

## **The monitoring of the rights of the child: a child rights-based approach**

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**THE MONITORING OF THE RIGHTS OF THE CHILD:**  
**A CHILD RIGHTS-BASED APPROACH**

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Submitted for the Ph.D.





## *The Monitoring of the Rights of the Child: A Child Rights Based Approach*

Due to the lacunae between legal obligations to human rights and the actual situation, monitoring is an essential component of the international and national human rights system. Monitoring illuminates the situation of human rights commitments and ensures the relevancy of instruments. The thesis explores monitoring in relation to the rights of the child and submits that a child rights-based approach is essential. Monitoring should not only consider the status and nature of child rights, but a child rights-based approach should also guide efforts so that they improve as well as reflect and respect children's rights.

The study defines monitoring and describes a child rights-based approach. As a subject of legal investigation, the thesis then addresses several questions. How do international and national monitoring efforts respect child rights? How have the supervision of international conference agreements supported child rights? Furthermore, how do different countries monitor? National activities are examined through case studies of two Commonwealth countries: Canada and South Africa. Then, analysis is presented about how actors interpret and execute monitoring and the significance of different approaches. Lastly, the rationale, challenges and existing support of a child rights-based approach are discussed. In sum, a child rights-based approach is not generally utilised and the implications of child rights upon the monitoring process are not yet realised. Most monitors, whether international, regional or domestic, inadequately consider the demands of child rights upon the process of ascertaining the situation of children's rights. Proposed guidelines are appended to support a child rights-based approach to monitoring.

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## List of Abbreviations

|                             |  |
|-----------------------------|--|
| African Children's Charter: | Charter on the Rights and Welfare of the Child   |
| African Charter:            | African Charter on Human and Peoples' Rights   |
| Agenda 21                   | Agenda 21: Rio Declaration on Environment and<br>Development   |
| American Convention:        | American Convention on Human Rights (Pact of San José),  |
| American Declaration:       | American Declaration on the Rights and Duties of Man   |
| Beijing                     | Declaration and Platform for Action, Fourth World<br>Conference on Women   |
| CAT                         | Convention against Torture and Other Cruel, Inhuman or<br>Degrading Treatment or Punishment                      |
| CCRC                        | Canadian Coalition for the Rights of Children  |
| CEDAW                       | UN Convention on the Elimination of All Forms of<br>Discrimination Against Women                                 |
| CERD                        | International Convention on the Elimination of All Forms<br>of Racial Discrimination                             |
| CGE                         | (South African) Commission for Gender Equality   |
| Charter                     | Canadian Charter of Rights and Freedoms  |
| CMWMF                       | International Convention on the Protection of the Rights of<br>All Migrant Workers and Members of Their Families |
| CoE                         | Council of Europe  |
| CRC                         | UN Convention on the Rights of the Child   |
| CRIN                        | Child Rights Information Network   |
| ECHR                        | European Convention for the Protection of Human Rights<br>and Fundamental Freedoms                               |
| ECOSOC                      | UN Economic and Social Council   |
| IACI                        | Inter-American Children's Institute  |
| ICCPR                       | International Covenant on Civil and Political Rights   |
| ICESCR                      | International Covenant on Economic, Social and Cultural<br>Rights  |
| ICJ                         | International Court of Justice   |
| ICPD                        | International Conference on Population and Development   |



*Guidelines for initial reports Guidelines for initial reports of States Parties, to be submitted in accordance with Article 44 para. 1 of the Convention on the Rights of the Child*

*Guidelines for periodic reports General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1 (B), of the Convention*

|                |  |
|----------------|--|
| HRC            | UN Human Rights Committee  |
| ICC            | International Criminal Court                                       |
| ICJ            | International Court of Justice                                     |
| ICPD           | International Conference   |
| IDASA          | Institute for a Democratic South Africa                            |
| NCRC           | National Children's Rights Committee (South African<br>NGO)        |
| NGO(s)         | Non-governmental organisation(s)                                   |
| NPA            | National Programme of Action                                       |
| NYC            | (South African) National Youth Commission                          |
| OAS            | Organisation of American States                                    |
| OHCHR          | Office of the United Nations High Commissioner for<br>Human Rights |
| OP             | Optional Protocol  |
| ORC            | Office on the Rights of the Child, The Presidency, South<br>Africa |
| PPA(s)         | Provincial Plans of Action (PPAs)                                  |
| SA             | South Africa   |
| SAHRC          | South African Human Rights Commission                              |
| SCY            | Society for Children and Youth of British Columbia                 |
| Social Charter | European Social Charter  |
| UN             | United Nations   |
| UNCEDAW        | UN Committee on the Elimination of Discrimination<br>Against Women |
| UNCESCR        | UN Committee on Economic, Social and Cultural Rights               |
| UNCRC          | UN Committee on the Rights of the Child                            |
| VCLT           | Vienna Convention on the Law of Treaties                           |

# **CHAPTER ONE: INTRODUCTION TO MONITORING & A CHILD RIGHTS-BASED APPROACH**

## **1.0 INTRODUCTION**

The achievement of 192 ratifications<sup>1</sup> for the United Nations (UN) Convention on the Rights of the Child (hereinafter CRC)<sup>2</sup> illustrates international commitment to child rights because the primary international legal instrument has received more ratifications than any other international human rights treaty. Further, it is an influential framework, guiding the development and interpretation of other instruments at both the international and national levels.<sup>3</sup> Success of child rights however, cannot simply be measured by the numbers of ratifications, accessions, instruments or agreements because respect of child rights is not automatic, comprehensive or consistent. Therefore, attention has turned to the reality of these commitments in terms of the extent of application.<sup>4</sup> Due to lacunae between the legal obligations and the actual situation, monitoring is an essential component of the international and domestic human rights system.

International, regional and national actors and procedures contribute to monitoring, which not only provides information about child rights, but also supports the commitments and the possibility of progress. The more explicit objective of accountability ensures actors carry out necessary measures and determine the nature of their results. It is through assessment or the identification of persistent difficulties that further improvements can be made. The results also may support development of dynamic policies, programmes and decision-making. Nevertheless, insufficient attention has been dedicated to child rights monitoring: while the importance may be acknowledged, it is rarely explored in academic literature impeding understanding of the process and substantive and procedural advancements.

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<sup>1</sup>Office of the United Nations High Commissioner for Human Rights (OHCHR) (2004), *Status of Ratifications of the Principal International Human Rights Treaties*, as of 09 June 2004.

<sup>2</sup>*Convention on the Rights of the Child*, Adopted on 20 November 1989, UN Doc. A/RES/44/25

<sup>3</sup>Examples include: *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182)*, adopted by the International Labour Conference, 1999; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, UN Doc.A/45/113, 1990; and case law in Chapter Four.

<sup>4</sup>For instance, UN Special Representative on Children and Armed Conflict Otunnu advocates beginning an “era for application” of norms; UN (2000), *Protection of children affected by armed conflict*, UN Doc. A/55/442, paras. 114-115.



Consequently, much monitoring to date inadequately illuminates the situation of the child and his/her rights. Wintersberger explains that research about children

*is usually selective and adult-biased in various ways. Reports and data on families, schools, as well as child care and welfare institutions are mostly not reports or data on children; even if children may be a crucial component of these institutions, children are generally not the unit of observation. Children are often considered as objects and not as subjects, persons and citizens.*<sup>5</sup>

The essential problem is that despite the international legal commitment, child rights still have not inspired or influenced the monitoring process resulting with several problems that Wintersberger identifies. First, research about children is usually adult-led, influenced by adult preoccupations, priorities, or prejudices, determining what and how information is collected, analysed and reported.<sup>6</sup> While adult perspectives are valuable, they should not exclusively define understanding of the child's situation. Second, research is not rights-based since the child continues to be relegated as the object, rather than the subject of the research. The child's reality is not completely understood and his/her rights not respected. Thus, international legal commitments are not reflected in research and the spectrum and content of the child's economic, social, cultural, civil and political rights as enunciated in the CRC and other instruments are not fully appreciated. Third, focussing on institutions may provide useful information about the nature and scope of the establishment but not necessarily about the child. Even if such data consider the child, the results are inherently limited by the understanding of the context, and cannot be relied upon to accurately, comprehensively illustrate the situation of the child rights. The child should not and cannot be defined by the particular institution under analysis but the limitations of this common research approach are not yet widely recognised.

Monitoring involves fundamental choices about procedures, objectives, and content because it is not possible to illustrate everything. Consequently, Qvortrup affirms researchers must "sort out the most important features and findings, and one crucial criterion is to meet the demand for commonality."<sup>7</sup> This demand for commonality requires basic agreement on

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<sup>5</sup>Wintersberger, 'Preface', in Ben-Arieh et al. (2001), *Measuring and Monitoring Children's Well-Being*, xiii.

<sup>6</sup>Monitoring is defined below in s.2.1.

<sup>7</sup>Qvortrup (2000), "Macroanalysis of Childhood." *Research with Children*, Christensen & James (eds.), 78.



standards for research and analysis. It appears that the commonality in most monitoring is that child rights are not necessarily considered in the design or execution of the research study. For instance, scholars may prefer to focus on the child's well-being.<sup>8</sup> This thesis examines the relevance of child rights upon the monitoring of the rights of the child.

The international law on the rights of the child has a long history over the last century however the 1989 adoption of the CRC crystalised commitments to children.<sup>9</sup> Yet the implementation of child rights remains a challenge in relation to monitoring for several reasons. Despite the elaboration of human rights in recent decades, international law continues to have biases, including the traditional state-centric framework, and legitimates gender inequalities,<sup>10</sup> that adversely affect the advancement of rights. While international law is traditionally understood as impartial and objective,<sup>11</sup> many monitoring activities reveal otherwise.<sup>12</sup> Moreover, while some exceptions exist, states generally do not want international attention to their domestic efforts or lack thereof. As Boulesbaa expounds, the continuing absence of a central human rights authority with the capacity to enforce laws, the principle of non-interference in domestic affairs<sup>13</sup> and the requirement to agree to the competence of human rights monitors continue to complicate effective monitoring.<sup>14</sup> It has also been argued that CRC accession or ratification by some states parties was not inspired by a commitment to children but reflects merely "rhetoric", due to weak enforcement mechanisms, lack of sanctions or a communications procedure.<sup>15</sup> Further, established monitoring procedures are generally followed without innovation based on child rights. Analysis and recommendations to reform established monitoring generally focus on procedural considerations or quantitative, rather than qualitative, issues due to efficiency

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<sup>8</sup>See Thesis Chapter 6, s.2.1 discussion about Ben-Arieh et al. (note 5 above).

<sup>9</sup>See Van Bueren (1998), *The International Law on the Rights of the Child*.

<sup>10</sup>See Charlesworth and Chinkin (2000), *The boundaries of international law: A feminist analysis*.

<sup>11</sup>Ibid., 17.

<sup>12</sup>See Chapter Five.

<sup>13</sup>*Charter of the United Nations*, adopted 26 June 1945, in force 24 October 1945, a.2(7).

<sup>14</sup>Boulesbaa (1999), *The U.N. Convention on Torture and the Prospects for Enforcement*, Chapter Three.

<sup>15</sup>Muscroft (ed.)(1999), *Children's Rights: Reality or Rhetoric?* 18.



concerns.<sup>16</sup> For example, the backlog of reports for UN treaty body consideration is a common consideration<sup>17</sup> but results from a relatively limited approach. This thesis attempts to contribute to current debate by directing attention to inadequately considered qualitative reform based on child rights demands. This reorientation is necessary for monitoring, which is a fundamental human rights process. The thesis does not reject quantitative reform but aims to broaden the scope of current monitoring discourse. Just as critics urge consideration of both qualitative and quantitative data when monitoring to understand the situation,<sup>18</sup> both dimensions are required not only to provide the child rights picture but also ensure respect of child rights. This holistic approach admittedly may not ease the burden of states parties, often overwhelmed with current demands, but they are obligated to realise their commitments. Moreover, the study offers better understanding of the complexity of child rights and their relevance to monitoring. To this end, child rights can be better respected.

Analysts rarely examine the implications of child rights so those monitoring activities as established in law are carried out without assessing the significance of child rights upon the process. The focus on development and specific concerns about impact of projects or programmes means only limited emphasis upon the rights framework.<sup>19</sup> The relationship between monitoring and children's rights is largely absent or not explored.

Child rights are challenging, demanding changes in society and to relationships, and consequently has been described a "quiet revolution" in international law<sup>20</sup> as the CRC brought about "a major legal-ethical breakthrough for humankind" evolving from children having no rights.<sup>21</sup> Nevertheless, children often continue to be limited to the private sphere,

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<sup>16</sup>See generally Bayefsky (2001), *The UN Human Rights Treaty System: Universality at the Crossroads*.

<sup>17</sup>For instance, see Crawford (2000), "The UN Human Rights Treaty System: A System in Crisis?" *The Future of UN Human Rights Treaty Monitoring*. Alston and Crawford (eds.), 4.

<sup>18</sup>Kanbur, Cornell University (2001), "Qualitative and quantitative approaches: a false dichotomy?" See Chapter Five, s.3.2.

<sup>19</sup>See below.

<sup>20</sup>Van Bueren (1996), "The Quiet Revolution: Children's Rights in International Law". *Children in Charge*, John(ed.), 27-37.

<sup>21</sup>Grant, UNICEF Executive Director (as he then was)(1992), "Address" at *Children at Risk*, International Conference, Bergen.



which restricts contributions to monitoring and rights awareness.<sup>22</sup> Moreover, advocating on behalf of children is difficult due to such challenges of determining the child's best interests and the proper, accurate role of advocates.<sup>23</sup>

For example, the role and support for child participation - an essential child rights principle - are well-established in the literature,<sup>24</sup> albeit with some dissent,<sup>25</sup> but discussion is limited in relation to monitoring. Flekkøy's support for the child's role in monitoring appears relatively unique but she does little more than affirm the position,<sup>26</sup> where a monitoring structure should be "a voice for children" for instance,<sup>27</sup> rather than analyse and suggest ways of facilitating it. Although states parties have the formal monitoring responsibility, Verhellen argues implementation and monitoring are the responsibility of everyone<sup>28</sup> yet, he does not explicitly enunciate the child's role. Lansdown examines the significance and practice of child participation and shares lessons learned including engagement in conferences but does not discuss the child's monitoring role.<sup>29</sup> Even so, child participation is only one aspect of child rights implications. The lack of understanding about the relationship between monitoring and child rights demands academic investigation.

Some efforts to advance monitoring exist but have limited value. Childwatch's project on monitoring children's rights took place from 1994 to 1998 to develop CRC monitoring

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<sup>22</sup>In relation to women, see Charlesworth and Chinkin (note 10 above), 56-59.

<sup>23</sup>Mnookin (1985), *In the Interests of Children: Advocacy, Law Reform, and Public Policy*, 11-12.

<sup>24</sup>As examples, see: Hart (1992), *Children's Participation: From Tokenism to Citizenship*; Lansdown (2001), *Promoting Children's Participation in Democratic Decision-Making*; and Rajani (1999), *Promoting Strategic Adolescent Participation*.

<sup>25</sup>For example, see Hafen & Hafen (Spring 1996), "Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child." 37 *Harvard International Law Journal*, 449-491.

<sup>26</sup>She argues "we cannot truly monitor implementation of participation rights without the participation of the children;" and identifies principles for national monitoring including "a voice for children." Flekkøy (1996), "Children's Participation and Monitoring Children's Rights". *Monitoring Children's Rights*. Verhellen (ed.), 59.

<sup>27</sup>Flekkøy (1993), "Monitoring implementation of the UN Convention on the national level". 1 *The International Journal of Children's Rights*, 233.

<sup>28</sup>Verhellen (1996), "Monitoring Children's Rights," *Monitoring Children's Rights*. Verhellen (ed.), 7-19.

<sup>29</sup>Lansdown (note 24 above).



systems through national case studies for replication and training for other countries.<sup>30</sup> One publication on monitoring edited by Verhellen,<sup>31</sup> provides a series of essays covering a spectrum of topics without in-depth analysis. Hodgkin and Newell have developed “checklists,” a practical tool to articulate the implications of each CRC article “for law, policy and practice and to promote and evaluate progress towards implementation,” but they do not serve any official reporting purpose.<sup>32</sup> Understanding of a child rights-based approach is not developed by these efforts. Lansdown analysed the process and actors of CRC reporting, but not the demands of child rights upon the process other than critiquing the implications of the reporting categories.<sup>33</sup> Van Bueren notes the potential child's role as a member of the UN Committee on the Rights of the Child (UNCRC).<sup>34</sup> In general however, the implications of child rights upon the process have not been examined.

Moreover, while the traditional division of rights into civil and political, and economic, social and cultural rights categories as reflected in international treaties has structured both international monitoring and much analysis, the CRC incorporates the spectrum. All human rights are indivisible as the Vienna Declaration affirms.<sup>35</sup> Yet generally, monitoring efforts do not reflect this understanding due to the absence of attention to the child's civil and political rights. Consequently, lack of respect of interconnections adversely affects understanding and monitoring of child rights. The UNCRC affirms: “There is no simple or authoritative division, of human rights in general or of Convention rights, into the two categories. ... economic, social and cultural rights, as well as civil and political rights, should be regarded as justiciable.”<sup>36</sup> As Robinson explains, an element required for making human rights a reality in developed countries is acknowledgement and acceptance of the

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<sup>30</sup>Childwatch, “Monitoring Children's Rights”.

<sup>31</sup>Verhellen (Ed.) (1996), *Monitoring Children's Rights*.

<sup>32</sup>Hodgkin & Newell (1998), *Implementation Handbook for the Convention on the Rights of the Child*, xvii.

<sup>33</sup>Lansdown (2000), “The Reporting Process Under the Convention on the Rights of the Child”. *The Future of UN Human Rights Treaty Monitoring*. Alston & Crawford (Eds.), 113-128.

<sup>34</sup>Van Bueren (note 9 above), 389.

<sup>35</sup>“All human rights are universal, indivisible and interdependent and interrelated.” *Vienna Declaration and Programme of Action*, 1993 UN Doc.A/CONF.157/24, para.5. See Chapter Five, s.3.3.

<sup>36</sup>UNCRC (2003), *CRC General Comment 5*, UN Doc.CRC/GC/2003/5, para.6.

indivisibility of human rights.<sup>37</sup> Child rights bridge traditional rights categories and should inspire new approaches to understanding and carrying out monitoring.

Furthermore, different approaches to monitoring are not yet acknowledged in the literature,<sup>38</sup> but generally exist where some monitors discuss measures without discussing impact or outcomes for rights; and others describe violations and gaps in implementing rights without providing the full context or detailing successes.<sup>39</sup> The research found the distinction between approaches to be significant for monitoring.

To continue, the chapter defines monitoring for the thesis before a typology of monitoring is outlined. A child rights-based approach is enunciated followed by the thesis approach and presentation of the chapter outline.

## 2.0 MONITORING DEFINED

This section elaborates: the definition and purposes of monitoring; the distinction between monitoring and implementation; and a typology of monitoring.

### 2.1 Definition & Purposes of Monitoring

Some definitions of monitoring exist in the child rights literature highlighting dimensions without fully illuminating the process. UNICEF's Gautam defines monitoring as "a data-gathering activity based on situation analysis which allows evaluation to be made on how an intervention is progressing and what impact is having."<sup>40</sup> Himes considers monitoring as "measurement and as an organised process of sustained systematic observations regarding these actual impacts."<sup>41</sup> Both understandings reflect a dichotomy between the monitor and the object of his/her efforts. An international monitoring seminar developed a broader,

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<sup>37</sup>Robinson (2003), "From Rhetoric to Reality Making Human Rights Work." 1 *E.H.R.L.R.*, 4.

<sup>38</sup>An exception is the violations approach. See Chapter Five, s.3.3.1.

<sup>39</sup>Linear approach, see Chapter Five, s.1.

<sup>40</sup>Gautam, *Preface*, in Black (1994), *Monitoring the Rights of Children*, 6.

<sup>41</sup>Himes (1996), "Monitoring Children's Rights: Cutting Through the Confusion and Planning for Effective Action". *Monitoring Children's Rights*. Verhellen (ed.), 115.



vaguer definition that involves measuring and a warning or policing watchdog functions,<sup>42</sup> which highlights essential functions but does not explain the process. But a unique dimension is identified: “In the context of social planning and programming, ‘monitoring’ has a precise function related to the collection of data and its analysis: admonition plays little or no part.”<sup>43</sup> Taken collectively, these definitions illustrate elements of the monitoring process but do not provide a complete, satisfactory description. More attention in the literature is dedicated to evaluating programmes and projects, rather than child rights.<sup>44</sup> As a result, it is a challenge to represent the status of rights rather than simply identify efforts or lack thereof for children. The limited discussion about child rights monitoring inadequately portrays the process.

Monitoring of human rights including children’s rights should provide a picture or illuminate the status of rights to advance their full enjoyment.<sup>45</sup> Accordingly, this thesis defines child rights monitoring as involving three main functions. First, monitoring involves research or collection of information to determine the situation of the rights of the child in a given context. Second, the assessment or evaluation of this data ascertains the extent of implementation. As reporting the results is the necessary completion following research and analysis,<sup>46</sup> the third objective is to report these results and raise awareness about the situation of these rights. These results can then be utilised to inspire, support or criticise action or lack thereof. To be effective, monitoring should be considered as a process over time, requiring ongoing efforts to research, assess and report details about child rights. The goal is to promote and support ongoing progress in the implementation of international child rights standards.

Monitoring is important for several reasons including facilitating the accountability of

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<sup>42</sup>Black (1994), *Monitoring the Rights of Children*, 14-18.

<sup>43</sup>Ibid., 14. See Chapter Five.

<sup>44</sup>See further below.

<sup>45</sup>See further: Committee on the Economic, Social and Cultural Rights: (1991), *General Comment 4*, UN Doc.E/1992/23, para.5; (1994) *General Comment 5*, UN Doc. E/1995/22, para.2; Human Rights Committee (1981) *General Comment 2* UN Doc.HRI/GEN/1/Rev. 4, para.1; Committee on the Elimination of Discrimination Against Women (1989) *General Recommendation 9*, UN Doc. A/44/38; and UNCRC (1991), *Recommendation 1*, UN Doc.CRC/C/19/Rev.9, preambular para.2. Also see UNCRC (2003), *CRC General Comment 5* UN Doc.CRC/GC/2003/5, paras.45-47. Chapter Five s.3.3 distinguishes between rights compliance and enjoyment.

<sup>46</sup>Keppel et al. (1992), *Introduction to Design & Analysis*, 14.



international legal actors for their efforts or lack thereof. Results can create “healthy competition” within and between states to improve progress;<sup>47</sup> or mobilise shame for poor efforts or results with children. Further, the results should allow for informed action for and with children and concerned others who can use the results in legal and non-legal venues to raise awareness and urge action including corrective responses or further political, financial or societal support. Monitoring also legitimises and justifies attention and concerns about their rights.

Rights empower children, reforming their traditional relegation to invisibility in the private realm of the family, public and private institutions and so on where violations can easily occur. If full respect is accorded to the child, then not only are their rights fully acknowledged but their rights also are respected in monitoring. Children engaged in focus groups conducted by the Ph.D. candidate as part of field work were clear about the purposes of monitoring.

*To find out if children understand their rights; to find out children's views and beliefs; to find out if there is any problem in their groups and areas; to monitor the children's health and well-being.*

VV. (12 year-old girl), M. (12 year-old boy), and G. (17 year-old boy), Cape Town<sup>48</sup>

*To get accurate information from the parties involved and to have proof that directives [of the CRC] are being followed. If those involved are saying something, in this case the children, they might have a different opinion. That is why monitoring is important, to show that they do think otherwise than what they are being told. To get many diverse opinions.*

TA. & RJ. (13 year-old boys), Ottawa<sup>49</sup>

These quotations indicate that there can be many benefits to a child rights-based approach to monitoring. First, the monitoring process can determine whether and how children comprehend their rights. Second, children's knowledge and views about their rights and their status, which may differ from adults, become available. Third, the information may illuminate emerging concerns or issues not yet comprehended by adults. Fourth, their involvement contributes to creating a comprehensive picture, not simply an adult perspective.

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<sup>47</sup>Roberfroid, UNICEF (2000), *The merits of goals-focused approaches to development*, Joint UN/OECD-DAC/World Bank/IMF Forum.

<sup>48</sup>Focus Group (2002) with Children's Resource Centre, Cape Town: 27 July. Focus groups on monitoring children's rights organised and facilitated by Ph.D. candidate in three countries: South Africa, Canada and U.K.; see Thesis Appendix B: Research Methodology.

<sup>49</sup>Focus Group (2002) organised and facilitated by Ph.D. candidate on Monitoring of Children's Rights involving Child and Youth Friendly Ottawa, Ottawa: 5 October.



As bearers of rights, children need the data to challenge the situation of their rights and recognise the beneficial efforts of those in authority. Moreover, if children themselves inform others about the status of their rights, the details will likely be more powerful to decision-makers and the general public and receive appropriate response.

## 2.2 Distinctions between Monitoring and Implementation

Monitoring should not be confused with implementation of children's rights as they are separate activities but are often used interchangeably.<sup>50</sup> Implementation refers to the application of human rights within defined jurisdictions and contexts through various means including constitutional or legislative provisions, case law, policies, programmes and practice. Himes clarifies that monitoring involves measurement and a process of systematic observation regarding the actual impacts of children's rights implementation.<sup>51</sup> In other words, monitoring supervises and assesses implementation.

While distinct activities, there is a symbiotic relationship between monitoring and implementation to advance child rights. Their means are generally different: while implementation involves efforts to realise rights; monitoring involves collection, assessment and reporting of data about rights. With the common objective of progress, the two activities overlap. Consequently, monitoring mechanisms may be considered implementation mechanisms including for example, the UNCRC.<sup>52</sup> Through review of reports, elaboration of child rights provisions in General Comments and thematic discussions, and sharing best practices, the Committee contributes to CRC implementation. Nonetheless, implementation is furthered due to the Committee's primary, explicit function of monitoring states parties.<sup>53</sup> Monitoring intends to promote observance of international instruments.<sup>54</sup> Better implementation relies on the results of monitoring to improve rights realisation. Therefore,

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<sup>50</sup>Himes (1996), "Monitoring Children's Rights: Cutting Through the Confusion and Planning for Effective Action". *Monitoring Children's Rights*. Verhellen (ed.), 113.

<sup>51</sup>Ibid., 114-115.

<sup>52</sup>For example, Chapter 14 of Van Bueren's book discussing monitoring mechanisms is entitled the "Implementation of the International Rights of the Child"; Van Bueren (note 9 above).

<sup>53</sup>Articles 43(1), 44(1).

<sup>54</sup>Capotorti (1968), "The international measures of implementation included in the Covenants on Human Rights." *International Protection of Human Rights*, Eide & Schou (eds.), 132.



both monitoring and implementation mutually reinforce child rights advancement.

The thesis assumes that monitoring should lead to child rights improvement through the identification of requirements to better realise commitments. As the Inter-American Commission enunciates, “human rights...always represents progress...”<sup>55</sup> Monitoring should allow understanding of the success of measures or lack thereof, including the identification of whether measures have even been implemented. In contrast, implementation does not necessarily lead to child rights progress.<sup>56</sup> Without exception, every state needs to be challenged and encouraged to improve implementation and benefits from advice and criticism about their situation. While follow-up is not ensured in every context, monitoring results should raise awareness, encourage discussion about efforts or lack thereof, and lead to action over the short-, medium- or long-term within a given jurisdiction. Thus, priority must be given to understanding and improving monitoring.

### 2.3 Typology of Monitoring

A typology of monitoring differentiates between social monitoring and rights monitoring as well as formal and informal monitoring.

Social reporting, monitoring or evaluation is distinguished from human rights monitoring. The development of the former has been described as a social reporting movement beginning in the United States in the 1930s, furthered in the 1950s by a UN expert commission, subsequently expanding to other countries and international organisations.<sup>57</sup> The tool of social indicators focusses on “social change” and “the measurement of welfare” due to “the increased demands for information made by an active social policy and by the challenge to operationalize and to quantify its core formula: the concept of quality of life”.<sup>58</sup> Accordingly, Carley and Bustelo define monitoring as “the systematic collection and organization of information, which is to be used in improving the decision-making process; either indirectly

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<sup>55</sup>*Roach & Pinkerton*, cited in Van Bueren (note 9 above), FN 23, 200.

<sup>56</sup>Tomaševski (2001), “Indicators”. *Economic, Social and Cultural Rights: A Textbook*, Eide et al. (eds.), 542.

<sup>57</sup>See Noll (1996), *Social Indicators and Social Reporting: The International Experience*, Symposium on Measuring Well-being and Social Indicators.

<sup>58</sup>*Ibid.*



by informing the public, or directly as a feedback tool designed for the purposes of project management, program evaluation or policy development.”<sup>59</sup> International, national or local organisations and governments monitor their programmes and policies to determine children’s situation and the effectiveness of their goals, activities and expenditures.<sup>60</sup> Barsh suggests that such efforts should be pursued over time at the project level to understand and assess the impact of state policy on rights, which could inform about the choices that governments have in implementing rights.<sup>61</sup> In focussing on particular policy or programme objectives or expenditures, this type of monitoring generally does not refer to international human rights law<sup>62</sup> or reflect rights standards. As this type of monitoring serves particular concerns, its contributions are limited to illuminate the overall rights situation although some efforts may support child rights monitoring. But in general, it should be recognised that monitoring of goals tended to support and complement monitoring children’s rights, not vice versa, as an Innocenti seminar concluded. The reaching of goals, usually date-bound and quantified, would indicate but not define progress towards rights fulfilment, which are universal and timeless.<sup>63</sup> These efforts are helpful in the identification and consideration of such practical issues as accountability, tools and methods. More often than not due to demands of and pressure from funding donors,<sup>64</sup> programme and project efforts do not contribute to better child rights understanding or support the international human rights framework (although it may be identified in some cases). Moreover, with the exception of the aforementioned work by Save the Children, a focus on the child’s role is absent. A

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<sup>59</sup>Carley & Bustelo (1984), *Social Impact Assessment and Monitoring: A Guide to the Literature*, 67.

<sup>60</sup>Examples include Oxfam, ActionAid, and Save the Children; see further: Roche (1999), *Impact Assessment for Development Agencies: Learning to Value Change*; ActionAid (2000), *Alps: Accountability, learning and planning system*; and Gosling with Edwards (2003), *Toolkits: A practical guide to planning, monitoring, evaluation and impact assessment*. The non-governmental sector has developed “participatory monitoring and evaluation” to encourage participation in development assistance; see Estrella & Gaventa (1998), *Who Counts Reality? Participatory Monitoring and Evaluation*, 6-14.

<sup>61</sup>Barsh (1993), “Measuring Human Rights: Problems of Methodology and Purpose”. 15 *Human Rights Quarterly*, 121

<sup>62</sup>Green (2001), “What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement”. 23 *Human Rights Quarterly*, 1064. Exceptions include Save the Children work, see Gosling with Edwards (note 60 above), Chapter 1, s.2.

<sup>63</sup>Black (note 42 above), 9

<sup>64</sup>For example, Wilkinson, Save the Children UK (2001), *Response to “Questionnaire on Activities Related to Children”*, 25 July.



challenge remains to coordinate monitoring processes to gather and assess relevant child information. Nevertheless, due to the long-term commitment to rights and to their progress, rights monitoring is essentially different.

Rights monitoring requires by definition international law as a consistent foundation or framework of operation and is carried out consistently over time to inform about ongoing rights implementation. (In contrast, social monitoring may involve assessments about particular project stages.<sup>65</sup>) Kent notes that monitoring to improve rights implementation is distinct from monitoring for steering future or existing efforts.<sup>66</sup> Rights monitoring considers all relevant influences and factors including legislative and other measures relevant to every child's rights over time, not restricted to any one decision or project.

The distinction between the two types of possible monitoring leads Bonoan-Dandan to differentiate rights indicators from development indicators<sup>67</sup> reasoning: "Human development indicators are premised on, or oriented towards, goals, not towards rights."<sup>68</sup> Separating goals from rights is probably an unsuccessful attempt to justify economic, social and cultural rights, the nature of which have been traditionally category-bound and less accepted than civil and political rights.<sup>69</sup> Bonoan-Dandan's conclusion reveals a faulty understanding of human rights, which include both goals and immediate application. Human rights incorporate various standards including the goal of development of the human person. Robinson observes "the concept of human rights should be broadly defined. ... The Universal Declaration on Human Rights... was intended to set out universal common standards or targets of achievement for all humanity."<sup>70</sup> Rights involve the legal obligation to consistently

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<sup>65</sup>See further Roche (note 60 above), Chapter Three.

<sup>66</sup>Kent (1997), "Realizing international children's rights through implementation of national law". 5 *The International Journal of Children's Rights*: 449.

<sup>67</sup>Chapter Five, s.3.2 discusses indicators.

<sup>68</sup>Dandan, current Chair, UN Committee on Economic, Social and Cultural Rights, cited in Green (note 62 above), 1090.

<sup>69</sup>For example, Bossuyt argues economic, social and cultural rights are vague and non-justiciable in Bossuyt (1993), "International Human Rights Systems: Strengths and Weaknesses". *Human Rights in the Twenty-First Century*. Mahoney & Mahoney (eds.), 47-55. Arambulo itemises the arguments against this rights categorisation in Arambulo (1999), *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Chapter III. See Thesis Chapter Two, s.6.0.

<sup>70</sup>Robinson (note 37 above), 3.



implement and monitor them so that the standards and targets progress over time. Yet the problematic apprehension with respect to the nature and status of economic, social and cultural rights has led to increased attention to them in recent years, creating an issue for monitoring discussed in Chapter Five. Moreover, the definition and application of human rights according to traditional categories of rights can restrict rights indicators and monitoring. But child rights indicators should not be limited in this way and should concern the four “P”s<sup>71</sup> of rights, also categorised as participation, provision, development and survival.<sup>72</sup> Involving both standards and targets, the CRC provides the range of rights, offering a new approach beyond the traditional rights boundaries, reflecting their indivisibility.

In general, a gap exists between academic and development literature restricting interaction or cross-fertilisation of ideas between social and rights monitoring. Himes believes that the achievement of human rights and human development are “foolishly” separated into an “enormous gulf”.<sup>73</sup> Recent attempts to collapse the distinction are evident including the Human Development Report 2000,<sup>74</sup> which appears influenced by Sen’s efforts to advance individual freedoms through human development.<sup>75</sup> Human rights literature reflects similar criteria for rights indicators as for development indicators as Green notes with two important exceptions: measurement over time to consider progressive realisation, improvement, and non-deterioration; and disaggregation.<sup>76</sup> Debate continues about the differences although Green believes “there is no distinction in kind between a rights indicator and other indicators.”<sup>77</sup> As discussed above, human rights include concern about human development

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<sup>71</sup>Namely, provision, protection, participation and prevention; see Van Bueren (note 9 above), 15.

<sup>72</sup>Canadian Coalition for the Rights of Children (1996), *Say It Right! The Unconventional Canadian Youth Edition of the United Nations Convention on the Rights of the Child*.

<sup>73</sup>Himes (1992), *Implementing the United Nations Convention on the Rights of the Child: Resource Mobilization and the Obligations of the States Parties*, 4.

<sup>74</sup>The report compares human development indicators and rights indicators; UNDP (2000), *Human Development Report 2000*, 91.

<sup>75</sup>See further Sen (1999), *Development as Freedom*.

<sup>76</sup>Green (note 62 above), 1084. While she relies on various information sources including UN and NGOs, additional academic literature should have been incorporated to her survey, including Barsh or Donnelly and Howard.

<sup>77</sup>See Green (note 62 above), 1090.



so rights indicators and other indicators must consider development; both are tools for understanding the status of a particular dimension of human life.<sup>78</sup> But it should be noted that rights indicators are not limited to human development. The thesis focusses on rights monitoring but lessons from development monitoring are considered as appropriate.

Child rights monitoring includes various formal and informal activities of actors at the international, regional, national and local levels. Formal monitoring is articulated in, and required by international human rights law, involving procedures and activities to describe progress in a specified jurisdiction.<sup>79</sup> For instance, CRC States parties are obligated to report to the UNCRC. In article 45(a), the CRC provides broad participation where the “Committee may invite the specialized agencies, the United Nations Children’s Fund and other competent bodies as it may consider appropriate to provide expert advice on implementation in areas falling within the scope of their respective mandates.” Consequently, a wide range of organisations participate from around the world, particularly facilitated by national child rights coalitions,<sup>80</sup> including for example, the Children’s Rights Alliance of Ireland.<sup>81</sup> The Non-Governmental Organisation (NGO) Group for the Convention on the Rights of the Child, a coalition of international NGOs formed in 1983 as the Informal Ad Hoc NGO Group for the Drafting of the CRC, coordinates the involvement of civil society in UN reporting. In addition, states parties may choose to include representatives outside government on their delegation to participate in the reporting process as the Indian government, which invited the National Movement of Working Children.<sup>82</sup> Three children from the organisation participated: Ratnakar, a 12 year-old cowherd; Jeyashankar, 14 year-old farm worker; and Girish, 16, who operates an automobile workshop; accompanied by three adult interpreters.<sup>83</sup>

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<sup>78</sup>Chapter Five, s.3.2 discusses tools.

<sup>79</sup>See Chapter Two.

<sup>80</sup>See for example: The International Save the Children Alliance Working Group on the CRC (1996), *Monitoring the Convention on the Rights of the Child at the National Level: The Experiences of Some National Coalitions*.

<sup>81</sup>Other examples are presented later in the thesis. Kilkelly (1997), *Small Voices: Vital Rights, Submission to the United Nations Committee on the Rights of the Child*.

<sup>82</sup>Ratna (2003), “For the children, by the children”, *India Together*. See the report developed by children: India National Movement of Working Children (2003), “The Alternate Report, submitted to the Committee on the Rights of the Child, July 2003”.

<sup>83</sup>India National Movement of Working Children, “Research: Child labourers participate in the Geneva meet”.



The inclusion of children in the process is valuable however, as Chapter Two discusses, their involvement on the government delegation should not implicate their responsibility for government measures or inaction.<sup>84</sup>

In contrast, informal monitoring does not necessarily respond to an international legal obligation and can include such activities as statistics collection and school assessments. While these informal efforts are not directly part of the formal international monitoring process, they may contribute their descriptions of the child rights situation. For example, if an organisation produces a report about the status of child health in the country, which is not designed for submission to international monitors, then it is a product of informal monitoring and supports follow-up to child rights obligations.<sup>85</sup> Hence, both formal and informal monitoring facilitate understanding of the situation of child rights in a jurisdiction. To illustrate, a national child rights coalition may formally report to the UN Committee about the CRC's status and another NGO may produce a domestic report without submitting it to the UN Committee.<sup>86</sup> As informal monitoring results may also contribute to formal monitoring, a link can be established between domestic NGOs and community-based organisations to feed into international child rights monitoring,<sup>87</sup> although a conundrum exists about how to address the need to improve rights awareness and monitoring in an accessible manner to the community. The thesis analyses both formal and informal monitoring of child rights.

### 3.0 A CHILD RIGHTS-BASED APPROACH OUTLINED

While states have been the traditional actors in the international legal sphere, understanding of the scope and nature of participation has expanded to include international organisations,

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<sup>84</sup>David, Secretary to the UNCRC (2001), Personal communication with author, 11 May.

<sup>85</sup>See for example, Canadian Institute of Child Health (2000), *The Health of Canada's Children*.

<sup>86</sup>In the UK for example, the Children's Rights Alliance of England produced an alternative report for the UN Committee and the Children's Select Committee, supported by Save the Children UK and the Foreign & Commonwealth Office, produced a report and held a hearing with the government and others about CRC status; Child Rights Alliance of England (2002), *State of Children's Rights In England: A report on the implementation of the Convention on the Rights of the Child*; and Save the Children UK (2000), *Children's Select Committee: Report on Children's Rights*.

<sup>87</sup>See examples in Chapter Four, s.2.7.



multinational corporations, NGOs and individuals.<sup>88</sup> Indeed, article 55(c) of the UN Charter outlines a fundamental international goal will be "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 states all UN members "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." In addition, article 71 provides that the Economic and Social Council (ECOSOC) may consult with relevant NGOs, international organisations and if the concerned UN member state agrees, national organisations. The main goal of human rights is to recognize the inherent dignity and equal and inalienable rights of every member of the human family.<sup>89</sup> A human rights-based approach aims to implement rights as provided in international law by empowering people to make due claims from others in support of their rights. As Chinkin explains, the approach affirms the legitimacy of claims, allowing "progress to be measured against objective standards and upholds the state's international obligations."<sup>90</sup> A human rights approach to international development has gained currency in recent years,<sup>91</sup> influencing methods and reasons for programming.<sup>92</sup> Rights evoke efforts, as Jebb explained in 1922, along "constructive rather than charitable lines."<sup>93</sup> Accordingly, rights demand and inspire approaches, which are neither reflections of generosity, nor vagaries of political whims, resource constraints or other excuses. Rights should involve responses to established legal obligations and duties to human beings.

A human rights approach inspires the development of a coterminous child rights-based approach. Due to the international legal recognition and universal relevance, international child rights law offers a vision and reflects a standard to be understood and respected in all efforts related to, and involving children. A relevant measure of their significance is whether

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<sup>88</sup>Higgins (1994), *Problems & Process: International Law and How We Use It*, 50.

<sup>89</sup>*Universal Declaration of Human Rights*, UN Doc. A/RES/217 A (III), 10 December 1948, preamble.

<sup>90</sup>Chinkin (2001), *Gender Mainstreaming in Legal and Constitutional Affairs*, 25.

<sup>91</sup>See for example UNDP (note 74 above).

<sup>92</sup>See for example, UNICEF (2001), *Operationalization for ESAR of UNICEF Global Guidelines for Human Rights Programming*. Donor countries including Sweden, Canada and the UK, are examining targeted development assistance to best support human rights; Save the Children (2001), *An Introduction to Child Rights Programming: Concept and application*, 12.

<sup>93</sup>Jebb, cited in Save the Children, *ibid.*, 5.



child rights monitoring reflects and respects the rights of the child. Consequently, the thesis explores national and international monitoring and the relevance of a child rights-based approach.

A child rights-based approach centres efforts, including monitoring, around the child and respects the indivisibility of the child's rights. For example, CRC article 4 identifies "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention." While the CRC's limited monitoring provisions in articles 43-45 do not specifically require attention to child rights in the process, in order to respect child rights, monitoring should not be discriminatory, serve the child's best interests and maximum "survival and development of the child", and the child has the right to express his or her views in "all matters affecting the child".<sup>94</sup> Thus, comprehensive implementation of rights includes the monitoring process. Further, this approach may contribute to the Committee's function enunciated in CRC article 45(d) to "make suggestions and general recommendations" about monitoring. Although non-binding, the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms<sup>95</sup> enunciates various obligations and duties to support rights. Articles 1 and 2(1) provide respectively: everyone's right, "individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels"; and that "Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields..." All conditions should include monitoring. But as discussed above, child rights inadequately influence monitoring of the child's situation.

A child rights-based approach is guided by the CRC's four guiding principles identified by the UNCRC: non-discrimination (article 2), best interests (article 3), maximum survival and

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<sup>94</sup>CRC articles 2, 3, 6 and 12(1). See further below.

<sup>95</sup>1998, UN Doc. A/RES/53/144.



development (article 6), and views of the child (article 12).<sup>96</sup> The four CRC general principles are essential to implementation but should also support monitoring. A child rights-based approach to monitoring will respect these principles.

CRC Article 2 outlines that the respect of the child's rights shall not be hindered by discrimination or distinction of any kind, including race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability or birth. Hence, each and every child is considered regardless of his/her background or circumstances to prevent excluding or marginalising anyone. In addition, suitable monitoring recognises the importance of group identity to which a child might ascribe. It does not simply consider the individual, but also assesses the needs of a child as a member of a particular group(s) such as part of a rural population, member of an Aboriginal nation, or HIV/AIDS status. Data will be appropriately disaggregated in order to highlight discrimination. The second principle of best interests of the child shall be "a primary consideration" in all actions concerning children, ensuring protection and care and all appropriate measures.<sup>97</sup> This article is a complex concept,<sup>98</sup> but essentially requires that all activity including monitoring, centres around the child who must be considered as an independent person, who is not ignored or excluded in all matters that concern her/him. An infant aged 0-2 years can provide information through behaviour and level of development before communicating in more traditional interactions with others and play of infants to preschool children can also be useful.<sup>99</sup> Studies show that by the age of nine, children's language use indicates feelings of involvement and the attitude of a participatory approach to society and its challenges.<sup>100</sup> Stevens notes that the child's use of the term "'ours' is definitive, applicable to country, government, debts, money and problems, the use of 'us' and 'we' almost tribal in its

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<sup>96</sup>Essential to a child rights-based approach, the general principles (articles 12, 2, 3, and 6 respectively) are discussed below. UNCRC (1991), *Guidelines for initial reports of States Parties*, UN Doc. CRC/C/58, III.

<sup>97</sup>Article 3.

<sup>98</sup>See generally Alston (1994), *The Best Interests of the Child: Reconciling Culture and Human Rights*.

<sup>99</sup>Garbarino et al. (1990), *What Children Can Tell Us*, 23, 154.

<sup>100</sup>Stevens, cited in Berman (1997), *Children's Social Consciousness and the Development of Social Responsibility*, 31.



assumption of close-knit interests.”<sup>101</sup> Child abduction cases for example, demonstrate judicial support for the child’s capacity from the age of nine years to express an opinion about his/her residence.<sup>102</sup> Adolescents are increasingly involved in their societies and articulate opinions, thoughts and feelings about their rights and those of other children.<sup>103</sup> Children’s different abilities pose a challenge as Garbarino et al. explain: “Because children are constantly changing, and because our cultural expectations, theories, and research data change, adults frequently under- or overestimate children’s abilities and knowledge.”<sup>104</sup> Nevertheless, throughout childhood, children often implicitly express their attitudes and judgments about society and the world around them.<sup>105</sup> They are capable of monitoring themselves and with appropriate accommodation, contributing to the monitoring efforts of others. Consequently, it is in the child’s best interests to involve him/her in the monitoring of his/her rights. For example, child impact assessments by decision-makers to respect the best interests of the child,<sup>106</sup> involve systematic follow-up and evaluation including children’s opportunity to express opinions to gauge the actual effect of decision-making.<sup>107</sup> Such efforts confirm the importance and relevance of children as subjects of their rights, which has not yet been thoroughly explored or realised in relation to monitoring.

The third principle of the child’s right to life and the requirement that states parties ensure maximum survival and development<sup>108</sup> requires support of child health as well as developing capacities and abilities, which underpin other rights. The concept should be reflected in

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<sup>101</sup>Ibid.

<sup>102</sup>While judicial support for child views is inconsistently available across jurisdictions, it remains significant. Cases include: *Re S (A Minor)* where an Australian court held that a 12½ year-old girl was mature enough to object to return (Court of Appeal 18 May 1990); and the English Court of Appeal accepted the objections of a nine year-old with the mental age of 12 (*Re S (A Minor)* 7 July 1992 Court of Appeal (Civil Division), LJ Balcombe); in Van Bueren on behalf of The British Institute of Human Rights, et al. (1993), *The Best Interests of the Child - International Co-operation on Child Abduction*, 19.

<sup>103</sup>Berman (note 100 above), 38.

<sup>104</sup>Garbarino et al. (note 99 above), 10.

<sup>105</sup>Berman (note 100 above), 39.

<sup>106</sup>Hammarberg, “Preface”, in Sylwander (2001), *Child Impact Assessments: Swedish Experience of Child Impact Analyses as a tool for implementing the UN Convention on the Rights of the Child*, 7.

<sup>107</sup>Sylwander, *ibid.*, 25.

<sup>108</sup>Article 6.



monitoring, allowing for the measurement and assessment of improving or worsening survival opportunities, health or development over time due to various influences including growth and maturity, enhanced or deteriorating educational measures, economic downturns or natural disasters to name a few. Lastly, in all matters concerning the child “who is capable of forming his or her own views the right to express those views freely,” which shall be given “due weight in accordance with the age and maturity of the child.” Further, the child shall have “the opportunity to be heard in any judicial and administrative proceedings affecting” him/her.<sup>109</sup> This principle is understood to establish the child’s right to participate and calls for the establishment of mechanisms to promote and support his/her capacity of participation.<sup>110</sup> It does not mean that the child should have more influence or authority in the monitoring process, but rather requires that their views should be considered along with others. Although an essential CRC principle, the implications of this particular child right for monitoring have not yet been widely explored or incorporated.

Although the child's right to participate and its benefits are gaining increasing recognition in the discourse,<sup>111</sup> conventional approaches to monitoring generally considered an “adult” concern or pursuit, do not provide roles for children because attitudes and established practices do not support child participation. Flekkøy affirms “the capacities of children have clearly been under-estimated.”<sup>112</sup> Adults’ prejudices and misperceptions of children, their roles and capabilities must be challenged. It should be noted that such undervaluing of their abilities is largely restricted to their right to participate and be heard, but not in terms of meeting the demand for labour and sexual exploitation. The thesis considers the right and general role of the child, regardless of age, to participate in monitoring processes. Some may believe that children cannot participate as they are simply too young or have nothing to offer. Despite child capacities, Prout and James note “almost all political, education, legal and administrative processes have profound effects on children, but they have little or no

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<sup>109</sup>Article 12.

<sup>110</sup>Santos Pais (1997), “The Convention on the Rights of the Child”. *Manual on Human Rights Reporting*. UN (ed.), 427-428.

<sup>111</sup>See examples: UN (2000), *Emerging issues for children in the twenty-first century*, UN Doc.A/AC.256/3-E/ICEF/2000/13, 12-16; UN (1999), *The future global agenda for children—imperatives for the twenty-first century*, E/ICEF/1999/10, 6-7.

<sup>112</sup>Flekkoy (note 26 above), 61.



influence over them.”<sup>113</sup> Children are similarly ignored in most monitoring processes. Obstacles may include limited awareness of monitoring, adult restrictions, and different interpretations of, or criteria to assess participation where women and children may be regularly excluded from “participatory” exercises for example.<sup>114</sup> However, CRC articles 42 and 12 demand otherwise: the former article requires children to know about their rights, and the latter provides that children have the right to express their opinions, which are to be given due weight.<sup>115</sup> Consequently, it is consistent to consider how children interpret and evaluate their rights, which in turn enhances their understanding as well as adults’ understanding of the rights. Children have the right and need to be informed about their rights and the obligation to monitor and have the opportunity to define the parameters of their involvement and if they choose, determine what is important about each of their rights and in assessing compliance. Promotion of participation will respect child rights and should result with enhanced accurate data and assessment, contribute to child development and that of the community.<sup>116</sup> Wintersberger stresses: “Therefore, children’s experience should not be neglected as an indispensable resource in the monitoring process at community level.”<sup>117</sup> Child engagement can and should be advanced however, at local, national and international levels. Participation also supports the engagement of vulnerable groups, broadening understanding of the constraints that exist in the legal system and society and encouraging the allocation of appropriate support for involvement if they choose. Engagement is not necessarily unrestricted because “Taking children’s autonomy seriously also means recognising the limits of that autonomy.”<sup>118</sup> Children are researchers in various ways: in school and carrying out their school projects; through adult-driven research projects; and

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<sup>113</sup>Prout & James (1997), “A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems”. *Constructing and Reconstructing Childhood*. James & Prout (eds.), 29.

<sup>114</sup>See Roche (2000), “Impact assessment: seeing the wood *and* the trees.” 10 *Development in Practice*, 543-555.

<sup>115</sup>The right to express opinions is understood to establish participatory rights for children; Santos Pais (note 110 above), 426-427.

<sup>116</sup>For discussion of child participation, see Hart (note 24 above).

<sup>117</sup>Wintersberger, ‘Preface’, in Ben-Arieh et al. (note 5 above), xiv.

<sup>118</sup>Brems (2002), “Children’s Rights and Universality.” *Developmental and Autonomy Rights of Children*. Willems (ed.), 28.



child-initiated and directed projects.<sup>119</sup> Child involvement in adult research requires conducive conditions that encourage children to take responsibility;<sup>120</sup> while child-led research reflects varying circumstances, objectives and children involved.

Children may participate in monitoring through the expansion of traditional approaches and processes. Younger as well as older children can contribute to those receptive to their perspectives.<sup>121</sup> As subjects of monitoring, children at different stages of maturity can contribute in various ways reflecting their developing mental, physical, emotional, and intellectual states and abilities.<sup>122</sup>

A child rights-based approach centres around the child, acknowledging monitoring cannot be adequately carried out without the child's perspective, priorities and concerns, which may differ from the adults.<sup>123</sup> Children should speak for themselves about their situation individually as well as aggregately.<sup>124</sup> In centring monitoring around the child and engaging him/her in the process with a child rights approach, rights will be respected and results should have improved accuracy and relevance.

Where milestones are often used to assess child development, a rights-based approach however, should not gauge every child by such markers as each child is unique: her/his capacities and maturity cannot be defined exclusively by age as CRC a. 12 recognises. Children who have experienced war, live in extreme poverty, younger children, and/or those with special needs as examples, will likely have different needs or express their views than other children. Rather than defining them as "failures" because the categorization system does not reflect their circumstances, weaknesses in such a universal "one-size fits all"

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<sup>119</sup>Alderson (2000), "Children as Researchers: The Effects of Participation Rights on Research Methodology". *Research with Children*. Christensen & James (eds.), 244-5.

<sup>120</sup>Theis (1998), "Participatory research on child labour in Vietnam". *Stepping Forward: Children and young people's participation in the development process*. Johnson et al. (eds.), 85.

<sup>121</sup>See generally Alderson (2000), *Young children's rights*.

<sup>122</sup>Garbarino et al. (note 99 above), 9.

<sup>123</sup>Participants in focus groups consistently raised this point.

<sup>124</sup>See further Qvortrup (1997), "A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard" & "Postscript". *Constructing and Reconstructing Childhood*, James & Prout (eds.).



approach must be acknowledged. Hence, children should be involved in ways that reflect and respect their capacities not simply their years of age as per CRC article 12. Creative approaches, including technological advances and use of media, should be pursued to elicit views and other data from each child to support understanding of his/her rights.

In addition to the four CRC general principles, other CRC articles including evolving capacities (a. 5) and others relevant to particular areas under consideration should be incorporated on a case by case basis. Thus, the CRC usefully guides the development and realisation of monitoring efforts for child rights for a child rights-based approach. The approach ensures the child's rights are respected in the process but also retains flexibility in order to accommodate children across contexts and situations.

#### 4.0 APPROACH OF THIS THESIS

In ascertaining the situation of child rights, it is submitted that monitors, whether international, regional or domestic, inadequately consider the demands of child rights upon the process. In practice, monitors tend to focus on specific issues or priorities or follow established procedures without questioning them in order to achieve an end-result and fulfil their mandate or responsibilities. In contrast, the Inter-American Court of Human Rights recognises child rights “require a dynamic interpretation...and one that addresses the needs of the child as a true legal person, and not just as an object of protection.”<sup>125</sup> Most monitors however, rarely examine the nature and scope of their procedures or the influence or significance of child rights upon the process. Monitoring does not simply concern determining the status of rights. To respect the legal standards, implementation of these rights is necessary and should also improve the process.

The thesis title may appear duplicated, rather it denotes the reflective nature of the thesis in addressing questions about the monitoring of child rights as well as exploring a child rights-based approach. This chapter presented a definition of monitoring and a description of a child rights-based approach. As a subject of legal investigation, the thesis then addresses several questions. How do international and national monitoring efforts respect child rights?

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<sup>125</sup>*Advisory Opinion OC-17/2002 of August 28, 2002, requested by the Inter-American Commission on Human Rights: Legal Status and Human Rights of the Child, OAS Doc. OEA/Ser.L/V/II.117 Doc.1 rev.1, 428, para.28.*



How has the monitoring of international conferences supported child rights? Further, how do different countries monitor? Then, analysis is presented about how monitors interpret and execute monitoring and the challenges posed by different monitoring approaches. Finally, what are the challenges and existing contributions to a child rights-based approach to monitoring? Lessons learned are highlighted throughout and the necessity of advancing monitoring at international, national and local levels is promoted. Since there has only been a limited number of investigations on the subject, the thesis contributes to the academic literature about monitoring. It will likely have relevance beyond child rights due to exploration of the nature and scope of monitoring, the activities and lacunae at the international and national levels, and the roles, approaches, and significance of various actors who support implementation of international human rights law.<sup>126</sup>

As the methodology (Thesis Appendix B) details, the research process involved various data sources. To supplement available information about international and regional actors concerned with children, a questionnaire was developed (Thesis Appendix C) and distributed to ascertain the nature and scope of activities. Interviews with experts were conducted throughout the research process. These contributions may not necessarily reflect the official position of the respondent's institution or agency but procedural data are considered accurate. These results indicate general approaches to and concerns in their activities, illuminating understanding of children and their rights. In addition, fifty children in South Africa, Canada and England from ages 7 to 17<sup>127</sup> participated in focus groups to discuss monitoring.<sup>128</sup> Participants were not necessarily representative of all children, but their contributions usefully illustrate some children's perspectives about monitoring. No formal College process exists to review research ethics, a concern since children, legal minors, were involved. Consequently, a research proposal for the focus groups was submitted and approved by the North East London Health Authority (NELHA) Research Ethics Sub-Committee. Its authority however, was limited to the London-based focus group. The procedure had both restricted jurisdiction and relevance to an international non-medical research study, posing

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<sup>126</sup>For example, the UN Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities had its fifth session in January-February 2005 (see UN Doc. A/AC.265/2005/2) with a sixth session planned for August 2005.

<sup>127</sup>Participants were under the age of 18 to respect the definition of a child in CRC a.1.

<sup>128</sup>See Thesis Appendix A: Research Methodology.



a disincentive to such participatory initiatives. Although there were no difficulties with the conduct of the focus groups, in the age of globalisation, an ethics approval procedure should be developed at the University or College.<sup>129</sup> Such research endeavours are useful as evidenced by the children's valuable knowledge, views and recommendations, which are incorporated throughout the thesis, identified by gender, hometown, and first initials of their first names to protect their privacy.<sup>130</sup>

Attention to rights monitoring is largely limited to the treaty body system,<sup>131</sup> which is only one dimension of the overall system. Moreover, it is commonly assumed that child rights monitoring is exclusively defined by the CRC reporting procedure,<sup>132</sup> which is only one of several monitoring procedures.<sup>133</sup> In addition to states and international and regional agencies that monitor,<sup>134</sup> the role and contributions of international and national civil society in human rights are increasingly recognised.<sup>135</sup> CRC article 45 for instance provides for other actors including UN specialized agencies and “other competent bodies”. The thesis considers a range of actors and procedures at international and national levels.

As a legal examination of monitoring children's rights, some issues should be noted. It assumes the valuable role of child rights in international law and does not discuss the

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<sup>129</sup>Research ethics committees are generally institutionally based.

<sup>130</sup>If the same first initial occurs more than once in a focus group session, the first letter of child's chosen pseudonym is added to distinguish the participant.

<sup>131</sup>Many examples include: the initial (1989) and final (1997) reports on *enhancing the long-term effectiveness of the UN human rights treaty system, by the independent expert, Mr. Philip Alston*, UN Docs.A/44/668 and E/CN.4/1997/74 respectively; the 2004 *report of the sixteenth meeting of chairpersons*, UN Doc.A/59/254; UN (2004), *Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties*, UN Doc.HRI/MC/2004/3; UN (2003), *Review of Recent Developments Related to the Work of Treaty Bodies*, UN Doc. HRI/MC/2003/2. Also see: Alston & Crawford (eds.) (2000), *The Future of UN Human Rights Treaty Monitoring*; and Bayefsky (note 16 above).

<sup>132</sup>See Appendix B.

<sup>133</sup>See Chapter Two.

<sup>134</sup>See UN (ed.) (1997), *Manual on Human Rights Reporting* UN Doc.HR/PUB/91/1(Rev. 1); and Szasz (ed.) (1999), *Administrative and expert monitoring of international treaties*, Part I.

<sup>135</sup>For example, see An-Na'im (1999), “Expanding the Limits of Imagination: Human Rights from a Participatory Approach to New Multilateralism”. *Innovation in Multilateralism*. Schechter (ed.), 205-222.



philosophy of children's rights, both of which have already been discussed.<sup>136</sup> While recommendations to improve monitoring procedures are generally valuable,<sup>137</sup> the thesis does not focus upon procedural concerns. In contrast, the thesis aims to contribute towards understanding the requirements and obligations of child rights upon monitoring children's rights. The thesis considers "children's rights" or the "rights of the child" interchangeably and generally as outlined in many international instruments and standards, but the focus is on the CRC, the primary international binding instrument for the rights of the child. Humanitarian law and private law may be applicable since both are separate areas as well as overlap with child rights, but the emphasis is specifically child rights and the countries in the cases studies reflect that. Discussion relies on the CRC's definition of children to include all those under the age of 18 years.<sup>138</sup> In general, the thesis emphasises overall monitoring processes for child rights with specific examples as appropriate, rather than particular thematic concerns. Although some technical issues are considered, the thesis does not focus upon such measurement issues as statistical analysis due to their inappropriateness in a legal investigation.

## 5.0 OUTLINE OF CHAPTERS

The thesis is divided into six chapters to analyse: child rights monitoring in international law, for global conference outcome and national case studies; and approaches to monitoring. Draft proposed guidelines are developed as appropriate throughout the thesis to support a child rights-based approach to monitoring.

Chapter Two examines the actors involved in monitoring the international law on the rights of the child. As affirmed in the Vienna Declaration and Programme of Action, the UN system, international organizations, non-governmental organizations (NGOs), national institutions and the media are all responsible for supporting human rights at the national,

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<sup>136</sup>See examples: Alston et al. (eds.) (1992), *Children, Rights and the Law*, which includes Eekelaar (1992), "The Importance of Thinking that Children Have Rights", 221; Van Bueren (note 9 above), Chapter 1; and Franklin (ed.) (1986), *The Rights of Children*.

<sup>137</sup>See for example Bayefsky (note 16 above).

<sup>138</sup>The CRC article 1 definition applies to every human being "unless, under the law applicable to the child, majority is attained earlier".



regional and international levels.<sup>139</sup> How do monitors consider the child? The complexities of the process are explored where the UNCRC has an important, but limited role because, as former Committee member Hammarberg describes, it can “only serve as a monitor of the monitors.”<sup>140</sup> In addition to the Committee and governments, many other entities are involved including *inter alia* regional institutions, for example the European Court on Human Rights, and the private sector.

The third chapter examines the monitoring processes for global conference agreements pertinent to children’s rights. Beginning with the 1990 Education for All Forum and the World Summit for Children,<sup>141</sup> the international community has gathered at fora to examine and commit to action on various issues affecting children’s rights. Progress towards the goals established in these agreements has been, and continues to be monitored. The chapter explores the relationship between conferences and international law and assesses the assumptions, principles and processes of monitoring. From a child rights’ perspective, what are the advantages and disadvantages of assessing these technically non-binding instruments from conferences? Is the movement towards political summits advancing or weakening children’s rights?

Chapter Four studies child rights monitoring in two countries as selected situational analyses to assess national interpretations of this responsibility and impact. For example, how are States parties’ reports to the UNCRC developed and followed up? Is monitoring due to international commitments and/or legal obligations or are other factors more pertinent? Interaction between various monitors at international, national and sub-national levels is examined. Moreover, useful lessons learned and challenges are identified and analysed.

Monitoring efforts in Canada and in South Africa are discussed.<sup>142</sup> Active in the CRC

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<sup>139</sup>*Vienna Declaration and Programme of Action* (note 35 above), operative paras. 4,5, 13, 36, 39.

<sup>140</sup>Hammarberg (1993), *The Work of the Expert Committee on the Rights of the Child*. Address at the Consultation on the role of the UN and NGOs in the Implementation of the CRC.

<sup>141</sup>*World Declaration on Education for All and Framework for Action Meeting Basic Learning Needs*, 1990, World Conference on Education for All; and *World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration*, 1990, World Summit for Children, CF/WSC/1990/WS-001.

<sup>142</sup>Chapter Four describes national case study selection criteria.



drafting and a co-initiator and co-host of the World Summit, the industrialised state of Canada has historically promoted children's rights internationally. The UN Committee considered Canada's initial report in 1995 and the second report in 2003. In response to the Committee's concern about the lack of a permanent monitoring mechanism,<sup>143</sup> the federal government has supported NGOs to develop CRC monitoring techniques.<sup>144</sup> Canada also actively promoted child rights during preparations for, and at the 2002 UN Special Session on Children. There are innovative approaches and difficult problems including the division of responsibilities due to federalism affecting monitoring. As a country in transition, South Africa's legacy of apartheid is giving way to a developing culture of human rights. For example, in addition to other rights in the 1996 Constitution, section 28 specifically incorporates children's rights including the child's right to a name and nationality, to family care or parental care or to appropriate alternative care, to be protected from maltreatment, neglect, abuse or degradation.<sup>145</sup> South Africa has adopted several pieces of legislation in support of children, human rights training projects, and the establishment of a committee, involving government and civil society, to identify, coordinate and evaluate programmes and prepare CRC reports.<sup>146</sup> Yet the country faces many challenges in implementing and monitoring children's rights including limited financial resources, pernicious levels of poverty, violence and many AIDS orphans. In Concluding Observations adopted in 2000, the UN Committee recommended further coordination between departments responsible for CRC implementation and review of the data collection system in order to incorporate all CRC areas.<sup>147</sup> Monitoring mechanisms and actors and successes as well as efforts to overcome difficulties are assessed in both case studies. The selection of these two countries demonstrate experiences of both developed and developing country contexts and allow the identification of lessons learned about child rights monitoring for Commonwealth states.

The fifth chapter discusses issues of and approaches to monitoring including the choice of

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<sup>143</sup>UNCRC (1995), *Concluding observations of the Committee on the Rights of the Child: Canada*, UN Doc.CRC/C/15/Add. 37.

<sup>144</sup>See Chapter Four.

<sup>145</sup>*Constitution of the Republic of South Africa 1996*, Act 108 of 1996.

<sup>146</sup>South Africa National Programme of Action Steering Committee (1997), *Initial Country Report-South Africa: Convention on the Rights of the Child*.

<sup>147</sup>UNCRC (2000), *Concluding observations of the Committee on the Rights of the Child: South Africa*, UN Doc.CRC/C/15/Add. 122.



tools including indicators and benchmarks. Analysis explores assumptions and principles of monitors and the impact of different approaches upon monitoring. Chapter Six elaborates the general status of a child rights-based approach to monitoring children's rights. A compilation of the proposed theoretical guidelines developed throughout the thesis are appended to contribute to better practices among international and national monitors to develop and acquire a child rights-based approach.

## 6.0 CONCLUSION

While the international community has been concerned about child rights for most of the twentieth century, the process of monitoring these rights only advanced with the 1989 adoption of the CRC. The establishment of the UNCRC was an important step forward as it was the first treaty monitor exclusively dedicated to children's rights.<sup>148</sup> As years have since passed, it is appropriate to analyse monitoring but to date, inadequate attention has been dedicated to the subject. Consequently, the role and influence of child rights in the monitoring process has not yet been examined. Given the extent and scope of the substantive development of the law on the rights of the child in recent years, the lack of understanding and analysis of monitoring and the efforts and roles of various actors is quite surprising. Monitoring continues to challenge many, if not all, actors and remains an enduring task and responsibility that requires analysis. As a contribution to academic literature, this thesis redresses these lacunae and advances understanding of the implications and significance of monitoring and a child rights-based approach.

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<sup>148</sup>There is now a Committee to monitor the African Charter on the Rights and Welfare of the Child; see further Chapter Two, s.4.0.

## CHAPTER TWO:

### THE MONITORING OF CHILDREN'S RIGHTS IN INTERNATIONAL LAW

*Pacta sunt servanda* outlines: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>1</sup> Respect of treaties is expected from states parties since it is "in the common interest."<sup>2</sup> States should avoid rights violations according to Schachter, because they "are rarely cost-free even to powerful States."<sup>3</sup> If states do not take their obligations seriously, they are violating the international norms as well as contravening established moral standards. Aust explains the breach of state party obligations as "an international wrong."<sup>4</sup> Violations of children's rights not only affect the children themselves and their families, they adversely influence the health of communities and country as well as potentially affect international reputation and relations with other states. At the international level, significant violations could: sacrifice a state's eligibility of international assistance due to questions about political leadership; subject it to various international monitoring procedures; or penalise it through the application of bilateral and multilateral pressure including sanctions. However, remedies are not clearly determined due to the absence of: an international judicial authority in the human rights sphere; and a coherent or consistent approach to remedies for state violations.<sup>5</sup> But, as children tend to be less visible and more vulnerable than adults in society, violations are more likely to be hidden with less costly consequences for the state. Hence, monitoring is essential to highlight the full situation and to advance child rights. While many violations continue throughout the world,

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<sup>1</sup>Vienna Convention on the Law of Treaties (1969), UN Doc.A/CONF. 39/26, adopted 23 May 1969, in force 27 Jan. 1980, a.26.

<sup>2</sup>For example, see objections of The Netherlands to the reservations of Malaysia, Qatar, and Singapore, which repeatedly state: "It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties." UN (1999), *Reservations, Declarations, and Objections relating to the Convention on the Rights of the Child*, UN doc.CRC/C./2/Rev.8, 66.

<sup>3</sup>Schachter (2000), "International Law in Theory and Practice". *International Human Rights in Context: Law, Politics, Morals*. Steiner & Alston (eds.), 132.

<sup>4</sup>Remedies include one or more of the following: "cessation of the wrongful conduct; assurances and guarantees of non-repetition; satisfaction; restitution in kind; and compensation;" Aust (2000), *Modern Treaty Law and Practice*, 300-1.

<sup>5</sup>See Shelton (1999), *Remedies in International Human Rights Law*.



attention to child rights and their status increase over time.<sup>6</sup>

The role of states to implement international human rights law necessitates international monitoring bodies.<sup>7</sup> To assess the status of the international law on the rights of the child, many international, and regional institutions and actors monitor through such procedures as reporting, communications, and thematic or country mechanisms. The essential question to consider is: how do monitors of international child rights law respect child rights in their efforts and procedures? In other words, are child rights adequately considered in the monitoring process? The chapter first identifies actors at different levels to discuss including UN Charter, treaty bodies, and institutions, regional organisations, international and domestic courts, civil society, and relevant national actors. Then, the status of a child rights-based approach to monitoring the international law of child rights is analysed.

## 1.0 UN TREATY BODIES

General human rights treaty monitors lack a child rights approach and child rights-specific monitors are plagued with difficulties including capacity and limited resources. While reporting is valuable, it is insufficient in itself because reports usually contain generalised data. Additional authority to carry out communications procedures or other monitoring is very important but communications have restricted relevance for children and is an avenue for future reform. While most major UN human rights treaties are not child-specific (except the CRC),<sup>8</sup> they are applicable to every individual with some specific provisions for children but the following discussion concentrates on treaty bodies with most significance for the international child rights law: the Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (UNCESCR), and particularly, the Committee on the

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<sup>6</sup>Such attention is evident in the expansion of international legal norms and recent international conferences in such areas as *inter alia* child labour, sexual exploitation, environmental health, and war-affected children.

<sup>7</sup>Sohn (1984), "Human Rights: Their Implementation and Supervision by the United Nations". *Human Rights in International Law: Legal and Policy Issues*. Meron (ed.), 395.

<sup>8</sup>The treaty bodies and their respective instruments are the Human Rights Committee (ICCPR), Committee on Economic, Social and Cultural Rights (CESCR does not provide for the committee as reports were to be examined by ECOSOC (Article 16(2)) but a committee has since been established.), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee on the Elimination of Racial Discrimination, the Committee against Torture (CAT), the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMWTF), and the Committee on the Rights of the Child (CRC).



## Rights of the Child (UNCRC).

The UNCRC issues General Comments on Convention articles or general recommendations, however to date, it has not been very prolific due to lack of capacity. After years of operation, the Committee only released its first General Comment<sup>9</sup> in February 2001, preceded by recommendations on the administration of juvenile justice in 1999 and on children in armed conflict in 1998.<sup>10</sup> The General Comment calls for a “comprehensive plan of action to promote and monitor realization of the objectives listed in article 29(1)” (paragraph 23); the UNCESCR also requests an education national plan, but unlike the UNCRC, enunciates participatory development.<sup>11</sup> The UNCRC identifies a review procedure to respond to complaints about education (paragraph 25) and requests states parties identify and explain existing review opportunities. This positive requirement furthers the accountability of government measures and would empower individuals domestically, thereby contributing to states’ understanding of implementation and monitoring obligations.<sup>12</sup> Despite some weaknesses, the first Comment succeeds in advancing CRC understanding and illuminates expectations for monitoring.

As of July 2005, the Committee has produced five subsequent General Comments,<sup>13</sup> which are generally useful but additional General Comments and recommendations will support CRC interpretation and assist monitoring. The General Comments illustrate the Committee’s priorities and concerns to date and have supported understanding to some degree. For instance, the General Comment on national human rights institutions is welcome, particularly due to their nebulous position in relation to the UNCRC and need for definition,<sup>14</sup> and the

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<sup>9</sup>UNCRC (2001), CRC General Comment 1, UN Doc.CRC/GC/2001/1.

<sup>10</sup>UNCRC (1999), Recommendation adopted by the Committee on the administration of juvenile justice, UN Doc.CRC/C/90.

<sup>11</sup>UNCESCR (1999), General Comment 11, UN Doc.E/C.12/1999/4, paras.3, 8. See below.

<sup>12</sup>UNCRC (1996), *Guidelines for Periodic Reports*, UN Doc. CRC/C/58.

<sup>13</sup>UNCRC (2002, 2003, 2005), CRC General Comment 2, UN Doc.CRC/GC/2002/2; CRC General Comment 3, UN Doc.CRC/GC/2003/3; CRC General Comment 4, UN Doc. CRC/GC/2003/4; CRC General Comment 5, UN Doc.CRC/GC/2003/5; and CRC General Comment 6, UN Doc.CRC/GC/2005/6.

<sup>14</sup>McClain, Commissioner, South African Human Rights Commission (2002), Interview with the author, Johannesburg: 10 July; and Parker-Loewen, Children's Advocate, Saskatchewan (2003), Interview with author, Saskatoon: 15 January. See Chapter Four.



emphasis upon national remedies specifically for children.<sup>15</sup> Although important, states parties often neglect such mechanisms and procedural concerns for children.<sup>16</sup> The General Comments related to HIV/AIDS, adolescent health, the aims of education, and unaccompanied and separated children illuminate relevant provisions. While the Committee acknowledges the likelihood of future elaboration, the General Comment on general measures of implementation is not particularly helpful, simply itemising various expectations without adequate explanation.<sup>17</sup> For example, despite the significance of reservations, the Committee only briefly discusses them, reiterating the need to review and withdraw them, similar to the treatment in concluding observations, and identifies concern about incompatible reservations. The rationale for concern and the significance of reservations are not considered.<sup>18</sup> The lacklustre text will not motivate state party action on the issue and hence, the opportunity is missed.

The UNCRC has referred to both binding and non-binding instruments without firmly distinguishing between them. For example, it acknowledges the relevancy of the Beijing Rules, the Riyadh Guidelines and the Rules for the Protection of Juveniles<sup>19</sup> to CRC implementation with respect to juvenile justice.<sup>20</sup> But the set of rules generally consider a juvenile to be any person under the age of 18 years<sup>21</sup> while CRC article 1 defines a child as every human being up to 18 “unless, under the law applicable to the child, majority is attained earlier.” Despite the CRC limitation, the Committee may expand the definition of the child in juvenile justice cases to extend protection to those who have reached majority

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<sup>15</sup>UNCRC (2002), CRC General Comment 2 (note 13 above).

<sup>16</sup>For example, the lacuna is evidenced by the limited number of national institutions for children in states parties; see s.5.2 below.

<sup>17</sup>UNCRC (2003), CRC General Comment 5 (note 13 above).

<sup>18</sup>Ibid., paras.13-16.

<sup>19</sup>*United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, 1985, UN Doc.A/40/33; *United Nations Guidelines for the Prevention of Juvenile Delinquency*, 1990, UN Doc.A/45/112; and *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, 1990, UN Doc.A/45/113.

<sup>20</sup>UNCRC (note 10 above).

<sup>21</sup>However, the Guidelines for the Prevention of Juvenile Delinquency do not specify an age. Cappelaere suggests the CRC definition of those up to 18 “can be considered to be the first target group of the Guidelines”; Cappelaere (1995), *International Standards Concerning the Rights of the Child - United Nations Guidelines for the Prevention of Juvenile Delinquency: Riyadh Guidelines, Introduction*, 3.



under age 18. The UNCRC should not expand its authority in this way but no state has objected to this development.<sup>22</sup> Moreover, despite the article 1 qualification, the Committee does not acknowledge restrictions based on the age of majority in relation to those younger than 18 in a recent General Comment where states parties are reminded "that data collection needs to extend over the whole period of childhood, up to 18 years of age."<sup>23</sup> Recently however, the UNCRC acknowledged the age of majority limitation in its 2005 General Comment.<sup>24</sup> The Committee is not consistently reflecting international child rights law, thereby impeding a child rights approach.

Due to monitoring challenges, various efforts attempt to enhance Committee capacity. The Plan of Action for the Implementation of the Convention in place since 1997, has provided more resources for the Committee, including a support team,<sup>25</sup> thereby increasing productivity by 50% per session: the examination of reports has increased from six to nine states parties and enhanced capacity to follow up recommendations.<sup>26</sup> A Global Plan of Action for all committees was launched in 2000 but implementation requires additional and consistent state support.<sup>27</sup> The UNCRC adopted a recommendation in 2002 to redress the backlog of reports as an "exceptional measure taken for one time only" with two solutions.<sup>28</sup> First, it will remind states parties in concluding observations about the deadline for the next report. Second, it will as appropriate either: request advance submission of the subsequent report if due within a year after the Committee's consideration; or if the subsequent report is due at the time of Committee's report consideration and the third report is due two or more years thereafter, the state party is requested to submit combined second and third reports at the time of the latter requirement.<sup>29</sup> At the time of writing, it is too early to assess this

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<sup>22</sup>UN (note 2 above),

<sup>23</sup>UNCRC, CRC General Comment 5 (note 13 above), para.48.

<sup>24</sup>UNCRC, CRC General Comment 6 (note 13 above), s.III.

<sup>25</sup>For details, see UN (1999), *Plan of Action to strengthen the implementation of the Convention on the Rights of the Child*, UN Doc.CRC/SP/26.

<sup>26</sup>David, Secretary to the UNCRC (2001), Personal communication with author, 11 May.

<sup>27</sup>UN (2001), *Strengthening Support to and Enhancing the Effectiveness of the Treaty Bodies*, UN Doc.HRI/MC/2001/Misc.2, para.6.

<sup>28</sup>UNCRC (2002), Recommendation adopted by the Committee on methods of work, UN Doc.CRC/C/114.

<sup>29</sup>*Ibid.*, paras.1, 2(i), (ii).



recommendation's impact. In addition, the CRC article 43(2) to enlarge the Committee from ten to 18 members<sup>30</sup> entered into force on 18 November 2002 to improve capacity; and the UN General Assembly approved the Committee to sit in two chambers in January 2006.<sup>31</sup> The enhanced support reflects the priority of child rights and the operational demands from an unparalleled number of states parties to the CRC but capacity limitations impede uniform, comprehensive monitoring and a child rights approach.

In accordance with the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>32</sup> the UNCESCR briefly acknowledges children in several General Comments,<sup>33</sup> but elaborates child issues in only three. General Comment 11 requires states parties to submit plans of action for free, compulsory primary education, following participatory engagement, and the plans must include “some means of periodically reviewing progress and ensuring accountability”.<sup>34</sup> General Comment 13 affirms *inter alia*: “States parties must closely monitor education”; corporal punishment is contrary to human dignity; and states parties are obliged to have a “transparent and effective system” to monitor educational objectives as per article 13(1).<sup>35</sup> The UNCESCR usefully elaborates the child's right to health in General Comment 14, acknowledging issues related to infants, children and adolescents, non-discrimination between boys and girls, harmful traditional practices, the CRC's provision of access to essential health services, and child-friendly information.<sup>36</sup> Monitoring is also acknowledged in State party requirement to adopt a national strategy, developed in a participatory manner, that includes policies, indicators and benchmarks, and access to

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<sup>30</sup>UN (1995), UN Doc. A/RES/50/155, 21 December 1995.

<sup>31</sup>UN (2004), UN Doc. A/RES/59/261, 23 December 2004.

<sup>32</sup>In addition to ICESCR's references to families (Articles 7(a)(ii), 10(1), 10(2), 11, 13(3)), children are specifically identified as requiring “special measures of protection and assistance” without discrimination, including protection from economic and social exploitation, access to education and state support for the right to highest standards of health (Articles 10(3), 12, 13). ICESCR, A/RES/2200 A (XXI), 16 December 1966.

<sup>33</sup>UNCESCR (1989, 1990, 1991, 1994, 1997, 1999 respectively): General Comment 1 UN Doc. E/1989/22, General Comment 3 UN Doc.E/1991/23, General Comment 4 UN Doc. E/1992/23, General Comment 5 UN Doc.E/1995/22, General Comment 7 UN Doc. E/1998/22, annex IV, General Comment 8 UN Doc.E/1998/22, General Comment 11 (note 11 above), General Comment 12 UN Doc.E/C.12/1999/5), General Comment 13 UN Doc.E/C.12/1999/10.

<sup>34</sup>UNCESCR, (note 11 above), paras.3 and 8.

<sup>35</sup>UNCESCR, General Comment 13 (note 33 above), paras.37, 41 and 49.

<sup>36</sup>UNCESCR (2000), General Comment 14, UN Doc.HRI/GEN/1/Rev.6.



effective remedies, to ensure the right to health for all.<sup>37</sup> These positions are consistent with the UNCRC, potentially reinforcing or duplicating CRC reporting obligations. But, the UNCESCR generally reflects a limited perception of children as passive and needing protection in interpreting them as a “disadvantaged group”,<sup>38</sup> rather than recognising capacities and contributions of children to their families, society, and monitoring. The limited view of children in the legal text, resulting with the restricted role of children as objects in monitoring.

The HRC regularly considers children in exemplifying the scope of the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> The HRC has issued two General Comments on articles 7 and 24 particularly significant for child rights monitoring. Under article 7, the right to dignity and integrity of the person includes prohibition of corporal punishment in educational and medical institutions, and protection from medical or scientific experimentation without free consent.<sup>40</sup> These two issues are important because the former position highlights an issue of UNCRC concern<sup>41</sup> and the latter confirmation was a lacuna from CRC drafting.<sup>42</sup> Thus, the HRC appears to appreciate child rights. The second General Comment on article 24 affirms every child has the right, without discrimination, to receive protection from the family and state.<sup>43</sup> The Committee finds this obligation is often underestimated and state party reports “supply inadequate information on the way in which

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<sup>37</sup>Ibid., paras.53-59.

<sup>38</sup>The Committee's position reflects Covenant articles 10(1) and (3), which acknowledges “dependent children” and provides for “special measures of protection and assistance” respectively. Its interpretation is evident in: UNCESCR, General Comment 4 (note 33 above), para.8(e).

<sup>39</sup>In addition to articles that pertain to families and parents, specific ICCPR provisions for children pertain to juvenile justice, legal matters including birth registration, name, nationality and guardianship and the right to protection; ICCPR articles 6(5), 10(2(b) and 10(3), 14(1)(4), 23(4), 24(1), (2), (3). HRC General Comments 6 (1982), 7 (1982- replaced by No. 20), 8 (1982), 9 (1982), 13 (1984), 15 (1986), 17 (1989), 18 (1989), 19 (1990), 20 (1992), 21 (1992), 22 (1993), 27 (1999), all in UN (2000), UN Doc. HRI/GEN/1/Rev.4, 81-135.

<sup>40</sup>HRC, General Comment 20, *ibid.*, paras.5, 7 respectively.

<sup>41</sup>However, as discussed earlier, the former Special Rapporteur on Torture believes the HRC's position differs from the UNCRC. UNCRC (note 9 above), para.8.

<sup>42</sup>Cantwell (1992), “The Origins, Development and Significance of the United Nations Convention on the Rights of the Child” *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*. Detrick (ed.), 27.

<sup>43</sup>HRC, General Comment 17 (note 39 above).



children are afforded enjoyment of their right to a special protection.”<sup>44</sup> This attention to child rights is welcome however, it is not necessarily child rights-based. While the Committee outlines “as individuals, children benefit from all of the civil rights” in the Covenant,<sup>45</sup> Van Bueren highlights its approach may not consider children to have the Covenant’s political rights; or consistently and thoroughly examine the best interests of the child in all actions concerning children.<sup>46</sup> Indeed, when treaties are not child-specific, monitors may minimise the scope of child rights to protection as the HRC did. For example, the HRC’s General Comment 17, entitled “the rights of the child”, focussing on such issues as protection from discrimination and birth registration and a name, in accordance with the specific ICCPR provision, but does not explore other ICCPR rights in relation to the child or the child’s agency or capacities in relation to political rights.<sup>47</sup> *Hendriks v. The Netherlands*<sup>48</sup> concerning parental conflict about child access, is also revealing. First, the European Commission majority found *inter alia* no violation of the applicant’s right to family life under ECHR article 8 since the domestic courts refused access “in the interest of the child”. Predating the CRC, the decision emphasised the child’s protection and well-being, reflecting a limited understanding of the child to justify the father’s lack of access.<sup>49</sup> The Commission’s dissenting minority noted the courts denied access to prevent tension in the new family created by the mother’s remarriage and did not consider the child’s interests in a dynamic manner regarding contact with his father. Subsequently, the HRC<sup>50</sup> supported the priority of the child’s interests and noted “there was no finding of inappropriate behaviour on the part of the author.” However, the HRC did not address whether the decision had been made in the best interests of the child, rather the importance of amending legislation to include the right of access except in exceptional circumstances was highlighted.<sup>51</sup> The

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<sup>44</sup>Ibid.

<sup>45</sup>Ibid.

<sup>46</sup>Van Bueren (1998), *The International Law on the Rights of the Child*, 385-386.

<sup>47</sup>HRC, General Comment 17, (note 39 above),

<sup>48</sup>*Hendriks v. The Netherlands*, Application No. 9427/78, 29 Eur.Comm. H.R. 1982, 5.

<sup>49</sup>For example, the majority affirmed the law’s function in protecting children “as much as possible from harm and mental suffering resulting, for instance, from a divorce of their parents.” Ibid., 18, para.120.

<sup>50</sup>*Hendriks v. The Netherlands*, Communication No. 201/1985 (30 December 1985), UN Doc. CCPR/C/33/D/201/1985.

