Article 19 of the ACHR and Article VII of the ADRDM, requires that 'when the state apparatus has to intervene in offenses committed by minors, it should make

23 The very first case brought before the IACmHR against the United States – Baby Boy vs. United States – shed light on another symptomatic, yet controversial issue related to children's rights protection in the USA on the protection of unborn children. The case Baby Boy vs. United States was brought under Article I (the right to life), Article II (the right to equality before law) and Article VII (the right to protection for children) and Article XI (the right to the preservation of health) ADRDM by pro-life advocates, on the grounds that the judicial legalisation of abortion in Roe vs. Wade and Doe vs. Bolton by the U.S. Supreme Court resulted in an alleged violation of the right to life of an aborted unborn child (referred to as Baby Boy) in a trial of a physician indicted for manslaughter in connection with his performance of an abortion. The legal question involved the issue of whether the right of life under Article I of the ADRDM applies from the moment of conception. Not having established the absolute concept of the right to life, the IACmHR declared that the USA did not violate Articles I, II, VII and XI of the ADRDM. See IACmHR, Report No. 23/81, Case 2141, "Baby Boy" vs. United States, 6 March 1981. For more on the Baby Boy vs. United States and the protection of unborn children in the Inter-American system, see De Ligia, 2011.

24 IACmHR, Report No. 62/02, Case 12.285, Michael Domingues vs. United States, October 2002; IACmHR, Report No. 97/03, Case 12. 193, Shaka Sankofa vs. United States, 29 December 2003; IACmHR, Report No. 100/03, Case 12.240, Douglas Christopher Thomas vs. United States, 29 December 2003; IACmHR, Report No. 101/03, Case 12.412, Napoleon Beazley vs. United States, 29 December 2003.

25 Michael Domingues vs. United States, paras. 84-85.

26 Michael Domingues vs. United States, paras. 84-85; Napoleon Beazley vs. United States paras. 48-49.

27 Michael Domingues vs. United States, para. 86; Shaka Sankofa vs. United States, para. 61; Douglas Christopher Thomas v. United States, para. 52; Napoleon Beazley vs. United States, para. 59.

substantial efforts to guarantee their rehabilitation in order to allow them to play a constructive and productive role in society'.[28]

The IACmHR's decision in *Jessica Lenahan et al. vs. United States*[29] (2011) revealed a systemic problem concerning the protection of women and children in the USA against domestic violence. In 1999, Mrs. Lenahan's three daughters, aged 7, 8, and 10, were abducted by her abusive ex-husband in violation of a restraining order. The petitioner, Mrs. Lenahan, repeatedly called the police to report the abduction, but the police failed to respond meaningfully. Ten hours after her first call to law enforcement, her ex-husband drove his pickup truck to the police department and opened fire. The police immediately shot him down and then discovered the bodies of Mrs. Lenahan's three daughters in the pickup truck, who had been shot to death. Mrs. Lenahan filed a federal lawsuit against the police, claiming due process violations on account of the non-enforcement of the restraining order. However, the U.S. Supreme Court decided that she had no personal entitlement to the enforcement of the restraining order by the police.[30] In her complaint to the IACmHR, Mrs. Lenahan asserted that the United States violated several provisions of the ADRDM, *inter alia* Article I (the right to life), Article II (the right to equality before law), and Article VII (the right to protection for mothers and children), by failing to exercise due diligence to protect her and her daughters from domestic violence. The IACmHR concluded that the U.S. state apparatus was not duly organised, coordinated, or prepared to protect the victims from domestic violence by effectively implementing the restraining order. These failures constituted a form of discrimination in violation of Article II of the ADRDM.[31] The United States' failure to adequately protect the petitioner's children from domestic violence was discriminatory and constituted a violation of their right to life under Article I and their right to special protection as children under Article VII of the ADRDM.[32] The state had an enhanced duty of due diligence to protect the children from harm and the deprivation of their lives, which required special measures of care, prevention, and guarantee. The United States' recognition of the risk of harm and the need for protection – manifested by the issuance of a restraining order – made the adequate implementation of this protection measure even more critical. Moreover, the police officers who failed to respond adequately to the petitioner's reports of abduction should have been trained regarding the connection between domestic violence and fatal violence against children perpetrated by parents.[33] Based on these considerations, the IACmHR held that the systemic failure of the United States to act with due diligence to protect the petitioner and her daughters from domestic violence violated the state's obligation not to discriminate and to provide equal protection

28 Michael Domingues vs. United States, para. 83.
29 IACmHR, Report No. 80/11, Case 12.626, Jessica Lenahan (Gonzales) et al. vs. United States, 21 July 2011.
30 Jessica Lenahan (Gonzales) et al. vs. United States, paras. 37-39.
31 Ibid., para. 160.
32 Ibid., para. 164.
33 Ibid., para. 165.

before the law, as outlined in Article II of the ADRDM.[34] The state also failed to undertake reasonable measures to prevent the deaths of the three children, which constituted a violation of their right to life under Article I of the ADRDM, in conjunction with their right to special protection under Article VII of the ADRDM. In its report, the IACmHR recommended that the United States, *inter alia*, conduct a serious, impartial, and exhaustive investigation into the systemic failures related to the enforcement of the protection order to guarantee their non-repetition. It also recommended the adoption of multifaceted legislation to create effective implementation mechanisms for restraining orders, to protect women from imminent acts of violence, and provide effective protection measures for children in the context of domestic violence, accompanied by adequate resources to support their implementation.[35]

3. The IACtHR's case law on children's rights

3.1. Conceptual framework for protecting and litigating children's rights

The first contentious case specifically focused on children's rights was brought before the IACtHR in January 1997, after the respondent state failed to comply with the IACmHR's initial recommendations.[36] The judgement in *'Street Children' vs. Guatemala,*[37] referred to by several scholars as historical and paradigmatic,[38] marked a significant milestone in the IACtHR's case law on the protection of children's rights under the ACHR. This case addressed the situation of severely underprivileged children in Guatemala, against whom state law enforcement forces carried out systematic acts of aggression, including threats, persecution, torture, forced disappearance, and homicide.[39] The IACtHR held that Guatemala had extensively violated children's rights under the ACHR, *inter alia*, by failing to adopt special measures of protection

34 Ibid., paras. 170 and 199.

35 Ibid., para. 201. The IACmHR has adopted several important decisions dealing with human rights issues affecting women and girls in OAS member states, specifically regarding gender-based violence and discrimination. For more on that subject, see Duhaime and Tapias Torrado, 2022, pp. 211–246.

36 IACmHR, Report No. 33/96, Case 11.383, 'Street Children' (Villagrán Morales et al.) vs. Guatemala, 16 October 1996.

37 IACtHR, 'Street Children' (Villagran-Morales et al.) vs. Guatemala, Judgment of 19 November 1999 (Merits), Series C No. 63 (hereinafter: 'Street Children' vs. Guatemala). In June 1990, five adolescents were detained, tortured, and shot to death by police officers in Guatemala City, within the systematic pattern of violence against the street children, as a means for countering juvenile delinquency. Victims' bodies were abandoned, and the police refrained from providing the victims' families with information about the events surrounding their deaths. In the criminal proceedings before the domestic courts, the accused officers, although identified by numerous witnesses, were acquitted for the lack of evidence. The case was brought to the attention of the IACmHR in 1994 by two NGOs representing the victims' next of kin, and subsequently submitted to the IACtHR in 1997 alleging violations of children's rights and the rights to life, physical integrity, personal liberty, a fair trial and judicial protection, guaranteed under the ACHR.

38 Cançado Trindade, 2003, p. 309; Feria-Tinta, 2014, p. 236; Aguilar Cavallo, 2008, p. 237.

39 'Street Children' vs. Guatemala (Merits), para. 189.

required under Article 19 of the ACHR and tolerating a systematic practice of violence against at-risk children in its territory.[40] In a separate judgement, the IACtHR ordered Guatemala to implement extensive reparation measures.[41]

The importance of the IACtHR's decision in *'Street Children' vs. Guatemala* lies in two main aspects. First, it broke with the climate of impunity concerning the fundamental rights of underprivileged children.[42] According to the late Judge Cançado Trindade, former president of the IACtHR, the significance of this landmark decision is that the mothers of the murdered street children – as poor and forsaken as their children had been in life – were able to gain direct access to an international court, allowing them to at least regain faith in justice.[43] Second, in *'Street Children' vs. Guatemala*, the IACtHR established fundamental concepts and principles for protecting children's rights under the ACHR, which have been reaffirmed and further developed in its later jurisprudence. The prominent concepts include: (I) the scope of the right to special protective measures and the correlative obligations of states, which encompasses the right to a dignified life; (II) the notion of *corpus juris*, describing the relation between the ACHR and international instruments on children's rights; and (III) the concept of the international legal personality of children.

The IACtHR considers Article 19 of the ACHR as providing an additional right for children, who require special protection due to their ongoing physical and emotional development and specific vulnerabilities.[44] Consequently, children have the same rights as all human beings, but they also enjoy the right to complementary protection.[45] These additional rights are correlated with the protective duties of the family, society, and the state.

The IACtHR recognises the prevailing role of the family in safeguarding children. According to the IACtHR, the family is primarily responsible for satisfying a

40 'Street Children' vs. Guatemala (Merits), paras. 191-198.

41 IACtHR, Case 'Street Children' (Villagran-Morales et al.) vs. Guatemala, Judgment of 26 May 2001 (Reparations and Costs), Series C No. 77, paras. 82, 93, 98, 101, 103. The IACtHR ordered the state to pay the victims' families compensation, for both pecuniary and non-pecuniary damage. Aside from compensatory remedies, the IACtHR ordered several other forms of reparations, including building a school in memory of the victims and placing a plaque with their names, investigating the facts that generated the violations of the ACHR, determining the individual responsibilities in the case, and sanctioning the perpetrators, which changed the domestic legislation in accordance with Article 19 ACHR as guarantee of non-repetition.

42 Feria-Tinta, 2014, p. 236; Cançado Trindade, 2007, p. 56.

43 Cançado Trindade, 2007, p. 56.

44 IACtHR, 'Juvenile Reeducation Institute' vs. Paraguay, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 112, para. 147.

45 According to the IACtHR, '(...) their condition demands special due protection by the State that must be understood as an additional right, complementary to the other rights that the Convention recognizes to every individual', IACtHR, Carvajal Carvajal et al. vs. Colombia, Judgement of 13 March 2018 (Merits, reparations, court costs and legal fees), Series C No. 352, para. 193. See also 'Juvenile Reeducation Institute' vs. Paraguay, para. 147; IACtHR, Gómez-Paquiyauri Brothers vs. Peru, Judgment of 8 July 2004 (Merits, Reparations and Costs), Series C No. 110, para. 164; Advisory Opinion OC-17/02, para. 54.

child's material, emotional, and psychological needs.[46] The importance of the family requires public authorities to implement measures to protect children while simultaneously providing assistance to families by adopting measures that promote family unity.[47] The IACtHR has inferred the obligation to preserve family unity and prevent separation from Article 17 of the ACHR, which protects family rights, as well as from other international human rights instruments, including the UN CRC.[48] The IACtHR has emphasised that the child has an inherent right to live with his or her family and has supported children's right to live with their biological and nuclear families, except in exceptional situations. In some child custody cases, the IACtHR found that separating children from their biological families posed such a risk of mental and emotional injury that it justified adopting provisional measures to prevent irreparable damage.[49]

Regarding the state's obligations vis-à-vis children, the right to complementary protection under Article 19 imposes the correlative obligation of states to adopt special measures of protection, in addition to their obligation to respect the rights and freedoms of all individuals. Consequently, the state must both carefully and responsibly assume its special position as guarantor of rights and provide special protection for children.[50]

According to the IACtHR, Article 19 of the ACHR, read in conjunction with Article 1, para. 1 of the ACHR, imposes a positive obligation on states to provide protection against mistreatment, whether in children's interactions with public authorities, private individuals, or non-governmental entities.[51] Article 19 of the ACHR *prima facie* entails the need to protect the child's physical and moral integrity, meaning that state authorities are obligated to protect children against all forms of physical or mental violence, injury, abuse, neglect, maltreatment, or exploitation.[52] However, since *'Street Children' v. Guatemala*, the IACtHR has required states to provide children

46 Advisory Opinion OC-17/02, para. 71; IACtHR, "Las Dos Erres" Massacre vs. Guatemala, Judgment of 24 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), Series C No. 211, para. 188.

47 Advisory Opinion OC-17/02, para. 66; Carvajal Carvajal et al. vs. Colombia, paras. 191-192.

48 Advisory Opinion OC-17/02 para. 71; Carvajal Carvajal et al. vs. Colombia, para. 192.

49 See, for example, IACtHR, Order on provisional measures with regard to Paraguay in the case L.M., 1 July 2011. The IACtHR ordered Paraguay to protect the rights of the family and the personal integrity of a child who shortly after birth was abandoned by his biological mother, and was cared for by a family who wanted to adopt him, by allowing supervised visits with the child's biological family while the custody decision was in process. See also IACtHR, Order of the President on provisional measures with regard to Argentina in the case Reggiardo Tolosa, 19 November 1993.

50 See, for example, IACtHR, Sawhoyamaxa Indigenous Community vs. Paraguay, Judgment of 29 March 2006 (Merits, Reparations and Costs), Series C No. 146, para. 177; 'Juvenile Reeducation Institute' vs. Paraguay, paras. 147 and 160; Carvajal Carvajal et al. vs. Colombia, para. 193; IACtHR, Yakye Axa Indigenous Community vs. Paraguay, Judgment of 17 June 2005 (Merits, Reparations and Costs), Series C No. 125, para. 172; IACtHR, Guzmán Albarracín et al. vs. Ecuador, Judgement of 24 June 2020 (Merits, reparations and costs), Series C No. 405, para. 116.

51 Advisory Opinion OC-17/02, para. 87.

52 Guzmán Albarracín et al. vs. Ecuador, para. 114.

with all the conditions that guarantee a dignified life, in addition to protecting their physical existence. Such a broad understanding of states' obligations towards children is connected with the extensive interpretation of the right to life under Article 4 of the ACHR and reflects the IACtHR's particular concept of *vida digna* (dignified life).[53] According to the IACtHR, education and health care are the two main pillars necessary for children to have a decent life, both of which require various protection measures.[54] The right to education is particularly significant among these protective measures, as it not only enables the possibility of enjoying a dignified life but also prevents unfavourable situations for both the child and society.[55]

Since *'Street Children' vs. Guatemala,* Article 19 of the ACHR – which entitles children to specific measures of protection – has been the primary normative basis for the IACtHR to decide on cases involving children's rights. While interpreting the normative content of Article 19 and its resulting scope of protection, as well as the correlative obligations of states, the IACtHR has considered other relevant international instruments, notably the UN CRC, along with Protocol II to the Geneva Conventions and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará).[56] In *'Street Children' vs. Guatemala*, the IACtHR definitively declared that the ACHR and the UN CRC form part of a comprehensive international *corpus juris* for the protection of the child, and that both should be used together to establish the content and scope of the general provisions of Article 19 of the ACHR.[57] Not only is the UN CRC a reference to construe and interpret the provisions of the ACHR, but it has also been used at a procedural level to establish existing patterns of systematic violations of children's rights through the evidentiary use of the UN Committee on the Rights of the Child's monitoring reports in litigation before the IACtHR.[58] Such far-reaching references to international standards, resulting in a dynamic and evolving interpretation of the ACHR, are possible under

53 'Street Children' vs. Guatemala (Merits), para. 144. On the concept of vida digna see, for example, Pasqualucci, 2008, pp. 1–32; Cançado Trindade, 2009, p. 479.

54 Advisory Opinion OC-17/02, para. 86, IACtHR, Xákmok Kásek Indigenous Community. vs. Paraguay, Judgement of 24 August 2010 (Merits, Reparations, and Costs), Series C No. 214, para. 258.

55 Advisory Opinion OC-17/02, para. 84; Guzmán Albarracín et al. vs. Ecuador, para. 117.

56 'Street Children' vs. Guatemala (Merits), paras. 192-195; IACtHR, 'Mapiripán Massacre' vs. Colombia, Judgment of 15 September 2005 (Merits, Reparations, and Costs), Series C No. 134, para. 153; IACtHR Angulo Losada v. Bolivia, Judgement of 18 November 2022 (Preliminary Objections, Merits and Reparations), Series C No. 475, paras. 127 and 168. See also Inter-American Commission on Human Rights, 2008, para. 53.

57 'Street Children' vs. Guatemala (Merits), para. 194.

58 Tinta-Feria, 2014, p. 241-242.

the general rules of interpretation derived from international law [59] and the specific interpretative rules in Article 29 of the ACHR. The specific interpretative rules prohibit any interpretation of the ACHR that would restrict the enjoyment of rights and freedoms recognised by virtue of another international convention to which a state is a party. The application of the international *corpus juris* allowed the IACtHR, *inter alia*, to define the term "child", as neither the ACHR nor the ADRDM contains relevant definitions. By referencing Article 1 UN CRC, the IACtHR established in *'Street Children' vs. Guatemala* that every human being who has not yet attained 18 years of age should be considered a child unless they have reached the age of majority under an applicable law.[60]

The IACtHR has placed significant emphasis on the legal status of children and adolescents as subjects of rights, irrespective of their lack of legal capacity to act autonomously. The IACtHR holds that children's inability to fully exercise their rights does not detract from their legal personality.[61] This recognition of children as rights holders has developed in parallel with the general paradigm shift in international children's rights law, marked by the adoption of the UN CRC in 1989.[62] The IACtHR's case law on children's rights clearly demonstrates that it treats child victims as genuine rights holders who, even in the most adverse and underprivileged conditions, are subjects of international human rights law, allowing them to assert their rights before an international court.[63]

In its contentious and advisory jurisdiction, the IACtHR has developed key principles that should be observed when adopting special protective measures under Article 19 the ACHR. The guiding principles that limit the discretion of state authorities

59 In particular, from the Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, UN Treaty Series vol. 1155, No. 18232. According to the IACtHR, the evolutive interpretation of international protection instruments is consequent with the general rules of the interpretation of treaties embodied in the 1969 Vienna Convention, see: 'Street Children' v. Guatemala (Merits), paras. 192-193. According to the IACtHR, the substantial number of countries that have ratified the UN CRC shows a broad international consensus (opinio iuris comunis) in favour of the principles and institutions set forth in that instrument, which reflects current development of this matter, OC 17-02, para. 29. See also Pasqualucci, 2013, pp. 12-13, Tinta-Feria, 2014, pp. 234-235.

60 'Street Children' vs. Guatemala (Merits), para. 188. See also Advisory Opinion OC-17/02, paras. 38-42; Gómez-Paquiyauri Brothers vs. Peru, para. 162.

61 Advisory Opinion OC-17/02, para. 41: 'Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations (...). Children do not have this capacity, or lack this capacity to a large extent. (...) But they are all subjects of rights, entitled to inalienable and inherent rights of the human person'. See also the concurring opinion of Judge A.A. Cançado Trindade, paras. 6-8; Aguilar Cavallo, 2008, p. 241.