<sup>51</sup>Van Bueren (note 46 above), 76-77.



reluctance of the European Commission majority and the HRC to examine the requirements of best interests reveals apprehension in monitoring child rights. More recently however, the HRC enunciates in General Comment No. 28 *inter alia* decisions regarding custody of children should be the same for men and women, which reflects growing appreciation of the roles of both parents to the child.<sup>52</sup> Even with greater awareness of child rights, the general efforts of the HRC and UNCESCR illustrate the important role of specific child rights monitoring and the necessity of refuting calls to consolidate all treaty reporting requirements into one report.<sup>53</sup>

The present treaty body system has been seriously criticised with calls for reform.<sup>54</sup> A 1998 UN Secretary-General report<sup>55</sup> acknowledges various problems faced by treaty bodies including lack of universal ratification, significantly overdue reports, problems related to documentation, development and use of electronic databases, public information, and advisory services.<sup>56</sup> Additional challenges include: poor quality reports; states' failure to follow relevant reporting guidelines; and overlapping reporting obligations overburdening states. Woll concluded developing countries particularly find reporting difficult and onerous due to the absence of comprehensive information about children, data collection mechanisms, and limited information about and experience in developing reports.<sup>57</sup> But if national authorities placed more emphasis on monitoring rather than military spending for instance, the issues regarding national priorities and resource allocation could be more easily resolved. Indonesia and Egypt as examples, have been criticised by the UNCRC for allocating too few resources to social expenditures in their national budgets and violating the CRC.<sup>58</sup> International bodies are well placed to assess the rights situation as there is no

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<sup>52</sup>HRC (2000), General Comment 28, UN Doc. HRI/GEN/1/Rev.6, para.26.

<sup>53</sup>See below.

<sup>54</sup>See generally: Alston & Crawford (Eds.) (2000), *The Future of UN Human Rights Treaty Monitoring*; and Bayefsky (2001), *The UN Human Rights Treaty System: Universality at the Crossroads*.

<sup>55</sup>UN (1998), *Effective Functioning of Bodies Established Pursuant to the United Nations Human Rights Instruments*, UN Doc.E/CN.4/1998/85.

<sup>56</sup>*Ibid.*, sections A-G.

<sup>57</sup>Woll (2000), "Reporting to the UN Committee on the Rights of the Child: A catalyst for domestic debate and policy change?" 8 *The International Journal of Children's Rights*, 72.

<sup>58</sup>Van Bueren (1999), "Alleviating Poverty Through the Constitutional Court". 15 *South African Journal on Human Rights*, 63.



conflict of powers that exist for domestic courts in distinguishing between the inability or unwillingness of the government to implement and support human rights.<sup>59</sup> States parties can request technical assistance from the OHCHR<sup>60</sup> or bilateral assistance. States parties must fulfil their obligations to provide comprehensive, accurate data. Moreover, Woll found the reporting process is generally limited to a closed government effort, without wider public participation and children themselves are rarely involved.<sup>61</sup> But, international bodies can engage these actors. Reporting can serve more than, as Alston describes, “as an isolated event absorbing precious bureaucratic resources solely to satisfy the requirements of an international body”,<sup>62</sup> when it facilitates participatory research to ascertain and address the rights situation.

Self-reporting by states parties has been criticised due to perceived imbalances of information and concerns about government willingness and capacity. To maintain its international reputation, avoid domestic debate, and/or due to lack of data, a state may describe its situation in a cursory, positive manner rather than present an honest account about challenges. States may merely list such measures as regulations or programmes as evidence of “progress made” without analysis of impact. The government’s need to justify expenses and demonstrate commitment likely encourages this approach. Moreover, states’ objectives may not be limited to the fulfilment of the reporting obligation. While states parties generally rely on the UNCRC reporting categories when detailing CRC implementation for example,<sup>63</sup> they may include additional information irrelevant to implementation. For instance, in addition to the CRC obligation, objectives of the second Canadian federal report<sup>64</sup> included: serving as a reference for NGOs and other countries about levels of

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<sup>59</sup>Ibid., 53.

<sup>60</sup>See below.

<sup>61</sup>Woll (note 57 above), 72.

<sup>62</sup>Alston (1997), “The Purposes of Reporting”. *Manual on Human Rights Reporting*. United Nations (ed.), 20

<sup>63</sup>The eight reporting categories are: General Measures of Implementation (CRC articles 4, 42, 44(para.6)); Definition of the Child (article 1); General Principles (article 2, 3, 6, 12); Civil Rights and Freedoms (articles 7, 8, 13, 14, 15, 16, 17, 37(a)); Family Environment and Alternative Care (articles 5, 9, 10, 11, 18 (paras.1, 2), 19, 20, 21, 25, 27, 39); Basic Health and Welfare (articles 6 (para.2), 18 (para.3), 23, 24, 26 and 27 (paras.1-3); Education, Health and Leisure (articles 28, 29, 31); and Special Protection Measures (articles 22, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40); UNCRC (note 12 above).

<sup>64</sup>Canada (2001), *Convention on the Rights of the Child: Second report of Canada, covering the period January 1993 to December 1997*.



government responsibility and various programs; and highlighting initiatives that interested other states, which saved costs due to UN report translation into multiple languages.<sup>65</sup> Such motivations may further justify the value of, and resources required for reporting above and beyond the legal obligation. Consequently, state party monitoring can meet government objectives and international child rights obligations. But report details should not be superfluous to avoid overburdening of the monitor.

Delays with report processing is a significant issue. Although the CRC requires regular monitoring,<sup>66</sup> the delays between report submission and UNCRC consideration may lessen the commitment of states parties to produce good quality reports as the information contained therein may be out-of-date when assessed. The Committee has a backlog of approximately two years with initial reports waiting for examination, aggravated in 1997 when periodic reports became due.<sup>67</sup> Bayefsky argues the general reporting scheme is no longer sufficient since it was created “when effective international monitoring was neither intended nor achievable.”<sup>68</sup> She favours consolidation of all reporting requirements to treaty bodies into one report.<sup>69</sup> If considering general human rights, the proposal has some merit since most countries have difficulty meeting reporting obligations and it may lead to mainstreaming of human rights issues across treaties.<sup>70</sup> However, it would diffuse attention given to children’s rights, which are specifically enunciated in international law and require special attention and consideration by child rights experts. It would also exacerbate the minimising of children’s voices in the process. The difficulty is also evident in Donnelly and Howard's proposal of a theoretical framework to simplify monitoring, due to the breadth of rights in general

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<sup>65</sup>Menard, Counsel, Human Rights Law Section, Department of Justice Canada (as she then was) (2003), Interview with author, Ottawa: 7 January.

<sup>66</sup>CRC a. 44(1)(a), (b).

<sup>67</sup>Lansdown (2000), “The Reporting Process Under the Convention on the Rights of the Child”. *The Future of UN Human Rights Treaty Monitoring*. Alston and Crawford (eds.), 125. The Committee recently addressed this issue with a recommendation on methods of work.

<sup>68</sup>Bayefsky (note 54 above), 1.

<sup>69</sup>Fontani also supports the proposal; Fontani, Programme Specialist, Division for the Promotion of Quality Education, UNESCO (2001), *Response to the “Questionnaire on Activities Related to Children”* (See Thesis Appendix C), 27 July.

<sup>70</sup>Over the past ten years, states parties have to produce reports on average every 1.1 years with report consideration every 1.2 years; Bayefsky (note 54 above), 25.



international instruments, by reducing human rights into four categories: survival, membership, protection and empowerment rights.<sup>71</sup> Their categories mirror the CRC's four general principles, albeit with slightly different terminology. While the proposal contributes to understanding, it reflects a limited child rights appreciation, since for example, the authors include the right to education as an empowerment right due to the role an educated child can play later in life. Thus, they support the limited perspective that the child must be educated for the benefits accrued in the future rather than affirming the child's right to learn and develop for itself in addition to his/her current contributions to society and processes. This proposal also raises the same concerns as with Bayefsky's proposal to consolidate UN treaty reporting. Additional instruments, including CEDAW and CRC, developed because general treaties inadequately protect such populations as women and children. Accordingly, child rights demand and require separate monitoring consideration. Even without consolidation, Himes et al. already find country reporting on resource issues to the UNCRC already "generally extremely weak in both scope and quality..."<sup>72</sup> Hence, a consolidated general rights report would only further compromise child rights information with little or no incentive to improve resource details or other areas.

Unless children are specifically invited by drafters, which remains unusual, they are unlikely to have any role or influence on the state party report. There are, however, some exceptions. Costa Rica is conducting a social rights "audit" to monitor the CRC involving children and communities.<sup>73</sup> NGOs have included children in their alternative reports.<sup>74</sup> Child engagement should be advanced since it is a CRC general principle. Further, the UNCRC has criticised a diverse group of states parties for the lack of or weak child participation including Hungary, Democratic People's Republic of Korea, Fiji, Kuwait, Sweden, Honduras and Benin while Austria, Honduras and Mali were complimented on their efforts and Thailand's engagement of children in the dialogue about its report was specifically

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<sup>71</sup>Their work was completed before the UN's CRC adoption but there is no mention of its genesis or potential implications; Donnelly and Howard (1988), "Assessing National Human Rights Performance: A Theoretical Framework". 10 *Human Rights Quarterly*, 214-248.

<sup>72</sup>Himes et al. (2000), "Resource Mobilization for the Realization of Children's Rights". *Children's rights: Turning Principles into Practice*. Petré and Himes (eds.), 156.

<sup>73</sup>UNICEF (2000), *Who monitors implementation of the Convention?*

<sup>74</sup>For example, see Canadian Coalition for the Rights of Children (1999), *How does Canada measure up?* Also see Chapter Five.



recognised.<sup>75</sup> Child participation in monitoring should improve.<sup>76</sup>

While the inter-state procedure has extremely limited relevance at the UN,<sup>77</sup> the individual and collective communications procedure is important in elevating the individual to participate in the international legal system, traditionally the preserve of states. The approach deviates from traditional international law as a state and its citizen(s) are treated on equal terms and thus was initially highly objectionable to states.<sup>78</sup> Individual and collective communications have been significant under ICCPR;<sup>79</sup> although utilised very infrequently under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>80</sup> and Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>81</sup> The UNCESCR does not have authority to consider individual complaints due to contemporary understanding that the procedure was inappropriate due to the nature of the rights and their implementation. There is now however, a draft optional protocol to provide for individual communications.<sup>82</sup> The individual procedure has been adopted as an optional protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW),<sup>83</sup> but it also remains unavailable under the CRC. While the

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<sup>75</sup>Hungary, para.28; Republic of Korea, para.77; Fiji, para.120; Kuwait, para.383; Sweden, para.548; Honduras, para.675; Benin, para.697; Thailand, paras.399, 402; Austria, para.433; Honduras, para.675; and Mali, para.982 in Concluding Observations in: UN (2000), *Report of the Committee on the Rights of the Child*, UN Doc.A/55/41.

<sup>76</sup>See further below.

<sup>77</sup>This type of communication has never been brought under the UN treaty procedures; Steiner & Alston (2000), *International Human Rights in Context: Law, Politics, Morals*, 776.

<sup>78</sup>Dimitrijevic (1993), "The Monitoring of Human Rights and the Prevention of Human Rights Violations Through Reporting Procedures". *Monitoring Human Rights in Europe*. Bloed et al. (eds.), 3.

<sup>79</sup>See further Steiner (2000), "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?" *The Future of UN Human Rights Treaty Monitoring*. Alston & Crawford (eds.), 15-53.

<sup>80</sup>*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, UN Doc.A/RES/39/46.

<sup>81</sup>Steiner & Alston (note 77 above), 776.

<sup>82</sup>The proposal remains on the agenda of the UN Commission on Human Rights. See further Arambulo (1999), *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*.

<sup>83</sup>*Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 1999, UN Doc.A/RES/54/4.



avenue does not prevent rights violations,<sup>84</sup> and tends to be time-consuming, it facilitates consideration of specific violations at the international level, which may have been inadequately resolved or not addressed at the domestic level. While avenues are currently available to children within the jurisdiction of state parties to regional rights treaties,<sup>85</sup> the optional protocols to the ICCPR<sup>86</sup> and CEDAW, as Van Bueren describes, others are “out in the cold.”<sup>87</sup> Further, children from states parties that have ratified or acceded to ICCPR communications do not usually use the avenue due to such reasons as confusion about location and length of the process, lack of oral hearings, and lack of Committee visibility.<sup>88</sup> The limited use of this procedure highlights the importance of a route specifically for children with appropriate support but this CRC lacuna and the absence of assistance for children question international respect of the child.<sup>89</sup>

Consequently, some commentators assert CRC provisions for state complaints or the right of individual petition are required,<sup>90</sup> where the former avenue has less influence and importance than the latter. Although the NGO group participating in CRC drafting promoted an individual communications procedure, the proposal was not supported by states or

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<sup>84</sup>Van Bueren (note 46 above), 378.

<sup>85</sup>The African Children's Charter is slow to operationalise. See s.4.0 below.

<sup>86</sup>*Optional Protocol to the International Covenant on Civil and Political Rights*, 1966, A/RES/2200 A (XXI).

<sup>87</sup>Van Bueren (1993), “The Struggle for Empowerment: the Emerging Civil and Political Rights of Children”. *Selected Essays on International Children's Rights*. Defence for Children International (ed.), 53.

<sup>88</sup>Van Bueren (note 46 above), 386. A rare exception is *Thomas v. Jamaica* where the HRC found violation of ICCPR article 10(2) and (3) because 17 year-old Thomas had been sentenced and kept among adult prisoners since he was 15, and article 24 was violated for failing to provide special protection to the child. The HRC stated an effective remedy involved institutionalisation in a juvenile facility separated from adults, and compensation. HRC (1998), *Communication No. 800/1998: Thomas v. Jamaica*. UN Doc.CCPR/C/65/D/800/1998, paras.6.5-7, 8. Thanks to Yalden for highlighting this case; Yalden, member of the UN HRC (as he then was) (2003), Personal communication with author, 10 February.

<sup>89</sup>See below.

<sup>90</sup>Kilkelly, in Fortin (1998), *Children's Rights and the Developing Law*, 47; and Van Bueren (note 46 above), 411.



formally discussed.<sup>91</sup> While Van Boven questions the child's capacity to use the procedure,<sup>92</sup> White outlines the failure to extend the right to complain to an impartial body "undermines the completeness of these rights."<sup>93</sup> Himes supports a different approach, arguing the Committee's problems necessitate avoiding direct involvement in actual violations; instead, it should direct its time and attention to the "*processes of monitoring, especially in terms of the quality of the formal reporting process and 'monitoring the monitors.'*"<sup>94</sup> This suggestion is unsurprising as it would technically simplify and streamline the process but, it does not advance substantive children's rights. The Committee can focus on international processes but it must also attend to child rights progress. While UN Charter violations receive much publicity, violations of human rights treaties require effective procedures.<sup>95</sup> Acceptance of the individual communications procedure reflects evolving understanding of international rights obligations and ongoing development of monitoring. Indeed, several international instruments and mechanisms affirm victims of violations should have access to effective judicial or appropriate remedies at both the national and international levels.<sup>96</sup> As the ICCPR and the CEDAW have optional protocols, UN members accept the role and value of the communications procedure and reform instruments accordingly. If such remedies are available to adults under other international instruments, it is illogical and discriminatory that children continue to be excluded from this route in the CRC and reflect a rights-based approach to monitoring. Reform measures must address issues of children's capacity and support to be effective.<sup>97</sup> In the meantime, the UNCRC should follow the UNESCR's innovative lead, which despite the procedure's absence has developed new mechanisms, broadly interpreted treaty provisions and developed rules of procedures to improve

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<sup>91</sup>Ad-hoc NGO Group, in Van Bueren (note 46 above), 389. See further about the Group in Price Cohen (1990), "The Role of Non-governmental Organizations in the Drafting of the Convention on the Rights of the Child". 12 *Human Rights Quarterly* 137.

<sup>92</sup>van Boven (2002), "Children's Rights are Human Rights; Current Issues and Developments." *Developmental and Autonomy Rights of Children*, Willems (ed.), 18. See Chapter Six.

<sup>93</sup>White (1996), *The Law of International Organisations*, 229.

<sup>94</sup>Original italics, Himes (1996), "Monitoring Children's Rights: Cutting Through the Confusion and Planning for Effective Action". *Monitoring Children's Rights*. Verhellen (ed.), 124.

<sup>95</sup>Sohn (note 7 above), 391.

<sup>96</sup>See for example: article 8 of the Universal Declaration on Human Rights, UN Doc. A/RES/217 A (III), 10 December 1948; article 2(3) of ICCPR; and the UNCESCR, General Comment 12 (note 33 above), para.32.

<sup>97</sup>See further discussion about communications in Chapter Six, s.2.5.



monitoring, including participatory engagement.<sup>98</sup>

The inquiry procedure is another valuable monitoring avenue as two optional protocols provide. If states parties agree to the Committee's competency, articles 8 and 9 of the optional protocol to CEDAW allow investigation of "grave or systematic violations by a State Party". Once in force, the optional protocol to CAT will facilitate regular visits by independent international and national actors to institutionalised persons to prevent inappropriate treatment.<sup>99</sup> Although not child-specific, these avenues could prove useful to monitoring by improving accountability and greater understanding of human rights situations. In addition to reacting, such investigations illuminate the reality and therefore may prevent further violations. If effective, this innovation could become child-specific through CRC amendment facilitating UNCRC's child rights expertise to assess violations.

UN treaty bodies follow legally and politically acceptable procedures. Although many monitors and procedures exist, there is heavy reliance on reporting, which may impede utilisation of other avenues. Moreover, as the requirement of producing reports for different monitors, including the AU and the UNCRC, poses a significant challenge,<sup>100</sup> reporting may lack creativity and the process and results are restricted. Heavy demands led to the consolidation proposal<sup>101</sup> however, this recommendation would restrict child rights consideration and results. Reform must benefit, not compromise child rights. Generally, child rights are inconsistently recognised and supported by general rights monitors. Although the UNCRC is participatory and has received valuable support to expand capacity, the Committee is plagued with difficulties including limited resources and the absence of an individual communications procedure, which obstruct a child rights-based approach.

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<sup>98</sup>Leckie (2000), "The UN Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform". *The Future of UN Human Rights Treaty Monitoring*. Alston and Crawford (eds.), 129-144.

<sup>99</sup>*Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc.A/57/199, 18 December 2002, a.1. As of 29 June 2005, there are 10 states parties and 37 signatories; OHCHR (2005), *Ratifications and Reservations*.

<sup>100</sup>For instance, Clay, Chief, Nutrition Programme Service, Food and Agriculture Organization of the UN (2001), *Response to "Questionnaire on Activities Related to Children"* (See Thesis Appendix C), 2 May.

<sup>101</sup>See Bayefsky discussion above.



## 2.0 UN CHARTER BODIES

Such UN Charter bodies as the General Assembly, Security Council, ECOSOC, and the Commission on Human Rights monitor child rights among other international concerns. As mainly inter-governmental bodies with extremely limited meeting time each year, these institutions consider child rights but may identify and pursue concerns for political reasons, and participants often have limited child rights expertise. Nonetheless, they remain very influential in the international system. Due to their relevance, this section specifically discusses, the General Assembly, Security Council, the Office of the High Commissioner on Human Rights (OHCHR), and thematic monitors.

Specific efforts to promote, raise awareness or advance international child rights standards are follow-up monitoring, involving progress reports, meetings, studies and adopting resolutions to support progress as detailed in declarations, guidelines, rules, and resolutions. While these documents are not traditionally binding international law *per se* as defined by the International Court of Justice,<sup>102</sup> their follow-up generally has a determinative and at least, identifiable effect. For example, the General Assembly receives reports on children's rights from: the UNCRC; the Special Rapporteur on the sale of children, child prostitution and child pornography; and the expert of the Secretary General on the impact of armed conflict on children. These documents, *inter alia*, detail monitoring results and can also lead to responsive action. Its annual adoption of a resolution on the rights of the child<sup>103</sup> and another on the girl child<sup>104</sup> usually reinforces the work of such monitors as thematic actors on the sale of children and on armed conflict, and recommends the extension of their mandates and

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<sup>102</sup>The traditional definition of international law is found in Article 38(1) of the Statute of the International Court of Justice, 26 June 1945, 1 UNTS xvi, which interprets international law in disputes applying:

- a. *international conventions, where general or particular, establishing rules expressly recognized by the contesting states;*
- b. *international custom, as evidence of a general practice accepted as law;*
- c. *the general principles of law recognized by civilized nations;*
- d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

<sup>103</sup>See for example, UN (2000), *The Rights of the Child*, UN Doc.A/RES/55/79.

<sup>104</sup>For example, see UN (2000), *The girl child*, UN Doc.A/RES/54/148.



appropriate resources.<sup>105</sup> Focusing on rights issues, the Commission of Human Rights plays a similar role. These various efforts are hampered if carried out in isolation as reflected by some actors at UN headquarters who refer to themselves as the “New York mafia” indicating their self-perceived detachment and influence.<sup>106</sup> The implications of this label can be avoided if opportunities to coordinate follow-up are pursued by all relevant actors, whether governmental or non-governmental, at national and international levels.

The Security Council has traditionally preoccupied itself with “hard” issues of international peace and security, but its approach now incorporates child rights. In 1999 for the first time, the Security Council adopted a resolution on children in armed conflict to express concern, call upon parties to respect international law, and end child involvement in armed conflict.<sup>107</sup> The Security Council now recognises that the issue of children in armed conflict corresponds to UN Charter article 24(1) mandating “primary responsibility for the maintenance of international peace and security”. The resolution requested the Secretary-General submit a report eleven months later on its implementation. Consequently, the Security Council adopted a follow-up resolution to express grave concern about armed conflict, its contributing factors and effects on the child.<sup>108</sup> Significantly, regional and subregional organisations and arrangements were urged to consider establishing child protection units within their secretariats “including children in the design and implementation” of policies and programmes.<sup>109</sup> In the follow-up Open Debate on Children and Armed Conflict in 2001, a 14 year-old former child soldier, Alhaji Babah Sawaneh, described his experience of being forced into combat and appealed to the Security Council to do all it could to better protect children.<sup>110</sup> The following resolution renewed commitment to the issue, and encouraged

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<sup>105</sup>See UN (2000), *The Rights of the Child*, UN Doc.A/RES/54/149, II paras.1-3 and III paras.1, 2, 5.

<sup>106</sup>Term learned by author in 1999 at UN-New York, speaker to remain anonymous.

<sup>107</sup>UN (1999), *Resolution 1261*, UN Doc.SC/RES/1261.

<sup>108</sup>UN (2000), *Resolution 1314*, UN Doc.SC/RES/1314.

<sup>109</sup>*Ibid.*, para.18(a).

<sup>110</sup>Sawaneh, in UN (2001), *Press Release 7219: Security Council Requests Secretary-General to List Parties to Armed Conflict that Recruit or Use Children*, 4422nd and 4423rd Meetings.



other actors to involve children.<sup>111</sup> Its ongoing efforts on behalf of children is a welcome development.<sup>112</sup> While this body does not have the capacity to comprehensively monitor, its influence is significant in evaluating and ensuring procedural progress by the international community for, and with, war-affected children. The initiative also lends weight to the efforts of other monitors including NGOs. But the Security Council's use of sanctions to achieve objectives in specific UN states has child rights significance as the Secretary-General acknowledges their impact upon vulnerable groups must be assessed.<sup>113</sup> Van Bueren argues where imposing sanctions, Security Council members who are states parties should consider their minimum core obligations under the ICESCR, which are not part of international customary law.<sup>114</sup> The Charter body must make child rights monitoring a consistent priority in all its efforts.

The OHCHR has an important role due to its secretariat duties for treaty bodies (except CEDAW) and the provision of technical advice and assistance to states. But Bayefsky notes its establishment after the current treaty body system have resulted with relationships between OHCHR and the committees that are not as strong as they should be, creating duplication of procedures, little coordination and follow-up.<sup>115</sup> Hence, improvements are continuously needed but successes include the CRC Plan of Action,<sup>116</sup> and greater attention to follow-up. The UN Technical Cooperation Programme in the Field of Human Rights complements but does not substitute national monitoring.<sup>117</sup> Bilateral or regional training on reporting and children's rights for example, often offered to and happily received by states

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<sup>111</sup>UN (2001), *Resolution 1379*, UN Doc.SC/RES/1379, paras.8(e), 13(a)b.

<sup>112</sup>UN (2003), *Resolution 1460*, UN Doc.S/RES/1460; and UN (2004), *Resolution 1539*, UN Doc.S/RES/1539.

<sup>113</sup>UN Doc. A/50/60-S/1995/1 paras.66-76, in Van Bueren (2002), "The Minimum Core Obligations of States Under Article 10(3) of the International Covenant on Economic, Social and Cultural Rights." *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Chapman & Russell (eds.), 158.

<sup>114</sup>Van Bueren, *ibid.*

<sup>115</sup>Some efforts are made including meetings of treaty body chairpersons; see Bayefsky (note 54 above), 1.

<sup>116</sup>See UN (note 25 above).

<sup>117</sup>This point is often reiterated in Secretary-General reports and Commission on Human Rights resolutions; OHCHR (2000), *Technical Cooperation*.





parties responsible for overdue reports, usually has influential results.<sup>118</sup> Child rights are better recognised as a priority. For instance, while OHCHR projects completed in 2000 include only one specifically identifying children's rights out of 20 descriptions, nine out of 41 ongoing projects that year identify this commitment.<sup>119</sup> Activities then include evaluations to assess project impact and develop follow-up plans,<sup>120</sup> recognising monitoring as a process rather than an isolated activity. Thus, the OHCHR has a significant role.

While there are resource and other limitations, country and thematic monitors, including special rapporteurs, independent experts and working groups, highlight issues with varying success largely depending on the individual. For example, the former Special Rapporteur on Education conducted quite good work but carried very few country missions, no investigative work, and did not receive communications.<sup>121</sup> Consequently, some may criticise her findings as more theoretical rather than practically verified. All thematic and country efforts are restricted due to: limited mandates, usually one to three years (possibly renewable); their volunteer basis with little time available (usually several weeks per year); and lack of resources and support. Inadequate resources will unlikely be resolved shortly due to competing demands and outstanding UN member states' dues. Consequently, creativity in overcoming restrictions is essential.

The range of mandates creates overlap among monitors. For example, children in the sex trade is a concern not only of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, but also the UNCRC and the Committee on the Elimination of Discrimination Against Women (UNCEDAW). The call to establish a special

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<sup>118</sup>David (note 26 above).

<sup>119</sup>It is recognised that general projects may have some relevance to children's rights, but less so than targeted activities. The completed project conducted a workshop to revise pertinent legislation in El Salvador. Ongoing projects included: human rights education; a global project on trafficking; national projects in: Somalia; Palestine; the Philippines; and Nicaragua. See OHCHR (2000), *Projects completed in 2000a* and *Ongoing projects in 2000c*.

<sup>120</sup>OHCHR (note 117 above).

<sup>121</sup>Tomaševski, cited by Pare, PhD candidate, QMW, University of London (2002), personal communication with author, 25 January. See forthcoming Ph.D. thesis on the child's right to education and street children.



rapporteur on violence against children<sup>122</sup> would further complicate mandates since violence pertains to the work of several special rapporteurs including torture, violence against women, sale of children and the special representative on armed conflict, not to mention the work of several treaty bodies. The current UN Study on Violence against Children will advance data collection of violence but no indications suggest that arrangements for a Special Rapporteur on Violence if appointed,<sup>123</sup> would be any different than those currently mandated and would unlikely make great monitoring advances. To address challenges posed by mandate overlap, greater coordination is needed to enhance monitoring and to avoid duplication. But some actors, as independent entities, may rather work in a vacuum, rather than collaboratively with others.<sup>124</sup> The mandate limitations adversely affect assessment of the global situation of the issue under consideration, highlighting the importance of other actors and procedures.

Country and thematic actors can achieve moderate success as reactive, rather than preventative monitors, on a case-by-case basis through responses to communications and country missions. Missions are a unique, useful tool because UN experts can go to places where alleged violations take place to assess the situation, meet with high-level officials and conduct confidential interviews.<sup>125</sup> Country and thematic monitors can highlight pertinent issues and raise global awareness and their interpretation of rights may support understanding. For example, the Special Rapporteur on the sale of children, child prostitution and child pornography has studied *inter alia* the underappreciated role of the business sector.<sup>126</sup> The Special Representative of the Secretary-General on Children and

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<sup>122</sup>The November 2001 International Conference on Children, Torture and Other Forms of Violence called for the appointment of a Special Rapporteur to examine individual complaints from children, conduct investigations and engage children, using the following definition: "Violence against children, both girls and boys, encompasses all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, and includes *inter alia*, sexual abuse, harmful traditional practices, trafficking, exploitation, bullying in schools and corporal punishment." World Organisation Against Torture (2001), *Press Release: Adoption of the Tampere Declaration on Children, Torture and Other Forms of Violence*.

<sup>123</sup>The position has not yet been appointed as of July 2005; it would likely not occur until after completion of the UN Study on Violence against Children expected in 2006.

<sup>124</sup>See further below.

<sup>125</sup>Beuze, Assistant to the Special Rapporteur on Torture (2001), *Response to the "Questionnaire on Activities Related to Children"*, (See Thesis Appendix C) 15 June. His response describes the work of Rodley (UK), Special Rapporteur from 1993-2001.

<sup>126</sup>UN Doc.E/CN.4/2001/78, in Philpot, Human Rights Officer, responsible for the mandate of the Special Rapporteur of the Human Rights Commission on the Sale of Children, Child Prostitution and Child Pornography (2001), *Response to "Questionnaire on Activities Related to Children"*, 23 April. Philpot's



Armed Conflict emphasises outreach to war-affected children “as participants and advocates” through special projects and spending time with children’s groups in conflict areas and schools.<sup>127</sup> These monitors can respect child rights in their efforts but they utilise child rights and the CRC to varying degrees. The Office of the Special Representative of the Secretary-General on Children and Armed Conflict highlights lack of information about war-affected children, advocates for action using a CRC framework, urges compliance with UNCRC recommendations.<sup>128</sup> Information sent to states about alleged torture within their jurisdictions for instance, focuses on state responsibility, always referring to relevant international norms - whether binding and non-binding instruments - including the Beijing Rules, Standard Minimum Rules, and the UN Rules for the Protection of Juveniles Deprived of their Liberty.<sup>129</sup> Despite child rights consideration, the CRC has never been a significant tool for the Special Rapporteur on Torture due to “difficult” longstanding lacunae of CRC General Comments.<sup>130</sup> Therefore, the release of several CRC General Comments in recent years should be helpful to a child rights-based approach.

In summary, Charter bodies support child rights monitoring in various ways, which are more indirect than UN treaty bodies. They are largely susceptible to politics and are rarely capable of resolving most child rights issues or situations due to the general focus on political implications.<sup>131</sup> Procedure 1503,<sup>132</sup> involving the Working Group on Communications of the Sub-Commission on the Promotion and Protection of Human Rights however, could be used for mass violations of children’s rights.<sup>133</sup> But, as a confidential procedure, it is not known

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response describes the work of Calcetas-Santos (Philippines), Special Rapporteur from 1994-2001.

<sup>127</sup>UN (2000), *Protection of children affected by armed conflict, note from the Secretary-General, A/55/442*, 26; and Cohn, Programme Officer, Office of the Special Representative of the Secretary General on Children and Armed Conflict (2001), *Response to "Questionnaire on Activities Related to Children"*, 18 May.

<sup>128</sup>UN, *ibid.*, 23.

<sup>129</sup>Beuze (note 25 above).

<sup>130</sup>*Ibid.*

<sup>131</sup>Brownlie (1998), *Principles of Public International Law - Fifth Edition*, 575.

<sup>132</sup>UN (1970), *ECOSOC Resolution 1503 (XLVIII)*.

<sup>133</sup>Van Bueren (note 46 above), 400.



to what extent children have used it. But the Security Council's attention to children in armed conflict is particularly encouraging. Work of the UN's Division for the Advancement of Women (DAW), part of the UN Secretariat for example, raises valuable concerns about the lack of gender perspective of other monitors.<sup>134</sup> Thematic and country monitors may focus attention to specific child rights issues but efforts are restricted to their specific mandate and limitations including their essentially reactive role following wide-scale rights violations.

### 3.0 UN ORGANISATIONS

Various UN bodies including funds, programmes and institutes support monitoring through conferences, reports, surveys, and evaluations where child rights have influenced efforts to varying degrees. This section focuses on Charter bodies: International Labour Organisation (ILO), and the UN Educational, Scientific and Cultural Organisation (UNESCO); and non-Charter bodies: United Nations Children's Fund (UNICEF), UN Environmental Programme (UNEP), and UN High Commissioner for Refugees (UNHCR).

#### 3.1 Charter Bodies

Standard-creating bodies focus on legal frameworks in their monitoring. The ILO uses the CRC as its legal framework to combat and monitor child labour through reporting, communications and follow-up.<sup>135</sup> Its child labour legal standards are monitored through regular government reports<sup>136</sup> and it has ad-hoc capacity to examine non-observance of ratified conventions to further accountability to children,<sup>137</sup> but it has not yet been used to

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<sup>134</sup>Connors, Chief, Women's Rights Unit, UN Division for the Advancement of Women (2001), Personal communication with author, 20 and 26 April.

<sup>135</sup>International Labour Organisation (ILO), *Combatting child labour: The legal framework*.

<sup>136</sup>Convention 138 stipulates that national policies should be developed to abolish child labour through establishing minimum ages for employment; ILO, *Minimum Age Convention* (Convention No. 138), 1973, 26 June 1973, in force 19 June 1976; and Convention 182 prohibits and abolishes employment likely to harm the health, safety or morals of children under the age of 18, aiming to eliminate such practices as child slavery, sexual exploitation, debt bondage, and trafficking; *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* 1999 (Convention 182), Adopted 17 June 1999, in force 19 November 2000.

<sup>137</sup>Noguchi, Senior Legal Officer, Infocus Programme on Child Labour, International Labour Organisation (2001), *Response to "Questionnaire on Activities Related to Children"*, 19 April.



uphold the Convention on Minimum Age.<sup>138</sup> Follow-up to the ILO Declaration on Fundamental Principles and Right to Work includes reporting from states that have not yet ratified the child labour conventions. Cases under Convention No. 29 on forced labour have occasionally included investigations of forced child labour.<sup>139</sup> Article 26 of the ILO's Constitution provides a inter-state communications procedure for complaints of non-observance of any ILO Convention which both have ratified.<sup>140</sup>

UNESCO monitors rights through reporting, inter-state, individual and collective communications procedures and facilitating follow-up. Its Committee on Conventions and Recommendations of the Executive Board considers complaints from individuals, groups and NGOs about alleged rights violations in its fields of competence of education, science, culture and access to information.<sup>141</sup> The mechanism provides another route for complainants, but the effectiveness of the confidential procedure cannot be assessed. A permanent reporting system exists for states parties to the Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms (1974) and the Declaration and Integrated Framework of Action on Education for Peace, Human Rights and Democracy (1995).<sup>142</sup> Article 7 of the Convention against Discrimination in the Field of Education<sup>143</sup> also requires regular states parties reports. A 1962 protocol to establish a Conciliation and Good Offices Commission, in force as of 1968, facilitates settlement of any possible disputes between states parties to the Convention. But access by and relevance of these procedures to children is unclear. The organisation's Youth Coordination Unit guides its work "with and for youth"<sup>144</sup> through communication, participation in events, an internal youth committee and

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<sup>138</sup>*Convention on Minimum Age*; Noguchi, ILO (2001), Personal communication with author, 10 May.

<sup>139</sup>*Ibid.*

<sup>140</sup>*ILO Constitution*, adopted April 1919.

<sup>141</sup>UNESCO, *Complaints concerning violations of human rights in UNESCO's fields of competence*.

<sup>142</sup>Fontani (note 69 above).

<sup>143</sup>*Convention against Discrimination in Education*, adopted 1960, in force May 1962.

<sup>144</sup>UNESCO *Youth Coordination Unit*.



an external Youth Council. But it does not specify the participation of children *per se*, relying on the UN definition of youth: those from 15-24 years of age. According to Fontani, the Unit has made useful contributions to UNESCO and its work;<sup>145</sup> however, it appears that child participation receives only limited emphasis, facilitated through meetings including international children's parliaments. Furthermore, although many staff in UNESCO address children's issues, child rights are not necessarily part of their approach. According to Fontani, "the link" to the CRC "is not automatic and the focus is not necessarily that of a rights-based approach."<sup>146</sup> While UNESCO's range of procedures is impressive, specific attention to, and support of child rights will improve its efforts.

### 3.2 Non-Charter Bodies

UNICEF refers to such international standards as the CRC and CEDAW,<sup>147</sup> yet, a broader child rights-based approach has not yet permeated its work. As typified by some titles of recent publications, including *The State of the World's Children 2002: Leadership*,<sup>148</sup> and the title and goals of the UNICEF-produced outcome from the World Summit for Children,<sup>149</sup> UNICEF generally continues to consider children as objects of concern or charity by others. Rather than implement a child rights approach, activities occur to, rather than with, children. For instance, despite child participation rhetoric and attempts as evidenced at the UN Special Session on Children, children's contributions are not consistently taken into account.<sup>150</sup> The need for better and greater rights implementation in UNICEF activities led to the development of a conceptual framework "...to address the basis for UNICEF's human rights work and, in turn, the expectations that flow from the adoption of a system-wide human

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<sup>145</sup>Fontani (note 69 above).

<sup>146</sup>Ibid.

<sup>147</sup>As examples, see UNICEF (1999), *Human Rights for Children and Women*; and UNICEF (1997), *Children's Rights and Habitat: Working towards child-friendly cities*.

<sup>148</sup>UNICEF (2002), *The State of the World's Children 2002: Leadership*. New York, UNICEF. Other examples from 2001 publication titles include "Ending vitamin A deficiency: A challenge to the world," "Poverty and Children: Lessons of the 90s for Least Developed Countries," "Profiting from Abuse".

<sup>149</sup>*World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration*, CF/WSC/1990/WS-001, 1990.

<sup>150</sup>See Chapter Three, s.2.4.



rights approach."<sup>151</sup> In contrast, the CRC's environmental provisions focus UNEP's work; for example, it is developing a long-term strategy to strengthen young people's involvement in environmental issues.<sup>152</sup>

As the majority of refugees are under age 18, there is much opportunity for UNHCR to address children's rights. Children are defined as a policy priority since they constitute 10 out of 22.3 million refugees and others and at the same time, it acknowledges the different needs of children.<sup>153</sup> It has designated staff, developed a strategy, guidelines, reports, and partnerships with other organisations have resulted with situational analyses, common goals and efforts on separated children in Europe and a training and capacity-building initiative.<sup>154</sup>

UN bodies generally rely on conferences. UNICEF led Special Session on Children preparations but while there were advancements, some children were disappointed in the process<sup>155</sup> because UNICEF's role in the inter-governmental UN system and its bureaucracy, both impede flexibility and innovation. UNEP pursues monitoring through regular consultations through UNEP Global Youth Fora, roundtables with Regional Youth Focal Points and seminars with NGOs, international children's conferences every two years. It has a Junior Board advising on preparations and follow-up and all participants and their schools become part of UNEP's network for children and the environment, which involves over 800 children's groups.<sup>156</sup>

Reports are a popular means of presenting monitoring results. UNICEF annually produces:

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<sup>151</sup>Santos Pais (1999), *A Human Rights Conceptual Framework for UNICEF*.

<sup>152</sup>Oben, Coordinator, Children, Youth and Sport and Environment Programmes, UNEP (2001), *Response to the "Questionnaire on Activities Related to Children"*, 16 May.

<sup>153</sup>UNHCR (2000) *Summary Note on UNHCR's Strategy and Activities concerning Refugee Children and Adolescents*, 1.

<sup>154</sup>UNHCR, *Issues: Children and Adolescents*.

<sup>155</sup>See Chapter Three, s.2.4.

<sup>156</sup>Oben (note 152 above).



*The State of the World's Children* and *The Progress of Nations*.<sup>157</sup> The ILO also publishes various research and progress reports. UNESCO monitors education with an active emphasis on non-discrimination. The *World Education Report* included world education indicators organised in regional and country tables, but the final report was released in 2000.<sup>158</sup> UNESCO comprehensively reviews its efforts in human rights education and special needs education.<sup>159</sup>

Surveys are regularly utilised to determine the child's situation although some efforts better reflect child rights than others. UNIFEM collects data about the girl-child and supported the first major review of global progress since the 1996 Study on the Impact of Armed Conflict on Children in cooperation with UNICEF.<sup>160</sup> The ILO interviews children for surveys and other data collection and involves them in determining direct assistance<sup>161</sup> but, the main unit of ILO's evaluation is families so details of the child's role are unavailable.<sup>162</sup> While the roles of families and caregivers in children's lives should not, and cannot be denied, there are instances where the general approach to people does not serve child rights. If children are not a separate category or requirement of consideration, there is no assurance that they will be accurately depicted or represented. This concern is relevant in relation to the aforementioned examples of: interpretation issues of the HRC and UNCESCR; the reform proposal for consolidated reporting; and ILO-IPEC's monitoring of the household. In contrast, Special Rapporteurs are an exception due to their focus on the rights of individuals. The FAO respondent argues emphasis should be moved from the child to the household,

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<sup>157</sup>As examples, see: UNICEF (2001), *The Progress of Nations*; and UNICEF (2000), *The State of the World's Children 2000*.

<sup>158</sup>Report production has been cancelled.

<sup>159</sup>As part of its human rights education efforts, UNESCO in cooperation with OHCHR researched the status of human rights education programmes and resources through a global survey of governments, inter-governmental organisations, national human rights institutions, National Commissions for UNESCO, and NGOs; OHCHR (2000), *Mid-Term Global Evaluation of the UN Decade for Human Rights Education (1995-2004): Questionnaires*; and UNESCO (1999), *Salamanca Five Years On: A Review of UNESCO Activities in the Light of the Salamanca Statement and Framework for Action*.

<sup>160</sup>UNICEF and UNIFEM (2000), *Press Release: Graca Machel Calls for an End to Impunity for War Crimes Against Children and Women*.

<sup>161</sup>Noguchi (note 137 above).

<sup>162</sup>Noguchi (note 138 above).



evidently questioning the focus on the child, reminiscent of historical arguments or practices against elaborating child rights in international law.<sup>163</sup> While the focus simplifies data collection about the right to food, the adoption of such an approach risks: ignoring the child's situation within the household, which for various reasons may differ from adults; and further marginalising children within or without households. Commitment to children's rights in research approaches should be developed and implemented.

Children are included in UNEP's monitoring of the environment.<sup>164</sup> UNEP conducted a survey of over 26,000 children between eight and 16 years of age from 72 countries in 1994-95 to determine environmental awareness followed by biennial surveys.<sup>165</sup> UNHCR also supports monitoring of refugee children affected by armed conflict for follow-up to the UN Study on the Impact of Armed Conflict on Children (the Machel study).<sup>166</sup> UNICEF has created some opportunities for children to express their views including on its website,<sup>167</sup> but Internet access is still largely restricted thereby limiting this outreach effort's relevance. But, UNICEF has also carried out surveys, including a Latin American regional survey of 12,000 children in 2000; and supported elections of children's rights in developed and developing countries, including Mexico in July 2000 where millions of children registered their opinions about their schools, communities and the state of Mexico's democracy.<sup>168</sup> It remains unclear whether or how the results will affect UNICEF's approach.

Programme and project evaluations are regularly carried out to determine the child's situation and justify UN bodies' efforts. The ILO's Statistical Information and Monitoring Programme on Child Labour (SIMPOC) provides technical assistance to 50 countries to develop reliable qualitative and quantitative statistics on working children at the country, regional and global

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<sup>163</sup>For example, see Van Bueren (note 46 above), chapter one.

<sup>164</sup>Oben (note 152 above).

<sup>165</sup>Macharia (1997), "Partnership for the Future" and "Children's Views on the Environment" Council for Environmental Education (Ed.), *Young Action for the Future*, 22-25, 19-21 respectively.

<sup>166</sup>UNHCR (note 153 above), 1.

<sup>167</sup>UNICEF *Voices of Youth: The Meeting Place*, <[www.unicef.org/voy/meeting/meethome.html](http://www.unicef.org/voy/meeting/meethome.html)> last visited 16 February 2001.

<sup>168</sup>UNICEF (2000), *Press Release: UNICEF supports children's elections in Mexico*.



levels.<sup>169</sup> UNICEF has published 9000 evaluations worldwide from 1991 to 2000.<sup>170</sup> UNHCR staff elaborate objectives, output and impact indicators for the field using an extensive field guide to ensure children's issues are included into programming and research.<sup>171</sup> However, this commitment to rights is challenged with revelations of sexual exploitation of child refugees by aid workers in refugee camps.<sup>172</sup> UNHCR must continue to stress children's rights.

In conclusion, while many UN bodies are concerned with children, very few UN bodies specifically monitor child rights. For example, the UNDP endorses the human rights approach but does not consider children as a separate category in its work.<sup>173</sup> The ILO's focus on the household does not necessarily appreciate the situation, or interconnections among, or dimensions of child rights. In general, the broad authority of Charter organisations to monitor state reports, communications and follow-up is valuable yet their efforts may still improve to support child rights. Some without broad monitoring authority, including UNEP, carry out useful activities.

#### 4.0 REGIONAL ORGANISATIONS

Regional human rights instruments and supervisory procedures are characterised differently from UN instruments.<sup>174</sup> Namely, there are fewer treaties, generally developed through protocols, supervised by consolidated central institutions; and unlike the UN system, more emphasis is placed upon the communications procedure rather than states parties' periodic

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<sup>169</sup>ILO (2000), *Statistical Information and Monitoring Programme on Child Labour*.

<sup>170</sup>Erickson, UNICEF Latin America and Caribbean Regional Office (2001), *Response to "Questionnaire on Activities Related to Children"* (See Thesis Appendix C), 17 July.

<sup>171</sup>Dalen, Junior Professional Officer, UN High Commissioner for Refugees (not an official UNHCR response) (2001), *Response to "Questionnaire on Activities Related to Children"*, April 26.

<sup>172</sup>Gillian & Moszynski (2002), "Agencies hid scandal of aid workers who bought child sex with food". *The Guardian*. London: February 28.

<sup>173</sup>Silovic, Social Development Group, Bureau for Development Policy (2001), *Response to the "Questionnaire on Activities Related to Children"*, 5 June.

<sup>174</sup>Crawford (2000), "The UN Human Rights Treaty System: A System in Crisis?" *The Future of UN Human Rights Treaty Monitoring*. Alston & Crawford (eds.), 2-3.



reports; and the supervisory bodies have judicial or quasi-judicial authority.<sup>175</sup> The instruments and mechanisms of the Organization of American States (OAS), Council of Europe (CoE), and the African Union (AU) place varying emphasis upon children's rights in monitoring. The American system cannot offer much specific legal protection to children. The European system offers increased protection but the main human rights instrument provides only narrow protection. The African system however, has a specific instrument and a designated monitoring mechanism offering much potential.

The American human rights system has reached judgment on children's rights in several cases, the first of which was the "*Baby Boy Case*" where the Inter-American Commission, which makes recommendations rather than binding decisions, decided the American Declaration on the Rights and Duties of Man<sup>176</sup> permitted each state to determine its approach to the right to life in relation to abortion.<sup>177</sup> The second case involved the issue of capital punishment for offences committed by those under 18 years of age. In *Roach and Pinkerton*, the Commission found that state laws of South Carolina and Texas allowing the death penalty violated the Declaration and requested the United States to allow a stay of execution. The state confirmed its position on the issue with its reservation to ICCPR: Roach was electrocuted while Pinkerton received a stay of execution, but later received lethal injection.<sup>178</sup> Subsequently, the Commission concluded in *Domingues*<sup>179</sup> that the Declaration now prohibits the execution of persons convicted for crimes committed under 18 years of age in accordance with international customary law and *jus cogens*. The stronger judgment consolidates the international legal position on the issue and buttresses child rights. More recently, the United States Supreme Court ruled the Eighth and Fourteenth Amendments

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<sup>175</sup>Ibid.

<sup>176</sup>*American Declaration on the Rights and Duties of Man*, signed 2 May 1948 OEA/Ser.L/V.11.71, at 17 (1988), Res.30.

<sup>177</sup>Res. No. 23/81 Case 2141 (USA), March 6, 1981; and Van Bueren (note 46 above), 35.

<sup>178</sup>Case 9647, OAE/SER.L/V/II.69, March 27, 1987.

<sup>179</sup>*Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 913 (2002).



forbid the death penalty for offenders for crimes committed while under the age of 18,<sup>180</sup> reflecting acceptance of changing legal norms related to the punishment, thereby nullifying Domingues' sentence. It would be useful if the International Court of Justice (ICJ) could provide definitive international guidance on this issue however, it is unlikely that a children's rights case will reach it since it is "not a human rights court".<sup>181</sup>

In late 1999, the Inter-American Court decided in *Villagrán Morales et al*<sup>182</sup> that Guatemala had violated the American Convention on Human Rights<sup>183</sup> due to neglect of five children living on the street who were tortured and murdered in 1990 by National Police members. The binding nature of the decision could be a deterrent to other states violating similar rights particularly since the Court has actively followed up the decision.<sup>184</sup> While these decisions demonstrate the Inter-American system actively participates and the value of communications procedure, it offers little protection of child rights since the *Roach and Pinkerton* decision was ignored by national authorities<sup>185</sup> and the *Villagrán Morales* decision followed, rather than preceded, the murder of several children. In light of recent legal developments, the Court issued an advisory opinion on the *legal status and human rights of the child*<sup>186</sup> in late 2002 following the Commission's request to illuminate state obligations and criteria for American Convention articles 8 and 25, which generally provide due process guarantees and right to recourse and remedy. The Court enunciates the definition of the child, best interests,

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<sup>180</sup>*Roper v. Simmons*, 125 S.Ct. 1183 (2005). Legal evolution is evident since only two years prior, the Court rejected the appeal from Hain on death row in Oklahoma following conviction for a crime committed when 17 years-old. *Hain v. Mullin*, 537 U.S. 1173 (2003). Reported below: 287 F.3d 1224. Two hours after the decision, 32 year-old Hain was given lethal injection.

<sup>181</sup>Higgins (1998), "Remedies and the International Court of Justice: An Introduction." *Remedies in International Law: The Institutional Dilemma*. Evans (ed.), 7-8.

<sup>182</sup>*Villagrán Morales et al. Case*, 1999 Inter-Am. Ct. H.R. OEA/SerL/V/III.47, doc. 6 (2000) Appendix XXXII 665.

<sup>183</sup>*American Convention on Human Rights (Pact of San José)*, signed 22 Nov. 1969, entered into force 18 July 1978, OASTS 36, OAS Off. Rec.OEA/Ser.L/V/II.23, doc. 21, rev.6 (1979).

<sup>184</sup>Order of the Inter-American Court of Human Rights of November 27, 2003: The "Street Children" Case (*Villagrán Morales et al.*) *Compliance with Judgment*.

<sup>185</sup>The U.S. Supreme Court however, has since recognised the evolution of law in *Roper*.

<sup>186</sup>*Advisory Opinion OC-17/2002 of August 28, 2002, requested by the Inter-American Commission on Human Rights: Legal Status and Human Rights of the Child*, OAS Doc. OEA/Ser.L/V/II.117 Doc. 1 rev.1.



positive rights and obligations, and child participation and protection in light of American Convention articles 19 and 17. The opinion clearly reflects the CRC's influence upon inter-American and international child law. In general however, states' inconsistent ratifications of the American Convention and OAS Charter amendments have developed several overlapping legal regimes posing a challenge to the effectiveness of the Inter-American regional system.<sup>187</sup>

The inter-American system also monitors member-states through General Assembly resolutions,<sup>188</sup> country reports considering rights,<sup>189</sup> and a Special Rapporteur for Children appointed in 1999 studied and promoted evaluation and measures for individual states.<sup>190</sup> Responding to a request from two regional NGOs,<sup>191</sup> the appointment's role and significance were constrained due to limited resources.<sup>192</sup> Nevertheless, such appointments have value since another special rapporteur on extra-judicial executions, which also affects children, is now requested.<sup>193</sup> The OAS also appears willing to evaluate its general mechanisms, which should eventually lead to more effective monitoring.<sup>194</sup> The Inter-American system is distinguished among regional organisations by its specialised research and advocacy body,

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<sup>187</sup>White (note 93 above), 242.

<sup>188</sup>OAS (2000), *Resolution: Children and Armed Conflict*, AG/Res.1709 (XXX-O/00), adopted 5 June 2000, operative para.5.

<sup>189</sup>For example, see Inter-Am. C.H.R. (2001), *Fifth Report on the Situation of Human Rights in Guatemala*, Doc. OEA/Ser.L/V/II.111, doc. 21 rev., 6 April 2001, Chapter XII.

<sup>190</sup>The term of Dr. Bicudo (Brazil) expired in 2001 and no new appointments have been made. Casa Alianza (1999), *Press Release: 1999/01/14 - Inter American Commission on Human Rights responds positively to Casa Alianza's petition for special rapporteur on children in the Americas*.

<sup>191</sup>These NGOs are Casa Alianza and The Centre for Justice and International Law; *ibid*.

<sup>192</sup>For instance, see Casa Alianza (2001), *Press Release: An SOS for the OAS - Why are you not protecting the region's children???*

<sup>193</sup>Casa Alianza (2003), *Press Release: Casa Alianza Asks Inter-American Commission to Name Special Rapporteur on Extra-judicial Executions*.

<sup>194</sup>Two evaluations include: the Permanent Council report on the evaluation of the Inter-American system for the protection and promotion of human rights, requested by AG/RES. 1633 (XXIX-O/99); and the report of the Chair of the Committee on Juridical and Political Affairs concerning dialogue on the Inter-American system for the protection and promotion of human rights, cited in OAS (2000), *Resolution: Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights with a View to its Improvement and Strengthening*, AG/RES. 1701 (XXX-O/00), adopted 5 June 2000.



the Inter-American Children's Institute (IACI), which contributes to deliberations, but has limited significance due to lack of resources. According to OAS's Pilotti, there is enhanced political commitment and increasing numbers of countries are "more comfortable" with issues related to children through OAS cooperation.<sup>195</sup> Despite weaknesses, the organisation appears committed to child rights.

The CoE also actively assesses human rights through various procedures and activities. As of March 2000, there have been a total of twenty inter-state complaints of human rights violations and in 1998, there were over 16,000 complaints from individuals under the European Convention on Human Rights (ECHR).<sup>196</sup> Children may apply to the Court without the permission of their legal guardians or representatives<sup>197</sup> although the Court to date has not considered positive measures to advance the child's right to participation, it has not attempted to limit this right.<sup>198</sup> Kilkelly notes that the child's right to be consulted, to participate and have legal representation in proceedings which concern him/her (under Articles 6 and 8) has significant potential and both the Commission and the Court have supported the importance of responding to the child's wishes where possible.<sup>199</sup> The complaints procedure has encouraged government actions and enhanced judicial sensitivity to the European Convention.<sup>200</sup> Communications under the CRC would likely be a valuable addition, supporting judgments of the ECHR. The ECHR's success is dependent on political will and actions of the Committee of Ministers and member states and coordinated action with other international bodies as appropriate.<sup>201</sup> According to Dimitrijević, this system is effective due to the cultural relationships and similarities among European countries leading

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<sup>195</sup>Pilotti, Coordinator, Social Policy, Unit for Social Development and Education, OAS (2001), *Response to the "Questionnaire on Activities Related to Children"*, 17 May.

<sup>196</sup>*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222. Council of Europe (2000), *Monitoring of Compliance with Commitments Entered into by Council of Europe Member States: An Overview*, 12.

<sup>197</sup>Kilkelly (1999), *The Child and the European Convention on Human Rights*, 123.

<sup>198</sup>*Ibid.*, 117.

<sup>199</sup>*Ibid.*

<sup>200</sup>Goonesekere (1992), *Women's Rights and Children's Rights: The United Nations Conventions as Compatible and Complementary International Treaties*, 32.

<sup>201</sup>Council of Europe (note 196 above), 13.



to earnest report examination and dialogue.<sup>202</sup> Similarities also exist in other regions but the important factor is the commitment to rights and various monitoring avenues. This is evident in the use of the inter-state complaints procedure, once considered an important part of international human rights law, but has very limited value for children in the ICJ, which focusses on trade and diplomatic concerns. The procedure has never been brought under the UN treaty procedures or African system, but it has been used several times under the ECHR.<sup>203</sup> For example, Sweden considered an inter-state action against the UK under the ECHR to protest its actions against two young boys accused of murder.<sup>204</sup> While the inter-state procedure empowers the state's role in monitoring, it has limited relevance due to political factors in international relations.<sup>205</sup>

In addition to ECHR avenues, the CoE Committee of Ministers began its own confidential monitoring procedure in 1996.<sup>206</sup> An independent Commissioner for Human Rights was established in 1999 to promote human rights and act as a preventative mechanism.<sup>207</sup> Moreover, the European Social Charter<sup>208</sup> is supervised through regular reports submitted by states parties. White has argued that the Social Charter does not have the same political commitment and has an inadequate supervisory system compared to the ECHR<sup>209</sup> but his criticism is less now relevant. Ratifications have improved: as of 1 June 2005 there are 18 states parties to the Social Charter and 14 have accepted the petition procedure under the 1995 Protocol.<sup>210</sup> The first child rights case involves a complaint lodged by the International

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<sup>202</sup>Dimitrijevic (note 78 above), 11.

<sup>203</sup>Steiner & Alston (note 77 above), 776.

<sup>204</sup>The two boys pursued their complaints against the UK at the European Court of Human Rights under *T. v. the UK* and *V. v. the UK*; Van Bueren (2001), Personal communication with author, 12 March.

<sup>205</sup>Bilder (1992), "An Overview of International Human Rights Law". *Guide to International Human Rights Practice*. Hannum (ed.), 13.

<sup>206</sup>Council of Europe (1999), *Introductory Note*.

<sup>207</sup>Specific details about child rights efforts are unavailable for analysis. Council of Europe (note 196 above), 11.

<sup>208</sup>Signed 18 Oct. 1961, in force 26 February 1965, 529 UNTS 89; ETS 35.

<sup>209</sup>White (note 93 above), 237-238.

<sup>210</sup>*Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* CETS No.: 158, Entered into force: 1/7/1998. Council of Europe (2005), *Signatures and ratifications of the European Social Charter: Situation at 1 June 2005*.



Commission of Jurists (ICJ) about child labour in Portugal.<sup>211</sup> ICJ alleged violation of Social Charter article 7 para. 1 and pursued a complaint to encourage Portugal to: monitor child labour more efficiently; devote more resources to the child labour efforts of the Portuguese General Labour Inspectorate; reinforce measures against child labour in public and private spheres; and dedicate more resources to address its roots and causes.<sup>212</sup> Portugal vigorously attempted to disallow and criticise the petition's merits but the Committee of Ministers concluded *inter alia* that "the satisfactory application of Article 7 [of the Social Charter] cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised..."<sup>213</sup> It decided in favour of the complaint due to non-conformity with the provision.<sup>214</sup> The subsequent adoption of a resolution by the Committee of Ministers identifying its expectation for follow-up details about the situation from the state in its progress report not only benefits child rights but flags the issue for the state and the Committee in future monitoring. A second case concerning child rights in 2002, *Autisme-Europe*, found France violated Social Charter articles 15, the rights of persons with disabilities; 17, the right of children and young persons to social, legal and economic protection; and E, non-discrimination, and also the inadequate provision of education to autistic persons under these provisions.<sup>215</sup> The case likely contributed to the CoE's recent establishment of a committee of experts to share experiences and best practices in the areas of education and integration for children with autism.<sup>216</sup> The World Organisation against Torture lodged a series of complaints in 2003 against Greece, Ireland, Italy, Portugal and Belgium alleging violation of article 17; the European Committee of Social Rights found a

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<sup>211</sup>European Committee of Social Rights Secretariat (February 16, 2001), *List of cases submitted under the 1995 Protocol to the European Social Charter providing for a system of collective complaints*.

<sup>212</sup>Council of Europe (ed.) (2000), *Human Rights Social Charter Monographs - No. 9. (2000)*. Complaint No. 1/1998: International Commission of Jurists against Portugal, Documents, 20-21.

<sup>213</sup>*Ibid.*, 159.

<sup>214</sup>*Ibid.*, 161.

<sup>215</sup>Collective Complaint No. 13/2002 *Autisme-Europe v. France*.

<sup>216</sup>Council of Europe (2004), *Press Release: "A society that can cope with autism can deal with all other disabilities"*, 6 & 13 April.



violation of Art. 17 in Belgium and Ireland but not in Portugal or Italy.<sup>217</sup> The procedure offers exciting possibilities for effective monitoring and child rights progress but applicable organisations must not only be aware of children's rights and their violations, they must take the initiative and have the resources to hold states parties accountable to their commitments.<sup>218</sup>

Another example of European activity demonstrates the controversy about corporal punishment. The European Court decided five votes to four in *Costello-Roberts v. UK*<sup>219</sup> that the state did not violate ECHR article 3, prohibiting torture or inhumane or degrading treatment or punishment, by not protecting a British independent school student from corporal punishment.<sup>220</sup> In *A. v. the United Kingdom*,<sup>221</sup> the Court found corporal punishment inflicted upon a boy by his stepfather breached article 3 because the treatment went beyond the limits of reasonable punishment and English law had not provided sufficient protection to the applicant.<sup>222</sup> The variation in the Court's decisions based on the "circumstances of the applicant's punishment may be distinguished" in the former decision<sup>223</sup> from those of A.'s treatment in the latter case resurrects the distasteful distinction of permissible violence made by the "rule of thumb" principle, which some understand historically regulated a stick's thickness with which one could beat one's spouse.<sup>224</sup> Such violence against adult family

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<sup>217</sup>Collective Complaint No.21/2003 *World Organisation against Torture (OMCT) against Belgium*, No.18/2003 *World Organisation against Torture (OMCT) against Ireland*, No. 19/2003 *World Organisation against Torture (OMCT) against Italy*, and No. 20/2003 *World Organisation against Torture (OMCT) against Portugal*, respectively.

<sup>218</sup>Applicable organisations include European employers' organisations, trade unions, NGOs with consultative status with the Council of Europe included on the Governmental Committee's list for this purpose, national employer organisations and trade unions; Council of Europe (note 212 above), 8-9.

<sup>219</sup>247 Eur. Ct. H.R. (ser. A) at 11 (1993), 19 E.H.R.R. 112.

<sup>220</sup>Van Bueren (1995), "The International Protection of Family Members' Rights as the 21st Century Approaches". 17 *Human Rights Quarterly*, 749-752.

<sup>221</sup>*A v. UK*, judgment of 23 Sept 1998, Reports 1998-VI, no 90, 27 E.H.R.R. 611.

<sup>222</sup>Detrick (1998), "European Court of Human Rights: Judgment in the case of *A. v. the United Kingdom*". 6 *The International Journal of Children's Rights*, 336.

<sup>223</sup>(Note 219 above), 133, para.31.

<sup>224</sup>This principle has had some legal implications in some court cases but controversy surrounds its origins; see Freyd and Johnson, *Commentary: Domestic Violence, Folk Etymologies, & "Rule of Thumb"*.



members is no longer acceptable; similarly, violence against children should not be permitted. The UNCRC's child rights interpretations are not influential to judicial actors as the European Court failed to suggest in *A. v. United Kingdom* that corporal punishment is a violation of children's rights under article 3,<sup>225</sup> despite the fact the Committee has "repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline."<sup>226</sup> While these decisions regarding corporal punishment cannot be described as contradictory, they do not support a common convergence in child rights interpretation. Monitoring will continue to be extremely complex if monitors do not support common positions on the nature and scope of child rights.

The African Commission on Human and Peoples' Rights supervises the African Charter on Human and Peoples' Rights (Banjul Charter)<sup>227</sup> by considering state reports and inter-state, as well as individual and collective communications. Steiner and Alston highlight the Commission's limited years of experience and few powers resulting with hesitant use of its authority and lack of creative development of its powers.<sup>228</sup> Several attempts exist however, to enhance African monitoring including the establishment of an African Court on Human and Peoples' Rights,<sup>229</sup> entered into force on 25 January 2004.<sup>230</sup> The Protocol to the African Charter on the Rights of Women in Africa<sup>231</sup> has not yet entered into force but includes the girl-child in its definition of women's rights, and may support the rights of the girl-child in monitoring. The AU not only provides specific child rights protection in its general human rights instrument but also has a specific instrument, the Charter on the Rights and Welfare

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<sup>225</sup>Fortin (2000), "Rights Brought Home for Children". *International Human Rights in Context: Law, Politics, Morals*. Steiner and Alston (eds.), 528.

<sup>226</sup>UNCRC (note 9 above), para.8.

<sup>227</sup>*African Charter on Human and Peoples' Rights*, adopted June 1981, in force 26 October 1986, OAU Doc.CAB/LEG/67/3/Rev.5.

<sup>228</sup>Steiner & Alston (note 77 above), 920.

<sup>229</sup>*Protocol of the Court of Justice of the African Union*, Adopted 11 July 2003.

<sup>230</sup>At the time of writing, it is too early to assess its impact.

<sup>231</sup>*Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, Adopted 11 July 2003. African Union (2005), *List of Countries which have signed, ratified/acceded to the Protocol*.



of the Child,<sup>232</sup> and monitoring mechanism, which is unique among regional systems. A Committee for the African Charter on the Rights and Welfare of the Child was established in July 2001 to monitor using a participatory process involving states parties and others recognised by the AU.<sup>233</sup> As it not only considers periodic states parties' reports, the Committee has broader authority than the UN Committee through follow-up on recommendations and decisions from other fora, and consideration of communications from individuals and accredited NGOs.<sup>234</sup> Van Bueren points out the African Children's Charter communications procedure would be the better procedure for children to utilise than the Banjul Charter, which is more limited both procedurally and substantively in terms of child rights.<sup>235</sup> As of July 2005, it is not possible to date to assess the African Children's Committee's efforts following several sessions as no states parties reports have yet been submitted and procedural challenges continue including delays in convening meetings, logistical and financial challenges.<sup>236</sup> But the AU's commitment to monitoring and follow-up is very positive for child rights.

The regional organisations offer valuable monitoring avenues, complementing UN efforts. Dedicated mechanisms to child rights allow focussed attention and tailored assessment. While consolidated mechanisms have demonstrated child rights-based approach in many procedures and results, inconsistencies across international and regional monitors is an area of a concern. Regional periodic reports make contributions but lack the impact of communications, which effectively highlight child rights issues. Communications procedures offer the best opportunities to advance child rights in the European and African systems, highlighting the role and value of this avenue. While its reactive role is unable to

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<sup>232</sup>Adopted July 1990, entered into force 29 Oct. 1999, OAU Doc. CAB/LEG/TSG/Rev.1.

<sup>233</sup>Johnson, Director a. i. Community Affairs Department, Organisation of African Unity (2001), *Response to the "Questionnaire of Activities Related to Children"*, 17 September.

<sup>234</sup>Articles 43 (reporting), 42(a)(i) and (iii) (make recommendations and cooperate with other institutions), 45 (investigations) and 44 (communications) respectively.

<sup>235</sup>Van Bueren (note 46 above), 403.

<sup>236</sup>The fifth meeting was scheduled in November 2004 in Nairobi; results are not publicly available as of July 2005. See: Lloyd (2004), *The Fourth Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child*; Lloyd (2003), *Regional Developments on the Rights and Welfare of Children in Africa: A General Report on the African Charter on the Rights and Welfare of the Child and the African Committee of Experts*; and; Lloyd (2004), *The Third Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child*.



prevent violations, serious quasi-judicial and judicial attention highlights child rights and likely supports prevention of future violations. Consolidated regional institutions likely face lesser demands than at the international-level bodies. Legal efforts offer advantages beyond the flexibility of political interpretations. For example, the Inter-American Commission's finding in *Domingues* that international customary law and *jus cogens* prevents the death penalty against convicted persons for crimes committed when under 18 years of age. Inter-American attention to children is not extensive but promising in light of its commitment to follow-up monitoring. Children access regional systems to varying degrees although additional support would be beneficial.

## 5.0 STATES & NATIONAL MONITORING

General treaty enforcement is carried out by states parties' implementation.<sup>237</sup> International monitors regularly stress national determinations of rights<sup>238</sup> to allow flexibility and the pursuit of different priorities. But monitors are necessary to support accountability to obligations, and buttress obligations of conduct under child rights law to achieve obligations of result.<sup>239</sup> Although resources and lack of capacity can be issues,<sup>240</sup> they should not be obstacles due to international cooperation.<sup>241</sup> To consider states' monitoring, this section first analyses the relationship between reservations and monitoring, focussing on the CRC: 66 states parties out of 192 have declarations and reservations to the CRC;<sup>242</sup> followed by national monitoring activities.

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<sup>237</sup>Brownlie (1998), *The Rule of Law in International Affairs*, 71.

<sup>238</sup>Many examples exist including: UNCEDAW (1988), General Recommendation 6, UN Doc. A/43/38; UNCESCR, General Comment 1 (note 33 above); and HRC (1981), General Comment 3, UN Doc.HRI/GEN/1/Rev.4, and General Comment 17 (note 39 above).

<sup>239</sup>See Chapter Five, s.3.3.

<sup>240</sup>Brownlie(1998) describes "the biggest single obstacle to treaty enforcement is the inability of national administrations in many countries to cope with even a minimal burden." (Note 237 above), 15.

<sup>241</sup>See generally Himes (ed.) (1995), *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income Countries*.

<sup>242</sup>Some states use an ambiguous distinction between declarations and reservations, intending to exclude or limit treaty provisions even though declarations should not have any legally binding effect; see below. UN (2001), *United Nations Treaty Collection [As of 9 October 2001] Declarations and Reservations*.



## 5.1 Reservations

Despite their significance for child rights, reservations reveal monitors' restraint. Many reservations due to religion and to their general nature, pose difficulties for both child rights implementation and monitoring due to their broad, imprecise nature yet relatively few reservations are subject to objections from states parties. Hence, monitors have a role and responsibility to respond appropriately. But while treaty bodies generally acknowledge the issue of reservations, they are not responding in order to effect action.

Reservations<sup>243</sup> are widely established in international human rights law;<sup>244</sup> the ICJ acknowledged treaty negotiations involve the majority principle to reach consensus, leading some states to make reservations.<sup>245</sup> During CRC negotiations, Sweden submitted a proposal to disallow reservations to several articles so states parties would improve national laws, but very little negotiation on this issue reveals widespread difficulty with the proposal, which was withdrawn to reach consensus.<sup>246</sup>

Many states parties have made reservations to CRC provisions due to potential or perceived conflict with domestic law or religion. Brunei Darussalam, Iran, Jordan, Kuwait, Maldives, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, and United Arab Emirates, as examples, made reservations due to Islam or sharia law.<sup>247</sup> Not all Islamic-motivated reservations are problematic since the nature of reservations varies. Some states parties have general reservations without explanation including Malaysia, which reserved articles 1, 2, 7, 13, 14, 15, 22, 28, 37, 40 (3, 4), 44, and 45, applicable to *inter alia* a CRC general principle and

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<sup>243</sup>Article 2(1)(d) of the *Vienna Convention on the Law of Treaties* defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

<sup>244</sup>Examples include CRC a. 51(2); *International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc.A/RES/2106 A (XX), 21 December 1965, a.20; CEDAW, a.28(2).

<sup>245</sup>*Advisory Opinion: Reservations to the Convention on Genocide*, 1951 ICJ Rep. 22.

<sup>246</sup>E/CN.4/1987/25, Annex 44; and E/CN.4/1988/28, 42, 43-44, cited in Detrick (Ed.) (1992), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, 606-607.

<sup>247</sup>UN (note 2 above), 15, 24-5, 32-4, 37-8. Roman Catholicism has led some states to submit declarations, affirming particular perspectives about child rights, particularly in relation to the right to life, including Argentina, Guatemala, and the Holy See, which declared human life is protected from the moment of conception.



monitoring provisions.<sup>248</sup> In contrast, others specifically identify applicable provisions with explanation including Egypt, which reserves articles 20 and 21 because adoption is considered contrary to sharia law.<sup>249</sup> Since Islamic scholars do not agree upon sharia's requirements, the scope of broad reservations and of the reserving state's obligations remain uncertain due to changing interpretations and practice.<sup>250</sup> Also posing difficulties, general reservations also result from the state's intention to preserve national law as Botswana has done.<sup>251</sup> If reservations do not specify relevant provisions, what scope and implications do they have? Such general reservations raise doubts about the commitments of states parties; as Charlesworth and Chinkin argue, their "indeterminacy, imprecision and open-ended nature are contrary to the certainty required for the acceptance of a legal obligation."<sup>252</sup> They also inevitably implicate monitoring. Even with specification, the general effects of some reservations upon child rights may be problematic. Poland declared CRC provisions, particularly articles 12 to 16, "shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family."<sup>253</sup> The declaration and that of Singapore could have reservation-like effects due to their similarity with the Holy See's reservation.<sup>254</sup> Poland's declaration is problematic because participation is a general principle and articles 13-16 are considered participation articles.<sup>255</sup> Moreover, Poland's declaration is tantamount to a reservation in the private sphere. In response, the UN Committee encouraged review of reservations and declaration, which state officials indicated their intention to do so with a view to possible

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<sup>248</sup>As discussed below, Malaysia has since withdrawn some of these reservations; *Ibid.*, 26-27.

<sup>249</sup>*Ibid.*, 20

<sup>250</sup>Charlesworth & Chinkin (2000), *The boundaries of international law: A feminist analysis*, 106.

<sup>251</sup>UN (note 2 above), 15.

<sup>252</sup>Charlesworth & Chinkin (note 250 above), 106.

<sup>253</sup>UN (note 2 above), 33.

<sup>254</sup>Singapore made a declaration potentially limiting CRC application, stating provisions shall "be exercised with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and in the best interests of the child and in accordance with the customs, values and religions." The Holy See made a reservation to articles 13-16, which should be interpreted in such a way to safeguard "the primary and inalienable rights of parents." *Ibid.*, 34, 22.

<sup>255</sup>Articles 13 to 17 affirms the child as an "active subject of rights" and states must legally recognise them to ensure their exercise; Santos Pais (1997), "The Convention on the Rights of the Child". *Manual on Human Rights Reporting*. UN (ed.), 433.



withdrawal.<sup>256</sup> But as of late 2001, the declaration still remains.<sup>257</sup> It is difficult to ascertain the influence of these declarations and reservation due to the difficulty of monitoring children's rights within the family.<sup>258</sup> Without acceptance of participation, the child rights-based approach will not fully advance.

Under the Vienna Convention on the Law of Treaties (VCLT), reservations and the power to object remain the purview of states parties and bilateral relations. States parties assess others' reservations and through objections, a state may react to a reservation based on how it affects the state's interest or the expected treaty benefits<sup>259</sup> relying upon the "object and purpose" test,<sup>260</sup> as per VCLT article 19(c). A reservation's compatibility is based on "the attitude of a State in making the reservation" and "the appraisal by a State in objecting to the reservation," determined on a case-by-case basis.<sup>261</sup> But the essential international legal principle of reciprocity, balancing rights and duties in bilateral state relations based on shared interests and mutual benefits,<sup>262</sup> does not support effective child rights monitoring. Charlesworth and Chinkin declare that it is "inadequate where the treaty objective is the attainment of common standards within all states parties, rather than the mutual acceptance of rights and obligations."<sup>263</sup> As a monitoring tool, states parties very infrequently use objections. Only a very small proportion of CRC states parties, including Denmark, the Netherlands and Sweden, have submitted objections to reservations of such states as Djibouti, Iran, Malaysia, Qatar, and Saudi Arabia.<sup>264</sup> Similarly, less than 10 percent of states

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<sup>256</sup>UNCRC (1995), *Concluding observations of the Committee on the Rights of the Child: Poland*, UN Doc. CRC/C/15/Add.31.

<sup>257</sup>UN (note 242 above).

<sup>258</sup>Van Bueren (note 220 above), 762.

<sup>259</sup>Lijnzaad (1995), *Reservations to UN Human Rights Treaties: ratify and ruin?*, 71.

<sup>260</sup>*Advisory Opinion: Reservations to the Convention on Genocide* (note 245 above), 15.

<sup>261</sup>*Ibid.*, 24, 26.

<sup>262</sup>As described by Lijnzaad (note 259 above), 65-68.

<sup>263</sup>Charlesworth & Chinkin (note 252 above), 103.

<sup>264</sup>There are now 192 States parties. UN (note 2 above), 45-61; UN (Note 242 above).



parties to CEDAW have objected to reservations.<sup>265</sup> Submitted objections tend to focus on the broad and undefined nature of reservations. For example, Finland's objections generally outline that internal law cannot justify "failure to perform a treaty" due to concern about broad, unclear reservations, which likely to contribute to undermining treaties.<sup>266</sup> Objecting states expect states parties will ensure internal law conforms with their commitments and be modified as appropriate.<sup>267</sup> Objections also articulate that declarations are interpreted as reservations as per: Austria, Finland, the Netherlands and Norway in relation to Singapore; by Germany in relation to Tunisia; and the Netherlands in relation to Kiribati.<sup>268</sup> Objections also demonstrate varying treaty interpretations. For instance, upon ICCPR ratification in 1992, the United States of America reserved a.6(5) for the right to impose the death penalty against convicted persons (except pregnant women) even if they were under 18 years of age at the time of the offence. Several European states objected, contending incompatibility with the treaty's object and purpose prohibiting execution of minors. Aust notes the objections were "quite surprising" since some of these states had made reservations to Covenant articles that did not permit derogation.<sup>269</sup> Nevertheless, the objections were appropriate and legitimate from states that do not utilise capital punishment, which is a fundamental rights issue, now considered part of customary law.<sup>270</sup> But the need for the second optional protocol to the ICCPR to explicitly prohibit the death penalty demonstrates varying national positions on the issue.<sup>271</sup> Variable interpretation of norms can be a significant monitoring issue.<sup>272</sup>

The influence of objections is evident in the withdrawal of some reservations to the CRC

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<sup>265</sup>Charlesworth & Chinkin (note 252 above), 107.

<sup>266</sup>UN (note 2 above), 52-57.

<sup>267</sup>Charlesworth & Chinkin (note 252 above), 104.

<sup>268</sup>UN (note 2 above), 71.

<sup>269</sup>Aust (note 4 above), 111.

<sup>270</sup>See *Domingues v. US*, (note 179 above); and evolution of US law in *Roper v. Simmons* (note 180 above).

<sup>271</sup>Lijnzaad (note 259 above), 205.

<sup>272</sup>See below and Chapter Five.



including the withdrawal of Myanmar's reservation to CRC article 37.<sup>273</sup> As "general practice demonstrates custom and not vice versa,"<sup>274</sup> monitoring by states to uphold customary law can be important. Myanmar withdrew reservations in 1993 to articles 15 (freedom of association and peaceful association) and 37 (punishment and detention); and in 1997, Pakistan withdrew its broad reservation that restricted application based on "the principles of Islamic laws and values."<sup>275</sup> The latter example demonstrates an important reversal where a state party confirms compatibility of children's rights with Islam that, due to significant numbers of this type of reservation, needs dissemination. Norway objected in 1996 to Malaysia's reservations of several articles as too broad in scope and undefined nature; monitoring articles 44 and 45 were "not optional" and reservations to them were "not permissible."<sup>276</sup> In 1999, Malaysia withdrew several reservations including those pertaining to these articles. Consequently, objections can be quite helpful however, the tool is not as effective as it should be. As Table One displays, reserving states including Iran, Brunei Darussalam, Saudi Arabia, and Qatar have not withdrawn their reservations despite receiving the most numbers of objections.<sup>277</sup> Despite the language of some objections, they do not prevent the treaty's entry into force between the reserving and objecting states.<sup>278</sup> Evidently, there is little pressure for withdrawal of reservations. While objections are not overused, the tool has limited influence without preventing entry into force of the treaty. Consequently, the use of objections may be a political, rather than a legal, response.

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<sup>273</sup>Van Bueren (note 46 above), 56. Myanmar originally reserved "the powers of arrest, detention, imprisonment, exclusion, interrogation, inquiry and investigation" in the purposes of preserving, strengthening the rule of law and public order for "the protection of the supreme national interest"; UN (note 2 above), 28-29.

<sup>274</sup>Meron (1989), *Human Rights and Humanitarian Norms as Customary Law*, 3.

<sup>275</sup>UN (note 2 above).

<sup>276</sup>*Ibid.*, 71.

<sup>277</sup>Analysis demonstrates that these states have been subject to nine or more objections from CRC states parties; see Table One below.

<sup>278</sup>For example, see Finland's objection to Syria's reservation. UN (note 2 above), 53.



**TABLE ONE: Objections To CRC Reservations & Corresponding Withdrawals<sup>279</sup>**

| State Party          | # of Objections to Reservations | Reservations Withdrawn  |
|----------------------|---------------------------------|---|
| Andorra              | 1                               |   |
| Bangladesh           | 3                               |   |
| Brunei Darussalam    | 9                               |   |
| Djibouti             | 6                               |   |
| Indonesia            | 6                               |   |
| Iran                 | 10                              |   |
| Jordan               | 3                               |   |
| Kiribati             | 3                               |   |
| Kuwait               | 2                               |   |
| Liechtenstein        | 1                               |   |
| Malaysia             | 8                               | Withdrawn reservation to a. 22, 28 (1)(b), (c), (d), (e), (2), (3), a. 40 (3), (4), a. 44, 45; reservations still in place for a. 1, 2, 7, 13, 14, 15, 28(1)(a), 37 |
| Myanmar              | 4                               | Withdrawn both reservations to a. 15, 37  |
| Oman                 | 6                               |   |
| Pakistan             | 7                               | Withdrawn its reservation about Islam   |
| Qatar                | 9                               |   |
| Saudi Arabia         | 9                               |   |
| Singapore            | 7                               |   |
| Syria                | 7                               |   |
| Thailand             | 2                               | Withdrawn reservation to a. 29 but still subject to a. 7, 22  |
| Tunisia              | 2                               |   |
| Turkey               | 2                               |   |
| United Arab Emirates | 1                               |   |
| UK                   | 1                               |   |

Objections to reservations do not consistently support child rights monitoring. The limited capacity of many national administrations to monitor state reservations cannot be ignored<sup>280</sup> as revealed by the fact that almost all objections stem from developed Western European

<sup>279</sup>The table does not display all states parties that have reservations or all that have withdrawn them. It is adapted from: LeBlanc (1995), *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights*, 56, Table 2.6; and based on UN (note 2 above).

<sup>280</sup>Brownlie (note 237 above), 15.



states.<sup>281</sup> However, reticence to object must also be significant since many developed states still have not objected. Although Linjzaad minimises the “unfriendly” perception of objections, she contends they “are in fact nothing other than the expression of legitimate concern about the quality of the international legal order.”<sup>282</sup> While this may be theoretically true, it is often not so simple for states. There could be many reasons for states not to develop and submit objections as LeBlanc explains including: avoidance of the perception of hostility or the accusation of being a “cultural imperialist” against a developing state; close relations, geography or dependency upon trade or natural resources; or there may not be any advantage or benefit due to reciprocity.<sup>283</sup> Consequently, objections can be useful in redressing reservations however due to their political nature, the realities of international relations and limited domestic administrative capacity, their impact on monitoring is quite limited.

The significance of reservations demands coherent, consistent action but there is no general judicial authority to determine the appropriateness of reservations to international rights treaties since the ICJ does not have an equivalent in the human rights sphere.<sup>284</sup> It is inappropriate however, to conclude that “most reservations can be dealt with perfectly well by application of the provisions in [Vienna Convention’s] Articles 19-23.”<sup>285</sup> Aust has much confidence in the processes and actors of the existing system but concern about reservations should not be limited to those subject of objections. Use of objections is extremely limited and does not facilitate reliable child rights monitoring. As the process is technically restricted to inter-state relations, reliance on objections to address reservations excludes the child from monitoring. Scholars generally do not consider the individual in the reservations process with the exception of examining the limited use of the individual communications

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<sup>281</sup>LeBlanc (note 279 above), 57. The only non-European state with an objection is Argentina due to its political conflict with the UK over the Falkland Islands and Slovakia is the only non-Western European state with an objection. The Netherlands is responsible for the objections against two European states (Liechtenstein and Andorra). UN (note 2 above).

<sup>282</sup>Lijnzaad (note 259 above), 409.

<sup>283</sup>LeBlanc (note 279 above), 57.

<sup>284</sup>According to Higgins, the Court “is not a human rights court” but it still has a “long involvement” in the area; see Higgins (note 181 above).

<sup>285</sup>Aust (note 4 above), 107.



procedure under some treaties.<sup>286</sup> While the individual cannot be described as a subject of international law *per se*, the individual remains connected through national actors in the system<sup>287</sup> and others. According to CRC article 45(b), “other competent bodies” broaden the process, which will illuminate the impact of reservations and the status of child rights treaty commitments.

While some question the state role to determine compatibility of reservations,<sup>288</sup> it is an international legal principle. Due to the state role, debate surrounds monitoring bodies' consideration of reservations. While regional treaties provide standing judicial authorities, they are generally not available in the UN system.<sup>289</sup> Charlesworth, Chinkin and Lijnzaad argue that although theoretically they have subsidiary roles, UN monitoring committees are justified in determining the compatibility of reservations.<sup>290</sup> But Aust questions the role of non-judicial monitors, arguing they are not equivalent to international courts or tribunals involving full legal argument.<sup>291</sup> He refers to the 1997 preliminary conclusions of the International Law Commission, which considering the issue of treaty reservations for several years, enunciated rights treaty bodies are “competent only to comment on and make recommendations as to the admissibility of reservations.”<sup>292</sup> But, as these committees are tasked with reviewing progress of treaties, it necessarily involves substantive evaluation and determination of the compatibility of reservations to them.<sup>293</sup> Basic disagreement amongst these commentators seems based on their particular orientations. While Aust presents a

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<sup>286</sup>Although some reservations under rights treaties can be subject to individual communications, there have been very few. Moreover, the procedure is not available under the CRC. See Lijnzaad (note 259 above), 417-419.

<sup>287</sup>Brownlie (note 237 above), 48.

<sup>288</sup>See Kuper (1997), “Reservations, Declarations and Objectives to the 1989 Convention on the Rights of the Child”. *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions*. Gardner (ed.), 113.

<sup>289</sup>There are some exceptions however. For instance CEDAW article 29(1) provides for access to the ICJ to resolve disputes between two or more states parties concerning CEDAW's interpretation or application that are not settled by negotiation or arbitration. The CRC has no such provision.

<sup>290</sup>Charlesworth & Chinkin (note 252 above), 110; and Lijnzaad (note 259 above), 412.

<sup>291</sup>Aust (note 4 above), 123.

<sup>292</sup>UN Doc. A/52/10, para.157, cited in *ibid.*, 123-124.

<sup>293</sup>Lijnzaad (note 259 above), 71, 97.



practical, national perspective in approaching reservations, the others are critical of such limitations in support of their internationalist rights approach.<sup>294</sup> This variance determines their conclusions: Aust is critical of negative judgments of reservations while the others are critical of the impact of reservations upon international human rights law. While the UN treaty bodies, in particular the UNCRC, do not allow for full legal argument and have various constraints, including the limited number of lawyers as members,<sup>295</sup> their role in considering reservations is legitimate due to their designated responsibilities. Due to the limitations of reciprocity, they have essential monitoring roles to pursue.

The UNCRC acknowledges reservations in concluding observations about states parties' reports and has expressed particular concern regarding reservations of a "broad and vague nature, or otherwise contrary to international law," in light of CRC Article 51.<sup>296</sup> The Committee however, should more actively encourage withdrawal as there is little incentive, understanding of, or debate about reservations as evidenced by the slow withdrawal rate. Since the 1989 CRC adoption, only nine states parties have withdrawn their reservations.<sup>297</sup> The Committee's customary response to reservations in concluding observations is unlikely to spur action since its regularly restrained language simply expresses "concern" about

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<sup>294</sup>Aust, Legal Counsellor with the UK's Foreign and Commonwealth Office, defends national interpretation and restrictions upon international treaties. The others present an internationalist perspective, supporting global human rights standards and arguing against obstacles to their advancement including reservations. Compare Aust (note 4 above); with the perspectives of Charlesworth & Chinkin (note 252 above); and Lijnzaad (note 259 above).

<sup>295</sup>The 18-member CRC Committee only includes nine lawyers or individuals with legal education; in another example, only 10 of the 23 CEDAW Committee members have legal education or are lawyers. See UNCRC, *Members*; and UN Division for the Advancement of Women, *Members of the CEDAW Committee -2005*, UN (2002), *Election, in accordance with article 17, paragraphs 4 and 5, of the Convention, of twelve members of the Committee, to replace those whose terms are due to expire on 31 December 2002*, UN Doc.CEDAW/SP/2002/3/Add.1, and UN (2004), *Election, in accordance with article 17, paragraphs 4 and 5, of the Convention, of twelve members of the Committee, to replace those whose terms are due to expire on 31 December 2004*, UN Doc.CEDAW/SP/2004/3.

<sup>296</sup>Article 51 pertains to reservations and the compatibility test; UNCRC, cited in Mower Jr (1997), *The Convention on the Rights of the Child: International Law Support for Children*, 149-150. For example, the UN Committee noted concern about Iran for instance due to "the broad and imprecise nature" of its "general reservation [that] potentially negates many of the Convention's provisions..." Committee on the Rights of the Child (2000), *Concluding Observations of the Committee on the Rights of the Child: Iran (Islamic Republic of)*, UN Doc.CRC/C/15/Add.123, para.7.

<sup>297</sup>For example, Pakistan withdrew its reservation to the CRC in 1997 that stated that it would be "interpreted in the light of the principles of Islamic laws and values". UN (2001), (note 242 above).



reservations.<sup>298</sup> In addition to the Vienna Declaration and Programme of Action,<sup>299</sup> UN treaty bodies' chairs have expressed concern about general reservations<sup>300</sup> and since 2002, an inter-Committee meeting regularly convenes to improve methods of work.<sup>301</sup> Treaty bodies should take stronger action on the inappropriateness and problems caused by reservations. While monitors may hesitate due to the ongoing work of the International Law Commission, they have authority to comment on the progress of their respective treaties and should also be more active. For instance, the UNCEDAW not only modified its reporting guidelines to include a reservations section, but also regularly asks states to explain the need for, and scope of, their reservations and the implications upon reserved provisions.<sup>302</sup> Such an approach is more useful than simple requests, which may not be consistently put forward, of states parties to reconsider withdrawal. The UNCRC inadequately addressed the issue of reservations in a 2003 General Comment, merely reiterating the need to review and consider withdrawal.<sup>303</sup> Hence, if they have not already done so, treaty bodies should examine and articulate a stronger position on reservations.

## 5.2 National Monitoring

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<sup>298</sup>Examples include: Indonesia's reservations raise "*serious concern* as to their compatibility with the object and purposes of the Convention" (Preliminary Observations adopted in October 1993, CRC/C/15/Add.7, para.7); "*notes with concern* the reservation" made by Australia (Concluding Observations adopted in October 1997, CRC/C/15/Add.79, para.8); "*notes with concern*" Canada's reservations (Concluding Observations adopted in June 1995, CRC/C/15/Add.37, para.10); and "*remains concerned*" about Bangladesh's reservations (Observations adopted in June 1997, para.11). Italics added for emphasis. In Holmström (Ed.) (2000), *Concluding Observations of the UN Committee on the Rights of the Child*.

<sup>299</sup>Paragraph 5 of the Vienna Declaration and Programme states: "The World Conference on Human Rights encourages States to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them."

<sup>300</sup>UN (2001), *Report of the chairpersons of the human rights treaty bodies on their thirteenth meeting*: 16/07/2001. A/57/...(Chairpersons Meeting)-Advance Unedited Text [but not finalised], paras.63,83.

<sup>301</sup>See for example, UN (2002), *Report of the First Inter-Committee Meeting of the Human Rights Bodies*, UN Doc.HRI/ICM/2002/3.

<sup>302</sup>UN (2001), *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, UN Doc.HRI/GEN/2/Rev.1, UNCEDAW, Initial Reports, 42-43, para.9; in Charlesworth & Chinkin (note 252 above), 109-110.

<sup>303</sup>See further s.1.0 above. UNCRC, CRC General Comment 5 (note 13 above), paras.12-16.



International legal procedures and mechanisms are largely dependent on national monitoring<sup>304</sup> by the state and civil society<sup>305</sup> since the UNCRC for example, can only act as “the monitor of monitors.”<sup>306</sup> National monitoring may involve executive and legislative levels and national rights institutions, which are generally familiar with local political, social and economic contexts.

State governments are formally responsible to fulfill treaty reporting commitments.<sup>307</sup> Various processes exist. Examples include: Malaysia has a joint monitoring group of government and NGOs; Mongolia is developing indicators for child participation and social protection; and Costa Rica is carrying out a social audit involving children and communities in rights assessment.<sup>308</sup> National monitoring results meet international obligations but can also benefit domestic policy-making and programming.

National child rights institutions, including children’s commissioners or ombudspersons, are important monitors at the national level where they exist.<sup>309</sup> Since Norway created the first ombudsperson for children in 1981,<sup>310</sup> many countries, states, and provinces have created offices with varying names, sizes, functions, legislative authority, and degrees of independence. Institutions are mainly distinguished by their relationship with the government whether contained within government,<sup>311</sup> independent (but possibly receiving

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<sup>304</sup>General consideration is provided as Chapter Four details two national case studies.

<sup>305</sup>The next section discusses civil society.

<sup>306</sup>Hammarberg (1993), *The Work of the Expert Committee on the Rights of the Child*. Consultation on the role of the UN and NGOs in the Implementation of the CRC.

<sup>307</sup>See further Bernard & Wille (1997), “The Preparation and Drafting of a National Report”. *Manual on Human Rights Reporting*. United Nations (ed.), 25-36.

<sup>308</sup>UNICEF (note 73 above).

<sup>309</sup>A proposal during CRC drafting to obligate state support of such institutions did not receive sufficient state support; Van Bueren (note 46 above), 408.

<sup>310</sup>See further Flekkoy (1993), *Children’s Rights: Reflections on and consequences of the use of developmental psychology in working for the interests of children*; and UNICEF (1997), *Ombudswork for Children*.

<sup>311</sup>Children’s rights offices in government ministries exist in Austria and in German Northrhine-Westphalia; and ministerial order or government decree established Denmark’s National Council for Children; and five regional offices (out of 89 regions) in the Russian Federation. (European Network of Ombudsmen for Children (ENOC) (2004), *Country Profiles*).



some support),<sup>312</sup> or non-governmental in nature.<sup>313</sup> These institutions often support the child's right to be heard and participate in relevant processes. Some mandates also administer communications to address alleged violations of individual or groups of children. Success depends upon the mandate's context within law; the Paris Principles, endorsed by the UN General Assembly, recognise these institutions must have the competence and broad mandate to promote and protect human rights.<sup>314</sup> To best support child rights and be most useful, the national institutions must monitor independently, not support government efforts. Consequently, the UNCRC specifically requests information about independent mechanisms.<sup>315</sup> Independence supported the Norwegian Ombudsman's success: a 1995 evaluation found the Ombudsman helped to put children on the political agenda, created greater public acceptance of child rights, children were well aware of its functions, and

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A Canadian centre has been proposed in Canada (Pearson & Kraft Sloan (2002), *Centre for Children, Youth and Citizenship*. See Thesis Chapter Four). The relationship of these offices with government impedes their success due to lack of independence and impartiality since they do not have the legal status without government approval to carry out their mandate; Van Bueren (note 46 above), 410. Nevertheless, they should aim to enhance child rights efforts.

<sup>312</sup>Each Austrian region has a local ombudsperson and all nine address federal issues; each of the 23 governments in Tunisia has Child Protection Delegates; ENOC, (note 311 above). Belgium's French Community Council has a General Delegate for Children's Rights and the Flemish Community has a Children's Rights Commissioner. Scotland, Wales, Northern Ireland, New Zealand, England (*The Children's Act 2004*, c. 31 (Eng.)), and Queensland, Australia established Children's Commissioners; Iceland, Ireland and Sweden created Ombudsmen for Children. Institutions are planned in Ukraine and under government consideration in: Germany and Latvia (ENOC in Newell and Holmberg (2000), "A 'Watchdog' for Children's Rights". *Children's Rights: Turning Principles into Practice*. Petrén and Himes (eds.), 188-189); Luxembourg and Poland (ENOC (note 311 above)); and Switzerland (Children's Rights Alliance for England (2000), *CRAE Children's Rights Factsheet #6: Independent Human Rights Institutions for Children: the Global Picture*, 4).

Child rights are included in the mandate of general national (or federal) human rights institutions in: Australia and in New South Wales, Hungary, Portugal, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, South Africa, Spain and in the Spanish autonomous region of Catalonia (ENOC (note 311 above)). While mainstreaming children's rights is useful, they should not be diminished in priority, and require comprehensive standards and functions for children (Newell and Holmberg (note 312 above), 173). For instance, the Portuguese Ombudsman for Justice covers children's issues with specific staff and a telephone hotline (ENOC in *ibid.*, 187).

<sup>313</sup>Examples include: Finland's national Children's Ombudsman Office, maintained by Mannerheim League for Child Welfare (ENOC (note 311 above)); and the Children's Rights Alliance of England established a Children's Rights Commissioner for the City of London involving 15 children on an Advisory Board (Office of Children's Rights Commissioner for London (2000), *Background Briefing: October/November 2000*, 1-2. The Office has since closed.). The influence of this Commissioner was limited due to the absence of a supportive legal culture but children's involvement is a positive development.

<sup>314</sup>*Principles relating to the Statute of National Institutions (The Paris Principles)* (1993), UN Doc.A/48/134.

<sup>315</sup>UNCRC (note 12 above), s. I, para.18.



through information dissemination, it also helped to make the rule of law more effective and improved the child's position in law.<sup>316</sup> In spite of the advantages, many states do not have independent mechanisms due to such reasons as lack of political will, financial and other resources. Hence, these national institutions should remain independent, credible, well-organised to create and maintain legitimacy with children and policy makers and fulfil their role in supporting children.<sup>317</sup>

Yet, while there appears to be much national activity, an insufficient number of independent national monitoring mechanisms exist, which likely restricts children's rights.<sup>318</sup> Consequently, the proposed monitoring guidelines urge the establishment of such national monitors.<sup>319</sup>

## 6.0 INTERNATIONAL AND DOMESTIC COURTS

Judges are not monitors since adjudication is reactive but case law illustrates the role and status of international child rights law. Hence, international and domestic courts contribute to monitoring. At the international level, the ICJ has limited relevance to child rights assessment since it is "very rare" for the ICJ to consider a human rights case<sup>320</sup> because individuals do not have status.<sup>321</sup> But the International Criminal Court (ICC) prosecutes individuals including those conscripting or enlisting children under the age of fifteen into national armed forces or using them to participate actively in hostilities.<sup>322</sup> Due to grave

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<sup>316</sup>Norway, Committee to evaluate the Commissioner for Children (1995), *Summary of the Committee's conclusions from the Norwegian Official Report on Commissioner for Children, and Childhood in Norway*, 26.

<sup>317</sup>Van Bueren (note 46 above), 410.

<sup>318</sup>For example, see UN (1997), *Question of torture and other cruel, inhuman or degrading treatment or punishment, Note by the Secretary-General*, UN Doc.A/55/290, para.13.

<sup>319</sup>See Thesis Appendix A.

<sup>320</sup>Higgins (note 181 above), 7-8.

<sup>321</sup>ICJ Statute a.34(1). Although the ICJ decided the U.S. violated various international obligations in relation to the rights of detained and convicted Mexican citizens including access to consular assistance. See *Mexico v. The United States of America*, 2004 ICJ Rep. 128.

<sup>322</sup>*Rome Statute of the International Criminal Court* (1998), UN Doc. A/CONF.183/9, entered into force on 1 July 2002, to prosecute such crimes as genocide, war crimes, crimes against humanity and eventually, crimes of aggression and crimes between nations as well as within them. The small number of children's rights under the mandate reinforces the importance of national courts.



crimes committed in the Democratic Republic of Congo (DRC), with reports of rape, torture, forced displacement and the illegal use of child soldiers, and with the DRC's referral of the situation to the Court, the Chief Prosecutor of the ICC opened its first investigation in June 2004.<sup>323</sup> The Ugandan President has also referred the situation concerning the Lord's Resistance Army (LRA) to the ICC due to situation there including the kidnapping of thousands of children to be soldiers or sexually exploited.<sup>324</sup> The Court has no jurisdiction over any person under 18 at the time of the alleged crime according to article 26. It will be interesting to assess the ICC's future contributions, including the involvement of children in its processes. In general, legal processes should be advanced to support child rights.

The Universal Declaration of Human Rights strongly encourages and the ICCPR requires national remedies for alleged violations,<sup>325</sup> to ensure the accountability of states parties to individuals and groups within their jurisdictions.<sup>326</sup> As Schachter notes, international law does not generally require states to provide remedies to individuals for international legal breaches in domestic courts but in some treaties, the "obligations of means" specifically require "procedures and agencies" to fulfil the obligation of result.<sup>327</sup> Then, the state decides whether the right to remedy by competent authority may be executive, administrative or judicial.<sup>328</sup> Whether international customary law includes domestic judicial recourse is difficult to determine, as Schachter explains, although foreigners should have access to the domestic courts.<sup>329</sup> The United States' *Alien Tort Statute* allows domestic courts to determine liability for rights violations in foreign jurisdictions to enforce international law.<sup>330</sup> In

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<sup>323</sup>ICC (2004), *Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I*, 5 July 2004 ICC-01/04; and ICC (2004), *Press Release: "The Office of the Prosecutor of the International Criminal Court opens its first investigation"*.

<sup>324</sup>ICC (2004), *Press Release: "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC"*.

<sup>325</sup>Universal Declaration, article 8; and ICCPR, article 2(3).

<sup>326</sup>See Shelton (note 5 above).

<sup>327</sup>Schachter (1991), *International law in theory and practice*, 240.

<sup>328</sup>See for instance, ICCPR a. 2(3); *ibid.*

<sup>329</sup>*Ibid.*, 241.

<sup>330</sup>28 U.S.C.; see further Steiner & Alston (note 77 above), 1049-1078.



monistic legal systems, international human rights is more easily adjudicated rather than in dualistic systems.

The balance among government branches is often contested with arguments favouring judicial restraint or activism.<sup>331</sup> Bossuyt argues against judicial enforcement of social rights due to his beliefs that such rights are the responsibility of administrative or political bodies, which should establish such priorities not the courts, and that social rights are not enforceable.<sup>332</sup> Bossuyt's categorical approach to human rights is limited to categories, denying the interconnectedness of rights. Social rights should not be restricted.<sup>333</sup> Moreover, national courts have already demonstrated their role to enforce social rights. For example, Van Bueren advocates a test case strategy in South Africa to combat poverty,<sup>334</sup> which the University of Western Cape advanced in *Grootboom*.<sup>335</sup> Canadian provincial courts also attempted to advance social rights in *Auton*.<sup>336</sup> Goonesekere affirms the CRC as particularly well-suited, legitimising judicial activism and the public commitment to implementation.<sup>337</sup> Hence, the courts have an appropriate and important role in relation to all child rights. Awareness-raising and training about children's rights and their applicability in national law must be available to and utilised by judges, lawyers and others.

## 7.0 CIVIL SOCIETAL ACTORS

Civil society, including local, national, regional and international NGOs, foundations, religious and professional organisations, media, the private sector and individuals, monitors in various ways at different levels. Actors draft alternative reports, provide information,

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<sup>331</sup>For instance, see Manfredi (1993), *Judicial Power and the Charter*.

<sup>332</sup>Bossuyt (1993), "International Human Rights Systems: Strengths and Weaknesses". *Human Rights in the Twenty-First Century*. Mahoney & Mahoney (eds.), 52.

<sup>333</sup>See Hunt (2000), "Social Rights: Building a Legal Tradition." *Universal Human Rights?* Patman (ed.).

<sup>334</sup>Van Bueren (note 58 above), 52-74.

<sup>335</sup>CCT11/00 2001 (1) SA 46 (CC) 4 October 2000. See Chapter Four, s.2.3.

<sup>336</sup>2002 BCCA 538, but the Supreme Court did not allow the interpretation to stand: [2004] 3 S.C.R. 657. See Chapter Four, s.2.3.

<sup>337</sup>Goonesekere (note 200 above), 33.



often raise issues that may not be receiving any or adequate attention. The demands upon these monitors may result however, in their limited approach and/or results impeding a child rights-based approach.

NGOs have important expertise as demonstrated by the example of Save the Children UK, which convened, with the Foreign & Commonwealth Office support, the Select Committee of 16 young people to investigate key international development issues and urge action.<sup>338</sup> Organisations however, are dependent on external funding requiring fundraising including basic rights information, which appropriates limited resources. Moreover, these sources and constraints may influence their work.<sup>339</sup> Nevertheless, it is often remarkable what many of these organisations, often understaffed and underfunded, can achieve, particularly when they coalesce at national and international levels as illustrated by the Child Rights Caucus at the UN Special Session on Children.<sup>340</sup> However, overbearing NGO approaches to monitoring, characterised by unbalanced or uneven quality work, may be distrusted and results dismissed,<sup>341</sup> thereby not benefitting child rights progress.

As the UNCRC recognises,<sup>342</sup> media can illuminate or discover child rights issues. However, Guest stresses that such cultural and political biases as Western attitudes and values, can inform the work of journalists and media outlets; national differences exist in how child rights are presented including positive examples of Mexican and Guatemalan coverage and Bangladeshi journalists pursuing and developing stories within a child rights framework.<sup>343</sup> But generally, child rights are rarely considered in media, which largely presents children as

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<sup>338</sup>Save the Children UK (2000), *Children's Select Committee: Report on Children's Rights*.

<sup>339</sup>See Chapters Four, s.2.7, and Five, s.1.

<sup>340</sup>See for instance Caucus letter of protest to the US delegation in CRIN (2002), *Special Session Update No. 4*.

<sup>341</sup>See further Chapter Five. Weissbrodt (1984), "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights". *Human Rights in International Law: Legal and Policy Issues*. Meron (ed.), 419.

<sup>342</sup>For example, see UNCRC: (note 9 above), para.21; and *General Discussion on "The Child and the Media"*, UN Doc. CRC/C/50, Annex IX.

<sup>343</sup>Guest, in Black (1994), *Monitoring the Rights of Children*, 40.



victims.<sup>344</sup> Media coverage of treaty reports by states parties has potential to engage the general public for more effective monitoring. Nonetheless, the media generally needs to be better informed about, and engaged in child rights.

The private sector at local, national and international levels is increasingly acknowledging human rights, including monitoring. While rights have traditionally concerned the state and relations with individuals, there is now greater understanding of the distinction between the public and private spheres including the private sector's relevance.<sup>345</sup> UNICEF acknowledges that one-third of its funding comes from the private sector comprised of individuals, corporations, foundations and organizations.<sup>346</sup> The corporate sector, often with the support of international organizations, national governments or coalitions, has developed voluntary codes of conduct in particular countries or areas.<sup>347</sup> The corporate world is urged to adopt a "triple bottom line" to reflect environmental and social justice concerns, examined through auditing.<sup>348</sup> As examples, Indian companies have established non-profit foundations to benefit communities and a Brazilian private foundation set up by toy manufacturers is actively promoting street and working children.<sup>349</sup> The UN Secretary-General expressed the need for further cooperation,<sup>350</sup> leading to the development of guidelines for UN organisations in relation to the corporate sector.<sup>351</sup> The overall framework of the UN's Global Compact was launched in 2000 as a network of UN agencies, labour, companies and civil society to advance ten principles of human rights, labour, the environment and anti-

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<sup>344</sup>ibid., 39.

<sup>345</sup>Examples include: Clapham (1993), *Human Rights in the Private Sphere*, Oxford: Clarendon Press; and Chinkin (1999), "A Critique of the Public/Private Dimension." 10 *EJIL* 387-395.

<sup>346</sup>UNICEF, *Building Alliance for Children: UNICEF and the Private Sector*.

<sup>347</sup>See for instance, McCrudden (2000), "Human Rights Codes for Transnational Corporations: The Sullivan and MacBride Principles". *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton (ed.), 418-448.

<sup>348</sup>Himes et al. (note 72 above), 165.

<sup>349</sup>Ibid., 166.

<sup>350</sup>Annan (2000), *'We the Peoples': The Role of the United Nations in the 21st Century*, 71.

<sup>351</sup>UN Secretary-General (2000), *Guidelines on Cooperation between the United Nations and the Business Community*.



corruption in corporate practices<sup>352</sup> but NGOs criticise its voluntary nature as weak and diverting attention from concrete commitments.<sup>353</sup> Even the UN acknowledges Compact participation must have more significance and actors' roles and responsibilities must be clarified.<sup>354</sup> But specific actions are also being undertaken. For example, the UN Commission on Human Rights requested in 2005 *inter alia* the appointment of a special representative on human rights and transnational corporations and other businesses: "To identify and clarify standards of corporate responsibility and accountability..."<sup>355</sup> The Gap clothing corporation's release of a monitoring report on sweat shops among its suppliers involving 90 full-time compliance officers is a positive development, potentially influencing *inter alia* child labour and other North American retailers.<sup>356</sup> Nevertheless, future research is required of the private sector's monitoring role and its significance.

There are many positive examples of civil societal monitoring by NGOs, media and the corporate sector; NGOs particularly carry out impressive activities to support child participation. Limited resources may challenge civil societal monitoring. In addition, the monitor's perspective is an important consideration in assessing procedures, efforts and results because it may potentially effect a limited approach and/or results. As Chapters Four and Five explore, the monitor is not necessarily bias-free, knowledgeable about child rights, or dedicated to their progress to the detriment of a child rights-based approach.

## 8.0 STATUS OF A CHILD RIGHTS-BASED APPROACH

To gauge a child rights-based approach in monitoring of international child rights law, this section presents the status of each CRC general principle and overall observations.

### 8.1 Non-discrimination

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<sup>352</sup>See UN (2005), *What is the Global Compact?*

<sup>353</sup>Wurst (2004), "Global Compact Promoted, Criticized Ahead of Today's Summit". *U.N. Wire*. Washington, D.C.: June 24.

<sup>354</sup>A current review of Compact includes *inter alia* these objectives; See UN (2005), *The Next Stages of Development*.

<sup>355</sup>UN (2005), *Human rights and transnational corporations and other business enterprises*, UN Doc.E/CN.4/RES/2005/69.

<sup>356</sup>McCarthy (2004), "Gap pressures other retailers with first report on sweat shops". *The Globe & Mail*, May 13, Toronto.



Non-discrimination is implicated in monitoring due to: the physical remoteness of mechanisms and perceived inaccessibility, and limitations of current efforts.

As most monitoring activity occurs in Geneva, New York and other international or national centres, many children and adults are far removed from it. Even if aware about the concept of child rights monitoring, which remains unusual, it may not be perceived as relevant to their lives. As discussed below, the lack of child-friendly institutions and procedures perpetuate discrimination and inhibit participation. One effort to redress this structural problem is the convening of UNCRC regional meetings in various locations to facilitate wider participation and supplement the formal UN process, which have been organised for follow-up.<sup>357</sup> Although costly and logistically challenging, these efforts benefit the Committee's awareness of regional realities and popularise its role and the CRC to local, national and regional populations including children. Additional creative approaches to overcome geographical challenges to effective monitoring are needed. More involvement of international and national monitors in conferences and other activities will enhance their visibility and likely their relevance. Moreover, the broad spectrum of actual and potential procedures of monitors, rules of admissibility and so on can appear either inaccessible or restricted to many adults and children, inhibiting usage. Although NGOs have attempted to demystify the system through Internet and other projects,<sup>358</sup> greater effort is needed because most individuals remain unfamiliar with the international rights system and monitoring avenues.

Cynicism and perceptions about law may encourage attitudinal impediments to effective monitoring. Weak laws, corrupt judges and a lack of lawyers in many societies to address concerns mean that the legal route and monitoring procedures are simply not relevant to many people. Further, international law is not known or understood by many people, including children, to be useful as a framework to address issues. Consequently, the non-

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<sup>357</sup>Informal regional meetings were held in Latin America, 1992, and South-East Asia, 1993; ten years passed before reconvening in Damascus (December 2003) and Bangkok (November 2004). See OHCHR (2004) *Report on the Workshop on the Implementation of the Concluding Observations of the Committee on the Rights of the Child*, UN Doc.HRI/TBFU/2003/SYR/2; OHCHR (2004) *Report on the Sub-Regional Workshop on the Implementation of the Concluding Observations of the Committee on the Rights of the Child*, UN Doc.HRI/TBFU/2004/THA. HRC held a similar meeting in Quito in 2002.

<sup>358</sup>For example, see Save the Children *Child Rights Advocacy Project*.



binding *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, also known as the Declaration on Human Rights Defenders,<sup>359</sup> specifically identifies in: article 2 the state's responsibility in protecting, promoting and implementing all rights and freedoms by *inter alia* creating appropriate conditions and legal guarantees; and article 6 preserves everyone's right "To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms..." In general, additional awareness-raising and capacity-building are needed to reduce the impact of these impediments.

Additional limitations exist to furthering non-discrimination including the relative absence of financial analyses, and lack of statistical data. Assessment of funding for child rights is important to illuminate financial commitments or distinctions for children as revealed in budget preparation and analyses of expenditures since such economists as de Vylder have established economic policies within countries and among them concern child rights.<sup>360</sup> Examples include: UNICEF;<sup>361</sup> and UNHCR, whose funding requests specifically designate money for child rights, and it receives donations explicitly for children from countries;<sup>362</sup> and the innovative South African Children's Budget project, which contributed to the CRC report.<sup>363</sup> Yet, analyses of state finances and expenditures are generally not carried out due to lack of expertise and commitment. There is also a difficulty or obstacle of producing and presenting statistical data about child rights. Although international organisations rely on statistics,<sup>364</sup> states parties provide little quantitative information in reporting.<sup>365</sup> Both types of limitations restrict monitoring efforts; more attention should be devoted to elaborating

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<sup>359</sup>*UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144.

<sup>360</sup>de Vylder (1996), *Development Strategies, Macroeconomic Policies and the Rights of the Child*.

<sup>361</sup>Erickson (note 170 above).

<sup>362</sup>Dalen (note 171 above).

<sup>363</sup>National Programme of Action Steering Committee South Africa (1997), *Initial Country Report - South Africa: Convention on the Rights of the Child*, 20. See Chapter Four, s.2.7.

<sup>364</sup>See Chapter Five, s.3.2.

<sup>365</sup>David (note 26 above).



such data.

Monitoring efforts need to better recognise varying and developing capacities of children since child rights not only distinguish children's concerns and perspectives from those of adults, but also identify and respect distinctions among children themselves. Monitors tend to lump children into groups, particularly in international analyses, make conclusions and develop recommendations about them without sufficiently exploring the contexts of their findings and results or recognising children's differences. For instance as CRC a.12 acknowledges, age is not the only reliable category of distinction since maturity is individually pursued yet the understanding that all children are similar is often assumed despite the fact that the CRC did not adopt this perspective.<sup>366</sup> Monitoring children as a group instead of relying on disaggregated data may often be discriminatory and inconsistent with a child rights approach if relevant individual characteristics and other group identities are excluded. For instance, despite recognition by the global community on several occasions, there continues to be lack of acknowledgment or concern about gender dimensions.<sup>367</sup> Although the UNCEDAW reflects one, it has not yet done enough to propagate a gender perspective in international law.<sup>368</sup> Consequently, other monitors inadequately consider or incorporate gender issues or concerns in their questions or General Comments.<sup>369</sup> Meetings of treaty body chairpersons regularly acknowledge the importance of gender perspectives, but rhetoric must be distinguished from action. David states the UNCRC is a "pioneer" in many areas including gender analysis, and refers to its use of terms for boys and girls to help sensitize states parties.<sup>370</sup> This favourable interpretation, however, is not shared as Connors states the Committee "does not appear to employ a gender analysis

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<sup>366</sup>The drafters concluded that the CRC be entitled the Convention on the Rights of the Child, not the Rights of Children, to promote and protect the rights of each and every child, not simply children as one group.

<sup>367</sup>As examples, the Vienna World Conference on Human Rights and the Beijing Declaration and Platform for Action; see Connors (1996), "General Human Rights Instrument and their Relevance to Women". *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Legislation*. Byrnes et al. (eds.), 27-38.

<sup>368</sup>Byrnes, in Clapham (2000), "UN human rights reporting procedures: An NGO perspective". *The Future of UN Human Rights Treaty Monitoring*. Alston & Crawford (eds.), 192.

<sup>369</sup>Clapham, *ibid*.

<sup>370</sup>David (note 26 above).



in its work, rarely considering the situation of girls as distinct from boys in particular contexts.”<sup>371</sup> Stronger efforts are needed to reflect all pertinent differences for children.

A child rights-based approach to monitoring includes consideration of non-discrimination, which necessitates attention be directed to *inter alia* geographic limitations, inaccessibility issues, and data collection shortcomings. The commitment to non-discrimination requires better efforts from all monitors to ascertain outcomes for each child.

## 8.2 Best Interests

The child’s best interests principle is a monitoring concern because the child and his/her rights do not centre efforts as revealed in: few independent evaluations of monitors and their efforts; weak coordination; and the need for increased resources.

Excepting UNHCR’s examination of its child rights activities and the general efforts of OHCHR and OAS, independent evaluations of various international and regional monitors appear to be inadequately carried out due to lack of available details including in most questionnaire responses. While UN Charter organisations monitor the work of many UN actors, overwhelmed agendas and other constraints limit their impact. These institutions, the OHCHR, and the OAS human rights system, undertake general evaluations but they are generally not independent,<sup>372</sup> which may make them more perfunctory than meaningful exercises. Evaluations are not only important to identify and rectify obstacles to children’s rights, implement and enhance progress, but also to address obstacles and advance monitoring progress. To be most effective, independent observers evaluate because they have nothing personal to gain from the monitors’ efforts. Independent evaluations illustrate a commitment to monitoring through learning about the strengths and weaknesses of efforts. NGOs could perform this function, however they tend to focus on states parties to instruments rather than examining such monitors as regional organisations, UNICEF, the private sector, and media to name a few. Academics could better fulfil this function but funding and access to appropriate institutional documentation and personnel must be

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<sup>371</sup>Connors (note 134 above).

<sup>372</sup>An exception is Alston’s work for the UN, see: UN (1989) *Initial report on enhancing the long-term effectiveness of the UN human rights treaty system, by the independent expert, Mr. Philip Alston*, UN Doc.A/44/668.



provided. Monitors must not only recognise the importance and value of such evaluations, but actively support them. Accordingly, independent evaluations facilitate "monitoring the monitors" as Hammarberg identifies,<sup>373</sup> in order to contribute to strengthening efforts and procedures and serve best interests.

An ongoing challenge remains to coordinate the efforts of many actors and mechanisms in the international system. While the spectrum of activity demonstrates commitment to, and interest in children's rights, its breadth results with actual and potential duplication since child rights are elaborated throughout international human rights law. For example, in addition to the CRC, children's rights are included in: CEDAW, which considers the girl child; CERD, in relation to discrimination experienced by different groups of children; CAT, with regard to ill-treatment of minors; ICESCR, which examines the impact of economic and social difficulties affecting children and access to education; and ICCPR, in relation to such concerns as forced labour, corporal punishment and juvenile justice.<sup>374</sup> With effective coordination, information can be shared amongst actors, problems can be detected early, lessons learned can be propagated, and monitoring results can be widely distributed and discussed. Moreover, it ensures consistent interpretation of rights, assessment of information, and avoids duplication and confusion.<sup>375</sup> There have been some advancements including regular input from WHO, UNESCO, UNICEF and ILO in CRC reporting.<sup>376</sup> Rodley concludes possibilities of duplication between treaty bodies and special procedures are avoidable or where relevant, accommodated administratively.<sup>377</sup> However, effective coordination requires efforts beyond cooperating over occasional projects or other isolated exercises so that monitors maximise use of available data and interpret child rights provisions consistently. Coordination suffers by some actors' distinct approaches as Beuze explains because many monitors are appointed as independent experts, so often they do not want to

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<sup>373</sup>Hammarberg (note 306 above).

<sup>374</sup>Tistounet (2000), "The problem of overlapping among different treaty bodies". *The Future of UN Human Rights Treaty Monitoring*. Alston & Crawford(eds.), 388.

<sup>375</sup>Van Boven (1997), "The International System of Human Rights: An Overview". *Manual on Human Rights Reporting*, 16.

<sup>376</sup>David (note 26 above).

<sup>377</sup>Rodley (2003), "United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights-Complementarity or Competition?" *25 Human Rights Quarterly*, 882-908.



refer to, nor be seen to rely on results - even if relevant - from other monitors.<sup>378</sup> For example, the UN Special Rapporteur on Torture visited Brazil yet, the Committee Against Torture's Concluding Observations about the initial report ignored not only his comments, but also those of the UNCRC, resulting with no references to children.<sup>379</sup> Some monitors focus on their particular mandates excluding others, thereby atomising their work and results so their concerns and recommendations seem weaker and if not shared with other monitors, may not be considered as seriously by the state under consideration or the international community.<sup>380</sup> Then, results may lack the impact required to effect change. Independence of monitors should not mean the lack of relevance of other monitors' work because the benefits of coordination are too valuable. But while different actors regularly recommend coordination,<sup>381</sup> it is either not occurring or effected weakly and remains an ongoing challenge.<sup>382</sup> Research has found for example that despite the identification of a focal point for communications in the UNCEDAW, the UNCRC "has not provided significant input".<sup>383</sup> Moreover, the wealth of valuable information collected by the reporting system over the years is rarely used outside the UNCEDAW;<sup>384</sup> a conclusion that may also apply to other treaty bodies. Monitors would benefit from efficacious, rather than superficial, coordination and information-sharing. With meaningful exchanges, wide involvement would not only provide more data for better comprehension, but it also would empower more monitors and achieve

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<sup>378</sup>Beuze (note 125 above).

<sup>379</sup>Ibid.

<sup>380</sup>Ibid.

<sup>381</sup>As examples, see: resolutions on the effective implementation of international instruments on human rights of UN General Assembly UN Doc.A/RES/53/138, 1 March 1999, and Commission on Human Rights UN Doc.E/CN.4/RES/2000/75, 27 April 2000; and *Vienna Declaration and Programme of Action*, Part II, A.

<sup>382</sup>As examples, see UN (2000), *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights*, UN Doc.E/CN.4/RES/2000/75; and UN (2001), *Status of the Convention on the Rights of the Child: Report of the Secretary-General*, 18 July 2001, UN Doc.A/56/203, para.17, which acknowledges the need for improved cooperation among the UNCRC and other stakeholders including UN programmes and bodies and NGOs, especially with national human rights institutions or ombudspersons and partners during the Committee's pre-sessional working groups.

<sup>383</sup>Connors (note 134 above).

<sup>384</sup>Cartwright (2005), "'CEDAW at 25" - Extract from the Commemorative Roundtable Discussion to mark CEDAW at 25." 2 *CEDAW Home-Progress on CEDAW for Pacific Women*, 7.



stronger impact, and benefit best interests of the child.

The need for increased resources for monitoring has been well-documented.<sup>385</sup> But, in order to support a child's best interests, improved resources and more follow-up are needed. Additional financial and human resources will support child rights monitoring. Support is needed for such practical issues as liaisons, the production of child-friendly documentation and coverage of other expenses including research and travel. Although lack of resources is an endearing issue at all levels, there is a need for a regular budget for children's rights monitoring at the UN, regional and national levels. For example, the UNCRC is dependent on ad-hoc funding where two-thirds of funding is from state voluntary donations, which is accurately described as "precarious and prevents planning."<sup>386</sup> Other monitors are also impeded from effectively satisfying their objectives due to the absence of regular, consistent funding of their work.

Limited staff is a significant, common issue as many institutions and actors acknowledge their overworked status, which inevitably affects the scope and quality of their work.<sup>387</sup> In particular, the availability of sufficient support to carry out volunteer mandates remains a significant issue. Survey respondents generally agree enhanced resources would be most significant to improve monitoring.<sup>388</sup> The broad scope of monitors' mandates and the fact that many are volunteers, reinforce this requirement. For example, the Special Rapporteur on the sale of children is a volunteer, expected to work only four weeks of the year, despite the huge global mandate, through country assessment missions (two per year) and reports to the Commission on Human Rights and the General Assembly.<sup>389</sup> S/he is the only dedicated UN advocate on these issues who has only one assistant despite the breadth of the

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<sup>385</sup>For example, see Evatt (2000), "Ensuring Effective Supervisory Procedures: The Need for Resources". *The Future of UN Human Rights Treaty Monitoring*. Alston & Crawford (ed.).

<sup>386</sup>David (note 26 above).

<sup>387</sup>Examples include the Office of the Special Representative of the Secretary-General, the OAS, and assistants to the UNCRC and the Special Rapporteur on the Sale of Children.

<sup>388</sup>David, secretary of the UNCRC (2001), *Response to "Questionnaire on Activities Related to Children"*, 27 April; and Philpot (note 126 above).

<sup>389</sup>Philpot, *ibid*.



responsibility.<sup>390</sup> Only six people support the work of the UNCRC. The size of the mandates and the amount of information to be considered inevitably compromise the capacity and effectiveness to carry out monitoring.

Many monitors and their support staff identify the significant problem of the lack of follow-up to their results, largely due to the absence of resources and the lack of enforcement. While some actors including HRC and UNICEF support follow-up of recommendations, their means are limited. Within the UN and other institutions, limited or no resources exist to facilitate responses to monitoring efforts. Moreover, lack of legal enforcement poses an ongoing challenge. The Special Rapporteur on Torture as an example, has little information to assess follow-up to his recommendations at the country level and within the UN system.<sup>391</sup> Best interests of the child would benefit if monitoring results have significance for child rights.

A child rights-based approach demands attention to the best interests of the child. The aforementioned problems of few independent evaluations of monitors and their efforts, weak coordination, and the need for increased resources reflect the fact that the child and his/her rights do not yet inspire or guide monitoring. These difficulties pose restraints to effective monitoring and to the priority of child's best interests and must be redressed to benefit him/her.

### 8.3 Maximum Survival & Development

The maximum survival and development principle demonstrates limitations of current monitoring including the lack of a child rights approach. The “child-saving” or protectionist approach to children endures. Protecting children - rather than advancing their rights - may benefit them in the short-term but it is a limited voluntary response to the situation rather than a legal obligation. The general principle of maximum survival and development signifies the child does not only need and have the right to protection, s/he needs to be nurtured, encouraged to develop and participate in matters of concern, which is not a concern of the protectionist approach. Moreover, a non-discrimination approach requires recognition

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<sup>390</sup>Ibid.

<sup>391</sup>Beuze (note 125 above).



of children as a diverse group. As discussed earlier, when treaties are not child-specific, monitors do not comprehensively consider child rights, tending to advance children as victims needing to be saved, without reference to other rights as per the HRC's lack of reference to political rights in the General Comment about Covenant article 24; and the UNCESCR's simplistic consideration of children as "disadvantaged." Better understanding of children's rights in relation to implementation and monitoring should be advanced through awareness-raising and training.

#### 8.4 Views of the Child

Monitoring involves broad participation as provided in CRC article 45; each state party reporting to the UN Committee involves at least five or six sources of information including ombudspersons or national human rights institutions, UN agencies, national and international NGOs, individual experts or children.<sup>392</sup> The CRC appears to have inspired wide engagement in other efforts including UNICEF and OAU (predecessor to the AU).<sup>393</sup> In general however, CRC monitoring is a specialised, country-specific activity, lacking a systematic approach to involve all relevant actors.<sup>394</sup> In particular, respect for the child's views in monitoring is impeded for several reasons including: limited experience and appreciation, attitudinal impediments, and overreliance on meetings. Some monitors may be interested in child participation but practice is often limited to a small minority within institutions so that it may not concern key decision-makers. Thus, while much interest and work exists in participatory programming at UNEP, Save the Children UK, UNICEF and UNHCR, lessons have limited impact on efforts including monitoring largely because they do not reflect institutional priorities. Despite verbal commitment, a dichotomy exists between the importance of child participation and its irrelevance or lack of priority in the overall institution or mechanism. For example, the UNCRC's first General Comment developed through "participatory" means<sup>395</sup> but, despite the Committee's commitment to participation, it did not involve

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<sup>392</sup>David (note 26 above).

<sup>393</sup>Erickson (note 170 above); Johnson (note 233 above).

<sup>394</sup>Bell, Head of Advocacy, The Save the Children Fund (2002), Interview with author, London: 21 November.

<sup>395</sup>First, a consultant (Alston) discussed the issues with the Committee and prepared the first text. The draft was shared with two Committee members and then education experts, including independent, NGO and UN representatives, were consulted at a London meeting. Committee members discussed the final text during the January 2001 session before formal adoption. David, Secretary to the UNCRC (2001),



children, which is ironic given article 29 aims to *inter alia* evaluate education's objectives from the child's viewpoint.<sup>396</sup> Thus, the Committee follows normal international practice emphasizing adults, and perpetuating the traditional exclusion of children in the development of international law, making it less likely to reflect all of children's concerns.<sup>397</sup> If children were involved, they would have likely contributed valuable insights into the practice of education, identifying issues and recommendations from their perspectives.<sup>398</sup> Moreover, such engagement and consideration of their views would have demonstrated respect of children. Even a petition of 95,698,415 young people from 118 states demanding an end of recruitment into armed forces was ignored during CRC negotiations.<sup>399</sup> UN thematic or country monitors engage children and generally consider children as subjects including the Special Representative on Children and Armed Conflict, the Special Rapporteur on Torture, and the Special Rapporteur on the Sale of Children<sup>400</sup> however, these monitors have limited resources, largely restricting child involvement and its impact. In general, monitors rely upon technical approaches and language without even considering children or justifying their exclusion due to over-reliance upon these established procedures. Most intergovernmental bodies for instance, may rely on strict interpretations of their mandate or rules of procedure to avoid different approaches or reform. Therefore, while there are some encouraging developments, most monitors generally do not appreciate or practice child engagement.

The question of what children think or know about their rights is rarely asked in monitoring. Out of 29 countries a year, approximately one to four countries reporting to the Committee involve children with slow improvement.<sup>401</sup> UNCRC secretary David believes children should not be on government delegations since children cannot be accountable for their

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Personal communication with author, 5 June.

<sup>396</sup>The provision emphasises the development of the child and his/her abilities and preparation for responsible life; Van Bueren (note 46 above), 254.

<sup>397</sup>*Ibid.*, 52.

<sup>398</sup>See Appendix A: Proposed Guidelines for Child Rights-Based Approach.

<sup>399</sup>This issue has since been addressed in an optional protocol. Van Bueren (note 46 above), 337.

<sup>400</sup>Philpot (note 126 above).

<sup>401</sup>David (note 26 above).



government's CRC implementation.<sup>402</sup> While the government is responsible for CRC progress, children can have clear roles on delegations to provide valuable insight and ideas about the reality of rights in their country. Further, as delegation members, not only are their expenses usually covered, an important consideration for children, they should receive respect and privileges. But whether children participate with government or NGO support, it is valuable for them to contribute, learn and share experiences. Further, it will broaden the reporting process and likely support follow-up in the home country. While states parties or other actors might be apprehensive about greater child involvement, there is no justification for their exclusion.

Monitors including the UNCRC, OAU, UNEP, FAO, UNESCO and ILO-IPEC tend to overemphasise conferences and meetings to facilitate child participation. While they can be important, such events are often ad-hoc and unique, reflecting only partial or lack of commitment to participation. While emphasis is placed on involving children in events or interviews to include their voices and raise awareness, engagement usually has limited impact on the institution or actor's processes and results. On Hart's ladder of participation, such events can range among the lowest rungs of manipulation, decoration, tokenism, which are examples of non-participation to enhancing degrees of participation.<sup>403</sup> Even though these efforts may hover on the lower ladder levels, they continue to be heralded as successful participation examples. If children were provided the space and support to articulate their situations, a much better understanding would likely be obtained to benefit monitoring and respect child rights.

Despite the fact that it is enshrined in CRC article 12 and the wealth of resources explaining the role and value of child participation in various matters,<sup>404</sup> attitudinal impediments continue to restrain it in monitoring because, while the international community acknowledges children and their rights, many representatives appear to prefer to talk *about*,

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<sup>402</sup>Ibid.

<sup>403</sup>The upper-most rungs to reflect child-initiated and directed activity, child-initiated with shared decision-making with adults, are less pertinent for adult-organised international monitoring or organisations. Hart (1992), *Children's Participation: From Tokenism to Citizenship*.

<sup>404</sup>See examples: Lansdown (2001), *Promoting Children's Participation in Democratic Decision-Making*; and Garbarino et al.(1990), *What Children Can Tell Us*.



rather than *with* children, as revealed in the difficulties or limitations of engaging children in processes or organizations. For example, the OHCHR and the UNCRC convened an event in 1999 to commemorate the CRC's tenth anniversary, assess its impact, and develop recommendations to improve implementation, involving UN and government officials, independent experts and children.<sup>405</sup> Among other proposals, the children stressed the importance of international agencies and governments actively consulting and involving children in their decision-making, and requested consideration of children's inclusion as UNCRC members. They complained about inaccessible language use during the event and the absence of some of their important proposals in the results. Some adult delegates criticised the children, contending that they lacked legitimacy as representatives.<sup>406</sup> While the adults should have been prepared for children's participation, the more fundamental issue remains: adults pertinent to international and national monitoring questioned the role and presence of children, even at an event examining the CRC's impact. This incident reflects a common lack of respect for child engagement and room for improvement. While absence of personnel, followed by the absence of policies, procedures and tools, are cited as impediments to child participation,<sup>407</sup> these findings reflect not only lack of resources, but also an attitudinal impediment to obtain them.

The paucity of child-friendly institutions and procedures is another barrier. Child-friendly institutions and procedures are inspired by the child, reflecting and supporting him/her. Monitoring would improve through child-friendly approaches as explained by K. where adults: "Try and keep long words out, use simpler, more appropriate language. They should try and explain what they mean."<sup>408</sup> J. explains:

*When documents are made, they should be able to report in a way where children can understand them as well as adults. Where children can understand them or*

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<sup>405</sup>OHCHR/UNCRC (1999), *Tenth Anniversary of the CRC Commemorative Meeting: Achievements and Challenges*.

<sup>406</sup>UNICEF's Regional Office for Europe (1999), *Children Speak Out: A Report from the CRC 10th Anniversary Commemorative Meeting*.

<sup>407</sup>However, it is believed that efforts will become more participatory following the recent evaluation; Dalen (note 171 above). Petit's appointment in mid-2001 may bring changes; Philpot (note 126 above).

<sup>408</sup>Twelve year-old girl, Focus Group on the Monitoring of Children's Rights (2003), organised and facilitated by Ph.D. candidate, with Article 12, London: July 28.



*adults can understand them. It would be a lot easier for everyone if there is a child-friendly version as well as a government long one.*<sup>409</sup>

Although many international legal avenues exist to pursue rights grievances, little or no consideration of the child's need for appropriate support or procedures to accommodate them, resulting with few advancements. Standard-setting institutions including the ILO have authority to improve the situation by mandating specific procedures.<sup>410</sup>

Generally, little consideration has been given to child engagement because most monitors only consider children as "objects of measurement," which has negative implications for their understanding of children's rights and their results. While the human rights system broadens avenues available to adults complaining of violations,<sup>411</sup> the principle of equality demands the similar consideration for children. Furthermore, as bearers of human rights, children are entitled to access to means and processes that may give effective remedies or consider their complaints.<sup>412</sup> The rights-based approach has advanced due to recognition that children can bring claims on their own behalf to monitors.<sup>413</sup> *Johnston v. Ireland*<sup>414</sup> illustrates that under the ECHR, the child has right of action and can obtain an independent judgment in a case even if his/her parents' application fails.<sup>415</sup> In this case, a child under age ten contested her illegitimate status along with her father and mother due to her father's inability to legally dissolve his marriage to another woman due to constitutional prohibition (article 41.3.2).<sup>416</sup> After the Irish Supreme Court decided an illegitimate child does not have the right to inherit, the applicants complained to the European Court, which found that due to the absence of a legal regime for her status as an illegitimate child, the state failed to respect her family life

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<sup>409</sup>Thirteen year-old boy, *ibid*.

<sup>410</sup>Institutions that focus on standard setting include UNESCO, ILO, OAU, OAS, and the Council of Europe.

<sup>411</sup>An example is the CEDAW communications procedure.

<sup>412</sup>Santos Pais (note 151 above), 6.

<sup>413</sup>Van Bueren (note 46 above), 53.

<sup>414</sup>*Johnston and Others v. Ireland*, judgment of 27 November 1986, 6/1985/92/139.

<sup>415</sup>Van Bueren (note 46 above), 61, EN # 85.

<sup>416</sup>Article 41.3.2 states that "No law shall be enacted providing for the grant of a dissolution of marriage." *Johnston and Others v. Ireland*, judgment of 27 November 1986, 6/1985/92/139, section II, A, para.16.



thereby violating article 8 for the girl and her parents. While children may access general monitors on occasion, it does not mean that monitors will appropriately and accurately analyse the alleged violations, which may differ from general rights obligations. The absence of a CRC provision to allow children to pursue individual or collective complaints is a particular structural obstacle<sup>417</sup> because there are limited avenues specifically designed for children with adequate support to pursue their rights, particularly problematic for marginalised children who face additional challenges in accessing the system. Despite ongoing UN reform efforts and the strengthening of human rights machinery,<sup>418</sup> the international community continues to ignore the issue, reflecting unwillingness to empower children. The aforementioned barriers should be explored further not only in the literature, but by international and regional organisations.

Child engagement will benefit monitoring since as Casas describes, reports “probably tell us much more about childhood policies than about the situation of children.”<sup>419</sup> Monitoring children’s rights should involve the “authentic voice of the children and not just a voice speaking for children,” as Verhellen describes.<sup>420</sup> Obi acknowledges: “The involvement of beneficiaries in the evaluation activities has been one of the areas which lacked considerable attention in the past. But this is changing.”<sup>421</sup> A recent evaluation of UNHCR activities included focus groups of refugee children.<sup>422</sup> Participation could include greater child representation during instrument drafting and implementation<sup>423</sup> and on Committee

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<sup>417</sup>As examples, Van Bueren (note 46 above), 410-411; and Ayotte (2001), *Separated Children and Adolescents Seeking Asylum - How Can We Consider Their Best Interests?*

<sup>418</sup>As examples, the UN adopted several optional protocols including: to CAT (2002); to CEDAW (1999); to CRC (2000).

<sup>419</sup>Casas (1996), “Monitoring Children’s Rights and Monitoring Childhood: Different Tasks?” *Monitoring Children’s Rights*. Verhellen (ed.), 49.

<sup>420</sup>Verhellen (1994), “The Search for the Achilles Heel: Monitoring of the UN CRC, and its implications for the States Parties.” *Children’s Rights: Monitoring Issues*. Verhellen & Spiesschaert (eds.), 7.

<sup>421</sup>Obi, Evaluation and Policy Analysis Unit, UNHCR (2001), Personal communication with author, 8 May.

<sup>422</sup>Dalen (note 171 above).

<sup>423</sup>Van Bueren (note 220 above), 748.



membership.<sup>424</sup> Engagement could be enhanced at General Discussion Days and by including children as advisors to, or as members of, the Committee. Other child rights monitors should also involve children since children have roles to contribute; moreover, research focus groups demonstrated the interest and capacity of children of various ages to participate in monitoring processes. Their involvement should not simply be ad-hoc and isolated, which would only have limited impact for the processes and participants. Rather, through formal selection mechanisms at national and international levels, children should be identified to reflect various considerations of representation, not simply geographic, but also children's diversity *inter alia*: abled and disabled, younger and older, rural and urban, developed and developing world, etc. Non-discrimination as recognised by CRC article 2 should be respected, and over time, fair representation should be achieved. Formal mechanisms for child selection and involvement would follow established procedures and timeframes, meet expectations and give credibility. Practical support should be available including liaisons dedicated to their specific needs, use of child-friendly language and resources to inform and prepare them for their roles. Mechanisms should also incorporate a mentoring element where children with national and international experiences would mentor younger children commencing their engagement to educate them about the processes involved and share lessons learned. Critical attention to the actual and potential role of the child and his/her views in monitoring is included as a proposed guideline for a child rights-based approach.<sup>425</sup>

### 8.5 General Observations

General issues influence monitoring including: the lack of child rights focus; political approach; and inconsistent child rights interpretations.

While the international community has accepted children's rights, rights inadequately influence monitoring due to political considerations, apprehension, ignorance or choice. Treaties are not necessarily motivating or inspiring action or monitoring efforts for, or with children. Although actors may vocally support children's rights, they are not aware of or choose not to reflect the requirements of respecting rights in mechanisms and efforts. While

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<sup>424</sup>The Convention does not include a criteria of age for Committee participation; Van Bueren (note 46 above) 389.

<sup>425</sup>See Thesis Appendix A.



the Special Rapporteur on Torture maintains firm clarity of CAT's legal definition of "torture," NGOs do not always share this understanding.<sup>426</sup> NGOs may attempt to broaden standards to address their concerns about violence, either due to ignorance about the legal definition or the desire to better protect children.<sup>427</sup> Moreover, UNESCO's staff have not embraced the CRC and a rights-based approach,<sup>428</sup> as the UNCRC's secretary recognises.<sup>429</sup> Although monitors may produce information, its scope and significance may be limited due to lack of focus on rights. For example, in preparation for a Romanian mission, the Special Rapporteur on Torture requested information from UNICEF and local NGOs on the ground but was informed there were no children's problems since money had been spent on renovating orphanages and so on. Beuze explains, "it was a missed opportunity to highlight children" because one year later, there were hundreds of allegations of torture of children in police stations.<sup>430</sup> The problem results when attention focusses on popular or contemporary priorities, rather than framed by a comprehensive child rights-based approach, where actors' various interpretations of child issues or rights inevitably affect monitoring.<sup>431</sup> As children's rights have not been fully integrated, the structural arrangements, procedures and activities of monitoring are adversely affected. For instance, attention and effort must be directed towards the child's rights, roles and capacities because "people can contribute positively to others only when they are respected and fulfilled."<sup>432</sup>

The international emphasis upon political, rather than legal, monitoring is problematic as no

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<sup>426</sup>CAT defines torture in article 1 as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Beuze refers to NGO demands to include wider concepts of violence in their advocacy work. Beuze (note 125 above).

<sup>427</sup>This has led to the successful call for a study on violence against children and the proposal to establish a special rapporteur. See above.

<sup>428</sup>Fontani (note 69 above).

<sup>429</sup>David (note 26 above).

<sup>430</sup>Beuze (note 125 above).

<sup>431</sup>See below and Chapter 5.

<sup>432</sup>Eekelaar, cited in Bainham (1998), *Children - The Modern Law*, 66.



international child rights court exists to provide definitive interpretations. Political procedures are more suited to pursue and respond to urgent situations but as they require majority votes in organs, they can be arbitrary and inconsistent.<sup>433</sup> Opsahl explains such political organs as the UN Security Council and Commission on Human Rights have only limited commitment to human rights.<sup>434</sup> Black acknowledges that monitors make value judgments about what actions to pursue and which are postponed or ignored.<sup>435</sup> Legal procedures support a long-term strategy, are more likely to be consistent, using regular procedures and pursuing defined obligations.<sup>436</sup> Procedures are described as ranging from soft to hard,<sup>437</sup> exemplified by reporting for soft efforts; and individual communications or judicial processes for hard processes.<sup>438</sup> Due to the various demands, monitors may reflect both political and legal influences.<sup>439</sup> While the concept and role of sovereignty are evolving, it remains the main accountability framework for reporting and country mechanisms.<sup>440</sup> The current system still preserves the freedom of political elites to limit their international obligations.<sup>441</sup> The political dimension of monitoring is also revealed in the discrepancy in results between developing states receiving and not receiving international assistance. Van Egmond reports the IACI has found some Latin American and Caribbean states with small governments and focussed ministries do not have difficulty with reporting because the population is small and the information is easily obtained; larger and poorer states find reporting more difficult. She concludes:

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<sup>433</sup>Van Boven (1992), "'Political' and 'Legal' Control Mechanisms: Their Competition and Coexistence." *Human Rights in Perspective: A Global Assessment*. Eide & Hagtvat (eds.), 58-60.

<sup>434</sup>Opsahl (1992), "Comments." *Human Rights in Perspective: A Global Assessment*. Eide & Hagtvat (eds.), 63.

<sup>435</sup>Black (note 343 above), 19.

<sup>436</sup>Opsahl (note 434 above), 64.

<sup>437</sup>Shelton (2000), "Law, Non-Law and the Problem of 'Soft Law'". *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton (ed.), 10.

<sup>438</sup>Chinkin (2000), "Normative Development in the International Legal System". *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton (ed.), FN #105 40.

<sup>439</sup>Opsahl (note 434 above), 64.

<sup>440</sup>Schrijver (1995), "The dynamics of sovereignty in a changing world." *Sustainable Development & Good Governance*. Ginther et al. (eds.), 88.

<sup>441</sup>Chinkin (note 438 above), 40-41.



*...the poorest governments are probably better off than the mid-level ones because they do have assistance from UNICEF - both technical and probably financial - to undertake this. But it is the certain mid-level ones where it becomes more complicated since the frustration in trying to get these things done.*<sup>442</sup>

Thus, while some may assume small states cannot effectively monitor, monitoring is not only affected by geography; the political dimension of monitoring influenced by international donors must be acknowledged.<sup>443</sup> With the spectrum of mechanisms and procedures available, and the political influences, effective utilisation and support with consistent child rights interpretations must be stressed.

Many actors focus on monitoring social objectives of particular programmes and projects<sup>444</sup> and not child rights posing both procedural and structural obstacles to a rights-based approach. This focus occurs when “outcomes are defined by activities, not children.”<sup>445</sup> Funding sources are also hugely influential.<sup>446</sup> Research confirms data are collected to suit the needs of agencies rather than those of children.<sup>447</sup> Many current institutional policies and programming do not emphasise rights as outcomes and process frameworks. Thus, adults' determination of research objectives and processes emphasise their concerns, goals and results that do not necessarily reflect the realities of children who are objects of measurement as evidenced in the focus on families where child rights may be relegated as cursory objectives or ignored. If child rights do not determine and define efforts, it follows that they will not be effectively or comprehensively monitored. But as Himes explains, child rights implementation has actual impact on people and demands more than simply procedural concerns about the results of processes.<sup>448</sup> The monitoring process also has significance for

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<sup>442</sup>Van Egmond, Senior International Analyst (as she then was), Strategic Policy and Research Division, Division of Childhood and Adolescence, Health Canada (2002), Interview with author, 8 October.

<sup>443</sup>See further Chapter Four.

<sup>444</sup>See also Chapter One's typology, s.2.3.

<sup>445</sup>This approach of some monitors was described by Cohn, (note 127 above). Cohn and the Office have done much child participation work.

<sup>446</sup>Wilkinson, Save the Children UK (2001), Response to Questionnaire on Activities Related to Children, 25 July.

<sup>447</sup>Ennew & Miljeteig (1996), “Indicators for children's rights: progress report on a project”. 4 *International Journal of Children's Rights*, 233.

<sup>448</sup>Himes (note 94 above), 114.



children and their rights should be respected. Many monitors are focussing on their procedural results, not children, thus separates rights from efforts that should be defined by them through adoption as a practical framework for monitoring. The UN Charter affirms in the preamble a determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". Respect of these conditions should include monitoring processes that ascertain the status of rights.

Some monitors lack common child rights interpretations, thereby restricting the role and significance of monitors' efforts due to inconsistent positions on the nature, scope and requirements of children's rights. For instance, the HRC and the Special Rapporteur on Torture believe torture does not include every case of corporal punishment, but ICCPR article 7's prohibition of torture and cruel, inhuman or degrading punishment or treatment includes corporal punishment.<sup>449</sup> When referring to corporal punishment, the Special Rapporteur identifies "assault" or "battery" but not torture.<sup>450</sup> According to Beuze, the Special Rapporteur believes determination of whether corporal punishment is torture depends on the circumstances, concluding the UNCRC and HRC have different positions<sup>451</sup> because the UNCRC unequivocally outlines corporal punishment "does not respect the inherent dignity of the child",<sup>452</sup> which is a position that UNCESCR shares.<sup>453</sup> These distinct perspectives reveal that significant UN monitors do not agree on the relationship of corporal punishment

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<sup>449</sup>UN (1997), *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur*, UN Doc. E/CN.4/1997/7, 3-4; and HRC (1992), General Comment 20: article 7 (in Compilation identified in note 39 above). HRC views "prohibition must extend to corporal punishment, including excessive chastisement ordered as a punishment for a crime or as an educational or disciplinary measure." 108, para.5.

<sup>450</sup>UN (2000), *Civil and Political Rights, Including Questions of Torture and Detention. Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to the Commission on Human Rights resolution 1999/32, Addendum, Visit of the Special Rapporteur to Kenya*, UN Doc. E/CN.4/2000/9/Add.4, para.56; and Beuze, Assistant to the Special Rapporteur on Torture (2001), Personal communication with the author, 19 November 2001. But the Special Rapporteur supports the view that "corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment," UN (note 449 above), para.6.

<sup>451</sup>Beuze (note 125 above).

<sup>452</sup>UNCRC (note 9 above), para.8.

<sup>453</sup>UNCESCR (note 11 above), para.41.



and torture to child rights. The discrepancy of what constitutes torture raises concern about consistent child rights interpretations, the absence of which challenges effective monitoring. While the European Court accepts limitations to corporal punishment (*A. v. the UK*), its use is still acceptable under ECHR (*Costello-Roberts v. UK*).<sup>454</sup> Domestic courts are similarly divided: the South African Constitutional Court supported the government's prohibition of corporal punishment in schools in *Christian Education* while the Canadian Supreme Court decided the Criminal Code provision to permit "reasonable" corporal punishment by caregivers in the *Canadian Foundation* case was constitutional.<sup>455</sup> Yet, the Constitutional Court explicitly did not articulate a position on whether the practice could or should be prohibited in homes. Generally corporal punishment continues to be acceptable and carried out against children around the world but its prevalence should not reflect its consistency with child rights. While corporal punishment may not generally fit in the definition of torture, it should be considered cruel punishment. While the UNCRC has the strongest position on the issue, it is consistent with the clear guidance provided in CRC article 19(1) that states parties "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation..." Moreover, physical violence is no longer acceptable against adult family members and it should be so for the child. Concern about mass criminalisation of caregivers, a concern of the Canadian Supreme Court majority, is addressed in various ways. For example, Sweden first banned all physical punishment of children in 1979<sup>456</sup> with the aim of educating caregivers, rather than criminalising them, so that it would become unacceptable.<sup>457</sup> The public/private distinction continues to impede state reform beyond the public sphere however, case law is beginning

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<sup>454</sup>See above.

<sup>455</sup>See Chapter Four. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] S.C.R. 76, (2000) 188 D.L.R. (4th) 718, (2000) 57 O.R. (3rd) 511; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) 18 August 2000.

<sup>456</sup>Sweden's Parenthood and Guardianship Code provides: "Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment." Since then, several European countries have passed similar prohibitions including Finland, Denmark, Norway and Austria; see Durrant (1996), "The Swedish Ban on Corporal Punishment: Its History and Effects." *Family Violence against Children: A Challenge for Society*.

<sup>457</sup>UNICEF International Child Development Centre (1997), "Children and Violence". *Innocenti Digest*, No. 2, 6.



to broaden state responsibility in cases including *Costello-Roberts* where the European Court allowed that the state could be responsible for rights violations in private schools.<sup>458</sup> The child's vulnerability to various degrees of violence, even if deemed "reasonable" by the courts,<sup>459</sup> and the power that others have over them must be critically examined. While domestic and international law are not yet consistently interpreted to protect the child from corporal punishment,<sup>460</sup> the position best reflects child rights and should be advanced in implementation and monitoring. In sum, there is much room to improve respect of child rights through greater understanding and the monitoring process.

## 9.0 CONCLUSION

Monitoring is increasingly relevant within the international child rights system as attention no longer focusses on developing instruments, but on applying them and measuring progress. Although there are weaknesses and room for procedural and substantive improvements, the reasonable wealth of legal instruments and mechanisms at different levels provide formal legal protection to children's rights. But most monitors continue to rely on assumptions about children and their needs, rather than effective monitoring of their rights and hence, generally do not reflect a child rights approach.

International law "has established primary rules of obligation, that is, commitments to eliminate discrimination against women, but has yet to develop or use sufficiently the secondary rules of process and enforcement, by which to interpret and apply legal commitments."<sup>461</sup> Similarly, the international legal system includes child rights but has not fully adapted to meet their demands and requirements. Monitors generally follow a traditional research approach, considering the child as an object of observation rather than as a subject. In essence, the system has responded to the formal international legal obligations to monitor children's rights with the same structural mechanisms in place as those

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<sup>458</sup>Charlesworth & Chinkin (note 252 above), 149.

<sup>459</sup>For example, Arbour J. highlighted the inconsistencies in her reasoning in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] S.C.R. 76, (2000) 188 D.L.R. (4th) 718, (2000) 57 O.R. (3rd) 511. See discussion in Chapter Four, s.2.3.

<sup>460</sup>See national case law in Chapter Four, s.2.3.

<sup>461</sup>Franck, in Cook (2001), "Effectiveness of the Beijing Conference in fostering compliance with international law regarding women". *United Nations-sponsored world conferences: Focus on impact and follow-up*. Schechter (ed.), 65.



for adults. However, it is an unsuitable system for the child due to less commitment to, and understanding of the necessities of children's rights. The present system reveals several interconnected challenges to a child rights-based approach including structural obstacles, procedural barriers, lack of resources, and attitudinal impediments. The general political means of monitoring lessens legal emphasis meaning that no institutional authority exists to provide definitive definitions to enforce child rights. Further, the overwhelming emphasis on the UNCRC's role may restrict discussion about monitoring or other actors' monitoring responsibility.

Monitoring should respect child rights to be effective, not simply consider the strict procedural requirements. Attention must now focus on improving the processes, mechanisms and results of each monitor's work. While there are many obstacles and errors have been made, they can serve as learning opportunities to serve future processes and inform monitors to create a system truly suitable for children.



### **CHAPTER THREE:** **ASSESSMENT OF RECENT INTERNATIONAL CONFERENCE OUTCOMES**

Since 1990, successive international conferences have addressed rights; for example, the UN and other institutions convened a multitude in the year 2001 alone.<sup>1</sup> Such conferences aim to reach consensus about the nature of and necessary responses to common issues facing the global community; additional functions include the creation, dissemination and sharing of knowledge; monitoring and early warning; and standard setting.<sup>2</sup> They are described as the “cornerstone” of the drive for greater international cooperation.<sup>3</sup> The conference outcome of declarations and/or action plans (also known as platforms or agendas for action), usually follow negotiation: declarations outline commitment to the issue(s); and action plans recommend the scope and content of relevant policy and programming and task relevant actors. Written outcomes are important because they signify political consensus on particular issues, either promoting change and furthering action, or outlining a stronger requirement or expectation of improvement in behaviour.<sup>4</sup> They also support monitoring over time<sup>5</sup> by international and national actors.

Despite the importance of international conferences and the resources involved, processes to monitor progress of commitments established at these events relevant to children’s rights have rarely been examined.<sup>6</sup> The outcomes from such major events as the World Summit for

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<sup>1</sup>UN events in 2001 include: World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, August-September; UN Conference on Illicit Trade in Small Arms and Light Weapons, July; Problem of human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS), June; Implementation of outcome of UN Conference on Human Settlements (Habitat II), June; and Third UN Conference on Least Developed Countries, May. External events include: Summit of Americas (OAS), April; 7<sup>th</sup> International Association for Adolescent Health conference, May; Fourth Child and Family Policy Conference, June; Youth Millennium Conference, September; and World Congress on Family Law and Rights of Children, September.

<sup>2</sup>Fomerand (1996), “UN Conferences: Media Events or Genuine Diplomacy?” 2 *Global Governance*: 361-375.

<sup>3</sup>UN (1995), *The United Nations and the Advancement of Women: 1945-1995*, New York: UN, 54.

<sup>4</sup>Shelton (2000), “Law, Non-Law and the Problem of ‘Soft Law’”. *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton (ed.), 4.

<sup>5</sup>Annan, *Preface*, in UN (1997), *UN Briefing Papers. The World Conferences: Developing Priorities for the 21st Century*, v.

<sup>6</sup>While scholars have studied theoretical issues of non-binding instruments, academic literature includes limited attention to monitoring and inadequate child rights consideration. Some rights consideration (although not child rights) is in Shelton (ed.): (2000), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Exceptions addressing children include: Jolly (2001), “Implementing global goals for children: lessons from UNICEF experience”, in Schechter (ed.)



Children<sup>7</sup> and the Fourth World Conference on Women<sup>8</sup> are described as soft law to denote the lack of binding character<sup>9</sup> distinct from traditional international law.<sup>10</sup> Soft law refers to imprecise instruments adopted and pursued by international, regional and national organisations that promote guidelines or principles of conduct and action to states, including examples of UN General Assembly resolutions and guidelines from international organisations.<sup>11</sup> In contrast, "hard" law involves precise wording, specifying obligations or rights.<sup>12</sup> Despite their non-binding status, international conference conclusions *inter alia* "have a direct influence on the content of law..."<sup>13</sup>

Hence, despite their non-binding soft law status, outcomes contribute to international human rights law, stimulating action including monitoring. Major UN conferences recognise children's importance and have contributed to the evolution of an influential, "important substantive agenda for human rights".<sup>14</sup> The authority of these texts however, is not automatic. These outcome agreements must be monitored so the standards have sustained relevance in order to achieve success. Involving many of the same actors as in international

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*United Nations-sponsored World Conferences: Focus on Impact and Follow-up.*

<sup>7</sup>World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration, 1990, World Summit for Children, CF/WSC/1990/WS-001.

<sup>8</sup>Declaration and Platform for Action, Fourth World Conference on Women: Action for Equality, Development and Peace (hereinafter Beijing), 1995, Fourth World Conference on Women, Beijing, UN Doc.A/CONF.177/20.

<sup>9</sup>Lord McNair is first credited in using this expression; Chinkin (2000), "Normative Development in the International Legal System". *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton (ed.), 22, FN #11.

<sup>10</sup>International law is traditionally defined as international conventions, international custom and general legal principles; *Statute of the International Court of Justice*, 26 June 1945, 1 UNTS xvi, a.38(a, b, c).

<sup>11</sup>While different kinds of soft law exist, this chapter focusses exclusively on international conference outcomes. For consideration of other soft law forms including examples of General Assembly resolutions and ILO Recommendations, see respectively: Brownlie (1998), *Principles of Public International Law-Fifth Edition*, 14; and Chiarabini (1997), "Report-Writing Procedures within the ILO." *Manual on Human Rights Reporting*. UN (ed.), 523-537.

<sup>12</sup>Chinkin (1989), "The Challenge of Soft Law: Development and Change in International Law". 38 *I.C.L.Q.*, 851.

<sup>13</sup>Brownlie (see note 11 above), 11. Binding instruments may be agreed upon or signed at conferences including: the UN Framework Convention on Climate Change and Convention on Biological Diversity, which opened for signature at the 1992 Conference on Environment and Development; and the Optional Protocols of the CRC, which opened for signature at the Millennium Summit.

<sup>14</sup>Santos Pais (1999), *A Human Rights Conceptual Framework for UNICEF*, 4.



child rights law,<sup>15</sup> monitors can uphold an outcome following a conference through reports, surveys, subsequent fora, creation of institutions or national plans of action, and/or political and legal follow-up. Hence, the chapter assesses the monitoring of conference outcomes pertinent to children's rights to determine whether this monitoring advances or dilutes child rights and a child rights-based approach.

The chapter discusses monitoring of several conference agreements from 1990 to 2002 largely associated with the UN. (See Table One.) The chapter first examines the role of conference agreements in the international legal order. Then, conferences and their monitoring is analysed according to a child rights-based approach.

Table One: Selected Conferences from 1990-2002

| Event   | Outcome Document, UN Doc. # if applicable   | Date |
|---|---|------|
| World Conference on Education for All, Jomtien                      | <i>World Declaration on Education for All and Framework for Action Meeting Basic Learning Needs.</i>  | 1990 |
| World Summit for Children, New York                                 | <i>World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration, CF/WSC/1990/WS-001.</i> | 1990 |
| World Conference on the Environment and Development, Rio de Janeiro | <i>Agenda 21, Rio Declaration on Environment and Development, UN/DPI/1344 and DPI/SD/1299</i>   | 1992 |
| World Conference on Human Rights, Vienna                            | <i>Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, A/CONF.157/24</i>  | 1993 |
| International Conference on Population and Development, Cairo       | <i>Report of the International Conference on Population and Development, A/CONF.171/13</i>  | 1994 |
| World Summit on Social Development, Copenhagen                      | <i>Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, A/CONF.166/9</i>                            | 1995 |
| Fourth World Conference on Women, Beijing                           | <i>Declaration and Platform for Action, Fourth World Conference on Women: Action for Equality, Development and Peace A/CONF.177/20</i>                          | 1995 |

<sup>15</sup>See Chapter Two.



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|--|---|------|
| Second UN Conference on Human Settlements (Habitat II), Istanbul                   | <i>The Habitat Agenda: Istanbul Declaration on Human Settlements, A/CONF.165/14</i> | 1996 |
| First World Congress on the Commercial Sexual Exploitation of Children, Stockholm  | <i>Declaration and Agenda for Action, A/51/385</i>                                  | 1996 |
| Millennium Summit, UN  | <i>United Nations Millennium Declaration, A/RES/55/2</i>                            | 2000 |
| Second World Congress against Commercial Sexual Exploitation of Children, Yokohama | <i>The Yokohama Global Commitment 2001</i>  | 2001 |
| UN Special Session on Children, UN   | <i>A world fit for children, A/S-27/19/Rev.1.</i>                                   | 2002 |

## 1.0 EFFECTIVENESS OF CONFERENCE OUTCOMES IN INTERNATIONAL LAW

Soft law is a common form to pursue international issues with advantages including more flexibility than treaties, allowing for rapid ratification and adaptation over time, quicker completion and implementation.<sup>16</sup> Soft law norms are more frequent in human rights and the environment than in trade and arms control.<sup>17</sup> State sovereignty is likely the cause: states are more prepared to be bound by norms in the latter with their clear international dimensions than the former, which have greater domestic policy significance. “Soft law instruments to some extent answer the demands of international civil society that action be taken, while preserving to political elites the freedom to curtail their obligations.”<sup>18</sup> But soft law has costs including: legally lesser standards, more nebulous and difficult to untangle, questionable political will, and less attention compared to binding law. Indeed, the complicated elaboration of binding and non-binding standards led the UNCRC to enunciate “that making particular commitments at global meetings does not in any way reduce States Parties’ legal obligations under the Convention.”<sup>19</sup> In general, non-binding provisions become binding international law once incorporated into a binding treaty or once emerged in customary international law, frequently becoming domestic law before evolving into binding

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<sup>16</sup>Lipson (1991), “Why are some international agreements informal?” *45 International Organization*, 495, 538, 500.

<sup>17</sup>Shelton (note 4 above), 3.

<sup>18</sup>Chinkin (note 9 above), 41.

<sup>19</sup>Committee on the Rights of the Child (UNCRC) (2003), *CRC General Comment 5 UN Doc. CRC/GC/2003/5*, para. 35.



international legal commitment.<sup>20</sup>

The legal status and impact of soft law is currently debated because the distinction between binding and technically non-binding documents “may be blurring...”<sup>21</sup> Shelton describes the “relative simplicity of traditional international law necessarily has given way to complex forms, processes, instruments, and norms.”<sup>22</sup> As part of soft law, conference outcomes consider the interdependencies of human rights and related issues, and according to Chinkin; “[t]hey cut across established legal categories in ways that may mold future international legal discourse.”<sup>23</sup> Soft law may be contributing to the evolution and maturation of the international legal order.<sup>24</sup> Roberts and Kingsbury outline the transformation of international law due to major power shifts:

*from increasingly enmeshed states to cross-state groupings or to international institutions; territoriality is declining as a central principle of organisation; and state sovereignty is being recast to accommodate human rights, economic aspirations, and international and external concepts of legitimacy.*<sup>25</sup>

Growing literature acknowledges the increasing complexity of international sphere.<sup>26</sup> Handl concludes non-binding documents including conference agreements “have proved to be highly effective internationally and must be deemed part and parcel of the international normative order.”<sup>27</sup> In addition, there may be little difference in language between binding

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<sup>20</sup>Shelton (2000), "Editor's Concluding Note: The Role of Non-Binding Norms in the International Legal System". *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton (ed.), 554.

<sup>21</sup>Ibid., 8.

<sup>22</sup>Shelton (note 4 above), 7.

<sup>23</sup>Chinkin (note 9 above), 28.

<sup>24</sup>Shelton (note 4 above), 12.

<sup>25</sup>Roberts & Kingsbury (2000), "The UN's Roles in International Society since 1945". *The Globalization Reader*. Lechner & Boli (eds.), 269.

<sup>26</sup>See for example: Abi-Saab (1994), "The changing world order and the international legal order...". *Global Transformation: Challenges to the State System*. Sakamoto (Ed.); Willetts (2000), "From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN". 6 *Global Governance*: 191-212; Meyer-Bisch (2001), "Acteurs sociaux et souveraineté dans les OIG". 53 *Revue internationale des sciences sociales*: 671-79; Luck (2002), "Global Insights: Rediscovering the State". 8 *Global governance*, 7-11; and Schrijver (1995), "The dynamics of sovereignty in a changing world", *Sustainable Development & Good Governance*.

<sup>27</sup>Handl (1988), "Remarks by Professor Handl, A Hard Look at Soft Law", 82 AM. SOC'Y INT'L L. PROC. 372.



and non-binding instruments.<sup>28</sup>

Until recently, international law only considered state actions in relation to children in a limited manner.<sup>29</sup> To redress lacunae, non-binding instruments offer guidance for states' efforts. Simma states it is "quite imprecise to regard soft law as legally non-binding, especially in a field like international human rights where the use of soft law for defining the precise content of hard law is more the rule than the exception."<sup>30</sup> Soft law does not create rights but can elaborate them with limited authority.<sup>31</sup> Handl affirms non-binding law "can be a valuable instrument for enhancing or supplementing international law proper."<sup>32</sup> Whether an instrument is binding or considered soft law does not seem to determine compliance, effective supervision appears to be more important for compliance than a binding agreement so monitoring mechanisms are "crucial."<sup>33</sup> Monitoring is essential to defining, clarifying and reinforcing the norm.

Although not legally binding *per se*, conference agreements often reflect or elaborate binding standards as the Declaration and Plan of Action from the World Summit for Children operationalise aspects of the CRC.<sup>34</sup> These goals should serve CRC monitoring of state

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<sup>28</sup>Dugard argues soft law are unenforceable, despite monitoring activity, but notes "little difference in enforceability" between Principle 1 of the non-binding Stockholm Declaration of the UN Conference on the Human Environment and article 24 of the binding African Charter on Human and Peoples' Rights, which provide the right to satisfactory environment for example; Dugard (2001), *International Law: A South African Perspective*, 316-17.

<sup>29</sup>See Van Bueren (1998), *The International Law on the Rights of the Child*.

<sup>30</sup>Simma (1988), "Remarks by Bruno Simma, A Hard Look at Soft Law", 82 *AM. SOC'Y INT'L L. PROC.* 377, 380.

<sup>31</sup>International outcome negotiations are restrained against innovation and advancing issues since states tend to follow precedents, restricting decision-making and providing some predictability to state behaviour; Sabel (1997), *Procedure at International Conferences*, 400.

<sup>32</sup>Handl (1991), "Environmental Security and Global Change: The Challenge to International Law". *Environmental Protection and International Law*. Neuhold et al. (eds.), 63.

<sup>33</sup>*Ibid.*, 538, 548.

<sup>34</sup>Grant, former executive director of UNICEF, stated the World Summit for Children, "which strongly endorsed the Convention, was, in a real sense, the first major global action for its implementation." Grant, Foreword, *First Call for Children*, 1990, 1. *World Declaration on the Survival, Protection and Development of Children...*, (note 7 above).



actions.<sup>35</sup> Other complementary provisions include *inter alia* CRC's articles 28 and 29 (the child's right to, and aims of education) and the World Declaration on Education for All;<sup>36</sup> and the Beijing Platform for Action, which specifically outlines its objective of progress for women, including girl-children, as "in full conformity with the purposes and principles of the Charter of the United Nations and international law."<sup>37</sup> While outcomes are generally valuable, they also serve understanding of binding international law, "which in turn can lead to an increased sense of obligation among states to comply with international law..."<sup>38</sup> Conference agreements therefore, may advance rights and monitoring as article 4 of the education declaration recognises monitoring involves both intentions and actual outcomes for children.<sup>39</sup> Therefore, while major conference outcomes are not traditional international law, they often have legal value for child rights.

International conference outcomes have legal character manifested in several ways. Many conferences are prepared and convened under the auspices of regional and international organisations and the results often adopted by the UN General Assembly.<sup>40</sup> Conferences follow established, regulated processes of procedure, express collective commitment and through monitoring, outcomes are clear components of the international legal order.<sup>41</sup> The support and involvement of states in preparations and the event itself demonstrate consent if not commitment to the issues under consideration. The process of drafting and indicating consent to the agreements at formal closing ceremonies may also be evidence of state practice.<sup>42</sup> Some states submit reservations and interpretative statements to conference

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<sup>35</sup>Flekkøy (1991), *Models for Monitoring the Protection of Children's Rights: Meeting Report, Florence, 27 November 1990 - 1 December 1990*, 4. UNICEF (1990), *Children and Development in the 1990s: a UNICEF Sourcebook*, 7. Van Bueren (note 29 above), 406.

<sup>36</sup>UNICEF, *ibid.*, 10.

<sup>37</sup>*Declaration and Platform for Action* (note 8 above), para. 9.

<sup>38</sup>Brautigam, in Cook (2001), "Effectiveness of the Beijing Conference in fostering compliance with international law regarding women". *United Nations-sponsored world conferences: Focus on impact and follow-up*. Schechter (ed.), 65.

<sup>39</sup>Chinapah (1997), *Handbook on Monitoring Learning Achievement*, 1.

<sup>40</sup>See Table One above for examples.

<sup>41</sup>Chinkin (note 9 above), 31-34.

<sup>42</sup>Shelton (note 4 above), 1.



agreements despite their technically non-legally binding character.<sup>43</sup> For instance, a significant number of countries expressed reservations or understandings to the Beijing Declaration and Platform for Action.<sup>44</sup> This phenomenon suggests states generally recognise these standards have greater weight than mere declarations, and reflects concern about the implications of the standards. Hence, conference agreements are often “deemed to lack requisite characteristics of international normativity, but which, notwithstanding this fact, are capable of producing certain legal effects.”<sup>45</sup> The prevalence of reservations or statements indicates states obviously prefer not to rely on legalistic positions regarding non-binding status, likely due to the high profile of such efforts.<sup>46</sup> But not all conference outcomes can be considered equally in terms of significance. For example, a regional conference may inspire more commitment and monitoring than an international event. Chinkin explains the intention of parties can be determined from the agreement’s language, the nature of its conclusion and often, follow-up actions.<sup>47</sup> Some conference outcomes never intend normative effect but promote further action,<sup>48</sup> but states are held accountable to the main conference standards to varying degrees through monitoring.

Non-binding standards also influence child rights monitors. For example, the UNCRC considers the three juvenile justice standards, namely: UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), and the UN Rules for the Protection of Juveniles Deprived of the Liberty,<sup>49</sup> as relevant to the application of CRC articles 37, 40 and

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<sup>43</sup>Chinkin (note 9 above), 28.

<sup>44</sup>Sixty-one states expressed reservations and understandings, largely due to concerns about the outcomes’ incompatibility with Islamic law and references to abortion, sexuality and reproductive issues; see UN (1995), *Press Release: "Fourth World Conference on Women Adopts 'Beijing Declaration and Platform of Action', Concludes Two-Week Session"*.

<sup>45</sup>Handl (note 27 above), 371.

<sup>46</sup>Chinkin (note 9 above), 40.

<sup>47</sup>*Ibid.*, 38.

<sup>48</sup>*Ibid.*

<sup>49</sup>*United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, UN Doc.A/RES/40/33, adopted 29 November 1985; *United Nations Guidelines for the Prevention of Juvenile Delinquency*, UN Doc.A/RES/45/112 adopted 14 December 1990; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, UN Doc.A/RES/45/113, adopted 14 December 1990.



39.<sup>50</sup> Cappelaere supports this development, arguing these documents “should not necessarily be limited to their “moral” impact.”<sup>51</sup> In two juvenile justice cases, *T. v. The United Kingdom* and *V. v. The United Kingdom*,<sup>52</sup> the European Court of Human Rights also acknowledges the non-binding nature of the Beijing Rules, yet refers to the Rules and the CRC to guide and reinforce decisions about the ECHR.<sup>53</sup> In regard to minimum age, the Court found the Rules helpful in both decisions because Rule 4 of the Beijing Rules “might provide some indication of an international consensus...”<sup>54</sup> following General Assembly adoption, which according to the judges, recognises their relevance for international customary law. In addition, monitors often utilise non-binding standards to support their efforts drawing upon all relevant instruments “to present as full a picture as possible of appropriate expectations.”<sup>55</sup> NGO commitment to articulate standards whether binding or non-binding, also reflects the lack of influence of the soft/hard law distinction.<sup>56</sup> The influence of conference outcomes are often acknowledged in binding instruments.<sup>57</sup> As examples, the CRC’s preamble recalls the Beijing Rules;<sup>58</sup> the preamble of the CRC Optional Protocol on the Sale of Children recognises the International Conference on Combatting Child Pornography on the Internet and the 1996 Stockholm Congress on the Commercial

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<sup>50</sup>UNCRC (1999), *Recommendation adopted by the Committee on the administration of juvenile justice*, UN Doc. CRC/C/90, preambular para. 1.

<sup>51</sup>As an example, he highlights Riyadh Guidelines a.7, which states interpretation and implementation should be within the framework of all UN instruments and norms related to children’s rights. Thus, these Guidelines do not distinguish between binding and non-binding status and are designed to elaborate on previous human rights standards. Cappelaere (1995), *International Standards Concerning the Rights of the Child - United Nations Guidelines for the Prevention of Juvenile Delinquency: Riyadh Guidelines, Introduction*, 5-6.

<sup>52</sup>*Case of T. v. The United Kingdom*, application number: 24724/94, handed down 16/12/1999; and *Case of V. v. The United Kingdom*, application number: 24888/94, handed down 16/12/1999.

<sup>53</sup>*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222. See further Chapter Two.

<sup>54</sup>*T. v. UK*, (note 52 above), para. 71; and *V. v. UK*, para. 73.

<sup>55</sup>Chinkin (note 9 above), 37.

<sup>56</sup>*Ibid.*, 31.

<sup>57</sup>Chinkin (1998), “The Role of Non-Governmental Organisations in Standard Setting, Monitoring and Implementation of Human Rights”. *The Changing World of International Law in the Twenty-First Century: Tribute to the Late Kenneth Simmonds*. Norton et al. (eds.), 56.

<sup>58</sup>preambular paragraph 10.