62 The UN CRC has recognised the child as a subject of rights, which is manifested in that the child holds rights which have an influence on her or his life (participatory rights under Article 12 of the CRC), and not only rights derived from her or his vulnerability or dependency on adults, see: Committee on the Rights of the Child, General comment No. 12 (2009) on the right of the child to be heard, 20 July 2009, CRC/C/GC/12.

63 Aguilar Cavallo, 2008, p. 241. See also 'Juvenile Reeducation Institute' vs. Paraguay, para. 8.

include the principle of the child's best interest and the procedural guarantees derived from the rights to a fair trial and judicial protection (Articles 8 and 25 of the ACHR).[64] The IACtHR has accepted that the special measures of protection referred to in Article 19 should be defined based on the particular circumstances of each case and the personal condition of the children involved.[65]

Advisory Opinion OC-17/02 on the Juridical Condition and Human Rights of the Child contains important guidelines regarding the adoption of protective measures in favour of children.[66] As a general principle, the guarantees set forth in Articles 8 (the right to a fair trial) and 25 (the right to judicial protection) of the ACHR should be correlated with the specific rights under Article 19. This correlation should be reflected in any administrative or judicial proceedings where the rights of a child are at stake.[67] Consequently, the child's participation in proceedings affecting his or her rights should be ensured to a degree reasonably adjusted to the child's capacities, in order to achieve effective protection of his or her best interest.[68] More specifically, the IACtHR indicates that protective measures should seek the continuation of the child's ties with his or her family, whenever possible and reasonable.[69] When it is necessary to separate the child from their family, the separation should be for the shortest time possible. Persons participating in decision-making processes should have the necessary personal and professional competence to identify advisable measures in the best interests of the child. Protective measures adopted by the state should aim at the child's reeducation and re-socialisation, while measures involving deprivation of liberty should be applied only as an exception and as a last resort.[70]

64 See, for example, Advisory Opinion OC-17/02, para. 113, which states that '(...) Under all circumstances, the substantive and procedural rights of the child remain safeguarded. Any action that affects them must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy.'

65 IACtHR, Chitay Nech et al. vs. Guatemala, Judgement of 25 May 2010 (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 212, para. 166.

66 The practice of state authorities brought to the IACtHR's attention by the IACmHR included, for example, reducing or annulling children's participation in civil and in criminal proceeding; using the minor's irregular situation (abandonment, dropping out of school, the family's lack of resources) to justify application of measures usually reserved for punishment of crimes applicable only under due process; considering the child's family milieu (family cohesion, the family's educational and economic background, etc.) as key decision-making factors with respect to minor under criminal or administrative jurisdiction to decide on his or her responsibility, or to determine measures affecting the child's right to a family, right of abode, or right to liberty. See Advisory Opinion OC-17/02, para. 3.

67 Ibid., paras. 95 and 117. See also Angulo Losada vs. Bolivia, para. 102.

68 Ibid., paras. 101-102.

69 Ibid., para. 103.

70 Ibid. On several occasions, the IACtHR has stressed that the detention of children must be exceptional and for the briefest time possible. See, for example, 'Street Children' vs. Guatemala (Merits), para. 197; IACtHR, Bulacio v. Argentina, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C No. 100, para. 135; Gómez-Paquiyauri Brothers vs. Peru, para. 169.

Preventive detention of children should be reserved for the most exceptional cases, which is a direct consequence of the limits imposed by the right to the presumption of innocence and the principles of necessity and proportionality. Under normal circumstances, the state should seek alternatives to preventive imprisonment, such as strict supervision, permanent custody, foster care, removal to a home or educational institution, care, guidance and supervision orders, counselling, probation, education and vocational training programmes.[71]

On numerous occasions, the IACtHR has reiterated that the principle of the best interests of the child takes precedence over any other normative consideration and determines the examination of the facts involving children.[72] In Advisory Opinion OC-17/02, the IACtHR explained that the principle of the best interests of the child

> is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.[73]

Following the Advisory Opinion OC-17/02, the prevailing role of the child's best interests has been reaffirmed in several contentious cases.[74] The prevalence of the child's best interests is understood as the need to satisfy all rights of the child, which binds the state and affects the interpretation of all other rights contained in the ACHR when the case refers to minors.[75] On several occasions, the IACtHR has referred to the interpretation of the principle of the best interests of the child as adopted by the UN Committee on the Rights of the Child. The Committee considers the best interests of the child, as outlined in Article 3, para. 1 of the UN CRC, as a threefold concept: a substantive right, a fundamental interpretative legal principle, and a rule of procedure.[76] The IACtHR explicitly stresses the need to consider the best interests of the child in various contexts, including adoption,[77] detention, and the child's right to

71 'Juvenile Reeducation Institute' vs. Paraguay, para. 230.
72 Aguilar Cavallo, 2008, p. 242; Tinta-Feria, 2014, p. 242.
73 Advisory Opinion OC-17/02, paras. 56-61.
74 Bulacio vs. Argentina, para. 134; 'Mapiripán Massacre' vs. Colombia, para. 152; Gómez-Paquiyauri Brothers vs. Peru, para. 163; Juvenile Reeducation Institute vs. Paraguay', para. 160; Carvajal Carvajal et al. vs. Colombia, para. 193; Guzmán Albarracín et al. vs. Ecuador, para. 116.
75 See, for example, 'Las Dos Erres' Massacre vs. Guatemala, para. 184; Xákmok Kásek Indigenous Community vs. Paraguay, para. 257; IACtHR, Girls Yean and Bosico vs. Dominican Republic, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 130, para. 134.
76 See, for example, IACtHR, Ramírez Escobar et al. vs. Guatemala, Judgement of 9 March 2018 (Merits, reparations and costs), Series C. No. 351, paras. 196, 215 and 226. For more on principle of the best interest of the child in the international human rights law, see Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, see also: Aguilar Cavallo, 2008, pp. 227-231; Zombory, 2023, p. 223-226.
77 Ramírez Escobar et al. vs. Guatemala, para. 216.

personal liberty.[78] This principle applies to decisions pertaining to the separation of a child from his or her family,[79] the imposition and implementation of criminal punishment on a parent or adult caregiver,[80] and the admittance or release of a child whose primary caregiver is in prison.[81] Additionally, it is relevant to any administrative or judicial decision concerning a child's entry into a country, their stay or expulsion, as well as the detention, expulsion, or deportation of her or his parents based on their migratory status.[82] Moreover, it encompasses any state, social, or household decision that limits the exercise of human rights to the detriment of children.[83] Not only should the superior interest of the child be the primary consideration in individual decisions, but it also requires states to take children's best interests into account when designing public policies, drafting laws and regulations concerning childhood, and implementing them in all areas related to children's lives.[84]

3.2. Protecting children in certain specific situations of vulnerability

The IACtHR has interpreted the scope of the protective measures required by Article 19 of the ACHR from various angles, addressing different situations of vulnerability, such as children in migration, children deprived of liberty, at-risk children, girls, and Indigenous children. The IACtHR expects states to implement a range of measures tailored to each category of vulnerability.

Generally, regarding the situation of at-risk children, the IACtHR indicates that special protection measures are needed to guarantee their survival and development, as well as to ensure minimum conditions for a dignified life. Such measures may include special assistance for children deprived of a family environment, social rehabilitation for abandoned or exploited children, and guarantees of non-discrimination or the right to an adequate standard of living.[85] Impeding children's integral and harmonious development by depriving them of the minimal conditions required for a decent life is a violation of their rights to special protection under Article 19 of the ACHR. This includes the failure of the state to prevent children from living in misery. In cases where states fail to adopt special measures to ensure children's full development and also infringe on the child's physical, or moral integrity, the IACtHR finds the state to be guilty of double aggression (*situación de doble agresión*).[86] It entails a twofold violation of children's rights: first, when states fail to prevent children from living in misery, thus depriving them of the minimum conditions for a dignified life

78 'Juvenile Reeducation Institute vs. Paraguay', para. 225.
79 Advisory Opinion OC-17/02, para. 73.
80 IACtHR, Differentiated approaches with respect to certain groups of persons in detention, Advisory Opinion OC-29/22 of 30 May 2022, Series A No. 29, para. 181.
81 Ibid., para. 185.
82 IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14 of 19 August 2014, Series A No. 21, para. 70.
83 Advisory Opinion OC-17/02, para. 65.
84 Advisory Opinion OC-21/14, para. 70.
85 'Street Children' vs. Guatemala (Merits), para. 196.
86 Ibid., para. 191.

and hindering their full and harmonious development; and second, when they violate children's physical, mental, and moral integrity and even their lives. According to the IACtHR, every child, including underprivileged children, has the right to pursue a project of life that should be supported and encouraged by public authorities, allowing them to develop this project for their personal benefit and that of the society to which they belong.[87]

The general condition of vulnerability shared by all children is significantly exacerbated in the case of girls, who are exposed to multiple vulnerabilities and are more likely to suffer acts of violence, coercion, and discrimination, implying also their vulnerability to sexual abuse.[88] In *Guzmán Albarracín et al vs. Ecuador,* the IACtHR addressed the issue of sexual violence in schools and declared that states are obliged to prevent and prohibit all forms of violence and abuse by school personnel. Additionally, they must adopt special measures to protect girls against sexual violence in educational facilities.[89] In the recent landmark case *Angulo Losada vs. Bolivia,* the IACtHR emphasised the importance of protecting girls from sexual violence in the family environment, and supported the access to justice for girls who have been subjected to sexual violence. Special protection measures in this context refer to, *inter alia,* conducting criminal proceedings related to sexual violence perpetrated against girls from a gender-sensitive and child-friendly perspective. This approach must align with the duty of enhanced due diligence and special protection to avoid the risk of revictimisation while respecting all guarantees associated with the right to judicial protection and the right to a fair trial, including the right to a hearing within a reasonable time.[90] In *Girls Yean and Bosico vs. Dominican Republic,* the IACtHR held that the state should have paid special attention to the needs and rights of the alleged victims – Haitian girls born in the Dominican Republic – who were denied their rights to nationality, legal personality, and education due to the state's refusal to register their births and recognise them as Dominican citizens, due to their condition as girls.[91]

On several occasions, the IACtHR has reaffirmed that states have special protective obligations towards children from Indigenous communities, who experience multiple layers of vulnerability – not only as children but also as members of

87 'Street Children' vs. Guatemala (Merits), para. 191.
88 Guzmán Albarracín et al vs. Ecuador, paras. 118-120; Angulo Losada vs. Bolivia, para. 100.
89 Guzmán Albarracín et al vs. Ecuador, paras. 118-120.
90 Angulo Losada vs. Bolivia, paras. 119, 124 and 127. This case concerned Bolivia's alleged responsibility for violating its duty to guarantee, without discrimination based on gender and age, the right of access to justice for a 16-year-old girl who suffered sexual violence from her 26-year-old cousin. The IACtHR found that by failing to prevent and redress repeated sexual assaults against the female victim, Bolivia was responsible for violating the rights to personal integrity, fair trial, judicial protection, private and family life, and children's rights, as guaranteed in Articles 5 para. 1, 8 para. 1, 11 para. 2, 19 and 25 para. 1 of the ACHR, in relation to Article 1 para. 1 ACHR. Bolivia was also found to have failed to comply with the obligations under from Articles 7.b) and 7.f) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará).
91 Girls Yean and Bosico vs. Dominican Republic, para. 134.

Indigenous communities. In the Americas, members of Indigenous communities have historically faced forced assimilation policies, discrimination, violence, and denial of land rights, all of which hamper the effective enjoyment of their human rights.[92] From the normative content of Article 19 of the ACHR and relevant international standards, the IACtHR has inferred states' obligation to adopt special measures to protect and respect the distinct cultural identity of Indigenous children. In *Xákmok Kásek Indigenous Community vs. Paraguay,* the IACtHR clearly stated that Article 30 of the UN CRC, which guarantees Indigenous children's right to cultural identity, 'gives content to Article 19 ACHR', by establishing an additional and complementary obligation for the states to promote and protect the rights of Indigenous children to live in accordance with their own culture, religion, and language.[93] The violation of Indigenous rights may sometimes result in the forced displacement of indigenous communities from their ancestral lands. In such cases, the state has an obligation to provide Indigenous children with the basic conditions necessary to ensure that the vulnerability of their community, due to a lack of territory, will not limit their development or undermine their life aspirations.[94]

Based on Article 19 of the ACHR, special protection measures are required for migrant children. In its Advisory Opinion OC-21/14 on the rights and guarantees of children in the context of migration, the IACtHR emphasised that states must provide migrant children with the necessary, suitable, and individualised attention based on their age. Additionally, if necessary, states must adopt special protective measures in accordance with the best interests of the child.[95] Special protection measures should be culturally appropriate and gender-sensitive. These may include ensuring access to health care, providing a standard of living adequate for the child's physical, mental, spiritual, and moral development, ensuring full access to education under equal conditions, protecting potential victims of child trafficking from further victimisation, and offering legal and medical assistance.[96] The special protective obligations under

92 Antkowiak 2013, pp. 115–119; Zombory, 2023a, p. 172.

93 Xákmok Kásek Indigenous Community. vs. Paraguay, paras. 261-262. This case relates to the state's international responsibility for failing to ensure the ancestral property rights of an Indigenous community and its members. This situation has led to the violation of several rights guaranteed under the ACHR, as preventing access to land and natural resources for Indigenous peoples is directly linked to situations of poverty, vulnerability and the loss of cultural identity. The circumstances to which the children from the Indigenous community have been exposed, including cultural loss, violated their rights under Article 19 of the ACHR, in relation to Article 1 para. 1 of the ACHR: '(...) the loss of traditional practices, such as male and female initiation rites and the Community's languages, as well as the harm arising from the lack of territory, particularly affect the cultural identity and development of the children of the Community, who will not be able to develop that special relationship with their traditional territory and that particular way of life unique to their culture if the necessary measures are not implemented to guarantee the enjoyment of these rights', Xákmok Kásek Indigenous Community. vs. Paraguay, paras. 263-264, see also: Chitay Nech et al. vs. Guatemala, para. 167.

94 Yakye Axa Indigenous Community vs. Paraguay, para. 172.

95 Advisory Opinion OC-21/14, para. 3 of the Opinion part.

96 Ibid., paras. 103-104 and 106.

Article 19 of the ACHR and Article VII of the ADRDM require that border authorities not prevent the entry of foreign children into national territory, even if they are unaccompanied, and that they promptly refer these children to personnel qualified to assess their protection needs based on an approach in which their condition as children prevails.[97]

Children deprived of liberty are another group of minors in vulnerable situations who have received special attention in the IACtHR's case law. In important cases concerning children in detention, such as *Bulacio vs. Argentina*[98] (where an adolescent died following his arbitrary arrest by police) or *Juvenile Reeducation Institute vs. Paraguay*[99] (involving death and injuries of child inmates in a juvenile detention centre), the IACtHR interpreted the obligations under Article 19 of the ACHR to include the obligations of states under Article 4 of the ACHR (the right to life) and Article 5 of the ACHR (the right to humane treatment).[100] In light of Article 5, para. 5 of the ACHR, the additional protective obligations of states under Article 19 of the ACHR require that minors subject to criminal proceedings be separated from adults and brought before specialised tribunals. This separation is necessary to safeguard the rights of detained children, especially their right to humane treatment.[101] In light of Article 4 of

97 Advisory Opinion OC-21/14, para 83.

98 IACtHR, Bulacio vs. Argentina, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C No. 100. Walter Bulacio (17 years old) was randomly arrested by police officers under a massive detention operation "razzia" on 19 April 1991. He was transferred to a police station, where he was tortured by police agents. The detention was not reported to the competent judge or to his next of kin. Two days later, the Walter Bulacio was transferred to a hospital, where a physician reported the admittance of an adolescent with injuries. On 26 April 1991, Walter Bulacio died. Ten years after his arbitrary arrest and death, the domestic proceedings to punish the perpetrators had still not been concluded. In 2002, the Argentinian Court of Appeals ruled that criminal legal action could not be pursued due to the statute of limitations. The IACtHR found a violation of the right to life (Article 4), right to humane treatment (Article 5), right to personal liberty (Article 7), rights of the child (Article 19), in addition to the right to a fair trial (Article 8) and to judicial protection (Article 25), to the detriment of Walter Bulacio and his next of kin.

99 The inmates at the juvenile facility endured inhuman detention conditions, which included, *inter alia*, overpopulation, violence, crowding, poor diet, lack of proper medical attention, and torture. They were confined in filthy cells, with few sanitary facilities and had little opportunity to engage in recreational activities. It was against this backdrop of inhuman detention conditions at the centre that nine inmates died and 42 were injured as a result of fires; another child died from a bullet wound. Subsequently, two children who had been transferred from the centre to an adult penitentiary died from wounds inflicted by a sharp instrument. See 'Juvenile Reeducation Institute' vs. Paraguay, para. 301. The examination of the case revealed that the state had violated the right to life (Article 4 ACHR), right to humane treatment (Article 5 ACHR), right to personal liberty (Article 7 ACHR), right to a fair trial (Article 8 ACHR), and rights of the child (Article 19 ACHR) to the detriment of the detained children.

100 According to the IACtHR, 'the examination of the state's possible failure to comply with its obligations under Article 19 ACHR should consider that the measures of which this provision speaks go well beyond the sphere of strictly civil and political rights. The measures that the state must undertake (...) encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment'. See 'Juvenile Reeducation Institute vs. Paraguay', para. 149.

101 Bulacio vs. Argentina, para. 136.

the ACHR, states are obligated to ensure that children in detention receive conditions necessary for their normal growth and development, such as regular healthcare and education programmes, to prevent detention from jeopardising their future prospects.[102] These measures are crucial because children are at a formative stage in their physical, mental, spiritual, moral, psychological, and social development, all of which influence their life plans.[103] The IACtHR has held that the state has a special role as guarantor of the rights of persons deprived of freedom, a responsibility that becomes crucial when dealing with children in detention. Vis-à-vis child detainees, the state must fulfil this role with the greatest care and responsibility, adopting special measures to ensure the best interests of the child.[104] The state should be particularly attentive to children's living conditions when they are deprived of liberty and apply higher standards to classify treatment or punishment as cruel, inhuman, or degrading compared to adult detainees. Additionally, the state's protective obligations towards child detainees include ensuring their right to establish contact with their relatives. This requires the state's obligation to immediately inform the child's relatives or representatives of his or her detention, even if the child has not requested it.[105]

The IACmHR's case law demonstrates that violence and inhumane living conditions in a detention facility, which threaten the life, safety, or personal integrity of child detainees, can be considered a situation of extreme gravity and urgency that warrants the adoption of provisional measures. In Matter of Children Deprived of Liberty in the 'Complexo do Tatuapé' of FEBEM, the IACmHR ordered the state to immediately implement the necessary measures to protect the life and personal integrity of all the children and adolescents residing in the detention facility, and to maintain the necessary measures that prevent young inmates from experiencing cruel, inhuman, or degrading treatment. Further provisional measures required from the state included substantial reductions in overcrowding within the facility, confiscation of weapons in the possession of the young people, separation of inmates in keeping with relevant international standards while considering the best interests of the child, provision of necessary medical care to ensure the detained children's right to personal integrity, and periodic inspections of the detention conditions and the physical and emotional well-being of the detained children.[106]

In its Advisory Opinion OC-29/22 on differentiated approaches concerning certain groups of persons in detention, the IACtHR addressed the states' protective obligations towards children incarcerated with their mothers or primary caregivers.