Sexual Exploitation of Children;<sup>59</sup> and the CRC Optional Protocol on the Involvement of Children in Armed Conflict notes the recommendation of the 1995 International Conference of the Red Cross and Red Crescent.”<sup>60</sup> NGO commitment to standards - whether binding or non-binding - also reflects the lack of influence of the soft/hard law distinction.<sup>61</sup> Thus, it appears the distinction between binding and non-binding status is not as significant in the international legal domain as in the past.

Due to their non-binding status, outcomes may allow for more innovative, flexible monitoring efforts, but their essential challenge and defining characteristic is the absence of a binding monitoring requirement in international law. Monitoring may or may not happen. The UN through the Economic and Social Council (ECOSOC) monitors outcomes;<sup>62</sup> the UN also assigns monitoring of most agreements to existing UN institutions, and creating new ones.<sup>63</sup> Inter-agency activities are important; for example, the UN Commission on the Status of Women, the UNCEDAW, UNIFEM, INSTRAW and DAW all contribute to monitoring Beijing.<sup>64</sup> While various activities may take place, the lack of coherence and consistency are problematic. The UN still continues to develop “A culture of working together...within the United Nations system both in countries and at headquarters.”<sup>65</sup> Varying or lesser commitment and resources also impede others. Thus, soft law's flexibility can be both an attribute and a disadvantage for monitoring.

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<sup>59</sup>preambular paragraphs 6, 11.

<sup>60</sup>Preambular paragraph 9, which provides “parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in hostilities”.

<sup>61</sup>Chinkin (note 9 above), 31.

<sup>62</sup>For example, ECOSOC made “integrated and well-coordinated follow-up to and implementation of” major UN conferences one of its major goals in 1995; UN (2000), *Assessment of the progress made within the United Nations system, through the conference reviews, in the promotion of an integrated and coordinated implementation of and follow-up to major United Nations conferences and summits in the economic, social and related fields: Report of the Secretary-General*, UN Doc.E/2000/57, para. 1. See UN (1999), *Integrated and coordinated implementation of and follow-up to major United Nations conferences and summits: Report of the Secretary-General*, UN Doc.E/1999/65.

<sup>63</sup>ECOSOC and its subsidiary machinery: the functional commissions, regional commissions and the executive boards of UN Funds and Programmes, have important roles to coordinate follow-up including monitoring; UN (1999), *ibid.*, paras 21-34.

<sup>64</sup>UN (note 5 above), 56.

<sup>65</sup>UN (1999) (note 62 above), para. 35.



## 2.0 RELEVANCE OF CHILD RIGHTS

Does monitoring conference agreements support or weaken children's rights and a child rights-based approach? The following discussion considers challenges, impediments and contributions to each of the general principles, and to an overall child rights-based approach.

### 2.1 Non-discrimination

Respect of the non-discrimination principle necessitates monitoring by various actors including the UN, civil society, and children. Moreover, the diversity of children must be acknowledged to avoid discrimination.

Like international human rights treaties, primary actors for implementation and monitoring of outcomes are state governments however, the roles and responsibilities of other actors are officially recognised. For the first time for example, Habitat II involved sub-national actors, including mayors, in the proceedings and recognised their roles in action plan implementation.<sup>66</sup> Such acknowledgement is welcomed because for such reasons as the plethora of standards, overtaxed governments and lack of political will or resources, governments may attempt to ignore outcomes and monitoring. UN Secretary-General Annan outlines other actors have important roles as "...an essential ingredient in maintaining pressure on Governments to implement their commitments and in sustaining post-conference momentum."<sup>67</sup> To counter the traditional state-centric approach, many conference outcomes, such as Habitat II and the Social Summit, recognise various roles in relation to the issues under consideration.<sup>68</sup> In particular, outcomes generally recognise civil societal monitoring

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<sup>66</sup>UN (1999), *Setting the Record Straight - UN Conferences: What Have They Accomplished?*, 4.

<sup>67</sup>Annan, *Preface*, in UN (note 5 above), v.

<sup>68</sup>*The Habitat Agenda: Istanbul Declaration on Human Settlements* (1996), Second UN Conference on Human Settlements (Habitat II), UN Doc. A/CONF.165/14, chapter IV para. D.3.182(f, h); *Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development* (hereinafter *Copenhagen*) (1995), UN Doc. A/CONF.166/9, Chapter I para. B.15(j), and Chapter V, para. 82. Other examples include: Agenda 21 recognises the roles of women, children and youth, indigenous people, NGOs, local authorities, workers and trade unions, business and industry, scientific and technology community, and farmers, discussed in chapters 24 to 32 respectively, among others, *Agenda 21*, UN Doc. UN/DPI/1344. UN Conference on Environment and Development, 1992, Rio de Janeiro; and *Report of the International Conference on Population and Development* (hereinafter *ICPD*) (1994), Cairo, UN Doc. A/CONF.171/13, chapter VII para. A.8.7. Beijing identifies *inter alia* governments, multilateral financial and development institutions, regional development institutions, through bilateral development cooperation, national and international NGOs and women's groups, paras. 58- 60, 274-285, *Beijing* (note 8 above).



including Beijing<sup>69</sup> and the Cairo Programme.<sup>70</sup> While some may question the democratic nature of these participants,<sup>71</sup> their involvement is important to broaden evaluation. Wide engagement of international institutions, private sector, NGOs and others can support monitoring. The most important way to further compliance with hard and soft instruments as Brown Weiss explains, is with regular interaction over time between states and other actors and long-term relationships enhance compliance with soft law instruments.<sup>72</sup> The international environment also contributes to compliance through conferences, media and public opinion, NGOs and other civil societal organisations and financial institutions,<sup>73</sup> informing about the rights situation. Peoples of the South must also be included “as equal partners in a global movement if it is to respond to their own priorities and concerns.”<sup>74</sup> Multiple perspectives support monitoring by contributing to a better understanding of the situation of children’s rights as outlined in conference commitments.

Children are part of civil society. For instance, Agenda 21 recognises children and young people as partners.<sup>75</sup> Such acknowledgement, however, was not automatic in conference preparations. By the Earth Summit’s third preparatory committee meeting, UNICEF was concerned about the few or absence of specific references in draft texts to goals and strategies for children.<sup>76</sup> Effort was required to incorporate children’s issues in conference discussions and outcome. In addition, outcomes do not always reflect the need for specificity. For

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<sup>69</sup>Beijing Platform paras. 297-298, cited in Chinkin (note 57 above), 59.

<sup>70</sup>*Report of the ICPD* (note 68 above), Chapter 13, paras.3, 4.

<sup>71</sup>See for example, Chinkin (note 9 above), 29. “Bottom up” multilateralism engaging grassroots organisations is essential to avoid some criticism of the UN and some NGOs, “as being less legitimate, transparent, and accountable than the governments whose actions they are seeking to ignite and, to some extent, supplement.” Schechter (2001), “Making meaningful UN-sponsored world conferences of the 1990s: NGOs to the rescue?” *United Nations-sponsored World Conferences: Focus on Impact and Follow-up*. Schechter (ed.), 207.

<sup>72</sup>Brown Weiss (2000), “Conclusions: Understanding Compliance with Soft Law”. *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Shelton (ed.), 540.

<sup>73</sup>*Ibid.*, 549.

<sup>74</sup>An-Na'im (1999), “Expanding the Limits of Imagination: Human Rights from a Participatory Approach to New Multilateralism”. *Innovation in Multilateralism*. Schechter (ed.), 214.

<sup>75</sup>*Agenda 21* (note 68 above), Chapter 25.

<sup>76</sup>UNICEF does not detail the extent or whether UNICEF participated in negotiations to that point; UNICEF (1992), *Children and Agenda 21: A Guide to UNICEF Issues in the Earth Summit's Blueprint for Development and Environment into the 21st Century*, 11.



example, the Social Summit Plan recognises anti-poverty efforts should include: “Special priority...to the needs and rights of women and children, who often bear the greatest burden of poverty, and to the needs of vulnerable and disadvantaged groups and persons.”<sup>77</sup> This recognition is so generalised that it may be interpreted as meaningless. Outcomes may mention children generally, but not necessarily acknowledge their diversity and such distinct realities of individual or groups of children due to evolving capacities,<sup>78</sup> disabilities, cultural backgrounds or other distinctions that may affect monitoring of the child in relation to the outcome commitments. Discrimination may result and their best interests ignored potentially impeding their maximum development. However, the Beijing Platform for Action enumerates many factors that may influence objectives in relation to women and girls.<sup>79</sup> As monitors do not all appreciate a child rights-based approach, their efforts may not comprehensively assess children, an issue which requires attention. The direct engagement of children, not simply represented by organisations or individuals, had been largely not considered by major UN conferences until the 2002 Special Session on Children.<sup>80</sup> Vigilant efforts are always necessary to highlight child rights in relation to global fora.

A child rights-based approach necessitates sufficient attention to the non-discrimination principle to support broad participation and recognise the child, not simply children, for accurate monitoring.

## 2.2 Best Interests of the Child

Best interests is an important principle influencing analysis of conferences, outcomes and their monitoring. Relevant issues include support of monitoring; event costs; the importance of political will; and politics.

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<sup>77</sup>*Copenhagen*, (note 68 above), para. 26(i) and Commitment 2(b) respectively.

<sup>78</sup>CRC article 5.

<sup>79</sup>*Beijing*, para. 46, acknowledges:

*barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other status. Many women encounter specific obstacles related to their family status, particularly as single parents; and to their socio-economic status, including their living conditions in rural, isolated or impoverished areas. Additional barriers also exist for refugee women, other displaced women, including internally displaced women as well as for immigrant women and migrant women, including women migrant workers. Many women are also particularly affected by environmental disasters, serious and infectious diseases and various forms of violence against women.*

<sup>80</sup>See s.2.4 below.



Global events urge monitoring of child rights commitments by international and national actors. Situational analyses of state and global status of rights under consideration are usually required to inform discussions and negotiations.<sup>81</sup> Conference outcomes create motivation to pursue follow-up monitoring to ensure the relevancy and effectiveness of standards over time. Global conferences, “by setting a number of precise goals and targets, made it easier to monitor and evaluate activities as well as to move towards results- or outcomes-based programmes.”<sup>82</sup> Effective monitoring contributed to the success of the World Summit for Children for example because Jolly notes, “If social mobilization is to succeed, information on progress needs to be widely disseminated.”<sup>83</sup> Article 4 of the World Declaration on Education for All advances understanding of monitoring, distinguishing between intentions and actual outcomes for children.<sup>84</sup> Habitat II spurred the UN Centre for Human Settlements (Habitat) to develop Guidelines for Action for all partners to implement and monitor the Habitat Agenda as well as specific guides for partners.<sup>85</sup> The Population Division of the UN Secretariat reviewed progress towards 1990s conference goals in social needs, supporting the Cairo Conference and Social Summit five-year reviews.<sup>86</sup> Thus, conferences and outcomes usually benefit the best interests of the child.

The costs of organising and executing conferences however, can be extremely high, raising the question of whether they serve the best interests of the child or would resources be better utilised redressing the issues rather than discussing them? The UN and other organizers justify secretariat expenditures, which range generally between \$1.8 million and \$3.4 million per conference, due to widespread support for the events, the importance of raising awareness, and focussing attention on specific issues.<sup>87</sup> While these costs may seem reasonable to some, the host country also incurs considerable additional costs of conference

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<sup>81</sup>For example, see: UN (2001), *We the Children: End-Decade review of the follow-up to the World Summit for Children: Report of the Secretary-General*, A/S-27/3..

<sup>82</sup>UN (1999) (note 62 above), para. 58.

<sup>83</sup>Jolly (note 6 above), 27.

<sup>84</sup>Chinapah (note 39 above), 1.

<sup>85</sup>Specific guides have been developed for local Authorities, Parliamentarians, Civil Society, the Private Sector, UN Resident Coordinator System and National Governments and National Habitat Committees; Habitat (1998), *Monitoring Progress in Implementing the Habitat Agenda: An Overview*.

<sup>86</sup>UN (1999), (note 62 above), FN. #3.

<sup>87</sup>An exception was the Earth Summit, which required \$10 million; UN (note 5 above), 7.



facilities, local staff, UN staff travel and accommodation when the events are not at UN facilities.<sup>88</sup> Moreover, each participating state, organisation, and participant incur costs. Although some cost-reducing efforts have been made,<sup>89</sup> they are undoubtedly expensive events. Expenses may restrict resource availability for monitoring and possibly lead states to contend that their duty to the issue(s) is fulfilled through support of and/or participation in the event. Financial costs are not the only concern as other detrimental effects upon child rights may be incurred. For example, street children among others were removed to prepare for the 1992 and 2002 Earth Summits in Rio and Johannesburg respectively to present "clean", orderly cities.<sup>90</sup> In light of CRC article 2, children should not be subject to discriminatory actions; their removal also implicates their article 36 right to be protected from any prejudicial exploitation affecting their welfare. These children should not have been penalised due to events taking place in their surroundings. In their removal, the children receive a strong negative message: they are targeted as offensive and non-desirable, which does not serve their best interests. There are inconsistencies between the events' preparatory processes and attention to children in the events' outcomes.

Political will is essential to support outcome monitoring, revealing a disadvantage of soft law. Chayes and Chayes recognise "the choice whether to intensify (or slacken) the international enforcement effort is necessarily a political decision."<sup>91</sup> Rio involved 108 heads of state and government;<sup>92</sup> and the Social Summit involved 117.<sup>93</sup> Such attendance may reflect interest and commitment but some leaders are criticised for interpreting conferences as travel or photo opportunities without offering leadership or vision.<sup>94</sup> While a minority may be responsible for such limited engagement, organisers continue to emphasise political

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<sup>88</sup>Ibid.

<sup>89</sup>Ibid.

<sup>90</sup>Smith Jr. (1992), "Carnival of dunces - 1992 Earth Summit." *National Review* July 6.  
Dempster (2002), "South Africa readies for Earth Summit". *BBC News*, 16 August.

<sup>91</sup>Chayes & Chayes (1993), "On compliance". *47 International Organization*, 202.

<sup>92</sup>UN (note 66 above), 2.

<sup>93</sup>Ibid., 3.

<sup>94</sup>Ryan (2000), *The United Nations and International Politics*, 154.



involvement due to the value added and long-term significance upon event objectives.<sup>95</sup> Leaders are likely to further monitoring and implementing outcomes following direct involvement to demonstrate their commitment and pressure can be exerted upon uncomplying leaders by other actors to encourage action and monitoring, thereby benefitting best interests.

Politics and political agendas in global fora however, may impede best interests. Conference monitoring often has difficulties due to “the dependency of UN expert human rights mechanisms on information supplied by human rights NGOs and, on the other hand, government resentment of NGO reports and activism.”<sup>96</sup> Divisions also affect civil society efforts. At the Social Summit for example, monitoring was impeded due to the sectoral nature of NGOs; although some cross-sectoral connections exist, too much depends on partial information, leading to very little joint action.<sup>97</sup> Many civil societal actors, including single-issue organisations, focus on particular concerns or political goals without cooperating, inhibiting comprehension of the full situation and advancing a limited, linear approach to monitoring.<sup>98</sup> Hence, the establishment of coalitions and networks along and across national and international levels to monitor is important to counter political tension.

The best interests of the child principle demands the child as the focus. Conference monitoring usually benefits understanding of the child but politics can be a hindrance, and political will is important to carry it out.

### 2.3 Maximum survival and development

The principle of maximum survival and development involves several dimensions discussed below: increased action, limitations of goals, and a limited approach to child rights.

Increased activity often follow global conferences benefitting maximum survival and

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<sup>95</sup>For example, UNICEF heralded Special Session participation, despite its postponement, with “64 summit-level participants, two queens, one king and other royalty”. UNICEF (2002), *Press Briefing by UNICEF Executive Director, 10 May 2002*. This representation was not as successful as the World Summit (with 71 heads of state and government) and primarily represented the developing world, not the developed.

<sup>96</sup>Gaer, in Schechter (note 71 above), 200.

<sup>97</sup>Somavía, cited in Schechter (note 71 above), 204.

<sup>98</sup>See Chapter Five.



development at various levels and monitoring. Successful mobilization for the World Summit for Children goals for example, led to significant monitoring and progress in the lives of many children through improved immunization coverage, management of diarrhoea, salt iodization, access to safe drinking water and support for breast feeding.<sup>99</sup> Monitoring is important to ascertain the reality of conference commitments and then pressure must be regularly applied to ensure states and others meet necessary requirements. Conferences also encourage action on emerging issues affecting child survival and development identified through monitoring not yet specifically addressed in international child rights law. As part of the Millennium Summit preparations for example, the UN Secretary-General acknowledged the increasing number of AIDS orphans,<sup>100</sup> already a concern of NGOs and international institutions.<sup>101</sup> Action on related children's rights is also possible due to assessment. For instance, insufficient progress, inappropriate strategies and programmes from the 1990 Education for All conference highlighted the need for the Salamanca conference on inclusive education.<sup>102</sup> Thus, global conferences may inspire acknowledgement and responses to monitored issues affecting survival and development.

As a result of the World Summit for Children, the UN system and other conferences continue to endorse and elaborate goals.<sup>103</sup> As a tool, goals can enunciate human rights<sup>104</sup> and specify expected action for implementation.<sup>105</sup> The significance of the World Summit goals for example is widely acknowledged for mobilising states and others to further children's progress.<sup>106</sup> The Summit plan of action focussed on child survival, protection and

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<sup>99</sup>UN (note 5 above), 16.

<sup>100</sup>Annan (2000), *'We the Peoples': The Role of the United Nations in the 21st Century*, 27.

<sup>101</sup>UNICEF Executive Director Grant recognised the issue at the "Children at Risk" International Interdisciplinary Conference, Bergen, Norway, 13 May 1992. NGOs and UNAIDS highlighted orphans at a Focal Point on the Sexual Exploitation of Children meeting attended by the author, Geneva, January 1998.

<sup>102</sup>UNESCO (1999), *Salamanca Five Years On: A Review of UNESCO Activities in the Light of the Salamanca Statement and Framework for Action*, 10.

<sup>103</sup>UN (2000) (note 62 above), para. 23.

<sup>104</sup>Kent (1997), "Realizing international children's rights through implementation of national law". *5 The International Journal of Children's Rights*, 444.

<sup>105</sup>Shelton (note 4 above), 4.

<sup>106</sup>For example, Ben-Arieh et al. (2001), *Measuring and Monitoring Children's Well-Being*, 120. UNICEF publication: *The state of the world's children*, elaborates progress.



development (excluding participation) including *inter alia* the goals of reducing: 1990 under-five child mortality rates by one third or to a level of 70 per 1000 live births; maternal mortality rates by half; and severe and moderate malnutrition among those under-five. These goals inspired regional, national and sub-national goals and plans of actions, mobilised people, established alliances, directed attention and resources, and guided periodic monitoring,<sup>107</sup> thereby sustaining political will and improving statistical information about children.<sup>108</sup> As a result, UNICEF champions goals for: “focussed action, social mobilization and monitoring measures”<sup>109</sup> and explains that time-bound goals “transform” CRC provisions into “specific, tangible claims”.<sup>110</sup> Time-bound goals have been regularly included in recent outcome documents including the International Conference on Population and Development outcome and the Beijing Platform for Action in *inter alia* international development assistance and implementation strategies respectively.<sup>111</sup> While there has been progress in some areas, doubts exist about accomplishing the goals of major UN conferences within established timeframes due to such issues as conflict and limited development resources.<sup>112</sup> While timelines encourage action, the call for national plans in outcomes by specific deadlines may inhibit development of a conscientious, coordinated approach, which should include monitoring.

While goals are valuable, little attention is given to their development or significance. What objectives do they serve or not serve? Goals generally have restricted scope, either

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<sup>107</sup>See for example, UN (1996), *Progress at Mid-Decade on Implementation of General Assembly resolution 45/217 on the World Summit for Children: Report of the Secretary-General*, UN Doc. A/51/256; and UN (note 81 above).

<sup>108</sup>Roberfroid, Deputy Executive Director, UNICEF (2000), *The merits of goals-focussed approaches to development*, Joint UN/OECD-DAC/World Bank/IMF Forum.

<sup>109</sup>Jolly, Introduction in UNICEF (1994), *Priorities for Children: What the World Summit for Social Development Can Do*, 1.

<sup>110</sup>UNICEF (1994), *ibid.*, 7.

<sup>111</sup>As examples, see: *ICPD* para. 14.11, which describes the internationally agreed-upon goal to reach the target of 0.7 per cent of the gross domestic product for overall official development assistance, involving specific US dollar amounts from donor countries to recipient countries for the years 2000, 2005, 2010 and 2015; and *Beijing* para. 297, which outlines Governments in consultation with institutions and NGOs should develop implementation strategies for the Platform “[a]s soon as possible, preferably by the end of 1995” and “preferably by the end of 1996...”

<sup>112</sup>Such areas as child health, literacy and life expectancy have progressed, but challenges remain in redressing *inter alia* poverty, unemployment, malnutrition, malaria, and HIV/AIDS; UN (1999), (note 62 above), paras. 3-5.



individually or as a collective result from an event, due to their focus on particular aspects rather than reflecting the full content or complexity of the corresponding right(s), potentially restricting implementation and monitoring. For example, the World Summit goal of universal access to basic education and at least 80 percent of primary school-aged children to complete primary education<sup>113</sup> stresses school attendance so follow-up may ignore *inter alia*: the costs of school fees and uniforms; the reduction of family income if child must leave work; the nature and scope of the aims of education; or discrimination against certain groups within the school system or curriculum. A corresponding goal of the Millennium Declaration is by 2015, to ensure "...children everywhere, boys and girls alike, will be able to complete a full course of primary schooling and that girls and boys will have equal access to all levels of education."<sup>114</sup> The goal is a valuable one but on its own does not illuminate *inter alia* the aims of education for example.<sup>115</sup> Consequently, an Innocenti seminar concluded "the monitoring of progress towards the goals tended to support and complement the monitoring of child rights - not the other way around. Attainment of the goals would itself be an indicator of progress towards the fulfilment of rights."<sup>116</sup> As the scope of rights are usually greater than goals, goals usually provides limited information about child rights so efforts are needed to illuminate data gaps. Emphasis tends to be placed upon quantitative goals at the expense of qualitative goals. Conference outcomes may result in limited goals, which are imprecise or restrict objectives, and may limit children's rights since monitoring results may not represent the full child rights picture. Moreover, goals often focus on survival and development, excluding other child rights, affecting both implementation and monitoring.

Maximum survival and development tends to be the focus of most global conferences, limiting the child rights approach. Attention, action and monitoring generally focuses on economic and social rights, ignoring or minimising cultural rights and excluding civil and political rights. Limited or different understandings of children's rights have adverse effects as evidenced by the World Summit for Children where world leaders considered less controversial issues and "refrained from formulating rights in the cultural, social and

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<sup>113</sup>World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration (note 7 above), para. 5(e).

<sup>114</sup>United Nations Millennium Declaration, (2000), Millennium Summit, UN, UN Doc. A/RES/55/2, para. 19.

<sup>115</sup>CRC article 29(1).

<sup>116</sup>Black (1994), *Monitoring the Rights of Children*, 9.



personality domain. The concern in the physical field provided them with the lowest common denominator on which they could agree.”<sup>117</sup> Consequently, the Summit outcome largely focussed on health and education goals initially formulated as part of a Task Force for Child Survival,<sup>118</sup> neglecting performance standards for other child rights already confirmed by the international community in the CRC. Consequently, despite CRC article 12 and UNICEF’s recognition in preparatory documentation,<sup>119</sup> child participation for example was largely ignored in the outcome, likely due to conflict with governments and fears about implementation of the Declaration and Plan of Action.<sup>120</sup> While protection rights received little attention in the outcome, they have since been elaborated in many national Programmes of Action<sup>121</sup> due to concerns about survival and development. The subsequent Vienna Declaration and Programme of Action for example, appear heavily influenced by UNICEF and the World Summit, emphasising protection and survival. Although participation is acknowledged in para. 45, there is no advancement of its potential significance for international or national bodies. While the Vienna outcome made valuable contributions related to children,<sup>122</sup> child rights are largely not advanced and the importance of previous international commitments reiterated. Even more recently, while more expansively developed than the World Summit for Children plan, all four main goals in the Special Session on Children outcome nevertheless focus on maximum survival and development namely: promoting healthy lives, providing quality education, protecting against

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<sup>117</sup>Veerman (1992), *The Rights of the Child and the Changing Image of Childhood*, 213.

<sup>118</sup>Many World Summit goals were formulated as part of the Talloires Declaration in March 1988 by the Task Force for Child Survival composed of World Bank, UNDP, UNICEF and Rockefeller Foundation. This Declaration was based on WHO/UNICEF’s initial list of goals for health development for women and children by 2000, endorsed in 1989 by UNICEF/WHO Joint Committee on Health Policy and the Executive Boards of UNICEF and WHO. Subsequently in 1990, UNICEF’s Executive Board approved goals based on WHO/UNICEF’s common goals and the Jomtien-endorsed education goals. Consequently, health and education dominate the World Summit for Children outcome. UNICEF (note 35 above), 13-14.

<sup>119</sup>UNICEF, *ibid.*, 10.

<sup>120</sup>Van Bueren (note 29 above), 15.

<sup>121</sup>Protection rights are encapsulated in the Summit goal to provide “improved protection of children in especially difficult circumstances,” which inspired some states to explore the commitment, including for example, Canada’s Children in Difficult Circumstances Fund. See for example, Canadian Coalition for the Rights of Children (1995), *Learning from Children in Difficult Circumstances*. But not all countries had the incentive or means to elaborate these vague goals domestically; Ledogar (1993), “Implementing the Convention on the Rights of the Child through national programmes of action for children”. 1 *The International Journal of Children's Rights*, 381.

<sup>122</sup>Recommendations include the study of children affected by armed conflict and that all UN bodies regularly monitor the situation of children; *Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, A/CONF.157/24*, 1993, paras. 50-51.



abuse, exploitation and violence, and combatting HIV/AIDS.<sup>123</sup> Child protection remains the primary goal of conferences and outcomes and hence, their monitoring.

While survival and development is an essential child rights principle, attention to it should not exclude other child's rights. Ironically, focussing exclusively on survival and development is self-defeating due to the interconnections among rights.<sup>124</sup> The lacuna of attention to other rights will in turn impede the child's full survival and development and hinder comprehensive monitoring.

#### 2.4 Views of the child

The views of the child principle involves several considerations. The child's right to participate should be recognised not only in outcome documents but in the event and monitoring the standards. Yet limited child engagement in the organisation and events themselves continues although some improvements are noted. A challenge remains to adapt processes and understandings to respect the child participation principle.

Child engagement is specifically recognised in many outcomes including Agenda 21, the Agenda for Action from the World Congress Against Commercial Sexual Exploitation of Children, Habitat II, the World Conference of Ministers Responsible for Youth; children with disabilities are specifically identified in the World Summit for Social Development +5 outcome.<sup>125</sup> As the definition of "youth" from the 1985 International Year of Youth includes all those between the ages of 15-25,<sup>126</sup> the role and participation of older children from 15 to 17 years of age are included in several texts.<sup>127</sup> Although not emphasising children, the

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<sup>123</sup>A world fit for children, UN General Assembly Special Session on children, 2002, UN Doc. A/S-27/19/Rev.1, B.

<sup>124</sup>Indivisibility is discussed in Chapter Five, s.3.3.

<sup>125</sup>See: Agenda 21 (note 68 above), Chapter 25 paras. 25.12 and 25.13; *Declaration and Agenda for Action*, First World Congress against Commercial Sexual Exploitation of Children, Stockholm, 1996, UN Doc. A/51/385, para. 6(a)(b); *The Habitat Agenda*, (note 68 above), chapter IV, para. B.3.86(b)(c). Commitment to the active participation of youth in society, relevant for older children, and "in decision-making processes at the national, regional and international levels" is in *Lisbon Declaration on Youth Policies and Programmes* (1998) World Conference of Ministers Responsible for Youth, Lisbon, UN Doc. WCMRY/1998/L.10, para. 10.

<sup>126</sup>UN (2001), *Youth and the United Nations: Questions and Answers*.

<sup>127</sup>*Habitat II* (note 68 above), chapter III para. C.45.(e), Chapter IV para. C.3.120(a)(b); *World Summit for Social Development* (note 68 above) Chapter I, para. B.26(j); *ICPD* (note 68 above), Chapter VI para. B.6.13, para. B.6.15, Chapter XI para. B.11.24; *Agenda 21* (note 68 above) chapter 25, para. A.25.2,



successful coordinated effort to engage youth at Habitat II involved a network of youth and youth NGOs to: increase the participation and contribution of youth; provide information and suggestions for funding and contacts; and resulted with an international network of Youth for Habitat.<sup>128</sup> Consequently, it is not surprising the Habitat Agenda describes the state commitment to ensure “the effective participation of youth, in political, economic and social life.”<sup>129</sup> In another example, youth developed a *Declaration of Young Inter-American Leaders*, which was contributed to the OAS meeting held in Windsor in 2000.<sup>130</sup> But youth does not mean that children are included. Despite the embrace of “youth,” attention is still needed on the role and participation of all children, including younger ones, in global fora because large numbers of children are still ignored and not informed, which does not respect their right to participate.

Nevertheless, the limited involvement, if not absence, of children in the organisation and participation at global conferences continues. For example, the first World Congress against Commercial Sexual Exploitation of Children involved 1,300 delegates from 125 countries,<sup>131</sup> yet only a small number of young people were in attendance and only three had personal experience with commercial sexual exploitation.<sup>132</sup> But conferences are not only discussing children, but beginning to engage them as participants.<sup>133</sup> To rectify Stockholm’s omission, *Out of the Shadows: International Summit of Sexually Exploited Youth* was held in 1998, involving 55 child and youth delegates from the Americas with experience of sexual

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para. A.25.7, para. A.25.9(a, b, c, f, g, h); *Further actions and initiatives to implement the Beijing Declaration and Platform for Action (Beijing+5)*, UN Twenty-third Special Session of General Assembly 2000, UN Doc. A/RES/S-23/3, para. IV.D.95(b); *Key actions for the further implementation of the Programme of Action of the International Conference on Population and Development (ICPD+5)*, UN Twenty-first Special Session of General Assembly 1999, UN Doc. A/S-21/5/Add.1 para. II.B.21(b), para.II.E.35(b), para.IV.E.83, para. V.90.

<sup>128</sup>Preparatory efforts of Youth for Habitat II described in Youth for Habitat II “*Building Our Global Home*,” Newsletter Issue 1.

<sup>129</sup>*Habitat Agenda* (note 68 above), para. 7.

<sup>130</sup>There were 411 university and college students (ages unspecified) from across the hemisphere for the Model Assembly of the OAS (2000), *Declaration of Young Inter-American Leaders*.

<sup>131</sup>Muntarbhorn (1996), *The Report of the Rapporteur-General*. World Congress against Commercial Sexual Exploitation of Children, 1.

<sup>132</sup>*International Summit of Sexually Exploited Youth: Executive Summary*, 1

<sup>133</sup>See: Lansdown (2001), *Promoting Children's Participation in Democratic Decision-Making*, which includes a section on child conference participation; and Cockburn (2001), *Meaningful Youth Participation in International Conferences*.



exploitation.<sup>134</sup> Consequently, the Second World Congress against the Commercial Sexual Exploitation of Children (Yokohama), Special Session on Children and Rio+10 stressed child involvement.

Although Yokohama explicitly engaged children, there were some oversights and difficulties. In terms of process, positive developments included 90 official youth delegates, including experiential youth, a preparatory meeting and specific debates and presentations; integration in the overall event; and a children's outcome.<sup>135</sup> The Congress likely supported the rapid entry into force of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.<sup>136</sup> Yet, despite lessons learned by governments and NGOs since the first World Congress,<sup>137</sup> the various background papers developed for the event did not include one on child participation in addressing commercial sexual exploitation.<sup>138</sup> Moreover, while recognising the role and value of child participation, the Congress outcome document does not acknowledge the child participants' outcome.<sup>139</sup> The Special Session on Children also made some progress as children were engaged at a preliminary Children's Forum, included on government and NGO delegations<sup>140</sup> and as panellists and speakers and for the first time, two children addressed the General Assembly to share the results of their

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<sup>134</sup>*Declaration and Agenda for Action of Sexually Exploited Children and Youth, Out of the Shadows: International Summit of Sexually Exploited Youth, Ratified by the Youth Delegates, March 1998, Victoria.*

<sup>135</sup>UNICEF (2001), *Press Release: UNICEF, ECPAT International and the NGO Group for the Convention on the Rights of the Child: Yokohama Congress exceeds best expectations*, Yokohama: 20 December.

<sup>136</sup>UN Doc. A/RES/54/263.

<sup>137</sup>Acknowledged by *The Yokohama Global Commitment 2001*. Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, December, I, 2.

<sup>138</sup>The papers considered: child pornography; sexual exploitation and the law; prevention, protection and recovery; private sector; sex exploiter; and trafficking; see <[www.csecworldcongress.org/en/yokohama/Background/Theme\\_papers.htm](http://www.csecworldcongress.org/en/yokohama/Background/Theme_papers.htm)> last visited 9 July 2005.

<sup>139</sup>However, at least one recommendation concerning punishment of the exploiters, not children, was in the Congress outcome (II, 5); *Final Appeal of Children and Young People*, Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 2001.

<sup>140</sup>The Special Session on Children had a record number of children as delegates with 250 children part of official delegations from 132 countries and others on NGO delegations; UNICEF (2002), *Press Briefing by UNICEF Executive Director*, 10 May 2002.



own forum “A world fit for us”.<sup>141</sup> UN General Assembly President Seung-Soo (Republic of Korea), acknowledged the presence of hundreds of children and young people: “is a sign of one of the most important lessons of the past decade: progress for children depends on partnership between many players and on the participation of children and many young people themselves.”<sup>142</sup> The outcome for the Special Session also acknowledges “all members of society” participate with states “in a global movement that will help build a world fit for children” engaging partnerships and participation of a range of actors, including children.<sup>143</sup> Yet, despite unprecedented child engagement, the conference outcome does not acknowledge their role or contribution in the event. Consequently, children’s expectations were not met. For example, Burke, an under-18 member of the NGO Child Rights Caucus at the Session, commented: “At the end of the Children’s Forum we explicitly told governments what A World Fit for Us would look like. The Outcome Document is a real disappointment. We spoke, but it feels like no one really listened.”<sup>144</sup> This is a recurring challenge in international legal and political affairs.<sup>145</sup> Nascent child engagement in practice means the role and significance of the contributions have not yet been determined in advance or during the process. So children may be consulted, their contributions are not always given “due weight” as CRC article 12(1) provides. If children are not consulted, it would be a backward step, ignoring their right to give their views. Child participation likely offers the biggest challenge of a child rights-based approach to monitoring. The Special Session young participant’s frustration offers a lesson learned: child participation provides important opportunities but all participants - child and adult - should be prepared for evolving processes and realistic expectations. Participation in an international conference may be confusing and overwhelming for many children, and stresses the primary importance of participation in

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<sup>141</sup>UN Children’s Forum, *A World Fit For Us*, Message from the Children’s Forum, delivered to UN General Assembly Special Session on Children by child delegates, Arrieta, 13, from Bolivia and Cheynut, 17, from Monaco on 8 May 2002. Four hundred children were at the Children’s Forum, convened immediately before the Special Session and 250 children on official government delegations from 132 countries and others on NGO delegations; *ibid*.

<sup>142</sup>UN (2002), *Press Release: World Leaders Urged to Heed Voices of Young People, As General Assembly Begins Three-Day Special Session on Children*, General Assembly, Twenty-seventh Special Session, 1st Meeting, GA/10016, 8 May 2002.

<sup>143</sup>UN (note 123 above), paras. 7, 32.

<sup>144</sup>Burke, cited in Mvulane (2002), “US leads the anti-rights bullying”. *ChildrenFIRST* (43).

<sup>145</sup>See Chapter Two, s.8.4. Indeed, adults are not always listened to either; for example, Australia presented the Four Directions Council’s proposal, which attempted to incorporate education into an indigenous child right provision (later cultural, religious and linguistic rights, a.30), a dimension that was deleted during CRC negotiations; see UN (1987), UN Doc.E/CN.4/1987/25, 12-15.



child-centred environments such as school, community centres and the home.<sup>146</sup> Nevertheless, international conferences can and should acknowledge the role and importance of children in practice and in theory.

Children in focus groups from South Africa, Canada and England all supported global conferences in the monitoring process.<sup>147</sup> Conferences and their outcomes may enhance awareness of issues pertaining to children amongst participants and by extension, their institutions, organisations and countries and through the media, the general public although their effectiveness in reaching children to date is questionable. For example, while G. & S., acknowledged the monitoring role<sup>148</sup> and L. noted the awareness-raising function,<sup>149</sup> O., J. & K. remarked: “We thought that there wasn’t much feedback and young people need to be more aware of what is going on at these conferences and what’s the result of them.”<sup>150</sup> If children are not aware of global events and their outcomes, they will continue not to be involved in monitoring.

Young people have identified the need for additional guidance and support for involvement in international events.<sup>151</sup> There are a spectrum of issues to ameliorate child participation including interpretation, location, and sufficient support of various types namely: financial resources to facilitate travel and accommodation; logistical and personal support to facilitate participation in adult fora; and psychological support if sharing difficult experiences with many people. Children and their advocates need access to relevant documentation in local languages and formats.<sup>152</sup> Even the convening of events in northern climes during winter can pose another obstacle to children from the south without sufficient warm clothing.

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<sup>146</sup>Black (note 116 above), 29.

<sup>147</sup>Focus Groups (2002, 2003), organised and facilitated by Ph.D. candidate on the Monitoring of Children's Rights involving: Child and Youth Friendly Ottawa, Ottawa: 28 June, and 5 October (2002); Children's Resource Centre, Cape Town: 27 July (2002); and Article 12, London: 28 July (2003).

<sup>148</sup>17 year-old boys, in Ottawa Focus Group, June (2002), *ibid.*

<sup>149</sup>15 year-old girl; Ottawa Focus Group, October (2002), (note 147 above).

<sup>150</sup>13 and 12 year-old boys and 12 year-old girl respectively; in London Focus Group (2003) (note 147 above).

<sup>151</sup>For example, see United Nations Association in Canada (2002), *Navigating International Meetings: A Pocketbook Guide to Effective Youth Participation*.

<sup>152</sup>Dugard (1994), "The Role of International Law in Interpreting the Bill of Rights". 10 *South African Journal on Human Rights*, 215.



Consequently for the most part, children's involvement at international conferences is extremely limited. Indeed, significant world conferences remain adult conferences with the addition of children, rather than substantively involving them in the events, their organisation and monitoring.<sup>153</sup> Not only should children be prepared for the international stage, the conferences can also adapt for younger participants to meet their needs and welcome their roles and contributions. The engagement of children can be challenging for adult conference organizers and the children themselves<sup>154</sup> with increasing awareness of the need for adults to recognise and promote children as organisers, participants and so on<sup>155</sup> as the 2002 Children as Partners international event in Victoria, Canada found for example, where children questioned the title.<sup>156</sup> In order to be "true 'global forums'" as claimed,<sup>157</sup> further emphasis and commitment to advance child participation at fora are needed.

## 2.5 Overall Child Rights Approach

While child rights have made progress in international conferences, obstacles remain. There are both positive and negative pressures; weak or lack of a child rights-based approach; limited follow-up; and the importance of regular regional and international child rights conferences.

In general, conferences and their outcomes may elaborate children's rights through clarifying provisions, redressing lacunae and articulating implications over time however, limited support or understanding of child rights continue to hamper opportunities. The restricted approach of the World Summit for Children for instance, influenced the Vienna Declaration and Programme of Action.<sup>158</sup> Since 1990 however, global fora have advanced child rights awareness in events concerning *inter alia* the environment, social development, gender, and

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<sup>153</sup>See further Lansdown (note 133 above), Part Three.

<sup>154</sup>Major international conferences are all organised and convened by adults; events orchestrated by children are not yet widespread nor influential.

<sup>155</sup>See for example: Cockburn (note 133 above); and Lansdown (note 133 above), Part Three.

<sup>156</sup>Event attended by author; see International Institute for Child Rights and Development, <[web.uvic.ca/iicrd/proj\\_partners.html](http://web.uvic.ca/iicrd/proj_partners.html)> last visited 2 November 2004.

<sup>157</sup>UN (note 66 above), 1.

<sup>158</sup>See below.



human settlements.<sup>159</sup> But the elaboration of rights in multiple fora enhances the potential for reversing of previously accepted language. For example, the Child Rights Caucus, representing more than 100 NGOs, expressed such concern about the United States' efforts in relation to sexual and reproductive health education and services and the death penalty during negotiations for the UN Special Session on Children outcome.<sup>160</sup> Some participants attempted to prevent incorporation of a child rights framework in the Special Session negotiations<sup>161</sup> and at times, even reference to the CRC, the primary international legal instrument, was questioned.<sup>162</sup> Non-binding language may allow progress or regression of standards as evidenced by negotiation challenges at Beijing+5.<sup>163</sup> Conference negotiations offer opportunities to those committed to child rights as to those suspicious or antagonistic towards them, offering the occasion to subject child rights to the anticipated "backlash".<sup>164</sup> Despite near universal CRC ratification, the child rights-based approach may remain contentious or misunderstood. Hence, although children's rights have made significant advances in recent years, challenges remain. Thus, appropriate authoritative, consistent monitoring is essential to reinforce binding and non-binding standards.

Weak or non-existing understanding of a child rights-based approach is evident in the World Summit documentation due to repeated references to "child rights" as one of several thematic issues rather than as an overall framework or approach.<sup>165</sup> This limited approach continues to influence more recent event outcomes as evident at the regional preparatory meeting of the

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<sup>159</sup>For example, UNICEF acknowledges the Earth Summit in 1992 "built on" the World Summit for Children achievements and recognises many world leaders referred to children in their speeches at Rio; UNICEF (note 76 above), 4-5.

<sup>160</sup>NGO Committee on UNICEF (2002), 3 *On the Record for Children*: May 20; & Child Rights Caucus, "Open Letter to US Secretary of Health and Human Services and the United States delegation", Child Rights Information Network (CRIN) (2002), *Special Session Update No. 4*, 10 May.

<sup>161</sup>See CRIN, *CRIN Special Session on Children Issues*; and for the final hours of negotiations, see NGO Committee on UNICEF, (note 160 above).

<sup>162</sup>The USA, which has not ratified the CRC, was the most vocal opponent and attempted to obstruct this development; see NGO Committee on UNICEF (note 160 above).

<sup>163</sup>See for example, Leigh (2001), "Fighting the anti-feminists". 15 *Association for Women's Rights in Development News*, Winter.

<sup>164</sup>Van Bueren (note 29 above), 25.

<sup>165</sup>For instance, UNICEF refers to "...goals outside the health sector, such as those dealing with child rights, protection of children in especially difficult circumstances and goals in the areas of education, literacy, and early child development..." UNICEF (note 35 above), 13-14.



Americas in 2000 for the Special Session on Children. The thematic workshop on protection included child rights as a subset issue although the conference focussed on children; the other thematic workshops on education, child participation and health did not have child rights as a subset.<sup>166</sup> Thus, conference organisers appeared to relate child rights only to protection issues and not other areas related to children. Child rights should not be a separate item of consideration but underpin all approaches to children. Conference organisers must improve upon their limited rights understanding, which affects monitoring.

While monitoring is gaining prominence, it is not necessarily in relation to rights however. As examples, the World Conference on Human Rights recommended regular monitoring of children by the UN and specialised agencies and the Special Session on Children recommended regular monitoring at national, regional global levels, but neither specifically recommended monitoring of their rights.<sup>167</sup> Data from general monitoring about the child will reveal perceptions about children depending upon the monitor, rather than details about the status of their rights. A focus on well-being of children may serve the traditional understanding of best interests, namely their welfare.<sup>168</sup> But child rights have expanded understanding of the child, his/her relationships and environments. The process of monitoring and results improve with use of a comprehensive approach - a child rights-based approach - in follow-up conference activity. But cultural and communications barriers that can exist within international organisations, government departments and civil society and among them may complicate monitoring and a rights approach. Different corporate cultures may also affect cooperation and support of conferences, outcomes and their monitoring. For instance, those involved in international affairs within a state may not communicate effectively to domestic policy actors or share the same enthusiasm for international standards and commitments, potentially obstructing and weakening any contribution to conference follow-up for child rights at international, national and sub-national levels.

The sheer number of conferences and outcomes with implications for many national

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<sup>166</sup>Fifth Ministerial Meeting on Children and Social Policy in the Americas, Jamaica, October, 2000, attended by author.

<sup>167</sup>*Vienna Declaration and Programme of Action*, (note 122 above), para. 51; *A world fit for children*, (note 123 above) paras. 60-61. Both documents however, refer to approach of the UNCRC (former, para. 89) and encourage informing the monitor about measures for the Plan of Action (latter, para. 61(a)).

<sup>168</sup>See Van Bueren (note 29 above), 45-50.



institutions poses a challenge not only for coordination,<sup>169</sup> but also monitoring by government or civil society. As examples, the Copenhagen Declaration on Social Development and Programme of Action is approximately 90 pages,<sup>170</sup> the Cairo Programme of Action is over 100 pages<sup>171</sup> and Agenda 21 has 40 chapters over 300 pages.<sup>172</sup> Moreover, when outcome documents are repetitive, inconsistent and too long, their relevance are questionable. A UN report acknowledges the price of data even for states supported by international organisations: “Many countries have difficulties in meeting the demands for statistics emanating both from within their countries and from outside even without the extra demands placed upon them by the resolutions of conferences.”<sup>173</sup> Major problems of national data include: availability; comprehensiveness in relation to geography or populations; conceptual relevance and collection methods; timeliness; comparability of difference sources; and accessibility.<sup>174</sup> Limited follow-up after some conferences hinders best interests of the child. Referring to world environmental events, Haas states their effectiveness is difficult to evaluate due in part to weak or lacunae in monitoring, some ambiguous goals, weak and incomplete state reporting, and few provisions for monitoring in conference agreements,<sup>175</sup> which are often true for other fora. Better national capacity and better coordination of data collection by international organisations are needed.<sup>176</sup> Onu recommends streamlining national reporting processes, monitoring around commonly agreed themes and goals, as well as the development of a “coordinated and consistent methodological approach to all the data requirements stemming from the global conferences.”<sup>177</sup> These suggestions are valuable as

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<sup>169</sup>The UN acknowledges the “particularly daunting” challenge; UN (1999), (note 62 above), para. 45.

<sup>170</sup>*Declaration and Programme of Action, World Summit for Social Development* (note 68 above).

<sup>171</sup>*Report of ICPD*, (note 68 above).

<sup>172</sup>*Agenda 21* (note 68 above), *Rio Declaration on Environment and Development*, UN Doc DPI/SD/1299.

<sup>173</sup>UN (1999), *Integrated and coordinated implementation and follow-up of major United Nations conferences and summits, A critical review of the development of indicators in the context of conference follow-up: Report of the Secretary-General*, UN Doc.E/1999/11, para. 20.

<sup>174</sup>*Ibid.*, para. 18.

<sup>175</sup>Haas (2002), “UN Conferences and Constructivist Governance of the Environment”. 8 *Global governance*, 80.

<sup>176</sup>See UN (1999), note 173 above).

<sup>177</sup>Onu (2001), “From Consensus-building to implementation: The follow-up to the UN global conferences of the 1990s”. *United Nations-sponsored World Conferences*. Schechter (ed.), 179.



long as child rights are clearly recognised and respected as a separate monitoring category.

Despite the weaknesses, a child rights-based approach is supported by regular and consistent international event outcome reviews. Dias feels the delay between general human rights conferences is too much: "Human rights are too important to be dealt with globally only at 25-year intervals."<sup>178</sup> He recommends the value and effectiveness of regular human rights review conferences every five years.<sup>179</sup> Advantages exist with such regular reviews including recognition of emerging issues, problems of resources,<sup>180</sup> and focussing attention to commitments. The Yokohama Congress for example, ensured child sexual exploitation remained an international concern and facilitated monitoring of the issue. Dias's recommendation however, ignores the fact that many conferences in recent years have addressed rights within the context of *inter alia* social development, population and development, human settlements, and women and development. These events may have contributed more to supporting rights than more regular general conferences. Several special sessions have been held to review progress five years after such events as Beijing and Copenhagen. But at the five year mark, what is their value? State processes to develop responsive strategies should take time to establish priorities, engage relevant actors within and outside the government, conduct consultations, and elaborate effective plans so it may not be realistic to expect major changes and results within five years. While it is important to monitor regularly at the national level and maintain momentum at both national and global levels, it is questionable that global progress is feasible and measurable within five years. Indeed, international reviews are held too soon to have any real impact, and only limited data is available either distorting or preventing useful analysis of progress as ECOSOC recognises. It concluded the five-year review "proved too short for the reviews [in a number of areas] to be based on an adequate assessment of whether policies for implementing conferences had been having an impact."<sup>181</sup> It has also been noted that national and regional

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<sup>178</sup>The 1993 UN conference on human rights was the first one in 25 years and only the second one in the UN's history; Dias (2001), "The United Nations World Conference on Human Rights: Evaluation, monitoring and review". *United Nations-sponsored world conferences: Focus on impact and follow-up*. Schechter (ed.), 29, 36.

<sup>179</sup>*Ibid.*, 36.

<sup>180</sup>UN (2000), (note 62 above), para. 7.

<sup>181</sup>UN (2000) (note 62 above), para. 6.



reports could be better utilised in global reviews<sup>182</sup> but limited time-frame for review likely restrains the ability to do so. Reviewing progress after only five years may heighten fatigue with respect to the issues. Further, some reviews were challenged by “a temptation...to reopen a number of issues agreed at the conferences, despite the commitment not to do so.”<sup>183</sup> Moreover, five-year reviews do not necessarily have much impact because they “have not always built on each other,” resulting with outcomes weakened by repetition and even contradictions without consistent mainstreaming.<sup>184</sup> In addition, civil societal participation was more limited in the five-year review processes than in the conferences themselves.<sup>185</sup> Although the CRC is periodically reviewed after five years of implementation following the initial report, the UNCRC and many states parties are overburdened by the task.<sup>186</sup> Yet, how often should global rights events take place? Additional review proposals include: one 10-year event involving a sequential review of the conferences; clustering the review of several closely related outcomes; staggering the conference reviews to avoid holding more than one review per year; and five-year reviews could be held by the functional commissions, while ECOSOC and the General Assembly could be responsible for ten-year reviews.<sup>187</sup> In general, these proposals reflect the propensity to address every global issue with a conference posing operational and follow-up difficulties. Even UN Decades, dedicating ten years to a particular issue, may result with minimal achievements.<sup>188</sup> While elaboration of rights issues, emerging issues and networking are valuable, event fatigue influences potential contribution, challenging the essential objectives of monitoring and implementation and should be avoided. An event should be convened well rather than poorly and quickly. Therefore, it is recommended that global fora be restricted to every ten years to specifically address the essential populations of: children, women and general human rights; and environmental

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<sup>182</sup>Ibid., paras. 14-15.

<sup>183</sup>Ibid., para. 6.

<sup>184</sup>Ibid., paras. 11-12.

<sup>185</sup>The report acknowledges that the nature of the participation changed and in several cases, but not all, became more effective at the international and national levels; UN (2000) (note 62 above), para. 28.

<sup>186</sup>See Chapter Two.

<sup>187</sup>UN (2000) (note 62 above), para. 33.

<sup>188</sup>Exceptions include the UN Decades for the Child and for Women in the 1970s, which resulted with the CRC and CEDAW respectively. For example, Dias notes the ECOSOC review for the Human Rights conference includes “an almost patronizing” conclusion about UN efforts for the UN Decade for Human Rights Education; see Dias (note 178 above), 54.



issues, which influence everyone. This participatory arrangement should incorporate reviews of previous global events to monitor progress on such issues of social development, population, and habitat.

In particular, regular global and regional child rights conferences are needed to assess and influence each generation of children and serve their rights. Therefore, a global and regional child rights conference should be held every ten years. A global event is important in developing commitment for action and awareness of child rights. Hence, another Special Session on Children should take place in 2012, and every ten years thereafter to review progress and mobilise on emerging issues. In preparation for the global event and provide the opportunity to monitor and improve implementation, regional events should precede it by five years, beginning in 2007, and continue every ten years thereafter. The regional event will facilitate discussion of geographic and cultural challenges and maintain momentum regionally and internationally for child rights. Events are valuable but only serve part of monitoring. National monitoring of all child rights norms and standards should constantly take place, but not necessarily involving conferences,<sup>189</sup> to inform global and regional follow-up; maintain the relevance of the commitments; and address emerging issues.

Child rights offer an appropriate framework to guide the organisation and monitoring of international conferences. While there are some advancements, significant challenges remain to overall child rights impeding the adoption of a rights-based approach.

### **3.0 CONCLUSION**

As part of the international legal and political order to promote and protect children's rights, global conferences and their outcomes are generally valuable. But the contributions of international conferences - either taken together over the last decade or considered individually - are complicated and manifold leading Alston to warn that "any portrayal of the conferences either as an unqualified success or a total waste of time simply overlooks the complexity of the exercises themselves and of the contexts in which they take place."<sup>190</sup> This conclusion is an accurate assessment of global fora. While concerns about child rights costs,

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<sup>189</sup>See Chapter Four.

<sup>190</sup>Alston (2000), "The U.S. and the Right to Housing: A Funny Thing Happened on the Way to the Forum". *International Human Rights in Context: Law, Politics, Morals*. Steiner & Alston (eds.), 976.



goal development and so on are valid, conferences also have beneficial results. The sharing of information, monitoring, warning function and agenda building are all positive, interrelated results.<sup>191</sup> Additional benefits of reporting and discussion of new and current research according to Oseman, can lead to ideas, encourage learning and communications resulting with the conclusion that the conference is “an essential part of scientific communication, a part of the long process whereby discovery is integrated into the body of knowledge.”<sup>192</sup> Conferences have supported the development of global consensus and norms, but the challenge remains to implement and monitor these non-binding commitments effectively.<sup>193</sup> Ad-hoc, inconsistent efforts are problematic. In addition, attention must be directed not simply to the event itself but also to advance preparation and follow-up monitoring as well as better coordination.

Monitoring supports the ongoing relevance of conference standards at international, national and sub-national levels. Additional respect of child rights is needed throughout the process. While a limited perspective of the child's survival and development is firmly entrenched in conferences, improvements are needed in every aspect of a child rights-based approach to monitoring.

Moreover, the flexibility of soft outcomes has resulted in lack of certitude about monitoring demands and processes. All monitors must place priority upon international child rights law in implementation and monitoring. Conference outcomes may be used as a tool but should not determine monitoring and implementation, which must always be inspired and guided by international child rights law. Greater effort must be expended to reflect the fact that conferences are part of a process to advance children's rights, rather than ends in themselves.

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<sup>191</sup>Fomerand (note 2 above), 371.

<sup>192</sup>Oseman (1989), *Conferences and Their Literature: A Question of Value*, 3, 117.

<sup>193</sup>Onu (note 177 above), 181.



## **CHAPTER FOUR:** **MONITORING CHILDREN'S RIGHTS: TWO COMMONWEALTH CASE** **STUDIES**

To ascertain the situation of child rights, international monitors can generally only act as "the monitor of monitors"<sup>1</sup> due to their dependence upon the efforts of national monitors. Consequently, national monitoring requires examination to understand the reality of monitoring: how do countries in different circumstances monitor and what is the significance of child rights upon their efforts? Through national case studies, lessons can be identified that may be relevant to other monitoring efforts in view of the commitment to child rights. Analysis of Canada and South Africa<sup>2</sup> provides the opportunity to appreciate some actors, techniques and issues of monitoring. These Commonwealth countries - one developed and the other in transition - illustrate how states interpret and respect the monitoring obligation, revealing both strengths and shortcomings.

Research for this chapter included field work in both countries with interviews of representatives of governments and civil society and focus groups with children.<sup>3</sup> The breadth and scope of activity at local, regional and national levels necessitate that this chapter covers the most important elements in the case studies.

The chapter is organised into several sections. Firstly, description of the context identifies the child rights framework in each country. Subsequently, categories of monitors and their activities are examined. The third section analyses the status of a child rights-based approach, and the conclusion highlights several lessons learned.

### **1.0 CHILD RIGHTS CONTEXTS**

Why compare these two disparate countries? Canada and South Africa share a common commitment to child rights and their approaches to and experiences with monitoring offer lessons from developed and developing contexts. Several criteria were used to select the case studies. The Commonwealth countries share the English legal tradition while offering

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<sup>1</sup>Hammarberg (1993), *The Work of the Expert Committee on the Rights of the Child*. Consultation on the role of the UN and NGOs in the Implementation of the Convention on the Rights of the Child.

<sup>2</sup>See below for selection rationale.

<sup>3</sup>See Appendix B: Thesis Methodology.



different settings for analysis.<sup>4</sup> Both states are party to the international human rights system, have both child rights monitoring experience following review of CRC progress by the UN Committee on the Rights of the Child (UNCRC) and monitoring mechanisms. The case studies encompass a wide range of political, economic and social circumstances and geography. In addition, numerous governmental and non-governmental efforts support child rights. Both countries have dualistic legal systems<sup>5</sup> so international law should influence national legislation through transformation.

### 1.1 Child Rights in Canada

Canada is a constitutional democracy with common and civil legal systems. Section 52 of the Constitution Act 1982 states the constitution is “the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.” The 1982 *Canadian Charter of Rights and Freedoms* (the Charter)<sup>6</sup> enshrined human rights in the Canadian constitution. Canada’s constitution does not specify children’s rights or the role of international law.<sup>7</sup> No obligation exists to invoke non-incorporated international law but judicial activity and legislative reform may consider international law as appropriate. As a federation, government responsibility is divided among various levels outlined in Constitution Act 1867. In general, the federal government’s responsibilities include criminal law and international relations whereas the ten provinces are exclusively responsible for health care and education, while both share jurisdiction in the area of immigration.<sup>8</sup> Three territories, which have not acquired provincial status, are allocated such authorities from the federal government. The division of powers allows different interpretation and implementation of governmental responsibilities, leading

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<sup>4</sup>In addition to common law, Canada has civil law in Quebec and South Africa follows Roman-Dutch and customary law.

<sup>5</sup>Although s.39(1) of the South African constitution, providing consideration of international law as described below, is unusual, allowing more monist influence.

<sup>6</sup>*Constitution Act, 1982 Schedule B.*

<sup>7</sup>For instance, Justice LaForest (as he then was), Supreme Court of Canada, stated: “American jurisprudence, like the British, must be viewed as a tool, not as a master.” *Rahey v. The Queen*, cited in Russell et al. (1990), *Federalism and the Charter: Leading Constitutional Decisions*, 21.

<sup>8</sup>See further Smiley (1980), *Canada in Question: Federalism in the Eighties*, chapter two.



to wide variations in terms of legislation, policy, spending and service delivery and so on.<sup>9</sup>

Canada has signed and ratified or adopted many international instruments and agreements.<sup>10</sup> The CRC was ratified on 13 December 1991 but due to concern about parental authority, the province of Alberta withheld formal support until January 1999.<sup>11</sup> It became party to the Optional Protocol to the CRC on the involvement of children in armed conflict in 2002 and ratified the Optional Protocol on the sale of children in 2005. The UNCRC acknowledged Canada's child rights commitment since it "played a leading role" in CRC drafting and in convening the World Summit for Children.<sup>12</sup> The country has much UN human rights experience following many reports to UN committees and communications from individuals.<sup>13</sup> Canada also ratified ILO Convention 182 on the worst forms of child labour but not the minimum age convention.<sup>14</sup> Canada is an OAS member and has ratified its Charter but not the American Convention.<sup>15</sup>

Federalism complicates incorporation of ratified international treaties. As the first report to the UN Committee notes, the federal, provincial and (to extent delegated by the federal government) territorial governments share the responsibility and obligation to implement the CRC.<sup>16</sup> Consequently, CRC incorporation for example would be extremely difficult, if not

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<sup>9</sup>For example, see Howe (2001), "Implementing children's rights in a federal state: The case of Canada's child protection system." 9 *The International Journal of Children's Rights*, 361.

<sup>10</sup>Canada acceded to ICESCR, ICCPR, the first OP to ICCPR, and the OP to CEDAW, and ratified CERD, CEDAW, CAT; OHCHR (2005), *Status by Country, as of 29 June 2005*.

<sup>11</sup>Klein, Premier of Alberta (1999), *Letter to The Right Honourable Jean Chrétien, Prime Minister of Canada*, unpublished, dated January 13.

<sup>12</sup>UNCRC (1995), *Concluding observations of the Committee on the Rights of the Child: Canada, at the 233rd meeting*, UN Doc.CRC/C/15/Add. 37, para.3.

<sup>13</sup>As of July 2005, Canada has submitted 35 reports under CAT, CCPR, CEDAW, CERD, CESC, and CRC; OHCHR (2005), *Submitted by Country*.

<sup>14</sup>*Convention on Minimum Age* (No. 138), Adopted 26 June 1973, entered into force 19 June 1976; *Worst Forms of Child Labour Convention*, 1999 (No. 182), Adopted 17 June 1999, entered into force 19 November 2000.

<sup>15</sup>*American Convention on Human Rights (Pact of San José)*, signed 22 Nov. 1969, entered into force 18 July 1978, OASTS 36, OAS Off. Rec. OEA/Ser.L/V/11.23, doc. 21, rev.6 (1979).

<sup>16</sup>Canada (1994), *Convention on the Rights of the Child: First Report of Canada*, para.1.



impossible.<sup>17</sup> A Canadian statute will prevail in contravention of an international treaty. However, transformation is beginning to take effect as Canadian legislation refers to international treaties in several instances<sup>18</sup> and specifically the CRC or best interests in acts about child sexual exploitation, youth criminal justice and divorce.<sup>19</sup> The highest court, the Supreme Court of Canada, increasingly refers to international treaties in decision-making<sup>20</sup> and the CRC is the most frequently cited international human rights treaty by Canadian courts<sup>21</sup> influencing *inter alia* the *Baker* decision.<sup>22</sup>

All levels of government are active on child issues although child rights do not always figure prominently. For example, the National Children's Agenda is the national vision of federal, provincial and territorial governments to promote the well-being -not rights- of children.<sup>23</sup> The Government of Canada officially promotes child rights<sup>24</sup> however, Canadian society does not yet comprehensively embrace them,<sup>25</sup> but a supportive civil society exists.

In response to Canada's first CRC report, the UN Committee expressed concern about insufficient attention "to the establishment of a permanent monitoring mechanism that will

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<sup>17</sup>Menard, Counsel, Human Rights Law Section, Department of Justice Canada (as she then was) (2003), Interview with author, Ottawa: 7 January.

<sup>18</sup>Multiculturalism Act and the Emergency Measures Act; Yalden (member of UN HRC as he then was) (2001), presentation to Canadian Parliamentary Human Rights Group, Ottawa, 4 October.

<sup>19</sup>The acts include: C-15A, An Act to amend the Criminal Code and to amend other Acts –luring on the Internet, and amend the sex tourism Act; Bill C-7: *Youth Criminal Justice Act*, assented to in February 2002 (see discussion below); and C-22, An Act to amend the Divorce Act; Pearson, The Senate of Canada (2001), Interview with author, Ottawa: 5 November; and Arsenault, Office of Senator Pearson (2002), correspondence with author, 7 November.

<sup>20</sup>Former C.J. Lamer, cited by Yalden, (note 18 above); and Yalden, member of the UN Human Rights Committee (HRC) (as he then was) (2003), Interview with author, Ottawa: 23 January. Yalden does not believe judicial references to international treaties are as high as it should be.

<sup>21</sup>Menard (note 17 above).

<sup>22</sup>*Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817. See below.

<sup>23</sup>For details, see Canada, *National Children's Agenda*.

<sup>24</sup>For example, see Hon. Manley, Deputy Prime Minister (2002), *Canada: Statement by The Honourable John Manley, Deputy Minister of Canada*, at UN Special Session on Children.

<sup>25</sup>For example, children's selection of child rights in a 1999 national election provoked some negative reactions and newspaper commentaries; for example, see Lowther (ed.) "Reaction to Elections Canada's National Election for the Rights of Youth".



enable an effective system of implementation of the Convention in all parts of the country.”<sup>26</sup>

## 1.2 Child Rights in South Africa

Following the well-known history of apartheid, South Africa acquired its first democratic government in 1994 and since then, has actively promoted human rights.<sup>27</sup> The role of young people in dismantling apartheid is widely recognised due to widespread rights violations.<sup>28</sup> The constitutional democracy has customary and common legal systems, the latter follows Roman-Dutch and English traditions.<sup>29</sup> The 1996 constitution outlines national, provincial and local areas of government; the national level propagates policy, and the others mainly carry out implementation.<sup>30</sup> The Constitution is “the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”<sup>31</sup> In contrast to Canada, the 1993 interim<sup>32</sup> and 1996 constitution specifically recognise international law<sup>33</sup> and child rights.<sup>34</sup> In section 39(1) of the 1996 Constitution, a court, tribunal or forum “must” consider international law when interpreting the constitution’s Bill of Rights, which provides for *inter alia* child rights in section 28<sup>35</sup> and the right to basic

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<sup>26</sup>UNCRC (note 12 above), para.9.

<sup>27</sup>See Black (1999), “The long and winding road: International norms and domestic political change in South Africa”. *The Power of Human Rights: International Norms and Domestic Change*. Risse et al. (eds.).

<sup>28</sup>As examples: the country acknowledged “children - many of them hardly in their teens - were instrumental in the fight against apartheid;” Minister Pahad (2002), South Africa Statement to the UN Special Session on Children, UN, 8 May; and South African Human Rights Commission (SAHRC) (2000), *Towards the Development of a Focal Point for Children in the SAHRC*, 3.

<sup>29</sup>Customary law’s influence is discussed below; Maithufi (2000), “The Best Interests of the Child and African Customary Law.” *Introduction to Child Law in South Africa*. Davel (ed.).

<sup>30</sup>The country has nine provinces; South Africa, National Programme of Action (NPA) Steering Committee (1997), *Initial Country Report - South Africa: Convention on the Rights of the Child*, 8; *Constitution of the Republic of South Africa 1996*, Act 108 of 1996, chapter 3.

<sup>31</sup>*ibid.*, s. 2.

<sup>32</sup>*Interim Constitution of the Republic of South Africa*, Act 200 of 1993.

<sup>33</sup>See Dugard (2001), *International Law: A South African Perspective, Second Edition*, 51.

<sup>34</sup>See Bekink & Brand (2000), “Constitutional Protection of Children.” *Introduction to Child Law in South Africa*. Davel (ed.).

<sup>35</sup>Constitution s.28(1) provides: “every child has the right  
(a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour



education in section 29. No specific constitutional obligation to CRC article 12, views of the child, exists indicating “the hesitant approach of legislators to this concept,” according to Gilbert.<sup>36</sup> (Such a reference is also absent in the Canadian constitution.) Nonetheless, the constitutional commitment to child rights is significant.<sup>37</sup>

The Government also has affirmed human rights, including child rights, internationally.<sup>38</sup> It ratified the CRC on 16 June 1995, acceded to the Optional Protocol on the sale of children in 2003 and signed the Optional Protocol on the involvement of children in armed conflict in 2002. Due to the democracy’s youth, the country has relatively little experience in the UN human rights system.<sup>39</sup> It has ratified ILO conventions on the worst forms of child labour and minimum age. To “better reflect African cultural concerns and to address other relevant issues not addressed in the CRC,” South Africa also ratified the African Charter on the Rights and Welfare of the Child (African Children’s Charter)<sup>40</sup> in 2000.<sup>41</sup>

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*practices; (f) not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child’s age; or (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner and kept in conditions that take account of the child’s age; (h) to have a legal representative assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; (i) not to be used directly in armed conflict, and to be protect in times of armed conflict.”*

S.28(2) provides for the application of the best interests principle in all matters; and s.28(3) defines a child as a person under the age of 18 years.

<sup>36</sup>Gilbert in University of the Western Cape Community Law Centre, South Africa (1998), *What the Children Said...*, 6. The NGO movement in the anti-apartheid struggle created an ongoing expectation of popular participation in policy-making, implementation and evaluation.

<sup>37</sup>Himonga notes the constitutions of South Africa, Malawi, Uganda and Namibia provide for child rights; Himonga (2001), “Implementing the rights of the child in African legal systems: The Mthembu journey in search of justice.” 9 *The International Journal of Children's Rights*, 93. See further Van Bueren (2003), “The constitutional rights of children.” 46 *Amicus Curiae*, 27-32.

<sup>38</sup>The country signed the ICESCR, ratified the ICCPR, CERD, CAT, CEDAW, acceded to both optional protocols to ICCPR. OHCHR (note 10 above).

<sup>39</sup>As of July 2005, South Africa has reported four times: once each for CAT, CEDAW, CERD, and CRC; OHCHR (note 13 above).

<sup>40</sup>*Charter on the Rights and Welfare of the Child*, adopted July 1990, entered into force 29 Oct. 1999, OAU Doc. CAB/LEG/TSG/Rev.1.

<sup>41</sup>Regional concerns include female circumcision, a child’s responsibilities, and the family’s role in raising the child; South Africa, Office on the Rights of the Child-The Presidency (ORC) (2002), *Children in 2001: Report on the State of the Nation's Children*, 21.



The CRC has influenced parliamentary law-making and policy formulation related to children.<sup>42</sup> The CRC's significance is manifested in the act of ratification, the constitutionalisation of child rights in section 28, and the constitutional provision requiring courts to consider international law.<sup>43</sup> The UN Committee acknowledged *inter alia* efforts in education have advanced the child's participatory rights.<sup>44</sup> Despite this impressive legal and political commitment, progress in implementation is needed since as a developing country, significant challenges include lack of resources, poverty, access to education, HIV/AIDS, violence and abuse. Consequently, international monitors, including UNICEF, are active in South Africa.<sup>45</sup>

Similar to Canada, the UNCRC expressed concern about domestic monitoring including insufficient qualitative and quantitative data collection.<sup>46</sup> While it welcomed establishment of the Human Rights Commission, it noted insufficient resources and absence of a clear procedure for children's complaints.

## 2.0 MONITORING PROCESSES IN CANADA & SOUTH AFRICA

National monitoring in both case studies are examined using the following categories of actors: executive and legislative monitors, the judiciary,<sup>47</sup> independent commissions or actors, academics, news media, NGO/voluntary sector, and international monitoring.

### 2.1 Executive Monitoring

Executive branches of national government are technically responsible for monitoring to fulfill international legal obligations. Canada's commitments to international child rights are not as explicit as South Africa. The South African government established the Office on

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<sup>42</sup>Sloth-Nielsen (2002), "Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child." 10 *The International Journal of Children's Rights*, FN #4, 5, 6, 137.

<sup>43</sup>*Ibid.*, 138-139.

<sup>44</sup>UNCRC (2000), *Concluding observations of the Committee on the Rights of the Child: South Africa*, 28/01/2000, UN Doc.CRC/C/15/Add. 122, para.8.

<sup>45</sup>See below.

<sup>46</sup>UNCRC (note 44 above), paras.13-14.

<sup>47</sup>As s.2.3 below explains, the courts are not monitors but case law illustrates the influence of child rights in adjudication.



the Rights of the Child in The Presidency (ORC),<sup>48</sup> affording highest political priority. The ORC facilitates the government's National Programme of Action (NPA) based on the CRC<sup>49</sup> and acts as secretariat to the NPA's Steering Committee. Launched on 6<sup>th</sup> November 1999,<sup>50</sup> the NPA coordinates all government child-related activities and policy development, prepares and submits CRC and African Children's Charter reports and responses to national or international inquiries.<sup>51</sup> Meeting bi-monthly, the NPA Steering Committee includes various national government departments,<sup>52</sup> UNICEF, the Human Rights Commission, the Youth Commission, and only one NGO, the National Children's Rights Committee (NCRC).<sup>53</sup> The UNCRC welcomed the NPA,<sup>54</sup> which is described as an "ongoing process" and evaluates its work every second year.<sup>55</sup> It is not however, without challenges. For instance, while the NPA document is comprehensive, the Steering Committee's approach is ad-hoc and not yet strategically focussed.<sup>56</sup> While activists are discontented,<sup>57</sup> nevertheless, the NPA is fulfilling its objectives.

While there is a Canadian federal secretary of state for children and youth, the office does not currently have much political clout and no equivalent ORC exists federally. Inter-departmental committees of federal officials coordinate and produce international treaty

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<sup>48</sup>Separate offices for the status of persons with disabilities and on the status of women have also been established in The Presidency.

<sup>49</sup>South Africa, NPA Steering Committee, (note 30 above), 17, FN #1.

<sup>50</sup>South Africa, National Plan of Action (1999), *What is an "NPA"?*

<sup>51</sup>For example, South Africa, ORC (2001), *End Decade Report on Children - South Africa*; Theron, ORC, Republic of South Africa (2002), Interview with author, Pretoria: 19 July.

<sup>52</sup>The core ministries are: Office of the President, Health, Welfare, Education, Water Affairs and Forestry, Finance and Justice; NPA Steering Committee (note 30 above), 21.

<sup>53</sup>Theron, (note 51 above). See further below.

<sup>54</sup>UNCRC (note 44 above), para.4.

<sup>55</sup>Theron (note 51 above).

<sup>56</sup>Mateljak, from Gill, Senior Programme Coordinator; Godt, Project Officer, Knowledge Resources Services; Ned, Project Officer, Social Policy & Local Governance; Mateljak, Monitoring & Evaluation Officer, UNICEF (2002), Interview with author, Pretoria: 15 July.

<sup>57</sup>For example, Motala, Board Member, Children's Rights Centre (2002), Interview with author, Durban: July 22.



reports and provincial input are collated to the federal sections.<sup>58</sup> CRC ratification did not lead to NPA development but the World Summit for Children led to the response of *Brighter Futures*,<sup>59</sup> which achieved some success but is “largely a catalogue of existing programmes” that does not address the CRC directly and is no longer relevant.<sup>60</sup> The “obligation to promote the human right of all children” is affirmed in the NPA in response to the UN Special Session released in May 2004.<sup>61</sup> It remains to be seen what success the plan will achieve.

The large number of committees across SA and Canadian government departments concerned with child rights issues creates the challenge of fragmentation.<sup>62</sup> For example, a child labour inter-sectorial committee, a national committee on child abuse and neglect, and a child justice committee contribute to South African programming.<sup>63</sup> Statistical agencies and departments provide data for monitoring in both countries. Many surveys in recent years supplied data about children including the Education for All Report (2000) for example,<sup>64</sup> demonstrating the benefits of conference review processes.<sup>65</sup> The National Longitudinal Survey on Children and Youth aims to establish a national database on child development over time,<sup>66</sup> and involves children in the development and response to research questions.<sup>67</sup> Part of the government’s National Children’s Agenda, the National Centres for Excellence for

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<sup>58</sup>The Social Union Framework Agreement supports intergovernmental cooperation on social policy. See below about provincial monitoring.

<sup>59</sup>Chapter Three discusses the World Summit; Canada, Health and Welfare, Communications Branch (1992), *Brighter Futures: Canada's action plan for children*/Government of Canada.

<sup>60</sup>Toope (1995), "The Convention on the Rights of the Child: Implications for Canada". *Children's Rights: A Comparative Perspective*. Freeman (ed.), 34, 56.

<sup>61</sup>Government of Canada (2004), *A Canada Fit for Children: Canada's plan of action in response to the May 2002 United Nations Special Session on Children*, 6, para.11.

<sup>62</sup>See below.

<sup>63</sup>Sewpaul, Director, Children and Youth Affairs, Department of Justice and Constitutional Development, South Africa (2002), Interview with author, Pretoria: 15 July.

<sup>64</sup>ORC(note 51 above), 4.

<sup>65</sup>*Ibid.*

<sup>66</sup>Human Resources Development Canada (2002), *National Longitudinal Survey of Children and Youth*.

<sup>67</sup>Pearson, Hon. The Senate of Canada (2002), Interview with author, Ottawa: 26 September.



Children's Well-Being aims to disseminate effectively advanced knowledge on key child health issues.<sup>68</sup> While enhancing research and fostering networks are valuable goals, the process and potential results focus on well-being and needs, rather than rights, and the nature and scope of their contributions remain unclear.

Monitors are dependent upon effective data collection to carry out their work and lack of reliable, consistent, disaggregated data is a constraint in both countries. For example, insufficient data on South African prevalence of disability exists due to "no consistently used definition of impairment or disability, no clarity of distinctions between degrees of severity of impairment, or need and assessment."<sup>69</sup> As both the NPA Steering Committee<sup>70</sup> and UNCRC recognise,<sup>71</sup> good quality baseline data about South African children is lacking, complicated by the absence of comprehensive birth records.<sup>72</sup> Although Canada collects much data, federalism complicates data collection due to wide variations.<sup>73</sup> According to the CCRC, little national information exists about children under provincial and territorial jurisdiction, including child abuse and neglect statistics, number of child refugees, and so on.<sup>74</sup> But, data collection is only one dimension of monitoring. Mbambo points out: "There is no value if we just collect information and people lack the capacity to know what to do with the information."<sup>75</sup> The *End Decade Report on Children-South Africa*<sup>76</sup> for example, provides information about such World Summit for Children goals as education and health, but is not comprehensive because monitoring demands more than statistics collection: it requires creation of the child rights picture. Evaluation is needed to fully appreciate the

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<sup>68</sup>Health Canada (2000), *Program Guide: Centres of Excellence for Children's Well-being*.

<sup>69</sup>Lansdown (2002), *Disabled Children in South Africa: Progress in implementing the Convention on the Rights of the Child*, 2002, 3.

<sup>70</sup>ORC (note 41 above), 22.

<sup>71</sup>UNCRC (note 44 above), para.14.

<sup>72</sup>Sloth-Nielsen, Faculty of Law, University of Western Cape (2002), Interview with author, Cape Town: 25 July.

<sup>73</sup>See below.

<sup>74</sup>Canadian Coalition for the Rights of Children (CCRC) (1999), *How does Canada measure up?* Ottawa: CCRC, 4.

<sup>75</sup>Mbambo, Assistant Project Coordinator, Child Justice Project, United Nations Development Programme (as she then was) (2002), Interview with author, Pretoria: 19 July.

<sup>76</sup>ORC (note 51 above).



information and the impact upon child rights. Statisticians, demographers, and so on should consider the implications of, and undertake a child rights framework to their work.<sup>77</sup>

Producing government reports for international treaty monitors, which are released by the executive level, is problematic using swiftly changing data during a time-consuming process, resulting with out-of-date results. Reflecting political motivation with the government change, South Africa's first CRC report not only promotes achievements but also identifies areas of weakness and for improvement for "the way forward."<sup>78</sup> The NCRC stated the government "did a commendable job in involving civil society in the country's report process."<sup>79</sup> As a commentator describes a limited report development process, this conclusion is questionable.<sup>80</sup> Gilbert also notes "the degree to which Article 12 has been implemented is negligible" in the report.<sup>81</sup> South Africa is currently developing its second CRC report and it appears the process has changed,<sup>82</sup> involving a government request to extend the deadline for the report.<sup>83</sup>

Canada submitted its initial CRC report in 1994<sup>84</sup> and the second report in mid-2001,<sup>85</sup> which was considered in late 2003 by the UN Committee.<sup>86</sup> The two CRC reports are long, divided

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<sup>77</sup>See: Rama (2000), *Monitoring the Implementation of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*. Paper prepared for Department of Welfare's training workshop, Statistics South Africa; and Rama & Bah (2000), *Monitoring Child Rights in a Society in Transition: The Opportunities Afforded by a Transformed Statistical Agency and the Culture of Child Rights Activism*, Statistics South Africa.

<sup>78</sup>NPA Steering Committee (note 30 above).

<sup>79</sup>NCRC (2000), *South Africa's First Supplementary CRC Report to the UN Committee on the Rights of the Child*.

<sup>80</sup>Sloth-Nielsen (note 72 above). The NCRC's privileged position with the government may lead some to question its compliment; see below.

<sup>81</sup>Gilbert in (note 36 above), 6.

<sup>82</sup>Sloth-Nielsen (note 72 above).

<sup>83</sup>Sewpaul (note 63 above).

<sup>84</sup>Canada (note 16 above).

<sup>85</sup>Canada (2001), *Convention on the Rights of the Child: Second report of Canada, covering the period January 1993 to December 1997*.

<sup>86</sup>UNCRC (note 12 above).



into separate federal, provincial and territorial government sections.<sup>87</sup> Ascertaining the child rights situation is difficult due to divisions of responsibility and report content. As smaller provinces have fewer resources leading to poor quality or late contributions, a working group of the Federal/Provincial Committee on Human Rights attempts to improve process over the long-term.<sup>88</sup> Delays in the reporting process meant the second CRC report does not reflect the current context and issues.<sup>89</sup> Despite committed policy people and lack of controversy with objectives and bottom lines,<sup>90</sup> time-consuming involvement across governments and the evolving population meant the report was already outdated by its release. Moreover, the periodic report requirement every five years, in accordance with CRC article 44(1)(b), seems to encourage ad-hoc, rather than ongoing monitoring. The CRC report should cover the 1993 to 1997 period but also includes details about the 1998 and 1999 reform of the juvenile justice system for example.<sup>91</sup> It appears the reporting period is ignored when it reflects better on the state party. A parliamentarian affirms the report process as “a consciousness-raising exercise” for both government officials and NGOs developing alternative reports.<sup>92</sup> Child rights would be better served by accurate reporting but government processes and requirements inhibit the goal, highlighting the importance of other monitoring efforts.

Federalism poses a significant challenge to effective monitoring in Canada and most, if not all federations, particularly inhibiting best interests as the process and results respect jurisdictional boundaries, rather than focussing on the child. The Canadian federal, ten provincial and three territorial governments share responsibility for international reporting, which results with numerous collated reports. Significant cross-referencing is necessary to ascertain the similarities and wide discrepancies across jurisdictions. Despite federalism's

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<sup>87</sup>Canada's third territory, Nunavut, was not created until April 1, 1999, after the period covered by the second report. See Canada (note 16 above); Canada (note 85 above).

<sup>88</sup>Dion, Director (as she then was), Human Rights, Humanitarian Affairs and International Women's Equality Division (AGH), Department of Foreign Affairs and International Trade (2001), Interview with author, Ottawa: 12 April.

<sup>89</sup>Van Egmond, Senior International Analyst, Strategic Policy and Research Division, Division of Childhood and Adolescence, Health Canada (as she then was) (2002), Interview with author, Ottawa: 8 October.

<sup>90</sup>Dion (note 88 above).

<sup>91</sup>Canada (note 85 above), 83-89.

<sup>92</sup>Pearson (note 67 above).



advantages,<sup>93</sup> the divisions of power complicate monitoring due to the complexity and specifics of each jurisdiction. Moreover, the divisions of responsibility are not always clear due to "...a large number of unresolved jurisdictional issues in federal-provincial relations."<sup>94</sup> Consequently, it is very difficult to get a complete picture of the situation of children across Canada.<sup>95</sup> While the federal/provincial/territorial governments are addressing concerns through committee meetings, conference calls and so on,<sup>96</sup> significant issues remain. The challenges of monitoring of a federal state are quite similar to monitoring multiple states parties. Each province has jurisdiction in education, health care, child welfare and so on, with its own legislation, service delivery system, and "significant variations" exist in the types of data collection and reporting.<sup>97</sup> These differences adversely affect assessment and comparability. Ontario's reaction to *Waldman*, the only UN HRC finding of a violation that Canada has not addressed,<sup>98</sup> illustrates another challenge. The province questioned the UN Committee's role and mandate despite the province's close consultation and written confirmation of ICCPR ratification. Although uninvolved in the decision following the rules of procedure, Yalden personally believes: "It is totally irresponsible for them [the Ontario government] to take the line that somehow or another they're not bound by this. Of course, the response of the federal government that "it's education and that's provincial," is just a cop out, that's all."<sup>99</sup> As international affairs are a federal responsibility, provinces generally

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<sup>93</sup>For example, Howe points out federalism facilitates "legislative reform and policy innovation;" Howe (note 9 above), 378.

<sup>94</sup>For example, Dion (note 88 above).

<sup>95</sup>Covell & Howe, Directors, Children's Rights Centre, University College of Cape Breton, NS (2003), E-mail interview with author, Sydney: 15 January; and Giroux, *Avocate, Vice-présidente, Commission des droits de la personne et des droits de la jeunesse (Québec)* (2003), Interview with author, (transl. from French) Montreal: 3 January.

<sup>96</sup>Reeve, Senior Advisor, Liaison and Outreach, Youth Justice Policy, Criminal Law Policy and Community Justice Branch, Department of Justice Canada (2002), Interview with author, Ottawa: 21 January.

<sup>97</sup>Federal-Provincial Working Group on Child and Family Services (1998), cited in CCRC (note 74 above), 42.

<sup>98</sup>Waldman is discussed below in s.2.8. As of January 2003, approximately 100 communications in total existed against Canada under the ICCPR with findings in 18 cases: the Committee found non-violations in nine cases and violations in the other nine; Yalden (note 20 above).

<sup>99</sup>*Ibid.*



do not participate at the international level,<sup>100</sup> so the federal government receives the criticism for Ontario's education responsibility. Monitoring a federal state is challenging; it would be valuable to further analyse the relationship between federalism and the international child rights law.<sup>101</sup>

A disconnect between formal monitoring and the populace occurs due to limitations of the international reporting process in Canadian provinces where governments take a reactive approach. Generally, upon federal notification, a designated provincial department coordinates relevant departments, each responsible for their own content;<sup>102</sup> and depending upon the province, the report is usually produced within a few months. While there is interest in fulfilling the CRC commitment for example,<sup>103</sup> reporting does not appear to provide an opportunity for significant reflection and revision. Consequently, the common NGO perspective about government CRC reporting is that every few years, "people would get a little bit busy";

*But the fact the reports are done off the side of somebody's desk in the provinces and territories, which have shown very little interest in doing the process and the federal government that's shown very little interest in actually pulling all that together into a report with some real meaning to it. ... I think [reporting] just creates a little bit more of a fertile ground for a moment or two...*<sup>104</sup>

While the provinces may be interested, treaty reporting is only one of many tasks of officials, restricting impact, compounded by federalism's separation of responsibility. Federal, provincial and territorial officials must distinguish among government levels, departments and responsibility with limited coordination, which restricts understanding of, and reporting about the overall situation. While the UNCRC has acknowledged federalism in *inter alia* the Canadian context,<sup>105</sup> it has not addressed how it affects monitoring.<sup>106</sup>

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<sup>100</sup>Mankovsky, Policy Advisor, Citizenship Development Branch, Ministry of Citizenship (2003), Telephone interview with the author, Toronto: 13 February.

<sup>101</sup>Regarding federations, see generally Aust (2000), *Modern Treaty Law and Practice*.

<sup>102</sup>Mankovsky (note 100 above).

<sup>103</sup>Ibid.

<sup>104</sup>Griffin, President, CCRC & Executive Director, Canadian Child Care Federation (as she then was) (2002), Interview with author, Ottawa: 30 September.

<sup>105</sup>For example, see UNCRC (note 12 above), para.9.

<sup>106</sup>The Committee acknowledges the state party's responsibility to fulfil its responsibility but a general comment identifies "permanant monitoring mechanisms" for non-discriminatory implementation without exploring the jurisdictional issues; see for example UNCRC (2003), *CRC General Comment 5*, UN



Political will to monitor appears to exist in South African provinces as most Premiers in the nine provinces want children's desks established in their offices and three have already done so: Limpopo, Kwazulu-Natal and the Eastern Cape.<sup>107</sup> Provincial Plans of Action (PPAs) reflect the NPA in all nine provinces; in contrast to the national level, there are five to ten NGOs involved in their provinces.<sup>108</sup> Two provinces, Western Cape and KwaZulu-Natal, have bills to establish Commissioners for Children but the status of the former province's bill is unclear and controversy caused withdrawal of the latter's bill.<sup>109</sup> Most Canadian provincial governments have child advocates who investigate and support the rights of children and youth receiving, who have or who are entitled to receive services from the state and address individual cases.<sup>110</sup> The strength of the role is determined by the nature of its appointment; if the advocate is appointed by the provincial government, as in Ontario, Alberta, Manitoba, and British Columbia, it is a weaker position than if it is appointed by the legislature, as in Saskatchewan, Quebec, Newfoundland and Labrador, and Nova Scotia, which allows more independence and power.<sup>111</sup> All provincial advocates form the Canadian Council of Provincial Child Advocates, which began with only six provincial members and in seven years has influenced the creation of offices in Newfoundland and Labrador and Nova Scotia; the North-West Territories is also interested and New Brunswick had a project for consideration.<sup>112</sup> The Canadian Council has made a valuable contribution despite some advocates' lack of independent status.

Provincial government departments also conduct monitoring. For example, Pike, complaints manager for all youth custody centres in her province, confirms complaints allow learning for all involved and across the system. Young persons' complaints receive responses usually within five days and "the child has some sense of satisfaction," recognising the need for

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Doc.CRC/GC/2003/5, para.40-41.

<sup>107</sup>Theron (note 51 above).

<sup>108</sup>Ibid.

<sup>109</sup>South African Law Commission (2001), *Discussion Paper 103 - Project 110: Review of the Child Care Act*, 1251.

<sup>110</sup>See below. Chisholm, Children's Ombudsman of Nova Scotia (April 2000), *Children's Advocate Services in Canada: An Overview*. Unpublished paper, 8-10.

<sup>111</sup>Giroux (note 95 above). Independent advocates are discussed below.

<sup>112</sup>Ibid.



consistency across the system.<sup>113</sup> In this way, the province affirms the child's role in monitoring.

### 2.1.1 Focus: Child Justice Reform

As monitoring can be part of legislative reform, Canada and South Africa's child justice processes and results are analysed due to their relevancy and recent consultations to illuminate the situation.<sup>114</sup> As both countries intend child rights approaches to juvenile justice,<sup>115</sup> how did child rights influence reform and the results?

Canada's *Youth Criminal Justice Act* (YCJA) received Royal Assent on 19 February, 2002 and entered into force on 1 April, 2003.<sup>116</sup> According to the government, new legislation was needed because the old legislation did not sufficiently direct areas including incarceration overuse, diversion for minor cases, sentencing disparities, problematic transfers to the adult system, and victims' interests.<sup>117</sup> A bill was developed following consultations and reports.<sup>118</sup> To date, details have not been published about the consultation process except one report briefly describing some 1999-2000 roundtable discussions<sup>119</sup> but their impact upon the process and the resulting legislation is unclear and not yet documented.<sup>120</sup> Such details are necessary to illustrate lessons learned and support future participatory undertakings.

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<sup>113</sup>Pike, Divisional Operations Manager, Child and Youth Mental Health and Youth Justice Division, Ministry of Children and Family Development, British Columbia (2002), Interview with author, Victoria: 15 August.

<sup>114</sup>See for example, Department of Justice Canada (2002), *Policy Statement and Guidelines for Public Participation: Department of Justice*, describing the department as "committed to involving individual Canadians and their intermediary organizations in the development, design and evaluation of public policies, programs, legislation and services."

<sup>115</sup>Reeve (note 96 above); Sewpaul (note 63 above).

<sup>116</sup>*An Act in respect of criminal justice for young persons and to amend and repeal other Acts*, Bill C-7, Assented to 19th February, 2002, ch. 1, 2002 S.C. (Can.).

<sup>117</sup>Department of Justice Canada (2002), *Youth Justice - The Youth Criminal Justice Act: Summary and Background*, 2.

<sup>118</sup>The Federal-Provincial-Territorial Task Force on Youth Justice, House of Commons Standing Committee on Justice and Human Rights, and Department of Justice produced reports; *Ibid.*, 1.

<sup>119</sup>Department of Justice Canada (2000), *Community Partnerships Symposium on Youth Justice Renewal*, 5.

<sup>120</sup>Reeve (note 96 above).



South African child justice reform has been a participatory process spanning years. The Department of Justice consulted internationally. The Law Commission completed a three-year project including children's workshops<sup>121</sup> with a draft bill advancing a system of diversion and criminal prosecution.<sup>122</sup> The consultations have significance as: "an excellent example of how public participation can strengthen policy and legislation..."<sup>123</sup> The Community Law Centre monitored and consulted with children in prisons<sup>124</sup> to find they "strongly supported" all children's access to diversion.<sup>125</sup> The three-year Child Justice Project provided UN technical assistance to support government implementation of new legislation.<sup>126</sup> The process has been long but generally, has benefited the result. There is "a very rigorous parliamentary [portfolio] committee, that is very adamant that Justice is able to ensure that we can implement legislation."<sup>127</sup> Consequently, costs have been determined, and welcomed by the Committee on the Rights of the Child,<sup>128</sup> for implementation including diversion, to find the government will likely save R180 million or over 20 per cent per year on current expenditures.<sup>129</sup> Diversion's benefits extend beyond financial considerations, reducing incarceration rates and the cycle of crime,<sup>130</sup> and benefit children's rights. The Child Justice Alliance is monitoring the process and lobbying for passage through

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<sup>121</sup>See further Skelton (2000), "The Child Justice Bill: Implementing the UN Convention Through the Process of Law Making", paper prepared for ISPCAN Conference, Durban.

<sup>122</sup>South African Law Commission (2000), *Project 106: Report on Juvenile Justice*. Pretoria: South African Law Commission.

<sup>123</sup>University of the Western Cape Community Law Centre (2002), *Report on Children's Rights: "They should listen to our side of the story"*.

<sup>124</sup>University of the Western Cape (note 36 above); and University of the Western Cape Community Law Centre (1997) *Children in Prison in South Africa: A Situational Analysis*.

<sup>125</sup>Ehlers (1999), "Children's Views on a New Child Justice System". 2 *Article 40: The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa* (August), 6.

<sup>126</sup>Skelton (2000), "The Child Justice Project...". 2 *Article 40: The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa*, September, 5.

<sup>127</sup>Sewpaul (note 63 above).

<sup>128</sup>UNCRC (note 44 above), para.15.

<sup>129</sup>Barberton & Stuart (2001), *Re-Costing the Child Justice Bill: Updating the original costing taking into consideration changes made to the bill*, May 2001, ii.

<sup>130</sup>*Ibid.*, iii.



Parliament.<sup>131</sup> The first bill was introduced to Parliament in 2002.<sup>132</sup>

The UN Committee specifically requests information about monitoring children deprived of their liberty.<sup>133</sup> While South Africa's bill recognises monitoring,<sup>134</sup> Canada's legislation neither has the same commitment nor even acknowledges monitoring's role. The proposed South African Law Commission's bill specifically identified "Child Justice Committees" to monitor at the district level such concerns as alternatives to arrest, release from custody, and diversion.<sup>135</sup> But surprisingly, given children's engagement in consultations, child participation was not recognised in the proposed bill; the role of children, especially those with juvenile justice experience, should have been included in these Committees' composition or mandate.<sup>136</sup> In the final bill proposed to Parliament however, the aforementioned committees are not included; the minister is merely required to develop regulations for the Act's monitoring.<sup>137</sup> While monitoring is identified, the provision is much weaker. The Canadian legislation provides for the possible establishment of a federal Child Justice Committee unlike the previous legislation.<sup>138</sup> Future research is supposed to assess implementation<sup>139</sup> but the expectations and requirements of monitoring are not established. Consequently, interested actors must ensure effective monitoring of the legislation (assuming South African passage) in both countries to ensure progress.

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<sup>131</sup>The Child Justice Alliance involves NGOs and academics among others to promote the bill's passage by Parliament; see <[www.childjustice.org.za/alliance.htm](http://www.childjustice.org.za/alliance.htm)> last visited 13 July 2005.

<sup>132</sup>*Child Justice Bill*, 2002, Bill B49-2002 (GA); Hollamby, Researcher, South African Law Commission (2003), personal correspondence with author, 14 January.

<sup>133</sup>UNCRC (1996), *Guidelines for Periodic Reports*, UN Doc.CRC/C/58, VIII (B)(2) para.140.

<sup>134</sup>*Child Justice Bill* (note 132 above), Chapter 11.

<sup>135</sup>South African Law Commission (note 122 above), *Chapter 12: Monitoring of Child Justice*, 297-299.

<sup>136</sup>*Ibid.*

<sup>137</sup>These regulations are to assess "proper application of and compliance with this Act"; *Child Justice Bill* (note 132 above), chapter 11.

<sup>138</sup>*An Act in respect of criminal justice for young persons* (Note 116 above), para.18.

<sup>139</sup>Reeve (note 96 above).



Both child justice bills are described as influenced by the CRC.<sup>140</sup> However, some concerns remain including the age of criminal capacity. The South African bill introduced to Parliament identifies the age of 10 years, below which a child cannot be prosecuted.<sup>141</sup> The Law Commission had considered a minimum age of 14, then 12,<sup>142</sup> before it was reduced to ten years in its current bill.<sup>143</sup> The Canadian age of criminal responsibility is 12 years but the new Canadian legislation lowers the age limit for adult sentences from 16 to 14 years (with flexibility for provincial application).<sup>144</sup> While the South African bill positively raises the age from seven to 10,<sup>145</sup> the new limit remains quite low. An international legal principle establishes the age of criminal responsibility should be related to the ability to understand the consequences of alleged offences.<sup>146</sup> But low ages, a UN Committee concern,<sup>147</sup> often result from fear of child crime. The designation of age 10 seems arbitrary without a clear rationale. Indeed, the appropriate minimum age of prosecution is “extremely controversial,” according to children with juvenile justice experience.<sup>148</sup> The Canadian Government argues previous legislation did “not adequately respect the rights of young people” due to transfer to adult court before conviction who lost “age-appropriate due process protections, including privacy protections, on the basis of an unproven charge.”<sup>149</sup> The new legislation only allows

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<sup>140</sup>Skelton (note 121 above), 1; Davel, Centre for Child Law, Faculty of Law, University of Pretoria (2002), Interview with author, Pretoria: 18 July; and Department of Justice Canada (2002), *Why did the Government Introduce New Youth Justice Legislation?*

<sup>141</sup>*Child Justice Bill* (note 132 above), Chapter 2, para.5(1).

<sup>142</sup>Sewpaul (note 63 above).

<sup>143</sup>The bill allows for the possibility of prosecuting those between 10 and 14 years of age with proof of capacity; *Child Justice Bill* (note 132 above), Chapter 2, s. 6 (1) & (2)

<sup>144</sup>*An Act in respect of criminal justice for young persons* (note 116 above), s. 64(1)

<sup>145</sup>South African Law Commission (note 122 above), xii.

<sup>146</sup>CRC art.40(3)(a).

<sup>147</sup>The Committee has identified concern about low ages; in its observations about Hong Kong as a UK dependent territory, it states concern about the low age of criminal responsibility, which “is not in conformity with the principles and provisions of the Convention...” UNCRC (1996), *Concluding observations of the Committee on the Rights of the Child (Hong Kong): United Kingdom of Great Britain and Northern Ireland*, UN Doc.CRC/C/15/Add.63, para.19. In discussions with the state, Committee member Hammarberg stated: “The overwhelming majority of countries had set the age of criminal responsibility much higher [than 7], and even 14 was considered low...” but it does not prescribe an age; UNCRC (1996), *Summary record of the 329th meeting (Hong Kong): United Kingdom of Great Britain and Northern Ireland*, UN Doc.CRC/C/SR.329, para.79.

<sup>148</sup>Ehlers (note 125 above), 6.

<sup>149</sup>Department of Justice Canada (note 140 above).



consideration of an adult sentence after conviction and if under 18, a youth is presumed to serve an adult sentence in a youth facility. The Government enunciates: "This is more consistent with the spirit of the United Nations Convention on the Rights of the Child..."<sup>150</sup> This improvement has not gone far enough to respect child rights because protections should not potentially disappear after conviction but be guaranteed throughout the process. Serving an adult sentence in a youth facility is only presumed, not ensured.<sup>151</sup> Public and media opinion seem to support variations in treatment across the teenage years, leading the government to "toughen" its approach. Hence, two Canadian advocates believe, despite CRC acknowledgement in the preamble, the Youth Justice Act "is not consistent with the CRC."<sup>152</sup> The province of Quebec and its human rights commission judicially challenged the bill due to various child rights concerns. The Quebec Court of Appeal found initially *inter alia* the legislation's onus on a young person who has committed a presumptive offence to justify a youth, rather than an adult, sentence violates the constitution.<sup>153</sup> The UNCRC upholds standards relating to children in conflict with the law as applicable to all under 18.<sup>154</sup> While the UN HRC acknowledges juvenile age is to be determined by each state party, it "is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice."<sup>155</sup> Consequently, both countries' approaches to age of criminal capacity are open to criticism by the UNCRC and the HRC.

While South Africa has no reservations to the CRC, Canada submitted a reservation upon

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<sup>150</sup>Ibid.

<sup>151</sup>See below.

<sup>152</sup>Covell & Howe (note 95 above).

<sup>153</sup>*Renvoi relatif au projet de loi C-7 sur le système de justice pénale pour les adolescents*, (2003) 228 D.L.R. (4th) 63, 145-146, para.286. But overall, the legislation is deemed consistent.

<sup>154</sup>As examples, the UN Committee: urges Cape Verde to "Ensure that children up to the age of 18 in conflict with the law are not treated like, and do not receive the same sanctions as adults", and "Consider deprivation of liberty only as a measure of last resort, for all children up to the age of 18 and for the shortest possible period of time..."; and identifies concern about lack of definition for the age of majority in Saudi Arabia so "persons under 19 may be prosecuted for crimes in the same manner as adults (i.e. without special procedures) and be subject to the same penalties as adults." UNCRC (2001), *Concluding observations of the Committee on the Rights of the Child: Cape Verde*, UN Doc.CRC/C/15/Add.168, para.66(e), (b); and UNCRC(2001), *Concluding observations of the Committee on the Rights of the Child: Saudi Arabia*, UN Doc.CRC/C/15/Add.148, para.41, respectively.

<sup>155</sup>HRC (1992), General Comment 21, UN Doc.HRI/GEN/1/Rev.4, para.13.



ratification to article 37(c) stating it "...reserves the right not to detain children separately from adults where this is not appropriate or feasible."<sup>156</sup> Canada did not however, lodge a reservation upon ratification to the similar ICCPR provision: article 10(2)(b). The HRC affirms accused juveniles should be separated from adults as "an unconditional requirement of the Covenant" and "deviation from States parties' obligations under subparagraph 2(b) cannot be justified by any consideration whatsoever."<sup>157</sup> Subsequently, the Committee commented "some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant."<sup>158</sup> The principle of separating an incarcerated child is also acknowledged in the non-binding Standard Minimum Rules for the Treatment of Prisoners and the Standard Minimum Rules for the Administration of Juvenile Justice.<sup>159</sup> The Canadian government has reviewed its CRC reservation involving parliamentary, public, and federal/provincial/territorial consultations,<sup>160</sup> but there are no reform plans. The Government notes the "vast majority of young offenders who are detained are in custody in youth custody facilities."<sup>161</sup> As the YCJA provides the "basic rule...that a young person must be held separate from adults," the Quebec Court of Appeal decided the rule is "in compliance with the Covenant."<sup>162</sup> Although subsequent commitments influence interpretation and application in accordance with VCLT article 31(3), the court did not consider Canada's lack of reservation to the ICCPR provision. The UNCRC expressed its concern about the reservations.<sup>163</sup> But the country's size creates difficulties in providing sufficient facilities and even if provided, they may move a child beyond the reach of his/her family, which as CRC

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<sup>156</sup>UN (1999), *Reservations, Declarations, and Objections relating to the Convention on the Rights of the Child*, UN Doc.CRC/C./2/Rev. 8. A second reservation pertains to a.21 on adoption to preserve customary forms of care among Aboriginal peoples.

<sup>157</sup>HRC (1982), General Comment 9, UN Doc.HRI/GEN/1/Rev.4, para.2.

<sup>158</sup>HRC (note 155 above), para.13.

<sup>159</sup>*Standard Minimum Rules for the Treatment of Prisoners*, approved by ECOSOC in resolutions 663 C(XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 8(d); and *UN Standard Minimum Rules for the Administration of Juvenile Justice*, UN Doc. A/40/33, 29 November 1985, Rule 26.3.

<sup>160</sup>Menard (note 17 above).

<sup>161</sup>Canada (note 85 above), 87.

<sup>162</sup>*Renvoi relatif au projet de loi C-7 sur le système de justice pénale pour les adolescents*, (note 153 above), 126, para.188.

<sup>163</sup>UNCRC(note 12 above), para.18.



provides, may be contrary to the child's best interests.<sup>164</sup> Despite the CRC reservation, if a child or another believes a violation of the Covenant provision has taken place and concerns are not taken seriously by domestic authorities, the ICCPR's communications procedure can be utilised. But to date, no Canadian has utilised this monitoring avenue; and the HRC has decided upon only one communication on the issue.<sup>165</sup>

In sum, juvenile justice legislative reform in both countries demonstrates the influence of child rights and monitoring upon the process and results. However, all relevant international standards are impeded in the domestic context due to politics, resource constraints and other issues. Hence, ongoing monitoring is necessary to expose the realities of reform upon child rights.

In conclusion, executive monitoring reflects active but varying efforts. While South Africa has clear monitoring plans and efforts, Canada continues to monitor in an ad-hoc manner. While many challenges remain in South Africa, the executive level has dedicated itself to children's rights. One official expresses pride in the achievements of the constitution, the legislation, and government priority of children's issues.<sup>166</sup> The NPA is an important monitoring contribution but coordination,<sup>167</sup> and resource availability must improve. One Canadian official affirms "extremely strong" political will for child rights monitoring due to lack of controversy, social conscience, recognition of the need for action, and "hugely successful" NGOs encouraging better government monitoring.<sup>168</sup> Various government actors participate including provincial child advocates.<sup>169</sup> Although the government is committed

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<sup>164</sup>CRC article 3(2) requires all appropriate measures for the child's protection and care consider his/her caregivers and article 37(c) provides for contact between an incarcerated child and his/her "family through correspondence and visits, save in exceptional circumstances." Pearson (note 67 above).

<sup>165</sup>*Thomas v. Jamaica* No. 800/1998 UN Doc.CCPR/C/65/D/800/1998 (26 May 1999) identified in Chapter Two, FN 85.

<sup>166</sup>Sewpaul (note 63 above).

<sup>167</sup>Theron (note 51 above).

<sup>168</sup>Dion (note 88 above).

<sup>169</sup>Pearson (note 67 above).



to children,<sup>170</sup> improvements are needed including better coordinated executive and bureaucratic priority and action at the federal level and particularly those provinces without advocates. Moreover, a federal children's commissioner still does not exist and concerted efforts including proposals<sup>171</sup> languish stimulating the question: "who [at the federal level] will have the political courage to create the function of [a] Children's Commissioner?"<sup>172</sup> The CRC's influence upon much child-relevant legislation and policies is also questioned.<sup>173</sup> Challenges exist to effective monitoring in both contexts.

## 2.2 Legislative Monitoring

South African legislative monitoring is also more formalised than in Canada. Established in 1999, the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Children, Youth and Disabled Persons involves 17 Assembly members and 9 Council members to monitor these populations, particularly referring to international commitments and domestic legislation.<sup>174</sup> The Committee contributes to the development of proposed legislation; may make relevant recommendations to parliament or any joint or house committee; or have joint sittings with portfolio committees during discussions, amendments or passing of bills.<sup>175</sup> As an independent committee, it can be an important monitor of government commitments<sup>176</sup> but its impact remains unclear since it "is getting off the ground very, very slowly."<sup>177</sup> Its broad mandate means the Committee must define and actively pursue its role and functions in relation to 45 other parliamentary committees and other relevant actors.<sup>178</sup> There is no comparable parliamentary committee at the Canadian federal

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<sup>170</sup>For example, speeches from the throne regularly identify children's importance including: Government of Canada (2002), *Speech from the Throne to Open the Second Session of the 37th Parliament of Canada: "The Canada we want"*.

<sup>171</sup>See below.

<sup>172</sup>Giroux (note 95 above).

<sup>173</sup>Covell & Howe (note 95 above).

<sup>174</sup>The National Assembly and National Council of Provinces form the national parliament; South African Law Commission (note 109 above), 1249.

<sup>175</sup>Ibid.

<sup>176</sup>Lansdown (note 69 above), 9.

<sup>177</sup>Sloth-Nielsen (note 72 above).

<sup>178</sup>Gilbert & Proudlock (2000), "Children's Voices in Parliament: Turning up the volume". 4 *ChildrenFirst* (34).



level devoted to children although existing committees consider children under their mandate as appropriate: for example, the House of Commons Standing Committee on Justice and Human Rights examined youth justice reform,<sup>179</sup> and the Senate Human Rights Committee is considering CRC implementation.<sup>180</sup> These members however, may not all have expertise in or commitment to child rights.

Like South Africa, Canada has several individual legislators committed to child rights monitoring. For instance, Senator Pearson, advisor on children's rights to the Minister of Foreign Affairs, contributes both domestically and internationally including: co-developed a proposal for a national centre for children (formerly commissioner), produces a regular newsletter detailing relevant legislative and other developments, and has a child-friendly website.<sup>181</sup> Several federal Members of Parliament have also distinguished themselves.<sup>182</sup> But Canada needs a formal legislative monitoring mechanism dedicated to child rights federally and in every province to institutionalise the commitment beyond particular individuals' efforts.

In conclusion, individual legislative advocates can make a significant contribution to child rights monitoring. South Africa's designated legislative committee is a useful structure to monitor government and should be a model for other countries, but capacity should be enhanced.

The executive and legislative monitors provide several lessons reflected in the proposed guidelines<sup>183</sup> including the value of specific legal provisions for child rights and formal structure. Individuals are important but legislative and executive structures as in the South African context facilitate monitoring beyond rhetoric and any individual's efforts to reflect

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<sup>179</sup>Department of Justice Canada (note 117 above).

<sup>180</sup>Parliament of Canada, Senate Standing Committee on Human Rights (2005), *Committee Proceedings*.

<sup>181</sup>The revised proposal is discussed below. Pearson, Senator & Kraft Sloan M.P. (2002), *Centre for Children, Youth and Citizenship; Children & the Hill*, produced quarterly; and <[www.sen.parl.gc.ca/lpearson/index-e.html](http://www.sen.parl.gc.ca/lpearson/index-e.html)> respectively.

<sup>182</sup>Godfrey co-chaired a caucus committee on children; former members Kraft Sloan co-authored proposals for commissioner and centre for children, and Harb proposed many private member's bills to revise federal legislation to reflect child rights.

<sup>183</sup>See Thesis Appendix A.



commitment and facilitate accountability. As a developed country, Canada may be complacent with its general rights efforts without recognising the importance of child rights-specific institutions at executive and legislative levels where monitoring responsibility should be established. Consequently, despite some dedicated actors, Canada's efforts are variable while South Africa ensures the importance of child rights. Moreover, South Africa's legal arrangements including constitutional provisions and structures all benefit the monitoring. Political will must also exist.

### 2.3 The Courts

As both countries are constitutional democracies, the judiciary plays an important role in adjudicating alleged rights violations from children and their advocates.<sup>184</sup> The judicial forum is facilitated by: the South African Constitution (s. 38), which provides for persons to litigate on behalf of another unable to do so; and Canada's acceptance of judicial challenges considered matters of public interest.<sup>185</sup> Moreover, the South African constitution also enunciates child rights and requires consideration of international law in interpreting the bill of rights.<sup>186</sup> While legislators have political roles, judges articulate the status of rights in their legal interpretation and decision-making in cases. To examine how child rights in domestic and international law influence the courts, the following Canadian and South African cases highlight two themes: the child in relation to the government; and the child in relation to caregiving or family.

#### 2.3.1 *The Child & Government*

The courts examine allegations of government discrimination against the child. As discussed below, the South African cases consider discriminatory measures or lack thereof against the child and Canadian cases determine that decisions related to children, even those contrary to their wishes or their parents, are not necessarily discriminatory in serving their best interests. The nature of positive obligations of the government towards the child are adjudicated.

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<sup>184</sup>For example, see Sloth-Nielsen (note 42 above).

<sup>185</sup>For instance, the applicant in *Canadian Foundation for Children, Youth and the Law v. Attorney General* (discussed below) applied under Rule 14.05 (3)(g.1) of *Rules of Civil Procedure* for a declaration that Criminal Code s. 43 is unconstitutional (according to two provisions), and to strike down any *common law* parental right of corporal punishment (para.9). The court gave special permission to consider the case "because it raises a serious legal question, and there is no other reasonable and effective way for the issue to be raised" (para.8), which the Attorney-General accepted (para.10).

<sup>186</sup>Sections 28 and 39(1) respectively.



*Grootboom*<sup>187</sup> concerned 510 children and 390 adults, homeless after eviction from what they considered vacant land, who claimed the South African state had a duty to provide shelter based on Constitution sections 26 and 28.<sup>188</sup> They successfully applied to the High Court for an order that the government provide basic shelter or housing until permanent accommodation became available.<sup>189</sup> Acknowledging the government's housing shortage, limited budget, and the reasonable program measures towards progressive realisation of the right to adequate housing, the Court reasoned the children were entitled to shelter under s.28(1)(c), not section 26, and that their parents were entitled to accommodation with them because a child's interests does not include removal from parents to provide shelter. The child-centred conclusion based on s. 28(1)(c) is unqualified, unimpeded by scarce resources, accordingly ordered national, provincial and municipal governments to immediately provide tents, portable latrines and water supply within specified time periods. The government appealed to the Constitutional Court, which determined the essential issue was whether the government implemented reasonable measures to support housing rights under s. 26.<sup>190</sup> The unanimous decision found the national housing program aims to progressively realise the right to adequate housing but that legislation does not explicitly provide temporary relief to those in crisis. Thus, the state had not met its obligation under constitution section 26(2); and that as legislation and common law obligates shelter for the child from family and alternatively from the state if in its care, Yacoob J expressed s. 28(1)(c) "does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families."<sup>191</sup> If parents are unable to shelter their child, the state has an obligation to provide legal and administrative arrangements to support protection but the state was not obligated to shelter children and through them, their parents; so the Constitutional Court determined that the High Court had incorrectly based the order

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<sup>187</sup>*Government of RSA and others v Grootboom and others* - CCT11/00 2001 (1) SA 46 (CC) 4 October 2000.

<sup>188</sup>These sections of the Constitution provide:

26. (1) *Everyone has the right to have access to adequate housing.*

(2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. ...*

28. (1) *Every child has the right - ... (c.) to basic nutrition, shelter, basic health care services and social services; ...*

<sup>189</sup>*Grootboom v. Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

<sup>190</sup>(Note 187 above), 21, para.33.

<sup>191</sup>*Ibid.*, 45, para.77.



on s. 28(1)(c).<sup>192</sup> It made two new orders requiring temporary accommodation and sanitation, water and service provision and a comprehensive housing programme, reasonable measures for those in crisis and provision to people in the Cape Metropolitan area but unlike the High Court order, no time periods were specified.<sup>193</sup> The Human Rights Commission is to monitor and report on compliance with s. 26 obligations - a valuable conclusion - but while immediate requirements of the court order have been addressed, those aspects necessitating ongoing involvement, including maintenance and service provision have not been.<sup>194</sup>

Both the High Court and Constitutional Court ordered shelter for the appellants but their decisions differed. In balancing all constitutional rights, child rights are not designed to determine all outcomes but they evidently require specialised understanding and should not be dismissed or minimised in the process. The High Court decision is more influenced by best interests<sup>195</sup> and maximum survival and development principles than the Constitutional Court which concluded child rights should not trump other rights and inadequately examined their separate demands. Further, unlike the High Court, which focussed on the rights requirements for its decision-making, the Constitutional Court was concerned about the expenses of rights and resource availability for housing programmes in determining whether the state has taken reasonable measures. A compromise of both the lower and upper court decisions, recognising both child and parental rights along with state duties, would have been preferable. In adjudication, child rights demand special obligations from states for promotion, protection and fulfillment.<sup>196</sup>

The South African *TAC* case<sup>197</sup> concerned two questions: whether government policy restricting supply of antiretroviral drug Nevirapine to prevent transmission of HIV/AIDS from mothers to their newborn babies was reasonable; and whether the government had a

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<sup>192</sup>Ibid., 46, para.79.

<sup>193</sup>Pillay (2002), "Implementing Grootboom: Supervision needed." 3 *ESR Review*(July).

<sup>194</sup>Ibid. Follow-up is considered in s.4.0.

<sup>195</sup>Van Bueren (note 37 above), 29.

<sup>196</sup>Van Boven et al. (eds.) (1998), "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights." SIM Special No. 20, para.6.

<sup>197</sup>*Minister of Health and others v Treatment Action Campaign and others (TAC)*- CCT8/02 2002 (5) SA 721 (CC); 2002 10 BCLR 1033 (CC) 5 July 2002.



comprehensive prevention policy against HIV mother-to-child transmission. The applicants applied to the Pretoria High Court requesting an order against the Minister of Health and all provincial health executive councils (except Western Cape) for restricting Nevirapine's availability to two research sites in each province with no plan or programme for expansion despite meeting quality, safety and efficacy standards. The court found the government's position unreasonable in restricting drug access in the public health sector and not identifying a time-frame for a national mother-to-child HIV transmission prevention programme. It ordered: provision of Nevirapine to pregnant women with HIV giving birth in the public sector and to their babies; extension of the mother-to-child HIV transmission prevention programme; and a comprehensive prevention programme, which the government appealed. The Constitutional Court found monitoring service provision at research sites was valuable but did not justify restricting Nevirapine in the public health system where capacity to administer it and medical need exist. A single dose is essential for children based on their constitutional rights. Replacing the High Court order, the Court ordered development and implementation of a comprehensive health services program for pregnant women and their newborn children including counselling and appropriate treatment; and the removal of restrictions upon Nevirapine's availability.

Success resulted from good preparation and valuable medical and scientific evidence confirming the drug's lack of side-effects.<sup>198</sup> The Court's recognition of child rights advances understanding of the right to health.<sup>199</sup> The transmission prevention programme in Kwa-Zulu Natal for example, is now available at all 47 maternity hospitals and pre-test counselling reached 48,529 mothers; of the 133 babies tested at 12 months after receiving Nevirapine, only 12 tested HIV positive.<sup>200</sup> Consequently, TAC's contribution is widely acknowledged,<sup>201</sup> confirming the importance of the courts to redress discrimination against the child.

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<sup>198</sup>Sloth-Nielsen (note 72 above).

<sup>199</sup>See further Van Bueren (2002), "Health". *South African Constitutional Law: The Bill of Rights*. Cheadle et al. (eds.), 491.

<sup>200</sup>Ducasse (2003), "Anti-retrovirals working in KZN". *The Natal Witness*, Pietermaritzburg: 14 February.

<sup>201</sup>For example, Gallinetti describes it as "the most fantastic outcome that's come from here, as far as progressing children's rights"; Gallinetti, Senior Researcher, Children's Rights Project, Community Law Centre, University of Western Cape (2002), Interview with author, Cape Town: 25 July.



The Supreme Court of Canada considered the right of education of children with disabilities in *Eaton*.<sup>202</sup> After three years of local public schooling, the teachers and assistants of Emily, a 12 year-old girl with cerebral palsy, decided it was not in her best interests to remain in a regular classroom. Her parents challenged the decision of the Ontario Special Education Tribunal confirming the special education placement as contrary to the constitutional equality provision. The Court majority decided: inclusion of children with disabilities in the regular classroom should not be presumed; the best interests of the child should determine placements; and that parents cannot speak for the child or his/her best interests. To advance best interests, adults with authority to decide for a child must ensure that appropriate accommodation be from “a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life.”<sup>203</sup> Thus, Toope describes the “‘best interests’ of children may not be what parents think they are.”<sup>204</sup> Sopinka J explained for the Court:

*For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children, and those like Emily, who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.*<sup>205</sup>

Without being acknowledged, the general principles of the CRC are influential in *Eaton* despite contradicting the inclusive education claims of most advocates for children with disabilities.<sup>206</sup> The Court did not reject inclusive education but concluded case-by-case consideration is necessary for each child.

The best interests principle is also at issue in the Canadian *B.H. v. Alberta* case,<sup>207</sup> about whether a 16½ year-old Jehovah’s Witness is capable of refusing blood transfusions as part of her leukemia treatment due to religious beliefs. Under the *Child Welfare Act (CWA)* of

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<sup>202</sup>*Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385.

<sup>203</sup>*Ibid.*, 278, para.77.

<sup>204</sup>Toope (1995), “The Convention on the Rights of the Child: Implications for Canada.” *Children’s Rights: A Comparative Perspective*. Freeman (ed.), 48.

<sup>205</sup>*Eaton* (note 202 above), 278, para.77.

<sup>206</sup>Organisations including the Canadian Association for Community Living, an intervener, advocate for inclusive education with adequate supports.

<sup>207</sup>*B.H. v. Alberta (Director of Child Welfare)*, 2002 ABCA 109, 2002 ABQB 371.



Alberta,<sup>208</sup> the Director of Child Welfare apprehended the child and issued a medical treatment order, which the girl and her family challenged. CWA section 2(d) states the court and other authorities should consider the child's opinion, but Kent J. explained her opinion cannot dictate the outcome because "...under the CWA the Court must do what is in the best interests of the child."<sup>209</sup> Kent J. concluded the girl was a mature minor, acknowledged her opinion, but determined she had been pressured by family and others and that medical treatment was legally required for her survival. On appeal, the court supported the treatment order. A child's evolving capacity affects interpretation of best interests as Seymour explains: "If the decision [of the child] is felt to be contrary to those interests, the most likely result will be a conclusion that the child lacks the capacity to make it."<sup>210</sup> The court relied on best interests to determine the necessary balance of the rights and responsibilities between the state and the child. Thus, although an important consideration, the views of the child are not determinant; a child does not have to agree with every judicial decision for his/her rights to be respected.

In the Canadian *Auton* case concerning health and development rights, four infants and their parents challenged the government's denial of the Lovass Autism Treatment, a type of applied behavioural analysis.<sup>211</sup> Due to loss of development without treatment, the Court of Appeal for British Columbia agreed autism treatment is necessary to avoid the very strong likelihood of the child's institutionalisation and to improve the child's condition. The Court largely agreed with the lower court finding an infringement of the children's constitutional equality rights and ordering treatment funding (although not specifying Lovaas treatment) and "symbolic" awards to the adult petitioners. In addition, the Court of Appeal affirmed the lower court's monitoring role to enforce the order and satisfy the government's child rights obligations. Saunders J confirmed "the law works for the protection and advantage of children" and the violation of the children's equality rights could not be justified under

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<sup>208</sup>R.S.A. 2000 c. C-12

<sup>209</sup>*B.H.* (note 207 above), 17, para.44.

<sup>210</sup>Seymour, cited in Thomas & O'Kane (1998), "When children's wishes and feelings clash with their 'best interests'." 6 *The International Journal of Children's Rights*, 150.

<sup>211</sup>*Auton v. British Columbia (Attorney General)*, 2002 BCCA 538, (2001), 84 B.C.L.R. (3d) 259, 197 D.L.R. (4th) 165, (2000) 78 B.C.L.R. (3d) 55, [2000] 8 W.W.R. 227 (B.C.S.C.).



Charter s. 1.<sup>212</sup> In addition, she affirmed the “modern emphasis on the development of children” as demonstrated by the CRC, which has “moral force” relevant to judicial assessment of constitutional obligations.<sup>213</sup> Yet, the underinclusiveness of the universal health care system did not violate substantial or procedural legal principles of fundamental justice as per Charter s. 7.<sup>214</sup> The equality violation was essential to the case's success because children have equal constitutional rights to positive benefits in society; the Court held the Charter does not provide positive entitlements, which contrasts with the South African context. The purpose of the Charter’s equality guarantee is the “protection of human dignity;” the differential treatment under the universal health care system amounted to unwarranted discrimination against the children, unacceptable according to the lower court since “as children and mentally disabled, they are doubly vulnerable.”<sup>215</sup> Both courts agreed monitoring the constitution does not necessitate judicial deference to legislative choices; the provincial Court of Appeal was the first Canadian court to direct health-care spending.<sup>216</sup> But the Supreme Court reversed the lower court decisions, and largely ignored child rights, including development, in justifying legislative choice to restrict funding.<sup>217</sup>

These cases highlight the powerful role of judges to assess the government’s relationship with the child. Positive dimensions of child rights continue to gain attention. Specific constitutional child rights<sup>218</sup> can be influential but in their absence, the Canadian constitutional equality rights guarantee may be significant. But generally the child may continue to suffer discrimination or neglect. In light of international and domestic law, the courts should redress government denial or neglect of child rights.

### 2.3.2 *The Child in Relation to Care-giving or Family*

Child rights face greater challenges in courts in relation to parenting or family. In particular,

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<sup>212</sup>Ibid., paras.61, 67.

<sup>213</sup>Ibid., para.63.

<sup>214</sup>Charter section 7 provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>215</sup>*Auton* (note 211 above), para.129.

<sup>216</sup>Makin (2002), “Court tells B.C. to pay for therapy.” *The Globe and Mail*. Toronto: October 17.

<sup>217</sup>*Auton v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657.

<sup>218</sup>See further Van Bueren (note 37 above).



judicial understanding of discrimination against children must improve in relation to customary law in South Africa and corporal punishment in Canada. Cases concerning inheritance, care-giving and parental deportation are also examined.

The best interests of the child principle can be significant in care-giving or family decision-making in both case studies. In *B v S*<sup>219</sup> for example, access of a non-custodial parent to his or her child is described as “the child’s right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent.”<sup>220</sup> Furthermore, South African law “recognises that the child’s welfare is central to the matter of such access [of a father to his illegitimate child] and that access is therefore always available to the father if that is in the child’s best interests.”<sup>221</sup> In *Hlophe*,<sup>222</sup> the father of a child, Sihle, who had been living with the respondents (her grandparents) following her mother’s death, contested her custody. Van Den Heever AJ decided custody would be based on best interests since both the appellant and the respondent gave conflicting evidence,<sup>223</sup> and followed Eekelaar’s child-centred advice to determine what the child would have wanted once she reached maturity.<sup>224</sup> The child expressed her view about the matter but the judge decided against her wishes concluding her best interests were served if the appellant had custody and she had regular contact with the respondents. Further, the judge requested monitoring of the child’s placement by the family advocate and also obtained confirmation that this was possible from the appropriate official. Van Den Heever AJ’s attention to monitoring is valuable, reflecting concern about the child, not simply the desire to resolve the dispute.

The role of customary law with respect to child rights in the South African legal sphere is

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<sup>219</sup>*B v S*, 1995 (3) SA 571.

<sup>220</sup>*Ibid.*, 582.

<sup>221</sup>*Ibid.*, 583.

<sup>222</sup>*Hlophe v Mahlalela and another* 1998 (1) SA 449 (T).

<sup>223</sup>Himonga, Private Law Department, University of Cape Town (2002), Interview with author, Cape Town: 29 July.

<sup>224</sup>Eekelaar in Baxter and Eberts, “The Child and the Court”, quoted in *A Source-book of African Customary Law for South Africa*, cited in *Hlophe v Mahlalela* (note 222 above).



problematic. Himonga usefully enunciates the challenges of upholding children's rights in the African legal context with respect to customary law - hitherto inadequately addressed in the literature - particularly illustrating culture, including customary law, in the legal framework is "one of the major obstacles."<sup>225</sup> Consequently, while there may be extensive legal provision for child rights, "in reality this may turn out to be an empty promise to the child, including the child who attempts the hazardous journey to enforce his or her rights in the complex and costly state machinery of justice."<sup>226</sup> Himonga highlights the South African *Mthembu v Letsela and Another*<sup>227</sup> case, which addressed the inheritance of a girl, Tembi, whose father died intestate. Her mother, the appellant, challenged the requirement to resolve the estate according to "Black law and custom" as provided in the Black Administration Act.<sup>228</sup> The appellant applied to the High Court and the Supreme Court of Appeal to request an order that the legislatively recognised customary rule of primogeniture was invalid due to alleged contravention of the interim Constitution. She argued R900 had been paid towards her *lobola* (also known as *lobolo* (bridewealth)), which was accepted by all parties in the dispute, and that she was married to the deceased through a customary union, which the deceased's father denied. The judges agreed that no marriage had taken place so Tembi was deemed illegitimate. "Black law and custom", in existence for generations and subsequently legislated, entailed it is "within the power of Blacks to choose how they wish their estates to devolve."<sup>229</sup> The appellant argued the child's right to inherit was thwarted by her gender, not her legitimacy. But the court focussed on her illegitimacy and deferred to discriminatory customary practices, explaining: "The question of gender discrimination is not reached in this case and it is not desirable to address a question of such constitutional importance in a case in which it is academic."<sup>230</sup>

A child of non-marital parents should not be defined by and discriminated against on the

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<sup>225</sup>Himonga (note 37 above), 90.

<sup>226</sup>Ibid.

<sup>227</sup>*Mthembu v. Letsela and Another* - Case No: 71/98 (30 May 2000), 2000 (3) SA 867 (SCA), 1998 (2) SA 675 (T), 1997 (2) SA 936 (TPD).

<sup>228</sup>*Black Administration Act 38 of 1927* published under Government Notice R200 of 6 February 1987.

<sup>229</sup>(Note 227 above) 11, para.23.

<sup>230</sup>Ibid., 14-15, para.33.



basis of his/her legitimacy. As various national legal frameworks continue to distinguish based on legal marital status,<sup>231</sup> based on CRC article 2, the UNCRC requests information about discrimination against *inter alia* non-marital children.<sup>232</sup> Tembi's relationship to her father was not contested but her gender disqualifies inheritance due to customary law. Gender discrimination is essential to the outcome because the rights of all girls to inherit - legitimate or not - are implicated and not boys. Davel describes the categorisation of children based on birth inside or outside of marriage as discrimination *per se* and primogeniture in indigenous law also places "the girl child in an inferior position."<sup>233</sup> The judges accepted primogeniture as *prima facie* discriminatory, but it is justified by the male heir's concomitant customary duty to provide maintenance and shelter. While neither the interim Constitution, nor the CRC, had entered into force at the time of the father's death, the Court simply dismisses Tembi and her rights in concluding an illegitimate child "belongs" to the maternal grandfather or successor.<sup>234</sup> While a child has relationships with others, s/he is not owned by anyone. Primogeniture's duty of care for dependents ignores equality rights and is based on stereotypical conclusions about women and children who have separate identities and rights. The UNCRC outlines:

*In fact, girls are simply human beings who should be seen as individuals and not just as daughters, sisters, wives or mothers, and who should fully enjoy the fundamental rights inherent to their human dignity. The rights of the girl should in no way be ignored or neglected, but rather promoted and protected.*<sup>235</sup>

Moreover, the judges assumed this duty of heirs is consistently fulfilled. Although L'Heureux-Dubé, Canadian Supreme Court Justice (as she then was), expressed the following about the Charter's influence in the Canadian context, it is equally applicable to other countries in the child rights era:

*It will be the law's challenge, for both legislatures and courts, to think creatively rather than traditionally about the purposes behind family-oriented legislation and to facilitate the adjustment of relations between state authority and social reality in our new Charter era of tolerance and non-discrimination.*<sup>236</sup>

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<sup>231</sup>See further L'Heureux-Dubé (2001), "What a difference a Decade Makes: The Canadian Constitution and the Family since 1991." 27 *Queen's Law Journal*, 366.

<sup>232</sup>UNCRC(note 133 above), III, A. para.27.

<sup>233</sup>Davel (note 140 above).

<sup>234</sup>(Note 227 above) 16, para.37.

<sup>235</sup>UNCRC(1995), *General Discussion on the girl child*, UN Doc. CRC/C/38, para.283.

<sup>236</sup>L'Heureux-Dubé (note 231 above), 367.



In view of child rights obligations, judges should challenge relevant aspects of customary law.

Highlighted in this case, Himonga identifies several factors adversely influencing child rights in African legal systems: increasing legal protection of culture; judicial interpretation of customary law in its written and thereby archaic form (explained below); the implications of *lobola*; non-registration of customary marriages; and judicial insensitivity to children's rights.<sup>237</sup> She clarifies two notions of customary law: written law in such sources as textbooks and legal codes and often considered "official customary law," which frequently does not reflect current practices; and living customary law, which describes "current customs and practices," an important distinction Himonga identifies since "culture is not static."<sup>238</sup> In *Hlophe v Mahlalela*<sup>239</sup> (discussed above) concerning child custody for example, the court supported best interests of the child as the main criterion, not customary law. Consequently, Maithufi concludes the best interests principle

*irrespective of the type of marriage contracted, and irrespective of whether or not the parents are unmarried or lobolo has been fully provided, applies to all disputes concerning children. The principles of customary law relating to the position of children therefore apply, subject to the provisions of section 28 of the Constitution.*<sup>240</sup>

Child rights commitments<sup>241</sup> necessitate that discriminatory or harmful practices against children should not be condoned in the name of culture.

*Baker*<sup>242</sup> is one of first Canadian Supreme Court cases referring to the CRC; it is often an example of international law's increasing influence in the Canadian legal context.<sup>243</sup> The majority decision about a contested deportation order for the appellant with Canadian-born children supported an exemption, based on humanitarian and compassionate grounds, from

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<sup>237</sup>Himonga (note 37 above), 91.

<sup>238</sup>Ibid., 95-6.

<sup>239</sup>*Hlophe v Mahlalela*, (note 222 above). The common terminology of "custody" is retained but noted as outdated, reflecting ownership; "parental responsibilities" is preferred to reflect parents' relationship to a child.

<sup>240</sup>Maithufi (note 29 above), 146.

<sup>241</sup>For example, CRC a.2, 24(3).

<sup>242</sup>*Baker*, (note 22 above).

<sup>243</sup>For instance, Menard (note 17 above).



the Immigration Act's<sup>244</sup> requirement (s. 114(2)) that applications for permanent residence be made outside the country. According to the Court, the exemption required procedural fairness and a written explanation for the decision by an impartial decision-maker. On behalf of the majority, L'Heureux-Dubé J. found bias in the decision of deportation and the immigration officer responsible was also "completely dismissive of the interests of Ms. Baker's children. ...I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion..." exercised by the officer.<sup>245</sup> Further, she declared: "Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society."<sup>246</sup> The court referred to Canada's CRC ratification as an "indicator" of the significance of considering children, recognised child rights and best interests in other ratified international legal instruments, and "...the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review," similar to other common law countries.<sup>247</sup> According to the Court,

*...the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. ... However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.*<sup>248</sup>

Two justices in the minority decision (Cory and Iacobucci JJ) disputed the influence of international law not incorporated into domestic law. But, a UN HRC majority similarly found best interests was the deciding factor in keeping a child with his parents who were ordered deported in *Winata v. Australia*.<sup>249</sup> Tension can exist between the child's right to family in relation to state objectives. In contrast to the Supreme Court and HRC outcomes, the South African Constitutional Court overruled the factor of family relations to determine outcomes on rights questions in *Grootboom*.<sup>250</sup> Hence, debate continues but the essential

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<sup>244</sup>*Immigration Act*, R.S.C., 1985.

<sup>245</sup>*Baker*, (note 22 above), 859, para.65.

<sup>246</sup>*Ibid.*, 860, para.67.

<sup>247</sup>*Ibid.*, 860-861, paras.69-70.

<sup>248</sup>*Ibid.*, 864, para.75.

<sup>249</sup>HRC (2000), *Hendrick Winata and So Lan Li v. Australia*, Communication No. 930/2000 (11 May 2000), CCPR/C/72/D/930/2000.

<sup>250</sup>See above.



influence and role of immediate family members to a child and his/her rights must be recognised and promoted.

*Focus: Adjudication of Corporal Punishment*

Corporal punishment of children concerns the relationship between the child and his/her caregivers and the recent subject of adjudication in both countries. The Supreme Court of Canada considered a challenge to the criminal code defence,<sup>251</sup> and the Constitutional Court of South Africa determined the constitutionality of prohibiting corporal punishment in schools in *Christian Education*.<sup>252</sup> The UNCRC opposes corporal punishment due to incompatibility with the child's right to protection.<sup>253</sup>

In the Canadian case attracting several interveners, the non-profit Canadian Foundation for Children, Youth and the Law challenged the constitutionality of Criminal Code<sup>254</sup> section 43, which provides a defence to teachers, parents or caregivers to use force if “by way of correction...the force does not exceed what is reasonable in the circumstances.” The organisation also sought a declaration to strike down any common law parental right to use corporal punishment. A Supreme Court majority disagreed with the Foundation's arguments that the impugned provision violated sections 7, 12, and 15 of the constitution. For the majority, McLachlin C.J. acknowledged children's security of the person is affected, but without contravening a principle of fundamental justice due to: existing procedural safeguards where the child's interests are represented by the Crown; best interests is not a principle of fundamental justice because, although a legal principle, insufficient consensus favours the principle as “vital or fundamental to our societal notion of justice” and its application is contextual and often debatable; and the impugned provision is not overly vague and contains adequate limitations to prevent harmful force. Secondly, corporal punishment was not found to result in constitutionally prohibited “cruel and unusual” treatment. And lastly, the majority understood equality rights do not require equal treatment so the provision

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<sup>251</sup>*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] S.C.R. 76, (2000) 188 D.L.R. (4th) 718, (2000) 57 O.R. (3rd) 511.

<sup>252</sup>*Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) 18 August 2000.

<sup>253</sup>Also see Chapter Two.

<sup>254</sup>*Criminal Code of Canada*, R.S.C. 1985.



does not discriminate against the child's equality rights in denying some legal protection. To support understanding of the provision's limit of reasonableness, Canada's international legal obligations, including the CRC, "confirm that physical correction that either harms or degrades a child is unreasonable".<sup>255</sup> But contrasting the dissenting opinions, the provision was deemed in conformity because; "Neither the Convention on the Rights of the Child nor the International Covenant on Civil and Political Rights explicitly require states parties to ban all corporal punishment of children."<sup>256</sup> Consequently, the appeal was dismissed.

But the Court's division in this case reflects the issue's controversial nature: one dissented in part from the majority and two provided separate dissenting opinions. Dissenting in part, Binnie J. acknowledged the child and found the provision infringes the child's equality rights, which the majority largely dismissed. He decided however, the government justified the violation under Charter s. 1 due to its pressing and substantial objective and the rational legislative provision but he favoured striking out the references to "schoolteacher" and "pupil" and declaring them null and void.

In dissenting, Arbour J. argued the impugned provision's vagueness offends Charter section 7 because inconsistent interpretation and application violate the child's constitutional rights to safety and security since the state of the law demonstrates: "Canadian courts have not thus far understood the concept of reasonable force to mean the "minor corrective force" advocated by the Chief Justice."<sup>257</sup> The majority acknowledged occasional unclear and inconsistent decisions but focussed not on the past, but whether the provision has clear meaning exists with appropriate limitations for the future.<sup>258</sup> Arbour J. noted the subjective nature of the provision's reasonableness limitation, allowing wide variation of acceptability, often influenced by culture and religion, intertwined with other controversial issues "including the relationship between the state and the family and the relationship between the rights of the parent and the rights of the child."<sup>259</sup> Unconstitutional vagueness means the

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<sup>255</sup>(Note 251 above) 101, para.31.

<sup>256</sup>Ibid., 101, para.33.

<sup>257</sup>Ibid., 142, para.132.

<sup>258</sup>Ibid., 106-7, para.44.

<sup>259</sup>Ibid., 162, para.185.



provision cannot be saved by s. 1 as a “reasonable limit prescribed by law” or minimally impairing rights.<sup>260</sup> The other constitutional arguments were deemed unnecessary to examine. Deschamps J. agreed with Arbour’s reasoning but preferred to address the provision’s violation of the child’s equality rights, which she argued is not saved by s. 1, necessitating striking down of the provision.

Canadian courts including Binnie J. were largely swayed by concern about the expansion of criminal law without s. 43, where common corporal punishment would be criminalised, overwhelming law enforcement and the judiciary with trivial discipline matters; and they highlighted federal educational programs to promote discipline alternatives. In essence, criminal law was understood as “a blunt instrument whose power can also be destructive of family and educational relationships.”<sup>261</sup> But Deschamps J. criticised the government’s contention that the legislative objective is to protect families from criminal law and damage of sanctions because then the provision’s purpose does not appear to serve parental rights but child protection, which is a “significant reclassification” of the legislative objective.<sup>262</sup> Striking down the section would not necessarily mean that all hitting or restraint would be judicially monitored. Arbour J. argued “Absent action by Parliament, other existing common law defences, such as the defence of necessity and the “de minimis” defence, will suffice to ensure that parents and teachers are not branded as criminals for their trivial use of force to restrain children when appropriate.”<sup>263</sup> Her reference to “restrain” is significant for at least two reasons. Restraint, which may be interpreted in some circumstances as assault but “minimal and insignificant” force, is often legitimate child discipline, correction or care, is distinguished from corporal violence as punishment.<sup>264</sup> Identifying restraint also addresses teachers’ main concern about prosecution for restraint in the classroom since it may be interpreted as assault.<sup>265</sup> Maintaining the current criminal legislative framework does not justify violating rights as Deschamps J. recognised “Although there is a benefit to parents,

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<sup>260</sup>Two aspects of the Oakes test, *R. v. Oakes* [1986] 1 S.C.R. 103, cited in *Ibid.*, 167, para.193.

<sup>261</sup>*Ibid.*, 112, para.60.

<sup>262</sup>*Ibid.*, 184, para.235.

<sup>263</sup>*Ibid.*, 142, para.132.

<sup>264</sup>*Ibid.*, 145, para.141.

<sup>265</sup>Consequently, the Canadian Teachers’ Federation intervened in support of the provision.



children, teachers and families to escape the unnecessary intrusion of the criminal law into the private realm of child-rearing, when there is harm to a child this is precisely the point where the disapprobation of the criminal law becomes necessary.”<sup>266</sup>

The majority’s argumentation is largely theoretical, focussing on adults without serious reflection about children or their rights in relation to the actual or potential harm of assault and inappropriately dismisses the significant case law demonstrating the provision’s inadequate limitations, inconsistent enforcement, and harm to children. Consistency cannot be assumed in interpreting the provision because as a federation, variations in applying and enforcing child protection legislation exist across jurisdictions.<sup>267</sup> Moreover, the fact that Ontario Association of Children’s Aid Societies, responsible for implementing and monitoring child protection legislation, the *Commission des droits de la personne et des droits de la jeunesse*, on its own behalf and on behalf of the Canadian Council of Provincial Child and Youth Advocates, all intervened to support the challenge demonstrates problems with the impugned provision, and the Canadian reality of child discipline. The Quebec child advocate considers s. 43 to be “an attack on the rights of the child and that it infringes the Quebec Charter and international norms”.<sup>268</sup>

The majority determined that the defence is applicable for “the mildest forms of assault” and not applicable to: children under age two, those with disabilities or other factors preventing learning,<sup>269</sup> against the head, the use of objects; and against teenagers, which is “harmful, because it can induce aggressive or antisocial behaviour”.<sup>270</sup> For instance, the Court’s acceptance of corporal punishment as harmful to teenagers without considering effects upon children between ages two and twelve and the likelihood they would also be induced to similar behaviour is curious and inconsistent. Binnie J. accurately described this “interpretive exercise” classifying children and types of assault as illustrative of a: ““one size fits all” approach to the “needs, capacities and circumstances” of children [and] does not fit

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<sup>266</sup>(Note 251 above), 187, para.241.

<sup>267</sup>See Howe (note 9 above).

<sup>268</sup>Giroux (note 95 above).

<sup>269</sup>(Note 251 above), 100, 98-9, paras.30, 25.

<sup>270</sup>Ibid., 103, para.37.



reality”, disagreeing with the majority’s conclusion that the provision is “firmly grounded in the actual needs and circumstances of children”<sup>271</sup> Further, Arbour J. noted the statutory provision does not include exclusions to some conduct and that: “To essentially rewrite it before validating its constitutionality is to hide the constitutional imperative.”<sup>272</sup> Such efforts to enunciate limitations are generally beyond the scope of judicial review.

Moreover, the majority did not question the linkage between the use of force and “correction” or learning. In fact, research demonstrates that the assumption is erroneous and corporal punishment correlates with negative developmental outcomes including aggression.<sup>273</sup> The majority reveals the acceptability of violence against the child, which is simply distinguished between acceptable and unacceptable violence without attention to real or potential harm of the former. In addition, according to the majority, “cruel and unusual” treatment concerns the state and “[c]orrective force by parents in the family setting is not treatment by the state”<sup>274</sup> and thus, dismisses the “cruel and unusual” treatment argument. But, the state criminalises assault between adults, which provides the defence for adults assaulting children. Hence, the distinction between public and private spheres of action, which traditionally excludes rights abuses,<sup>275</sup> conveniently excuses the state from providing full legal protection of children.<sup>276</sup> The majority did not address the fact that understanding of discipline has evolved significantly as has the understanding of child rights. Attention to the state’s potential intrusion in the family mirrors historical justification of corporal punishment once acceptable for use against women, in addition to as Arbour J. notes, apprentices, employees, passengers on ships and prisoners; thus children are perpetuated as “the only group of citizens who are deprived of the protection of the criminal law in relation to the use

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<sup>271</sup>Ibid., 131, 116, paras.103, 68.

<sup>272</sup>Ibid., 144, para.139.

<sup>273</sup>For example, the Commission on Violence in Youth of the American Psychological Association concluded: “Physical punishment may produce obedience in the short term but continued over time it tends to increase the probability of aggressive and violence behaviour during childhood and adulthood, both inside and outside the family.” In Lansdown (2000), “Children’s Rights and Domestic Violence.” 9 *Child Abuse Review*, 423. Also see Ateah et al. (2003), “The Risks and Alternatives to Physical Punishment Use With Children.” 17 *J Pediatr Health Care*, 126-132.

<sup>274</sup>(Note 251 above), 108, para.48.

<sup>275</sup>See further Chinkin (1999), “A Critique of the Public/Private Dimension.” 10 *EJIL*, 387-395.

<sup>276</sup>The Supreme Court relied on the same distinction in *R. v. Sharpe* [2001] 1 S.C.R. 45 as discussed in Van Bueren (note 37 above).



of force”.<sup>277</sup> By permitting assault, Deschamps explained “s. 43 appears to be a throwback to old notions of children as property. Section 43 reinforces and compounds children’s vulnerability and disadvantage by withdrawing the protection of the criminal law” further exacerbated when corporal punishment is from a caregiver.<sup>278</sup> In addition, the provision results in discriminatory treatment of the child in purpose and effect and “encourages a view of children as less worthy of protection and respect for their bodily integrity based on outdated notions of their inferior personhood.”<sup>279</sup>

The majority appears to consider children as objects. In addressing whether the impugned legislation violates fundamental justice by denying children fair procedure and equal benefit and protection, McLachlin C.J. argued in s. 43 decisions: “The child’s interests are represented at trial by the Crown. ... Nor is there any reason to conclude on the arguments before us that providing separate representation for the child is either necessary or useful.”<sup>280</sup> This position contrasts with the South African Constitutional Court in *Christian Education*, which specifically identified the child’s voice and that it was “unfortunate” a *curator ad litem* had not been appointed to represent children in the case; because according to Sachs J: “Their actual experiences and opinions...would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.”<sup>281</sup> The Canadian Court dismissed the child’s perspective in determining whether the law marginalises him/her because “Applied to a child claimant, this test may well confront us with the fiction of the reasonable, fully apprised preschool-aged child.”<sup>282</sup> This position reveals the Court’s generalisation and dismissal of the child as “preschool-aged”, despite also acknowledging in the provision’s application to most children from two to the teen years. The majority’s understanding reveals a picture of the incompetent, unreasonable child, incapable of informing decision-making. Consequently, the majority concludes: “The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child,

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<sup>277</sup>(Note 251 above), 155-7, paras.171, 173.

<sup>278</sup>Ibid., 181, para.226.

<sup>279</sup>Ibid., 183, para.232.

<sup>280</sup>Ibid., 92, para.6.

<sup>281</sup>CCT 4/00, 37, para.53.

<sup>282</sup>(Note 251 above), 110, para.53.



who seriously considers and values the child's views and developmental needs."<sup>283</sup> The Court contrasts with *Eaton's* affirmation of the child's view and it is likely the absence of child perspectives affected by this provision allows the majority to not fully appreciate the section's harm.

In contrast to the European Court on Human Rights,<sup>284</sup> the South African judicial commitment to, and understanding of children's rights, is progressive in relation to corporal punishment as illustrated in *Christian Education*.<sup>285</sup> The Court decided Parliament had not unconstitutionally limited the religious rights of parents who consented to corporal punishment of their children by teachers in independent schools. The impugned section 10 of the Schools Act<sup>286</sup> prohibits corporal punishment due to alleged violations of various constitutional provisions including privacy, freedom of religion, education, language and culture and cultural, religious and linguistic communities. The Court dismissed the appeal because the Schools Act does not restrict parents' ability to raise their children as they wish, the legislation only prevents authorising schools from using corporal punishment. This conclusion differs from the majority decision of the European Court in *Costello-Roberts v. United Kingdom*<sup>287</sup> that the State did not violate ECHR article 3, prohibiting torture or inhumane or degrading treatment or punishment, by not protecting a child from corporal punishment<sup>288</sup> at an British independent school.

While Canadian courts to date are not yet prepared to do so, South Africa's obligations to children and their rights figured prominently in the Court's reasoning. In addition to considering constitutional obligations to reduce violence, the Court refers to the CRC obligation to protect the child. Moreover, the Court acknowledged: "It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right

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<sup>283</sup>Ibid.

<sup>284</sup>See Chapter Two.

<sup>285</sup>(Note 252 above).

<sup>286</sup>*South African Schools Act*, Act 84 of 1996.

<sup>287</sup>*Costello-Roberts v. United Kingdom*, 247 Eur. Ct. H.R. (ser. A) at 11 (1993), 19 E.H.R.R. 112.

<sup>288</sup>Van Bueren (1995), "The International Protection of Family Members' Rights as the 21st Century Approaches." 17 *Human Rights Quarterly*, 749.



which every child has. The principle is not excluded in cases where the religious rights of the parent are involved.”<sup>289</sup> The Court did not favour the government’s equality argument to support the impugned legislation because “the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect.”<sup>290</sup> The Court placed greater import in the state’s interest in protecting children from degradation and indignity and concluded the corporal punishment prohibition in schools “had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.” With constitutional imperatives, the Court did not simply consider the rights of caregivers but also those of children unlike the Canadian decisions. Given the strong decision, it will be interesting to assess in the future the Court’s position on corporal punishment in the home, not at issue in this case.

Corporal punishment highlights different judicial approaches and conclusions to child rights in both countries. In focusing on schools, the South African court could focus on the state’s role in the public sphere while the Canadian majority collated both the public (teachers) and the private sphere (parents, caregivers), which affect the child in preserving the impugned provision. Nevertheless, the South African decision reflects a more child-centred approach than that of the Canadian majority, which do not give serious consideration to child rights.

As the aforementioned cases demonstrate, judges’ understanding of discrimination can better support child rights. While the family demands consideration as in *Baker*, customary law and corporal punishment continue to degrade the child’s dignity and rights facilitated by concern about interfering in family and customary practices. While courts protect the child from most harm, maximum survival and development is a more demanding principle. It includes consideration of the best interests principle for instance, which appears accepted in both countries but inconsistently interpreted.

In general, child rights have varying influence for the child in relation to government and caregivers but the specific South African constitutional provisions for child rights and international law consideration provide greater leverage for a better child rights-based

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<sup>289</sup>(Note 252 above), 27, para.41.

<sup>290</sup>(Note 252 above), 29, para.42.



approach. The absence of similar constitutional provisions impede the Canadian courts from referring as often to international child rights law. Canadian judges have been increasingly interpreting Canadian legislative and administrative efforts using a lens of Canada's international obligations;<sup>291</sup> demonstrating increasing influence<sup>292</sup> but insufficiently in relation to child rights to date. Both the Canadian Supreme Court and the South African Constitutional Court however, should move beyond concern regarding expenses to improve their support of child economic and social rights as *Auton* and *Grootboom* reveal. Despite some child rights progress, challenges remain to improve *inter alia* judicial commitment to children's rights, and capacity to respond to judicial decisions.<sup>293</sup>

The judiciary provides an increasingly recognised forum for child rights advocates in both countries. As Chapter Two enunciates, the Universal Declaration of Human Rights encourages, and the ICCPR requires national remedies for alleged violations.<sup>294</sup> Remedies are consistent with other instruments' requirement of States parties to take all measures to implement the enunciated rights in the ICESCR, CEDAW and the CRC.<sup>295</sup> In resolving issues, remedies also lessen demand upon international monitors. The state determines the mechanism(s) through which remedies will be available, but they should be appropriate to determine the nature of alleged violations. In *Z. and others v. the United Kingdom*, children who suffered "horrific" abuse and neglect were unable to sue the local authority for negligence to obtain compensation, revealing a gap in domestic law.<sup>296</sup> Consequently, a majority of the Grand Chamber of the European Court held the state had violated ECHR article 13 for failing to provide an effective remedy to the applicants regarding the state's failure to protect them from abuse, as required by 3, and ordered compensation. According to the Court, ECHR article 13 plays a "crucial function" in requiring the state to provide the national remedy to enforce ECHR rights to address the substance of an alleged violation and grant relief; in accordance with ECHR article 13 it "must be "effective" in practice as well

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<sup>291</sup>Toope (note 60 above), 39.

<sup>292</sup>Menard (note 17 above).

<sup>293</sup>These issues are discussed below.

<sup>294</sup>Universal Declaration, a.8; and ICCPR, a.2(3).

<sup>295</sup>ICESCR, a.2; CEDAW, a.2; and CRC a.4.

<sup>296</sup>*Z. and others v. the UK*, Application no. 29392/95, (2002) 34 E.H.R.R. 3.



as in law".<sup>297</sup> Children's "invisibility" create the urgency to ensure accessible, effective remedies, with appropriate support, at local and national levels. The South African High Court for instance "is the upper guardian of all minor children within its area of jurisdiction and as such has very wide powers in relation to children."<sup>298</sup> In determining whether government legislation is reasonable, the limits of judicial review must be recognised: judges can interpret legislation and adjudicate but cannot legislate; yet judicial activism or restraint influence decision-making, thereby encouraging or disheartening rights activists.<sup>299</sup> If a case is successful for advocates, generally it brings binding, immediately responsive decisions, but it is also expensive.<sup>300</sup> The Canadian federal government funds the national non-profit Court Challenges Programme to financially assist litigation concerning constitutional equality and official language rights.<sup>301</sup> Based on the former guarantee, the Programme provided grants to the Canadian Foundation for its test case challenging Criminal Code s. 43.<sup>302</sup> While this financial support is valuable, it was justified only as an equality rights challenge. Overall, few avenues exist in either country for children and their advocates to support litigation due to the limitations of legal aid.<sup>303</sup> Due to the expenses involved, one Canadian advocate proposed the establishment of a specific fund to advance the legal protection of child rights.<sup>304</sup> In South Africa, international NGOs including Save the Children Sweden support the valuable work of such local organisations as the Legal Resources Centre, which was involved in *TAC*.<sup>305</sup> Nevertheless, funding for judicial challenges is restricted, likely

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<sup>297</sup>Ibid., paras.103, 108.

<sup>298</sup>Justice van Heerden, Cape High Court (2002), Interview with author, Cape Town: 30 July, 2002.

<sup>299</sup>See Collins (1995), *Seeking Equality: An Assessment of the Implications and Limitations of Equality Rights in the Canadian Charter of Rights and Freedoms*, M.A. thesis, Dalhousie University.

<sup>300</sup>Madotyeni (2000), "Enforcing children's rights through litigation". *2 Article 40: The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa* (September), 9-10.

<sup>301</sup>Charter of Rights s. 15 and 23, 16, 20, 18, 19, 17 respectively; Court Challenges Program of Canada (2002), *Annual Report: 2001-2002*.

<sup>302</sup>Court Challenges Program, *ibid.*, 23-24.

<sup>303</sup>For example, the SAHRC acknowledged in 1999-2000 "No legal aid is available..."; cited in Lansdown (note 69 above), 32.

<sup>304</sup>Horne, Defence for Children International-Canada, made the proposal at Canadian International Development NGO consultation about follow-up to the Special Session on Children, convened by Senator Pearson, 25 June 2002, Ottawa.

<sup>305</sup>Reinius, Regional Representative, Southern Africa Regional Office, Save the Children Sweden (2002), Interview with author, Pretoria: 18 July 2002.



following an ad-hoc approach rather than a consistent child rights litigation strategy.

Litigation is difficult. As Lansdown explains, there are reporting difficulties, refusal to accept children as credible witnesses, and courts' inaccessibility.<sup>306</sup> Even the South African Law Commission acknowledges: "To approach the courts is often a lengthy and costly exercise and may not be the best way of ensuring immediate protection of children's rights."<sup>307</sup> It is "expensive, time consuming, and it always doesn't bring the result you hoped."<sup>308</sup> As Sloth-Nielsen points out, much debate continues about litigation's role and value since *Grootboom* for example "...made huge theoretical advances in developing socio-economic rights; and has been the basis now for the mother-to-child transmission case...[but] The Grootbooms are still living in the same place they were living in two years ago."<sup>309</sup> Even if successful, litigation results may not always be useful. Therefore, other actors have important roles and responsibilities to monitor and focus on child rights progress.

#### 2.4 Independent Commission or Advocate Monitoring

Independent commissions or advocates monitor in both countries, which the UNCRC encourages.<sup>310</sup> Section 184(1)(c) of the Constitution provides for the South African Human Rights Commission (SAHRC) mandated *inter alia* "to promote, protect and monitor child rights."<sup>311</sup> With several provincial offices,<sup>312</sup> the Commission carries out advocacy, education, training and according to Constitution section 184(3), provides annual reports to Parliament on economic, social and cultural rights including constitutional child rights. These reports are developed based on analysis of responses to protocols (or sets of questions) about implementation from national, provincial, and since 2002 local governments.<sup>313</sup>

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<sup>306</sup>Lansdown (note 69 above), 14.

<sup>307</sup>South African Law Commission (note 109 above), 1245.

<sup>308</sup>McClain, Commissioner, SAHRC (2002), Interview with the author, Johannesburg: 10 July.

<sup>309</sup>Sloth-Nielsen (note 72 above).

<sup>310</sup>See UNCRC(2002), *CRC General Comment 2*, UN Doc.CRC/GC/2002/2.

<sup>311</sup>SAHRC (note 28 above), 1.

<sup>312</sup>Offices are in Gauteng (national headquarters), Eastern Cape, KwaZulu Natal, Northern Province and Western Cape; *ibid*.

<sup>313</sup>The reports also incorporate academic monitoring results and other civil societal sources are under consideration; McClain (note 308 above).



According to Commissioner McClain, these protocols are, “probably the most powerful tool we have - monitoring how government is fairing in terms of rights.”<sup>314</sup> The Commission also has a legal services department to respond to alleged violations.<sup>315</sup> Due to the difficulties of litigation, the Commission’s favoured route is mediation, considered “a lot more constructive, and I think it is part of the culture we are trying to build.”<sup>316</sup> The Commission should develop a test case strategy for mediation to advance child rights.

Section five of the South African Human Rights Commission Act authorises establishment of advisory committees.<sup>317</sup> A plan of action of the SAHRC’s committee on the rights of the child involved a study tour, meetings with national NGOs and community-based organisations, children’s workshops, and the recommendation to establish a focal point for children.<sup>318</sup> Workshops with 9 to 13 year-old children and focus groups of marginalised children ascertained their understanding of SAHRC’s role, how they may be involved in SAHRC programming, and identified necessary mechanisms for accessibility.<sup>319</sup> The sessions resulted with valuable findings including:

*the majority of children had never heard of the SAHRC and therefore found it difficult to engage properly in the activities where they had to create symbols representing the SAHRC or knowing when to access the SAHRC. It is evident that more work needs to be done to make the SAHRC an accessible and visible organisation in the lives of children in the country.*<sup>320</sup>

While educational, what impact did these efforts have on the institution? Officially, the Commission plans on “using and implementing some of the findings.”<sup>321</sup> Commissioner McClain highlights two examples of their significance. The children’s workshops inspired not only the current development of a complaints form that a child can fill out; but also a

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<sup>314</sup>Ibid.

<sup>315</sup>Ibid.

<sup>316</sup>Ibid.

<sup>317</sup>*The Human Rights Commission Act*, no. 54 of 1994

<sup>318</sup>SAHRC (note 28 above), 1, 3.

<sup>319</sup>Ibid., 57-118.

<sup>320</sup>Ibid., 109.

<sup>321</sup>Mabusela, in *ibid.*, 2.



report on child sexual abuse, which was an issue constantly brought up in discussions.<sup>322</sup> The Commission also plans to conduct a snap survey of special schools for children with disabilities due to many sexual abuse complaints from parents and NGOs, particularly affecting deaf children.<sup>323</sup> Despite limited resources, the SAHRC's monitoring is proactive and reactive in responding to complaints and other contributions.

Although the SAHRC is a general human rights institution, its efforts reveal a genuine commitment to child rights. For example, it was able to change restrictions upon refugee children or children seeking asylum from going to school.<sup>324</sup> The UNCRC acknowledged its importance but criticised the lack of resources;<sup>325</sup> the Committee's recommendation about adequate resources, child-friendly complaint procedures and awareness-raising among children "strengthens the hand of the SAHRC in its quest to ensure that it is accessible to children."<sup>326</sup> Consequently, the Commission obtained funding to undertake focal point preparation,<sup>327</sup> nevertheless its capacity to plan or undertake its efforts continue to be seriously undermined due to budgetary constraints.<sup>328</sup> While knowledgeable people carry out the work, the Commission is unable to offer appropriate salaries to potential employees due to lack of capacity and resources.<sup>329</sup>

In contrast to SAHRC, the Canadian Human Rights Commission with its limited mandate does not play a significant role in child rights monitoring.<sup>330</sup> The Commission has

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<sup>322</sup>SAHRC (2002), *Report on the Enquiry into Sexual Violence against Children: Does the Criminal Justice System Protect Children?*, cited by McClain (note 308 above).

<sup>323</sup>Lansdown (note 69 above), 13.

<sup>324</sup>McClain, (note 308 above).

<sup>325</sup>UNCRC(note 44 above), para.13.

<sup>326</sup>Mabusela, Deputy Chairperson of the Commission (as she then was), "Background to the project", in SAHRC (note 28 above), 1.

<sup>327</sup>SAHRC (note 28 above), iii & 1.

<sup>328</sup>McClain, (note 308 above).

<sup>329</sup>Ibid.

<sup>330</sup>The Canadian Human Rights Act "applies to federal government departments, Crown corporations and agencies, as well as to businesses under federal jurisdiction...[for] complaints of discrimination in employment and in the provision of goods and services." Canadian Human Rights Commission (1998), *Filing a complaint with the Canadian Human Rights Commission*.



recommended to Parliament that it play an independent monitoring role to assess Canada's performance of international human rights treaties.<sup>331</sup> If successful, the proposal would likely further international rights domestically offering adequate resources and consistent, coherent efforts, but it is not progressing. Even if accepted, the Commission would have to develop child rights capacity. It is not surprising that advocates note the absence of a national independent child rights monitor as a significant weakness.<sup>332</sup>

The South African constitution establishes another relevant body: the Commission for Gender Equality (CGE).<sup>333</sup> Commissioner McClain believes it is "an important body" for gender issues including its work on girls.<sup>334</sup> However, the Law Commission has concluded: "Unfortunately, there seems to be no evidence of the development of systems and indicators for monitoring gender equality, particularly pertaining to the girl child."<sup>335</sup> The National Youth Commission (NYC), established by the National Youth Commission Act, focusses on any "person between the ages of 14 and 35 years"<sup>336</sup> mandated to *inter alia* monitor.<sup>337</sup> But neither the CGE nor the NYC appear to play a significant child rights role since key South African informants generally did not identify them in numerous research interviews.<sup>338</sup> While it may be curious that no child commission exists,<sup>339</sup> due to vigorous efforts, the SAHRC is fulfilling that role so it is unlikely an independent institution for children will be established in South Africa. The ORC is not engaging in any discussions about the proposal.<sup>340</sup> Moreover, various existing institutions receive insufficient resources so limited support exists

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<sup>331</sup>Dion (note 88 above).

<sup>332</sup>See below. As examples: Giroux (note 95 above); and Parker-Loewen, Children's Advocate, Province of Saskatchewan (2003), interview with author, Saskatoon: 15 January.

<sup>333</sup>*Constitution of the Republic of South Africa, 1996* (note 30 above), s.187.

<sup>334</sup>McClain (note 308 above).

<sup>335</sup>South African Law Commission (note 109 above), 1249.

<sup>336</sup>*National Youth Commission Act 19 of 1996*; and section 1(vi) of the Act; *ibid.*, 1250.

<sup>337</sup>Its "mission is to co-ordinate, monitor and promote the development of young people...;" cited in National Youth Commission (2001), *About: Vision/Mission*.

<sup>338</sup>The exception was McClain (note 308 above).

<sup>339</sup>du Toit, Executive Director, Child and Youth Care Agency for Development (2002), Interview with author, Pretoria: 16 July.

<sup>340</sup>Theron (note 51 above).



to compromise resources to create another body.<sup>341</sup> But an independent children's institution is not required due to SAHRC's demonstrated commitment and activities; however, additional resources are necessary to support capacity. If well coordinated, the gender and youth commissions could more actively monitor but capacity and lack of resources likely constrain efforts. But the Law Commission also contributes through investigations of law and legal reform, promoting consultation including children in law-making.<sup>342</sup> In conclusion, South African independent monitoring structures have varying impact.

Canadian provincial and territorial human rights legislation provide protection and human rights commissions or other bodies play monitoring roles but the CCRC notes: "...the process can be forbidding and sometimes restrictive. Most children lack the awareness of their rights and the redress mechanisms and the skills and confidence to access them."<sup>343</sup> Further: "Although age is a prohibited ground in certain provinces and territories, only people between 18 and 65 years of age are protected from age discrimination."<sup>344</sup> Most provinces and territories have a general or specific ombudsman.<sup>345</sup> But provincial child advocates have the important child rights roles. There are eight who work within an independent general human rights body, within government ministries or independently.<sup>346</sup> The Saskatchewan advocate explains: "In the last five years, provincial child advocates have become better known and proactive, especially in a national way, in absence of national commissioner."<sup>347</sup> But legal context determines success of the mandate.<sup>348</sup> Several provincial legislatures have appointed independent child advocates who carry out good work<sup>349</sup> but their independence is not always sufficiently appreciated. For instance, British Columbia's independent

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<sup>341</sup>Gallinetti (note 201).

<sup>342</sup>See above for discussion of child justice efforts.

<sup>343</sup>CCRC (note 74 above), 33.

<sup>344</sup>Ibid., 34.

<sup>345</sup>Ibid.

<sup>346</sup>The provinces are: British Columbia, Alberta, Manitoba, Saskatchewan, Ontario, Quebec, and Nova Scotia, Newfoundland & Labrador. Government-appointed advocates are discussed above.

<sup>347</sup>Parker-Loewen (note 332 above).

<sup>348</sup>Mandates and government-appointed child advocates are described in s.2.1.

<sup>349</sup>Fronczek, Executive Director (as she then was), Society for Children and Youth of BC (SCY) & board member, CCRC (2002), Interview with author, Vancouver: 9 August.



Children's Commission has been highlighted internationally,<sup>350</sup> but has since been dismantled<sup>351</sup> as the government created an Office for Children and Youth appended to the office of the Attorney General with cuts in budget and staff.<sup>352</sup> Capacity of other provincial advocates is an issue as Newfoundland, Nova Scotia and British Columbia as examples, are understaffed.<sup>353</sup>

Independent monitors with special authority to carry out their mandate are particularly effective. Quebec's *Commission des droits de la personne et des droits de la jeunesse* is a particularly strong office with unique legislative authority in the country to order change. *La loi sur la protection de la jeunesse* provides that the Commission can consider and use legal means to remedy any situation violating child rights and it can refer a matter to youth court when the remedy has not been implemented within a reasonable time period.<sup>354</sup> According to provincial advocate Giroux, this authority is not used very often since it is well-known by government and most Commission recommendations are followed, but it is used occasionally and is very helpful.<sup>355</sup> Quebec also has its own human rights charter,<sup>356</sup> which is considered quasi-constitutional, and it will attempt shortly to reinforce child rights.<sup>357</sup> Similarly, the need to respond to SAHRC protocols is encouraging government departments to task specific officials with responsibility to have relevant information available in light of ratified international treaties, which can also serve reporting needs to Cabinet.<sup>358</sup> The SAHRC also has useful authority from the Human Rights Commission Act<sup>359</sup> to subpoena government departments, which has forced government departments to respond after missing two or three deadlines; in 2001, it used this authority nineteen times leading to receipt of required

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<sup>350</sup>South African Law Commission (note 109 above), 1234.

<sup>351</sup>British Columbia, *Office for Children and Youth*.

<sup>352</sup>*Ibid.*, and Giroux (note 95 above).

<sup>353</sup>Giroux, *ibid.*

<sup>354</sup>*La Loi sur la protection de la jeunesse*, R.S.Q., chapter P-34.1, s. 23(c) and 25.3 respectively.

<sup>355</sup>Giroux (note 95 above).

<sup>356</sup>*La Charte des droits et libertés de la personne*, R.S.Q., c.C-12.

<sup>357</sup>Giroux (note 95 above).

<sup>358</sup>McClain (note 308 above).

<sup>359</sup>*The Human Rights Commission Act*, no. 54 of 1994, s. 9(1)(c).



information or questioning of the department and media interest.<sup>360</sup> Thus, these independent monitors have the capacity for impact but not always. Saskatchewan advocate Parker-Loewen confirms: “There is sincere interest in what our Office has to say in order to improve kids’ lives” and achievement on individual issues; “However, progress is slow in relation to our second role on systemic issues. There is not always agreement. There are some difficulties with that. There is reluctance to have children’s stories told.”<sup>361</sup> The advocates attempt to advance children’s rights within their respective mandates but obstacles - financial, structural, procedural and attitudinal - impede their overall achievements.<sup>362</sup>

Challenges remain in Canada to successfully establish an independent institution - a significant lacuna highlighted by several commentators.<sup>363</sup> But the proposal for a children’s commissioner has changed in favour of a “centre” for children.<sup>364</sup> A federal centre to focus on children is useful due to the absence of federal structures for children. However, the new proposal reduces the monitoring role: where one of the proposed commissioner’s roles was accountability of government measures influencing children,<sup>365</sup> accountability is no longer included in the proposed centre’s mandate.<sup>366</sup> The revision is likely due to the need to improve federal funding possibilities. As accountability of government to independent actors is an important dimension of the success of this monitoring category, it is an unfortunate loss. At least one advocate finds the proposal’s revision too generic and is concerned about monitoring.<sup>367</sup> Even if the revised proposal is approved, the limited monitoring role questions the nature and scope of the federal commitment to child rights.

Independent monitors from both countries identify the issue of the unclear relationship

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<sup>360</sup>McClain (note 308 above).

<sup>361</sup>Parker-Loewen (note 332 above).

<sup>362</sup>See below.

<sup>363</sup>Parker-Loewen (note 332 above); and Giroux (note 95 above).

<sup>364</sup>Pearson & Kraft Sloan (note 181 above).

<sup>365</sup>Pearson, Senator & Kraft Sloan M.P. (2001), *A Commissioner for Canada's Children*, 3-4.

<sup>366</sup>The mandate for the Centre is now to: establish a focal point for children and youth; encourage best practices; and foster inclusive citizenship; Pearson & Kraft Sloan (note 181 above), 4-5.

<sup>367</sup>Giroux (note 95 above).



between international monitors and national independent rights institutions.<sup>368</sup> While these actors focus on the domestic situation, they would like to contribute their unique perspectives to international monitoring but as they are not government or non-governmental, they have found no clear route exists. Consequently, the UNCRC's release of a specific General Comment is valuable in affirming national independent institutions

*“should contribute independently to the reporting process under the Convention...and monitor the integrity of government reports to international treaty bodies with respect to children’s rights, including through dialogue with the Committee on the Rights of the Child at its pre-sessional working group and with other relevant treaty bodies and other UN monitors.”*<sup>369</sup>

It will be useful to assess involvement of these institutions in international processes. The realisation of Giroux’s proposal for an international association of ombudsmen for children<sup>370</sup> could maximise this opportunity.

## 2.5 Academic Monitoring

Academic monitors appear to be more active in South Africa than in Canada. For instance, the Children’s Institute (at the University of Cape Town), the Children’s Rights Project of the Community Law Centre (at the University of Western Cape), and NGO: the Children’s Rights Centre, are coordinating development of an alternative report for South Africa’s second CRC report.<sup>371</sup> Academic monitors also provide information to SAHRC’s reports about economic and social rights.<sup>372</sup> The Centre for Child Law at the University of Pretoria educates lawyers, disseminates knowledge, and carries out community services, including sexual abuse investigation, and assistance to the university’s legal aid clinic.<sup>373</sup> Individual academics also monitor including Sloth-Nielsen who is examining *inter alia* child-headed households and constitutional obligations, corporal punishment, and juvenile justice.<sup>374</sup> In

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<sup>368</sup>McClain (note 308 above); and Parker-Loewen (note 332 above).

<sup>369</sup>UNCRC(note 310 above), paras.20, 22.

<sup>370</sup>Giroux proposed the association at the autumn 2001 ENOC meeting and a working group is considering it; Giroux (note 95 above).

<sup>371</sup>Gallinetti (note 201 above). Also see below.

<sup>372</sup>McClain (note 308 above).

<sup>373</sup>Davel (note 140 above).

<sup>374</sup>Sloth-Nielsen (note 72 above).



Canada, very few academic centres for children's rights exist and none in a law faculty.<sup>375</sup> Some individuals carry out valuable work<sup>376</sup> and may support NGO monitoring.<sup>377</sup> While some Canadian academics contribute the aforementioned National Longitudinal Survey of Children and Youth and conduct other monitoring,<sup>378</sup> they may not consistently utilise a child rights framework. Consequently, child rights awareness and monitoring in Canadian academe should be advanced.

## 2.6 News Media

News media in both countries can be important monitors and can mobilise immediate responses to redress issues. For example, once a South African news programme revealed malnutrition deaths of children in Eastern Cape were directly linked to the difficulty of obtaining child support, the Minister of Social Development travelled there to provide a grant to all children under age 17 exempting them from the means test.<sup>379</sup> A Western Cape NGO and university monitors cooperated to bring results.<sup>380</sup> Moreover, media's role vis-à-vis juvenile justice in the early 1990s is credited as a factor in the law reform process.<sup>381</sup> Canadian officials also acknowledge media's role and influence in creating "a public profile".<sup>382</sup> While media are powerful resource, weaknesses exist. Typically, media report on "newsworthy" issues, usually responding to situations, rather than preventing them; as

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<sup>375</sup>The centres are: the International Institute for Child Rights and Development at the University of Victoria convenes conferences and conducts international development; and the Children's Rights Centre, University College of Cape Breton (NS), which supports curricula and education and international development.