102 Juvenile Reeducation Institute vs. Paraguay, para. 161.
103 Ibid., paras. 172-173.
104 Ibid., paras. 160-162, Bulacio vs. Argentina, para. 126.
105 Bulacio vs. Argentina, para. 130.
106 IACtHR, Matter of Children Deprived of Liberty in the 'Complexo do Tatuapé' of FEBEM, Provisional measures regarding Brazil, orders of 17 November 2005, 30 November 2005, 4 July 2006, 3 July 2007, 10 June 2008, on account that the state had not complied with the precautionary measures ordered priorly by the IACmHR. On 25 November 2008, the IACtHR rescinded the provisional measures considering that the state had achieved 'remarkable progress' in complying with court orders.

It urged states to adopt a differentiated approach in the treatment of such children. According to the IACtHR, Article 19 of the ACHR requires states to adopt necessary measures to ensure the appropriate development of children's physical, mental, and emotional capacities through specialised health care and adequate nutrition, which are connected to the proper implementation of the right to health and the right to food.[107] In view of the state's special role as a guarantor of rights, when children live with their mothers or primary caregivers in prison, the state is responsible for providing the necessary means to ensure their proper upbringing, survival, and integral development free from fear.[108] Children should be provided with special protective measures that promote the integral development of their personalities, talents, and mental and physical capacities. Such measures should include, at a minimum, medical care, access to early childhood and basic education, and areas for play and recreation with direct access to natural light and open-air spaces. Moreover, the IACtHR called for the respect of children's rights to grow up in a family and social environment appropriate for their development. Any decision by state authorities regarding the admission or release of a child with a parent or responsible adult in prison, as well as any decision related to separation from such parents or caregivers, must follow a thorough individual evaluation that gives due consideration to the protection of the child's rights and best interests.[109]

4. Conclusions

In the Inter-American system, children are entitled to special protective measures guaranteed by the principal human rights instruments adopted under the auspices of the OAS: the ADRDM and the ACHR. Both instruments create legal obligations for OAS member states regarding children's rights protection. States' compliance with human rights is overseen by the IACmHR and IACtHR, which can receive and consider individual complaints under the ACHR against states that are parties to it. For OAS member states outside the ACHR framework, accountability for human rights violations is based only on the ADRDM and is enforced exclusively by the IACmHR.

The conceptual framework for children's rights protection developed by the IACmHR and IACtHR rests upon the following principles: (I) the scope of the right to special protection under Article 19 of the ACHR and states' corresponding obligations should consider the UN Convention on the Rights of the Child; (II) children are genuine rights holders and subjects of international human rights law, and they can assert their rights before an international court; (III) while adopting special protection measures, states should respect the right to a fair trial, judicial protection, and the principle of the child's best interest; (IV) special protection measures should be

107 Advisory Opinion OC-29/22, paras. 208-213.
108 Ibid., paras. 214-223.
109 Ibid., para. 185.

determined individually, based on the particular circumstances and the personal condition of each child; (V) protective measures should focus on reeducation and re-socialisation, with deprivation of liberty applied only as last resort; and (VI) the family plays a primary role in protecting children, therefore, state authorities should support family unity and prevent its separation.

Children in different situations of vulnerability require special attention and tailored protective measures. At-risk children need special measures that ensure their survival, full development, and provide minimum conditions for a dignified life. Girls require special protection from sexual violence, both in educational institutions and within the family environment. Protective measures for Indigenous children should focus on respecting their distinct cultural identity and preventing the vulnerable situation of their community from undermining their life aspirations. Special protection for migrant children requires culturally appropriate and gender-sensitive measures to ensure access to health care, education, adequate conditions for development, and legal and medical assistance. For children deprived of liberty, protection requires that they are treated separately from adults and provided with regular health care, access to education, and living conditions that allow for normal growth and development. This also includes preventing violence in detention facilities and maintaining contact with the child's relatives. Children living with incarcerated mothers (or caregivers) require a differentiated approach, with measures ensuring the integral development of their personality through medical care, access to education, appropriate living conditions, direct access to natural light, open-air spaces, and areas for recreation, while respecting their right to grow up in a family and a social environment appropriate for their development.

Judge Cançado Trindade has argued that the jurisprudence of the Inter-American human rights bodies reflects the unique judicial heritage of all the countries and peoples of the Western Hemisphere.[110] The recurring themes in the IACmHR's and IACtHR's case law, including the gravest and most systematic violations of children's rights, further demonstrate that their role as final arbiters of human rights cannot be overstated in a region where justice too often seems scarce, especially for the youngest and most vulnerable.

110 Cançado Trindade, 2003, p. 307.

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CHAPTER 11

Protection of Children in the African Human Rights System: Framework and Institutions

Cocou Marius MENSAH

ABSTRACT

Safeguarding the rights of children remains a fundamental priority in every society. In Africa, a region experiencing the highest fertility rate globally – at 31,599 births per 1,000 people in 2023 – the responsibility to ensure the well-being of its young population is crucial. With approximately 60% of its inhabitants aged below 25 years, Africa's sizeable youth demographic underscores the pivotal role children play in shaping the continent's future and driving sustainable development. This chapter delves into the structure of the African human rights system and the organisations that serve as the cornerstone for upholding and advocating children's rights. It considers the diverse cultural, legal, and societal landscapes across the continent. Furthermore, the chapter examines the rationale underpinning legal mechanisms such as oversight committees designated to safeguard children's rights. Emphasis is placed on their significance in addressing several pressing challenges confronting children in Africa.

KEYWORDS

African Charter on the Rights and Welfare of the Child, Children's Rights, African Human Rights Mechanism, Youthful Demographics, Safeguarding Minors, Child Welfare

LIST OF ABBREVIATIONS:

ACRWC – African Charter on the Rights and Welfare of the Child
UN – United Nations
UNCRC – United Nations Convention on the Rights of the Child
OPAC – Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OPSC – Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography
OPIC – Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
ILO – International Labour Organization
ACHPR – African Charter on Human and Peoples' Rights
OAU – Organisation of African Unity
UDHR – Universal Declaration of Human Rights
ANPPCAN – African Network for the Prevention and Protection Against Child Abuse and Neglect
UNICEF – United Nations Children's Fund
ACERWC – African Committee of Experts on the Rights and Welfare of the Child

Cocou Marius MENSAH (2024) 'Protection of Children in the African Human Rights System: Framework and Institutions'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 235–266. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_11

CSO – Civil Society Organisations
AU – African Union
ACCP – African Children's Charter Project
SIDA – Swedish International Development Agency
Art. – Article
GFI – Girl-Friendliness Index
FGM – Female Genital Mutilation
ACDEG – African Charter on Democracy, Elections, and Governance
ACPF – African Child Policy Forum

1. Introduction

Africa has one of the largest and fastest-growing youth populations in the world. Children's rights are universal and inalienable; however, millions of children across the African continent continue to face numerous challenges that hinder their development and well-being. The African human rights system, comprising regional and sub-regional institutions and legal frameworks, seeks to address these challenges and protect children's rights. This chapter presents an in-depth analysis of the framework and institutions within the African human rights system focusing on protecting children. With projections of continued growth over the coming decades, the continent's share of children under the age of 15 years stands at an impressive 40%, above the global average of 25%. According to the report 'Generation 2030 Africa 2.0: Prioritizing Investment in Children to Reap the Demographic Dividend' released by UNICEF, which examines child demographics in Africa and their implications for the continent and the global landscape, it is projected that Africa's population under the age of 18 years will witness an expansion of nearly 170 million by the year 2030. Furthermore, by 2050, Africa is anticipated to be home to 40% of the global population of children under 18 years, and this proportion is forecasted to rise to 50% by the year 2100.[1] This demographic fact brings challenges, particularly regarding children's well-being and development.[2] In sub-Saharan Africa, the infant mortality rate is 72 per 1000 live births.[3] Despite a consistent annual decline of 3.1%, the projected number of 54 deaths per 1,000 live births by 2030 falls significantly short of the United Nations' objective of reducing it to less than 25 deaths. The gravity of this challenge is intensified by the pervasive issue of malnutrition – a major public health concern in Africa.[4] Moreover, constrained access to quality education compounds the adversity faced by African children.[5] In Sub-Saharan Africa, the number of children out of school is very high, with 98

1 UNICEF, 2017, p. 5.
2 El Habti, H. (2022), 'Why Africa's youth hold the key to its development potential', *World Economic Forum*, 19 September 2022. [Online]. Available at: https://www.weforum.org/agenda/2022/09/why-africa-youth-key-development-potential/ (Accessed: 9 June 2024).
3 WHO Africa, 2022.
4 Djoumessi, 2022.
5 Adebisi et al., 2022.

million lacking access to educational facilities.[6] Notably, these current statistics reflect the realities faced by African children in the 1990s.[7] The pursuit of a mechanism to safeguard children's rights was initiated at the Sixteenth Ordinary Session in Monrovia, Liberia, held from 17 to 20 July 1979, during the Assembly of Heads of State and Government. This assembly adopted the Declaration on the Rights and Welfare of African Children, laying the groundwork for the ensuing concrete convention. Subsequently, in July 1990, the African Charter on the Rights and Welfare of the Child (ACRWC) was established, which eventually came into force on 29 November 1999. This charter served as a vital instrument for addressing the pressing challenges faced by African children – driven by many reasons – in the 1990s. These reasons encompassed the following significant factors: 1. Pervasive child poverty: Approximately one in three children in Africa lived in poverty in the 1990s, deprived of necessities such as food, water, shelter, and healthcare. 2. Prevalence of child labour: An estimated 25% of African children are engaged in child labour, exposing them to hazardous and exploitative working conditions, low pay, and long working hours. 3. Prevalence of child abuse and neglect: Disturbingly, one in four African children has experienced various forms of abuse and neglect, including physical, sexual, and emotional maltreatment. 4. Impact of armed conflicts: The 1990s witnessed several conflicts across Africa, including the Rwandan genocide and the Sierra Leone Civil War, resulting in widespread child displacement and loss of life.

The formulation of the ACRWC in the 1990s marked a pivotal step towards tackling these multifaceted challenges. This landmark human rights instrument articulated and safeguarded children's rights throughout Africa. With all 54 African countries having ratified the ACRWC by 2023, its transformative impact has touched the lives of millions of children on the continent. The Charter has contributed to boosting awareness concerning children's rights and provided a comprehensive framework for governments and stakeholders to collaborate to improve the lives of African children. The ACRWC is a testament to Africa's commitment to upholding children's rights. An invaluable resource, the Charter serves as a guiding beacon for governments, civil society organisations, and individuals working to improve the well-being of African children. Against this background, in the subsequent sections, we focus on the following key aspects: 1. Universal and Regional Human Rights Instruments for the Protection of Children's Rights in Africa 2. Regional Monitoring Mechanism 3. Case Studies 4. National Institutions for Child Protection 5. Additional Legal Tools for Child Protection in Africa 6. Prospects: Agenda 2040.

6 UN News, 2022.
7 Fleshman, 2002.

2. Universal and Regional Human Rights Instruments for the Protection of Children's Rights in Africa

The international legal framework for protecting human rights is extensive and impressive, encompassing adults and specifically addressing the rights and needs of children. This protection is achieved through a combination of global and regional conventions dedicated to safeguarding children's welfare, development, and participation in society.

At the forefront is the United Nations Convention on the Rights of the Child (UNCRC), adopted in 1989, which is the most comprehensive global treaty on children's rights. It covers a wide range of rights – civil, political, economic, social, and cultural – and is based on core principles such as non-discrimination, the best interests of the child, the right to life and development, and the right for children to be heard on matters affecting them. Additionally, several key optional protocols complement the CRC: a) The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), established in 2000, aims to protect children from being used in hostilities, raising the minimum age for military recruitment and prohibiting their participation in armed conflict.

b) The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (OPSC), also established in 2000, focuses on protecting children from sexual exploitation, including trafficking, prostitution, and pornography. c) The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), adopted in 2011, allows children or their representatives to report violations of their rights directly to the Committee on the Rights of the Child. d) The International Labour Organization (ILO) Convention No. 182 on the Worst Forms of Child Labour (1999) is another crucial instrument, targeting the elimination of the most severe forms of child labour, such as forced labour, trafficking, hazardous work, and other exploitative practices.

While other relevant conventions may not be explicitly mentioned, the collective aim of these legal measures is to provide a universal shield for children's rights, ensuring their protection and well-being, particularly in regions such as Africa, where vulnerabilities may be more pronounced. Within the African context, specific legal frameworks have been established to protect children in addition to the universal instruments that incorporate their monitoring mechanisms. These regional instruments are carefully crafted to address African children's distinctive challenges and requirements. They ensure that children's rights and well-being are effectively preserved within the continent's unique environment. These tools are predominantly aligned with African realities despite often being based on universal conventions. When asked about the need for regional legal instruments despite existing universal ones, the answer often hinges on cultural relativism nuances and geopolitical factors. For instance, many African regional conventions incorporate provisions that address the specific realities of the continent, such as efforts towards economic development

and the fight against discrimination and poverty. This reflects the broader debate concerning universalism and relativism in the field of human rights.[8] Universalists maintain that human rights are fundamental, inherent, and applicable to all individuals, regardless of cultural or regional contexts.[9] Meanwhile, relativists argue that human rights are not absolute but are shaped by cultural and societal norms, suggesting that cultural justifications and practices specific to each society determine the legitimacy of human rights.[10] To fulfil these objectives, Africa adopted its initial international convention dedicated to upholding fundamental human rights on 27 June 1981, during the 18th Conference of the Organization of African Unity, held in Nairobi, Kenya. This convention took effect on 21 October 1986, following its ratification by 25 member states. The convention is also known as the Banjul Charter because the final draft was produced in Banjul, the capital of The Gambia.

2.1. African Charter on Human and Peoples' Rights[11]

In the introduction to the book 'Human Rights in Africa: Legal Perspectives on their Protection and Promotion', edited by Anton Bösl and Joseph Diescho, Archbishop Emeritus Desmond Mpilo Tutu of Cape Town, South Africa, perceptively acknowledges the delayed recognition of human rights as a legal concept and the formalisation of human dignity within the African context.[12] He underscores that Africa's consideration of human rights must be seen in light of dynamic advancements in the United Nations system and international law. Tutu attributes the impetus for these advancements to the struggles African states faced during their colonial and post-independence periods. This observation aligns with the emergence of the African Charter on Human and Peoples' Rights (ACHPR) in the 1980s, a notable progression shaped by Africa's colonial history and the establishment of the Organisation of African Unity (OAU) in 1963.

In the 1960s, as numerous African nations achieved independence, they focused primarily on asserting national sovereignty and addressing immediate political challenges. However, during this era, the African human rights system concept was initially articulated at a gathering of African lawyers in Lagos in 1961. This assembly adopted the "Law of Lagos" declaration, which championed the establishment of an African Convention on Human and Peoples' Rights. This declaration laid the foundation for acknowledging the necessity of a region-specific human rights mechanism. The OAU played a pivotal role in supporting anti-colonial and anti-apartheid movements and progressively acknowledged the significance of promoting human rights within its agenda. A noteworthy example of this commitment is the 'Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to

8 Aidonojie et al., 2021, pp. 97 – 109.
9 See Donnelly, 2007, pp. 281 – 306.
10 See Renteln, 1990.
11 Nairobi, 1981 The African Charter on Human and Peoples' Rights., IEG. [Online]. Available at: https://hhr-atlas.ieg-mainz.de/articles/plath-nairobi (Accessed: 20 June 2024).
12 Bösl and Diescho, 2009.

Africa' held in Cairo in 1969. Additionally, internal struggles within Africa during the 1970s, such as the successful intervention by Tanzanian forces in Uganda leading to the ousting of Idi Amin from power, followed by human rights abuses by dictatorial regimes, prompted the OAU to prioritise human rights at its 16th Summit in Monrovia in 1979. This focus aimed to restore the organisation's international reputation. Along with the challenges encountered, the adoption of the ACHPR in the 1980s entailed complexities stemming from the intricate nature of post-independence African states. Nevertheless, the continental human rights instrument eventually emerged, reflecting Africa's growing awareness of safeguarding human rights within its distinct historical and cultural context. Participants at the Monrovia Summit resolved to draft the ACHPR to swiftly promote and protect human and people's rights. Ultimately, adopted in Banjul, The Gambia, the ACHPR, also known as the Banjul Charter, became Africa's primary regional human rights treaty. It outlines a comprehensive range of civil, political, economic, social, and cultural rights for individuals and peoples. The ACHPR and the Universal Declaration of Human Rights (UDHR) are two international instruments aimed at upholding and safeguarding the rights of individuals and collectives. They ensure fundamental rights such as the right to life, liberty, education, and freedom of expression. These instruments are binding on states that have ratified them and are overseen by monitoring bodies such as the African Commission on Human and Peoples' Rights and the United Nations Human Rights Committee. However, significant distinctions exist between these two instruments. The UDHR has universal applicability, whereas the ACHPR is rooted in the African regional context. The ACHPR addresses issues deeply connected to the progress of the African continent. For instance, Article 22 focuses on the right to development. Conversely, Article 16 outlines the right to a healthy environment, underlining states' collective responsibility to safeguard their populations' well-being. Other provisions, such as Article 17, highlighting the right to participate in cultural community life, and Article 20, explicitly mentioning the right to self-determination, further underscore the ACHPR's emphasis on African realities and the aspiration for development. This emphasis considers the needs of the population and the environmental considerations arising from resource exploitation. These distinct elements give the ACHPR a unique characteristic compared to the broader scope of the universal convention.

Therefore, Articles 16, 17, 20, and 22 of the ACHPR apply to adults and children, particularly Article 18, paragraphs 1, 2, and 3, which underline the primordial role of the family and the need to protect women and children by banishing all kinds of discrimination as stipulated in international conventions. Regarding the protection of children's rights, although the ACRWC is a legal instrument tailor-made to protect

children's rights, the ACHPR also contains several articles dealing with children's protection.[13]

2.2. The African Charter on the Rights and Welfare of the Child

The ACRWC, a significant human rights instrument imbued with African culture and tradition, marks a notable stride in protecting children's rights within a regional context. Adopted in 1990 and enacted in 1999, the ACRWC is a pivotal expression of commitment to advancing and safeguarding children's rights and well-being across Africa. This Charter outlines distinct provisions tailored to children's rights and the responsibilities of state parties in ensuring their welfare.