<sup>376</sup>For example, Howe (note 9 above).

<sup>377</sup>As examples: Covell, co-director, Children's Rights Centre, University College of Cape Breton, is a former CCRC board member and wrote a national NGO report for Special Session preparations: Covell (2001), *Canada's Non-Governmental Organizations Report*; Bailey and Bala, Queen's University, worked with Child Welfare League of Canada to monitor Ontario and federal legislation; SCY: Rights Awareness Project (RAP) (2001), *The UN Convention on the Rights of the Child: A Model for Assessing Policy Compliance*, 14. Some academics contributed to CCRC (note 74 above).

<sup>378</sup>For example, Willms (2002), *Vulnerable children: Findings from Canada's National Longitudinal Survey of Children and Youth*.

<sup>379</sup>Special Assignment produced this story about the Mount Frere district; Gallinetti (note 201).

<sup>380</sup>Motala (note 57 above).

<sup>381</sup>Sloth-Nielsen (1999), "The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach Carry the Day?" 18 *Quinnipiac Law Review*, 471.

<sup>382</sup>For example, Mankovsky (note 100 above).



a result, one NGO representative criticises: “Children are a good media opportunity, and they are used as such. It’s exploitative.”<sup>383</sup> Moreover, news media cover issues on a day-to-day basis and are not necessarily committed to child progress; nor does child monitoring hold the same legitimacy for most news media as financial news for example.<sup>384</sup> In conclusion, news media often do not support a child rights approach to their work, but some small efforts are encouraging including: Young People’s Press, which engages children in Canadian news media; as does Soul City in South Africa.<sup>385</sup>

## 2.7 NGO/Voluntary Sector Monitoring

Various non-governmental or voluntary actors in the case studies contribute to monitoring. The NCRC led the development of South Africa’s first alternative CRC report with impressive participation although procedural details - despite acknowledgment of some dissatisfaction<sup>386</sup> - are curiously absent in the report, despite the need to contextualise results and offer lessons learned. According to Rantla, the NCRC invited 10 or 15 national issue-specific organisations to identify participants for the national task team, then provincial task teams were established. Workshops for NGOs and workshops for children were held in every province to develop provincial reports, which were consolidated into the overall report at a national meeting.<sup>387</sup>

Issue-specific organisations can make important contributions including for instance, supportive Canadian refugee NGOs pursuing both domestic litigation, as interveners in *Baker* for example, and international avenues.<sup>388</sup> Their efforts can be useful and participatory, but also largely reactive. Issue-specific organisations by definition focus on particular concerns often without considering the spectrum of child rights or contextual information, thereby

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<sup>383</sup>Motala (note 57 above).

<sup>384</sup>Glossop, Executive Director of Programs and Research, The Vanier Institute of the Family (2003), Interview with author, Ottawa: 7 January.

<sup>385</sup>Young People’s Press <[www.ypp.net](http://www.ypp.net)> last visited 28 October 2002; Soul City <[www.soulcity.org.za](http://www.soulcity.org.za)> last visited 3 March, 2003.

<sup>386</sup>NCRC (note 79 above), 76.

<sup>387</sup>Rantla, from Rantla, Executive Director; Siwani, Research Consultant; Mabusela, Project Co-ordinator; Makoena, Project Co-ordinator, NCRC (2002), Interview with author, Pretoria: 16 July.

<sup>388</sup>*Baker* interveners included the Canadian Council for Refugees. Following NGO contributions to Canada’s CRC report consideration, the UN Committee acknowledged concerns about refugees in its Concluding Observations; UNCRC(note 12 above), para.13



influencing monitoring and results.<sup>389</sup> While response to the NCRC report is positively portrayed,<sup>390</sup> it follows a linear approach (discussed in Chapter Five), making claims or conclusions about children without adequate justification. Yet the South African government provided the NCRC with a draft of its second CRC report for critique and encourages a second supplementary report, which NCRC is considering.<sup>391</sup> As stated above, academic monitors and other NGOs, including the Child Rights Centre, are developing an alternative report.<sup>392</sup>

Child rights tools to better execute monitoring are needed. Some useful efforts include: Statistics SA and the NPA developing and utilising indicators,<sup>393</sup> as is UNICEF South Africa;<sup>394</sup> IDASA analysis of social spending;<sup>395</sup> and *amicus curiae* interpretations of core minimum content of rights in *TAC*.<sup>396</sup> Nevertheless, actors in both countries highlighted the need to identify and develop models and indicators,<sup>397</sup> the absence of which impedes data collection. Lack of tools complicates monitoring generally reserving it to a small minority, effecting discrimination in terms of participation, but civil societal attempts are being made to address the problem.

Addressing the UN Committee's comment about the absence of a permanent monitoring mechanism,<sup>398</sup> Canadian NGOs have developed CRC monitoring techniques and processes. The Society for Children and Youth of British Columbia (SCY) developed and tested a rating

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<sup>389</sup>See Chapter Five's discussion of approaches.

<sup>390</sup>Rantla affirms government support and; "The UNCRC commented after we presented the report that ours was one of the best NGO reports that they have received." Rantla et al. (note 387 above).

<sup>391</sup>Rantla, *Ibid*.

<sup>392</sup>The network has several project teams that focus on child participation, data collection, media and communication; National Civil Society Network for an Alternative Report to the UN: Children's Rights Now Steering Committee (2004), *Minutes from Meeting*, unpublished report, 15-16 March.

<sup>393</sup>McClain (note 308 above).

<sup>394</sup>Gill et al. (note 56 above).

<sup>395</sup>See below.

<sup>396</sup>*Amici* were IDASA and Community Law Centre, University of Western Cape.

<sup>397</sup>Van Egmond (note 89 above); McClain (note 308 above); and Rantla, Rantla et al. (note 387 above).

<sup>398</sup>UNCRC (note 12 above).



system on every provincial statute and some regulations and some relevant federal legislation, designating each up to four stars based on the degree of CRC compliance using two criteria: overall compliance, and article 12 compliance.<sup>399</sup> Aspects of the tool's use remain unclear because the first report does not explain why only certain CRC general principles are considered depending on the legislation; and the rationale for rating is inadequately explained.<sup>400</sup> But the useful tool has also been utilised in other provinces.<sup>401</sup> The SCY is developing a three-tier monitoring framework for legislation, policy and practice.<sup>402</sup> It has identified foster care regulations for analysis, developed a step-by-step guide for policy analysis, and guidelines for developing policy.<sup>403</sup> Child rights expertise however is necessary to fully comprehend each CRC provision and implications in considering a particular policy. Moreover, relevant questions for consideration include: How to ensure a consistent monitoring approach and who is involved in the assessment process and why? Nevertheless, these contributions are useful to execute and popularise monitoring with accessible tools, which need promotion.<sup>404</sup> Consultations are being held provincially, and with the CCRC nationally, with policy developers and others to determine how to make the child rights lens part of policy development and raise awareness.<sup>405</sup>

The Canadian Coalition for the Rights of Children (CCRC) first developed a monitoring framework in 1997 and used it as the basis of a mechanism to assess Canada's CRC implementation.<sup>406</sup> The aforementioned SCY effort concentrated on government efforts for child rights; the CCRC collected relevant information according to the framework grid,

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<sup>399</sup>SCY (1998), *The UN Convention on the Rights of the Child - Does Domestic Legislation Measure Up?*

<sup>400</sup>See generally *ibid.*

<sup>401</sup>Bailey, Bala and the Child Welfare League (note 377 above); and Pellatt and the Alberta Civil Liberties Research Centre (1999), *United Nations Convention on the Rights of the Child. How Does Alberta's Legislation Measure Up?*

<sup>402</sup>Fronczek (note 349 above).

<sup>403</sup>SCY, RAP (2001), *The UN Convention on the Rights of the Child: 1. Guidelines for Policy Development; 2. A Model for Assessing Policy Compliance; 3. Supplement.*

<sup>404</sup>Fronczek (note 349 above).

<sup>405</sup>*Ibid.*

<sup>406</sup>See Fanjoy & Sullivan (1997), *Canada and the UN Convention on the Rights of the Child: Developing a Monitoring Framework.*; and CCRC (note 74 above) respectively.



which identifies: legislation and regulations, case law, policy, practice, statistics and research, public opinion, other relevant sources, and the voices of children.<sup>407</sup> While the collation of all relevant information is a significant task, reserving the undertaking to specialised researchers,<sup>408</sup> it does create a picture of the situation of children in terms of specific CRC provisions. The CCRC had a participatory process, engaging NGOs, experts and children although younger children were not involved, which could be rectified in a permanent monitoring mechanism.<sup>409</sup> The CCRC 2003 update for the UNCRC however, did not adhere to same research approach guided by CRC provisions in including additional “emerging issues” identified at a national NGO consultation.<sup>410</sup> The CCRC has completed a project involving ten communities across the country, engaging community-based networks to raise awareness and train actors about child rights to create an accessible monitoring framework.<sup>411</sup> The CCRC decided its earlier framework was “too big and too complex,” and “much more legalistic and much more looking at the research and indicators.”<sup>412</sup> While accessibility is important, it is unfortunate the NGO cannot build on its previous work. The new effort also raises concern that the CRC’s holistic, interdependent nature may be lost for accessibility. Yet, communities and provinces are often disconnected from national monitoring efforts. How can the grassroots be involved in formal monitoring when monitoring and the responsibility to report to international monitors are neither well-known nor accessible? This continues to be a significant challenge for both countries.<sup>413</sup> Hence, the CCRC’s user-friendly toolkit for community monitoring to assess local implementation of child rights is a welcome development.<sup>414</sup>

These aforementioned NGO efforts were the result of short-term exercises dependent upon

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<sup>407</sup>Fanjoy & Sullivan (ibid.), 10.

<sup>408</sup>CCRC (1999), *How does Canada measure up?* 126.

<sup>409</sup>Ibid., 119, 126.

<sup>410</sup>CCRC (2003), *The UN Convention on the Rights of the Child: How Does Canada Measure Up? 2003 Update to Canada’s Report to the UN Committee for the Rights of Children, May 2003.*

<sup>411</sup>CCRC (2003), *Monitoring Children’s Rights: A Toolkit for Community-Based Organizations.*

<sup>412</sup>Griffin (note 104 above).

<sup>413</sup>See below.

<sup>414</sup>CCRC (note 411 above).



available funding and human resources. In contrast to South African efforts, the Canadian federal government financially supported the development of these projects. The Canadian emphasis upon the development of tools may serve monitoring, its understanding and execution in various contexts.

Other efforts include groups coalescing to describe child rights in Alberta<sup>415</sup> and contributions from such South African NGOs as the Child Rights Centre and ChildrenFirst.<sup>416</sup> Save the Children Sweden has developed an innovative opinion poll involving 1,200 South African children using focus group activities relative to the development of the participants to ascertain views on their rights.<sup>417</sup> The NCRC's pilot project in Limpopo investigated inter-generational communication,<sup>418</sup> finding cultural issues are causing communication gaps and developed five communications models.<sup>419</sup> The project is useful in light of the UN Committee's concern about "traditional practices and attitudes" limiting full CRC implementation, especially in provincial and local areas, due to tension with views of the child.<sup>420</sup> The impact of the wide-ranging NGO efforts varies.<sup>421</sup>

The monitoring of government allocations and expenditures is a major South African strength as results illuminate the reality of the child rights commitment and supports the monitoring of international child rights. Similar Canadian government work has been done<sup>422</sup> but without the same significance since such government efforts tend to be haphazard, often focussing on specific areas in isolation from other spending or allocations of different

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<sup>415</sup>Roundtable on Rights of Child (1995), *The Alberta Disadvantaged: State of Alberta's Children: 1995 - Summary of Proceedings of Round Table on Rights of Child*.

<sup>416</sup>Motala (note 57 above); and Desmond, ChildrenFIRST (2002), Interview with author, Durban: 23 July.

<sup>417</sup>Clacherty and Associates & Donald, University of Cape Town (2002), *Children's Poll: South African Child Rights Survey*.

<sup>418</sup>Rantla, Siwani, Mabusela, Mahwelereng and Vhembe Communities (2002), *Intergenerational Communication Initiative: Pilot Project Report*.

<sup>419</sup>Mabusela, from Rantla et al., (note 387 above).

<sup>420</sup>UNCRC(note 44 above), para.19.

<sup>421</sup>See below.

<sup>422</sup>For example, Government of Canada, Canadian International Development Agency, Political and Social Policies Division, Policy Branch (1999), *Annual Report: CIDA's Programming in Support of Children, Fiscal Year 1996-97*. Although identified as an "annual report", it has not appeared annually.



departmental divisions or departments and do not necessarily consider child rights. While a government mechanism to assess government spending on children does not exist,<sup>423</sup> the task is well managed by the Children's Budget project of the Institute for a Democratic South Africa (IDASA).<sup>424</sup> According to the ORC's Theron, IDASA "serves as a very effective monitoring mechanism for our office. I normally read their publications on the children's budget and the evaluation of government service delivery - which has proved to be extremely useful. I see this as constructive criticism on how service delivery to children can be improved."<sup>425</sup> Beginning in 1996, its approach has evolved from a poverty-focus to a child rights approach as IDASA's Cassiem explains:

*We started by providing an overview of the situation of children and where they are in the budget. This has complemented and further allowed us to move farther. Now government budgets are more accessible. Government information better informs child rights programming. So we've moved away from a poverty focus to one of discrimination. It's important for South Africa because of issues of social exclusion for example. We want to look at examples of class, gender, and race in our work as well. Those sorts of things, those issues, speak more to a child's rights framework than child poverty.*<sup>426</sup>

IDASA also provides capacity building on budgeting monitoring tools for civil society and government.<sup>427</sup> For example, government analysis found in 2001 that between 30 to 60 per cent of HIV/AIDS allocations to South African provinces were not utilised.<sup>428</sup> It also plans a social and economic rights study to inquire about children's opinions of government service delivery and what government priorities should be for children's rights.<sup>429</sup> As part of developing child rights framework, this monitoring study aims to listen to child voices, which "gives more credibility to our research findings and recommendations."<sup>430</sup>

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<sup>423</sup>South Africa NPA Steering Committee (note 30 above), 20.

<sup>424</sup>See examples: Cassiem and Streak (2001), *Budgeting for child socio-economic rights: Government obligations and the child's right to social security and education*; and Cassiem et al. (2001), *Child Poverty and the Budget in South Africa: A South African Child-Focussed Budget Study*.

<sup>425</sup>Theron (note 51 above).

<sup>426</sup>Cassiem, Manager, Children's Budget, IDASA (2002), Interview with author, Cape Town: 29 July.

<sup>427</sup>Ibid.

<sup>428</sup>Godt, in Gill et al. (note 56 above).

<sup>429</sup>Cassiem (note 426 above).

<sup>430</sup>Ibid.



Many monitors have inadequately considered government allocation and spending even though the area is significant in determining child rights commitments and the UNCRC specifically requests it.<sup>431</sup> IDASA is one of only a few organisations in the world undertaking such budget monitoring.<sup>432</sup> Unfortunately, Cassiem has found very few countries can replicate its methodology since most countries lack a strong constitutional court, constitutional human rights obligations, civil societal constitutional challenges, and human rights culture.<sup>433</sup> The availability of information and government's willingness to be monitored also promotes success.<sup>434</sup> Government's acceptance and respect of IDASA's role and results is a valuable example of the way forward for relations among all monitors. While this type of monitoring is significant, it is not the only one: all elements affecting child rights should be monitored including *inter alia* legislation, regulations, policies and programmes.

While Canadian actors from government and civil society regularly communicate and active NGO coalitions exist, South Africa faces a major problem of lack of communication amongst most actors, which aggravates fragmentation and potentially duplication. Despite the ChildrenFirst magazine, the Child Justice Alliance, and the network to develop an alternative CRC report,<sup>435</sup> research interviews demonstrated consistent lack of awareness of others' activities. For example, the NCRC is communicating inadequately and several no longer see its relevance,<sup>436</sup> which creates much tension throughout much South African civil society due to its role as NGO representative on the NPA Steering Committee. Competition among monitors may also be an issue,<sup>437</sup> impeding coherence of approach and efforts.<sup>438</sup> The value of communications is a Canadian lesson learned through reliance upon established coalitions or media including an organisation to promote and monitor the CRC (CCRC), another to improve children's lives (National Children's Alliance), and a website to provide resources

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<sup>431</sup>UNCRC(note 133 above), para.20.

<sup>432</sup>Cassiem (note 426 above).

<sup>433</sup>Ibid.

<sup>434</sup>Ibid.

<sup>435</sup>See above.

<sup>436</sup>Motala (note 57 above); Reinius (note 305 above); Sloth-Nielsen (note 72 above).

<sup>437</sup>Motala (note 57 above).

<sup>438</sup>Reinius (note 305 above).



(Child and Family Canada). Nonetheless, Canadian communications between government and civil society can improve to advance monitoring.<sup>439</sup> As monitoring child rights is still fairly recent responsibility, consensus on effective approaches does not yet exist resulting with fragmentation and ad-hoc efforts in both case studies, which highlight the valuable role of communications.

While politicisation is a factor in Canada,<sup>440</sup> it appears more significant in South African civil society<sup>441</sup> and the NPA.<sup>442</sup> The NCRC's position as the sole NGO representative on the NPA Steering Committee is contentious. Rantla explains the organisation had a critical historical role, leading to its inclusion.<sup>443</sup> Significant civil societal actors acknowledge the NCRC's significant anti-apartheid role, but believe it is weak, non-communicative<sup>444</sup> and non-representative.<sup>445</sup> Another questioned the NCRC's linkage with the ANC, the governing political party.<sup>446</sup> An ORC official recognises the problem and indicated follow-up meeting plans with NGOs to discuss NPA representation.<sup>447</sup> Monitoring is affected since attention focuses on political forces or situations, rather than child rights.

In sum, NGOs are often important monitors but capacity is often questionable due to variable resources. Canadian organisations expect and need funding from the federal government while South African organisations often receive funding from international donors. Funding can therefore, affect the process and results of work.<sup>448</sup> Civil societal approaches may also

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<sup>439</sup>Van Egmond (note 89 above).

<sup>440</sup>For example, some actors politicise international monitoring to dismiss results; see s.2.8.

<sup>441</sup>Hollamby, Researcher, South African Law Commission (2002), Interview with author, Pretoria: 17 July; Reinius (note 305 above); and Cassiem (note 426 above).

<sup>442</sup>Sloth-Nielsen (note 72 above).

<sup>443</sup>Rantla, from Rantla et al. (note 387 above).

<sup>444</sup>Gallinetti (note 201 above).

<sup>445</sup>Motala (note 57 above).

<sup>446</sup>Reinius (note 305 above).

<sup>447</sup>Theron (note 51 above).

<sup>448</sup>See below.



vary, affecting monitoring results.<sup>449</sup>

## 2.8 International Monitoring Experiences

Domestic monitors in both countries highlight the valuable role to their work of the UNCRC, its Concluding Observations and other international monitors. As examples, one South African NGO quotes from the Committee in government submissions and to focus other work,<sup>450</sup> and a Canadian acknowledged the “effective advocacy tool” and significant “media mileage” from UN comparative reports to support the case for domestic action or to illustrate different approaches.<sup>451</sup> The arrival of Chinese children in boats to British Columbia for example involved a UN Special Rapporteur, the UN High Commission for Refugees and International Red Cross all focussing on the children’s situation.<sup>452</sup> Provincial officials found it beneficial to get reinforcement of almost all their efforts and to learn about children’s feelings about their experiences in care.<sup>453</sup> But a Canadian federal official acknowledged the UN Committee results have limited impact on government: “although we are always aspiring not to be embarrassed or to look good, [it] is probably a short-term impact;” but the Committee provides “very effective” lever for civil society.<sup>454</sup> Hence, the importance of the relationship between international and national monitors should not be underestimated.

International monitors particularly contribute to developing countries including South Africa. UNICEF for instance, is conducting institutional analysis about children in municipalities to obtain quantitative indicators and analysis of capacities of duty-bearers, using the triple ‘A’ cycle of assessment, analysis and action, where people including children in communities undertake their own monitoring and develop responsive action plans.<sup>455</sup> Thus municipalities will be educated, more aware of children, and have resources to become a monitoring system

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<sup>449</sup>See below and Chapter Five.

<sup>450</sup>Motala (note 57 above).

<sup>451</sup>Glossop (note 384 above).

<sup>452</sup>Pike (note 113 above).

<sup>453</sup>Ibid.

<sup>454</sup>Van Egmond (note 89 above).

<sup>455</sup>Mateljak, from Gill et al. (note 56 above).



that takes follow-up action.<sup>456</sup> International donors can often play a valuable domestic monitoring role.

While the Canadian government supports some monitoring, South African monitoring tends to be funded by international donors as illustrated by: UNICEF's grant to publish South Africa's initial CRC country report;<sup>457</sup> the UN Development Programme and the Swiss Agency for Development and Cooperation sponsoring of UN technical assistance in child justice;<sup>458</sup> and the Norwegian Human Rights Institute and Save the Children Sweden funding to publish an IDASA report.<sup>459</sup> International actors are important, if not essential, to South African monitoring<sup>460</sup> with such advantages as many international and regional links and experiences, technical advice and financial support, and can address important issues local actors may not.<sup>461</sup> Several South African NGOs confirm the valuable role of international funding, particularly due to limited domestic and local funding focussing on service-delivery.<sup>462</sup> As funding determines activities however, one commentator believes international NGO agendas have played a divisive, manipulative role in promoting some organisations and not others.<sup>463</sup> An evaluation of the South African Law Commission's child participation process also identifies some potential complications: international materials may not be applicable or useful domestically; insensitivity to the foreign situation; or lack of acceptance of international actors by citizenry of "foreign methodology".<sup>464</sup> International donors' efforts may not always meet domestic needs; in response, extensive contextual

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<sup>456</sup>du Toit (note 339 above).

<sup>457</sup>South Africa NPA (note 30 above).

<sup>458</sup>Ministry for Justice and Constitutional Development & UNDP South Africa, *Pamphlet: Child Justice Project*.

<sup>459</sup>Cassiem & Streak (note 424 above), iii.

<sup>460</sup>South African Law Commission (note 109 above), 1230.

<sup>461</sup>Reinius (note 305 above).

<sup>462</sup>Cassiem (note 426 above); Liedeman, National Coordinator, Disabled Children's Action Group (DICAG) (2002), Interview with author, Cape Town: 30 July; and Rantla, from Rantla et al. (note 387 above).

<sup>463</sup>Sloth-Nielsen (note 72 above).

<sup>464</sup>Nevertheless, the project was productive; Clacherty and Associates (2001), *Evaluation of the South African Law Commission Child Participation Process*, 27-29.



briefing of international actors is recommended.<sup>465</sup> Coordinated government funding of NGOs can allow “more consistency and coherence in the range of initiatives being supported,” and in theory is more democratic with local, rather than internationally determined objectives.<sup>466</sup> But NCRC for example has not even considered approaching government for financial support.<sup>467</sup> Government funding however, can be problematic too. Fully funded NGOs are no longer independent and “are consequently less capable of providing an effective critique of government policy.”<sup>468</sup> Alternatively, a Canadian NGO representative criticises federal funding for monitoring because: “It really limits it because there is so little.”<sup>469</sup> Funding sources inevitably involve various implications that require consideration.

Usage of the international monitoring system by citizenry illustrates the system’s relevance to a country. While South Africans have not utilised international procedures much to date due to few ratified instruments,<sup>470</sup> many Canadians have. For instance, Canadians are among the few countries whose citizens have submitted the most number of complaints under the first Optional Protocol to ICCPR.<sup>471</sup> According to UN HRC member Yalden (as he then was), this is due to Canada’s active bar and NGO community aware of human rights.<sup>472</sup> For example, Waldman contested Ontario’s public funding for Roman Catholic schools, which had not been available for his or other religions, alleging violation of his children’s right to

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<sup>465</sup>Ibid.

<sup>466</sup>Lansdown (2002), *Disabled Children in South Africa: Progress in implementing the Convention on the Rights of the Child*, 2002, 11.

<sup>467</sup>Rantla, Executive Director; Siwani, Research Consultant; Mabusela, Project Co-ordinator; Makoena, Project Co-ordinator, NCRC (2002). Interview with author, Pretoria, 16 July.

<sup>468</sup>Lansdown (note 69 above), 11.

<sup>469</sup>Griffin (note 104 above).

<sup>470</sup>See s.1.2 above.

<sup>471</sup>OHCHR (2002), *Statistical survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights* (3 May 2004): Australia (75), Canada (110), France (61), Jamaica (177), Netherlands (78), Spain (59), and Uruguay (79) are the only states parties from the total number of 104 that are the source of fifty or more complaints (as noted).

<sup>472</sup>Australia, France, the Netherlands and Canada are the sources of more than 25 per cent of the complaints to the HRC; Yalden (note 20 above).



freedom from discrimination under ICCPR.<sup>473</sup> Resort to the ICCPR was useful since domestic court challenges have been unsuccessful due to constitutional guarantees for denominational schools.<sup>474</sup>

But, Waldman's role as payer of tuition fees to his children's private religious school dominated the complaint and the results; child rights were of little concern to either the complainant or the monitor. Consequently, the Waldman communication is an example of children's invisibility in monitoring<sup>475</sup> and highlight the need for international communications about child rights. Consistent with the VCLT,<sup>476</sup> the state's rationale of the constitutional obligation to fund Catholic schools was rejected.<sup>477</sup> The UN Committee found Canada violated ICCPR article 26, equality before the law and equal protection of the law, due to discriminatory Catholic school funding excluding other denominational schools (although a non-denominational public system also exists). While the state party must determine its response, the *Waldman* finding has had little official impact upon the government: there was and continues to be little consideration of this discriminatory arrangement; in fact the relevance of the international monitoring results was questioned.<sup>478</sup> The case reveals tension between national sovereignty and international human rights that the UN Charter reflects.<sup>479</sup> It would have been beneficial for the HRC to contextualise its recommendations since results perceived to be irrelevant or unconstitutional can lead to questions not only about the results but also the monitor's role. But why did the Government of Canada not address this constitutionally-sanctioned discrimination at the ratification of either the ICCPR or CRC? While Canada has not officially responded to this contravention

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<sup>473</sup>*Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (5 November 1999).

<sup>474</sup>Constitution Act 1867, s. 93, *Adler et al. v. Ontario* (1992), 8 O.R. (3d) 676 (Div. Ct.) aff (1994), 19 O.R. (3d) 1 (C.A.), and *Bal v. Ontario* (1995), 21 O.R. (3d) 681 (Gen. Div.), cited in CCRC (note 74 above), 85.

<sup>475</sup>This concept, discussed below, is identified by Sloth-Nielsen (note 42 above).

<sup>476</sup>Article 27 states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"; *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF. 39/26, adopted 23 May 1969, entered into force 27 Jan. 1980.

<sup>477</sup>HRC (note 473 above), para.10.4.

<sup>478</sup>Pearson (note 67 above).

<sup>479</sup>See preamble and Chapter I.



since education is a provincial matter; the province now partly funds religious education (other than Catholic) through tax deductions, although it will not acknowledge the ICCPR or the HRC's role in promoting change.<sup>480</sup> Thus, the impact of monitoring results is not always clear or discernible in a jurisdiction.<sup>481</sup>

While the role and significance of international monitors, particularly the UNCRC, are acknowledged by domestic monitors, better consideration and appropriate responses to international monitoring results are generally necessary. Moreover, child rights actors in Canada and South Africa tend to focus solely on the CRC and its monitoring. Awareness of and contributions to other international monitors may be useful to child rights. The role of the African Children's Committee for instance, offers much potential with its mandate not only to review state party reports but also conduct communications and investigations.<sup>482</sup>

### 3.0 EVIDENCE OF A CHILD RIGHTS-BASED APPROACH IN DOMESTIC MONITORING

A child rights-based approach based on CRC general principles (non-discrimination, best interests, maximum survival and development and views of the child) frames analysis followed by overall considerations.

#### 3.1 Non-Discrimination

Respect of the non-discrimination principle respects every child including his/her group identity in monitoring and ensures disaggregated data collection. Relevant issues for both countries include: equality rights; and absence of or weakness of provincial or community monitoring.

Judicial decision-making in both countries affirm non-discrimination to varying degrees. Despite increasing CRC reference, Canadian courts are more likely to consider the child's constitutional right to equality as a persuasive argument rather than unincorporated children's rights law. Sloth-Nielsen also found the theme of equality arguments more significant in

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<sup>480</sup>Yalden (note 20 above).

<sup>481</sup>See below.

<sup>482</sup>African Children's Charter a.43, 44 and 45; see Thesis Chapter Two, s.4.0.



constitutional litigation than children's rights.<sup>483</sup> Non-discrimination is not advanced in monitoring South African customary law, due to inconsistent interpretation effecting discrimination, particularly for girls and non-marital children. A future study should examine the relationship between equality rights and child rights in international and national law.

Both countries' absence or weakness of provincial or community rights-based monitoring is an obstacle to non-discrimination. Some exceptions include the Free State, which is translating the PPA well to local programmes of action (LPAs),<sup>484</sup> SCY's aforementioned work in British Columbia, and the CCRC community-based project. But concerns remain about the lack of community involvement in both countries.<sup>485</sup> Most monitoring is considered a technical and inaccessible process. The ORC has been unable to encourage provinces to establish LPAs.<sup>486</sup> As rural areas remain a challenge,<sup>487</sup> such organisations as DICAG should be engaged since 95 per cent of its membership is rurally-based.<sup>488</sup> More individuals and institutions should undertake local and provincial monitoring.

South Africa's commitment to non-discrimination with constitutional child rights, the Constitutional Court, and formal monitoring structures, is commendable. Canada has good participation opportunities for children and data collection but federalism makes data comparability across jurisdictions difficult. Canadian monitors follow an ad-hoc approach, furthering inconsistent efforts. In both countries, academics, news media and NGO/voluntary sector are active although most are hampered by lack of capacity or resources, compromising non-discrimination in the comprehensiveness of efforts.

### 3.2 Best Interests

The best interests principle requires centring all activity around the child. While some judges accurately reflect the principle, the following issues are problematic and restrain a child rights

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<sup>483</sup>Sloth-Nielsen (note 42 above), 149-152.

<sup>484</sup>du Toit (note 339 above).

<sup>485</sup>Griffin (note 104 above); and Gallinetti (note 201 above).

<sup>486</sup>Cassiem (note 426 above).

<sup>487</sup>Ned, from Gill et al. (note 56 above).

<sup>488</sup>Liedeman (note 462 above).



approach: limited resources and capacity; and fragmentation.

Lack of, or limited resources restrict domestic monitoring in both countries<sup>489</sup> and best interests of the child. As examples, Van Heerden acknowledges the problematic restriction of the High Court to major centres;<sup>490</sup> and academic funding affects how much can get done.<sup>491</sup> Nevertheless, lack of resources does not mediate or excuse the commitment to children. For instance, IDASA found defence spending had increased relative to welfare allocations,<sup>492</sup> resulting with job creation to advance poverty alleviation objectives,<sup>493</sup> but minimising the government priority of children. The UN Committee's concern about the SAHRC's lack of resources continues to be relevant since it is "seriously understocked and seriously incapacitated with resources."<sup>494</sup> The monitor's important work demands sustained financial support. But funding availability must be critically analysed since it may adversely affect objectivity, compromising distance between civil society and government, and losing distinct voices.<sup>495</sup> In Canada, government supports the development of alternative reports while international donors support South African efforts. Parfitt supports the Canadian approach because the task requires money and is an important area of human endeavour.<sup>496</sup> In general, the government has a role and responsibility to support broad monitoring; NGOs lack capacity and funding sources usually focus on service-delivery, hence there are very few "monitoring-only actors".<sup>497</sup> In addition to financial support, necessary resources include human and technical capacity. Family Advocates in the Western Cape and Eastern Cape for example are tasked with monitoring and mediating the best interests of minor children under South Africa's 1979 Divorce Act, and "much falls to their untrained discretion to determine

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<sup>489</sup>Desmond (note 416 above); Fronczek (note 349 above); Griffin (note 104 above); and Giroux (note 95 above).

<sup>490</sup>van Heerden (note 298 above).

<sup>491</sup>Covell & Howe (note 95 above).

<sup>492</sup>Cassiem et al. (note 424 above), 100.

<sup>493</sup>Ibid., 54.

<sup>494</sup>Gallinetti (note 201 above).

<sup>495</sup>Sloth-Nielsen (note 72 above); Glossop (note 384 above).

<sup>496</sup>Parfitt, former Deputy Ombudsman for Children and Youth and Deputy Ombudsman British Columbia (and as of 2005, UNCRC member) (2002), Interview with author, Victoria: 16 August.

<sup>497</sup>Pearson (note 67 above).



what constitutes this complex concept.”<sup>498</sup> Moreover, with South African democracy, the gap in resources impeded engagement of skilled civil servants.<sup>499</sup> Now, many former representatives of civil society are now employed in government, inevitably affecting the former’s human resources. This development may have precipitated the conclusion that NGO involvement in governmental efforts was no longer necessary, limiting NGO representation on the NPA Steering Committee.<sup>500</sup> Lack of resources also restricts experimentation or expansion of monitoring. For example, the courts are out of reach due to the expenses of travel, difficulty of representing oneself or obtaining legal aid for private law concerns.<sup>501</sup> Even if monitors collect data, lack of resources to analyse and/or report results stunt potential impact. Commitment to the child’s best interests and better awareness of the important role of monitoring<sup>502</sup> should improve resource availability.

Due to resource limitations, monitors in both Canada and South Africa face difficulties in maintaining capacity, hindering child rights monitoring and the child’s best interests. As examples, the South African sexual abuse registry is “struggling”,<sup>503</sup> and completion of the CCRC monitoring project was difficult.<sup>504</sup> Civil society is particularly overworked and struggling to fulfil mandates,<sup>505</sup> which is insufficiently recognised. For instance, the South African Law Commission’s child participation process on the Child Care Act learned assumptions were incorrect about the skill sets of those expected to run consultations.<sup>506</sup> The SAHRC consultations with children experienced similar difficulties with some NGO partners.<sup>507</sup> Differences of resources, staff training, and the issue of race appear to affect

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<sup>498</sup>Glasser (2002), “Can the Family Advocate adequately safeguard our children’s best interests?” *65 Journal of Contemporary Roman-Dutch Law*, 77, 82.

<sup>499</sup>Klugman (2000), “The Role of NGOs as Agents for Change”, *Development dialogue* (1/2), 108.

<sup>500</sup>See below. Motala (note 57 above).

<sup>501</sup>van Heerden (note 298 above).

<sup>502</sup>See below.

<sup>503</sup>Davel (note 140 above).

<sup>504</sup>CCRC (note 74 above). Following completion, the Coalition closed its office; it is now housed within a member’s office.

<sup>505</sup>Clacherty and Associates (note 464 above), 24.

<sup>506</sup>*Ibid.*, 34-36.

<sup>507</sup>SAHRC (note 28 above), 110-111.



capacity of South African civil societal organisations where “a kind of apartheid still exists in structures and the set up of things.”<sup>508</sup> The NCRC executive director describes:

*Black organisations and South African organisations are not necessarily that competent. ... We are struggling to acquire competencies, to do work as in monitor or whatever we must do, participate in international and regional processes that get between our capacity and knowledge, if you wish, as compared to that in the white organisations. We still have to catch up.*<sup>509</sup>

The differences have created tension among actors. Similarly, Canadian government officials often assume civil society can participate in events or committees without costs.<sup>510</sup> While the Canadian federal government has funded some NGO monitoring endeavours, it has not yet sustained efforts towards a permanent monitoring mechanism. Occasional small-scale focussed examinations take place, but most formal monitoring is limited to report preparation - whether government or non-government - every five years so the child rights situation is inadequately assessed.<sup>511</sup> The UNCRC repeated its concern about the absence of coordinated monitoring.<sup>512</sup> Limited mandate and capacity often restrict monitoring to reacting, rather than preventing crisis situations. Parker-Loewen criticises her office’s role in responding to child welfare situations after the death of a child; she believes that monitoring should be more proactive and consistent over time in its attention to children.<sup>513</sup> Effective monitoring is an ongoing activity requiring continuous attention and sufficient capacity to serve the child's best interests.

Fragmentation of actors, whether government or civil society, and of efforts can weaken monitoring and obstruct best interests. For example, the South African provincial premiers’ offices attempt to monitor but do not work together and remain isolated without information and knowledge.<sup>514</sup> The division of child rights responsibility in both countries across numerous government departments and sections within departments, along with government

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<sup>508</sup>Reinius (note 305 above).

<sup>509</sup>Rantla, from Rantla et al. (note 387 above).

<sup>510</sup>Glossop (note 384 above).

<sup>511</sup>Covell & Howe (note 95 above).

<sup>512</sup>UNCRC (note 12 above), para.10-11.

<sup>513</sup>Parker-Loewen(note 332 above)

<sup>514</sup>Mbambo (note 75 above).



restructuring, isolate efforts from one another, create questions of responsibility, and complicate monitoring. For instance, a UNICEF representative identifies the real problem is not so much that South African government departments do not monitor as there are various departmental surveys and systems, it is “the integration of these different information systems to come up with a comprehensive picture, especially at the lower level.”<sup>515</sup> The conclusion also describes the fragmented, ad-hoc approach to Canadian government monitoring. In addition, the fact that most NGOs operate on a project-by-project basis without core funding or long-term planning capacity stunts knowledge creation.<sup>516</sup> The NCRC agrees the lack of organisation has adversely affected monitoring.<sup>517</sup> Fragmentation also creates and sustains communications difficulties discussed above. Despite encouraging activity for an alternative CRC report, the absence of a national child rights coalition in South Africa also reflects fragmentation. Strong divisions between government and civil society also exist. For instance, the Constitutional Court noted in *TAC* a “...regrettable degree of animosity and disparagement, culminating in unsubstantiated and gratuitous allegations of untruthfulness...” between government and applicants.<sup>518</sup> Little interaction exists between South African NGOs and government<sup>519</sup> since, for example, the South African Joint Monitoring Committee found in 2001 *inter alia* the Eastern Cape PPA excluded civil society, and hence was ineffective.<sup>520</sup> Improved coordination and mainstreaming child rights are needed;<sup>521</sup> policy-makers, researchers and monitoring institutions should work more closely together.<sup>522</sup> Coordination among monitors will serve child rights by increasing data collection and assessment, improving awareness, and potentially advancing follow-up.

In conclusion, the South African commitment to best interests led not only to the constitutional commitment but also to the establishment and efforts of executive, legislative,

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<sup>515</sup>Mateljak, from Gill et al. (note 56 above).

<sup>516</sup>Glossop (note 384 above).

<sup>517</sup>Rantla, from Rantla et al. (note 387 above).

<sup>518</sup>*TAC* (note 197 above), para.20.

<sup>519</sup>Liedeman (note 462 above).

<sup>520</sup>Joint Monitoring Committee, in Lansdown (note 69 above), 33.

<sup>521</sup>Theron (note 51 above).

<sup>522</sup>Cassiem (note 426 above).



judicial and independent child rights monitors. Canadian executive, legislative and judicial actors consider best interests more inconsistently; provincial advocates play a valuable role primarily for children in care of the state but are not yet in every province or federally. Academics, news media and NGO/voluntary sector in both countries monitor best interests but are influenced by limited capacity. South African judges have advanced the principle and other child rights while Canadian judges are more variable. For instance, *Christian Education* affirmed the child as the “centre of the enquiry”.<sup>523</sup> But best interests continue to be restrained in judicial decision-making at the highest level in both countries due to concerns about expenses of rights as demonstrated by *Grootboom* and *Auton*. Child rights should have higher priority. Himonga states the principle is the most important harmonising instrument of domestic legislation and customary law with the CRC as *Hlophe* illustrates.<sup>524</sup> While the Canadian Supreme Court decided in favour of best interests in *Baker*, the principle is not yet revolutionary in Canadian decision-making as per the corporal punishment issue where child rights were minimised and parental rights stressed. Parfitt explains adults do not always realise their reliance upon their own experiences in determining the child’s best interest; “our experience with people looking after our best interest had been pretty negative, because we haven’t listened to the [child’s] voice in a meaningful way”.<sup>525</sup> But the principle is evolving since *Eaton* affirmed parental views are not necessarily in the child’s best interests. Despite some progress in both countries, the principle is hampered by concerns about expenses and the child’s invisibility since the child’s perspective contributes to determining best interests.<sup>526</sup>

### 3.3 Maximum Survival and Development

The principle of maximum survival and development requires monitoring the improvement or worsening of child’s survival or development opportunities over time. Monitors in South Africa and Canada are concerned with the child’s right to maximum survival and development but the former’s formal structures may more consistently address children’s rights despite limited capacity. Further, it is problematic that societal failure to advance a

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<sup>523</sup>(note 252 above) 10, para.15.

<sup>524</sup>Himonga (note 223 above).

<sup>525</sup>Parfitt (note 496 above).

<sup>526</sup>Thomas & O’Kane (note 210 above), 137.



child's survival and development can result with his/her death before adequate response in such examples as Eastern Cape malnutrition deaths or Canadian child welfare cases. Emphasis should be on preventative monitoring, rather than reactive responses to child rights. Moreover, the principle is usually interpreted as protection, which is important but should not overwhelm other child rights dimensions including non-discrimination, best interests, and a child's views.

### 3.4 Views of the Child

The views of the child principle ensures children are engaged in relevant matters with due weight given to their views in monitoring. Examples include IDASA's project involving urban and rural children to monitor budgets at the local government level for the realisation of their rights.<sup>527</sup> With NGO and other support, children give presentations to the South African parliament and legislatures about the child support grant.<sup>528</sup> A child or youth's appointment as a Commissioner to the Quebec Human Rights Commission to participate in decision-making is also proposed.<sup>529</sup> South African executive, legislative, and independent monitors all formally address the child's views but insufficiently due to lack of resources and capacity while Canadian executive, legislative monitors and judges address child engagement in an ad-hoc manner. Since "child-centred proceedings are rare,"<sup>530</sup> judges should also be more aware and respectful of child rights. Child engagement is not currently legislatively required so most South African courts do not involve children.<sup>531</sup> But Canadian provincial advocates including those from Saskatchewan and Quebec distinguish themselves in supporting child participation, which the provinces are increasingly acknowledging.<sup>532</sup> In both countries, academics, news media and NGO/voluntary sector consider child engagement but success largely depends upon individual advocates. Monitoring does not yet widely, consistently or effectively involve children. The child's voice is muted in both countries,

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<sup>527</sup>IDASA (2005), *Children Participating in Governance Project (May 2005)*, unpublished paper.

<sup>528</sup>Ned, from Gill et al. (note 56 above).

<sup>529</sup>Giroux (note 95 above).

<sup>530</sup>Van Bueren (2001), *Child Sexual Exploitation and the Law: A contribution of UNICEF to the 2nd World Congress Against Commercial Sexual Exploitation of Children*, Yokohama, December, 17.

<sup>531</sup>van Heerden (note 298 above).

<sup>532</sup>For example, provincial child protection legislation increasingly provide for participation rights although it is an "uneven development" across the country; Howe (note 9 above) 370.



which probably exacerbates a needs-based approach<sup>533</sup> since adults, without child engagement, are largely influencing processes and results; broadening child rights awareness and dedication are necessary.

Children involved in the research process all supported child participation because they believe children have a right and role to engage in monitoring and that inter-generational dialogue involving children, parents and adults is essential. AV. argues: "We should also be informed at every step that the monitors are doing, everything that they do. We should also be working closely with them. ...we can help the other children to know about it."<sup>534</sup> RL. concurs: "Also when the children are involved in monitoring, it kind of lessens the generation gap because the children are really involved with the adults and it helps understanding."<sup>535</sup> National distinctions existed in focus group recommendations to advance engagement: Canadian children suggested offering incentives including awards while South African children recommended awareness campaigns. Canadian children demonstrated sensitivity and concern about monitoring in developing country contexts. South African children emphasised the constitution's importance and how it empowers them. They all had much to offer in terms of knowledge and recommendations.

Officially, child participation is advancing globally. A number of governments are supportive at the international level according to Dion, including Mexico, and some African states although Mali, Eastern and some Western European countries remain quite conservative.<sup>536</sup> Its role and significance within the particular context determines effectiveness; and countries have strengths in different areas. Mexico had a non-binding children's election, while Nicaragua and Brazil allow children to vote,<sup>537</sup> reflecting the degree of commitment of these countries to the child's role in society.

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<sup>533</sup>See below.

<sup>534</sup>Seventeen year-old girl, in Focus Group (2002), organised and facilitated by Ph.D. candidate on the Monitoring of Children's Rights involving Children's Resource Centre, Cape Town: 27 July.

<sup>535</sup>Fifteen year-old girl, in Focus Group (2002), organised and facilitated by Ph.D. candidate on the Monitoring of Children's Rights involving Child and Youth Friendly Ottawa, Ottawa, Canada: 5 October.

<sup>536</sup>Dion (note 88 above).

<sup>537</sup>The Nicaraguan constitution (1987), article 47, gives children above the age of 16 the right to vote, which was emulated by Brazil; Van Bueren (note 146 above), 140.



Although there is much vocal government and civil societal support of child participation and its impact in both countries,<sup>538</sup> “invisibility” of the child in monitoring reflects limited appreciation of child participation.<sup>539</sup> The South African government recognised: “What type of data is collected is a reflection of the predominant view of the commissioning institution or society as a whole. In the case of children, adult views have predominated. If we are to realise children’s rights to participation, their voices must be reflected in decisions about data to be gathered.”<sup>540</sup> Parker-Loewen explains: “There are not yet enough voices of parents and kids, of folks, asking the question of what should be monitored. What should be monitored? It is often a top-heavy decision.”<sup>541</sup> Even with acceptance of child participation, it does not necessarily translate into influential engagement. Covell and Howe point out:

*There is so little understanding of the role or competences of children or the CRC at this time that it is hard to find any political will to take children’s voices seriously. It is not hard to find token representation of children - in fact it seems to have become trendy to have a child on committees - but meaningful participation is generally misunderstood or absent.*<sup>542</sup>

Du Toit confirms such misunderstanding means existing efforts are almost patronising.<sup>543</sup> In the South African context, Lansdown explains empowering children to participate in reform efforts “is relatively poorly developed because neither the government, nor the majority of NGOs, have begun to explore these issues sufficiently.”<sup>544</sup> Sloth-Nielsen found “the invisibility of non-litigant children” is a theme in case law where adults lead efforts to implicate children’s rights in judicial decisions.<sup>545</sup> The conclusion extends to Canada. Children are invisible in monitoring for various reasons. They are generally not aware of child rights and/or monitoring. Participation increases the complexity, cost and time: consultations for example, require commitment and money.<sup>546</sup> Consequently, children are often not engaged in national CRC report development because as one official explains:

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<sup>538</sup>For instance: Dion (note 88 above); Gallinetti (note 201 above).

<sup>539</sup>Originally identified by Sloth-Nielsen (note 42 above).

<sup>540</sup>South Africa, ORC (note 41 above), 22.

<sup>541</sup>Parker-Loewen (note 332 above).

<sup>542</sup>Covell & Howe (note 95 above).

<sup>543</sup>du Toit (note 339 above).

<sup>544</sup>Lansdown (note 69 above), 28, 32.

<sup>545</sup>Sloth-Nielsen (note 42 above).

<sup>546</sup>Hollamby (note 441 above).



“...[I]t is quite complicated to try to get a [government] report done, let alone to do it either in conjunction, or in collaboration or involving in some way civil society or children”, despite the participatory ambitions of rights-oriented officials.<sup>547</sup>

Marginalised children including for example, those with disabilities, face particular obstacles. While South African authorities advance participation, “little work” to date has engaged children with disabilities in developing proposals for education reform for instance.<sup>548</sup> Similarly, Canadian children with disabilities continue to be overlooked and/or excluded.<sup>549</sup> They remain invisible because some families do not admit to having a child with disabilities due to prejudice, likely leading to under-reporting and less access to services.<sup>550</sup> In addition, monitors do not always study children with disabilities. IDASA’s Children’s Budget report (2000) for example, did not but it is now examining the relationship in the Western and Eastern Cape.<sup>551</sup> Consulted children with disabilities considered inclusion as the most important right, but it is thwarted by many daily barriers; they identified themselves as central to overcoming barriers and effecting change.<sup>552</sup>

There are two levels of child participation in legal challenges. The first level involves children themselves, but they are generally not using the law to challenge their rights violations.<sup>553</sup> Lansdown explains: “there are few [South African] mechanisms available for children to use the law...”<sup>554</sup> The second level involves representation of children by others including the Canadian Foundation for Children, Youth and the Law for example. Case law demonstrates some familiarity with this level: a guardian was appointed for the children in

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<sup>547</sup>Van Egmond (note 89 above).

<sup>548</sup>Lansdown (note 69 above), 19.

<sup>549</sup>Hanvey (2002), *Children with Disabilities and Their Families in Canada: A Discussion Paper*, National Children’s Alliance, 7.

<sup>550</sup>Lansdown (note 69 above), 4.

<sup>551</sup>*Ibid.*, 24.

<sup>552</sup>Youth Workshop report (2001), organised by DICAG, Cape Town, in *ibid.*, 26.

<sup>553</sup>For instance, Sloth-Nielsen (note 42 above).

<sup>554</sup>Lansdown (note 69 above), 31.



TAC;<sup>555</sup> and Sachs J. criticised the absence of an appointed guardian to represent the children's views in *Christian Education*.<sup>556</sup> While generally beneficial, such representation can be problematic since it involves adults' interpretations of children's needs or rights, which may not be accurate. Hence, child engagement remains important.

Although both countries support child participation, improvements are needed. The South African government admitted lack of promotion<sup>557</sup> but it is now "accelerating children's participation in the process of [CRC implementation], especially younger children."<sup>558</sup> Beginning 1 June 2002, known as South Africa's International Children's Day, the ORC began a process involving three nominated children per province and children with physical disabilities at Parliament to discuss: the Special Session on Children outcome and its implementation; their contributions toward a moral regeneration movement; and roles in developing provincial children's fora.<sup>559</sup> Details are needed about the selection process, who the children represented, and how they will contribute over the long-term. Provincial workshops are also taking place over three years throughout the country to discuss the Special Session outcome, the CRC country report, local programmes of action and the issue of NGO representation on the NPA Steering Committee. While these are positive steps, their significance is unclear. But, the NCRC generally criticises child input where "children from the rural areas, villages, townships and informal settlements are often excluded. When attempts are made to involve these children, they are fewer in numbers in groups that are dominated by children from relatively affluent backgrounds."<sup>560</sup> The Government of Canada advanced child participation internationally during preparations for and the UN Special Session<sup>561</sup> and supported domestic consultations with children as part of preparations.<sup>562</sup> An

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<sup>555</sup>(note 197 above).

<sup>556</sup>(note 252 above).

<sup>557</sup>South Africa NPA Steering Committee (note 30 above), 22.

<sup>558</sup>*Ibid.*, 24.

<sup>559</sup>Theron (note 51 above).

<sup>560</sup>NCRC (note 79 above).

<sup>561</sup>See Pearson (2002), *Statement made by The Honourable Landon Pearson to the Senate of Canada: UN General Assembly Special Session on Children*, June 13th.

<sup>562</sup>Save the Children Canada (2001), *A Canada Fit for Children: A Report on the Realities for Young People in Canada Today*.



official describes: "People [within the Government of Canada] are believing it and undertaking it with enthusiasm at the Department of Foreign Affairs, Justice, and Health Canada. The important challenge is to make it effective."<sup>563</sup> While more participation plans exist, obstacles within the Foreign Affairs department for instance include: "the absence of skill/knowledge, which is very important and linked to lack of resources."<sup>564</sup> It is questionable how broad support for child participation extends beyond the small number of civil servants. It is problematic that child participation in both countries tends to be ad-hoc where consultation tends to be the most prevalent effort.<sup>565</sup> At least one advocate believes the South African NPA and ORC consultations are "meaningless."<sup>566</sup> As consultations tend to result from a short-term approach, adults should consider other or longer-term efforts with children.<sup>567</sup> For instance, specific "platforms for children for their own voices and experiences" should be included in systems and processes to ensure children as monitors at every level.<sup>568</sup> Improvements to support the child's role could include for example, making the monitoring system more understandable.<sup>569</sup> Child involvement is not necessarily complex as opportunities exist in such institutions as schools, churches and households.<sup>570</sup> A culture supportive of child participation is also needed as part of the broader context of public participation with clarity of roles and responsibilities.<sup>571</sup>

### 3.5 Overall Considerations

Various general barriers impede a child rights approach to monitoring including: lack of

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<sup>563</sup>Van Egmond (note 89 above).

<sup>564</sup>Dion (note 88 above).

<sup>565</sup>South Africa had the "Say Yes" campaign where the majority of children (68.1%) identified education for every child as a priority, closely followed by a large number who supported that children must be put first with care for every child; fighting poverty and HIV/AIDS was a third priority with 50.2%; Pahad (note 28 above). Canada had a national children's election in 1999 (see <[www.unicef.ca/eng/election/droits\\_enfants.html](http://www.unicef.ca/eng/election/droits_enfants.html)> last visited 10 November 2002); and a Special Session children's consultation; Save the Children Canada (note 562 above).

<sup>566</sup>Motala (note 57 above).

<sup>567</sup>Additional discussion below.

<sup>568</sup>Mbambo (note 75 above).

<sup>569</sup>Van Egmond (note 89 above).

<sup>570</sup>Motala (note 57 above).

<sup>571</sup>McClain (note 308 above).



awareness of, and support for children's rights; limited familiarity with, or the constitutional position of, international law; prevalence of needs-based monitoring; and implications of different monitoring approaches and processes.

Limited knowledge about, and support for children's rights poses significant procedural and attitudinal obstacles to child rights-based monitoring in both case studies. Many children are unaware of their rights and even more are not empowered to seek assistance due to violations as the SAHRC's consultation found.<sup>572</sup> AA. believes a children's march to improve monitoring would not face resistance as children did in 1979 and: "It will inform people. People would be more aware of children's rights."<sup>573</sup> Some adults are unfamiliar with or are threatened by children's rights<sup>574</sup> due to cultural or traditional concerns. With lack of awareness, how are rights to be monitored? But cultural resistance continues in both countries as demonstrated by: continuing high levels of abuse despite South African legislation to ban corporal punishment in schools,<sup>575</sup> and opposition to remove the Canadian Criminal Code defence of corporal punishment. Toope identifies "moral self-awareness", required by child rights, which: "would require of all adults a conscious rethinking of their attitudes towards children, a reassessment of their physical, economic and social power over children..."<sup>576</sup> Government officials in both countries also lack understanding or ignore rights in their work.<sup>577</sup> Some Canadian actors are even apprehensive to use rights language in advocacy because they believe the government will not respond to it.<sup>578</sup> Challenges include improving judicial awareness<sup>579</sup> and the relevance of child rights in much Canadian Supreme

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<sup>572</sup>Lansdown (note 69 above), 32.

<sup>573</sup>14 year-old girl, in Focus Group (Cape Town) (note 534 above).

<sup>574</sup>For example, the 1999 National Election for Youth Rights in Canada provoked concern of "family rights" advocates; Lowther, opposition M.P. (as he then was), compiled some newspapers' negative reactions, (note 25 above).

<sup>575</sup>Lansdown (note 69 above), 14.

<sup>576</sup>Toope (note 60 above), 57-58.

<sup>577</sup>McClain (note 308 above); Pike (note 113 above); and Van Egmond (note 89 above).

<sup>578</sup>Griffin (note 104 above).

<sup>579</sup>van Heerden (note 298 above). Previous efforts include: South African Justice Department's training for magistrates: Sewpaul (note 63 above); UN Child Justice Project's training of criminal justice professionals, Mbambo (note 75 above); and Yolles (1998), *The United Nations Convention on the Rights of the Child: A Practical Guide for Its Use in Canadian Courts*.



Court decision-making<sup>580</sup> and South African decision-making related to customary law.<sup>581</sup> Additional efforts are important because even if training takes place, staffing changes for example, compromise the contribution.<sup>582</sup> Child rights awareness-raising is critical, requiring ongoing attention to support monitoring.

While some rely upon international law,<sup>583</sup> both countries need to promote familiarity with, and constitutional position of, international law to support monitoring. South African actors are aware of international law due to the constitutional provision but confirm its limited domestic influence, particularly in rural areas.<sup>584</sup> Moreover, understanding of child rights usually focusses on the CRC, restricting attention to other monitoring avenues. The African Children's Charter, for example, is inadequately utilised by South Africans to date largely due to the monitoring committee's recent establishment (July 2001) and may still be insufficiently known.<sup>585</sup> Despite *inter alia* CRC article 42, which requires citizenry be informed, and a Canadian minority utilising international law and procedures, general familiarity does not exist due to lack of experience, education,<sup>586</sup> training, exacerbated by the distinction between domestic and international law<sup>587</sup> and the absence of constitutional recognition. Canadian press and even governments question the authority and position of international monitors.<sup>588</sup> Although a Canadian Senate committee now focuses on human rights treaty implementation,<sup>589</sup> Parliament is not debating national reports and Committee observations furthering the disconnect between the domestic context and international law

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<sup>580</sup>See above.

<sup>581</sup>Himonga (note 37 above); and Sloth-Nielsen (note 42 above), 149-152.

<sup>582</sup>McClain (note 308 above).

<sup>583</sup>Pearson (note 67 above); Van Egmond (note 89 above); Gallinetti (note 201 above); and Cassiem (note 426 above).

<sup>584</sup>Motala (note 57 above); Desmond (note 416 above); du Toit (note 339 above).

<sup>585</sup>Davel (note 140 above); Gallinetti (note 201 above).

<sup>586</sup>International human rights law is not always taught and is not obligatory in law school.

<sup>587</sup>Yalden (note 20 above).

<sup>588</sup>Yalden (note 18 above).

<sup>589</sup>See for example, Parliament of Canada, Standing Senate Committee on Human Rights (2001), *Promises to Keep: Implementing Canada's Human Rights Obligations - Report of the Standing Senate Committee on Human Rights*. The Committee is currently examining CRC implementation.



and monitoring. Thus, current CCRC advocacy efforts for example, are not strongly connected to international law.<sup>590</sup> The limited role of international law confirms Beuze's observation about the inconsistencies or irrelevance of legal concepts to many NGO efforts.<sup>591</sup> Consequently, much room exists to improve understanding and use of international child rights instruments in both countries.

The weak understanding of international rights law means many monitors follow a needs-based, rather than a rights-based approach in detailing children's situation. There are fundamental differences between the two approaches. "Essentially, human rights allow human beings to make claims on all other people to uphold their rights."<sup>592</sup> Consequently, a rights-based approach is based on obligation and responsibility whereas a needs-based approach is one of charity, involving choice as to whether the need is addressed or not. Traditionally, the needs-based approach predominated in international law, considering the child an object, rather than subject.<sup>593</sup> Protection was the overriding concern as demonstrated in the limited approach to children in the Declaration on the Rights of the Child, article 10 (3) of the ICESCR, and article 24(1) of the ICCPR.<sup>594</sup> A rights-based approach "integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development."<sup>595</sup> It demands understanding the various causes preventing rights enjoyment,<sup>596</sup> which is necessary for comprehensive monitoring. IDASA now recognises the distinction, better incorporating child rights for an advanced focus on discrimination.<sup>597</sup> But too many monitors follow a needs approach, relying on their adult perceptions and priorities. For example, the Canadian corporal punishment decisions demonstrate a needs perspective - that children need to be corporally punished for their own

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<sup>590</sup>Griffin (note 104 above).

<sup>591</sup>Beuze, Assistant to the Special Rapporteur on Torture (2001), *Response to the "Questionnaire on Activities Related to Children"*, 15 June. See Chapter Two.

<sup>592</sup>Save the Children UK (2002), *What's all this about rights?*

<sup>593</sup>Van Bueren (note 146 above), 51.

<sup>594</sup>Ibid., 53. Also see Chapter Two.

<sup>595</sup>OHCHR (2002), *Human Rights in Development: Rights-based approaches - What is a rights-based approach to development?*.

<sup>596</sup>UNICEF, in Collins, Pearson, Delany (2002), *Rights-based Approach*, 2.

<sup>597</sup>Cassiem (note 426 above).



“good” - inadequately considering their rights.<sup>598</sup> Some actors find it difficult to operationalise and monitor children’s rights because rights seem too abstract so monitoring their interests may seem more realistic.<sup>599</sup> Griffin believes “there is very little monitoring, if hardly any done, from a rights perspective.”<sup>600</sup> The predominant needs-based approach impedes awareness and understanding of child rights and effective monitoring.

Monitors’ approaches determine the pictures they create about the situation of children.<sup>601</sup> Due to these differences, critical analysis of results is essential.<sup>602</sup> The collection, analysis or reporting may be suspect due to efforts not exclusively focussing on child rights: politics, emphasis upon popularity rather than facts, funding objectives may be overriding objectives. For example, Hollamby notes some NGOs may highlight spurious data about children to attract publicity for funding.<sup>603</sup> One Canadian official explains, research should be done by credible sources with capacity who attempt “to understand the whole picture rather than a small part of it or a part that is conveniently left out for political purposes...”<sup>604</sup> The process should not endanger those involved as children in focus groups identified.<sup>605</sup> Thus, the credibility of monitors determines the value and role of the results. For example, domestic monitors increasingly understand and implement child participation in monitoring to enhance credibility as IDASA upholds.<sup>606</sup> Monitors’ efforts, objectives and implications must be assessed to ensure legitimacy and value.

In conclusion, the status of the four CRC general principles in South African monitoring reflects a more formal commitment than Canadian monitoring. South Africa has the ORC to ensure high-level government attention to children’s rights. In contrast, the Canadian

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<sup>598</sup>*Canadian Foundation* (note 185 above).

<sup>599</sup>Glossop (note 384 above).

<sup>600</sup>Griffin (note 104 above).

<sup>601</sup>See Chapter Five.

<sup>602</sup>Sloth-Nielsen (note 72 above).

<sup>603</sup>Hollamby (note 441 above).

<sup>604</sup>Van Egmond (note 89 above).

<sup>605</sup>RJ. and TA., 13 year-old boys, in Focus Group (Ottawa), (note 535 above).

<sup>606</sup>Cassiem (note 426 above).



government has an ad-hoc approach, relying on inter-departmental committees to coordinate international treaty report development without a formalised commitment to consistent monitoring. South African executive, legislative, judges, and independent monitors all formally address child rights. The existence of such structures as the SAHRC, Joint Monitoring Committee, ORC, reflects a pledge to children's rights inspired by CRC ratification. While it is problematic that South Africa is not able to implement all of its intentions, the clear vision and establishment of necessary structures are valuable as are their efforts, offering lessons learned to other countries including Canada. While Canada is committed to children's rights, it has not yet consistently articulated this pledge in its efforts. National executive, legislative, judicial and independent structures inadequately support child rights with their ad-hoc, inconsistent approaches. While federalism is a complicating factor, it cannot excuse the country's child rights obligation. Academics, news media and NGO/voluntary sector in both countries consider child rights in their monitoring although inconsistency and other challenges constrain their efforts. The range of challenges in domestic monitoring is significant but not insurmountable. A coordinated child rights approach among monitors should make significant improvements in domestic efforts.

#### 4.0 CONCLUSION

The international law on child rights has inspired much monitoring in Canada and South Africa with broad societal engagement. (No significant private sector involvement is discernable other than some aforementioned newsmedia.) Both case studies are strongly committed but generally, each country has a unique focus: Canada develops monitoring processes (by NGOs with government support) while South Africa establishes structures (by governments or with government support). Canada's attention to processes, including the movie-star rating system or the framework, may be a response to the challenges of federalism, where establishing structures poses jurisdictional difficulties. It may also result with limited executive and legislative monitoring since other sectors are active.<sup>607</sup> Due to other actors' successes, child rights may not be seen as relevant and are not mainstreamed into general rights efforts. While essential general rights structures exist in Canada, excepting some provincial child advocates, inadequate attention is dedicated to child rights.

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<sup>607</sup>In South Africa for example, DICAG's success means "many other DPOs [Disabled People's Organisations] taking no responsibility within their own organisations for promoting the rights of disabled children." Lansdown (note 69 above), 11.



Moreover, the impact of monitoring processes upon child rights is not always evident.<sup>608</sup>

South Africa has established such structures as SAHRC and the Parliamentary Joint Monitoring Committee. These structures and their importance in society reflects political will,<sup>609</sup> likely due to their absence during apartheid. While structures can mean effective responsibility and progress, their efforts are restrained by limited capacity and resources required to carry out their mandates. In particular, more support for the SAHRC as well as establishing a Canadian federal-level independent monitor for children's rights are needed. Resources for monitoring and child rights awareness also need to improve. But the development and utilisation of appropriate processes or techniques, including IDASA's, should be advanced as they can be utilised by existing actors without establishing new structures. Both processes and structures are beneficial to monitoring and complementary, offering useful suggestions for other jurisdictions.

While circumstances differ in the two countries, useful lessons and common challenges exist to respecting a rights-based approach that are not only relevant to the two case studies but also for other Commonwealth states and some states outside the common law tradition committed to international child rights law. A lesson is that domestic child rights monitors largely focus on the CRC only in their work and tend to ignore the potential contributions of other international instruments and procedures. Hence, the child rights sector is often isolated from other sectors and monitoring avenues.

When child rights are specifically enshrined in the constitution, they are established priorities that are better protected and advanced than non-enunciated rights. The South African constitution specifically provides child rights awareness and efforts whereas the Canadian constitution does not. While constitutional amendment would be beneficial, it is unlikely for Canada in the appreciable future due to unsuccessful struggles in the 1990s. Yet South Africa's legal and political commitment to child rights and monitoring, with various dedicated structures and actors, offers a more important lesson.

Absence of understanding of, and commitment to monitoring cause procedural and attitudinal

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<sup>608</sup>See below.

<sup>609</sup>Mbambo (note 75 above).



obstacles, including the restriction of resources, capacity, and tools, likely due in part to limited child rights awareness. Although the number of individuals dedicated to child rights within society is growing,<sup>610</sup> there are relatively few government or civil society monitors, thereby restricting appreciation of monitoring and its comprehensiveness. Limited resources lead to choosing between service delivery and monitoring, often resulting with exclusive focus on the former despite monitoring's contributions to better service delivery. South African capacity is limited for example, since researchers specialising in children are unavailable.<sup>611</sup> While some attention is dedicated to report preparation, domestic efforts are only piecemeal.

According to one NGO representative, some South African government departments still do not have a monitoring consultant or staff and government employees expressed concern about how monitoring would only reveal how ineffective they are.<sup>612</sup> But, monitoring is more complex and valuable than simply resulting with criticism when it focusses on the goal of child rights progress as Cassiem explains: non-governmental monitors should “keep a distance from government but let government know that the kind of information that we’re providing benefits them rather than criticises them.”<sup>613</sup> Mbambo affirms: “Action is needed at a higher level...” to improve support of monitoring.<sup>614</sup>

South Africans are generally more aware and explicitly committed to monitoring than Canadians as demonstrated by Van Den Heever AJ request that the Family Advocate monitor Sihle’s placement in *Hlophe*.<sup>615</sup> Although provincial judges in *Auton* recognised monitoring, Canadian judicial decision-making would benefit with greater attention to it. Canadian monitoring is also inconsistent since the Canadian International Development Agency (CIDA) for example, developed an “annual” report but not beyond fiscal year 1996-97.<sup>616</sup>

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<sup>610</sup>For example, Senator Pearson is particularly recognised including Griffin (note 104 above); and Glossop (note 384 above).

<sup>611</sup>Barnes-September, Programme Planning and Evaluation Specialist, Institute for Child and Family Development, University of the Western Cape (2002), Interview with author, Bellville: 29 July.

<sup>612</sup>Motala (note 57 above).

<sup>613</sup>Cassiem (note 426 above).

<sup>614</sup>Mbambo (note 75 above).

<sup>615</sup>(Note 222 above).

<sup>616</sup>Government of Canada (note 422 above).



The absence of defined commitment to monitoring in the Canadian child justice legislation also reflects its inadequate role. Children's lack of familiarity with monitoring and processes reflects the societal lack of appreciation impeding their potential contributions. KM., KP. and T. describe the challenge:

*The main thing is that [monitoring] is a new concept. A lot of youth aren't aware of monitoring at all, so just educate people about it so that you can become aware of everything that is going on. Create that awareness and give that opportunity for people to be able to express themselves and to monitor and know about this idea and this concept - that's our main point. Create the opportunity for people to voice their opinions, because a lot of people, children, they don't have the opportunity, they aren't given that fair chance. So that opportunity needs to be created in order for them.<sup>617</sup>*

Greater commitment to monitoring is thus required in both countries.

Monitoring children does not necessarily mean monitoring child rights. Both case studies have efforts to determine how children are doing but they differ in terms of informing about child rights due to attention to needs, rather than rights. An exception is IDASA, which recognises attention to poverty is a weaker approach than focussing on child rights including discrimination. Analysis of the case studies also offer instruction about what is relevant in rights monitoring and how to interpret child rights and their obligations; for example, legislation, policy, government spending are relevant.

The process of monitoring involves several steps, which are not always addressed similarly: a monitor's approach influences the process and results.<sup>618</sup> Consequently, critical analysis of results is necessary due to varying contributions and value. Actors' various societal roles involve different perspectives and priorities, inevitably affecting monitoring and child rights understanding. Consequently, no individual monitor should be relied upon to provide the definitive picture. In general, government monitors focus on progress through legislation, policy and programmes while civil society focusses on lacunae. Accordingly, Glossop describes monitoring efforts by both government and civil society as instrumental; the former attempts to defend its actions and the latter tries to critique the actions.<sup>619</sup> He explains it is

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<sup>617</sup>15 year-old girls, in Focus Group (2002), organised and facilitated by Ph.D. candidate on the Monitoring of Children's Rights involving Child and Youth Friendly Ottawa, Ottawa: 28 June.

<sup>618</sup>See Chapter Five.

<sup>619</sup>Glossop (note 384 above).



very difficult for government to determine whether a policy or programme has the intended effect so it expounds on the nature of the effort, the resulting practices, the amount of money was spent, and so on, serving a rationalising purpose.<sup>620</sup> As a result, one advocate does not believe that government monitors, rather “it is a listing of programs.”<sup>621</sup> Sloth-Nielsen describes civil society’s position to government can be more complex, determining approaches to monitoring: whether in opposition, co-opted by government or somewhere in between.<sup>622</sup> Civil societal monitoring is likely critical of government actions, but governments should seriously consider their findings, not simply be defensive. Similarly, civil societal monitors should understand government roles, functions and constraints. Most monitors are largely reactive and should be proactive to support child rights progress. Due to the different roles, contributions of various monitors can provide useful details, context and understanding.

If monitoring takes place, a gap can exist between the results and responsive action. For instance, the dire situation of many Canadian indigenous children is a common monitoring concern and yet progress continues to be elusive.<sup>623</sup> Some actors question the role and impact of monitoring in relation to progress. For example, Pearson recognises some usefulness of NGO monitoring but questions “the capacity of monitors and the mechanisms of monitoring to have an effect. ... I don’t honestly see a likelihood that a NGO could perform adequately to provide the cost/benefit [of monitoring].”<sup>624</sup> While her proposal to further invest in the UNCRC’s capacity is useful,<sup>625</sup> the Committee remains dependent upon national monitoring to carry out its mandate. While national-level monitors may not have yet accomplished all they should, they are generally important contributors to the overall system. Aware of criticism of the NPA’s absence of action since it lacks a sanctioning authority,<sup>626</sup> at least one

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<sup>620</sup>Ibid.

<sup>621</sup>Fronczek (note 349 above).

<sup>622</sup>Sloth-Nielsen (note 72 above).

<sup>623</sup>Examples: Giroux (note 95 above); Parker-Loewen (note 332 above); Yalden (note 20 above).

<sup>624</sup>Pearson (note 67 above).

<sup>625</sup>Ibid.

<sup>626</sup>Motala (note 57 above).



South African government official wants constructive responses to monitoring.<sup>627</sup> Children are also concerned about potential lack of significance from monitoring and urge responses. For example, G. explains, “With the information that they get, ...for instance, slavery, child slavery, that if they have this information, the government takes further steps, not just sit back and allow child slavery to go on.”<sup>628</sup> However, responses must also be appropriate as Pearson highlights the result of Ontario child deaths, which increased the number of children taken into state care and did not necessarily serve their best interests; evaluation of potential implications of monitoring is recommended.<sup>629</sup>

To link results to change, some independent monitors, including SAHRC and the Quebec Commission, have valuable legislative authority to effect progress; nonetheless, all monitors should establish strategies to support awareness of, and responses to their results. For example, information-sharing through meetings, conferences and media can ensure results are taken seriously by decision-makers and others. Cassiem recommends “when you do monitor, it is not for the sake of monitoring; that you actually identify persons who can turn your monitoring into realisation or activate it. And you have to work with them.”<sup>630</sup> Such follow-up also buttresses societal support of monitoring. Moreover, to sustain credibility and effective response, monitors should also carefully develop results and recommendations to ensure relevance. For instance, international imperatives and domestic realities demanding contextualised monitoring results including appropriate or realistic recommendations.<sup>631</sup> For instance, due to such difficulties as decentralisation and complexities of responsibilities,<sup>632</sup> do recommendations accurately recognise the realities of the divisions of powers?<sup>633</sup> The importance of this lesson is evident: “When there are particular comments that really don’t make sense, it is easier to dismiss the comments made by the Committee or by any monitoring agency. That is an issue for rights monitoring because if one thing can be

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<sup>627</sup>Sewpaul (note 63 above).

<sup>628</sup>17 year-old boy (Cape Town), (note 534 above).

<sup>629</sup>Pearson (note 67 above).

<sup>630</sup>Cassiem (note 426 above).

<sup>631</sup>Pearson (note 67 above).

<sup>632</sup>Covell & Howe (note 95 above).

<sup>633</sup>Menard (note 17 above).



dismissed, other things can be dismissed as well.”<sup>634</sup> Thus, monitors should give much attention to follow-up and correct recommendations so their efforts and results have significance.

Cooperation among various monitors can bring progress. For instance, IDASA sees government as “critical allies” but:

*although we monitor and work with government, we keep a certain distance. ... To describe our monitoring, we work with organisations to improve the kind of monitoring and child poverty alleviation; to work through agencies that can influence change [for example, Human Rights Commission, the parliamentary Joint Monitoring Committee, and Treasury] and to keep a distance so we are not perceived to be in bed with government.*<sup>635</sup>

Monitors should target and inform important actors about results, to realise recommendations and inform a broad audience to support progress.<sup>636</sup> This valuable strategic approach allows government and civil society to trust the organisation and its work, offering another lesson to other domestic monitors.

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<sup>634</sup>Van Egmond (note 89 above).

<sup>635</sup>Cassiem (note 426 above).

<sup>636</sup>Ibid.



## CHAPTER FIVE:

### APPROACHES TO CHILD RIGHTS MONITORING

The general aim of monitoring should be child rights progress however, efforts to accomplish this objective can vary. The political and economic situation affect monitoring; political ideology and leadership influence both the country and monitoring capacity.<sup>1</sup> In addition, natural disasters and armed conflict pose particular challenges.<sup>2</sup> Practical support includes guidebooks for various contexts including developing or repressive states.<sup>3</sup>

International legal instruments provide for and facilitate monitoring;<sup>4</sup> consequently, a range of actors monitor but their approaches differ. Yet, very few approaches are identified in the literature<sup>5</sup> due to limited theoretical work on monitoring. Some acknowledgement exists of actors' influence upon their activities including Prout and James who identify "the social sciences are not neutral commentaries on childhood but active factors in its construction and reconstruction."<sup>6</sup> Higgins notes despite legal philosophy, practical experience demonstrates "...the answer often depends upon the tribunal answering it ... and upon the question asked" and that "choices cannot be made without reference to the result."<sup>7</sup> As monitoring results are usually strategically utilised, Glossop describes: "Research necessarily has got interests embedded in it, which is not to say that it's not objective. But we are human beings who are asking research questions and our human interests are embedded in the search for knowledge."<sup>8</sup> A monitor influences the process and results yet the issue remains insufficiently explored in the literature and demands attention.

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<sup>1</sup>Barnes-September, Programme Planning and Evaluation Specialist, Institute for Child and Family Development, University of the Western Cape (2002), Interview with author, Bellville: 29 July.

<sup>2</sup>Black (1994), *Monitoring the Rights of Children*, 43.

<sup>3</sup>For example, see: English and Stapleton (1997), *The Human Rights Handbook*, focuses on monitoring civil and political rights in difficult contexts.

<sup>4</sup>See Chapter Two.

<sup>5</sup>An exception is UN treaty monitors' approach of constructive cooperation with states parties, not confrontation; Van Boven (1997), "The International System of Human Rights: An Overview". *Manual on Human Rights Reporting*, 12.

<sup>6</sup>Prout & James (1997), "A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems." *Constructing and Reconstructing Childhood*. James & Prout (eds.), 28-29.

<sup>7</sup>Higgins (1994), *Problems & Process: International Law and How We Use It*, 205, 227.

<sup>8</sup>Glossop, Executive Director of Programs and Research, The Vanier Institute of the Family (2003), Interview with author, Ottawa: 7 January.



Earlier chapters demonstrate many actors monitor and the nature and scope of efforts vary due to possibilities of such research stages as: “deciding the focus, developing the research questions and strategy, selecting the method(s), collecting data, conducting the analyses and writing up.”<sup>9</sup> Consequently, the chapter analyses how monitors approach their efforts and submits the view that a monitor’s motivation in the process influences both the process and the result. What and how one monitors are often the result of the monitor’s understanding and untangling of rights where some choose to pursue particular objectives at specific stages or throughout the process. Thus, an essential distinction must be made between the “linear” and “circular” approaches of monitors and their outcomes.<sup>10</sup>

This chapter first examines the aforementioned distinction and its relevance to monitors, their outcomes, and child rights. Then, implications of these approaches are analysed in relation to untangling rights, tool-use, and limited monitoring, including the violations approach.

### 1.0 LINEAR APPROACH: AN OUTCOME GOAL<sup>11</sup>

Many monitors choose to pursue particular issues or priorities, which limits and simplifies the scope of research, facilitating a results-oriented process. Consequently, the approach follows a linear pattern where the initial choice inspires and guides data collection, analysis and reported results (See Diagram One).

#### *Diagram One: The Linear Approach*

Linear monitors usually approach monitoring as a means to highlight their particular concerns



or priorities about children. Their data collection can involve selection of existing

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<sup>9</sup>Robson, in Lewis & Lindsay (2000), "Emerging Issues." *Researching children's perspectives*. Lewis & Lindsay (eds.), 189.

<sup>10</sup>The categorisation is inspired by Fanjoy’s original distinction between “research” and “advocacy” approaches to monitoring, which has not yet been documented, during the work of the Canadian Coalition for the Rights of Children in 1996-97. This chapter originally expands upon the categorisation.

<sup>11</sup>See note 10 above.



information or limited research to support a particular perspective. Data analysis seeks to justify the monitor's specific understanding of the situation or issues without necessarily considering the whole context or all relevant factors. In essence, linear monitoring does not truly seek to understand the situation of child rights. Results are intended to condemn actions or lack thereof or actors designated as responsible, or results merely describe measures without examining their impact, ignoring or concealing realities, and lacking critical analysis. Monitors may reflect a linear approach for various reasons including: genuine belief not requiring evidence that their understanding and recommendations are accurate and necessary for children's best interests; the view that their approach calls attention to child rights better than a voluminous research report; conviction that urgent action is necessary to further rights by advancing specific objectives, or countering actions and actors; and/or resources to pursue this approach are available.

Due to political or other motivations, governments may use linear monitoring, which influences child rights interpretations, monitoring tool development, or results.<sup>12</sup> Government legislation, policies and programmes for children do not necessarily focus on human rights as Tomaševski acknowledges, so rights are not necessarily operationalised by government measures, where for example, a national education policy does not include the right to education.<sup>13</sup> Her point not only illustrates the potential difference between development and rights-based efforts, but also that government monitoring may intend to assess child rights, but in justifying measures, the process or results may have little to contribute in understanding the situation. Hence, neither government child rights interpretations, nor monitoring is necessarily accurate. Ideally, if governments are seriously committed to child rights, the temptation to distort details should weaken, despite political concerns, to accurately represent rights with the goal of improving progress. But self-monitoring poses a challenge since political concerns may inhibit a CRC State party report from accurately representing the situation. In order to justify or defend legislative and other measures, governments may overemphasise their successes or eliminate details of difficulties when describing child rights progress. Governments may also have a limited or selective

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<sup>12</sup>Bayefsky states: "State representatives often lie" in reporting, relying on the example of Syria before the CERD Committee in 1991; Bayefsky (1994), "An International Human Rights Agenda for the End of the Century: New Human Rights?" 88 *ASIL Proceedings*, 430.

<sup>13</sup>Tomaševski (2001), "Indicators." *Economic, Social and Cultural Rights: A Textbook*. Eide et al. (eds.), 531.



perspective, where representatives are not aware of all children's realities and therefore deny for instance that children are on the streets within their jurisdiction.<sup>14</sup> Therefore, accurate monitoring by international actors and national civil society is essential to assess government measures or inactivity using tools to determine whether governments are unwilling or incapable of supporting progress.<sup>15</sup>

NGOs generally carry out linear monitoring. For instance, Barnardo's, a UK childcare organisation, conducts research but a representative acknowledges "the combination of practice, research, policy and our charitable objects make it both appropriate and possible for us to be involved in advocacy in a way which might be less appropriate for scholarly researchers. The key issue is whether we are working in the interests of those we are set up to serve - children."<sup>16</sup> Commitment to children however, does not necessarily mean monitoring results accurately represent child rights reality. While exceptions exist, NGO monitoring is usually weakened due to "poor research methods and weak analytical skills," relying on media information and anecdotes.<sup>17</sup> Childwatch explains the NGO "purpose [in monitoring] is often more to publicize their programmes than to carry out objective research."<sup>18</sup> The weakness of the linear approach does not eliminate the rationale for this type of monitoring - whether government or civil society - but illuminates the need for critical analysis of all results to determine their role and value.

The linear approach tends to be reactive to situations, rather than preventive. The monitor's choice of focus inspires and guides the whole process of monitoring. While endeavours may develop or respond to previous monitoring results, linear efforts are independent based on the monitor's concerns without attempting to elucidate the whole child rights situation. Previous research results serving their particular aims are often utilised and no new research is undertaken - specific results are selected, collated and presented.

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<sup>14</sup>The author heard a government minister attest this perspective at the Fifth Ministerial Meeting on Children and Social Policy, Jamaica, October 2000.

<sup>15</sup>Tomaševski (note 13 above), 532.

<sup>16</sup>Roberts (2000), "Listening to Children: and Hearing Them." *Research with Children: Perspectives & Practices*. Christensen & James (eds.), 227.

<sup>17</sup>Childwatch (1996), *Indicators for Children's Rights: Sources of information for country case studies*.

<sup>18</sup>*Ibid.*



The linear approach also allows needs-based, rather than rights-based, understandings of children in isolating particular issues or problems. A needs-based approach can manifest itself for example when monitors strive for results that reflect their understanding of the child rights reality, not necessarily the actual situation. Monitors may highlight others' roles and responsibilities without taking responsibility for what can be done or they criticise others without considering the full context or the range of efforts: both positive and negative. Monitoring is thereby compromised due to the potentially inaccurate, unreliable picture created, leading to questions and/or undermining the process and results. The child may provide information in the approach, but his/her role is limited since the approach is not based on child rights and does not require engagement. A child rights-based approach is not effected since a proper child rights interpretation does not guide the effort or process and the child is no longer the centre or inspiration.<sup>19</sup>

## 2.0 CIRCULAR APPROACH: A RESEARCH GOAL<sup>20</sup>

Using a broader perspective, circular monitors collect all relevant data about the status of the child including positive and negative contributions to child rights and relevant contextual information to analyse and report on the whole situation. Consequently, the final result is a researched, reasoned one, rather than predetermined to promote the monitor's particular perspective or concern. Hence, the objective is neither justification, nor admonition.

In general, circular monitors are motivated by the desire to understand child rights according to law. This approach has broad scope. Considering compliance and enjoyment leads to questions about the interpretation and significance of child rights. This approach reflects a circular pattern because the desire to appreciate child rights inspires the collection and analysis of data. Data collection and analysis methods and results should lead to better understanding of child rights. Reporting the results follows analysis and aims to further understanding. As Diagram Two demonstrates, the circular process is a never-ending process over the long-term to respect rights over time, making it difficult to implement on a project-to-project basis.

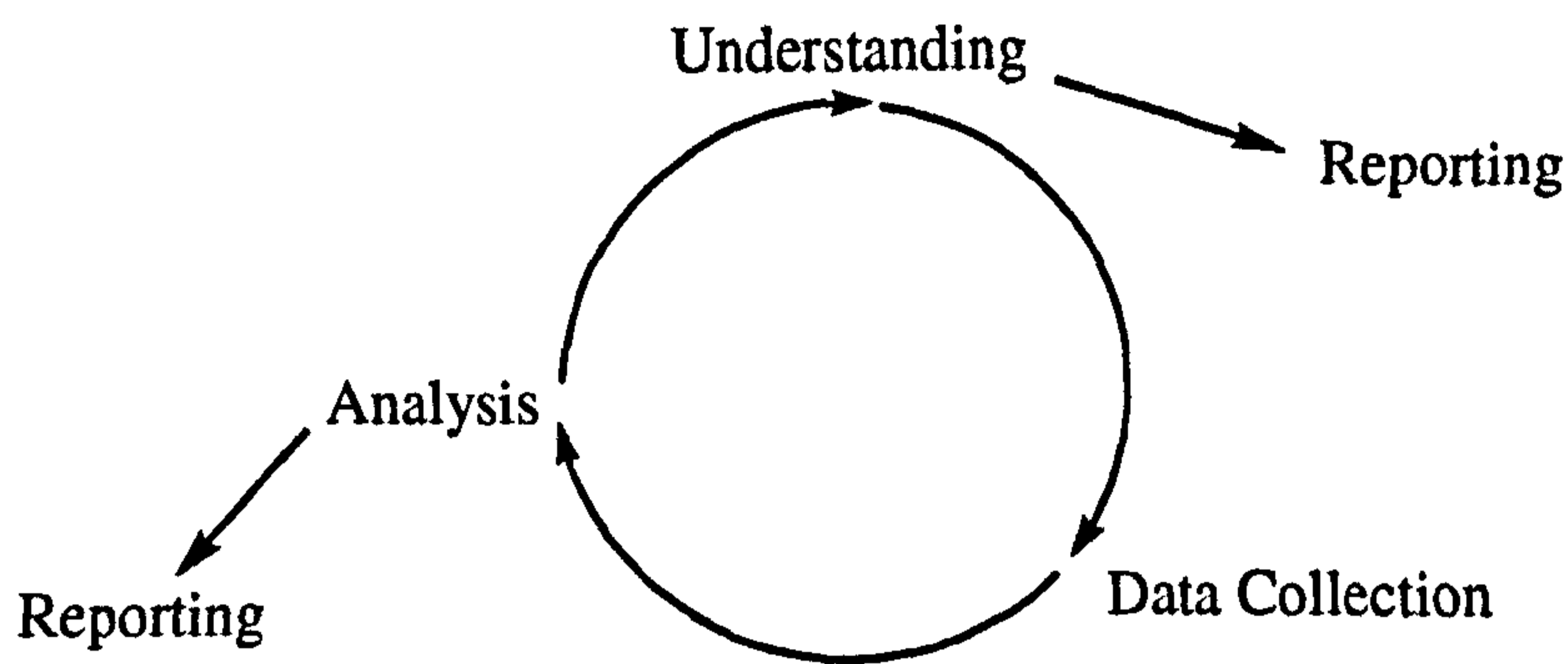
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<sup>19</sup>The needs-based approach is identified in Chapter Four, s.3.5 and Chapter Six s.1.0.