The inception of the Charter can be traced back to a seminal conference organised collaboratively by the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) and the United Nations Children's Fund (UNICEF) in 1987. During this pivotal gathering, participants were informed of the ongoing drafting process of the UNCRC in Geneva. Notably, the conference underscored the importance of viewing children's rights from a regional vantage point, prompting the proposal to convene a dedicated meeting to examine the UNCRC draft from an African standpoint.

Subsequently, with indispensable support from UNICEF, ANPPCAN orchestrated an important assembly in 1988 to craft the ACRWC as a supplementary document to the UNCRC. This Charter was conceived to address specific challenges unique to the African continent. Its purpose was to complement the UNCRC and facilitate the eventual ratification and implementation of the UNCRC by African nations. The ACRWC defines a child as anyone under 18 years of age and provides several protections, including comprehensive coverage of child labour in Article 15 and protection from harmful social and cultural practices (e.g. child marriage and gender discrimination in Articles 21 and 22 and protection from sexual exploitation in Article 27). Furthermore, Article 29 addresses the prevention of the sale, trafficking, and abduction of children, whereas Article 16(2) requires state parties to establish monitoring bodies to prevent the abuse and exploitation of children. The Charter mandates that states

13 Article 4 recognises every human being's right to life. This includes children's right to be protected from domestic or military violence in theatres of war or anything that could take their lives or endanger them. Article 5 prohibits any form of discrimination; however, it would have been worthwhile if the legislator had prioritised gender equality. Generally, this article can be interpreted as meaning that children (boy or girl) are entitled to the same rights and freedoms as adults without discrimination. Article 16 can be interpreted as prohibiting the exploitation of children. This includes the exploitation of children in the labour force, the sex trade, and armed conflict. Article 17 recognises children's right to education and aligns with point 4: access to quality education of the UN 2030 agenda for sustainable development. This includes the right of children to access free and compulsory primary education and the right to receive an education appropriate to their needs and abilities. Article 18 acknowledges the family as the nucleus of society and calls for its protection by State institutions, which refers to the material assistance of social services and institutions in charge of the family. Article 24 protects the human right to a healthy environment, which could be interpreted as the child's right to a healthy and conducive environment for personal development.

provide comprehensive protection against child abuse, discrimination, neglect, and exploitation. Each state Party must submit reports detailing the measures they have taken to implement the provisions of this Charter and the progress made in protecting and promoting these rights.[14] Despite these efforts, questions persist about the Charter's effectiveness three decades after its adoption and 22 years in force.

While the intentions behind the ACRWC are commendable, there has been a troubling rise in child labour, particularly in sub-Saharan Africa.[15] A recent UNICEF and ILO report reveals that 16.6 million children in this region have been involved in child labour in the last four years.[16] The global estimate of child labour masks significant regional differences. In sub-Saharan Africa, the prevalence rate is as high as 24%, which is three times higher than in Northern Africa and Western Asia, the region with the second-highest rate. Notably, the nearly 87 million children engaged in child labour in sub-Saharan Africa outnumber those in the rest of the world combined.[17] The challenges faced by African children have been compounded by issues such as child marriage, teenage pregnancy, child trafficking, and the COVID-19 pandemic. The Charter included a committee of experts in its monitoring tools to ensure its implementation and work closely with African governments to improve the situation of children. However, this situation remains a significant challenge three decades later, with extreme poverty and a lack of social protection forcing many children into exploitative situations. Additionally, the expansion of informal settlements without proper planning leads to overcrowding and exposes children to exploitation and harsh living conditions.

Among the legal instruments available to protect children, the UN Convention on the Rights of the Child (UNCRC) and the ACRWC are two important international human rights instruments dedicated to protecting and promoting children's rights worldwide and in Africa.

Common Point: The ACRWC and the UNCRC share a central objective of safeguarding and promoting the rights and welfare of children. They recognise that children, as vulnerable members of society, are entitled to special care, protection, and opportunities for their well-being and development. The treaties emphasise that children should be granted the right to survival, education, health, and protection from all forms of exploitation, abuse, and discrimination. Moreover, both instruments underscore the importance of considering the child's best interests as the primary consideration for all actions concerning them.

14 ACRWC Article 43- REPORTING PROCEDURE.
15 International Labour Office and United Nations Children's Fund, 2021.
16 Ibid.
17 Ibid.

Differences:

Geographical Scope

The fundamental distinction between the ACRWC and the UNCRC is their geographical extent. The ACRWC is a regional human rights treaty designed exclusively for Africa. Endorsed by the Organization of African Unity (now known as the African Union) in 1990, it was enforced in 1999. Conversely, the UNCRC is a universal treaty ratified by the United Nations General Assembly in 1989 and enacted in 1990. The UNCRC applies to all nations globally, whereas the ACRWC confines its scope solely to the African region.

Specific Regional Concerns

The ACRWC addresses various concerns and challenges unique to Africa. Lloyd (2002) noted that the ACRWC is a substantial human rights instrument that conscientiously upholds African values.[18] This characteristic is pivotal, ensuring that the treaty remains pertinent to African children's distinct needs and realities. For instance, within the ACRWC, there are provisions on child labour (Article 15), harmful traditional practices (Articles 21 and 22), sexual exploitation (Article 27), and trafficking (Article 29). These provisions reflect issues specific to the region, highlighting the challenges African children face.

Focusing on the significance of education for African children, Chitsamatanga and Rembe (2020) emphasised its critical role.[19] Another pressing concern is the health of internally displaced children in sub-Saharan Africa, as detailed by Salami et al. (2020).[20] Displacement often exposes many children to malnutrition, malaria, and respiratory infections, marking a humanitarian crisis that requires immediate attention.

The collective evidence provided by these studies further justifies the support that Diallo (2018) extended to the ACRWC.[21] Moreover, Abdullah et al. (2022) aptly explained that addressing the complex issues arising from social norms and specific challenges faced by African children necessitates multifaceted strategies.[22]

Enforcement Mechanisms:

Another difference between the two instruments pertains to their enforcement mechanisms. The ACRWC institutes the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), tasked with overseeing its execution and presenting reports to the African Union. Conversely, the UNCRC establishes the Committee on the Rights of the Child, an assembly of impartial experts accountable for supervising its implementation among state parties and evaluating their advancements.

18 Lloyd, 2002, p. 12.
19 Chitsamatanga and Rembe, 2020, p. 66.
20 Salami et al., 2020, p. 4.
21 Diallo, 2018, p. 176.
22 Abdullah et al., 2022, p. 12.

The ACRWC and UNCRC are important instruments for protecting children's rights. They have different strengths and weaknesses and complement each other in many ways. Together, they provide a robust framework for ensuring that all children, regardless of where they live, can enjoy their rights to a safe, healthy, and happy childhood. In addition to the differences mentioned above, the ACRWC is more explicit than the UNCRC in its recognition of the rights of children to participate in decision-making processes that affect their lives. The ACRWC also emphasises the importance of family life and the role of parents in raising children.

Comparison of the ACRWC and UNCRC: Strengths, Weaknesses, Key Provisions, Future Prospects, and Cases:

Convention/Charter	The African Charter on the Rights and Welfare of the Child	The United Nations Convention on the Rights of the Child
Strengths	Specific Regional Focus	Universal
	Implementation Mechanism (Committee)	Holistic Protection
	Right to Education (Article 11)	Committee on the Rights of the Child
	Comprehensive Protection from Abuse	Comprehensive Protection from all forms of abuse and neglect
	Prohibition of Harmful Practices (e.g. Child Marriage, Female Genital Mutilation)	Protection from Violence Article 19 Right to Education (Article 28)
	Monitoring through the Committee of Experts	Monitored by the UN Committee on the Rights of the Child.
Weaknesses	Limited Ratification (continental level)	Dependency on States' Willingness and Resources
	Enforcement Challenges	Reservations and Limitations
	Regional Variations in Implementation	Lack of Enforcement Mechanism
		Lack of Monitoring Mechanism
Key provisions	Article 15 (Child Labour)	Article 19 (Protection from Violence)
	Article 21 (Harmful Traditional Practices)	Article 28 (Right to Education)
	Article 22 (Child Marriage)	Article 32 (Child Labour)
	Article 27 (Protection from Sexual Exploitation	Article 34 (Protection from Sexual Exploitation)
		Article 37 (Detention and Imprisonment)
	Article 29 (Trafficking and Abduction)	Article 31 (Rest, Play, Recreation, and Culture)
	Article 30 (Protection of Minority or	Article 36 (Protection from Other Forms of Exploitation)
	Indigenous Children)	Article 39 (Rehabilitation and Social Reintegration)
Future Prospects	Strengthening Implementation Mechanisms	Enhanced Monitoring and Reporting Mechanisms
	Addressing Regional Variations	Increased Global Cooperation on Children's Rights
	Promoting Awareness and Advocacy	Effective Measures to Tackle New Challenges (e.g.
	Online Child Exploitation)	
	Incorporating Emerging Child Rights	Strengthening Protection for Children in Conflict Zones
	Issues (e.g., Digital Rights)	Addressing Climate Change's Impact on Children
	Strengthening Child Participation	Limited Child Participation

Convention/Charter	The African Charter on the Rights and Welfare of the Child	The United Nations Convention on the Rights of the Child
Overview of Cases	Hadijatou Mani Koraou vs. Niger (slavery, trafficking, early marriage, child marriage)[23]	Olga Tellis vs. Bombay Municipal Corporation (Protection of street children and right to livelihood)[24]
	African Commission on Human and Peoples' Rights vs. Kenya (2012): allegations of violations of children's rights in Kenya, including issues related to child labour, early and forced marriage, and access to education.	Ms. X vs. Argentina[25]

The ACRWC, which was designed to curb child abuse and provide protection while considering the unique circumstances of Africa, focuses on the various challenges experienced by African children. This distinct approach distinguishes it from the UNCRC, which has a more expansive scope. Recognising Africa's different requirements, the ACRWC was tailored to encompass specific regional needs. This has resulted in the enshrinement of the Charter of the concept of comprehensive protection against abuse and demonstrates a solid commitment to protecting children against all forms of abuse and exploitation across the continent.[26] However, according to Ndimurwimo and Vundamina (2021), vulnerable groups, especially refugee children, are often marginalised. Additionally, forced marriage and genital mutilation[27] prevail in Africa and negatively affect the lives of many young girls across all regions. [28]Therefore, it is necessary to develop proposals based on cultural and traditional aspects. By referring to specific articles devoted to different aspects of abuse, such as child marriage, sexual exploitation, and harmful practices, the ACRWC ensures that the protection of children is holistic and considers the different challenges African children face or may face according to their countries and traditions. The ACRWC's focus on child abuse throughout the Charter demonstrates the legislator's commitment at all costs to protecting children, who represent the continent's future and its guarantee of economic development. Thus, the Charter arises as a guarantor and defender of the dignity and well-being of children across the African

23 Hadijatou Mani Koraou vs. La Republic de Niger, Arrêt No. ECW/CCJ/JUD/06/08, para. 11 (ECOWAS Cour de Justice Oct. 27, 2008). [Online]. Available at http://www.unhcr.org/refworld/docid/491168d42.html (Accessed: 28 May 2023). The explanation of the case in English is available at https://www.law.cornell.edu/women-and-justice/resource/hadijatou_mani_koraou_v_republic_of_niger (Accessed: 28 June 2024).

24 Olga Tellis & Ors vs. Bombay Municipal Council [1985] 2 Supp SCR 51. [Online]. Available at: https://www.escr-net.org/caselaw/2006/olga-tellis-ors-v-bombay-municipal-council-1985-2-supp-scr-51 (Accessed: 28 June 2024).

25 Case 10.506, Report No. 38/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 50 (1997). [Online]. Available at: http://hrlibrary.umn.edu/cases/1996/argentina38-96.htm (Accessed 30 June 2024).

26 Murungi, Nkatha, 2021, p. 2.

27 Wikholm, K., Mishori, R., Ottenheimer, D., et al., 2020, p. 676.

28 Yirga et al., 2012, p. 50.

continent and human rights in general through the following provisions: 1. Protection from Exploitation (Article 16): It emphasises the duty of state parties to protect children from all forms of exploitation, economic exploitation, and hazardous work that may be harmful to their health, education, or development. 2. Protection against Harmful Social and Cultural Practices (Article 21): Some of the Harmful Social and Cultural Practices referred to in Article 21 of the ACRWC may include the following:

a) Female Genital Mutilation (FGM): This practice involves the partial or total removal of external female genitalia for non-medical reasons. It is considered a grave violation of girls' and women's rights and can lead to severe physical and psychological consequences.
b) Child Marriage: Child marriage refers to the marriage of children, especially girls, before the age of 18 years. Early marriage deprives children of their right to education, exposes them to health risks, and perpetuates the cycle of poverty.
c) Forced Marriages: Forced marriages occur when children are coerced or compelled into marriage against their will without their consent.
d) Harmful Rituals and Initiation Practices: Certain initiation rituals or practices in some cultures can cause physical harm or psychological trauma to children, particularly during their transition from childhood to adulthood.
e) Witchcraft Accusations: In some communities, children are accused of witchcraft, leading to stigmatisation, abandonment, and even violence against them.
f) Breast Ironing/Flattening: This practice involves using heated objects to flatten or suppress girls' breast development, mistakenly believed to delay their sexual maturity and protect them from sexual harassment.
g) Violence in the Name of Tradition: Some cultural practices may involve violent actions against children, such as physical punishment or corporal discipline justified by tradition.
h) Harmful Cultural Beliefs: Certain cultural beliefs may hinder children's access to education, healthcare, or equal opportunities based on their gender or social status.
i) Protection from Child Marriage (Article 22): Article 22 addresses child marriage and highlights the need to take legislative and other measures to prohibit and eliminate child marriage.
j) Protection from Sexual Exploitation (Article 27): This article specifically addresses the protection of children from sexual exploitation and calls for measures to prevent and punish perpetrators.
k) Protection from Trafficking and Abduction (Article 29): It emphasises the need to prevent child trafficking and abduction and take appropriate measures to protect and assist victims.
l) Protection of Refugee and Internally Displaced Children (Article 30): This article highlights the need to protect refugee and internally displaced children, including protecting them from abuse and exploitation.

m) Right to Rest, Leisure, Play, and Cultural Activities (Article 31): While not explicitly mentioning abuse, Article 31 emphasises the right of the child to rest, leisure, and play, which indirectly contributes to their protection from abusive practices.
n) Wide Range of Protections: The ACRWC (Article 16) covers a broad spectrum of abuse children may face, including physical, emotional, and sexual abuse, as well as neglect and exploitation. By addressing various forms of abuse comprehensively, the Charter aims to provide holistic protection to children.
o) Prohibition of Harmful Practices: The ACRWC (Article 21) explicitly addresses harmful practices affecting children such as child marriage, FGM, and other traditional practices that may be detrimental to their physical and mental well-being.
p) Age-Appropriate Measures: Article 4 of the ACRWC deals with the protection of children's rights, stating that governments shall take legislative and other measures to ensure that the rights and welfare of children are recognised and protected. These measures must consider the child's age and evolving capacities.
q) Focus on Vulnerable Groups: Article 2 of the ACRWC emphasises that a child's rights and welfare should be guaranteed without any discrimination. It specifically mentions that special protective measures should be taken in favour of the most vulnerable or marginalised children.
r) Commitment to Education and Awareness: Article 11 of the ACRWC addresses children's right to education. It emphasises that states should take measures to promote and protect the child's right to education, including eliminating illiteracy and ensuring that the child has access to appropriate and quality education.
s) Establishment of a Monitoring Mechanism: Article 45 of the ACRWC establishes the ACERWC. This committee is responsible for monitoring the implementation and application of the Charter's provisions. It also receives and considers reports from state parties on their efforts to protect and promote children's rights.
t) Empowerment of Children: The ACRWC recognises the right of children to participate in decisions affecting their lives (Article 5). This encourages children's participation in matters concerning their protection, enabling them to express their views and have their voices heard.
u) Regional Context and Customary Law: The Charter acknowledges the regional context of Africa and considers the diversity of cultures and customary law. This allows for developing child protection measures that respect local traditions while ensuring that the child's best interests are upheld.

2.3. Additional Legal Tools for Child Protection in Africa

The African Charter on Democracy, Elections, and Governance (ACDEG) indirectly protects children in Africa by promoting democratic governance, the rule of law, and respect for human rights and freedoms. By establishing a conducive environment for safeguarding children's rights through good governance, the ACDEG enables a stable and democratic society to address child protection issues more effectively. The emphasis on human rights in the ACDEG also reinforces children's rights to education, health, protection against violence, and participation in decision-making processes (ACDEG, Articles 2, 3, and 4).

The Protocol to the ACHPR on the Rights of Persons with Disabilities in Africa demonstrates Africa's commitment to protecting and promoting the rights of children with disabilities. By recognising their right to access education, healthcare, and other services equally, the Charter aims to prevent discrimination and ensure equal participation and inclusion opportunities (Articles 4, 5, 6, 9, and 11).

The Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol- 2003), while not directly focused on children, plays a crucial role in protecting women's rights, who are often primary caregivers for children. By promoting gender equality, eliminating discrimination against women, and ensuring their rights to education, health, and economic empowerment, the protocol indirectly contributes to children's well-being (Articles 3, 4, 6, 9, 11, and 12).

The African Court on Human and Peoples' Rights, established in 2004, is a regional human rights court that hears cases of human rights violations in Africa. The court generally hears matters related to human rights violations, and children's rights may be addressed as part of broader cases involving human rights issues. It can issue binding decisions, allowing individuals and organisations to seek redress for human rights violations, including those that affect children. The ACHPR's decisions and advisory opinions have helped raise awareness of the challenges of children's rights in Africa and the need for greater protection. Additionally, its work has contributed to developing national laws and policies for protecting and promoting children's rights.

The African Commission on Human and Peoples' Rights was established on 2 November 1987 in Addis Ababa, Ethiopia, with its operational headquarters located in Banjul, The Gambia. In conjunction with responsibilities assigned by the Assembly of Heads of State and Government, the Commission has been officially designated three primary functions: ensuring the protection of human and peoples' rights, advocating for the rights of humans and peoples, and offering interpretations of the ACHPR.

The Commission, founded even before the African Court on Human and Peoples' Rights, is pivotal in overseeing the implementation of the ACHPR, assuming a critical responsibility in advancing children's rights and promoting child protection throughout the continent. Although it lacks the authority to issue legally binding decisions, the Commission can provide governments with recommendations to safeguard human rights. Notably, its impactful cases have significantly contributed to preserving children's rights in Africa. Several noteworthy examples include the following:

Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea (2008): In this case, the ACHPR addressed the rights of refugee children in Guinea, ensuring their protection and access to basic services. The decision highlighted the need to safeguard the rights of vulnerable children, including those affected by conflict and displacement.

Institute for Human Rights and Development in Africa v. Angola (2000): This case dealt with the forcible eviction of families, including children, from their homes in Angola. The ACHPR's decision underscored the importance of protecting children's rights in situations of displacement and the obligation of states to ensure adequate housing and protection from arbitrary eviction.