<sup>20</sup>See note 10 above.



## Diagram Two: The Circular Approach



A circular approach to monitoring is not simply issue-based but strives for understanding because the research process aims “to contribute to the development of systematic, verifiable knowledge”.<sup>21</sup> Are child rights actually the focus of one’s monitoring or does the focus on a particular issue obstruct a fuller understanding of rights? One analyst recognises monitoring can be either guided by research or preconceptions.<sup>22</sup> Moreover, the Human Development Report states: “Today information is demanded that empowers people with facts, not opinion.”<sup>23</sup> Although the Report does not acknowledge the distinction, herein lies the essential difference between the circular and linear approaches. Monitoring results reflecting the circular approach attempt to represent the full factual picture following comprehensive data collection and analysis. In contrast, linear results rely upon particular data without necessarily considering the full picture, to justify opinion(s) and presenting a specific, limited understanding of the situation. All monitors request, gather and assess information, measure progress but their efforts are distinguished because: “The watchdog may alert the measurers to move into action; the measurers may produce information which the watchdogs publicize, thereby gaining political space for remedial action.”<sup>24</sup> Black notes these sets of interests may coincide or vary due to other dynamics and that value judgments are made about what actions to pursue and which ones are postponed or ignored.<sup>25</sup> This

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<sup>21</sup>Frankfort-Nachmias & Nachmias (1992), *Research Methods in the Social Sciences, Fourth Edition*, 74.

<sup>22</sup>Rama (2000), *Monitoring the Implementation of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*. Paper prepared for Department of Welfare's training workshop on the CRC/African Children's Charter and the World Summit Goals, August, s. 3.

<sup>23</sup>UNDP (2000), *Human Development Report 2000*, 90.

<sup>24</sup>Black (note 2 above), 18-19.

<sup>25</sup>*Ibid.*, 19



description also reflects aspects of the linear and circular approaches.

The scientific method illustrates useful lessons for distinguishing the two approaches and the value of the circular approach. “The scientific method is the process by which scientists, collaboratively and over time, endeavor[u]r to construct an accurate (that is, reliable, consistent and non-arbitrary) representation of the world.”<sup>26</sup> The method involves the following elements: hypothesis (an attempt to explain cause and effect); observation; and explanation/rationalisation.<sup>27</sup> The hypothesis predicts the outcome of an experiment based on a set of assumptions, tested in an experiment to allow observation.<sup>28</sup> Every detail of the study should be examined critically to determine any errors or flaws.<sup>29</sup> Science is not about what we know but rather, “is defined in terms of how and why we know something.”<sup>30</sup> As a result, the method requires scepticism about results thereby establishing checks and balances and minimising the scientist’s bias upon the experiment’s outcome.<sup>31</sup> Unlike the linear approach, the scientific method does not allow prejudging research results. Reliance on “common sense” or “logic” may lead to acceptance of the hypothesis as accurate explanation without conducting the necessary experiment to test it results with a relatively common research error.<sup>32</sup> “It is the system of data-based explanation that distinguishes science from dogma.”<sup>33</sup> McCain and Segal describes: “a scientist accepts facts as given and belief systems as tentative, whereas a dogmatist accepts the belief systems as given; facts are irrelevant.”<sup>34</sup> Other possible errors are the elimination of data that do not support the hypothesis due to the scientist’s belief in the hypothesis or pressure to support it or ignoring

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<sup>26</sup>Wolfs (1996), *Appendix E: Introduction to the Scientific Method*.

<sup>27</sup>Ibid.

<sup>28</sup>McCain & Segal (1973), *The Game of Science, Second Edition*, 31.

<sup>29</sup>Keppel et al. (1992), *Introduction to Design & Analysis, Second Edition*, 15.

<sup>30</sup>McCain & Segal (note 28 above), 36.

<sup>31</sup>Wolfs (note 26 above), For examples highlighting unacceptable approaches to science, see McCain & Segal (note 28 above), 36-8.

<sup>32</sup>Ibid.

<sup>33</sup>Emphasis removed, McCain & Segal (note 28 above), 43.

<sup>34</sup>Ibid.



systematic errors.<sup>35</sup> Through consistent implementation of the scientific method, “active experimentation and open communication” may eliminate individual or group bias to develop consensus about experimental results.<sup>36</sup> Thus, respect of the scientific method should support monitoring.

All monitors should follow guiding principles or codes of ethics to support such issues as informed consent and experiments with minors, for ethical research.<sup>37</sup> Validity facilitates measurement of what one intends to measure.<sup>38</sup> Data from any one source should be validated with data from two other sources for “triangulation”.<sup>39</sup> Reliability identifies variable or measuring errors from one research effort to the next<sup>40</sup> due to missing or misrecorded data, insufficient sampling and so on.<sup>41</sup> Strategies to address data weaknesses can be developed,<sup>42</sup> including public scrutiny of results.<sup>43</sup> Hence, other monitors have a role to highlight inaccuracies.

A monitor’s approach to the process is a strategic choice. Glossop explains his organisation attempts:

*...to document and provide evidence that is descriptively accurate - and there are different strategies as to how you do that. We try to lay the foundation for compelling arguments or advocacy to advance the interests of children and young people who are marginalised, affected, or disabled people, or whatever. ... Our decision here is that, as a publishing organisation, the reputation of an organisation pretty much stands on the accuracy of its descriptive work, we then use it as a foundation for our own policy interpretation, analysis, "shooting our mouths off" as I put it at the media, and what have you. Other groups will do that or they may decide*

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<sup>35</sup>Wolfs (note 26 above).

<sup>36</sup>Original emphasis, *ibid.*

<sup>37</sup>Frankfort-Nachmias & Nachmias (note 21 above), Chapter Four.

<sup>38</sup>Three types of validity exist: content validity, empirical validity and construct validity; see *ibid.*, 158-162.

<sup>39</sup>Roche (1999), *Impact Assessment for Development Agencies: Learning to Value Change*, 86-93.

<sup>40</sup>See further Frankfort-Nachmias & Nachmias (note 21 above), 163-6.

<sup>41</sup>Hand (1999), "Introduction." *Intelligent Data Analysis: An Introduction*. Berthold & Hand (eds.), 9.

<sup>42</sup>See Little and Rubin (1990), "The Analysis of Social Science Data with Missing Values." *Modern Methods of Data Analysis*, 374-409.

<sup>43</sup>McCain & Segal (note 28 above), 46-7.



*that they may blend the two and create documents that are filled with both descriptive information and advocacy - it is a strategic judgment call on the part of those organisations.*<sup>44</sup>

Similarly, IDASA's Children's Budget has made a choice about its approach as Cassiem explains: "The reason why we feel that we should limit our advocacy activities is because there are other programs that do it, and we can provide the research and training and capacity building to support their advocacy."<sup>45</sup> The activities of non-governmental monitors for instance are evaluated by government, which often determines the response. One national official explains: "It is a difficult balance to reach between research and advocacy in monitoring efforts. Research should be separate and advocacy should follow it. If organisations are primarily advocates, their research is suspect."<sup>46</sup> Another concurs: "Interpretation of statistics and indicators [and results] need to be analysed critically."<sup>47</sup>

Various efforts reflect the choice between approaches. Consequently, with a circular approach to national or international monitoring, results will likely be respected. If a government does not honestly portray the child rights situation in its national report or response, reflecting the linear approach, international monitors will likely criticise the contribution. Similarly national or international non-governmental monitoring results not reflecting the whole situation will be criticised and/or ignored. The introduction of the UNDP's "Human Freedom Index" in 1991 for example, met with much criticism for ranking countries with measures deemed culturally and socially specific by many developing countries and thus, not globally relevant.<sup>48</sup> Recognising the choice and its influence over a monitoring process and results appears to pose a significant challenge. Monitors, both civil society and governments, like to think their research is descriptive - both utilise descriptive information, but information can also serve advocacy.<sup>49</sup> Melton identifies some useful

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<sup>44</sup>Glossop (note 8 above).

<sup>45</sup>Chapter Five discusses IDASA's activities. Cassiem, Manager, Children's Budget, IDASA (2002), Interview with author, Cape Town: 29 July.

<sup>46</sup>Dion, Director (as she then was), Human Rights, Humanitarian Affairs and International Women's Equality Division (AGH), Department of Foreign Affairs and International Trade (2001), Interview with author, 12 April 2001.

<sup>47</sup>Van Egmond, Senior International Analyst (as she then was), Strategic Policy and Research Division, Division of Childhood and Adolescence, Health Canada (2002), Interview with author, 8 October.

<sup>48</sup>See further Barsh (1993), "Measuring Human Rights: Problems of Methodology and Purpose". *15 Human Rights Quarterly*, 87.

<sup>49</sup>Glossop (note 8 above).



questions to determine the approach:

*When the monitor has gathered information about children's status, is the subsequent role one of information-giving or persuasion? Should the monitor seek to diffuse the information actively or should [s/]he simply make the information available to those seeking it? Whatever the precise scope of the monitor's work, the mechanism should be efficient.<sup>50</sup>*

The choice between linear and circular approaches is influenced by different factors of varying degrees depending upon the monitor. Motivations may include funding,<sup>51</sup> politics, agendas and the desire for policy and programming directions.

In conclusion, differing objectives and aims influence monitoring; the choice between circular and linear can be either implicit or explicit with significant and manifold consequences. It is not simply a theoretical distinction but a practical one with implications. Some monitors, including Glossop and Cassiem, are aware of the choice, which influences respect and credibility of the monitor, processes and results. Some monitors may utilise their research results to advocate or share with others for advocacy work, which is distinguished from linear monitoring. The former effort highlights particular concerns and attempts to influence decision-makers and often public opinion about legislation, policy and/or programming; research results may be used to buttress argumentation. In contrast, both the process and results of linear monitoring as discussed above are influenced by the desire to influence others. As a linear pursuit, gains are only short-term without long-term understanding while the circular approach, like the scientific method, is without beginning or end. Circular monitoring does not identify particular goals other than the identification and elaboration of the child right(s) situation; whereas linear monitoring has already determined the goal and how to get there and does not reflect the scientific method.<sup>52</sup> When monitoring, child rights should inspire and guide research, which will always be directed towards understanding the status of rights, without relating the process or results to specific goals. But due to this distinction between approaches and its influence, critical analysis is essential when considering monitoring and results.

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<sup>50</sup>Melton, "Some Summary Impressions," in Flekkøy (1991), *Models for Monitoring the Protection of Children's Rights*, 52.

<sup>51</sup>Sloth-Nielsen, Faculty of Law, University of Western Cape (2002), Interview with author, Rondebosch, 25 July.

<sup>52</sup>Tension can exist between supporters of pure research for its own purposes and action research, which is oriented towards specific goals. The scientific method can apply to both pure and action-oriented research. Tine & Ennew (1998), *The African Contexts of Children's Rights: Seminar Report*, 31.



### 3.0 INFLUENCE OF APPROACHES

The differing approaches affect several dimensions of monitoring including: the untangling of rights; tool use; and limiting the process.

#### 3.1 Interpreting or Untangling rights

A monitor's approach influences understanding and untangling of rights.<sup>53</sup> A linear monitor may rely on existing data or carry out limited research to justify particular concerns, constraining the meaning of rights to available data. In contrast, a circular approach attempts to untangle the significance of rights within the context and then monitor. Before data collection, rights need to be interpreted but despite international elaboration, rights are not always understood in every context, complicating monitoring. Generally, multipurpose treaties do not allow for easy distinctions due to breadth and scope of the instrument.<sup>54</sup> Parker-Loewen explains: "Rights are visionary but rights also have to be defined in a concrete way for monitoring. However, defining rights also limits our vision, where advocates work to the letter and not the spirit of the law. It is important to have both vision and minimum standards."<sup>55</sup> Rights continually challenge actors to improve implementation and monitoring over time using flexible wording for comprehensive relevance leading Glenn to describe them as "variable standards".<sup>56</sup> Barsh believes the International Bill of Rights for example contains principles that "are neither precise, nor equally valued in all cultural contexts".<sup>57</sup> Many CRC States parties appear to share this understanding as illustrated in the number of reservations, which reflect their apprehension.<sup>58</sup> Donnelly and Howard are

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<sup>53</sup>Understanding of a human right has evolved. Minogue describes: "Rights are no longer derived from the operations of natural reason, but rather from our ideas of what it is to be human"; while Cranston defines it as a "*lawful* entitlement," and "*just* entitlement". (Minogue (1979), 'The History of the Idea of Human Rights.' *The Human Rights Reader*. Laqueur & Rubin (eds.): 14; Emphasis in the original, Cranston (1979), 'What Are Human Rights?' *The Human Rights Reader*. Laqueur & Rubin (eds.): 19.) Van Bueren outlines rights are "concerned with both the protection of the individual from the state and the creation of societal conditions by which all individuals can develop to their fullest potential." Van Bueren (1998), *The International Law on the Rights of the Child*, 4. Green details rights not only provide a legitimate international normative framework, they outline permissible and impermissible actions and/or inactions. (Green (2001), "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement." 23 *Human Rights Quarterly*, 1066.

<sup>54</sup>Lijnzaad (1995), *Reservations to UN Human Rights Treaties: ratify and ruin?*, 81-82.

<sup>55</sup>Parker-Loewen, Children's Advocate, Saskatchewan (2003), Interview with author, 15 January.

<sup>56</sup>Glenn (2000), *Legal Traditions of the World*, 336.

<sup>57</sup>Barsh (note 48 above), 103.

<sup>58</sup>See Chapter Two, s.5.1.



concerned about the use of “arbitrary definitions”,<sup>59</sup> which is a valid concern as rights are not necessarily commonly comprehended or appreciated.<sup>60</sup> For example, street children do not all live on the street.<sup>61</sup>

One’s monitoring approach influences untangling as actors must reconcile the targets and standards outlined in flexible language with a particular context as: “the adjustment to reality of the legal provisions concerning human rights is an important aspect of their task.”<sup>62</sup> A UN HRC member confirms the ICCPR’s general outline is well known but details can be discussed endlessly to address specific national questions; “we know what we’re talking about, but it’s not a 100% tied down and it probably never will be.”<sup>63</sup> Some may be uncomfortable or apprehensive with broad language of rights.<sup>64</sup> Indeed, the potential designation or understanding of structural issues as human rights aggravates the problem as Tomaševski explains: “structural problems [including poverty] require structural remedies; individual entitlements-or individual remedies for that matter-are insufficient.”<sup>65</sup> Linkages between rights and structural issues need to be better understood.<sup>66</sup> The lesson learned is that careful attention and consideration must be given to untangling rights. There are many who are experienced and comfortable with rights language.<sup>67</sup> But untangling is complicated by monitors’ varying child rights interpretations and their approaches. While discrepancies are possible, efforts are needed to further general common, correct understandings of child rights and advance consistent monitoring. To this end, De Vylder favours use of country-specific impact indicators including life expectancy, school enrolment, infant mortality and gender

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<sup>59</sup>Donnelly and Howard (1988), “Assessing National Human Rights Performance: A Theoretical Framework.” 10 *Human Rights Quarterly*, 216 FN #4.

<sup>60</sup>For example, Chapter Two discusses torture and corporal punishment.

<sup>61</sup>Boyden, cited in Black (note 2 above), 26.

<sup>62</sup>Capotorti (1968), “The international measures of implementation included in the Covenants on Human Rights”. *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium*, Eide & Schou (eds.), 134.

<sup>63</sup>Yalden, member of the UN Human Rights Committee (HRC) (2003), Interview with author, Ottawa, 23 January.

<sup>64</sup>See discussion in Chapter 6, s.2.1 about Ben-Arieh et al.’s work.

<sup>65</sup>Tomaševski (note 13 above), 537.

<sup>66</sup>Ibid.

<sup>67</sup>For example, one national official finds: “Since the CRC is so forward thinking, it is excellent for drafting as it provides explicit definitions of rights.” Dion (note 46 above).



discrimination, to serve international comparisons.<sup>68</sup> Such indicators have value in highlighting rights issues similar to budget assessments,<sup>69</sup> and they may support comparisons to reveal, despite minimal policy areas explicitly focusing on children, that policies are not “child-neutral.”<sup>70</sup> Indicators may be convenient and useful but monitoring should involve more tools and information than can be obtained from indicators, which reflect only some rights or aspects of specific rights, precluding consideration of others.<sup>71</sup>

The concept of minimum core obligation supports untangling of obligations so “minimum essential levels of each of the rights is incumbent upon every State party.”<sup>72</sup> In order to reflect current conditions, not simply those developed in the past, according to international law, minimum core is derived from treaty provisions, corresponding *travaux préparatoires*, the treaty monitor’s observations about States parties’ progress, general comments, UN resolutions and programmes of action.<sup>73</sup> Further, a recent publication usefully elaborates on minimum core obligations of economic, social and cultural rights.<sup>74</sup> But minimum core cannot be utilised as a vehicle to lower child rights standards; monitors must guard against this danger. Similar to progressive realisation, minimum core cannot be relied upon to justify weak or limited implementation because it is justified only “as a springboard for further action.”<sup>75</sup>

The emphasis upon political, rather than legal monitoring at the international level is problematic as no international child rights court exists to provide definitive interpretations. Therefore, monitoring “...must promote the uniform interpretation of the convened clauses

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<sup>68</sup>De Vylder (1996), *Development Strategies, Macroeconomic Policies and the Rights of the Child*, 66.

<sup>69</sup>See Chapter Four, s.2.7.

<sup>70</sup>De Vylder, in Ben-Arieh et al. (2001), *Measuring and Monitoring Children's Well-Being*, 57.

<sup>71</sup>See next section on tools.

<sup>72</sup>Committee on Economic, Social and Cultural Rights (UNCESCR) (1990), *General Comment 3*, UN Doc.E/1991/23, para 10.

<sup>73</sup>Van Bueren (1999), “Alleviating Poverty Through the Constitutional Court”. 15 *South African Journal on Human Rights*, 58.

<sup>74</sup>Chapman & Russell (eds.) (2002), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*.

<sup>75</sup>Van Bueren (note 73 above), 59.



by hindering prevalence of national interests.”<sup>76</sup> The European Court of Human Rights and the Inter-American Court on Human Rights provide relevant influential jurisprudence at regional and domestic levels.<sup>77</sup> Due to the limited mandate to adjudicate disputes between states as per Statute article 34,<sup>78</sup> the International Court of Justice does not have an influential human rights role.<sup>79</sup> The International Criminal Court (ICC) has authority to prosecute individuals including those conscripting or enlisting children under the age of fifteen into national armed forces or using them as active participants in hostilities.<sup>80</sup> Nevertheless, final resolution of disputes to ensure the international monitoring system’s effectiveness is lacking.<sup>81</sup> Without comprehensive and definitive international legal guidance at the global level, child rights are inconsistently interpreted.<sup>82</sup> Capotorti argues “a judiciary solution, apt to safeguard the interests of a general and objective nature, should be preferred to the agreed settlement of international disputes concerning the respect of human rights.”<sup>83</sup> But political monitoring will continue due partly to “excessive attachment most States continue to have for the traditional idea of sovereignty”, which allows overlap of various procedures,<sup>84</sup> and the absence of definitive child rights jurisprudence, perpetuating the challenge of untangling child rights.

### 3.2 Monitoring Tools

Tools including indicators, benchmarks, and indices contribute to understanding the rights

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<sup>76</sup>Capotorti (note 62 above), 133.

<sup>77</sup>The *African Union Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of An African Court on Human and Peoples’ Rights* only came into force on 25 January 2004 but will play such a role. See Chapter Two, s.4.0.

<sup>78</sup>*Statute of the International Court of Justice*, 26 June 1945, 1 UNTS xvi. For discussion, see Higgins (1998), “Remedies and the International Court of Justice: An Introduction.” *Remedies in International Law: The Institutional Dilemma*. Evans (ed.), 1-10.

<sup>79</sup>UN (1995), *The United Nations and Human Rights: 1945-1995*, 7.

<sup>80</sup>It will prosecute such crimes as genocide, war crimes, crimes against humanity and eventually, crimes of aggression and crimes between nations and within them. As per article 126 of the *Rome Statute of the International Criminal Court* (1998), UN Doc.A/CONF.183/9, entered into force on 1 July 2002; as of July 2005, there are 139 signatories and 99 states parties; UN (2005), *Rome Statute of the International Criminal Court*. Limited mandate related to child rights reinforces the importance of national courts.

<sup>81</sup>Capotorti (note 62 above), 142.

<sup>82</sup>See Chapter Two.

<sup>83</sup>Capotorti (note 62 above), 143.

<sup>84</sup>*Ibid.*, 147-148.



situation but one's monitoring approach influences selection and utilisation of tools to identify and facilitate data collection. Determining academic or literacy skills for example only presents a limited picture of children, and the right to, and aims of education.<sup>85</sup> The Roeher Institute also identifies dilemmas where different developmental paths are not reflected in much current monitoring including: children may be excluded from monitoring because they do not fit the measurement criteria, such as verbal skills; children may be included but as they cannot achieve the outcomes being measured, they are seen as failures; and policies may ignore or negate children with disabilities due to poorer cost-benefit ratios in investments than other children.<sup>86</sup> Consequently, the Institute favours the development of self-determined tools based on the person that can determine the reality of various elements in his/her life to reflect community inclusion and participation.<sup>87</sup> Indeed, monitoring rights differs from monitoring abilities. Critical analysis of tools and methods may reveal exclusionary monitoring and the necessity of improvements for a child rights-based approach.

Monitors, including Childwatch<sup>88</sup> and UNICEF,<sup>89</sup> are generally strongly attached to indicators since, as Green describes, the data provides "a snapshot of the current enjoyment by individuals and groups" of various rights and are not only "highly relevant to the human rights community" but also "crucially important."<sup>90</sup> The Limburg Principles affirm indicators for data relevance and comparability.<sup>91</sup> Indicator development however, is not without complications or debate. The Roeher Institute cautions "...no indicator is value free. Indicators are based on a set of assumptions that stem from definitions or understandings

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<sup>85</sup>CRC a.28 and 29. For example, standardised tests attempt to assess education progress but raise concerns about standards, expectations, relevancy, and validity of results since tests and results provide only one source of information about schools. How meaningful is the information and what further can be done to monitor education and child rights?

<sup>86</sup>Roeher Institute (2002), *Toward An Inclusive Approach To Monitoring Investments and Outcomes in Child Development And Learning*, 73-4.

<sup>87</sup>Ibid, 76-7.

<sup>88</sup>Childwatch International (1999), *Monitoring Children's Rights Project (Indicators for Children's Rights): Report to the Swedish International Development Cooperation Authority*, 2, 16.

<sup>89</sup>For example, UNICEF (2001), *The Progress of Nations*.

<sup>90</sup>Green (note 53 above), 1091.

<sup>91</sup>Due to measurement errors or incompatibility, indicators cannot always facilitate comparability; see below. "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987), 9 *Human Rights Quarterly*, 122, UN Doc. E/CN.4/1987/17, para. 79.



about persons, communities, development, and about health and well-being.”<sup>92</sup> Further, some issues are difficult to measure.<sup>93</sup> Barsh notes many difficulties or weaknesses of efforts in the construction of indicators, highlighting the importance and considerations of accurate definitions for measurement.<sup>94</sup> Also, as Glossop notes, “there is a preoccupation with risk factors so we have a limited sense of protective indicators, little of positive indicators of development as a society because we’ve focussed on the present if not past tense.”<sup>95</sup> Comparative monitoring can be complicated by indicators with different meanings across cultures or locally-pertinent indicators may differ from those relevant at a larger scale.<sup>96</sup> Indicators may reflect contextual influences, including different cultural and political viewpoints.<sup>97</sup> In particular, Western understanding about children influence most existing indicators and data collection.<sup>98</sup> Due to these difficulties, some may conclude quantitative comparisons without globally acceptable definitions are impossible.<sup>99</sup> But some responses to this challenge exist. Quantitative information measuring behaviour, according to Pawson, can illuminate understanding of concepts.<sup>100</sup> Alternatively, Carley affirms “objective measures with indicators of perceptions” can be combined to enhance validity and equivalence.<sup>101</sup> Directly involving participants also contributes to understanding.<sup>102</sup> Thus, while complex and requiring critical attention, indicator development is not impossible. For example, Hollamby describes a simple indicator of the Human Science Research Council to find those in greatest poverty by inquiring about ownership of a rubbish bin because a marker

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<sup>92</sup>Roeher Institute (note 86 above), 11.

<sup>93</sup>Save the Children (2000), *Children and Participation: Research, monitoring and evaluation with children and young people*, 32.

<sup>94</sup>Barsh (note 48 above), 87.

<sup>95</sup>Glossop, (note 8 above).

<sup>96</sup>Save the Children (note 93 above), 32.

<sup>97</sup>Barsh (note 48 above), 92.

<sup>98</sup>Ennew & Miljeteig (1996), "Indicators for children's rights: progress report on a project". 4 *International Journal of Children's Rights*, 234.

<sup>99</sup>Barsh (note 48 above), 96.

<sup>100</sup>Pawson, in Barsh, *ibid*.

<sup>101</sup>Carley, cited in Barsh, *ibid*.

<sup>102</sup>Barsh (note 48 above), 96-97.



of real poverty is the absence of rubbish.<sup>103</sup>

Some believe indicators refer solely to statistics while others understand indicators to include additional information, including qualitative data.<sup>104</sup> International organisations particularly emphasise quantitative information due to the difficulty of comparing qualitative information and since they must restrict their data. The UNDP's Human Development Report for instance, recognises limitations since human rights "...issues go far beyond what can be captured in numbers" but concludes in favour of statistics to illuminate questions and issues from generalised information.<sup>105</sup> Likewise, UNIFEM reasons "qualitative indicators are not readily available for global comparisons and are more appropriate for local-level assessments".<sup>106</sup> UN agencies, involving UN development cooperation countries, determined 40 indicators, including rates for child immunization against measles and those working under 15 years of age, would guide monitoring of international conference commitments.<sup>107</sup> However, caution is necessary as quantitative information may not reveal the whole situation since: "Statistics come with strings attached. They provide great power for clarity, but also for distortion."<sup>108</sup> Statistical information also stresses "quantitative headline-hitting progress as opposed to qualitative sustainable progress."<sup>109</sup> Alderson notes quantitative information is valuable for large assessments: "...such as numbers of children living in poverty. But numbers can be unhelpful when researching children's capacities."<sup>110</sup> Thus, while statistics are politically important and valuable as illustrations, they are only one information source

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<sup>103</sup>Hollamby, Researcher, South African Law Commission (2002), Interview with author, 17 July.

<sup>104</sup>For instance, Türk, UN Special Rapporteur on the Realization of Economic, Social and Cultural Rights, affirms the former understanding, while the ILO supports the latter, as per Green (note 53 above), 1077-1080.

<sup>105</sup>UNDP (note 23 above), 90.

<sup>106</sup>UNIFEM (2000), *Progress of the World's Women 2000*. New York: UNIFEM, 62.

<sup>107</sup>UN Common Country Assessment Indicators of the UN Development Assistance Framework, in *ibid.*, 65-6.

<sup>108</sup>UNDP (note 23 above), 90.

<sup>109</sup>Van Bueren (note 53 above), 387.

<sup>110</sup>Alderson (2000), *Young children's rights: exploring beliefs, principles and practice*, 83.



and must be interpreted in a broader context and “used with care” as Qvortrup urges.<sup>111</sup> A child rights-based approach demands a comprehensive, long-term approach to monitoring and contextualised data for meaningful results. Also, children are often excluded in quantitative research because Scott notes research questions of large quantitative studies have an “adultcentric bias [that] is unacknowledged and inappropriate.”<sup>112</sup> Global child rights monitoring would benefit by acknowledging this bias and striving to adopt a child rights approach.<sup>113</sup> Quantitative data could be much richer for instance if research included children as participants, as “competent social actors in their own right”.<sup>114</sup> Qualitative information is not as important from the monitors where it can be overly subjective and difficult for comparison as it is from the monitored. Such data from the subjects of rights provides descriptive details necessary for the creation of a picture of rights. Involving children in indicator development would also help to ensure monitoring addresses issues of concern to them.<sup>115</sup>

Broader data sources including qualitative indicators about legislation or legal policies “may measure in part what Tomaševski calls the “willingness” (as opposed to “capacity”) of governments with regards to human rights.”<sup>116</sup> Alderson differentiates:

*Qualitative research takes a rainbow approach, exploring the differences in each child and circumstance, enlarging understanding and empathy. Quantitative research takes a binary black and white approach, in order to classify and count similarities. It can be as dangerous and misleading to over-generalise from 2,000 children as from two. Qualitative and quantitative methods can both be used well or badly, appropriately or inappropriately, depending on the kinds of questions and data concerned.*<sup>117</sup>

The value of different information types was also recognised at a 2001 Cornell University workshop convening quantitative and qualitative experts in poverty monitoring. The session

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<sup>111</sup>Qvortrup (1997), “A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard” & “Postscript”. *Constructing and Reconstructing Childhood*. James & Prout (eds.), 104-5.

<sup>112</sup>Scott (2000), “Children as Respondents: The Challenge for Quantitative Methods.” *Research with Children*. Christensen & James (eds.), 98.

<sup>113</sup>See below.

<sup>114</sup>Scott (note 112 above), 100.

<sup>115</sup>Save the Children (note 93 above), 32.

<sup>116</sup>See further below. Green (note 53 above), 1080.

<sup>117</sup>Alderson (note 110 above), 83.



concluded that while quantitative and qualitative approaches each have benefits, research should consider how the two could be carefully and effectively combined to advance monitoring.<sup>118</sup>

Alston notes “the capacity to gather, analyze and make use of the data required for indicators is heavily dependent upon the availability of the appropriate technical expertise and resources.”<sup>119</sup> But, Barsh states social scientists tend to rely on unverified methods of instrumentation resulting with philosophically weak distinctions between concepts and indicators, and inaccurate results.<sup>120</sup> He argues greater scholarly effort is directed to “sophisticated statistical manipulations of indicator data, however, than to defining and validating the indicators” and that greater attention needs to be devoted to methodological issues of measuring rights.<sup>121</sup> International indicators require conceptual clarity and “internationally accepted and recognized measures...limited in number and readily intelligible in meaning and policy implications to their likely users,...readily available for all or most countries.”<sup>122</sup> To determine their objectives, monitors should consider whether indicators are used to understand and define child rights, simplify monitoring and/or child rights, or to describe or quantify the situation? The Childwatch project on monitoring for example, found the development of a universal set of indicators was not the best approach due to such challenges as definition, and advocated the development of a process and framework to establish culturally and nationally relevant indicators.<sup>123</sup> The UNCRC acknowledges the national context of global standards since their reporting guidelines request such details as

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<sup>118</sup>See further Kanbur, Cornell University (2001), "Qualitative and quantitative approaches: a false dichotomy?" 13 July, DFID 2001 Cross-Departmental Seminar Series: *Monitoring Poverty: from donor policing to citizen's empowerment*.

<sup>119</sup>Alston (1999), "International Governance in the Normative Areas." *International Human Rights in Context: Law, Politics Morals, Second Edition*. Steiner & Alston (eds.), 317.

<sup>120</sup>Referring to examples including the Human Freedom Index of the 1991 Human Development Report; Barsh (note 48 above), 90-91.

<sup>121</sup>Ibid., 92-98.

<sup>122</sup>De Neufville, cited in Barsh (note 48 above), 99.

<sup>123</sup>The project ran from 1994 to 1998, coordinated by the Centre for Family Research at the University of Cambridge, examining such countries as Senegal, Zimbabwe, and Vietnam. Ennew & Miljeteig (note 98 above), 233; Childwatch International (note 88 above), 15.



independent national institutions.<sup>124</sup> The Childwatch project offers two main lessons: global indicators will only be developed through accumulation of local knowledge; and local/national monitoring mechanisms need to be developed.<sup>125</sup> Thus: "Indicators are only tools in the establishment of national monitoring systems as part of the proper process of governance."<sup>126</sup> Indicators may identify and collect data about some dimensions of the rights situation, thereby realising disaggregation, but they are limited because the image provided "is not enough to determine the actual state of economic, social and cultural rights in a country or for an individual."<sup>127</sup> The conclusion is also true about civil and political rights because indicators-regardless of their subject- do not reflect the comprehensive nature of rights. While research involves decision-making about what information is pertinent, child rights monitoring demands more information than what indicators can provide in order to understand the rights situation. In general, excessive attention is given to indicators as a means to simplify and streamline monitoring. Thus, in order to reflect a child rights-based approach, a national situation must be detailed to contextualise global indicators results.

The demands of disaggregated data<sup>128</sup> to determine differential impact of measures upon the child and his/her group identities complicate collection since the heterogeneity of childhood reflects many differences between children in and between states, whether developing and developed.<sup>129</sup> Ben-Arieh et al. find children are not sufficiently monitored due to the ongoing use of "highly aggregated data" inadequately revealing variations across populations.<sup>130</sup> But Qvortrup warns the focus on the individuality of children's lives restricts the commonality

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<sup>124</sup>Committee on the Rights of the Child (UNCRC) (2002), *CRC General Comment 2*, UN Doc. CRC/GC/2002/2; UNCRC(1996), *General Guidelines Regarding the Form and Contents of Periodic Reports* UN Doc. CRC/C/58; UNCRC(1991), *Guidelines for initial reports of States Parties*, UN Doc. CRC/C/58.

<sup>125</sup>Childwatch International (note 88 above), 2.

<sup>126</sup>Ibid., 16.

<sup>127</sup>Green (note 53 above), 1091.

<sup>128</sup>Disaggregation generally focusses on groups with special international human rights protection (for example children and women under specific treaties) and groups vulnerable to or likely experiencing discrimination or disadvantage for various reasons (as examples ethnic minorities or rural populations); Green (note 53 above), 1085.

<sup>129</sup>James et al., in Qvortrup (2000), "Macroanalysis of Childhood." *Research with Children: Perspectives and Practices*. Christensen & James (eds.), 81.

<sup>130</sup>Ben-Arieh et al. (note 70 above), 102-3.



of child experience, risking “being left ignorant or oblivious of variables that are strategic for changing the life worlds of all or any age group of children.”<sup>131</sup> Such comparative analysis raises “awareness of macro parameters, which may be overlooked because they appear to be - and in a sense are - constant factors. However, what comparative analysis suggests is that they are likely to be the most powerful parameters of conditions and behaviour, exactly because their influence is widespread.”<sup>132</sup> Qvortrup identifies structural, normative and regulative influences upon childhood, applicable to all population groups and stresses the importance of both micro- and macro-level approaches to research so that childhood is “seen from as many fruitful angles as possible.”<sup>133</sup> Regarding concerns about generalisations, Qvortrup responds that “losing information in a controlled way is the very idea of research. It was never the task of researchers to tell everything they knew; on the contrary, the task was always to sort out the most important features and findings, and one crucial criterion is to meet the demand for commonality.”<sup>134</sup> For example, UNIFEM acknowledges that as an international organisation, it can only tell a limited number of stories and that statistical indicators are powerful in contributing to commitment to, and progress for women.<sup>135</sup> Other monitors also make such choices in determining what child rights picture they create: aggregate data about children are valuable as disaggregated data.

While benchmarks do not necessarily measure rights as indicators attempt but tailor goals to specific countries, due to the linear approach, monitoring may not serve child rights if motivations are impeded by political and other concerns. Benchmarks are believed “to bring statistical precision” in national contexts, and is “increasingly being used to set specific, time-bound targets for making progress.”<sup>136</sup> But data can also be inappropriately manipulated to meet goals or benchmarks, highlighting the importance of separating “the monitor from the monitored, or benchmarks will have their biggest impact on recorded statistics, not on

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<sup>131</sup>Qvortrup (note 129 above), 82, 84-5.

<sup>132</sup>Ibid., 88.

<sup>133</sup>Ibid., 89-90, 93.

<sup>134</sup>Ibid., 78.

<sup>135</sup>UNIFEM (note 106 above), 62.

<sup>136</sup>UNDP (note 21 above), 99.



reality.”<sup>137</sup> Neither benchmarks nor indicators should be used to define or identify child rights; rights must remain the focus in tool development.

The rating scales of indices are often used to compare national governments’ efforts in development and rights, in the examples of Global Campaign for Education report, which grades rich countries’ education efforts, or the Human Development Report.<sup>138</sup> But the tool provokes such concerns as: the fact they reflect the values of the producers; many do not reflect human rights law; and the degree to which they inform about the relative situations in different countries.<sup>139</sup> Different placements of any one country or between states over time may not reflect real changes.<sup>140</sup> Individual or group differences are eliminated for a strong results.<sup>141</sup> The combination of various measures and different levels of measurement create heterogeneity problems.<sup>142</sup> Furthermore: “An index cannot contain more information, be more reliable, or be more valid, than the measures from which it was constructed.”<sup>143</sup> Indices may even be used inappropriately to justify political ends. For instance, a government leader attempted to dismiss a decision of the UN HRC by referring to his country’s top Human Development Index placement; a conclusion deemed an abuse of the index.<sup>144</sup> Due to their common problems, it is beneficial that indices are not often used for child rights. Monitoring does not require ranking states performance from best to worst; progress over time within a jurisdiction should take precedence.<sup>145</sup>

In conclusion, Chapter One explains monitoring should provide a picture or illuminate the

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<sup>137</sup>Ibid.

<sup>138</sup>Phillips (2003), *Must Try Harder: A 'School Report' on 22 rich countries' aid to basic education in developing countries*. For development of the Human Development Index, see Haq (1995), *Reflections on Human Development*, Chapter Four.

<sup>139</sup>Green (note 53 above), 1082.

<sup>140</sup>Goldstein, cited in Green, *ibid.*, 1083.

<sup>141</sup>Barsh (note 48 above), 97.

<sup>142</sup>Krausz, in *ibid.*

<sup>143</sup>Barsh (note 48 above), 98.

<sup>144</sup>The provincial premier supported its government position with Canada’s top index ranking following the HRC finding an ICCPR violation in *Waldman v. Canada* (see Chapter Four); UNDP (note 21 above), 93.

<sup>145</sup>Tomaševski (note 13 above), 542.



status of rights.<sup>146</sup> To illustrate potential results from tool use, should the picture created by monitoring results resemble a photograph or a movie?<sup>147</sup> If a snapshot, data from indicators will usually represent the scene without fully explaining the reasons. For instance, data may reveal that a child attends school or may testify in a court case, but no details inform about other children or the impact of these efforts upon children or their communities. In contrast, if the picture reveals a story similar to a movie, various tools including indicators, goals, benchmarks and child rights tools<sup>148</sup> collecting quantitative and qualitative data, may inform and explain child rights progress and ongoing challenges. Since a movie informs about why and how a situation has been reached, it provides valuable contextual information. To carry the analogy further, global monitoring is similar to an international film festival: a movie can describe child rights in a jurisdiction and assesses progress; the collection of films allows development of comparisons across jurisdictions. Since monitoring should be ongoing, every jurisdiction should have a commitment and resources just as Hollywood and Bollywood are dedicated to movie production. However, limited tool use can further linear approaches to monitoring by restricting contextual information or relevant details about the situation. To respect child rights, monitors should not rely on any one tool.

### 3.3 Limited Monitoring

Limited monitoring results from a myopically restricted understanding of rights following traditional rights categories due to such issues as progressive realisation. For some, the categorisation of civil, political rights and economic, social, cultural rights challenges monitoring because the latter raises concerns about progressive realisation, available resources and core content. For example, Verhellen believes different rights complicate monitoring because civil and political rights require state passivity and social, economic and cultural rights require state action.<sup>149</sup> Similarly, Ben-Arieh et al.<sup>150</sup> and Chapman distinguish

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<sup>146</sup>Chapter One, section 2.1.

<sup>147</sup>Analogy also briefly used by Cook (2001), "Effectiveness of the Beijing Conference in fostering compliance with international law regarding women". *United Nations-sponsored world conferences: Focus on impact and follow-up*. Schechter (ed.), 79.

<sup>148</sup>See below.

<sup>149</sup>Verhellen (1994), "The Search for the Achilles Heel: Monitoring of the UN Convention on the Rights of the Child and its implications for the States Parties." *Children's Rights: Monitoring Issues*. Verhellen & Spiesschaert (eds.), 4.

<sup>150</sup>See below.



between rights applying to all states and social, economic and cultural rights, subject to progressive realisation and resource availability,<sup>151</sup> leading to the development of the violations approach (discussed below). But these concerns reflect outdated understanding of rights, which are indivisible and interconnected. Such concerns as progressive realisation and core content should not impede comprehensive monitoring that respects child rights in the process. As Eide explains: "The theoretical legalistic debate...is largely off the mark. The significant question is how to protect these rights..."<sup>152</sup> As discussed below, limited monitoring results with: inadequate attention to the indivisibility of rights, and the civil and political rights of the child; and a debate over the focus, namely whether compliance or enjoyment should be the priority of monitoring. The violations approach to monitoring also reflects limited monitoring. These motivations hinder monitoring inappropriately, thereby reflecting a linear approach: monitoring should consider all rights equally and their full significance.

Despite universal establishment and acceptance of indivisibility,<sup>153</sup> the traditional categorisation of economic, social and cultural rights and civil and political rights influences much monitoring. Both set of rights are clearly recognised and have equal status in the Universal Declaration of Human Rights preamble.<sup>154</sup> In 1950, prior to the adoption of the covenants, the UN General Assembly acknowledged this understanding.<sup>155</sup> Moreover, the 1993 Vienna Declaration affirms: "All human rights are universal, indivisible and

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<sup>151</sup>Chapman (2000), *Indicators and Standards for Monitoring: Economic, Social and Cultural Rights*. Second Global Forum on Human Development, 2.

<sup>152</sup>Eide (1993), "Future Protection of Economic and Social Rights in Europe." *Monitoring Human Rights in Europe*. Bloed et al. (eds.), 214.

<sup>153</sup>For political reasons, only one state-the United States-has challenged acceptance of economic, social and cultural rights as rights, preferring such alternative language as "goals"; Alston (1993), "The importance of the inter-play between economic, social and cultural rights, and civil and political rights." *Human rights at the dawn of the 21st century: Proceedings of Interregional meeting organised by the Council of Europe in advance of the World Conference on Human Rights*, 61.

<sup>154</sup>The preamble affirms "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people". Alston, *ibid*.

<sup>155</sup>The UN General Assembly majority declared in its fifth session (1950) that the enjoyment of rights "are interconnected and interdependent"; Schwelb (1968), "Some aspects of the International Covenants on Human Rights of December 1966." *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium*. Eide & Schou (eds.), 105-110.



interdependent and interrelated."<sup>156</sup> Yet, indivisibility "is generally disregarded in practice" since economic and social rights tend to be treated as less important and their differences, particularly in relation to enforceability, overstated.<sup>157</sup> Instruments, including the UN covenants,<sup>158</sup> and European and American regional treaties, separate rights into the categories to reflect dated understanding, and continue to perpetuate "misunderstandings".<sup>159</sup> But the CRC integrates civil and political rights with economic, social and cultural rights thereby rising above the categorisation. The treaty supports a different approach to rights that is more positive and child-centred.<sup>160</sup> Hence, the instrument "...may contribute to undermining peoples' *idée-fixes* on economic and social rights and to giving those rights their much-needed upgrade."<sup>161</sup> In fact, the categorisation due to resource requirements and so on, is no longer appropriate since assumptions have been discounted.<sup>162</sup>

But attention to economic, social and cultural rights often highlights the restrictions of the traditional categories, rather than the interconnections among all rights. The UNCRC established reporting categories to consider groups of rights and their relationships<sup>163</sup> to simplify the process, but even they largely reflect the traditional separation of rights.

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<sup>156</sup>Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights (1993), UN Doc.A/CONF.157/24, para. 5.

<sup>157</sup>Brems (2002), "Children's Rights and Universality." *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities*. Willems (ed.), 31.

<sup>158</sup>On the development of two covenants, see Schwelb (note 155 above).

<sup>159</sup>ICCPR, ICESCR, ECHR, European Social Charter, American Convention and Additional Protocol in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); Brems (note 157 above), 31.

<sup>160</sup>Van Bueren (note 73 above), 55.

<sup>161</sup>Brems (note 157 above), 31.

<sup>162</sup>For instance, civil and political rights are assumed to require only negative obligations from the state and hence, be cost-free but a juvenile justice system falls into this category, requiring resources; Van Bueren (note 53 above), 382.

<sup>163</sup>Information about Convention articles is to be organised and presented in the following eight reporting categories: General Measures of Implementation (articles 4, 42, 44(para. 6)); Definition of the Child (article 1); General Principles (article 2, 3, 6, 12); Civil Rights and Freedoms (articles 7, 8, 13, 14, 15, 16, 17, 37(a)); Family Environment and Alternative Care (articles 5, 9, 10, 11, 18 (paras. 1, 2), 19, 20, 21, 25, 27, 39); Basic Health and Welfare (articles 6 (para. 2), 18 (para. 3), 23, 24, 26 and 27 (paras. 1-3); Education, Health and Leisure (articles 28, 29, 31); and Special Protection Measures (articles 22, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40); UNCRC(1996), (note 124 above).



Lansdown points out the inherent difficulties.<sup>164</sup> Many CRC articles do not lie neatly into any one category, and the clustering obstructs the interrelated character of the rights, potentially narrowing interpretation of each right. She argues periodic reporting would have been better served by adopting an article-by-article system.<sup>165</sup> While this approach would ensure comprehensive reporting, it is impractical, and could result in useless repetition of information, and voluminous and unmanageable reports for an already overburdened Committee.<sup>166</sup> Expanding reporting requirements would likely not be well received since the established categories are widely utilised. Furthermore, it must be recognised that present guidelines are already more voluminous than those for the other rights treaties,<sup>167</sup> and considered arduous by government officials.<sup>168</sup> While better representation of CRC interrelationships, not simply of provisions within reporting categories but across them, is desirable, the Committee should maintain the established reporting requirements, but strongly elaborate and encourage interpretation of rights indivisibility through General Comments and concluding observations. Due to the CRC's comprehensive scope, child rights bridge traditional rights categories and should inspire new approaches to monitoring, including consideration of the implications of general principles and other relevant articles.<sup>169</sup> But governments and other actors still continue to adhere to categories and their stereotypes. Robinson calls for the embrace of the indivisibility of all human rights.<sup>170</sup> An important step is the elimination of the categorisation of rights.<sup>171</sup> Monitors must ensure non-discrimination in their approach to child rights, which are indivisible and interconnected, considering the

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<sup>164</sup>Lansdown (2000), "The Reporting Process Under the Convention on the Rights of the Child". *The Future of UN Human Rights Treaty Monitoring*. Alston & Crawford (eds.), 117-118.

<sup>165</sup>Ibid.

<sup>166</sup>As of 1 October 2004, the UNCRC received 182 initial, 88 second, and 12 third periodic reports and considered 222 reports; it had not yet considered 60 reports; UN (2005), *Committee on the Rights of the Child: Report on the Thirty-seventh session (2004)*, UN Doc. CRC/C/143, 9, para.18. Improved support has improved the delay of report consideration from four to two years. Moreover, in accordance with UN Doc. A/RES/59/261, the enlarged 18-member Committee will operate in two chambers in January 2006.

<sup>167</sup>The CRC guidelines comprise half of: UN (2001), *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties - Report of the Secretary-General*, UN Doc. HRI/GEN/2/Rev.1.

<sup>168</sup>For example, Van Egmond (note 47 above).

<sup>169</sup>See Chapter Six.

<sup>170</sup>Robinson (2003), "From Rhetoric to Reality Making Human Rights Work." 1 *E.H.R.L.R.*, 1-8.

<sup>171</sup>Van Bueren (note 53 above), 381-3.



spectrum of rights beyond categories. For instance, both individual complaints procedures provided by CERD article 14 and Procedure 1503 do not categorise the alleged violation.<sup>172</sup> While certain monitors may be restricted by formal mandates, in general monitors should exercise increasing awareness and address the rights for what they are and what they demand, not simply reflect categories. Despite mandate limitations, even some UN treaty monitors are beginning to implement this understanding as evidenced by some recent efforts of the UNCESCR and the HRC.<sup>173</sup> In this way, attention to rights leads to better understanding of the dimensions and significance of rights to reflect a child rights-based approach to monitoring.

The traditional categorisation has marginalised economic, social and cultural rights;<sup>174</sup> in response, greater attention to these particular rights attempts to heighten understanding and prominence.<sup>175</sup> Slow production of substantive General Comments about ICESCR<sup>176</sup> provisions over the years for example, likely stunted comprehension.<sup>177</sup> Although established in 1991,<sup>178</sup> the UNCRC did not release general comments until 2001. Much recent research focuses on economic and social rights<sup>179</sup> resulting with limited attention dedicated to civil and political rights inhibiting some monitors' appreciation of their significance in relation to a child. For example, the HRC may not consider a child has ICCPR political rights.<sup>180</sup> Even

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<sup>172</sup>Scheinin (2001), "Economic and Social Rights as Legal Rights." *Economic, Social and Cultural Rights: A Textbook, Second Revised Edition*. Eide et al.(ed.), 31.

<sup>173</sup>As examples, the HRC has explored the "social dimension" of the right to life, particularly in two General Comments about ICCPR article 6 and expressed concern about homelessness for instance in concluding observations about some states parties, and the UNCESCR addressed legal remedies in General Comment No. 4 about the right to adequate housing; in *ibid.*, 41, 45.

<sup>174</sup>Hunt (2000), "Social Rights: Building a Legal Tradition." *Universal Human Rights?* Patman (ed.).

<sup>175</sup>For example Eide et al (eds.) (2001), *Economic, Social and Cultural Rights: A Textbook*.

<sup>176</sup>*International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/RES/2200 A (XXI), 16 December 1966.

<sup>177</sup>The Committee only produced one on the right to adequate housing (general comment No. 4) prior to 1999; Chapman & Russell (2002), "Introduction". *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Chapman & Russell (eds.), 3.

<sup>178</sup>UNCRC (1991), *Provisional Rules of Procedure:14/11/91*, UN Doc. CRC/C/4, Rule 13.

<sup>179</sup>Examples include: Chapman (1996), "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights". 18 *Human Rights Quarterly*, 23, which is discussed below.

<sup>180</sup>Van Bueren (note 53 above), 385-6. See Chapter Two, s.1.0.



a UNICEF meeting to develop “a small set of core indicators” for regular international child rights monitoring<sup>181</sup> could not reach agreement upon indicators for civil rights and freedoms, which could include: government consultation with children; methods of informing and equipping children with skills; and encouraging children’s associations.<sup>182</sup> Additional effort should be directed to equalise monitoring of all child rights provisions, including the lacuna of tools for civil and political rights, in order to eliminate the categorisation of rights.

The limited approach to monitoring is reflected in the ongoing debate about whether monitoring should be concerned with rights compliance or inputs through legislative and other measures, or rights enjoyment, or the results of measures.<sup>183</sup> Mirroring the philosophical debate about whether the objective of equality rights is formal or substantive,<sup>184</sup> the difference between effort and result is important. Generally, the circular approach examines both compliance and enjoyment whereas depending upon the monitor, the linear approach is concerned with either compliance or enjoyment. Chapman favours an obligation of conduct or inputs with economic, social and cultural rights, rather than an obligation of result or outputs.<sup>185</sup> Green tentatively supports this conclusion, suggesting a focus on government obligations, rather than rights enjoyment, particularly in relation to economic, social and cultural rights, due to “progressive realization.” She proposes that: “it may be easier to determine the exact nature of each right by looking first to the exact nature of the governmental obligation under the “progressive realization” clause”, while acknowledging the issue is not yet resolved in the human rights literature.<sup>186</sup> Chapman’s conclusion about the obligation of conduct is not included in her more recent (co-authored) contribution.<sup>187</sup> While useful to explain dimensions of implementation in relation to inputs and outputs, it is incorrect to conclude that the obligation of implementation, and by extension monitoring, is restricted to inputs because it does not reflect the vision of human rights, more concerned

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<sup>181</sup>UNICEF (1998), *Indicators for global monitoring of child rights: Summary Report*, 1.

<sup>182</sup>*Ibid.*, 7.

<sup>183</sup>See further Green (note 53 above), 1085.

<sup>184</sup>See Collins (1995), “Seeking Equality,” M.A. thesis, Dalhousie University..

<sup>185</sup>Chapman (note 151 above), 3.

<sup>186</sup>Green (note 53 above), 1088.

<sup>187</sup>Chapman & Russell (note 177 above), 1-19.



with constraining it. As rights necessitate and demand progress in every state party, attention to input only could lead to complacency with efforts - however they are defined - ignoring whether they are successful or even intend to be successful. Moreover, such attention to compliance is likely only concerned with government efforts, ignoring the complexity of implementation, and other actors' roles. Monitoring plays a necessary role in determining the reality of the distinction.

The UNCRC has a substantive approach, affirming: "Implementation [of the CRC] is the process whereby States Parties take action to ensure the *realisation* of all rights in the Convention for all children in their jurisdiction".<sup>188</sup> Similarly, the UN Committee on the Elimination of Racial Discrimination affirms the equality of result interpretation of CERD.<sup>189</sup> The African Children's Charter shares this approach as evidenced in Article 1 for instance, which does not simply require implementation measures, but clearly enunciates measures are "necessary to give effect to the provisions of this Charter."<sup>190</sup> The Charter's provisions for Committee functions for reporting, communications, investigations, and the affirmation of the relevance of international human rights, all support the approach.<sup>191</sup> Article 4 of the World Declaration on Education for All for example, acknowledges this understanding as monitoring should consider both intentions and actual outcomes for children.<sup>192</sup> Thus, instruments and monitors affirm not only standards, but also progress in their implementation. Monitoring is fundamentally important to ascertain the reality, the truth behind claims or numbers, and ensure accountability to rights of every child.<sup>193</sup> Thus for child rights at the international and regional levels, a substantive approach considering efforts and results is required.

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<sup>188</sup>Emphasis added; UNCRC (2003), *CRC General Comment 5* UN Doc. CRC/GC/2003/5, para.1.

<sup>189</sup>Meron, cited in Felice (2002), "The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights." *24 Human Rights Quarterly*, 212.

<sup>190</sup>*Charter on the Rights and Welfare of the Child*, adopted July 1990, entered into force 29 Oct. 1999, OAU Doc. CAB/LEG/TSG/Rev.1.

<sup>191</sup>*Ibid*, articles 42-46.

<sup>192</sup>The World Declaration on Education for All, a.4, affirms the focus of basic education must be "on actual learning acquisition and outcome...", cited in Chinapah (1997), *Handbook on Monitoring Learning Achievement*, 1.

<sup>193</sup>Kent (1997), "Realizing international children's rights through implementation of national law." *5 The International Journal of Children's Rights*, 454.



Monitoring compliance is necessary due to attention to essential elements that should be in place for rights fulfilment, including legislation, but compliance is only the first step in ascertaining the reality of rights fulfilment. What is the impact of these elements; do they achieve their objectives? As rights are designed to inspire and represent progress, monitoring should consider both compliance and rights enjoyment or substantive results for children. Consequently, the Roehrer Institute affirms indicators should "...measure the effectiveness and efficiency of inputs (i.e. dollars spent), activities (i.e. research, analysis, policy development) and outputs (i.e. policies, programs, services) in achieving outcomes that meet the stated goals and the overall objective of the initiative."<sup>194</sup> But it is not always easy to determine a monitor's objective because NGOs, UN bodies, and government indicators are not usually explicit about measuring enjoyment or compliance; Green explains "Often there is no way or need to distinguish between the two, and often the UN body or the NGO switches easily between indicators that clearly look from one direction or the other."<sup>195</sup> Indeed, the UN human rights system focusses on measuring both compliance and enjoyment;<sup>196</sup> and indicators for both exist.<sup>197</sup> Compliance is a necessary element in considering rights enjoyment. Klein and Carter state the approach to measuring inputs, processes and outcomes must each be addressed and the interrelationships between them considered by monitoring efforts.<sup>198</sup> Thus, research questions should consider how inputs affect output as they may or may not be related or the relationship may be indirect. Not only initial child rights objectives and results are relevant for analysis but the process involved, which should be considered in monitoring. Hence, the debate about focussing on either compliance or rights enjoyment is short-sighted, ignoring the reality and challenge of rights implementation.

### 3.3.1 Violations Approach

To monitor the ICESCR (which includes child rights<sup>199</sup>), Chapman developed the violations

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<sup>194</sup>Roehrer Institute (note 86 above), 44.

<sup>195</sup>Green (note 53 above), 1087.

<sup>196</sup>Ibid., 1088.

<sup>197</sup>See s.3.2 above.

<sup>198</sup>Klein & Carter (1988), "Performance Measurement: A Review of Concepts and Issues". *Performance Measurement: Getting the Concept Right*. Beeton (ed.), 17

<sup>199</sup>See Chapter Two; and Van Bueren (2002), "The Minimum Core Obligations of States Under Article 10(3) of the International Covenant on Economic, Social and Cultural Rights." *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Chapman & Russell (eds.), 147.



approach to monitoring in response to the challenges of progressive realisation and absence of indicators.<sup>200</sup> Due to failure to act or interference, a violation is defined as “a failure by a State party to comply with an obligation articulated therein.”<sup>201</sup> Chapman argues

*violations are more readily defined and identified, particularly for non-governmental organizations and perhaps for governments and international bodies as well. The work of the UN Committee on Economic, Social and Cultural Rights attests to the fact that it is possible to identify violations of enumerated rights without first conceptualising the full scope of a right and the obligations of States parties in relationship to it.*<sup>202</sup>

To address the Covenant’s distinction between progressive and immediate application, emphasis is placed on conduct and results through the identification of a right’s core content. Identification of core content to effect this approach is not as simple as Chapman suggests; as Dias questions: what is the core content, how is it determined and who makes such decisions?<sup>203</sup> Chapman co-edited a publication on minimum core obligations of economic, social and cultural rights and utilised the opportunity to defend the violations approach in light of three main areas of debate.<sup>204</sup> First, concern that attention to violations would detract from full rights implementation is rebutted with affirmation of the approach’s complementarity with full implementation. Second, there is anxiety that the approach would result with government criticism, thereby imperiling NGO monitoring in certain countries. In response, the violations approach is posited to complement constructive cooperation between civil society and government. Third, criticism highlights violations are not theoretical abstractions, which is not disputed with acknowledgement that a “violation requires a setting and a context.”<sup>205</sup> Barsh agrees: “The human impact of violations is highly contextual and cultural.”<sup>206</sup> In further defence of the violations approach, it is contended that “it is not necessary first to delineate the full scope of the right.”<sup>207</sup> But how would the

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<sup>200</sup>See: Chapman (1995), “A New Approach to Monitoring the International Covenant on Economic, Social and Cultural Rights”. 55 *The International Commission of Jurists: The Review*, 23; (note 179 above); and (note 151 above).

<sup>201</sup>The Limburg Principles (1986), cited in Chapman, *ibid.*, 33.

<sup>202</sup>*Ibid.*, 31.

<sup>203</sup>Dias (2000), *Towards Effective Monitoring of Compliance with Obligations and Progressive Realisation of ESCR.*, 1.

<sup>204</sup>Chapman & Russell (note 177 above), 7-8.

<sup>205</sup>*Ibid.*

<sup>206</sup>Stohl et al., in Barsh (note 48 above), 101.

<sup>207</sup>Chapman (1996), in Chapman & Russell (note 177 above), 8.



identification of violations in certain contexts affect monitoring? Chapman suggests her approach focusses attention on “more obvious or concrete kinds of violations”,<sup>208</sup> which may seem easier but Barsh cautions:

*If a measure of “domestic repression” is limited to torture, killings, and disappearances, for instance, a state can improve its score simply by replacing torture with more censorship and longer prison terms for its political opponents. Unless all tools of repression are included, the measure will fail to identify all instances of repression.*<sup>209</sup>

While addressing measurement based on unclear terminology, Barsh’s concern is also relevant to certain violations once identified and monitored. If certain violations become the focal point of monitoring, not only does monitoring narrow its approach and attention, ramifications could be very problematic for the monitored, as Barsh suggests, not simply for domestic monitors as Chapman acknowledges. It is not clear whether she understands this implication. The attempt of the violations approach to develop a definitive list of violations even if acknowledging “a setting and a context”, may reduce the present and future scope of rights provisions. Just as it may not be possible to fully conceptualise the full scope of a right,<sup>210</sup> it follows that it may not be conceivable to elaborate the full universal set of violations under a specific right. An inventory of violations may ignore potential violations within certain cultural or national contexts or be too reductionist in developing a definitive, “user-friendly” list of violations. The aforementioned defences demonstrate Chapman accepts the violations approach as part of spectrum of monitoring activity and not the only approach, which is a welcome acknowledgement.

While it may be helpful to identify violations to illustrate potential weaknesses in treaty implementation, further potential dangers of the approach for child rights monitoring should be considered. First, the results of this negative approach will likely present an unbalanced picture of the particular child rights situation. Dias highlights this approach does not distinguish between violations and compliance with obligations as it “treats each and every noncompliance with obligations as a violation” and that it focuses on State obligations.<sup>211</sup> Consequently, he identifies a “promotional approach”, relevant to economic, social and

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<sup>208</sup>Barsh (note 48 above), 101.

<sup>209</sup>Ibid.

<sup>210</sup>See s.3.1 above.

<sup>211</sup>Original emphasis, Dias (note 203 above), 2.



cultural rights and progressive implementation, distinguished from the focus on violations with civil and political rights.<sup>212</sup> Acknowledging the interrelationships between all rights, he offers a checklist to monitor progressive realisation, not violations, of the ICESCR. As implementation can be complex, it is simplistically categorical to designate implementation either as violations or successful progress as Chapman suggests. The promotional approach is useful in distinguishing the spectrum of rights implementation from full effort to violations. Some advocates may be satisfied with an emphasis on violations but the focus will not represent the overall situation. “The bias of human rights information towards violations,” Tomaševski believes, “has to be overcome if indicators are to capture the efforts of governments, the obstacles they are facing, the progress and the retrogression in the implementation of human rights obligations.”<sup>213</sup> The Inter-American Court on Human Rights for instance recognises similar complexity in enunciating that the American Convention provision for domestic remedies requires adequacy and effectiveness, not simply that they formally exist.<sup>214</sup> The focus on violations likely also ignores the role of civil society in child rights. Participation and responsibility are thus restricted to facilitate targeting of criticism and blame.

The violations approach follows the linear approach to monitoring, without acknowledging its weaknesses, to prove one’s chosen end objective but treaty implementation is more complicated. While every country may violate human rights to varying degrees, there are also usually successes and positive lessons learned - however great or small - about implementation that should be highlighted and shared. Further, progressive realisation should not be ignored, nor should it adversely affect monitoring. Hunt identifies a “tyrannizing” distinction between the violations approach and the progressive realisation approach due to concern about excessive attention to the theoretical difference between compliance and enjoyment.<sup>215</sup> As discussed above, both compliance and enjoyment are relevant to, and should not restrict monitoring. As Brems explains, progressive realisation is “a useful flexibility tool, which makes it possible to vary standards of human rights

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<sup>212</sup>Ibid.

<sup>213</sup>Tomaševski, (note 21 above), 532.

<sup>214</sup>*Velásquez Rodríguez*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser.C) No.4 (1988), paras.62-63.

<sup>215</sup>Green (note 53 above), 1086.



evaluation according to the economic and financial situation of the state. In fact there is no reason why this technique should not be extended to all human rights."<sup>216</sup> It seems Chapman is comfortable with the categorisation of economic, social and cultural rights with respect to progressive realisation without critical analysis. Progressive realisation of rights should not restrict monitoring, nor constrain it to consideration of violations.

Another danger of the violations approach is that monitoring can become issue-or needs-based rather than rights-based, which is problematic. Issues or designated "needs" can address particular points or questions according to particular perspectives but are not necessarily stemming from or guided by rights. Instead of springing from child rights concerns and a rights-based process, the violations approach may lead to focussing on stereotypes or misconceptions about children, perpetuating a negative approach to children and monitoring, which does not necessarily reflect child rights or the actual situation of children.<sup>217</sup> Issue-based monitoring may lose sight of the overall context of children's rights, similar to media criticism, distorting numbers involved or affected, creating inaccurate pictures. In this way, the violations approach again mirrors the linear approach so monitoring becomes less credible or useful in improving children's rights.

Gross violations cause serious concern so Chapman correctly considers them; however, monitoring demands more than she suggests. Rights and monitoring are not only about addressing violations but promoting rights progress and preventing violations before they happen. Rather than concentrate only on violations, it would be more useful to construct a framework that incorporates dimensions of rights into monitoring, which acknowledges the roles and contributions of all relevant actors.<sup>218</sup>

Where does the monitor situate itself in terms of understanding its role and priorities? Why should the whole spectrum of rights implementation be considered and not simply the abuses? If focussing exclusively on violations or gross violations, then the monitor has only

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<sup>216</sup>Brems (note 157 above), 43.

<sup>217</sup>Research demonstrates for example, poverty's influence upon Canadian child development is not as important as once believed; parenting practices are in fact more important. See Chao & Willms (2000), "Family Income, Parenting Practices, and Childhood Vulnerability: A Challenge to the "Culture of Poverty" Thesis". *Policy Brief*.

<sup>218</sup>Ennew & Miljeteig (note 98 above), 233. The CRC implementation checklists are helpful; see Hodgkin & Newell (2002), *Implementation Handbook for the Convention on the Rights of the Child*.



a limited perspective of implementation and more likely to pursue linear monitoring. Whereas a circular approach means the monitor considers the whole picture and the range of implementation. Thus, not only violations, but also compliance and enjoyment are assessed. A monitor's position on spectrum of rights implementation determines understanding of rights. Hence, limited monitoring is a significant issue influencing child rights and their comprehensive understanding.

#### 4.0 CONCLUSION

Is the challenge of monitoring accurately described by Verhellen as the “Achilles heel” of the CRC?<sup>219</sup> This chapter demonstrates monitoring is a complex undertaking with numerous issues to consider and choices to be made, which can affect the credibility of the process and results, thereby influencing the value of the contribution, which can be disputed or worse, negligible. If well done, monitoring allows understanding of child rights, provides data to inspire and mobilise ongoing progress. Resources are needed to support the effectiveness and comprehensiveness of monitoring. But the issue of cost/benefit of monitoring remains a challenge: how to ensure resources dedicated to monitoring actually justify the expense?<sup>220</sup> The broad range of actors, procedures, and various contexts inhibits the compilation of a comprehensive list of criteria for cost/benefit analysis. But in terms of the costs, issues include whether resources are used effectively and efficiently. With many monitors, overlapping efforts are possible, resulting with potentially wasteful resource use. Are lessons learned about resource-use incorporated into the process for its improvement?

But resources alone will not ensure success. To make a contribution, monitoring is dependent upon the legal and political commitment and context: why and how it is being done and by whom. Official domestic monitors of the Indian public distribution system for example, affirm no Indian starves, yet it is reported they “rarely stir from their offices. Millions of people are hungry in India not through lack of food but because of massive official corruption, bureaucratic apathy and political indifference.”<sup>221</sup> Widespread commitment and dedicated effort are necessary to accurately monitor. Furthermore, the monitor's perspective is fundamental. Monitoring should include independent actors who

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<sup>219</sup>Verhellen (note 149 above), 3.

<sup>220</sup>Pearson, Senate of Canada (2002), Interview with author, Ottawa: 26 September.

<sup>221</sup>Harding (2002), “Dying in hunger in a land of surplus”. *Guardian Weekly*: November 21-27, 3.



are outside others' influence to protect data and results from theft, political agendas, resource withdrawals and so on.

To be clear, monitoring is not an end in itself, rather serves as a means to improve child rights. Diversity is valued in the process and different forms of data and analysis contribute to the overall picture. Hence, coordination is essential among monitors and of procedures, as Van Boven explains, "...to maintain consistency in the interpretation of standards and in the assessment of facts and information, and with a view to avoiding duplication and confusion..."<sup>222</sup> But, as monitors appear to rely on different child rights interpretations as well as utilising different approaches to monitoring, mere coordination is not occurring, moreover, it is insufficient. Different approaches determine the value of various contributions as tool use, data selection and the monitors themselves *inter alia* influence the nature of the process and results. Due to the differences of every monitoring effort and the diversity of participants, each activity and result must be critically analysed on a case-by-case basis. To determine some benefits of monitoring, do data results illustrate various dimensions of child rights, provide new understanding of the situation, confirm or rebuke conventional understanding? A circular approach is preferred due to its research orientation, comprehensive, unbiased process and outcomes.

Identifying different approaches to monitoring assists with critical analysis of results. But linear monitors should not be dismissed because they still have roles to play in creating the picture of child rights. Barsh supports the value of participant involvement in research to determine the reality of issues or concepts due to the subjective nature of "impact, value and meaning" across cultures and likely over time.<sup>223</sup> Different monitors reflect various roles and expectations in relation to monitoring and can critique others' results or relying upon them for their efforts. Interactions among monitors over time support the creation and maintenance of an accurate illustration of child rights. Accordingly, political monitoring has specific purposes and can complement legal procedures.<sup>224</sup>

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<sup>222</sup>Van Boven (note 5 above), 16.

<sup>223</sup>Barsh (note 48 above), 103, 109, 119.

<sup>224</sup>See Van Boven (1992), "'Political' and 'Legal' Control Mechanisms: Their Competition and Coexistence." *Human Rights in Perspective: A Global Assessment*. Eide & Hagtvat (eds.), 56-60.



International child rights law not only establish standards for children, but should also influence processes related to children including monitoring. As the thesis demonstrates, the assessment of the status of children's rights can either respect or ignore child rights in the process. Thus, while child rights may inspire monitoring efforts, they may not necessarily guide them. Linear monitors choose a limited focus, influencing the untangling of rights, tool use, and overall process. Hence, a linear approach reflects limited understanding of child rights and monitoring while a circular approach is more comprehensive, reflecting child rights principles. Hence, commitment to child rights requires *inter alia* children's involvement to contribute their perspectives to the description of the situation as well as consideration of the end-result: what are the benefits or problems created by the results? Attention to follow-up is required. The next chapter expounds upon how a child rights-based approach to monitoring facilitates respect of children's rights.



**CHAPTER SIX:**  
**A CHILD RIGHTS-BASED APPROACH TO MONITORING**  
**THE RIGHTS OF THE CHILD**

In general, existing monitoring may meet formal requirements established in international law but should improve to reflect and respect the demands of child rights since most monitors do not utilise a child rights-based approach. The long-term goal of the child rights-based approach, indeed the CRC's fundamental goal, must be the universal realisation of every child's rights under the state's jurisdiction.<sup>1</sup> Consequently, monitoring bodies should ensure respect of children's rights as they undertake the collection and assessment of data. A suitable monitoring system not only examines the status of child rights but how child rights are respected by the process. The question is not only how child rights are monitored, but how child rights are maximised in monitoring. What obstacles remain and what contributions exist towards the approach? The chapter discusses the rationale for a child rights-based approach to monitoring. Then, challenges to the approach are elaborated before existing supportive factors to implement it, including tools, are presented. Thesis Appendix A offers proposed theoretical guidelines to support the utilisation of a child rights-based approach to monitoring.

**1.0 RATIONALE FOR A CHILD RIGHTS-BASED APPROACH TO MONITORING**

While international child rights law has evolved over the last century, the standards have not yet inspired much attention to monitoring. This may be the result of CRC's reporting provisions, largely tasking the UNCRC with the responsibility. Yet the Committee's limitations and the roles and activities of other monitors and procedures<sup>2</sup> highlight the importance of considering the overall system. Research has found that child rights have been incorporated into the adult rights system but inadequately influence the process.

As Chapter One discusses, a human rights approach is helpful in understanding and analysing issues including monitoring. Santos Pais supports the approach to "inform and guide" UNICEF's efforts.<sup>3</sup> The UN High Commissioner for Human Rights (as she then was) believes a rights-based approach requires "describing situations not in terms of human needs,

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<sup>1</sup>Santos Pais (1999), *A Human Rights Conceptual Framework for UNICEF*, 7.

<sup>2</sup>See Chapter Two.

<sup>3</sup>Santos Pais (note 1 above), 1.



or areas for development, but in terms of the obligation to respond to the rights of individuals...[It] implies the direct involvement of people in decisions relating to their own development.”<sup>4</sup> The obligation to rights is comprehensive, effecting and affecting all measures.<sup>5</sup> To be effective and progressive, measures should depend upon monitoring results, hence monitoring is a relevant measure for consideration.

The international child rights legal framework adequately provides for monitoring by various international and national actors. International legal attention to substantive concerns in recent years has led to the adoption of *inter alia* optional protocols to the CRC on armed conflict and the sale of children. But procedural concerns related to child rights have been largely neglected. Although the international legal framework provides for child rights, enforcement avenues are limited. Moreover, as this dissertation demonstrates, actors may pursue different approaches to monitoring.

There is a lacuna between monitoring and child rights demands as evidenced by various limitations of current efforts discussed in the dissertation including the linear or needs-based approach, and the focus on well-being instead of rights. Such linear efforts usually follow specific concerns or issues, likely deviating from child rights; whereas, circular efforts generally respect child rights and their demands throughout the process. Rights should guide monitoring since they are an international legal obligation, and the commitment should also be realised in monitoring. Indeed, attention to child rights require that the child be the centre of the inquiry, in accordance with his/her best interests. Moreover, adults must recognise the discrimination that children face in their lives and in monitoring. Children are born into an existing adult world, which “constructs children *out of society*, mutes their voices, denies their personhood, limits their potential”.<sup>6</sup> Adults may be well-meaning in attempting to serve child needs,<sup>7</sup> but their monitoring efforts may not reflect the child's right to development, or evolving capacities, or may neglect discrimination, which also inhibits child participation.

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<sup>4</sup>Robinson, ‘Foreword’, in *ibid.*, iv.

<sup>5</sup>As examples, see CRC a.4, ICESCR a.2, ICCPR a.2, CEDAW a.2, 3.

<sup>6</sup>Original emphasis, Alanen et al., in Ennew (1994), “Time for Children or Time for Adults?” *Childhood Matters*. Qvortrup et al. (eds.), 125.

<sup>7</sup>Chapter Five, s.1.0 discusses needs-based approach.



Even though a child may be unable to enforce his/her rights, his/her rights are not disputed.<sup>8</sup> Utilisation of child rights can improve the process of monitoring.

A child rights-based approach highlights the distinction between circular and linear approaches, challenging monitors to continually improve their processes and results in order to better respect international child rights law. Inspired by the human rights approach, a child rights-based approach utilises child rights in monitoring, acknowledging all child rights are interrelated,<sup>9</sup> with primary emphasis upon the four CRC general principles and reference to the child's evolving capacities as per CRC article 5. Monitoring is a process that can and should be influenced by child rights as some actors have already demonstrated.<sup>10</sup> Accordingly, monitoring not only considers their status and nature but is also guided by them to both reflect and respect children and their rights. As rights represent progress,<sup>11</sup> a child rights approach demands progress in monitoring.

## **2.0 CHALLENGES**

Various challenges to a child rights-based approach exist including varying interpretations of child rights monitoring; limited data collection; lack of or limited resources; restricted rights awareness and commitment; and the child's limited role.

### **2.1 Interpretation of Child Rights Monitoring**

The most significant challenge to a child rights-based approach is the interpretation of child rights monitoring. Broad participation<sup>12</sup> and varying approaches influence how the situation of child rights is understood, how the monitoring process is comprehended and realised, inevitably affecting the results. Consequently, narrow monitoring focuses on economic, social and cultural rights for instance, neglecting civil and political rights and their

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<sup>8</sup>Lauterpacht (1950), cited in Higgins (1994), *Problems & Process: International Law and How We Use It*, 53.

<sup>9</sup>Santos Pais (1997), "The Convention on the Rights of the Child." *Manual on Human Rights Reporting*. UN (ed.), 405.

<sup>10</sup>IDASA is an excellent example, in Chapter Four, s.2.7.

<sup>11</sup>Inter-American Commission of Human Rights in *Roach and Pinkerton*, "human rights...always represent progress..." cited in Van Bueren (1998), *The International Law on the Rights of the Child*, 200, FN #23.

<sup>12</sup>Participation also contributes, discussed below.



indivisibility.<sup>13</sup> The traditional division of rights should be eliminated<sup>14</sup> because a child rights approach monitors all rights. But how are variations in understanding and implementing the approach resolved?

Inconsistent child rights interpretations, with their universal and national significance, may challenge a common monitoring approach. For instance, some monitors may interpret the best interests of the child in a non-child rights manner due to the term's traditional welfare-or protectionist-history. Weak reasoning or strategy may permit international monitors' varying understanding of child rights, and effect different monitoring approaches and results. For example, the UNCRC and the UN Special Rapporteur on Torture have different approaches to corporal punishment as does the European Court of Human Rights in *Costello-Roberts v. United Kingdom*.<sup>15</sup> The problem perpetuates due to the absence of a global judicial rights body. The UN Committee is not a judicial body but assumes its mandate in accordance with the CRC provides adequate justification for its child rights positions. For example, the Committee could have explained its opposition to corporal punishment but simply pronounces without reasoning in its first General Comment, concluding article 28(2) establishes limits on discipline and that concluding observations have "repeatedly" established its "clear" position.<sup>16</sup> General Comments in particular should not only state positions but contribute to child rights understanding and common positions but the Committee's interpretation is not persuasive due to the absence of compelling argumentation. The Committee blurs its international legal responsibility to support consistent child rights interpretations with comments akin to political stances so this aspect of the general comment is not particularly helpful. As child rights is a relatively new field, innovation may be difficult. Nevertheless, progress is required to overcome difficulties with inconsistent child rights interpretations, which exacerbate current monitoring problems. If provisions are unclear or inconsistently understood, a child rights-based approach is impeded.

The complexity of child rights may overwhelm the uninitiated or even those familiar with the

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<sup>13</sup>See Chapter Five, s.3.3.

<sup>14</sup>Van Bueren (note 11 above), 381-3.

<sup>15</sup>247 Eur. Ct. H.R. (ser. A) at 11 (1993).

<sup>16</sup>Committee on the Rights of the Child (UNCRC) (2001), *CRC General Comment 1*, UN Doc. CRC/GC/2001/1, para. 8.



framework, but growing literature can inform actors and support untangling of child rights.<sup>17</sup> Nevertheless, hesitancy or confusion about a rights framework persists. For example, Ben-Arieh et al.'s contribution on monitoring indicators uses language that appears to accept child rights, but explicitly chooses to focus on "well-being" instead of rights. The authors acknowledge the controversy between the approaches but conclude in favour of "well-being" for two reasons.<sup>18</sup> First, the CRC's acceptance in articles 4 and 27 of "progressive realisation" where implementation measures using maximum resources or means indicates "an expectation that the minimal levels that are acceptable and/or adequate will vary."<sup>19</sup> Whilst it has been argued that varying implementation challenges indicator development for different states and within states, this position is faulty as it reflects a misunderstanding about progressive realisation. Indicators should be developed based on child rights and the context, not on the degree of implementation. The UNCESCR clarifies progressive realisation "should not be misinterpreted as depriving the obligation of all meaningful content",<sup>20</sup> a position affirmed by the UNCRC.<sup>21</sup> Monitoring ensures progressive realisation is not an excuse for lack of or weak implementation. Each State party can decide but may have to justify its approach to treaty monitors.<sup>22</sup> The European Commission and Court adopted the fundamental purpose argument for "interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty" instead of restricting obligations.<sup>23</sup> Hence, monitors and other actors are not hampered by progressive realisation. Second, it has been inadequately argued that indicators for well-being are more powerful than those for rights despite similarities between monitoring well-being and rights including the foundation based on the CRC's recognition of the child and his/her dignity, the focus on child-centred indicators, and the significant principles of best interests and evolving capacities.<sup>24</sup> In

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<sup>17</sup>See examples: Santos Pais (note 9 above), 393; Hodgkin & Newell (2002), *Implementation Handbook for the Convention on the Rights of the Child: Fully revised edition*.

<sup>18</sup>Ben-Arieh et al. (2001), *Measuring and Monitoring Children's Well-Being*, 42.

<sup>19</sup>Ibid.

<sup>20</sup>Committee on Economic, Social and Cultural Rights (UNCESCR) (1990), *General Comment 3*, UN Doc.E/1991/23, para 9.

<sup>21</sup>UNCRC (2003), *General Comment 5*, UN Doc.CRC/GC/2003/5, para. 5.

<sup>22</sup>UNCESCR (note 20 above), para. 4.

<sup>23</sup>European Court of Human Rights in *Wemhoff* (1968), cited in Van Bueren (note 11 above), 392.

<sup>24</sup>Ben-Arieh et al. (note 18 above), 43.



contrast, Barnes-September understands rights and well-being in a complementary manner: "...somewhere in the background will always be the CRC. ... And the well-being of children is how well are we doing in terms of measuring these rights."<sup>25</sup> Therefore, rights and well-being should reinforce each other. But a child rights-based approach, not well-being, must instigate and guide monitoring due to the international legal obligation to the child. Furthermore, child rights demand attention to both the process and results, which are equally important.<sup>26</sup>

Due to monitors' discretion, some may interpret a child rights approach to be subjective but this is incorrect. If subjective, results could reflect bias or be fashioned to serve personal or political agendas rather than children and their rights; it could also be diminished by those unsympathetic to child rights.<sup>27</sup> This type of monitoring would be linear because results reflect a particular concern or understanding of the situation, not necessarily reality or international child rights law. Such subjectivity would be problematic to a child rights-based approach. Chayes and Chayes believe "the general level of compliance with international agreements cannot be empirically verified" because "questions of compliance are often contestable and call for complex, subtle, and frequently subjective evaluation."<sup>28</sup> Such subjectivity reflects a concern of the New Haven school of law,<sup>29</sup> which focusses upon decision-making processes guided by notions of human dignity and contextual issues of which international law is a product.<sup>30</sup> It is valuable in highlighting different "observational standpoints" due to the range of human communities and identities and to analyse the law. In particular, Lasswell and McDougal argue:

*It is of the utmost importance that the scholarly observer adopt perspectives different*

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<sup>25</sup>Barnes-September, Programme Planning and Evaluation Specialist, Institute for Child and Family Development, University of the Western Cape (2002), Interview with author, Bellville: 29 July.

<sup>26</sup>Wilson (1994), "Defining Children's Rights," address to Canadian Institute Conference on Children and the Law, May.

<sup>27</sup>See examples: Simon (2000), "United Nations Convention on the Wrongs to the Child". 8 *The International Journal of Children's Rights*, 1-13; and Hafen & Hafen (1996), "Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child". 37 *Harvard International Law Journal*, 449-491.

<sup>28</sup>Chayes & Chayes (1993), "On compliance." 47 *International Organization*, 176.

<sup>29</sup>See Lasswell and McDougal (1992), *Jurisprudence for a free society vol. 1*.

<sup>30</sup>See summary in Charlesworth & Chinkin (2000), *The boundaries of international law: A feminist analysis*, 32-34.



*from either of the community member or advocate making claims or of the authoritative decision maker who responds to such claims, and maintain and employ functional theory and procedures which enable him [/her] economically and realistically to perform the indispensable intellectual tasks in relation to the flow of authoritative decision and its accompaniment of conventional theories.*<sup>31</sup>

Similarly, Higgins describes international human rights law as not simply a set of rules to be followed because international law is a process where decision-making involves choices that reflect relevant context.<sup>32</sup> This understanding accurately reflects the demands of human rights, which establish universal standards that vary according to the context. In this way, the New Haven school is consistent with the findings of this thesis, which has revealed different standpoints, or approaches, from which monitors untangle the demands of the standards, assess the child rights situation, and progress of implementation. Monitors have different roles and priorities, influencing their approach, process and results. Differences exist however, between the New Haven School and a child rights-based approach. The school does not focus on human rights,<sup>33</sup> does not recognise such critical perspectives as gender and sex,<sup>34</sup> and does not understand the law as neutral. The school is criticised for its subjectivity.<sup>35</sup> The child rights approach is centred on international child rights law and the monitoring obligation, embracing its neutrality to guide efforts. Attention must be focussed upon law's interpretation and utilisation in monitoring to respect and advance international child rights standards.

The International Court of Justice acknowledges difficulty with a subjective term, which can serve “both the result to be achieved and the means to be applied to obtain this result”.<sup>36</sup> In reference to the problematic “equitable” formula, Higgins acknowledges “choices cannot be made without reference to the result.”<sup>37</sup> She stresses the ends of decision-making be

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<sup>31</sup>Original emphasis; Lasswell and McDougal (note 29 above), 184.

<sup>32</sup>See Higgins (note 8 above),

<sup>33</sup>The main text only addresses human rights in two appended articles to the work; see Lasswell and McDougal (note 29 above), appendices 3, 6.

<sup>34</sup>Charlesworth & Chinkin (note 30 above), 33.

<sup>35</sup>Ibid.

<sup>36</sup>*Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* 1982 ICJ Rep. 18 at 59, para. 70.

<sup>37</sup>Higgins (note 8 above), 227.



articulated<sup>38</sup> since undefined terms without a rationale lead to random conclusions. As argued above, the UNCRC would be wise to follow such advice in its general comments.<sup>39</sup>

Child rights can mean different things depending on the perspective. In order to ensure consistency in approaching monitoring, law must be maintained as the foundation to understanding and activities. The legal framework guides the process, the understanding of child rights and the approach; legal methods are based upon clearly defined obligations. The flexibility of child rights interpretation does not signify deficiency in definition and significance. Child rights are defined by the content and intent of relevant international legal instruments and documentation, including *travaux préparatoires*. Hence, the NGO desire to expand the definition of such legal terms as torture for example, in order to maximise monitoring avenues for specific concerns, does not reflect international rights law.<sup>40</sup> But the number and nature of CRC reservations for instance, demonstrate perceived potential constraints to cultural, religious and/or national imperatives, and present an obstacle to consistent interpretation.<sup>41</sup> Human rights are universal and not mitigated by such concerns so how do monitors address these concerns? Glenn enunciates that as rights are not absolute, their advancement results with the consideration of specific problems in their given context, as the European Court of Human Rights interprets “human rights as variable standards, capable of violation *in varying degrees*”.<sup>42</sup> Monitors consider the context in which the rights are situated and the nature of their progress or constraint. Alston explains monitoring should “...involve neither the embrace of an artificial and sterile universalism nor the acceptance of an ultimately self-defeating cultural relativism.”<sup>43</sup> A balance must be made between the universalism of rights with particular contextual considerations. Thus, acknowledging “childness” and the child's specificities, cultural or otherwise, cultural, religious and national

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<sup>38</sup>Ibid.

<sup>39</sup>See above.

<sup>40</sup>See Chapter Two.

<sup>41</sup>Chapter Two, s.5.1 discusses reservations.

<sup>42</sup>Glenn (2000), *Legal Traditions of the World*, Oxford: Oxford University Press, 336.

<sup>43</sup>Alston (1994), *The Best Interests of the Child: Reconciling Culture and Human Rights*, 2.



issues should not constrain fully inclusive rights protection.<sup>44</sup> Legal techniques accommodate relevant factors, as Brems explains, to reflect child rights flexibility and “facilitate the assessment of states’ failure to provide a sufficient degree of human rights protection” as some “context-specific provisions and frequent elastic terminology” accommodate diversity among children.<sup>45</sup> Constraints are only perceived, providing excuses, rather than justifications. Monitors at various levels must relate religious, cultural and national concerns to international child rights law since these considerations may attempt to excuse actual or potential violations. While rights are universal, a child rights approach reflects the circumstances of the monitored and their rights. Consequently, the general interpretation process is the same although rights may have different dimensions depending upon the context.<sup>46</sup> Due to the contextual variations across jurisdictions, guidelines, rather than instructions, are proposed in an appendix to support a child rights-based approach to monitoring.

But pure logic does not always support the result reflecting a gap that can exist between logic and law, the cost of which is uncertainty in legal reasoning, but the outcome allows judges for instance to respond to changing social conditions for example.<sup>47</sup> Consequently, uncertainties must be identified and influences considered before thorough research to determine what best supports one’s objective(s).<sup>48</sup> To reflect a child rights-based approach, monitors should be guided by child rights in an objective manner to maintain independence from personal concerns so that efforts respect the international legal demands of child rights. Monitors that follow a needs-based or linear approach are more likely to follow a subjective approach that stems from personal opinions about child rights and their status. Hence, if their monitoring focusses on such problems as truancy for example, results will likely not reflect the whole situation, only the difficulties. This type of effort offers a limited view of the child and child rights have not guided the process. In accordance with a circular approach, a child

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<sup>44</sup>Brems (2002), “Children’s Rights and Universality.” *Developmental and Autonomy Rights of Children*, Willems (ed.), 32-45.

<sup>45</sup>*Ibid.*, 43, 45.

<sup>46</sup>For example, monitoring the right to, and aims of education in Canada will differ from South Africa due to *inter alia* different constitutional guarantees. See Chapter Four.

<sup>47</sup>Holland & Webb (1991), *Learning Legal Rules*, 203-204.

<sup>48</sup>*Ibid.*, 209-210.



rights-based approach focusses on the means or process of monitoring and does not define the result in order to reflect and respect the child and his/her rights. Monitors must strive for objectivity in untangling rights within a specific context. Then, a human rights framework can be utilised, which Alston explains, includes: "...normative specificity, an accepted legal obligation, a commitment to the use of all appropriate means, the provision of forms of redress in response to violations and the establishment of mechanisms of accountability at the national and international levels."<sup>49</sup> International child rights law provides the foundation but critical analysis must be directed to monitors' choices to ensure proper reflection of these standards.

## 2.2 Data Collection

Data collection is another challenge to a child rights-based approach. Significant resource expenses can be involved within and across jurisdictions, hindering monitoring capacity. A World Bank review of data availability for the international development indicators agreed by donors and developing countries for example, indicates data are inadequate, either missing or very out of date, in approximately 40% of countries, most significantly in Africa.<sup>50</sup> For example, South Africa only had until recently the 1995-96 census data to use as a baseline, which does not include children as a unit of analysis or cover the whole population, resulting with many gaps.<sup>51</sup> Even where relevant data exist, child rights may not be reflected in the development or results. Maximum survival and development for instance, requires monitoring of child health and evolving capacities to determine whether development is improving or deteriorating over time and disaggregation to determine the status of each child's rights. Economic hardship does not relieve states parties' obligation to protect vulnerable populations, including children, and monitoring to determine their status. The UNCESCR states monitoring, strategies and programmes for rights promotion "are not in any way eliminated as a result of resource constraints."<sup>52</sup> In elaborating General Comment 5, the UNCRC unequivocally states CRC article 4 requires: "Whatever their economic circumstances, States are required to undertake all possible measures towards the realisation

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<sup>49</sup>Alston (1998), cited in Green (2001), "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement." 23 *Human Rights Quarterly*, 1095.

<sup>50</sup>Eele, Development Data Group, World Bank (2001), "Monitoring the International Development Goals/Targets - where do the data come from?" 24 May.

<sup>51</sup>Barnes-September (note 25 above).

<sup>52</sup>UNCESCR (note 20 above), para 11.



of the rights of the child, paying special attention to the most disadvantaged groups.”<sup>53</sup> The South African state’s duty may be even higher during economic difficulties according to Van Bueren since “children are most at risk from the neglect, degradation and economic exploitation...”<sup>54</sup> States must act upon their duty to make data collection a priority.

While some states have more resources than others, resource availability alone does not determine monitoring success. Monitoring requires not only capacity, but also willingness.<sup>55</sup> Political will and commitment are required to dedicate various resources<sup>56</sup> consistently over time. If willingness is lacking, data safety must be ensured with back-up copies to safeguard against theft (not to mention technological difficulties).<sup>57</sup>

Even where qualitative and quantitative information about children exists, “we know surprisingly little about the state of our children.”<sup>58</sup> There are many influential factors. Inconsistent or sweeping data collection methods may inhibit the maximum survival and development and non-discrimination principles. While countries may collect information about children, the task is usually divided across government departments.<sup>59</sup> Moreover, much data collection meets institutional needs rather than child needs and rights.<sup>60</sup> Also, technical collection methods including “the psychological experiment, psychometric testing,

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<sup>53</sup>UNCRC (note 21 above), para. 8.

<sup>54</sup>Van Bueren (1999), "Alleviating Poverty Through the Constitutional Court". 15 *South African Journal on Human Rights*, 61.

<sup>55</sup>Tomaševski (2001), "Indicators." *Economic, Social and Cultural Rights: A Textbook, Second Revised Edition*. Eide et al. (eds.), 532.

<sup>56</sup>Verhellen (1994), "The Search for the Achilles Heel: Monitoring of the UN Convention on the Rights of the Child and its implications for the States Parties." *Children's Rights: Monitoring Issues*. Verhellen & Spiesschaert (eds.), 9.

<sup>57</sup>For example, burglaries of files and computer equipment, excluding other valuables, from human rights organisations have been documented in 2002 in Guatemala City; see Cruz (2003), "Notes from the Field: Data Protection for Human Rights Groups in Guatemala". *XXIII Report on Science and Human Rights*, Washington D.C.

<sup>58</sup>Ben-Arieh et al. (note 18 above), 1. Children are not included in social accounts including statistics and little information directly details child experience at societal level; Scott (2000), "Children as Respondents: The Challenge for Quantitative Methods." *Research with Children: Perspectives and Practices*. Christensen & James (eds.), 98.

<sup>59</sup>Childwatch (1996), *Indicators for Children's Rights: Sources of information for country case studies*.

<sup>60</sup>Ennew & Miljeteig (1996), "Indicators for children's rights: progress report on a project". 4 *International Journal of Children's Rights*, 233.



sociometric mapping, ethnographic description and longitudinal surveys have ...structured our thinking about children.”<sup>61</sup> Government efforts are “overwhelmingly concerned with two age groups:” children under five years old, concentrating on health; and young people over 15 years, focussing on employment, such issues as conflict with the law, sexuality, and drug use.<sup>62</sup> Research tends to focus on children’s problems or issues, rather than positive approaches. Wintersberger acknowledges the focus on children at risk and “pathological phenomena like mortality, morbidity, child abuse and juvenile delinquency, while the basic conditions of childhood affecting the child population at large are widely neglected.”<sup>63</sup> Negative approaches remove the child from his/her context so that his/her situation is not fully comprehended. Due to the preoccupation with risk and negative approaches, Glossop explains “we have a limited sense of protective indicators, little of positive indicators of development as a society because we’ve focussed on the present if not past tense.”<sup>64</sup> Further: “Available statistics concentrate on (1) the production of children, (2) expenses invested in them, and (3) their failure to meet the desired requirement. ...[I]t is certainly not conducive for a positive attitude towards children as human beings to see them reduced to cost factors.”<sup>65</sup> Lack of understanding about children is compounded by an overwhelming role of statistics, which are only one source of information- usually lacking context - about children.<sup>66</sup> Mayall concludes:

*Much research...has been carried out on children, based on the assumption that children, compared to adults, are incompetent, unreliable and developmentally incomplete; so it is the goal of the researcher, on the basis of adult paradigms of child development, to improve knowledge of children’s position and progress on the journey to adult maturity.*<sup>67</sup>

Thus, children are inadequately understood. A broader rights perspective is clearly needed

<sup>61</sup>Prout and James (1997), "A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems." *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood, Second Edition*. James and Prout (eds.), 9.

<sup>62</sup>Childwatch (note 59 above).

<sup>63</sup>Wintersberger, 'Preface', in Ben-Arieh, et al. (note 18 above), xiii.

<sup>64</sup>Glossop, Executive Director of Programs and Research, The Vanier Institute of the Family (2003), Interview with author, Ottawa: 7 January.

<sup>65</sup>Qvortrup (1997), "A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard" & "Postscript". *Constructing and Reconstructing Childhood*,. James & Prout (eds.), 91, 100.

<sup>66</sup>Ibid., 104-5.

<sup>67</sup>Mayall (2000), "Conversations with Children: Working with Generational Issues." *Research with Children*, Christensen & James (eds.), 121.



in collecting and analysing data to comprehensively understand children and the situation of their rights.

Most existing information about children, including statistics, does not involve children in the research process.<sup>68</sup> "The history of the study of childhood in the social sciences has been marked not by an absence of interest in children... but by their silence."<sup>69</sup> Minority children, including those with disabilities are particularly excluded or overlooked.<sup>70</sup> Existing information about children often refers to the situation of their caregivers, and children's status as "dependents" is unquestioned, thereby depriving them "of an account of themselves in their own right."<sup>71</sup> Large quantitative research often pursues adult-centric questions even though "the best people to provide information on the child's perspective, actions and attitudes are children themselves."<sup>72</sup> Children are excluded in surveys according to Scott, for several reasons including: "inertia of practice" where adults in the lives of children are the focus of attention; tendency of relying on adults as those with "greater knowledge, experience and power"; perception that involving children is too problematic; and mere ignorance or belief that children cannot be valuable respondents.<sup>73</sup> Academic researchers are also slower to understand the importance of working with children themselves, possibly due to procedural and ethical concerns, which can and have been effectively addressed.<sup>74</sup> Consequently, Qvortrup concludes "children are the invisible group par excellence in our society."<sup>75</sup> Children's understandings of their rights "complement and reinforce macro-studies" about childhood "in indicating that their rights are poorly recognized, and that social

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<sup>68</sup>Qvortrup (2000), "Macroanalysis of Childhood." *Research with Children*, Christensen & James (eds.), 78-79.

<sup>69</sup>Prout and James (note 61 above), 7.

<sup>70</sup>For example, see Hanvey (2002), *Children with Disabilities and Their Families in Canada: A Discussion Paper*, National Children's Alliance.

<sup>71</sup>Qvortrup (note 65 above), 90.

<sup>72</sup>Scott (note 58 above), 98-9.

<sup>73</sup>Ibid., 101.

<sup>74</sup>Roberts (2000), "Listening to Children: and Hearing Them." *Research with Children*. Christensen & James (eds.), 235.

<sup>75</sup>See further Qvortrup (note 65 above), 88.



policies should directly address children's interests, rather than, simply, adults' interests."<sup>76</sup> Thus, data and collection methods perpetuate discrimination against the child and their engagement, and inhibit the best interests and survival and development principles, posing a significant barrier to a child rights approach.

Efforts are being made to address the data collection problem. For example, an international research project developed indicators to measure the "well-being" of children due to concerns about the general "failure to measure the state of children beyond survival or their basic needs."<sup>77</sup> Researchers should focus on child rights as a framework and approach to monitoring to understand their realities. With various data sources (which may include censuses and surveys, administrative data,<sup>78</sup> primary research and secondary sources), adequate data generally exist to support the development of national monitoring systems.<sup>79</sup> Persistence and creativity are often required to manipulate the information to inform about child rights.<sup>80</sup> Freedom of information also contributes to monitoring success. In recent years, some states have focussed on children with specific statistical publications including Denmark, Finland, Norway, and Sweden.<sup>81</sup> Nonetheless, most data collection should improve using a child rights approach.

### 2.3 Lack of, or Limited Resources

Lack of, or limited resources hamstringing the overall system, monitors and the adoption of a child rights-based approach. In addition to finances, resources comprise: human resources, including health, knowledge, creativity, skills and time availability; such organisational resources as household and community structures, relationships, institutes, and organisations

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<sup>76</sup>Mayall (note 67 above), 134.

<sup>77</sup>However, as discussed above, the authors did not adopt a child rights approach; Ben-Arieh et al. (note 18 above), xxi.

<sup>78</sup>Administrative data are collected as part of an institution's regular identification of service use and are inadequately considered; *ibid.*, 92.

<sup>79</sup>Childwatch's five country case studies led to this conclusion; Childwatch International (1999), *Monitoring Children's Rights Project (Indicators for Children's Rights): Report to the Swedish International Development Cooperation Authority*, 17.

<sup>80</sup>Ennew & Miljeteig (note 60 above), 233, 236.

<sup>81</sup>Qvortrup (note 65 above), 103.



in the public and private sectors.<sup>82</sup> Technical resources include availability of databases, computers, software and so on.<sup>83</sup> Human resources include the capacity of a state to develop and sustain research and child-rights awareness and understanding, which may not be assumed, particularly in developing contexts.<sup>84</sup> Under-resourced monitors are unable to monitor consistently, effectively or comprehensively. Lack of resources appears to be a factor in the gap of independent monitoring mechanisms for children in many states or the lack of capacity of such institutions in others. Restrictions also affect the availability of: skill development for such monitors as judges; and capable individuals who facilitate child engagement. Greater understanding is needed of the important role of monitoring as an international legal obligation and as the source of valuable details about child rights. Then, tension caused by resource limitations can be resolved in favour of supporting effective monitoring.

Resources are fundamental to ensure efficiency and effectiveness of monitoring, but how can the cost/benefit issue be resolved to ensure dedicated resources are justified?<sup>85</sup> The goal of enforcement, according to economist Stigler, “is to achieve that degree of compliance with the rule of prescribed (or proscribed) behavior that the society believes it can afford.”<sup>86</sup> If monitoring does not benefit practical understanding of child rights, the value of the results and the process come into question. Using an illustrative economic formula, Stigler argues a “rational measure of enforcement procedure could in principle be established in almost any area”; so enforcement costs will not be out of proportion with the return and be rationally guided and justified.<sup>87</sup> Most monitors have generally inadequately demonstrated their work's value and significance and yet complain about insufficient resources. Indeed, a tension exists between economics' emphasis upon priorities and optimal use of resources, while human

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<sup>82</sup>Himes (1992), *Implementing the United Nations Convention on the Rights of the Child: Resource Mobilization and the Obligations of the States Parties*, 7.

<sup>83</sup>Barnes-September (note 25 above).

<sup>84</sup>*Ibid.*

<sup>85</sup>Pearson, Senate of Canada (2002), Interview with author, Ottawa: 26 September.

<sup>86</sup>Stigler (1970), “The Optimum Enforcement of Laws.” 78 *Journal of Political Economy*, 526.

<sup>87</sup>*Ibid.*, 532-33.



rights highlight universalism.<sup>88</sup> While rights do not need justification, due to limited resources, choices must be made about what and how monitoring activities should be undertaken among the range of actors and activities. Success of monitoring must be measured by degree of effectiveness, accuracy, respect of child rights, and the contribution to understanding the child rights situation. It is rational to support the more successful monitors and their activities with limited resources to meet the aforementioned objectives. Political interference, undue or unfair discrimination however, are possible in determining the success of one monitor over another. Independent decision-makers are likely well-placed to deliberate the cost/benefit issue and best use of resources.

#### 2.4 Inadequate Child Rights Understanding and Commitment

Inadequate numbers of people are aware or understand child rights impeding monitoring work.<sup>89</sup> While there has been some success in raising awareness among those working directly on child policies and programmes, too many adults and children do not know about child rights due to unfamiliarity with human rights, concerns about conflicts with rights of adults or parents, and difficulties with awareness-raising.<sup>90</sup> Adult constraints upon children and misunderstandings about their rights also allow preconceptions or prejudices about the child to affect monitoring. Lack of or limited rights awareness means the child is restricted to an object in monitoring. This barrier affects the efforts of individual monitors as well as the overall system, challenging the adoption of a child rights approach.

Despite the existence of the international legal framework of child rights, an unsupportive legal culture<sup>91</sup> is problematic. The barrier may be particularly evident in those countries with dualist legal traditions separating international law from the domestic legal system and law students may not be educated about international law.<sup>92</sup> Thus, the population or even lawyers may not be aware of international child rights or may ignore its relevance, a position that

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<sup>88</sup>Besley, Van Bueren, and Sfeir-Younis (2003), *Economics and Human Rights: Common Ground Or Continual Conflict?*, University of London event, 20 November.

<sup>89</sup>Examples include: Canadian Coalition for the Rights of Children (1999), *How does Canada measure up?*, 33; and Mabusela, Deputy Chairperson (as she then was), in South African Human Rights Commission (SAHRC) (2000), *Towards the Development of a Focal Point for Children in the SAHRC*, 1.

<sup>90</sup>Muscroft (ed.)(1999), *Children's Rights: Reality or Rhetoric?*, 30.

<sup>91</sup>Higgins (note 8 above), 206.

<sup>92</sup>*Ibid.*



often percolates into national law. It is unlikely that the standards will be propagated or respected within a jurisdiction. Inaccurate interpretation of CRC general principles may also be a problem. General rights monitors tend to emphasise the child's right to protection and consider children merely as victims. For example, the HRC overwhelmingly focused on protection in its general comment on the rights of the child and did not examine best interests in *Hendriks*.<sup>93</sup> Better understanding of child rights principles is needed through awareness-raising and training for effective monitoring. Child rights and monitoring demand more commitment and a supportive legal culture.

## 2.5 Limited Child's Role

Although children in research focus groups for instance, have clear ideas about functions and importance of monitoring,<sup>94</sup> the child's right to participate - a dimension of a child rights-based approach - is generally not respected. While children participate in different ways including civic, religious, and education contexts, very limited research exists on children participating in monitoring.<sup>95</sup> Monitoring should not only meet the needs of the monitor, but also consider the issues and concerns of children themselves according to various supporters.<sup>96</sup> For instance, Santos Pais expresses "...the views of children need to be respected and taken into account when policies are shaped, actions undertaken, and results assessed."<sup>97</sup> Monitoring mechanisms "should be a voice for children", as Flekkøy describes, and in so doing would:

*"transmit information from children; make the needs and rights of children publicly known; impart to children information they need to know, making sure that children are aware of the Convention and its relevance to their daily lives; ensure that the literal voices of children are heard - that is, that the concerns and opinions which*

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<sup>93</sup>See Chapter Two.

<sup>94</sup>Focus Group on Monitoring Children's Rights, organised and facilitated by Ph.D. candidate (2002 and 2003), with: Child and Youth Friendly Ottawa, Ottawa: 28 June and 5 October, 2002; Afrika Cultural Centre, Johannesburg: 10 July, 2002; Children's Resource Centre, Cape Town: 27 July, 2002; and Article 12, London: July 28, 2003.

<sup>95</sup>Barnes-September (note 25 above).

<sup>96</sup>Examples include: Alderson (2000), "Children as Researchers: The Effects of Participation Rights on Research Methodology." *Research with Children: Perspectives and Practices*. Christensen & James (eds.); Save the Children (2000), *Children and Participation: Research, monitoring and evaluation with children and young people*; and Flekkøy (1996), "Children's Participation and Monitoring Children's Rights". *Monitoring Children's Rights*. Verhellen (ed.).

<sup>97</sup>Italics added for emphasis; Santos Pais (note 1 above), 5.



*children themselves have actually expressed are taken into consideration.*"<sup>98</sup> Child advocates cannot ensure the suitability of monitoring efforts since as Melton states: "Child advocates act on behalf of children, but they do not always represent children."<sup>99</sup> Different perceptions between adults and children was discovered for example, in a 1993 project involving 4-5 year-olds in an economically-deprived area of London, England.<sup>100</sup> Children produced a mural of their local environment and then depicted it as they would like it to be. It was learned that children objected to grass-covered communal play areas -widely perceived as most appropriate- because it obscured broken glass, dog excrement and discarded drug needles and they preferred concrete surfacing. Thus, even young children have distinct, valuable contributions. Direct work with children is important and would advance suitable monitoring but as the thesis explores, the child's role remains a significant challenge.

Many interpretations of participation exist along with various criteria to assess it.<sup>101</sup> CRC article 12 defines the right of "the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." It has also been defined as

*a process in which children and youth engage with other people around issues that concern their individual and collective life conditions. Participants ...respect each other's dignity, with the intention of achieving a shared goal. [And]...the child experiences ...a useful role in the community. Formal processes of participation deliberately create structures for children's engagement in constructing meaning and sharing decision making.*<sup>102</sup>

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<sup>98</sup>Flekkøy (1993), "Monitoring implementation of the UN Convention on the national level". 1 *The International Journal of Children's Rights*, 233.

<sup>99</sup>Melton, cited in Flekkøy (1993), *Children's Rights: Reflections on and consequences of the use of developmental psychology in working for the interests of children. The Norwegian Ombudsman for Children: A practical experience*. Doctoral thesis, University of Gent, 371.

<sup>100</sup>Stepney and Wapping Community Child Health Project, cited in Lansdown (2001), *Promoting Children's Participation in Democratic Decision-Making*, 8.

<sup>101</sup>Roche (2000), "Impact assessment: seeing the wood *and* the trees." 10 *Development in Practice*, 546.

<sup>102</sup>As a June 2000 symposium concluded, "Children's Participation in Community Settings", in Chawla (2001), "Evaluating children's participation: seeking areas of consensus." *PLA notes*, Chawla (ed.), 9. Other offerings include: "the action or an act of taking part with others"; and "In its most basic sense, adolescent participation can be defined as adolescents partaking in and influencing processes, decisions and activities." See respectively Woolf (2000), "seen but still not heard? the child's right to participate." *Child participation: Challenges of empowerment, World Vision discussion papers*. World Vision UK (ed.), 15;



In general, child participation involves influential interaction with others, which positively affects relations. Mann also describes “enormous variations in the type and manner of child participation: it can vary from an infant’s expressed need for love and comfort, to a child’s involvement in after-school activities to an adolescent’s contribution to student council.”<sup>103</sup> The most appropriate form of participation, as Chawla explains, “varies with circumstances, including culture, age, gender, setting, political conditions, available resources, and participants’ goals.”<sup>104</sup>

How is child involvement rights-based? As an essential CRC general principle, participation is a child right.<sup>105</sup> Roberts explains “listening to children is central to recognizing and respecting their worth as human beings.”<sup>106</sup> The CRC affirms, as Van Bueren explains, the value of “child-oriented freedom of expression”, which involves a change of “focus from what children cannot do to what children can do, and to which decisions and parts of decisions children may make.”<sup>107</sup> While children have this freedom, it is not simply a matter of States parties removing restrictions upon the freedom, children require support to express themselves, requiring significant state effort.<sup>108</sup> States parties to the CRC are expressly obligated to provide the child with the “opportunity to be heard in any judicial and administrative proceedings affecting the child”.<sup>109</sup> While participation has gained increasing attention recently, it has not yet been widely understood in relation to monitoring. Moreover, participation rights, which are easiest to implement through legal and judicial processes for adults, are in fact “the most elusive” for children, described as “the most difficult to define, to implement and to monitor.”<sup>110</sup> Influences or obstacles to participation rights include: adult

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and Rajani (1999), *Promoting Strategic Adolescent Participation*, 7.

<sup>103</sup>Mann (1999), *The Right to Participate: A Working Paper on Child Participation*, 9.

<sup>104</sup>Chawla (note 102 above), 9.

<sup>105</sup>Article 12 is often interpreted as the child’s right to participate; Santos Pais (note 9 above), 426-427.

<sup>106</sup>Roberts (note 74 above), 229.

<sup>107</sup>Van Bueren (1995), “The International Protection of Family Members’ Rights as the 21st Century Approaches”. 17 *Human Rights Quarterly*, 742.

<sup>108</sup>Ibid.

<sup>109</sup>CRC Article 12(2)

<sup>110</sup>Black (1994), *Monitoring the Rights of Children*, 28.



perceptions of children; religious beliefs; cultural practices; traditions; and laws.<sup>111</sup> A child can be "invisible" for various reasons including: institutionalisation, migration, fear, or monitoring procedures focusing on the household rather than its individual members; as a result, children are not easily reflected in monitoring efforts.<sup>112</sup> Consequently, due to widespread lacuna, child participation remains the most significant challenge to a child rights-based approach to monitoring. Creativity is required to engage invisible children; children can contribute to revealing invisible children.<sup>113</sup> As Lewis and Lindsay confirm: "It is our task as researchers, from both practical and ethical considerations, to ensure that we ask the right questions in our studies, those which are important, and that we conduct our research in a manner that optimizes the opportunity for children's perspectives to be listened to - and heard."<sup>114</sup>

A child rights approach requires the monitor to consider the child's situation and the child's own perspective. If the child's views are not addressed, not only are his/her rights not respected, the monitoring results will reflect a limited picture with restricted impact. Some individual and groups of children have been involved in some collecting and analysing data; Alderson explains the advantages: "To involve all children more directly in research can therefore rescue them from silence and exclusion, and from being represented, by default, as passive objects, while respect for their informed and voluntary consent helps to protect them from covert, invasive, exploitative or abusive research."<sup>115</sup> Child participation is also valuable because: "Children are the primary source of knowledge about their own views and experiences."<sup>116</sup> Participatory techniques have many advantages. They "enable dialogue with children about complex and abstract issues."<sup>117</sup> Participatory research can also redress ethical difficulties in working with children and enhance the validity and reliability of the research

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<sup>111</sup>Miljeteig, in *ibid.*

<sup>112</sup>Boyden, cited in Black (note 110), 26-7.

<sup>113</sup>*Ibid.*, 27.

<sup>114</sup>Lewis & Lindsay (2000), "Emerging Issues." *Researching children's perspectives*. Lewis & Lindsay (eds.), 197.

<sup>115</sup>Alderson (note 96 above), 243.

<sup>116</sup>*Ibid.*, 253.

<sup>117</sup>O'Kane (2000), "The Development of Participatory Techniques: Facilitating Children's Views about Decisions which Affect Them." *Research with Children*, Christensen & James (eds.), 155, 141.



results.<sup>118</sup> Techniques may address concerns about adult control and manipulation. For example, child impact assessments and other monitoring efforts are not simply undertaken for form, but compensate for the little political power that children have, directly or indirectly, in society.<sup>119</sup> But O’Kane acknowledges “the biggest challenge for researchers working with children are the disparities in power and status between adults and children”.<sup>120</sup> Thus, participation is not simply a method but “part of a process of dialogue, action, analysis and change”.<sup>121</sup>

Child participation can take many diverse forms in monitoring. Children can be consulted; they can be researchers or evaluators; they can be observed; and they can start democratic structures and guide monitoring efforts themselves.<sup>122</sup> Many successful examples include: child researchers with Children’s Express as reporters (aged 8-13) (along with 14-18 year-old editors), producing print media reports in Europe and North America; children (aged 10-13) in Sarajevo carried out children’s opinion polls in 1993 and developed radio programming;<sup>123</sup> child-led research by street children in Bangladesh;<sup>124</sup> and child researchers in Zimbabwean informal settlements.<sup>125</sup> A child participatory method is relevant at all stages of the research process: developing the project and research team and methods, as well as collecting, analysing and writing reports; and can redress power imbalances, widen collection methods

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<sup>118</sup>Thomas and O’Kane, in *ibid.*, 152.

<sup>119</sup>See further below. Hammarberg, “Preface”, in Sylwander (2001), *Child Impact Assessments: Swedish Experience of Child Impact Analyses as a tool for implementing the UN CRC*, 7.

<sup>120</sup>Morrow and Richards, in O’Kane (note 117 above), 136.

<sup>121</sup>Pretty et al, in *ibid.*, 138.

<sup>122</sup>Hart’s participation ladder describes degrees of child participation; Hart (1992), *Children’s Participation: From Tokenism to Citizenship*.

<sup>123</sup>Alderson (note 96 above), 250-1. See <[www.childrens-express.org](http://www.childrens-express.org)> last visited 25 Aug. 2003.

<sup>124</sup>West (1998), “Different questions, different ideas: child-led research and other participation.” *Stepping Forward: Children and young people’s participation in the development process*. Johnson et al. (eds.).

<sup>125</sup>McIvor (2001), ““Do not look down on us”: child researchers investigate informal settlements in Zimbabwe.” *PLA Notes* 42, Chawla (ed.).



and promote understanding of the data.<sup>126</sup> Many supportive resources exist.<sup>127</sup> However: “The limitations in Europe and North America for research by children seem to lie less therefore in children’s (in)competencies, than in adults’ limiting attitudes, in constraints, and concern for protection over participation rights.”<sup>128</sup> As children are not mini-adults, some adults may interpret children’s contributions as limited or even negligible, leading to either no participation or token participation (where children lack a substantive role, serving as ‘window-dressing’), which reflects adult manipulation, deficient in meaning or significance for the children or adults.<sup>129</sup> The ideal adult role is as a “facilitator: to guide but not to control unduly, and least of all to extinguish. The most common obstacle encountered by children ... is the uncompromising adult presence and its attachment to restrictive rules and regulations.”<sup>130</sup>

As noted in earlier chapters, consulting with children is likely the most common and popular form of engagement in monitoring due to its simplicity, adult involvement (if not control), cost and so on. The UK government for instance, supported Save the Children to consult with 400 four to 17 year-olds for its report in 2000 to the UNCRC.<sup>131</sup> Yet, consultation is not simple or always successful. Barriers include:<sup>132</sup> lack of time; lack of confidence or skill in communicating with children; possible language barrier; family dynamics; fear of losing control; anxiety about children’s potential problems; and prejudice against engaging young children. As adults often lead monitoring, cooperation between adults and children is required for a child rights-based approach. A supportive culture is needed as part of the broader context of public participation with clarity of roles and responsibilities.<sup>133</sup> Adults should “be more aware of all children’s potential, and to search with each child how much

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<sup>126</sup>Alderson (note 96 above), 246, 241.

<sup>127</sup>As examples: Save the Children (note 96 above); Christensen & James (2000), *Research with Children: Perspective & Practices*; Masson (2000), “Researching children’s perspectives: legal issues”. *Researching Children’s Perspectives*. Lewis & Lindsay (eds.); Qvortrup (note 65 above); and Greig and Taylor (1999), *Doing Research with Children*.

<sup>128</sup>Alderson (note 96 above), 254.

<sup>129</sup>Black (note 110 above), 29.

<sup>130</sup>*Ibid.*, 30.

<sup>131</sup>Alderson (2000), *Young children’s rights: exploring beliefs, principles and practice*, 88.

<sup>132</sup>*Ibid.*, 73-77.

<sup>133</sup>McClain, Commissioner, SAHRC (2002), Interview with the author, Johannesburg: 10 July.



he or she can understand and be involved, instead of assuming incapacity.”<sup>134</sup> Assumptions should generally be avoided since efforts to designate a minimum age for child participation for example, are unsubstantiated in international law. For instance, CRC article 12(1) does not address freedom of expression in terms of age, but rather in terms of ability. Further, the Hague Convention on Abduction<sup>135</sup> does not specify a minimum age for consideration of children’s objections regarding return to a parent.<sup>136</sup> Two decades of child development research shows competence is largely contextualised, thus the best approach “is to assume competence in some degree, and to ask at every age: what support can be provided to enable children to participate to the best of their ability?”<sup>137</sup> A child rights position, as Lewis and Lindsay explain, “does not absolve researchers from conducting research which is appropriate to the children’s developmental and power status.”<sup>138</sup> Children’s evolving capacities must be respected, which includes recognition of their limitations.<sup>139</sup> Scott highlights several factors for valuable data collection:<sup>140</sup> Questions must be appropriate for the child’s experience or knowledge; the child must be willing and able to respond to the questions and reflect his/her experience and knowledge; and attention must be given to the child’s motivation to responding to the research questions, which can improve through good, respectful relationships.<sup>141</sup> Mindful of ethical issues, researchers must consider:<sup>142</sup> purpose; costs and expected benefits; privacy and confidentiality; selection of participants; funding; review of research aims and methods by others; information for participants and their carers; consent; dissemination of results; and overall impact upon children.<sup>143</sup> Moreover, when

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<sup>134</sup>Alderson (note 131 above), 83.

<sup>135</sup>*Hague Convention on the Civil Aspects of International Child Abduction*, Hague Conference on International Private Law, signed on 25 October, 1980.

<sup>136</sup>Van Bueren on behalf of The British Institute of Human Rights, and Reunite: National Council for Abducted Children (1993), *The Best Interests of the Child-International Co-operation on Child Abduction*, 19.

<sup>137</sup>Italics removed. The June 2000 symposium, “Children’s Participation in Community Settings”; conclusions in Chawla (note 102 above), 12.

<sup>138</sup>Lewis & Lindsay (note 114 above), 194.

<sup>139</sup>Brems (note 44 above), 28.

<sup>140</sup>Scott (note 58 above), 107-109.

<sup>141</sup>*Ibid.*

<sup>142</sup>Alderson, in Roberts (note 74 above), 229-230.

<sup>143</sup>*Ibid.*



engaging children in monitoring, activities should be fun as children in focus groups stressed. With more experience of cooperative work, adults and children will then improve their confidence and expertise, leading to greater and broader participation at both national and international levels.<sup>144</sup> It must be remembered that participation will differ from child to child. For instance, the contributions of girls may differ from boys, so single-sex groups may be useful in some contexts; contributions of older children will often contrast those of younger children.<sup>145</sup> If a child does not feel safe in a situation, it is unlikely that s/he will contribute.<sup>146</sup> While children's diversity complicates participatory undertakings, it also enhances the value of the exercise.

Children in Canadian, English and South African focus groups support participatory monitoring. Although some Canadian focus group participants expressed reservations about engaging children in "third world countries" in monitoring due to a necessary focus on survival,<sup>147</sup> another believes rights awareness remains an obstacle.<sup>148</sup> Yet, participatory monitoring is not simply a western, developed world proposal. Barnes-September from South Africa,<sup>149</sup> along with individuals and groups from developing countries including Indonesia and Nepal,<sup>150</sup> Thailand's ECPAT,<sup>151</sup> the Philippines,<sup>152</sup> and *Acción por los Niños*

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<sup>144</sup>Alderson (note 131 above), 93.

<sup>145</sup>See Johnson et al. (eds.) (1998), *Stepping Forward: Children and young people's participation in the development process*.

<sup>146</sup>Canadian focus groups participants emphasised this point, namely KM., a 15 year-old girl, in June; and P., a 17 year-old boy; RL. and S., 15 and 16 year-old girls respectively, in October: Focus Group (2002) (note 94 above).

<sup>147</sup>TA. and RJ., 13 year-old boys; and RL., 15 year-old girl, Ottawa, 5 October (note 94 above).

<sup>148</sup>In the same session, 15 year-old girl L., originally from Kenya, stated institutions in such countries "are very defensive. There is poverty. They are not pushing to defend the opportunity to advertise our rights." Ibid.

<sup>149</sup>Barnes-September (note 25 above).

<sup>150</sup>Nurick & Johnson (2001), "Putting child rights and participatory monitoring and evaluation with children into practice: some examples in Indonesia, Nepal, South Africa and the U.K." *PLA Notes*, Chawla (ed.).

<sup>151</sup>See ECPAT (2002), *ECPAT Newsletter: End Child Prostitution, Child Pornography, and Trafficking of Children for Sexual Purposes*, (3).

<sup>152</sup>See Sali (2000), "Expanding children's participation in social reform." *Child Participation: challenges of empowerment*, 24-28.



in Peru,<sup>153</sup> respect and support child participation. Many children desire to engage but not every child will or want to participate.

The influence of the world upon a child will affect his/her potential participation.<sup>154</sup> Notwithstanding, the child has the right to participate; whether s/he decides to participate is another matter. To support the right, structural, cultural and other barriers to participation should be challenged through provision of information and so on.<sup>155</sup> But this interest should not be assumed. Children in focus groups repeatedly emphasised the value of incentives (including information campaigns, music, awards) and fun for successful child participation.<sup>156</sup> Nonetheless, the child's individual circumstances may mean participation is not realistic or practical. Child engagement in some situations may be "exploitative or inappropriate, just as in other cases, not to involve children and young people represents poor practice."<sup>157</sup> Thus, the child's right to autonomy or participation includes both a developmental and a protectionist element.<sup>158</sup> Choosing a research method involves:<sup>159</sup> preference, practicality, view of research or ideology, ethical considerations, and the research questions. But "practical considerations and preferences, ... should not *determine* the method, although they may determine the research focus and hence the questions."<sup>160</sup> If there is disagreement about the approach, Roche advises that several perspectives about the participation and results be considered to determine the quality and depth of participation for triangulation of sources.<sup>161</sup> Hart's ladder model, describing degrees of participation, has been

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<sup>153</sup>See <[www.accionporlosninos.org.pe](http://www.accionporlosninos.org.pe)> last visited 5 September 2003.

<sup>154</sup>Qvortrup describes "no child can evade the impact of economic or spatial forces, nor ideologies about children and the family - let alone political and economic ideologies and realities"; Qvortrup (note 68 above), 79.

<sup>155</sup>For example, child researchers from Zimbabwean informal settlements overcame adult suspicion about their role and efforts through several public meetings to explain the importance of participatory consultation and the failure of previous studies; in McIvor (note 125 above), 36.

<sup>156</sup>Children in focus groups in South Africa, England and Canada all supported this point.

<sup>157</sup>Roberts (note 74 above), 225.

<sup>158</sup>Brems (note 44 above), 28.

<sup>159</sup>Lewis & Lindsay (note 114 above), 190-191.

<sup>160</sup>Original emphasis, *ibid.*

<sup>161</sup>Roche (note 101 above), 547.



influential<sup>162</sup> in assessing rights. As Shier describes, this model's most useful contribution has been the identification of the lowest ladder rungs of non-participation (namely manipulation, decoration or tokenism), which has led to the improvement of practical participation.<sup>163</sup> Children themselves should be involved in determining how participation should be monitored. Thus, children in various situations should be engaged for a range of perspectives and knowledge with attention to effectiveness and ongoing improvement of efforts.

Although substantive concerns have been addressed in recent CRC optional protocols, a major procedural issue continues to be neglected. Although proposed during negotiations, a communications mechanism to facilitate individual and collective communications was not included in the CRC to avoid confrontation in favour of cooperation with states parties.<sup>164</sup> The omission is problematic because the procedure elevates the individual to participate in the international legal system, previously the preserve of governments, to directly address complaints.<sup>165</sup> However, while quicker than reporting, the procedure does not prevent human rights violations,<sup>166</sup> and tends to be time-consuming. Yet, Van Boven explains "...the right of petition may not only provide relief in individual cases, it has a broader impact by revealing patterns of injustice and by putting a sharper focus on the interpretation of international standards."<sup>167</sup> Even if children have access, existing procedures have not been designed with children in mind and lack the necessary supports to accommodate and sustain their efforts. The only major UN instruments or protocols that do not include the right to petition are ICESCR and the CRC.<sup>168</sup> A HRC member (as he then was) believes all major human rights treaties should include such an avenue

*...including of course the rights of the child because it is a much more pointed way*

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<sup>162</sup>The model first appeared in Hart (note 122 above).

<sup>163</sup>Shier (2001), "Pathways to Participation: Openings, Opportunities and Obligations." 15 *Children & Society*, 110.

<sup>164</sup>Van Bueren (note 11 above), 411.

<sup>165</sup>See further Chapter Two.

<sup>166</sup>Van Bueren (note 11 above), 378.

<sup>167</sup>van Boven (2002), "Children's Rights are Human Rights; Current Issues and Developments." *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities*. Willems (ed.), 18.

<sup>168</sup>*Ibid.*, 17.



*of getting at a particular rights issue than is the procedure of having a country appear at a general discussion with the delegation and so on. It's absolutely clear that... it provides a mechanism for much more pointed review of state policy in a particular issue.*<sup>169</sup>

The lacuna reflects unwillingness to consider the child's complaints. Van Boven supports an alternative proposal: a provision or protocol to empower such "competent bodies", as per article 45(a) and (b), as national and international NGOs, to inform on their own initiative the Committee about gross violations and mandate the Committee to investigate issues similar to the CEDAW optional protocol article 8.<sup>170</sup> While a potentially useful addition, NGOs do not typically encounter obstacles in contributing to the CRC reporting process due to the a.45(1) provision. The issue of empowering children directly with communications, would be "both egalitarian and evolutionary".<sup>171</sup> The proposal is consistent with existing international law. For example, the African Children's Charter affirms the role and responsibilities of the child as part of the community and provides for communications from any person or group about Charter matters.<sup>172</sup> The recent addition of the procedure to CEDAW demonstrates the evolving capacity of the international legal system to recognise and accommodate rights monitoring. While some may not support the proposal due to concern about limited resources, rights are not determined by resources. Consequently, to reflect a child rights approach, a communications procedure with adequate child-friendly support, should be incorporated into the CRC to address alleged individual and group violations in a child rights manner.<sup>173</sup>

In summary, a child rights-based approach recognises monitoring should include the child's perspective and priorities, which may differ from adults as children in research focus groups consistently held.

### 3.0 EXISTING SUPPORT AND CONTRIBUTIONS

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<sup>169</sup>Yalden, member of the UN HRC (2002-as he then was), Interview with author, Ottawa: 23 January.

<sup>170</sup>van Boven (note 167 above), 18-19.

<sup>171</sup>Van Bueren (note 11 above), 411.

<sup>172</sup>Charter articles XXXI and XLIV respectively

<sup>173</sup>See examples: Kindernoethilfe (2001), *Strengthening Children's Rights: Documentation of the Conference*; and Müller (2002), *Children as Strong as Nations: Background, reasons and arguments for introducing a right of petition*.



Numerous contributions already support a child rights-based approach to monitoring. They include: the elaboration of international child rights law and expertise; broad participation; monitoring tools including budget analysis and child impact assessments; and child involvement.

### 3.1 Elaboration of Child Rights Law and Expertise

The elaboration of child rights in international law has been beneficial to monitoring.<sup>174</sup> There is better understanding of commitments to children over time. These commitments led to the development of the CRC Plan of Action for example, which has improved UNCRC report processing and productivity.<sup>175</sup> Child rights expertise has grown and tools have been developed, which all contribute to a child rights-based approach. Although greater awareness is needed, child rights have inspired much activity and dedication around the world.

### 3.2 Broad Participation

Despite general constraints of lack of awareness and limited resources, the thesis reveals broad participation in monitoring beyond state governments to include *inter alia* international organisations, NGOs, academics and individuals. As the Vienna Declaration and Programme of Action affirms, various actors have important roles to support human rights.<sup>176</sup> Wide monitoring engagement enhances data collection, furthering non-discrimination and best interests principles of the child rights approach. With broad participation, many actors are concerned about the status of child rights and collectively, contribute more information to facilitate better understanding of the situation. Due to the different approaches and limitations of individual monitors, it is beneficial to involve more actors in the process. “No one [research] method alone can produce all knowledge needed.”<sup>177</sup> Monitoring improves from the efforts of many, rather than only a few actors. Wide participation can also support child engagement in different monitoring roles as researchers, evaluators and disseminators of results.<sup>178</sup> The CRC’s unique identification of the roles of UN specialised agencies,

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<sup>174</sup>For example, the two optional protocols to the CRC have expanded understanding of child rights in the areas of sale of children and armed conflict respectively.

<sup>175</sup>See Chapter Two, s.1.0.

<sup>176</sup>Vienna:1993, UN Doc. A/CONF.157/24, paras. 36-39 respectively.

<sup>177</sup>Qvortrup (note 68 above), 78.

<sup>178</sup>Save the Children (note 96 above), 25-29; and Alderson (note 96 above).



UNICEF and “other competent bodies” for example, supports the UNCRC's understanding of the situation.<sup>179</sup> Interactive monitoring involving the African Children's Committee is mandated through meetings, inter-disciplinary assessment and cooperation with a wide range of institutions.<sup>180</sup> Communications procedures in the American Convention, the Optional Protocol to the ICCPR and the optional protocol to CEDAW, provide opportunities to children in states parties to pursue their complaints.<sup>181</sup> The absence of this procedure however, in the CRC is problematic.<sup>182</sup> As argued above, greater attention to child involvement in monitoring is required.

### 3.3 Monitoring Tools

Various monitoring tools reflecting child rights principles have been developed in recent years, which further understanding of the situation of child rights in various ways including considering the child as a subject in the research process. While room exists to improve the development and use of tools, their availability furthers a child rights approach. Child rights budget analysis is a way of interpreting the status of rights, illustrating the relationship between decision-making and the reality of the commitment to children.<sup>183</sup> De Vylder explains costs reflect the government's willingness to act determined by the social allocation ratio (percentage of public expenditures allocated to social sector development including health, education and sanitation) and the social priority ratio (percentage of social expenditures to basic social services including primary education and health care).<sup>184</sup> As government spending in these areas are distinct for each country, reflecting priorities and realities over time, it should be measured.<sup>185</sup> As governments do not normally consider the

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<sup>179</sup>CRC article 45(1)

<sup>180</sup>Charter article XLII(a)(i) and (iii)

<sup>181</sup>See Chapter Two.

<sup>182</sup>See above.

<sup>183</sup>UNCRC (1996), *General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties*, UN Doc. CRC/C/58, I, para.20. This relationship is also acknowledged in general rights; see Van Boven, Flinterman & Westendorp (eds.) (1998), “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.” *Netherlands Institute of Human Rights*, para.6.

<sup>184</sup>De Vylder (1996), *Development Strategies, Macroeconomic Policies and the Rights of the Child*, 66.

<sup>185</sup>*Ibid.*



whole child dimension in their budgets or spending,<sup>186</sup> monitors must conduct primary research. Consequently, Save the Children Sweden developed the International Child-Focused Budget Project studying various countries, relying heavily on IDASA's experiences in South Africa.<sup>187</sup> Development Initiatives for Social and Human Action (DISHA), a Gujarat-based NGO, also monitors the government budget considering *inter alia* education.<sup>188</sup> Thus, budget analysis is an important tool for effective child rights monitoring.

A child rights approach demands more than analysis of government financial expenditures or lack thereof: children's economic resources and contributions should also be monitored as Ben-Arieh et al. argue. They recognise this area as one of five domains for measuring children's well-being, proposing several indicators.<sup>189</sup> "In essence, we think that in order to know what children have as well as what they think and feel, and especially what they contribute, one must look at their economic resources and contribution."<sup>190</sup> While some analysts may advocate economic approaches in relation to children and social concerns,<sup>191</sup> economists and economic research generally do not focus on children other than "as objects, as consumers, and as future adults; they are almost never viewed as subjects and human beings. ... There are a number of studies on childhood in modern societies, which focus on the cost of children, but only a few studies about children's activities and their economic contributions."<sup>192</sup> Children's resources and contributions must be monitored to reflect a child rights-based approach.

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<sup>186</sup>For example, the UNCRC criticised Egypt and Indonesia for inadequate social spending in their national budgets; Van Bueren (note 54 above), 63.

<sup>187</sup>Chapter Four discusses IDASA. Study summaries of Angola, El Salvador, Ethiopia, Peru, South Africa, Sweden, Vietnam and West Bank and Gaza/Palestine included in: Save the Children Sweden (2002), *Are Children getting their fair Share of Budget Allocations? Summary of Eight Child-Focused Budget Studies*.

<sup>188</sup>UNDP (2000), *Human Development Report 2000*, 98.

<sup>189</sup>The other four domains are: children's activities; civic life skills, personal life skills, and safety and physical status; Ben-Arieh et al. (note 18 above), chapter 4, and 56.

<sup>190</sup>*Ibid.*

<sup>191</sup>As examples, see Holtermann (1998), *Weighing it up: Applying economic evaluations to social welfare programmes*; and Parker (1994), *Resources and Child Rights: An economic perspective*.

<sup>192</sup>Recognition of this essential child rights principle is welcomed but unexpected given the authors' explicit rejection of child rights as discussed above. Ben-Arieh et al. (note 18 above), 56.



Child impact assessments, which include “appraisals, analysis, reviews and evaluations”, are “a *prior assessment of the impact* which a decision can have on the child or group of children affected by it.”<sup>193</sup> Such exercises are useful to understand the status of rights as part of the ongoing monitoring process. Consistent with a child rights approach, Swedish experience demonstrates these assessments require long-term development with appropriate systems and support; the task cannot be the responsibility of one individual within a department or organisation.<sup>194</sup>

Child engagement in monitoring can be facilitated through various means. Tools and methods associated with participatory monitoring and evaluation of projects and programmes, commonly termed “participatory rural appraisal” or “participatory rapid assessment”, may be useful including visualisation (through participants’ diagrams and pictures), interviewing and group work.<sup>195</sup> For example, Woodhead’s “Children’s Perspective Protocol” involves several activities with children without requiring literacy to illuminate their lives including daily activities, school and work, relationships, and views on child development through *inter alia* drawings, diagrams and maps.<sup>196</sup> Using role-playing and drama, video, photography, focus group work, and writing, children can also share their knowledge on a range of issues.<sup>197</sup> Child-to-child is another tool that can educate, empower and monitor children. The approach informs and encourages older children to consider the development of younger children in their communities, promoting the child’s role, hence “...the philosophy and work of child-to-child is in fact a practical expression of the [child rights] convention’s many provisions...”<sup>198</sup> Child-to-child has great significance: “For the first time, the experience of the South has been used to formulate an educational concept which is valid for both North and South. The immediate success achieved by this method

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<sup>193</sup>Original emphasis; Sylwander (note 119 above), 20.

<sup>194</sup>Ibid., 22.

<sup>195</sup>Estrella & Gaventa (1998), *Who Counts Reality? Participatory Monitoring and Evaluation: A Literature Review*, 35-37.

<sup>196</sup>Woodhead, in *Save the Children* (note 96 above), 17-19.

<sup>197</sup>Save the Children (note 96 above), 19-23.

<sup>198</sup>Otaala (1998), “Children’s participation for research and programming in education, health and community development: selected experiences in Africa.” *Stepping Forward: Children and young people’s participation in the development process*. Johnson et al. (eds.), 136-7.



in Africa is due to the fact that it is derived from practices already in operation there."<sup>199</sup> Such participatory techniques are useful and important in minimising the construct of age as a barrier to the child's ability to participate.<sup>200</sup>

Quantitative research methods, including community surveys or ecological assessments, should be participatory to respond to community needs and situations where participants determine what information to collect, the collection method and timing.<sup>201</sup> Children's involvement will contribute to a survey's relevancy and appropriateness. Activities including children's elections, opinion polls and qualitative research, can support identification and assessment of children's perspectives although they are generally adult-instigated efforts that may be manipulative or tokenistic.<sup>202</sup> Other tools include: the conversation between the researcher and a child; and listening to children, which has a long history but remains an unrealised resource.<sup>203</sup> Informal conversations with children and between children are valuable according to Mayall because they "allowed access to children's knowledge and to accounts of daily life from both child and adult perspectives."<sup>204</sup> The research conversation has several advantages:<sup>205</sup> children can control or influence the conversation, which allow the researcher to understand child priorities; adults can learn about children's social worlds and knowledge gathering; and the conversation can demonstrate children's social skills.<sup>206</sup> But Lewis stresses "the greatest imperative is to engender a listening culture amongst the adults to whom they must direct their voice."<sup>207</sup> Facilitators - whether adult or child - must be skilled in communications, facilitation and conflict negotiation.<sup>208</sup> Monitoring can benefit

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<sup>199</sup>Vanistendael, cited in *ibid.*, 137.

<sup>200</sup>Solberg, in O'Kane (note 117 above), 140.

<sup>201</sup>Estrella & Gaventa (note 195 above), 37.

<sup>202</sup>UNICEF (1998), *Indicators for global monitoring of child rights: Summary Report*, 7.

<sup>203</sup>Mayall (note 67 above); and Roberts (note 74 above).

<sup>204</sup>Mayall (note 67 above), 129, 134.

<sup>205</sup>*Ibid.*, 133-4.

<sup>206</sup>*Ibid.*

<sup>207</sup>Lewis (1996), "Children Teaching Adults to Listen to Them." *Children in Charge*, John (ed.), 214.

<sup>208</sup>O'Kane (note 117 above), 151.



because: “Children’s understandings both complement and reinforce macro-studies” about child rights and their interests.<sup>209</sup> Working with children in their environments can provide valuable data collection about their lives not commonly known by adults; for example, studies are investigating child use of space to develop understandings of childhood and policies for their physical environments.<sup>210</sup>

Communications other than verbal means including “play, activities, songs, drawings and stories”, can be utilised with children of varying ages and skills, although some methods require certain conceptual or physical abilities.<sup>211</sup> With various means of communication however, problems in interpretation can occur. Lewis and Lindsay acknowledge: “The more that a child’s perspective is inferred indirectly [through drawings, photographs, models, observation, analyses of talk, diaries and so on], the greater the danger of misinterpreting or overinterpreting what children present”.<sup>212</sup> In responding to children’s perspectives, adults should ensure that they are accurate and not simplifying their interpretations of children’s rights.<sup>213</sup> Roberts notes: “It cannot be taken for granted that more listening means more hearing, or that the cost benefits to children of participating in research on questions in which they may or may not have a stake is worth the candle.”<sup>214</sup>

Observation is a technique common to certain disciplines but it does not involve direct contributions of children. It may be useful for interpreting child perspectives of very young children, such as those involved in early childhood programming.<sup>215</sup> However, its use should be restricted because it can become an excuse to avoid direct communications with, and engagement of children. Even very young children can be consulted or engaged.<sup>216</sup> Various tools will support their engagement in monitoring.

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<sup>209</sup>Mayall (note 67 above), 134.

<sup>210</sup>Ibid., 132-3.

<sup>211</sup>O’Kane (note 117 above), 139, 155.

<sup>212</sup>Lewis & Lindsay (note 114 above), 193.

<sup>213</sup>Alderson (note 131 above), 81.

<sup>214</sup>Roberts (note 74 above), 229.

<sup>215</sup>Gosling with Edwards (2003), *Toolkits: A practical guide to planning, monitoring, evaluation and impact assessment*, 32.

<sup>216</sup>For methods of involving young children, see Alderson (note 131 above), Chapter 4.



In sum, various useful contributions exist to further a child rights-based approach to monitoring including elaborated international child rights law and expanded expertise, broad participation and tools. To benefit efforts, monitors should determine the most useful for their purposes and utilise them effectively.

#### 4.0 CONCLUSION

Over the last century, international human rights law has evolved to specifically promote and protect the child's rights. It is monitoring that provides the means of understanding the reality of these rights enunciated in international instruments, custom, and described in international conference agreements. The thesis contributes to a better understanding of international and national monitoring. It demonstrates that although child rights have been formally adopted by the international system, they have not yet generally influenced monitoring. According to a child rights-based approach, inadequate efforts are made to respect and reflect child rights in the process. The international law on the rights of the child offers a significant challenge to every state party, concerned organisation and individual. Complacency with existing monitoring efforts - however big or small - is unacceptable as the child rights challenge must continually be addressed in and across every jurisdiction. While time and other resources are needed for a child rights approach, the approach is both useful and valuable. The approach is inspired and guided by international child rights law and provides a method for critical analysis of monitoring processes and results. Moreover L. explains: "Because you are doing the monitoring for the benefit of people, so if you don't get what they want, you don't get the opinion, then what is the use of doing what you are doing?"<sup>217</sup> The contributions of children engaged in the research focus groups provided broad and thoughtful suggestions to improve monitoring. Their contributions also confirm the value of child engagement and potential for a child rights approach.

Different roles and different approaches involve choices effecting both advantages and limitations. All actors should use every relevant tool and avenue to advance monitoring and support child rights in the process, maximising successes, overcoming ignorance and learning lessons from failures or weaknesses. The implications of some results for instance, may be perplexing however, as monitoring not only holds out the promise of improving child rights, it may also mean restrictions upon children. The significant decrease of child deaths in

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<sup>217</sup>Fifteen year-old girl, in Ottawa Focus Group, 5 October (2002) (note 94 above).



British road accidents from 1970 to 1992 is positive in reducing child mortality but likely resulted from increased restrictions upon children to move around freely, no longer to cross roads or visit parks alone as examples; thus adult concerns about security restricted children's new experiences.<sup>218</sup> Similarly, monitoring of child deaths in the Canadian province of Ontario resulted with increased numbers of children taken into state care.<sup>219</sup> Like monitoring itself, the impact of monitoring may be complex. It is essential for monitors to continually evaluate the situation of child rights, including the impact of their own efforts upon child rights, to ensure ongoing progress. Inspired by the scientific method,<sup>220</sup> interaction among monitors will ensure ongoing improvement in understanding the child rights situation.

Follow-up to monitoring results or the child rights situation cannot be assumed. Notwithstanding the resources dedicated to monitoring, responses are not necessarily developed or fulfilled by government or civil society. Just as actors have discretion in their monitoring, decision-makers and the general public are usually inundated with information from various sources and must choose which issues to pursue. Power to enact reform is at issue.<sup>221</sup> How can results capture attention and spur effective actions for child rights progress? Monitors must ensure adequate attention is directed towards effective communications of results to create awareness of the child rights situation and obligation to effect progress. The wider an audience the results reach, the likelihood of follow-up should improve. Strategies must be developed involving time-lines, awareness-raising, communications, media and events including conferences. Children in focus groups repeatedly stressed the importance of responses to monitoring for progress;<sup>222</sup> for instance, VV., M., and G. highlighted the necessity of getting the information "to the right people."<sup>223</sup> Follow-up not only justifies monitoring efforts but also ensures the relevance of child rights.

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<sup>218</sup>Qvortrup (note 68 above), 92.

<sup>219</sup>Pearson (note 85 above).

<sup>220</sup>See Chapter 5, s.2.0.

<sup>221</sup>Estrella & Gaventa (note 195 above), 40-41.

<sup>222</sup>Focus Groups (2002, 2003) on the Monitoring of Children's Rights involving members of Child and Youth Friendly Ottawa, Ottawa: 28 June and 5 October, 2002; Children's Resource Centre, Cape Town: 27 July, 2002; and Article 12 members, London: July 28, 2003.

<sup>223</sup>Twelve year-olds girl and boy respectively, and 17 year-old boy, G., (2002). Focus Group on Monitoring Children's Rights, Cape Town, South Africa with Children's Resource Centre: 27 July, 2002.



A child rights approach will benefit the monitoring process and results and serve rights. Child rights are not only significant for children, but also for adults and their relationships to children. Eekelaar stresses that: "It would be a grievous mistake to see the Convention applying to childhood alone. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all *people*. It could influence their entire lives."<sup>224</sup> In conclusion, Bernard Shaw's observation is instructive: "It's all that the young can do for the old, to shock them and keep them up to date."<sup>225</sup>

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<sup>224</sup>Original italics, Eekelaar (1992), cited in Bainham (1998), *Children - The Modern Law*, 66-67.

<sup>225</sup>Shaw, "Introduction", *Fanny's First Play*.



## **APPENDIX A: Proposed Guidelines For Effective Child Rights-Based Monitoring**

### **Background**

To contribute to an understanding of the practice of a child rights-based approach, guidelines are proposed. These theoretical *Guidelines For Effective Child Rights-Based Monitoring* have been developed from my research at Queen Mary, University of London, to reflect international child rights for better practice. They have been designed for use by such international and regional monitors as the UN Committee on the Rights of the Child, the African Children's Committee, and civil society as well as for such national actors as governments, academics, non-governmental/voluntary organisations and children. The guidelines are developed for child rights monitors - whether adults or children - but they are also relevant to actors to buttress the advancement of child rights monitoring. The aim of the guidelines similar to monitoring is to support child rights progress.

Child rights place demands upon all measures including monitoring. As child rights should influence and guide monitoring efforts to respect the obligations and benefit the process, a child rights-based approach is proposed. There tends to be an overemphasis upon international reporting and upon the CRC in relation to child rights monitoring, thereby minimising understanding, and potentially efforts, of other monitors. Attention shall be directed to the overall monitoring system in which each actor has a role and responsibility. Child rights pose a constant challenge to each monitor to consistently improve efforts. The monitor must seriously consider the nature of its approach since different roles and approaches to monitoring involve choices and limitations that affect efforts and results. The guidelines require a range of legal, political and programme efforts. Actors should identify and advance their specific contributions to improve child rights monitoring in accordance with an established time-line.

The guidelines focus on the monitoring process, outlining procedural requirements; they do not direct how each specific child right should be assessed. The proposal applies to all monitors, whether at the international or national level, as their efforts should be considered interdependent. Specific guidelines are also directed to national actors. Guidelines are followed by commentary to illuminate their significance. General guidelines for monitoring are presented followed by instructions in accordance with the four general principles of the United Nations Convention on the Rights of the Child: non-discrimination, best interests of



the child, maximum survival and development, and the views of the child (namely articles 2, 3, 6, and 12). Additional guidelines for national contexts are then presented.

### **General Child Rights Considerations**

**1.0 Monitors shall reflect and respect child rights in their efforts.**

The international rights of the child demand specific consideration as the focus of monitoring. Actors at all levels should examine the role of international child rights upon their efforts as attention to institutional priorities, programme objectives, child needs or well-being does not necessarily constitute child rights monitoring. Data collection and assessment should reflect comprehensive dimensions of child rights to create an accurate picture.

**2.0 Monitors shall promote comprehensive, effective child rights awareness-raising and training.**

As inadequate child rights knowledge impede effective monitoring, strong rights understanding and commitment are required and should be advanced through awareness-raising and training.

**3.0 Monitors shall strive to develop consistent child rights interpretations.**

Although debate is beneficial, varying interpretations of child rights depending upon the actor complicate monitoring. Child rights should eventually be consistently untangled based on the international legal framework in order to further understandings of child rights and a common monitoring approach. Stronger references to international child rights law are required. As the lead international child rights monitor, the UN Committee on the Rights of the Child should carefully detail its interpretations and promote consensus about common definitions, engaging relevant international, regional and national monitors.

**4.0 Recommendations from monitoring results shall be relevant and appropriate.**

Following child rights assessment, the monitor's recommendations for progress are important to identify responsive action. They must be carefully developed and contextualised for accuracy and pertinence due to their implications for the credibility of both the monitor and the results. If proposed recommendations are inappropriate, due to such considerations as federalism or the constitution, then monitors and their efforts run the risk of being deemed irrelevant.



**5.0 Monitors shall dedicate attention to the follow-up of their results.**

Follow-up by various actors to monitoring results is essential to support child rights progress. Awareness-raising is necessary to create interest about the findings, which cannot be assumed. An effective communications strategy - to support wide knowledge of results and spur appropriate responsive action - is vital to the success of the results and their follow-up to improve rights implementation.

### **Non-Discrimination**

**6.0 Data about every child and to group identities must be collected.**

The non-discrimination principle requires disaggregated data to ascertain the child's situation in relation to such specific dimensions as gender, minority group affiliations, rural or urban identification and so on. The non-discrimination principle also necessitates that monitors respect the evolving capacities of each child (Convention article 5).

**7.0 Broad participation shall be promoted at all levels across international and national spheres of activity.**

Wide engagement supports the collection and assessment of numerous sources of data about children's rights for better understanding of the situation. International reporting tends to be overemphasised, and the role of national monitors usually minimised. International and domestic monitoring should include local or regional-level activities to support non-discrimination and overcome inaccessibility of actors and processes. Decision-makers and the general public should be more aware and actively supportive of child rights monitoring.

**8.0 Monitors shall maximise use of various data collection tools.**

Over-reliance on any one tool results with inherently limited data and understanding of child rights, affecting the non-discrimination principle. Exclusive attention to quantitative or qualitative data also restricts the child rights picture; monitors should consider both types as complementary. New techniques including child rights budget analysis should be utilised.

### **Best Interests**

**9.0 Resources for, and capacity of monitors must be enhanced to support the best interests of the child.**

The range of resources shall be enhanced for monitoring including human and technical in addition to financial support. Insufficient resources appear to affect all monitoring, acting



as a constraint to a child rights approach, often affecting the nature, scope and effectiveness of monitoring. Appropriate, child-friendly support for those contributing to monitoring or pursuing rights grievances in judicial and other avenues is also important. Resource utilisation must be efficient to address cost/benefit concerns.

10.0 Monitors shall improve coordination with other international and national monitors to overcome fragmentation of actors and activities.

Coordination among monitors at different levels - international, national and local - and across sectors including international organisations, civil society and the voluntary sector, should be enhanced to support information-sharing about procedures and result, also highlight lessons learned, and improve effectiveness. Monitoring benefits from the inclusion of many perspectives detailing the child rights situation. Interdisciplinary communications among monitors facilitates cooperation across professional sectors to enhance child rights understanding and may also allow strategic resource use, avoiding duplication. A mandate's independence does not preclude coordination. Independence is necessary so that monitors are not influenced by the monitored; it does not require work to be done in isolation.

11.0 Monitors shall support regular independent evaluations of their methods and results. Monitors shall determine the impact of their monitoring and continually strive for relevant improvements. The role and contributions of monitoring at the national level need to be better understood and appreciated. An independent evaluation of a monitor's efforts allows understanding of strengths and weaknesses in order to further improvement, expand useful efforts, and support child rights progress. Identifying the effectiveness of activities also supports appreciation of the costs/benefits and justification of the monitor's role and endeavours to others, particularly useful for funding requests. Independent assistance is needed due to the difficulties of lack of perspective, political or professional concerns (where for instance, criticism or honesty may not be welcome), and lack of time or other resources.

### **Maximum Survival and Development**

12.0 A comprehensive approach to child rights is necessary to reflect a child rights-based approach.

Focussing on specific concerns, such as child protection or health in isolation, does not reflect child rights. Child rights include the spectrum of human rights requiring attention not only to economic and social rights, but also to cultural, civil and political rights. Accurate



and complete data collection and assessment are critical.

13.0 To support maximum survival and development, preventative monitoring, not simply reactive efforts, shall be advanced.

Maximum survival and development needs monitoring over time; the obligation is not fulfilled by creating a snapshot of children, rather a long-term commitment allows regular determinations of how and where child rights are progressing or not.

### **Views of the Child**

14.0 The views of the child shall be promoted and given "due weight" in monitoring in accordance with article 12 of the UN Convention on the Rights of the Child.

The role of the child in monitoring shall ameliorate and his/her knowledge considered in monitoring in order to overcome limited understanding of children. Child involvement shall not be restricted to consultations or meetings, which are ad-hoc efforts that do not reflect a long-term commitment to child engagement or child rights. Child participation can involve other means including: child researchers, a child advisory team, or child board members who can inform and guide work. International organisations shall promote child participation beyond geographic representation to reflect the non-discrimination principle to the extent possible to respect such considerations as disability, age and minority group affiliation as guided by the enumerated grounds of potential discrimination in CRC article 2(1).

15.0 Accessible procedures and actors are necessary for child participation to respect the non-discrimination principle.

Better engagement and support of children are required including child-friendly procedures, information, support, and the development of a CRC communications route are required at national and international levels.

### **National Monitoring**

As international monitoring is based on national efforts, national monitoring by government and civil society is particularly important. Effective national monitoring, and the availability of adequate remedies, lessen demands upon international monitors.

16.0 States shall enunciate child-specific provisions in law, with emphasis upon constitutions, to promote and protect child rights.



Legal provisions for the child are more effective to furthering a child rights-based approach to monitoring, adjudication and implementation.

17.0 National remedies shall recognise and respect child rights; and national monitors shall accurately reflect and promote international child rights law in their efforts.

Information campaigns and training are needed to enhance the relevance of the legal route to redress rights grievances as well as support familiarity with international law due to cultural, religious or national impediments. States cannot rely upon international-level monitoring; national monitoring and remedies are required and support to children needed. Children should be informed about international child rights law and participate in monitoring through child-friendly national and local activities. The role and significance of international child rights law in national monitoring should improve the quality and relevance of efforts.

18.0 Formal monitoring structures for child rights shall be established in all pertinent national sectors including executive, legislative and civil societal domains. In particular, the national commitment to child rights requires a national independent monitoring mechanism.

Monitoring should not be restricted to one actor or category of actor as it is a broad responsibility and task requiring wide participation. An independent national human rights institution, such as an ombudsperson or commissioner, shall monitor child rights. If one does not exist, all monitors and other actors should promote the establishment of an independent monitor. These monitors require sufficient resources to effectively carry out and improve mandate and efforts. Specific legislative authority to enact progress with static problems is especially beneficial.



## **APPENDIX B: RESEARCH METHODOLOGY**

Research took place in the UK, South Africa and Canada involving interviews, focus groups with children and more extensive distribution of questionnaires.

### **1.0 Questionnaires**

In order to supplement existing information and to ascertain objectives and methods, the "Questionnaire on Activities Related to Children" was developed and distributed. There was no mechanism for obtaining approval of the questionnaire and its process; there was no reason for external approval and it was not advised. The professional audience could choose or not to choose to respond to it. During preliminary development, it was determined that the questionnaire should not explicitly refer to the terms "monitoring" or "children's rights". Such references posed a risk of dismissal by potential respondents due to the significant role of the UN Committee on the Rights of the Child, which could have prejudiced responses about the impact of children's rights upon their work. Hence the questionnaire refers to "research and evaluation" about 'children' or 'children's issues' and with specific questions about the CRC and the UN Committee to gauge their impact upon the respondents and their efforts.

From April to August 2001, thirty-three copies were distributed primarily by electronic mail to UN, international and regional institutions addressing various children's issues including inter-governmental bodies, thematic monitors, research institutions, specialised agencies, UN divisions, funds and programmes and regional organisations. By 17 September 2001, 19 communications were received and responses with detailed information were received from 15 institutions for a total response rate of 57.6 per cent.<sup>1</sup> The total includes six telephone

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<sup>1</sup>Fifteen institutions or representatives responded with detailed information either in written form or through telephone interviews: UNESCO, UNDP, UNEP, ILO, UN Division on the Advancement of Women (DAW), UNHCR, FAO, Secretary to the UN Committee on the Rights of the Child, Assistant to the UN Special Rapporteur on Torture, Office of the Special Representative on Children and Armed Conflict, Assistant to the UN Special Rapporteur on the Sale of Children, UN Interregional Crime and Justice Research Institute (UNICRI), UNICEF/Regional Office for Latin America and the Caribbean, OAS, and OAU. Four institutions responded but did not provide information due to lack of staff or available time (the Special Rapporteur on Education, Hague Conference on Private International Law) or the perceived inappropriateness of responding (INSTRAW and EU). Organizations that did not respond include UNIFEM, WHO, World Bank, the assistants to the Special Rapporteurs on the Elimination of Violence against Women and Freedom of Opinion and Expression, UNICEF/HQ, East & South Africa Regional Office, and the country offices of Peru and South Africa, UNFPA, WFP, UNDCP, UNAIDS, UNRISD, and Council of Europe. To buttress efforts and reach UN treaty bodies, Special Rapporteurs and working



interviews, which were transcribed and subsequently verified by the respondent. In some cases, further electronic communications were carried out if additional details or clarifications were required. A number described the survey as challenging due to various reasons depending on the respondent. The questionnaire was time-consuming; the questions had not been considered before or were under discussion within the institutions; or there was a lack of emphasis on the relationship to child rights in day-to-day work.

Although the research questionnaire was broadly distributed within the Office of the High Commissioner for Human Rights (OHCHR), lack of or limited response from many thematic actors or support staff impeded research. Responses were received however, from the Office of the Special Representative on Children and Armed Conflict and the OHCHR officers who support the Special Rapporteurs on sale of children, child prostitution, and child pornography and on torture.

Interestingly, some actors are unaware of their monitoring roles as some questionnaire respondents demonstrated.<sup>2</sup> It may be that attention to the UNCRC's role may minimise or restrict comprehension of others. But their various activities including research, analysis, and documentation, support monitoring and the various perspectives to support better child rights understanding.

## 2.0 Interviews

Various personal, telephone and e-mail interviews were conducted with relevant actors in the UK, South Africa and Canada. (See attached schedule of research meetings.) The means were determined based on my travels and the interviewee's availability. All interviewees received a copy of the transcript of the discussion for their review and approval.

After researching monitoring activities at the international and regional levels, field work was

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groups, which are supported by the Office of the High Commission for Human Rights, a letter and questionnaire were sent in April 2001 to High Commissioner Robinson (as she then was) to forward the survey to appropriate individuals, which was carried out as an Office representative confirmed. Consistent follow-up by e-mail and telephone enhanced the response rate.

<sup>2</sup>Cohn, Programme Officer, Office of the Special Representative of the Secretary General on Children and Armed Conflict (2001). *Response to "Questionnaire on Activities Related to Children"*, 18 May; and Pilotti, Coordinator, Social Policy, Unit for Social Development and Education, OAS (2001). *Response to the "Questionnaire on Activities Related to Children"*, 17 May.



essential to consider national level efforts. Travel was essential to learn about monitoring in practice in the case studies of South Africa and Canada since the issues are inadequately considered in the literature. Three main research questions were pursued. First, how is monitoring pursued at the national and sub-national level? What are the successes and the challenges? Lastly, what is the role of child rights in these efforts? There were two main research objectives: to meet with various representatives from government and civil society, including academics, international development agencies, and national NGOs, to investigate and discuss monitoring; and to hold focus groups with children in different parts of the country to gather their knowledge and views (see below).

### 3.0 Focus Groups

Focus groups did not measure, but attempted to respect child rights, including the right to participate, as well as illustrate child knowledge and perspectives about monitoring. The process involved an invitation and information for potential participants and their parents or legal guardians about the research study. Consent forms for signature by the participants and their carers were designed to ensure they understood the purpose of the research. A copy of the focus group transcript was forwarded to all participants via their host organisations for their review and approval.

Very little information exists in the academic literature to support focus groups with children.<sup>3</sup> Moreover, no formal College process is available to review research ethics, a concern since children, considered minors, were involved. A formal research proposal for the focus groups, detailing rationale and plans including participant consent, was submitted and approved by the North East London Health Authority (NELHA) Research Ethics Sub-Committee for use under its jurisdiction, pertinent to the London focus group.<sup>4</sup>

The sessions addressed two main questions: how can children's rights be respected in monitoring them; and how do children consider monitoring. They included general information about children's rights and current monitoring efforts as background to support

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<sup>3</sup>Scott (2000). "Children as Respondents: The Challenge for Quantitative Methods." *Research with Children: Perspectives and Practices*. Christensen & James (eds.), 111.

<sup>4</sup>As the thesis introduction discusses, the process had limited jurisdiction and relevance to an international non-medical research study.



the process of determining the role of the child should be and their ideas to improve monitoring.

In partnership with several NGOs, fifty children in total from ages 7 to 17<sup>5</sup> were involved in focus groups facilitated by the author: 12 in Canada, in association with Child and Youth Friendly Ottawa; 35 in South Africa, in cooperation with Children's Resource Centre (Cape Town), and Afrika Cultural Centre (Johannesburg); and three in England, with Article 12's association. Younger children were not included due to potential limits to what children under the age of seven can convey to others<sup>6</sup> and due to limitations in scope and resources. Children who were involved were not necessarily representative of all children, but their contributions usefully illustrate some children's perspectives. The participants provided valuable knowledge and recommendations, which are incorporated throughout the thesis. Each child is identified by their gender, city, and the first initial of their first name only to protect their privacy. If the same initial occurs more than once in a session, the first letter of the child's chosen pseudonym is added to distinguish each participant. Focus groups averaged two and a half hours per session.

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<sup>5</sup>Participants were under 18 years to respect the definition of a child in CRC article one.

<sup>6</sup>Garbarino et al. (1990), *What Children Can Tell Us*, 23, 67, 154.



## Schedule of South African Research Meetings and Focus Groups, July 2002

### JOHANNESBURG

- 10 July: Charlotte McClain, Commissioner, South African Human Rights Commission  
12 July: Benjy Francis, Bontle & others from Afrika Cultural Centre (focus group preparation)  
13 July: Focus Group with Afrika Cultural Centre

### PRETORIA

- 15 July: Ooshara Sewpaul, Director, Children and Youth Affairs, Department of Justice and Constitutional Development  
15 July: Rina Gill, Senior Programme Coordinator; Sue Godt, Project Officer, Knowledge Resources Services; Goran Mateljak, Monitoring & Evaluation Officer; Ntjantja T. Ned, Project Officer Social Policy & Local Governance; UNICEF  
16 July: Lesley du Toit, Child and Youth Care Agency for Development  
16 July: Mabel Rantla and others - National Child Rights Committee  
17 July: Gordon Hollamby, Researcher, South African Law Commission  
18 July: Lennart Reinius, Regional Representative & Nomakhwezi Malahleha, Programme Officer, Child Participation, Save the Children Sweden  
18 July: Prof. Trynie Davel, Centre for Child Law, University of Pretoria  
19 July: Buyi Mbambo, Assistant Project Coordinator, Child Justice Project, UNDP  
19 July: Crystal Theron, Office on the Rights of the Child, The Presidency

### DURBAN

- 22 July: Shirin Motala, Board Member, Children's Rights Centre  
23 July: Cos Desmond, ChildrenFirst

### CAPE TOWN

- 25 July: Julia Sloth-Nielson, Law Professor, University of Western Cape  
25 July: Marcus Solomon, Director, Children's Resource Centre (focus group preparation)  
25 July: Jacqueline Gallinetti, Senior Researcher, Children's Rights Project, Community Law Centre, University of the Western Cape, Bellville  
27 July: Focus Group with Children's Resource Centre  
29 July: Shaamela Cassiem, Manager: Children's Budget, IDASA



29 July: Rose Barnes-September, Programme Planning and Evaluation Specialist, Institute for Child and Family Development, University of the Western Cape, Bellville  
29 July: Prof. Chuma Himonga, Private Law Dept., University of Cape Town  
30 July: Ntsiki Tiko, PA to Chairperson, Monitoring Committee, Parliament  
30 July: Hon. Justice BJ van Heerden, Cape High Court  
30 July: Bernadette Liedeman, National Coordinator, Disabled Children's Action Group (DICAG)

### **Canadian Research Meetings and Focus Groups**

#### **2003**

April 7: Email Interview: Colleen Matthews, Crown Counsel, Constitutional Law, Saskatchewan Justice, Saskatoon, SK  
February 13: Telephone Interview: Sheine Mankovsky, Policy Advisor, Citizenship Development Branch, Ministry of Citizenship, Ontario, Toronto, ON.  
January 23: Interview: Max Yalden, member of United Nations Human Rights Committee, Ottawa, ON.  
January 21: Interview: Marilou Reeve, Senior Advisor, Liaison and Outreach, Youth Justice Policy, Criminal Law Policy and Community Justice Branch, Department of Justice Canada, Ottawa, ON.  
January 15: E-mail Interview: Drs. Katherine Covell & Brian Howe, Directors, Children's Rights Centre, University College of Cape Breton, NS  
January 14: Telephone Interview: Deborah Parker-Loewen, Provincial Child Advocate, Saskatoon, SK  
January 7: Interview: Elaine Menard, Counsel, Human Rights Law Section, Department of Justice Canada, Ottawa, ON.  
January 7: Interview: Bob Glossop, Executive Director of Programs and Research, The Vanier Institute of the Family, Ottawa, ON.  
January 3: Interview: Céline Giroux, Avocate, Vice-présidente, Commission des droits de la personne et des droits de la jeunesse, Montréal, QC

#### **2002**

October 8: Interview: Cecilia Van Egmond, Senior International Analyst, Strategic Policy and Research Section, Division of Childhood and Adolescence, Health Canada, Ottawa  
October 5: Focus Group with seven young people, Child and Youth Friendly Ottawa



September 30: Interview: Sandra Griffin, President of the Canadian Coalition for the Rights of Children & Executive Director of the Canadian Child Care Federation, Ottawa, ON.

September 26: Interview: Honourable Landon Pearson, The Senate of Canada, Advisor on Children's Rights, Ottawa, ON.

August 16: Interview: Brent Parfitt, former Deputy Ombudsman (and as of 2005, current UNCRC member), Victoria, BC

August 15: Interview: Robin Pike, Divisional Operations Manager, Child and Youth Mental Health and Youth Justice Division, Ministry of Children and Family Development, British Columbia, Victoria BC

August 9: Interview: Valerie Fronczek, Executive Director, Society for Children and Youth of B.C., member of board of directors, Canadian Coalition for the Rights of Children, Vancouver, BC

June 28: Focus Group with five young people, Child and Youth Friendly Ottawa, Ottawa, ON.

#### 2001

12 April: Interview: Adèle Dion, Director, Human Rights, Humanitarian Affairs and International Women's Equality Division, Department of Foreign Affairs and International Trade, Ottawa, ON.

#### United Kingdom Research Meetings and Focus Group

#### 2003

28 July: Focus Group with three young people, Article 12, London, UK

#### 2002

21 November: Bill Bell, Head of Advocacy, The Save the Children Fund, London, UK

18 November: Daniella Baro & Marta Foresti, Save the Children Fund, London, UK

#### 2001

25 July: John Wilkinson, Save the Children UK, London, UK

19 July: Rachel Hurst, Disability Awareness in Action, London, UK

10 July: Dharitri Patnaik, Impact Assessment Learning Fellow, ActionAid, London, UK



## FOCUS GROUP AGENDA

1. Icebreaker: Name, favourite hobby or sport, favourite or important right? (10 minutes)
2. Introduction: (10 mins.) Who am I? Relevant life experience.  
Thesis: (Purpose & Importance of Monitoring)  
Why conducting focus groups? Imp. & benefits of child & youth participation  
Review Focus Group Agenda  
Process explained. Time = limited, but future communications poss.  
Permission to record: purpose of recording and how info will be used. Anonymity protected.  
Process rules: agreement to listen to and not interrupt other speakers  
Full agenda, have to keep it going = warning, cutting off discussion because tight agenda  
thus: Parking Lot on flipchart
3. Children's Rights: (15 mins.)  
What are rights?  
Chronology of children's & human rights  
Basic CRC background  
*Activity*: Rights/Needs/Desires
4. Monitoring: (20 mins.)  
Monitoring Definition  
*Question*: What examples of Monitoring do you know???  
How to monitor? Reports, communications, country & thematic mechanisms, & follow-up  
*Activity*: "Monitoring the World's Implementation of Children's Rights" - identify possible actors involved in monitoring using handout diagram & follow-up discussion  
*Handout*: Read together selection from "A world fit for us"
5. Discussion Questions: (50 mins.)  
Intro & Small group work (each group shld identify writer & rapporteurs) (15 mins)  
Report back (10 mins.)  
Discussion & recommendations (20 mins.)  
Discuss following questions in relation to different areas of kids' lives: family, institutions, community, national, international  
*Understanding of Monitoring*: What examples of monitoring do you know? What is important in monitoring? What do you think of current monitoring efforts for children? Why is monitoring imp.?



*International Conferences:* What do you think about the various international conferences related to children, ie UN Special Session for Children, WSSD, UN Conference on Racism, etc? Are you familiar with the results? Should children be involved in these events? If so, why and how? How should the confs. be monitored?

*Participation:* Who do you think should monitor children's rights? What obstacles are there to participating in monitoring? How can more participation be encouraged and supported?

*Child Participation/Partnership:* What should be the role of the child in monitoring children's rights? What are the requirements of a suitable monitoring system or process for children? What ideas and recommendations do you have to increase the participation of children in monitoring? How do we encourage and support the participation of vulnerable or marginalised children?

*Group Discussion*

What do you think about Canada's monitoring of children's rights?

What are the challenges to effective monitoring of children's rights?

What do you think are the requirements of a child rights approach to monitoring?

What are your recommendations to improve monitoring of children's rights?

6. Conclusion: Other forms of expression welcome; commitment to share transcript.

If you are interested in follow-up, provide name (5 mins.)

7. Evaluation: sheet to fill out (5 mins.)



## **APPENDIX C: QUESTIONNAIRE ON ACTIVITIES RELATED TO CHILDREN**

Please respond to the following questions in the spaces provided. If you wish to continue on a separate sheet, please do so, specifying the number of the question to which you are replying.

Return by **EMAIL**: tara\_collins@hotmail.com; or **FAX** to Canada: + 1.613.562.5170  
(c/o P. Mayer)

Your name: \_\_\_\_\_ Date: \_\_\_\_\_  
Position: \_\_\_\_\_ Email: \_\_\_\_\_  
Tel: \_\_\_\_\_ Fax: \_\_\_\_\_

### **DETAILS ABOUT YOUR INSTITUTION**

1. Official name of institution and mailing address:
2. Approximate year of establishing focus on the situation of children:
3. Type of activities relevant to children's issues:  
Research                      Analysis              Training              Documentation  
Publications                  Conference-Organisation      Financing  
International Cooperation Programmes              Media programming  
Other (Describe): \_\_\_\_\_
4. How are your results about the situation of children disseminated?  
Journals              Books              Progress Reports  
Conference Proceedings              Other(Describe): \_\_\_\_\_
5. Number of staff or consultants carrying out research and evaluation on children:  
full-time: \_\_\_\_\_ part-time: \_\_\_\_\_
6. Describe main objectives and research orientation to children's issues.
7. How does your institution's work on children follow-up on international commitments, such as human rights standards or conference agreements?
8. Current research and evaluation on children (include dates and authors) by your institution (please specify if it follows up on international commitments):
9. Does your institution conduct analyses of expenditures for children? If yes, please describe.
10. Has your institution carried out urgent actions or appeals on behalf of children? If so, briefly describe including sources of information leading to these appeals.
11. Would you describe your institution as a "watchdog" for children, encouraging or criticising actions or lack thereof that impact children? Please explain.

### **INFLUENCE OF CHILDREN'S RIGHTS & RELATIONS WITH OTHERS**

12. Has the 1989 UN Convention on the Rights of the Child (CRC) affected your work on children and if so, how?



13. What preparation or support does your institution provide to its staff or consultants working on children's issues? (e.g. training on children's rights)
14. How is progress of children determined by your institution? (e.g. in relation to the CRC, international agreements, other determinants?) What measures are used and how are they developed?
15. How are goals related to children developed by your institution? Who participates in their development?
16. Describe your relationship with the UN Committee on the Rights of the Child. Has it influenced your research and evaluation efforts on children? Has your institution supported the Committee's work? Please provide details.
17. Identify your institution's relations with other international, regional or non-governmental organizations (names and nature of connection) that impact your work on children. How do these bodies affect this work?
18. How would you improve the effectiveness of research and evaluation of the situation of children by the international human rights system?

### CHILDREN IN RESEARCH AND EVALUATION PROCESSES

19. Has the UN Committee invited the participation of children through your institution? If yes, please describe.
20. Have you involved children in your institution's research and assessment work on children?  
*If YES, please respond to Question #21. If NO, go directly to Question #22.*
21. If so, how have they been consulted? (e.g. children's advisory group, questionnaires, Internet, or invitations to conferences, etc.) What kind of support has been available for this involvement of children? (e.g. financial or logistical support, child-friendly documentation, etc.)
22. Please rank the following obstacles to child participation in your institution in order of priority ("1" as biggest obstacle, "5" as smallest obstacle). Feel free to add any additional obstacles that should be considered.
  - absence of skill/knowledge
  - absence of incentive or improper incentive
  - absence of environment support (personnel, policies/procedures, tools)
  - absence of motivation



Other obstacles:

23. Does your institution have plans to make its efforts on children more participatory?

*If YES, please respond to Questions #24 and 25 but if NO, go directly to #26.*

24. What sort of support will your institution provide to children who participate?

25. Do these plans follow a time line? If yes, briefly describe.

26. Please attach any relevant supplementary information about your institution's activities related to children.

***THANK YOU FOR YOUR CONTRIBUTION.***



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