Amnesty International v. Sudan (2000): In this case, the ACHPR addressed the issue of child soldiers in Sudan. The decision emphasised the need to protect children from recruitment into armed forces and groups, highlighting the importance of preventing child recruitment and ensuring rehabilitation and reintegration for former child soldiers.

The Malawi African Association and Others v. Mauritania (2000): This case focused on the issue of slavery in Mauritania, which affects many children. The ACHPR's decision condemned slavery and emphasised the need to protect children from all forms of exploitation and forced labour.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (2003): This case has positively impacted the protection of African children, particularly indigenous children. It reinforces their rights to cultural preservation, education, land, and resources and promotes non-discrimination and meaningful participation.

Overall, these conventions, protocols, decisions, and recommendations are powerful tools in Africa's legal arsenal for child protection. They reflect the continent's commitment to democratic governance, human rights, gender equality, and inclusion, paving the way for a more just and equitable society for children by 2040 and beyond.

3. Monitoring Mechanism

The ACERWC[29] plays a vital role in implementing and monitoring the ACRWC. The committee is established under Part II, Chapters 2 and 3, Articles 32–46 of the ACRWC. The articles describe the establishment, organisation, mandate, procedure, activities, composition, and roles, among other key aspects. The Committee seeks to ensure that children's rights are respected, protected, and fulfilled across the continent and is responsible for monitoring the implementation of the ACRWC and safeguarding the rights of children in Africa. The Committee conducts two ordinary

29 ACERWC (2023) The African Committee of Experts on the Rights and Welfare of the Child. [Online]. Available at: https://www.acerwc.africa/en (Accessed: 7 July 2024).

sessions annually, engaging with various stakeholders to fulfil its promotion and protection mandate. The main functions of the Committee, as specified in Article 42 of the Charter, include promoting and protecting children's rights, monitoring the Charter's implementation, interpreting its provisions, and conducting tasks entrusted by the AU's Assembly of Heads of State and Government and other AU organs. To achieve its mandates through its sessions, the ACERWC conducts several activities according to the provisions of the Charter. These activities, outlined in Articles 42–45 of the Charter and the Committee's Rules of Procedures, include the following: examination of State Party Reports on the status of Charter implementation; consideration of communications/complaints about alleged violations of children's rights by State Parties submitted by civil society organisations (CSOs); investigations or country visits to assess Charter implementation; developing norms and standards through General Comments and Guidelines on matters covered by the Charter; research and studies on child rights issues in Africa; leading the celebration of the Day of the African Child; issuing resolutions, declarations, statements, and letters of urgent appeals; monitoring the implementation of Agenda 2040.

As for its composition, the ACERWC comprises eleven members renowned for their high moral character, integrity, impartiality, and expertise in matters concerning children's rights and welfare. These members are chosen through a secret ballot from a list of nominees proposed by State Parties to the Charter. Each State Party can nominate up to two candidates, who must be citizens of the African Union (AU) member states and signatories to the Charter. The election process prioritises gender balance and regional representation to ensure diversity. Members serve in their capacities and not as representatives of specific states. They hold a five-year term, with the possibility of being re-elected once. The Bureau supervises and coordinates the Committee's activities, which is composed of the Chairperson, Vice-Chairperson, and Rapporteur. Their tenure lasts two years, and the Chairperson is ineligible for re-election. The Secretariat, led by the Secretary, facilitates the Committee's effective functioning, which offers technical and logistical support.

State Parties adhering to the Charter must submit reports to the ACERWC detailing the status of Charter implementation within their respective countries. Initial reports are due two years after Charter ratification and subsequently every three years. These reports encompass general information about the state, its legal and institutional frameworks for child protection, and the measures taken to actualise children's rights enshrined in the Charter. Periodic reports focus on implementing previous concluding observations and recommendations issued by the Committee, in addition to outlining the efforts undertaken to enforce the Charter's provisions.

4. Cases

The ACERWC provides advisory opinions and recommendations on child rights issues in Africa. Although these opinions lack legal binding, they have a significant influence, and member states bound by the ACRWC are expected to consider them when formulating child rights laws and policies. To further support its mission and promote children's rights within AU bodies and mechanisms, the ACERWC participates in the "African Children's Charter Project (ACCP)" along with a consortium of regional and international non-governmental organisations, with support from the Swedish International Development Agency (SIDA). Owing to its partners, the ACERWC has access to an invaluable resource known as The African Child Rights Case Law Database.[30] This database contains a comprehensive collection of judgements from domestic courts across diverse African countries focusing specifically on cases related to children's rights and welfare. The availability of such a database equips the committee with a wealth of legal precedents and insights into how child rights issues have been addressed and adjudicated in various jurisdictions. With access to this vast case law repository, the ACERWC gains a powerful tool to bolster its efforts in protecting children's rights in Africa. This database enables the committee to make well-informed decisions, provide authoritative recommendations, and issue advisory opinions that draw on legal insights from different contexts. This, in turn, strengthens the committee's mandate to safeguard and promote children's rights throughout Africa, enhancing its effectiveness and impact on child protection efforts.

The cases handled by the Committee are referred to as "communications" about alleged violations of the Charter by a state party. The process is governed by Article 44 of the ACRWC, which allows communications from any individual, group, non-governmental organisation, member state, or the United Nations concerning matters covered by the Charter. The committee has established the 'Guidelines for Consideration of Communications and Monitoring Implementation of Decisions'[31] to outline the procedures and rules for dealing with communications, ensuring fairness and adherence to established criteria. Once a communication is received, the committee conducts a preliminary review to ascertain its form and content compliance, as specified in the guidelines. If deemed admissible, the ACERWC evaluates the merits of the case and examines the alleged child rights violations. If the committee finds violations, it may call for appropriate remedies from the concerned state party. Subsequently, the state party must report the measures taken to implement the committee's decisions. The committee engages in various follow-up activities to ensure the effective implementation of its decisions. These include country visits, implementation

30 ACERWC (2023) ACERWC Case Law Database. [Online]. Available at: https://www.acerwc.africa/en/resources/case-law-database (Accessed: 15 July 2024).

31 ACERWC (2023) Guidelines for Consideration of Communications and Monitoring Implementation of Decisions [Online]. Available at: https://www.acerwc.africa/en/page/guidelines-consideration-communications-and-monitoring-implementation-decisions (Accessed: 15 July 2024).

hearings, and reports to the Executive Council of the African Union, among others. The ACERWC has also established a Working Group on the Implementation of Decisions, which focuses on effectively monitoring the implementation of the committee's decisions.

As of August 2023, the Committee has issued significant advisory opinions and recommendations on various issues related to child rights in Africa. Some cases are pending; others are declared inadmissible, amicably settled, or finalised.

Communication Nº.	Respondent state	Alleged facts	Status
0023/Com/005/2022	Nigeria	The plaintiffs, all non-governmental organisations (NGOs) working on child rights in Nigeria, argue that the Nigerian government has failed to protect children adequately from violence, exploitation, and abuse.	Pending
0018/Com/002/2021	Cameroon	The complainants have filed a Communication with the Committee, reporting cases of child marriage in Cameroon involving Fadimatou Mohamadou and nine others.	Declared inadmissible: the plaintiffs' not having exhausted local remedies.
0012/Com/001/2019	TANZANIA	The Complainants allege that in Tanzania, primary and secondary school girls are forced to undergo pregnancy testing and are expelled from schools if they are found pregnant or married.	Finalised: The Committee has found Tanzania guilty of violating its obligations under multiple Articles (1, 3, 4, 10, 11, 14, 16, 21) of the African Charter on the Rights and Welfare of the Child.
004/Com/001/2014	Malawi	Incompatibility of the Constitution of Malawi Article 23(5) with Article 2 of the ACRWC and violation of Articles 1 and 3 of the ACRWC.	Amicably settled

5. Prospects: Agenda 2040[32]

In 2015, the Committee formulated a strategic roadmap known as Africa's Agenda for Children 2040 (Agenda 2040) to shape an Africa suitable for its young population. This initiative was inspired by a conference commemorating the 25th anniversary of the African Children's Charter, which involved an assessment of children's conditions in Africa over the preceding quarter century. The development of Agenda 2040 was a natural progression of the broader AU Agenda 2063, primarily focusing on empowering African children by ensuring the comprehensive implementation of the African Children's Charter. This initiative gained official endorsement from

32 Cilliers, 2021, p. 33.

the African Union's Executive Council through decision nº EX. CL/Dec.997(XXXI).[33] Outlined within Agenda 2040 are ten aspirational objectives to be accomplished by 2040, informed by insights gleaned from the past 25 years. At its core, the initiative aims to safeguard Africa's children's rights and prioritise the objectives outlined in the Agenda. The aspirations include the following: ensuring an effective continental framework to advance children's rights under the supervision of the African Children's Committee; establishing child-friendly national legislative and institutional structures in all Member States; registering every child's birth and vital statistics; ensuring every child's survival and healthy childhood; providing proper nutrition and access to necessities; offering quality education for all children; protecting them against violence, exploitation, neglect, and abuse; implementing a child-sensitive criminal system; safeguarding them from the impact of armed conflicts and disasters; recognising and valuing the voices and views of African children.

Overall, Agenda 2040 sets forth a comprehensive vision for the future, and its successful implementation relies on collective efforts, commitment, and collaboration between African countries and stakeholders to create a thriving and secure environment for the continent's children. By achieving these aspirations, Africa can pave the way for a brighter future where every child's rights are upheld, leading to sustainable development and progress across the continent.

6. National Institutions for Child Protection

To effectively implement children's rights, it is essential to have dedicated institutions at the national level that implement international, regional, and national laws. International conventions, treaties, and agreements are incorporated into the local laws of countries that have ratified them based on the legal principles of "monism" or "dualism", depending on each country's legal system. Regardless of the approach taken, Article 27 of the Vienna Convention on the Law of Treaties (1969) emphasises that states must fulfil their treaty obligations and cannot use domestic law as a defence for non-compliance.[34] When it comes to conventions addressing the protection of children, states adhere to the international treaties to which they are parties and integrate the standards of these texts into their national laws. In national laws, provisions from various regional and international treaties play a crucial role:

33 African Union. (2017, January 25). EX.CL/Dec.997(XXXI). EXECUTIVE COUNCIL Thirtieth Ordinary Session 25 – 27 January 2017 Addis Ababa, ETHIOPIA DECISIONS. [Online]. Available at: https://au.int/sites/default/files/decisions/32521-sc19552_e_-ex_cl_decisions_939-964-xxx.pdf (Accessed: 31 July 2024).

34 Vienna Convention on the Law of Treaties 1969, adopted and opened to signature in Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331. [Online]. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (Accessed: 20 July 2024).

Agreement no. 138 of the ILO on the minimum working age; Agreement no. 182 on the worst forms of child labour; The ACRWC; UNCRC.

These standards are transposed into local legislation to ensure compliance with international law. Below is a non-exhaustive list of a few countries and their respective regulations concerning the protection of children.

Country	Legislation[35]	Key Provisions
Kenya	The Children Act 2022	Provides for the following measures for the protection of children: • Education; Healthcare. • Protection from exploitation and all forms of violence against children, including physical, sexual, and emotional abuse and violence.
	The Constitution of Kenya Amendment Bill 2020	This Bill proposes amendments to the Constitution of Kenya to strengthen the protection of rights. The protection of children is enshrined in Article 53 and includes:[36] • The right of children to be free from all forms of violence, abuse, and exploitation. • The right of children to participate in decisions that affect their lives. • The right of children to access quality education and healthcare. • The right of children to be protected from harmful traditional practices. • Article 54 of the constitution addresses the protection of persons with disabilities. While this provision does not explicitly focus on children, it can be interpreted as a crucial tool to safeguard the rights of disabled children, ensuring their access to education and active participation in society.
Mauritius	The Children's Act 2020	• Prohibition of all forms of violence against children (Art. 13), including physical,37 sexual and emotional abuse. • Establishment of a National Child Protection Agency to oversee the implementation of the law. • Creation of specialised child protection courts to hear cases involving children. • Provision of support services for children affected by violence or abuse. • Guarantee children's right to education, healthcare, and social security. • Increased focus on prevention of child abuse and neglect.

35 ACPF (2023) CHILD LAW RESOURCES. [Online]. Available at: http://clr.africanchildforum.org/home (Accessed: 20 July 2024).

36 Kenya Law Reform Commission (KLRC) The Constitution of Kenya (2020) [Online]. Available at: https://www.klrc.go.ke/index.php/constitution-of-kenya/113-chapter-four-the-bill-of-rights/part-3-specific-application-of-rights/219-53-children (Accessed: 20 July 2024).

37 cf. End Corporal Punishment (2022). [Online]. Available at: https://endcorporalpunishment.org/mauritius-prohibits-all-corporalpunishment/#:~:text=The%20Children's%20Act%202020%20aims,the%20Juvenile%20Offenders%20Act%201935 (Accessed: 25 July 2024).

Country	Legislation	Key Provisions
Rwanda	Law No. 71/2018 relating to the protection of the child	Determines specific crimes against children and their penalties and determines special rights of the child, subject to other rights provided for him/her by other laws, and also provides modalities for the protection of the child and offenses and penalties.[38]
Benin	Law 2015-08 code de l'enfant en République du Bénin (Children's Code of Benin)	• Extension of the time limit for the declaration of births (Art. 34, Art. 40) to 21 days accompanied by penalties instead of 10 days provided for by the personal and family code. • The obligation for the State to assist destitute families lacking the necessities to provide for the well-being of their child (Arts. 42, 121). • Enables the creation of institutions for the social protection of children. • Establishment of duties of the child. The child, therefore, has responsibilities towards himself, his parents, his family, society, the State, and the international community.
	Law N° 2002 – 07 - Code des Personnes et de la Famille (Benin Code of Persons and Family) enacted in 2004[39]	• Advancing women's rights to land and natural resources. Fighting against child labour and prohibition of children from engaging in hazardous or exploitative work. • Promotion of children's right to education and healthy development. • Regulation of the process of adoption in Benin, outlining the requirements and procedures to ensure the best interests of the child. • Children's inheritance rights, ensuring that they are protected and receive fair treatment in matters of inheritance, provisions regarding child support and maintenance, aiming to provide children's financial well-being and support, etc.

38 U.N.CRC/C/RWA/RQ/5-6 (2020). Replies of Rwanda to the list of issues in relation to its combined fifth and sixth periodic reports. [Online]. Available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhslkWNXMhf9fu6FCGs-Ju8rdp03QA9YikCYuGEB7FYsyYSub%2Bx8XZLYEuBKQ15dx%2FucVxmKB2R0%2FAJoSP-tIE2k1T%2F8hzOwxxQwY%2BpCh7s9BTDU#:~:text=Law%20N%C2%B071%2F2018,and%20give%20his%2Fher%20opinion (Accessed: 25 July 2024).

39 U.N. (2005). Concluding comments of the Committee on the Elimination of Discrimination against Women: Benin. [Online]. Available at: https://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING_COMMENTS/Benin/Benin-CO-1-3.pdf (Accessed: 25 July 2024).

Country	Legislation	Key Provisions
Tunisia	Organic Law n° 2016-61 on the prevention and fight against trafficking in persons, 2016[40]	Prevention of any exploitation that individuals, particularly women and children, might face; combat trafficking; hold those responsible accountable; and provide protection and support to the victims.
	Constitution (2014)	Article 47 of the 2014 Constitution of Tunisia guarantees: the rights to dignity, health, care, and education. The state must provide all types of protection to all children without discrimination and in their best interest.
	Code of Child Protection, Law n° 95-92 (1995)[41]	• Recognises the rights of the child to life, survival, and development; education; healthcare; protection from violence, abuse, and exploitation; and participate in decisions that affect their lives. • Imposes responsibilities on parents to provide for their children's care, education, and protection. • Establishes a system of child protection services to help children who need protection. • Implements punishments for child abuse and neglect
Botswana[42]	Deserted Wives and Children Protection Act, 1978	Protection of deserted wives and children.
	Children's Act, 2009	• Guarantees Education, Healthcare, and Protection from violence. • Prohibits all forms of human trafficking in Botswana.
	Anti-human Trafficking Act, 2014	Assistance to the victims of human trafficking, including medical care, psychological counselling, and legal aid. Reintegration of the victims of human trafficking into society.
South Africa	Children's Act (2005)	Promotes and protects children's rights and covers parental responsibilities, child protection, foster care, and adoption matters.
	Children's Amendment Act (2022)[43]	• Establishes the National Child Protection Register. • Establishes the National Child Protection Register. • Improves access to justice. • Increases protection from violence, etc.

40 ICRC ; IHL (2018). Loi organique n° 2016-61 du 3 août 2016, relative à la prévention et la lutte contre la traite des personnes. [Online]. Available at: https://ihl-databases.icrc.org/en/national-practice/organic-law-prevention-and-fight-against-trafficking-persons-2016 (Accessed: 30 July 2024).

41 ICRC ; IHL (2018). Loi n° 95-92 du 9 novembre 1995, relative à la publication du code de la protection de l'enfant. [Online]. Available at: https://ihl-databases.icrc.org/en/national-practice/code-child-protection (Accessed: 30 July 2024).

42 ACPF (2023). CHILD LAW RESOURCES in Botswana. [Online]. Available at: http://clr.africanchildforum.org/country/13 (Accessed: 30 July 2024).

43 This Act amends the Children's Act of 2005 and strengthens the protection of children's rights in a number of areas. cf. Government Gazette, REPUBLIC OF SOUTH AFRICA, Act No. 17 of 2022: Children's Amendment Act, 2022. [Online]. Available at: https://www.gov.za/sites/default/files/gcis_document/202301/47828gen1543_0.pdf (Accessed: 30 July 2024).

Country	Legislation	Key Provisions
Nigeria	Child Rights Act (2003)[44]	Establishes the rights of the child and prohibits violence against children,[45] child marriage, child labour, and child trafficking.
	Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003	Provides for the rehabilitation and reintegration of child victims.
Angola	Law for the Protection and Development of the Child (1990)	Ensures the protection, development, and welfare of children.
	National Action Plan of 2013–2020	Empowerment of women and girls, fight against poverty,[46] protection from violence, participation in decisions related to their well-being, gender equality, etc.
	Angola 2025 Roadmap	Long-term strategy to ameliorate and augment social services and holistic programmes to combat rural poverty.
Egypt	The Arab Republic of Egypt, Law No. 12 of 1996 promulgates the Child Law amended by Law No. 126 of 2008.	Protects the rights and welfare of children by ensuring: Protection from Exploitation, Education, Prohibition of Child Marriage, and improvement of the Juvenile Justice System.

Despite adopting legal protection instruments and states' efforts, child protection organisations are raising concerns about the actual situation of children in most African countries. For example, the African Child Policy Forum (ACPF)[47] has published a series of reports known as the African Report on Child Wellbeing. These reports assess African governments' commitment to children and analyse the strengths and weaknesses of implementing child-sensitive laws and policies. The report "How Friendly are African Governments towards Girls" (2008) states that while some progress has been made, there is a pressing need for more significant investment in girls' education, health, protection from violence, and active involvement in decision-making. Regarding the report "How Child-Friendly are African Governments?" (2008), the findings were more alarming, as they revealed that African governments,

44 Federal Government of Nigeria, Country Report on Violence Against Children by the Federal Ministry of Women Affairs, Abuja, submitted to: The UN Secretary General's Independent Expert on The Study on Violence Against Children, July/August 2004. [Online]. Available at: https://youthaction.ng/dosomething/document/report-on-child-abuse/ (Accessed: 30 July 2024).

45 cf. National Population Commission of Nigeria, UNICEF Nigeria, and the U.S. Centers for Disease Control and Prevention. Violence Against Children in Nigeria: Findings from a National Survey, 2014. Abuja, Nigeria: UNICEF, 2016.

46 cf. De Neubourg, C. Safojan, R. Dangeot, A. (2018). Childhood in Angola - A Multidimensional Analysis of Child Poverty. [Online]. Available at: https://www.unicef.org/esa/sites/unicef.org.esa/files/2019-01/UNICEF-Angola-2018-A-Multidimensional-Analysis-of-Child-Poverty.pdf (Accessed: 30 July 2024).

47 African Child Policy Forum (ACPF) (2020). African Report on Child Wellbeing. [Online]. Available at: https://geo.fyi/2020/11/30/child-friendliness-of-african-governments/ (Accessed: 30 July 2024).

on the whole, are failing to prioritise child welfare adequately. Emphasising a rights-based approach, equitable access to basic services, and robust protection against violence is imperative for creating a genuinely child-friendly environment across the continent. The report "Budgeting for Children" (2011) also raised the alarm about the insufficient allocation of resources for promoting child well-being. This emphasises the urgency of increased investment in education, health, and social protection, placing children at the forefront of budgetary considerations. The following report, "Towards Greater Accountability to Africa's Children" (2013), exposed a significant accountability deficit by African governments towards children. Involving children in decision-making processes and respecting their rights is vital to bridge this gap and ensure effective governance for children. In 2016, the report "Getting it Right: Bridging the Gap between Policy and Practice" highlighted the critical need to align policy intentions with practical implementation for child well-being. The report suggests that governments must effectively execute policies, diligently monitor progress, and learn from past experiences to address prevailing challenges. The 2018 report "Progress in the Child-Friendliness of African Governments" acknowledged commendable progress but urged continued investment in child wellbeing by ensuring access to basic services and protection from violence. The African Report on Child Well-Being 2020 revealed that African girls face numerous challenges, including a higher likelihood of being victims of trafficking, sexual abuse, and labour exploitation. They are also more prone to early marriage, FGM, and discrimination based on marriage and inheritance laws. Additionally, girls are more likely than boys to be economically disadvantaged, face higher risks of mental health problems, lack access to healthcare and quality education, and have higher school dropout rates. Moreover, the Girl-Friendliness Index (GFI), developed by the ACPF, is unique and indicates that while some African governments prioritise girls' rights and well-being, many fall short. Mauritius has emerged as the most girl-friendly country in Africa, followed by Tunisia, South Africa, Seychelles, Algeria, Cabo Verde, and Namibia. Conversely, South Sudan ranks at the bottom of the table, with Chad, Eritrea, the Democratic Republic of Congo, Niger, the Central African Republic, and Comoros rated as the least child-friendly countries.[48]

7. Conclusions

Africa's journey towards ensuring the protection and well-being of its children has seen significant strides and transformative achievements. With one of the world's largest and fastest-growing youth populations, the continent's commitment to safeguarding children's rights remains unwavering. Over the years, Africa has developed a comprehensive framework of universal and regional human rights instruments led by the ACRWC. Adopted in 1990, the ACRWC emerged in response to the pressing

48 Ibid.

challenges faced by African children in the 1990s, including pervasive child poverty, child labour, abuse, and the devastating impact of armed conflicts. The Charter has been instrumental in articulating and safeguarding children's rights across Africa. It enshrines fundamental principles such as the child's best interests, non-discrimination, the right to life, survival, and development, and children's right to express their views on matters affecting them.

As of 2023, all 54 African countries have ratified the ACRWC, and its transformative impact has touched the lives of millions of children on the continent. Governments, civil society organisations, and individuals have embraced the Charter as a guiding beacon, working tirelessly to improve the well-being of Africa's children. Moreover, Africa has established regional mechanisms to monitor and enforce children's rights. The ACERWC plays a vital role in overseeing the implementation of the ACRWC. It issues advisory opinions and recommendations on various child rights issues in Africa, guiding state parties in developing and implementing child rights laws and policies. Its work has been complemented by the African Child Rights Case Law Database, which enables access to judgements from domestic courts across African countries, enriching the legal landscape for child protection.

To build on the foundation laid by the ACRWC, Africa developed Agenda 2040, a long-term strategic plan to realise the rights and well-being of children across the continent. The integration of Agenda 2040 into national regulations is organised into distinct phases, each spanning five years, to assess the progress made by member states in achieving the aspirations outlined in the Agenda at the domestic level. Each member state must formulate a national implementation plan for each phase, with timelines set for completion in 2020, 2025, 2030, 2035, and 2040. The first phase of implementation, covering the years 2016–2020, has been completed, and the ACERWC has published an assessment report presenting evaluations of the progress made by various countries.

While Agenda 2040 has influenced national regulations somewhat, the degree to which its goals are reflected in domestic laws and policies varies widely across the continent. Implementation has been inconsistent, with notable disparities between regions. Some states have been slow or stagnant in prioritising children's rights, leading to an uneven realisation of the objectives of Agenda 2040. The report underscores the need for ongoing advocacy, capacity building, and resource allocation to ensure that the aspirations of Agenda 2040 are fully achieved by 2040.

One of the most pressing concerns highlighted in the Agenda 2040 report is nutrition and food security. Regions affected by drought, climate change, and food insecurity face significant challenges in providing access to nutritious food for children's survival and development. Additionally, violence against children, particularly in conflict zones such as the Democratic Republic of Congo and Sudan, remains a widespread issue that undermines efforts to protect children's rights. However, there has been progress in increasing the visibility and focus on the rights of the girl child, especially during the review period. The COVID-19 pandemic has also profoundly

impacted children's well-being, disrupting education, health, and protection systems while presenting opportunities for transformative change.

Therefore, not all member states have successfully established child-friendly legislative frameworks. Issues such as corporal punishment, child marriage, and anti-trafficking laws have not been fully addressed in many countries. The quality of education and access to early childhood education continue to be significant challenges in many regions. Despite these challenges, some countries have made notable legislative achievements, demonstrating progress towards realising the aspirations of Agenda 2040, particularly in the areas of corporal punishment, child marriage, and anti-trafficking laws. Regarding corporal punishment, Seychelles took a significant step forward when the National Assembly adopted the Children (Amendment) Act 2020 on 12 May 2020, explicitly prohibiting corporal punishment and repealing the defence of reasonable chastisement. Similarly, Benin had already declared corporal punishment unlawful in the home in 2015. The 2015 Children's Code (Loi No. 2015-08) in Benin ensures that discipline is enforced with humanity and respect for children's dignity, reflecting a broader commitment to protecting children from physical harm.

Regarding child marriage, eleven African countries – Botswana, the Democratic Republic of Congo, Egypt, Kenya, Ghana, Malawi, Mauritania, Nigeria, South Sudan, Uganda, and Zimbabwe – have established 18 years as the minimum age of marriage, with no exceptions. This legislative consistency across multiple nations marks a critical move towards safeguarding young girls from early and forced marriages. Moreover, Burundi has enacted legislation aimed at preventing and responding to gender-based violence, reinforcing the protective legal environment for women and girls. Guinea's revised draft of its Children's Code removes provisions that previously allowed minors to marry with parental consent. In Seychelles, the legal minimum age for marriage is now set at 18 for all, eliminating the former requirement for paternal consent. Similarly, Madagascar has amended its laws, raising the minimum marriage age to 18 for both genders, up from the previous thresholds of 14 for girls and 17 for boys. Regarding anti-trafficking laws, Ethiopia issued Proclamation No. 1178/2020 to prevent and suppress the trafficking of persons, demonstrating a firm stance against human trafficking. Similarly, the Congo enacted child-friendly anti-trafficking legislation in 2019, and Tunisia passed Organic Law No. 2016-61 in 2016, focusing on preventing and combatting human trafficking. Namibia joined these efforts by introducing Law 1 of 2018 to combat human trafficking. Nigeria also took significant steps by amending its Trafficking in Persons Law Enforcement and Administration Act in 2015, with Niger and Malawi following suit by adopting their respective anti-trafficking legislations.

These legislative achievements represent critical advancements in protecting the rights and well-being of children across the continent, reflecting a growing commitment to the aspirations outlined in Agenda 2040.

These examples highlight the progress made by countries in aligning their national laws with the aspirations of Agenda 2040. Nevertheless, the varying pace of

implementation across the continent suggests the need for continued efforts to ensure that all children in Africa benefit from the protections, hope, and opportunities envisioned in Agenda 2040.

Overall, the aspirations of Agenda 2040 are ambitious, with ten aspirations to be achieved by 2040 based on lessons learned from the past 25 years. By fostering a culture of accountability, enhancing resource allocation, and leveraging regional and international partnerships, Africa can make significant progress in improving the lives of its children. The successful implementation of Agenda 2040 represents a critical blueprint for the future of African children. It builds on the foundation of the ACRWC and aligns with global commitments such as the SDGs. The success of Agenda 2040 will depend on the collective efforts of all stakeholders to ensure that every child in Africa grows up in an environment that supports their rights, nurtures their potential, and prepares them to contribute to the continent's progress.

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| CHAPTER 12 |

The Practice of Children's Rights Protection in Africa

Lilla GARAYOVÁ

ABSTRACT

This chapter examines the issue of children's rights protection in Africa, focusing on the challenges hindering the effective implementation of these rights and the progress that has been made. It delves into the roles of key institutions such as the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the African Court of Human and Peoples' Rights, emphasising their efforts to promote and safeguard children's rights across the continent. This chapter also highlights the ongoing issues of poverty, armed conflict, and harmful cultural practices that disproportionately affect African children. Importantly, it further shows that these challenges have not completely deterred African nations from taking significant strides towards legal reforms and educational advancements aimed at enhancing the protection and realisation of children's rights. This chapter advocates a deeper understanding and integration of African cultural values into the discourse on children's rights.

KEYWORDS

Children's Rights, African Commission on Human and Peoples' Rights, African Children's Charter, Human Rights Protection, Child Advocacy, Legal Reform

1. Introduction

Children and adolescents enjoy a comprehensive set of fundamental human rights on par with those of adults and specific rights that acknowledge their distinct needs. That is, these young individuals are not the possessions of their parents, but rather autonomous human beings vested with their own rights and have equal status as members of the global human family. Still, children must rely on adults for the nurturing and guidance required to progress towards independence, the ideal source of such nurturing being the family environment. Then, in instances where primary caregivers are unable to meet their children's needs, it becomes the responsibility of the state, as the primary duty bearer, to secure alternative arrangements that serve the best interests of the child.

Lilla GARAYOVÁ (2024) 'The Practice of Children's Rights Protection in Africa'. In: Anikó RAISZ (ed.) Children's Rights in Regional Human Rights Systems. pp. 267–290. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.ar.crirhrs_12

Virtually every facet of government policy, ranging from education to public health, exerts an impact on children, albeit to varying extents. Nearsighted policy-making that neglects the interests of children detrimentally affects the collective future of society. Specifically, the transformation of family structures, the forces of globalisation, climate change, digitalisation, mass migration, evolving employment patterns, and diminishing social welfare support in numerous nations all exert profound effects on children. These effects can be particularly devastating in circumstances characterised by armed conflict and other emergencies. Given the ongoing development processes to which children are exposed, they exhibit heightened vulnerability – surpassing that of adults – to adverse living conditions such as poverty, substandard healthcare, human trafficking, commercial sexual exploitation, child labour, harmful traditional practices (e.g. female genital mutilation), child marriage, malnutrition, access to safe water, adequate housing, and environmental pollution. Human rights protection ensures that children have access to their rights of survival, development, growth, and participation, and yet the consequences of disease, undernourishment, and poverty imperil not only the future of children but also the future of the societies within which they reside. These are all vulnerable situations that children encounter and that are omnipresent, albeit they vary in their specifics by region.

When focusing on children's rights in Africa, it is essential to recognise the multifaceted challenges they face and the various forms of abuse to which they are exposed, such as economic and sexual exploitation, gender-based discrimination in education and healthcare access, and involvement in armed conflicts. Other significant factors affecting African children include migration, early marriage, disparities between urban and rural environments, child-headed households, street children, and the pervasive issue of poverty. Of particular concern is the high prevalence of child labour in sub-Saharan Africa. The challenges specific to Africa require tailored practices, which is why we see it as crucial to explore the practice of children's rights protection in Africa within this book.

The African continent currently grapples with the highest rates of adolescent pregnancy globally. For example, the adolescent pregnancy rate is close to 200 per 1,000 adolescent girls in Mali, Mozambique, the Central African Republic, Equatorial Guinea, and South Sudan, whereas the global average is 40 per 1,000 girls.[1] The pandemic has further contributed to a surge in teenage pregnancy rates in several countries. Throughout Africa, tens of thousands of students are excluded from educational institutions owing to pregnancy or parenthood, and many African countries do not feature established policies to facilitate the re-entry of young mothers into schools or address the challenges of adolescent pregnancy within the educational system.

Another issue in Africa is the exclusion of children from education. Millions of children face financial, social, and discriminatory impediments, which are

1 United Nations Population Fund: World Population Dashboard [Online]. Available at: https://www.unfpa.org/data/world-population-dashboard (Accessed: 1 October 2023).

formidable obstacles that significantly increase the likelihood of their exclusion from high-quality education. This exclusion disproportionately affects certain groups, particularly girls, children with disabilities, those from low-income households, and those residing in regions affected by armed conflict. Sub-Saharan Africa has the highest rates of children out of school globally, along with the highest levels of exclusion. Approximately 31.2% of children in sub-Saharan Africa find themselves outside the educational system, and of the 59 million out-of-school children of primary school age worldwide, 32 million live in Sub-Saharan Africa.[2] The closure of schools due to the pandemic, coupled with the limited availability of offline and online learning resources, has further exacerbated the preexisting disparities in access to education.

In areas of military conflict, children are even more vulnerable to educational exclusion. This is because military groups often use schools as military facilities, and related soldiers damage schools and classrooms and confiscate educational resources. In fact, the repercussions of armed conflict on education have led to pressing humanitarian, developmental, and broader societal dilemmas. In Africa, many educational institutions, ranging from schools to universities, have suffered from bombings, shelling, and arson, while children, students, teachers, and academics have endured fatalities, injuries, abductions, and arbitrary detention. Furthermore, in the course of armed conflicts, educational facilities have sometimes been repurposed by various parties as bases, barracks, or detention centres, placing students and educational personnel in harm's way. This, in turn, often results in the deprivation of the right to education for numerous children and students, depriving communities of the foundational elements necessary for their future. In numerous countries, armed conflicts shatter not only the physical school infrastructure but also the aspirations and dreams of an entire generation of children. In Nigeria, schools and students have become targets of high-profile attacks and abductions by various armed groups, including insurgency organisations like Boko Haram.[3] Accordingly, the African Union should persist in its appeal to member states, urging them to guarantee the safety of children from attacks targeting education and curtail the utilisation of schools for military purposes. Furthermore, every nation within the African Union should officially support the Safe Schools Declaration, an intergovernmental commitment aimed at enhancing the prevention of and response to attacks on students, educators, educational institutions, and universities during times of conflict. Although 30 African countries have endorsed the Declaration, there are ongoing attacks on children, teachers, and educational institutions in Ethiopia, Nigeria, Burkina Faso, and the Democratic Republic of Congo. As aforementioned, these attacks on education encompass violence targeting

2 UNESCO Institute for Statistics: Fact Sheet no. 56, UIS/2019/ED/FS/56, New Methodology Shows that 258 Million Children, Adolescents and Youth Are Out of School [Online]. Available at: https://uis.unesco.org/sites/default/files/documents/new-methodology-shows-258-million-children adolescents-and-youth-are-out-school.pdf (Accessed: 1 October 2023).

3 Ewang, 2021, More Schoolchildren Abducted in Nigeria, Human Rights Watch [Online]. Available at: https://www.hrw.org/news/2021/02/17/more-schoolchildren-abducted-nigeria. (Accessed: 1 October 2023).

educational facilities, students, and educators, with the resulting damage and threats having profound consequences for individuals and society. Apart from military conflicts, there are additional reasons why children are excluded from education, such as the absence of legal frameworks and policy and resource inadequacies. Examples of these other obstacles to primary and secondary education in Africa include instances of sexual and gender-based violence within educational settings in Senegal; the privatisation of education in Uganda; forced military training of secondary school students in Eritrea; child marriage in Malawi, South Sudan, Tanzania, and Zimbabwe; the discrimination against children with disabilities in South Africa, Mozambique, and Tanzania. Despite these barriers, it remains that the African Union should guarantee access to education for all African children while safeguarding them from any form of violence, exploitation, and discrimination.

Recent assessments conducted by the International Labour Organization and the United Nations International Children's Emergency Fund (also known as UNICEF) reveal that the number of children engaged in child labour has escalated over the past six years in sub-Saharan Africa. More specifically, factors such as population growth, recurring crises, severe poverty, and insufficient social protection measures have collectively resulted in an additional 16.6 million children being engaged in child labour.[4] This alarming surge marks an initial upturn in global child labour rates over the past two decades. The International Labour Organization has issued a cautionary statement regarding the global scenario, and projected that by the end of 2023, an additional nine million children would face the danger of being forced into child labour owing to the repercussions of the COVID-19 pandemic. Moreover, according to a simulation model, this estimation could surge to 46 million if these children did not have access to essential social protection.[5] The compounding economic shocks and protracted school closures resulting from the impact of COVID-19 also imply that children who were already engaged in child labour before the pandemic may find themselves working longer hours or experiencing deteriorating working conditions after the pandemic. Simultaneously, a growing number of children may be coerced into dire forms of child labour as a direct result of the job and income losses experienced by vulnerable families. In nations such as Uganda and Ghana, where financial aid programs for families during the pandemic have proven inadequate, numerous children have been forced to engage in exploitative and dangerous child labour to assist their families. Therefore, there is an immediate need to realign the efforts aimed at eradicating child labour with established global commitments and objectives.

Notwithstanding the professed commitment of African governments to safeguard and advance the rights and well-being of children within their respective domains,

4 International Labour Office and United Nations Children's Fund, Child Labour: Global estimates 2020, trends and the road forward, International Labour Organization and the United Nations International Children's Emergency Fund, New York, 2021. License: CC BY 4.0.
5 Ibid.

a significant proportion of children in Africa still find themselves marginalised in their pursuit of fundamental human rights and access to essential services (e.g. proper nutrition, suitable housing, quality education, and healthcare). One of the reasons for this dire circumstance is the lack of knowledge among key stakeholders regarding pertinent standards related to children's rights and the requisite processes and mechanisms for their enforcement. This informational void results in the ineffective execution of existing legal and policy frameworks at the domestic level, thereby engendering severe consequences for the quality of life of a substantial number of children on the African continent. More than 30 years have passed since the United Nations (UN) Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (hereinafter Children's Charter), and significant progress has been made towards adherence to these. For instance, numerous governments have done the following: enacted legal reforms, taken proactive measures to safeguard children against discrimination; various policy and governmental decisions have been made considering by the best interests of the children (e.g. focusing on their survival, development, and active participation in society); the number of children receiving full immunisation has increased, leading to a significant reduction in infant mortality rates across several countries. Despite these advancements, the situation persists, regrettably so, that not every child has the opportunity to experience a wholesome childhood; instead, millions remain exposed to and still endure violations of their rights as they are deprived of adequate healthcare, nutrition, education, and protection from violence. Childhoods are still being cut short when children are excluded from education, forced to engage in dangerous adult labour, marry prematurely, become involved in armed conflict, or find themselves incarcerated in adult prisons.

Importantly, there are three main institutions in Africa tasked with overseeing member states' adherence to human rights agreements, namely the African Commission on Human and Peoples' Rights (hereinafter just the Commission), the African Committee of Experts on the Rights and Welfare of the Child (hereinafter just the Committee), and the African Court of Human and Peoples' Rights (hereinafter just African Court). The effectiveness of any human rights system, be it operative at the domestic, regional, or international level, hinges on the robust development of three key components, namely the normative, institutional, and jurisprudential frameworks. The previous chapter was devoted to the normative framework, which constitutes the foundation for the shaping of the laws and regulations that guide the practical application of human rights principles. This chapter continues on with the exploration of the aforementioned three key components by addressing the practice of protecting children's rights, encompassing the institutional and jurisprudential elements – that is, the institutional framework. This framework revolves around the expertise and capabilities of the human resources tasked with translating theoretical principles into real-world solutions. The jurisprudential framework evolves naturally from the institutional one, as the institutional structure interacts with the normative provisions contained within human rights instruments. Over time, this

jurisprudential framework develops organically, contributing to a body of legal decisions and precedents.

2. The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights is a quasi-judicial entity responsible for advancing and safeguarding human rights across Africa. Its mandate includes the interpretation of the African Charter on Human and Peoples' Rights (hereinafter the Banjul Charter) and the examination of individual complaints related to Charter violations. The Commission's functions encompass the investigation of human rights abuses, formulation and endorsement of action plans to promote human rights, and establishment of effective channels of communication with member states to gather firsthand information on human rights violations.

The African Union, originally established under the name Organisation of African Unity (also known as OAU, which then legally became the African Union in 2001), was conceived and established in 1963 in Addis Ababa, Ethiopia, with 32 signatory governments.[6] This occurred during a time when state sovereignty held paramount importance and the heads of states were particularly focused on safeguarding the hard-won independence of their nations. Accordingly, the Organisation of African Unity Charter made only passing references to human rights. Then, 18 years later, and in response to widely condemned violations of fundamental liberties in various member states of the Organisation, its governing body endorsed the Banjul Chater.[7] Then, in late 1987, the African Commission on Human and Peoples' Rights, established by the Banjul Charter, commenced its operations. The Banjul Charter draws considerable influence from prior international human rights documents, particularly the Universal Declaration of Human Rights[8] and two International Covenants, namely the Covenant on Civil and Political Rights[9] and the Covenant on Economic, Social, and Cultural Rights.[10] However, the drafters of the Banjul Charter, led by distinguished Senegalese

6 Organisation of African Unity, Charter of the Organization of African Unity, 25 May 1963 [Online]. Available at: https://www.refworld.org/docid/3ae6b36024.html (Accessed: 1 October 2023).

7 Organisation of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [Online]. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

8 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) [Online]. Available at: https://www.refworld.org/docid/3ae6b3712c.html (Accessed: 30 October 2023).

9 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 [Online]. Available at: https://www.refworld.org/docid/3ae6b3aa0.html (Accessed: 30 October 2023).

10 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 [Online]. Available at: https://www.refworld.org/docid/3ae6b36c0.html (Accessed: 30 October 2023).

jurist Keba Mbaye, aimed to imbue the document with a distinct African character.[11] Thus, while the Charter's 29 articles detailing the rights and freedoms largely pertain to individuals, a significant number involve people's collective rights. The Banjul Charter commences with the assertion of non-discrimination, explicitly prohibiting differentiation based on factors such as 'race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.[12] It proceeds to enumerate a range of civil and political rights, and subsequently addresses economic, social, and cultural rights. The Charter also breaks new ground by including the rights of people (from Arts. 19 to 24) and outlining duties (from Arts. 25 to 29) applicable to both state parties and individuals.

A problem of the Banjul Chater is that the mechanisms for safeguarding human rights at the domestic level in most African states and regionally under the Charter are considerably less robust than those found in European nations. This makes the existence of the aforementioned Commission in Africa a surprising phenomenon, and gives way for the expectation of it facing substantial constraints to its efficacy. Indeed, given the unique circumstances in Africa, including the enduring impact of colonialism, inadequately established and often unstable governmental institutions, limited state capacities, and precarious economic conditions, the Commission began its operations with several inherent challenges. The Commission's capacities are also restricted by its original mandate, which was primarily focused on promoting rather than protecting human rights. Consequently, the Commission primarily formulates recommendations that are then forwarded through the relevant institutional hierarchy to the Assembly of Heads of State and Government of the African Union (hereinafter just Assembly of Heads of States and Government), which then takes appropriate actions. This entails that despite its status as a regional government institution, the Commission still needs more factual authority and enforcement powers.

The initial members of the Commission were elected during the 23rd Assembly of Heads of State and Government of the Organisation of African Unity, which took place in June 1987. The Commission was formally inaugurated on 2 November of the same year, and subsequently operated for two years by the Organisation of African Unity's Secretariat in Addis Ababa, Ethiopia. The Secretariat was eventually relocated to Banjul, Gambia, in November 1989, and has convened biannually (typically in March, April, October, and November) ever since. One of these meetings generally takes place in Banjul, while the other can occur in any African state, with each session typically spanning eight to ten days. Importantly, there is a legitimate concern regarding whether this period is adequate for a thorough consideration of the matters brought before the Commission. Additionally, the Charter lacks provisions

11 Kannyo, The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background. In: Human Rights and Development in Africa, Albany: State University of New York Press, 1984, p. 128.

12 African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [Online]. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

for the Commission to adopt emergency procedures, such as the ability to convene the meeting on a shorter notice in case of urgent situations.

The Commission features 11 members elected through secret balloting at the Assembly of Heads of State and Government. Based on Art. 31 of the Charter, these members, each serving six-year terms that can be renewed, are selected from among individuals of the highest reputation in Africa for their exceptional moral character, integrity, impartiality, and competence in human and people's rights matters, with a particular emphasis on individuals with legal expertise.[13] The Charter establishes a level of impartiality regarding the provisions concerning the election of Commission members and their security of tenure, with the sole method for the removal of a Commission member being outlined in Art. 39 (2). Specifically, it can only occur if, in the unanimous judgment of the Commission, the member in question has ceased to fulfil one's duties for any reason other than temporary absence. According to Art. 31 of the Charter, members are expected to act independently in carrying out their responsibilities and serve in a personal capacity (i.e. without representing their respective home states).[14] However, it is stipulated that each member state can have up to one of its nationals on the Commission. The members elect a chairperson and a vice chairperson from within their ranks, each of whom serves a renewable two-year term. Additionally, Art. 43 ensures that the Commission operates with the required autonomy and is free from external interference, granting Commission members diplomatic privileges and serving as a safeguard to protect Commission members from the potential actions of state parties that may obstruct the execution of their duties. Considering these measures, the Commission can be regarded as an independent entity capable of impartially conducting its functions without constraints.

Nonetheless, certain deficiencies exist in the provisions related to the Commission that could significantly undermine its independence. The first provision is Art. 33, which stipulates the appointment of Commission members by the parties to the Charter. An inherent concern is that the prevailing attitudes and recurring infringements regarding human rights in Africa may result in the selection of members who share a similar perspective on human rights with the nominating state party. Thus, it would have been beneficial to allocate certain seats on the Commission to entities such as bar associations, national human rights organisations, and other non-governmental groups. This approach bolstered the impartiality of the commission.

13 'The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience'. Art. 31, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 1982. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

14 'The members of the Commission shall serve in their personal capacity'. Art. 31, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [Online]. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

The second provision that diminishes the authority of the Commission is Art. 50, which permits the Commission to address human rights violations solely after all domestic remedies have been pursued. One of its major issues is that it overlooks the practical impossibility of exhausting local remedies in many non-democratic African nations. It is also the situation that both the Commission and Charter have yet to provide a legal definition of what qualifies as the exhaustion of local remedies within the scope of the Charter. As a result, the interpretation of this requirement may need to rely on domestic laws or the perspectives of the courts in states that are party to the Charter. Given the uncertainty surrounding this provision, the drafters of the Charter could have considered the provisions of the Inter-American Human Rights Convention, which include an escape clause under Art. 46. This clause allows individuals to petition the American Commission if they can demonstrate that domestic remedies, as prescribed by local laws, are nonexistent.[15]

Another issue that poses a threat, now a structural one, to the independence of the Commission is the confidential nature of its proceedings. Art. 59 of the Charter specifies that 'All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide'.[16] In addition, the Rules of Procedure of the Commission, especially regarding closed-door sessions, are overly restrictive, which in practices reflects on the Commission tending not to disclose the names of the states that are the subjects of complaints. Consequently, the Commission is deprived of a potent tool that could tarnish a state's reputation, subject it to significant international pressure, and prompt a shift in its stance on human rights. Therefore, as mentioned above, the Commission needs more authority to conduct independent investigations into alleged human rights violations, as its powers are currently restricted to bringing instances of human rights abuse to the attention of the Assembly. After this process, it is then the Assembly of Heads of State and Government that may request the Commission to compile a report containing its findings and recommendations. Furthermore, the Commission lacks enforcement power, and all decisions based on its recommendations are implemented by state parties.

Regarding other aspects of the activities of the Commission, it employs various specialised mechanisms, including special rapporteurs, working groups, and committees, to examine and provide reports on specific human rights concerns. These concerns encompass topics such as freedom of expression, women's rights, the rights of indigenous populations, and the prevention of torture. Each of the aforementioned mechanisms compiles and delivers a report on its undertakings to the Commission during the Commission's regular sessions.

15 Brownlie, 1981, p. 505.

16 Art. 59, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [Online]. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

Therefore, the Commission is officially tasked with the following three primary functions (and may be assigned any other responsibilities by the Assembly of Heads of State and Government): the promotion of human and people's rights, the protection of human and people's rights, and the interpretation of the Banjul Charter. The Commission's mandate is outlined in Art. 45 of the Charter, as follows:

> The functions of the Commission shall be: 1. To promote Human and Peoples' Rights and in particular: (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments. (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations. (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights. 2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter. 3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU. 4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.[17]

Another facet of the Commission's limited authority is its inability to declare that the domestic laws of state parties are incompatible with the fundamental human rights outlined in the Charter. If the Commission possessed the authority to scrutinise the legitimacy of legislation or decrees enacted by the governments of state parties and then potentially label objectionable legislation as incongruent with the principles and provisions of the Charter, it would significantly enhance its capability to protect, or at least serve as a more assertive advocate for, human rights.

What can be concluded from the above analysis is that the wording of the Charter is very limiting and does not allow the Commission to effectively fulfil its purposes. The rigorous language used in the Banjul Charter is then even further softened by the Commission's Rules of Procedure and actual practice. Specifically, the Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on 13 February 1988, delineates the operational structure of the Commission in accordance with the Charter. Importantly, following their election during the July 1987 Organisation of African Unity Assembly meeting, the 11 initial Commissioners promptly embarked on the task of refining their roles, which led to notable modifications.

17 Art. 45, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [Online]. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

These concerned particularly the confidentiality of proceedings and reports, the recognition of the roles of non-governmental organisations and legal experts, and the emphasis placed on the consideration of petitions.

Regarding the Commission's human rights monitoring procedures, they are the state-reporting procedure, the inter-state complaints procedure, and the individual complaints procedure. First, regarding the state-reporting procedure, state parties are obligated to provide a report to the Commission every two years outlining their progress in adhering to the Banjul Charter. Non-governmental organisations can also submit their own reports (shadow reports) and obtain an observer status with the Commission.

Second, regarding the interstate complaints procedure, it allows for disputes to be resolved in two ways; in the first option, if a state believes that another state has violated the provisions of the Charter, it can inform the other party through written communication. This communication is also forwarded to the Secretary-General of the African Union and the Chairman of the Commission. The accused state then has the opportunity to provide a written explanation for the inquiring state, and if no resolution is achieved within three months of the initial complaint, both parties have the right to refer the matter to the Commission. The second option allows a state to directly lodge a complaint with the Commission regarding an alleged Charter violation, and if an amicable solution cannot be reached, the state prepares a report detailing the facts, findings, conclusions, and recommendations. This report is then sent to the concerned states and the Assembly of Heads of State and Government. Importantly, this procedure has been seldomly utilised.

Third, regarding the individual complaints procedure, states, individuals, or organisations acting on behalf of an individual may submit a complaint to the Commission, specifically the Commission's Secretariat, which registers them on receipt. Subsequently, the complaint is forwarded to the Commission for examination, which must then decide by a simple majority (at least six members) whether to consider the complaint. This decision hinges on whether the complaint alleges a prima facie violation of the Charter, and whether it conforms to the provisions of Art. 56.[18] If the Commission elects to consider the complaint, it must assess its admissibility. Thereafter, to warrant further consideration, communication must be part of a systematic pattern of gross human rights violations. If the Commission chooses to proceed with the case,

18 'Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they: I. Indicate their authors, even if the latter request anonymity, II. Are compatible with the Charter of the Organisation of African Unity or with the present Charter, III. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity, IV. Are not based exclusively on news discriminated through the mass media, V. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, VI. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, VII. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter'.

the Assembly of Heads of State and Government is notified. They may then request the Commission to conduct an in-depth study and present a factual report accompanied by its findings and conclusions. The ultimate decision of the Commission, referred to as a recommendation, is not legally binding to the state parties. The entire procedure is kept confidential and the final decision is made public by the Commission only if it gains the approval of the Assembly of Heads of State and Government. Decisions based on individual complaints available to the public are appended to the Commission's Annual Activity Reports.

Therefore, despite the formal language used in the Charter, the Programme of Action, and the Guidelines for National Periodic Reports, the current status of the Commission is less than satisfactory, and several factors contribute to the Commission's weaknesses. First, most states have not taken seriously the requirement to submit comprehensive reports. While the reporting obligation may seem straightforward, governments appear hesitant to invest the effort required to meet the Commission's mandates. For instance, it took several years after the entry into force of the Banjul Charter in 1986 for the first reports compliant with Art. 62 of the Charter to be presented and reviewed. These initial reports, originating from Rwanda, Tunisia, and Libya, were assessed during the ninth ordinary session held in Lagos in April 1991. The outcomes proved disappointing to both the commissioners and external observers, as the reports were notably brief, merely alluding to laws, constitutional provisions, or similar elements, and did not provide specific texts. The inadequate advance access to the reports, the lack of translations, and the mere 90 minutes allocated for each review further hindered the process. Furthermore because the Commission intended to use these initial reports to establish a detailed baseline for subsequent examinations, the countries' reports lacking substantial information undermined the potential effectiveness of the Commission.

Second, as stated in a 1989 workshop organised by the African Association of International Law and several Nordic human rights institutions, the Commission has 'suffered from insufficient equipment, resources, and support to make it fully operational'.[19]In particular, the financial challenges faced by the parent organisation, the Organisation of African Unity, also affected the Commission, and only special assistance from the European Community and the UN Voluntary Fund for Advisory Services enabled the Commission's Secretariat to function. As mentioned above, its headquarters were established in Banjul, where the Gambian government allocated three out of the four floors in a building for its use.

Third, the most significant challenge faced by the Commission is one that lies beyond its control. It is the situation that human rights non-governmental organisations have not yet taken root in many parts of Africa. This fledgling state of affairs becomes evident in a recently-compiled directory by Human Rights Internet,[20]

19 Benedek, 1990, p. 250.

20 Wiseberg and Reiner, 1990, Africa: Human Rights Directory and Bibliography-Special Issue of Human Rights Reporter Vol. 12, No. 4. African Studies Review. 33, p. 185.

wherein no openly active human rights or social justice organisations could be identified across 20 member states, and there were just one or two of such institutions with somewhat tangential objectives in another dozen of the member states. The exception is South Africa, which accounts for over one-third of the organisations described in the directory and boasts a wealth of human rights groups. The consequence of the scarcity of non-governmental organisations is that the Commission lacks independent Africa-based sources of information regarding human rights abuses and advocacy groups to support its endeavours.

Importantly, the Charter and the Commission were based on the European model of human rights protection. This model, in which the Commission originally had only limited competencies and was complemented by a court, was reflective of the European context, in which democracy and human rights evolved in tandem with a deep respect for individualism. However, it is debatable whether this framework, which was also significantly reformed in Europe following Protocol 11 – which in turn resulted in a merger of the commission and the court in Europe into a single, more potent judicial body – is still suitable for Africa. The European shift towards a more consolidated and empowered model underlines a critical evolution in human rights governance that suggests a need for similar advancements in African human rights mechanisms. Given this evolution, one must consider whether adhering to the original model is advantageous or whether moving towards a "post-Protocol 11" system could foster a more robust mechanism for the protection of children's rights in Africa. In general, what appears is that it is not possible to apply the European human rights protection model to other regions without due contextual changes. This is because, as described earlier in this paragraph, democracy and human rights in Europe evolved in tandem with a deep respect for individualism, with non-governmental organisations acting as advocacy groups to safeguard the interests of their members, firmly establishing themselves, and serving as a counterbalance to governmental authority. Meanwhile, the communal nature of African society significantly influences the landscape of regional political activities.

In April 1991, the Commission had already granted observer status to 37 human rights non-governmental organisations, including well-known organisations (e.g. Amnesty International, the International Commission of Jurists, and Human Rights Watch) and lesser-known ones (e.g. Senegalaise d'Etudes et de Recherches Juridiques). At the time of writing this chapter, 570 non-governmental organisations had been granted observer status.[21] However, the Commission's ability to access independent information and exert political pressure will remain fundamentally constrained until a significant number of human rights organisations are established in Sub-Saharan Africa. While the well-known non-governmental organisations mentioned above have made commendable efforts to document human rights abuses, they cannot fully address the fundamental reality, which is that the effective protection of

21 The African Commission on Human and Peoples' Rights Website, Non-governmental organisations [Online]. Available at: https://achpr.au.int/en/network/ngos (Accessed: 30 October 2023).

human rights must be first firmly rooted in African societies. Only locally based non-governmental organisations can establish vital connections between the population, their governments, the Commission, and other relevant entities.

The Commission may create subsidiary mechanisms such as special rapporteurs, committees, and working groups. The creation and membership of such subsidiary mechanisms may be determined by consensus, but if this fails, the decision shall be taken by voting. At the time of writing this chapter, there was no special rapporteur, committee, or working group for children, configuring a shortcoming of the Commission. The Commission has been aware that the lack of special mechanisms protecting children is an issue, and while some special procedures partially cover children (e.g. the Special Mechanism on the Rights of Women in Africa), they do not provide comprehensive protection. In 2009, at the 45th Ordinary Session of the Commission held in Banjul, a resolution was adopted to cover this void by enhancing cooperation between the Commission and the Committee,[22] the latter to which cases of violations of children's rights are typically reported. Indeed, the Committee (explored in the following subchapter) is authorised to receive complaints regarding breaches of the Children's Charter. The case *Doebbler vs. Sudan*[23] pertains to violations of the rights of a group of students in Sudan, and has been adjudicated by the Commission. However, there is no available information regarding the ages of the students involved. On 13 June 1999, a group of female students associated with the Nubia Association at Ahlia University organised a picnic along the banks of the river in Buri, Khartoum. They were subsequently sentenced to receive 25–40 lashes for public order offences, contravening Art. 152 of the Criminal Law of 1991. The punishment was imposed because their attire was not considered proper and their engagement in activities deemed immoral, including dancing and interacting with boys. A complaint was filed with the Commission, asserting that this penalty constituted a violation of Art. 5 of the Banjul Charter, which prohibits inhuman or degrading treatment. The Commission found the communication admissible and requested the government of Sudan to do the following: promptly revise the Criminal Law of 1991 to align with its obligations under the Banjul Charter and other pertinent international human rights agreements; eliminate the practice of corporal punishment (lashes); implement suitable measures to ensure victims' compensation.

This decision was made during the 33rd Ordinary Session of the Commission in Niamey, Niger, from 15 to 29 May 2003. Despite this decisive ruling, the effectiveness of its implementation remains a topic of concern. Available reports and follow-ups indicate sporadic compliance, with significant delays in legislative reforms and persistent reports of corporal punishment practices continuing in various regions. The absence of a systematic monitoring mechanism and inadequate enforcement

22 Resolution on Cooperation between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa - ACHPR/Res.144(XXXXV)09.

23 Sudan: Communication 236/2000 - Curtis Francis Doebbler vs. Sudan.

capabilities within the country often undermine the full realisation of the Commission's directives.

3. The African Committee of Experts on the Rights and Welfare of the Child

The Children's Charter was adopted by the Organisation of African Unity in 1990. Similar to the CRC, the Children's Charter serves as a comprehensive instrument outlining the rights of children and establishing universal principles and norms for their wellbeing. These two treaties represent the sole international and regional human rights agreements that cover the entire spectrum of civil, political, economic, social, and cultural rights for children. Both treaties encompass numerous similar provisions and share common overarching principles such as non-discrimination, participation, upholding the best interests of the child, and ensuring their survival and development. In the Children's Charter, African states advocated for several additional issues to be addressed, including the following: children facing the challenges of apartheid; harmful practices targeting girls, such as female genital mutilation; dealing with internal conflicts and the displacement of children; providing a clear definition of a child; safeguarding the rights of children with imprisoned mothers; rectifying poor and unsanitary living conditions; acknowledging the African perspective on the responsibilities and duties of communities; fortifying enforcement and monitoring mechanisms for children's rights; delineating the family's role in adoption and fostering; elucidating the obligations and responsibilities of the child towards the family and community.

The Children's Charter acknowledges the unique status of children in African society, underscoring their need for protection and special care, as well as recognises that children are entitled to exercise various freedoms, including the freedom of expression, association, peaceful assembly, thought, religion, and conscience. The Charter's objectives encompass safeguarding a child's private life and protection against all forms of economic exploitation, harmful labour, interference with education, and actions that jeopardise the child's well-being, whether physical, social, mental, spiritual, or moral. It also emphasises the prevention of abuse, maltreatment, detrimental social and cultural customs, exploitation, sexual abuse (including commercial sexual exploitation), and illicit drug use. Additionally, it aims to prevent child trafficking, sale, abduction, and begging.

The Children's Charter was born out of African nations' belief that the CRC did not adequately address critical sociocultural and economic aspects specific to Africa, and in so doing, it underscores the importance of incorporating African cultural values and experiences into the discourse on children's rights. Specifically, the Charter deals with issues specific to Africa through the actions described in the following list: challenging traditional African beliefs that may clash with children's rights, such

as child marriage, parental rights and responsibilities, and the status of children born out of wedlock; prohibiting the exploitation of children as beggars; promoting affirmative actions to enhance girls' access to education; ensuring that girls have the right to return to school after pregnancy; safeguarding expectant mothers and mothers of infants and young children who are incarcerated; explicitly stating that the Children's Charter takes precedence over any custom, tradition, cultural practice, or religious belief that contradicts the rights, duties, and obligations outlined in the Charter; offering a clearer definition of a child as an individual under 18 years old; outright prohibiting the recruitment of children (those under 18 years old) for armed conflicts and addressing child conscription into armed forces; prohibiting child marriage; protecting internally displaced and refugee children; emphasising the role of extended families in the care of the child; ensuring the protection of children with disabilities.

The key principles guiding the implementation of these rights in the Children's Charter are those of non-discrimination, the best interests of the child, the right to life, survival, and development, and child participation. Of the 55 member states of the African Union, 50 have ratified the Children's Charter, with the Democratic Republic of Congo having become the 50th state to ratify the Charter in December 2020. This is important because, as aforementioned, the Children's Charter contextualises children's rights, both legally and culturally, to Africa. Accordingly, to truly have an impact and positively transform the lives of children in Africa, it is imperative that individuals and governments collectively acknowledge and embrace children's rights as legally binding principles with corresponding obligations. Regardless of them turning legally binding or not, it remains that the Children's Charter is a vital source of inspiration for African member states, representing a collective commitment to the rights and well-being of African children while providing a legal framework for their safeguarding.

The Children's Charter calls for the establishment of an African Committee of Experts on the Rights and Welfare of the Child. The Committee is tasked with promoting and safeguarding the rights delineated in the Charter, actively applying these rights, and interpreting the provisions as required by state parties, African Union institutions, or any other organisation recognised by the African Union or a member state. The Committee was established in July 2001, approximately one year and a half after the Children's Charter became effective, but commenced its operations only in 2003. This Committee derives its authority from Arts. 32 and 46 of the Children's Charter,[24] and comprises 11 members elected by the Assembly of Heads of State and Government, who in turn serve in their individual capacities. The selection process involves a secret ballot, with the candidates being nominated by state parties to the

24 Organisation of African Unity, African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49, (1990), 11 July 1990 [Online]. Available at: https://www.refworld.org/docid/3ae6b38c18.html (Accessed: 31 October 2023).

Charter.[25] In the past, members were usually elected by the Executive Council and appointed by the Assembly of Heads of State and Government. However, in February 2020, the Assembly of Heads of State and Government decided to delegate this authority to the Executive Council. Candidates are required to possess high moral standing, impartiality, and competence in matters concerning children's rights and welfare.

Importantly, according to the Charter, the terms of office are for five years, and Art 37 of the Children's Charter initially prohibited members from being reelected. However, in January 2015, the Assembly of Heads of State and Government adopted an amendment to Art. 37(1) that allows members to be re-elected once for a five-year term.[26] This reelection amendment raises several important considerations. On the one hand, allowing reelection could benefit the continuity and stability of the Committee's work, providing experienced members with the opportunity to continue contributing to the evolving jurisprudence and advocacy for children's rights. Experienced members are likely to gain deeper understanding of the complexities involved in enforcing and promoting children's rights across the diverse African jurisdictions. On the other hand, the possibility of reelection could pose risks to the impartiality and dynamism of the Committee. Long tenures may lead to stagnation or bias, and may affect the Committee's ability to adapt to new challenges or innovate in response to evolving rights issues. Furthermore, the political dynamics involved in the reelection process could influence members' decisions, affecting their impartiality and commitment to upholding the highest standards of child rights protection. The Committee convenes two regular sessions annually, each lasting no more than a fortnight, with the inaugural session having been conducted in July 2001. In addition, the chairperson has the authority to call extraordinary sessions in response to a request from the Committee or any state party to the Charter.

In general, the Committee is entrusted with safeguarding human rights across Africa and interpreting the provisions of the Children's Charter. Until December 2020, its headquarters was located in Addis Ababa, Ethiopia, but it was relocated to Lesotho following an agreement with the African Union. The Committee's activities encompass the following: gathering information, issuing general comments, and offering guidance and interpretation pertaining to the Children's Charter; monitoring the Charter's implementation; reviewing reports submitted by states and civil society organisations concerning the Charter's implementation by state parties; issues recommendations, known as "concluding observations", based on the review of these reports; provides recommendations to governments in collaboration with children's rights organisations; investigates the measures taken by states to execute the Charter through missions, data collection, and state interrogations (as defined in Art. 45 of the charter); handles communications, such as complaints alleging violations of the

25 Art. 34, African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990), 11 July 1990 [Online]. Available at: https://www.refworld.org/docid/3ae6b38c18.html (Accessed: 31 October 2023).
26 Assembly/AU/Dec.548(XXIV).

Children's Charter by state parties; conducts fact-finding and promotional missions to address systematic child rights violations in state parties; establishes standards and guidelines to assist state parties in fulfilling their obligations. The Committee is also tasked with selecting the theme for the annual Day of the African Child, occurring every 16 of June, to commemorate those who perished in the Soweto uprisings in South Africa. While the Committee lacks the authority to bring cases before the Court, it is empowered to seek advice from the Court on legal matters pertaining to human rights instruments. The Committee is the only treaty body addressing child rights issues that features a unique complaints procedure, which allows even non-party states to the Children's Charter to submit communications to the Committee on behalf of a child from a state that has ratified the Children's Charter. However, this is contingent on the complaint's ability to demonstrate that it is in the child's best interest.

The African Committee's mandate is more specifically defined than that of the UN's Committee on the Rights of the Child. Art. 42 of the Children's Charter emphasises the Committee's role in promoting and protecting these rights, with its responsibilities being characterised by various actions, as described herein: the collection and documentation of information; the initiation of interdisciplinary assessments of children's rights issues in Africa; the organisation of meetings; the support of national and local institutions dedicated to child rights and well-being; the provision of opinions and recommendations to governments as needed. Many of these powers are not granted to CRC, implying that the African Children's Charter established a progressive, action-oriented enforcement mechanism. The Committee is also tasked with overseeing the Charter's implementation and ensuring the protection of the rights it enshrines. In contrast, the CRC primarily focuses on assessing the progress made by state parties in CRC implementation. In principle, the Children's Charter represents a more robust instrument than its parent charter, and holds the potential to strengthen children's rights in Africa by establishing effective monitoring and enforcement mechanisms.[27] Nevertheless, there are challenges related to enforcement mechanisms as mentioned above, and the Committee's impact on promoting and safeguarding children's rights appears to be evolving slowly.

4. The African Court of Human and Peoples' Rights

The African Court of Human and Peoples' Rights is an international judicial body established by member states of the African Union to implement the provisions outlined in the Banjul Charter. Situated in Arusha, Tanzania, the Court serves as the judicial branch of the African Union and is one of the three regional human rights tribunals alongside the European Court of Human Rights and the Inter-American Court of Human Rights.

27 Heyns and Viljoen, 1999, p. 421.

The establishment of the Court represents a crucial milestone in the development of a coherent and effective human rights protection system across the African continent. This progressive initiative not only reinforced but also complemented the existing framework outlined in the Banjul Charter, as well as the primary oversight body responsible for upholding the rights guaranteed by the Charter and the Commission. In recognition of the institutional limitations, resource constraints, non-binding nature of decisions, and challenges in implementing these decisions by states, which led to the perceived inefficacy of the Commission in safeguarding human rights, there emerged a strong urge to formulate a Protocol to the African Charter for the establishment of an African Court. The African Court's inception can be traced back to a Protocol associated with the Banjul Charter, which was adopted in 1998 in Burkina Faso under the Organisation of African Unity. The Protocol was scheduled to take effect 30 days after the deposition of the 15th instrument of ratification by an African state, as specified in Art. 34 of the Protocol. This milestone was reached on 25 January 2004, exactly 30 days after the Union of Comoros ratifying the Protocol on 26 December 2003. In 2006, the Court elected its initial group of judges, and it issued its inaugural judgment in 2009.[28] The primary mandate of the Court is to complement and strengthen the functions of the Commission.[29] The Court's jurisdiction encompasses all cases and disputes related to the interpretation and application of the Banjul Charter, the protocol associated with the Charter, and any other relevant human rights instruments. It holds the authority to issue advisory opinions on legal matters and adjudicate contentious cases.

The Court comprises 11 judges, nominated by African Union member states and elected by the Assembly of Heads of State and Government. These judges serve six-year terms and are eligible for reelection only once. The Court's president resides and works full-time in Arusha, while the remaining ten judges perform their duties on a part-time basis. The administrative, managerial, and registry functions are managed by a registrar. At the time of writing this chapter (i.e. October 2023), the African Court had delivered 375 decisions, comprising 217 judgments and 158 orders, and had 141 pending cases.[30]

The Court possesses authority over all cases and disputes brought before it concerning the interpretation and application of the Charter and any other pertinent human rights instruments ratified by the involved states, and it exercises both adjudicatory and advisory jurisdiction. Regarding its adjudicatory jurisdiction, complaints may be initiated by the Commission, states, individuals, or non-governmental organisations. Additionally, the Court may permit relevant non-governmental organisations with observer status before the Commission and individuals to directly file cases before it, given that the state against which the application is lodged has declared its acceptance

28 Rodríguez and Álvarez, 2020.

29 Stone, 2012, African Court of Human and People's Rights. Advocates for International Development. Legal Guide.

30 African Court Cases, Statistics [Online]. Available at: www.african-court.org (Accessed: 31 October 2023).

of the Court's competence to receive such communications. The Court's judgments are legally binding, the respective states are obligated to comply with and ensure the execution of these judgments, and the African Union's Council of Ministers oversees judgment enforcement. Regarding the Court's advisory jurisdiction, the Court itself, at the request of a member state of the African Union, the African Union itself, or any African organisation recognised by the African Union, can provide legal opinions on matters related to the Charter or any other relevant human rights instrument. This is permissible if the subject matter of the opinion is not concurrently under examination by the Commission.

On 11 May 2018, the Court issued its judgment in a case involving the Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (also known as APDF) and the Institute for Human Rights and Development in Africa (also known as IHRDA) against Mali.[31] This marked the Court's first ruling addressing the rights of women and children in Africa. Through this decision, the Court established stringent obligations on states to uphold international human rights standards, particularly in the realm of family law, even if doing so necessitates the disregard of religious and customary laws. Specifically, the case was brought forward by two Malian human rights non-governmental organisations, the aforementioned association known as APDF and institute known as IHRDA. The applicants argued that the Malian Family Code, adopted in 2011, contravened several international human rights treaties ratified by Mali, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), the Children's Charter, and the Convention on the Elimination of All Forms of Discrimination Against Women (also known as CEDAW). Notably, a significant portion of Mali's population is Muslim, and the 2011 Family Code resulted from a compromise between the National Assembly and various Islamic organisations within the country. These organisations vehemently opposed a prior attempt by the Malian Parliament to codify family rights in 2009, which aimed to align family matters more closely with human rights treaty standards.

The applicants contended that the 2011 Family Code, which set the minimum age for females to marry at 16 (as opposed to 18 years for males) years and provided an exception allowing girls to marry at 15 years with their fathers' consent, contravened Art. 6(b) of the Maputo Protocol and Art. 2 of the Children's Charter, which established 18 years as the minimum age for female marriage. The applicants also asserted that the 2011 Family Code failed to require religious ministers to obtain both parties' consent before marriage, or to ensure the presence of both parties at the ceremony, thus infringing upon the right to consent to marriage as outlined in Art. 6(a) of the Maputo Protocol and Arts. 16(a) and (b) of the Convention on the Elimination of All Forms of Discrimination Against Women. Moreover, the applicants argued that the

31 Application 046/2016, Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) vs. Republic of Mali. Judgment, 11 May 2018.

2011 Family Code mandated the application of Mali's Islamic law on matters of inheritance, which granted women half of what men received. This violated the right to equitable inheritance established in Art. 21(2) of the Maputo Protocol, which granted both men and women the right to inherit their parents' property in equal shares. Finally, the applicants contended that by adopting the 2011 Family Code, Mali had not fulfilled its positive obligation to eliminate traditions and customs that harm women and children, which is enshrined in Art. 2(2) of the Maputo Protocol, Art. 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women, and Art. 1(3) of the Children's Charter.

In its ruling, the court fully endorsed the arguments presented by the applicants, concluding that Mali had violated each of the aforementioned treaty provisions by enacting the 2011 Family Code. The Court rejected Mali's contention concerning the flexibility of the Code, emphasising that the Family Code in Mali enforces religious and customary law as the prevailing regime in the absence of an alternative legal framework. The judgment stated that by adopting the 2011 Family Code and maintaining discriminatory practices that undermine the rights of women and children, Mali has violated its international obligations. Consequently, the Court ordered Mali to amend its 2011 Family Code to align it with international human rights standards, and educate its population about these rights and obligations.

5. Conclusions

The practice of protecting children's rights in Africa is a complex and multifaceted issue requiring scholarly attention. Children's rights, as enshrined in various international and regional human rights instruments, are meant to protect and promote their well-being, dignity, and development. In the African context, the African Children's Charter and other global treaties (e.g. the CRC) serve as crucial framework for ensuring children's rights. This chapter explores the practice of children's rights in Africa, focusing on the institutional framework, challenges, and progress in this critical area.

It is justifiable to assert that a comprehensive culture of children's rights is lacking in Africa, primarily because of the early stages of development of the Children's Charter. For some Africans, the concept of children possessing rights can be perceived as threatening, leading to widespread misconceptions about the essence of children's rights. However, there is concomitantly a genuine eagerness to support the satisfaction of children's needs. It is imperative to enhance people's comprehension of how children are viewed in society and the notion that children possess rights should no longer be considered incompatible with African values. This is especially so as there seems to be, unfortunately, insufficient awareness of the Children's Charter and a noticeable absence of scholarly discourse on the subject in Africa. A more profound comprehension of what children's rights signify within the diverse tapestry of African cultures holds the potential to equip invested stakeholders with the necessary tools

to effectively implement children's rights instruments and, ultimately, to oversee the impact of policy and program interventions.

The practice of protecting children's rights in Africa is a dynamic and evolving field within which there are both challenges and progress. Despite the persistent obstacles related to poverty, armed conflicts, and harmful practices, African nations are taking significant steps to protect and promote children's rights. Their legislative, educational, health, and child protection initiatives demonstrate the commitment to ensuring a better future for African children, and since African societies continue to recognise the significance of children's rights, the region is poised to make further advancements in this critical area.

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