


# ‘Turning the Rights Lens Inwards’: The Case for Child Rights-Consistent Strategic Litigation Practice

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## ABSTRACT

The last three decades have seen an explosion of academic, advocacy and policy-maker interest in both the theory and the practice of children’s rights. There is a growing global body of strategic litigation focused on the advancement of those rights through positive legal and/or social change.

In this context, child rights have primarily played an ‘outward-facing’ role: used as a schema that should constrain or mandate the actions of external decision-makers that are the targets of litigation. However, children’s rights have not generally been used as a framework by which to assess, and as necessary, critique strategic litigation practice—i.e. as a lens to be turned inwards by litigators to consider the extent to which their practice is consistent with child rights standards.

This article considers the case for child rights strategic litigation (CRSL) practice that is child rights-consistent. In doing so, it identifies CRSL-relevant rights under the UN Convention on the Rights of the Child and outlines how such rights arise in the litigation process. It ultimately posits that child rights can serve as a clear, multi-faceted framework that enables litigators to strengthen their existing practice in a legitimate, unified and coherent way.

**KEYWORDS:** UN Convention on the Rights of the Child, child rights, children’s rights, strategic litigation, legal practice, impact litigation

## 1. INTRODUCTION

The last three decades have seen an explosion of academic, advocacy and policy-maker interest in both the theory and the practice of children’s rights. This has mirrored—and to some degree contributed to—a growing global body of strategic litigation focused on the advancement of those rights. Some of this litigation has been driven by legal practitioners, organisations and

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national human rights institutions (NHRIs) with a specific child rights focus. Other cases have been brought by generalists—whether lawyers, legal clinics or advocacy organisations—who focus on children’s rights as part of their work in relation to other social groups (e.g. women or disabled persons) or in the context of work focused on non-child-exclusive thematic areas (e.g. education, climate justice or sexual violence). Children’s rights have been central to the aim of such work in the sense that the litigation has sought to bring about positive legal and social change in terms of children’s enjoyment of their rights.

Thus far, children’s rights have primarily played an ‘outward-facing’ role in this context: they have been treated by practitioners and others involved in planning and operationalising strategic litigation as a schema that should constrain or mandate the actions of external decision-makers that are the direct or indirect targets of the strategic litigation. However, child rights have not generally been used as a framework by which to assess, and, as necessary, critique the practice of strategic litigation—i.e. as a lens to be turned inwards by those carrying out such litigation to consider the extent to which their practice (rather than simply the aims or impact of such) are consistent with child rights standards.

This lack of focus on practice from a child rights perspective is striking in light of the significant existing research on child rights (or child rights-based)<sup>1</sup> approaches with regard to an ever-expanding range of areas, including social policy and programme development,<sup>2</sup> research,<sup>3</sup> budgetary decision-making,<sup>4</sup> economic policy,<sup>5</sup> and judicial decision-making.<sup>6</sup> These efforts have involved the use of children’s rights as a normative framework to inform and assess the inputs, outputs, operationalisation and/or outcomes of child-related processes. Thus far, however, there is very limited evidence of efforts focused on the development, implementation, impact assessment and critique of CRSL from a child rights perspective. This gap exists despite the fact that the concerns raised with regard to the legitimacy (and efficacy) of the aforementioned activities from a child rights perspective where their conceptualisation, implementation and assessment are not informed/shaped by child rights standards apply equally to strategic litigation.

Furthermore, in the context of human rights research and practice more broadly, while there is increasing academic and other work focused on the practice and impact of human rights strategic litigation, there is very limited published work in relation to child rights strategic litigation work specifically.<sup>7</sup> This is a surprising and concerning lacuna given the growing body of child rights

<sup>1</sup> A child rights-based approach can be understood as a conceptual framework for a specific process that is normatively based on children’s rights (most commonly those set out in the UN Convention on the Rights of the Child) and operationally directed towards promoting and protecting children’s rights. This has been adapted from the description of a human rights-based approach outlined in UN Sustainable Development Group, ‘Human Rights-Based Approach’, available at: [unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach#:~:text=The%20human%20rights%2Dbased%20approach,promoting%20and%20protecting%20human%20rights](https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach#:~:text=The%20human%20rights%2Dbased%20approach,promoting%20and%20protecting%20human%20rights) [last accessed 16 February 2022]. It should be noted that ‘a child rights approach’ and ‘a child rights-based approach’ are frequently used interchangeably by different actors (for instance UNICEF) and the Committee on the Rights of the Child has decided to use the language of ‘child rights approach’ rather than a child rights-based approach (see, e.g. UN CRC, General Comment No. 21 on children in street situations (2017) CRC/C/GC/21, [5], [10]–[11]).

<sup>2</sup> See, e.g. Children’s Rights Alliance for England, ‘Barriers and Solutions to Using Children’s Rights Approaches in Policy’; Byrne and Lundy, ‘Children’s Rights-Based Childhood Policy: a Six-P Framework’, 23(3) *IJHR* 357–373.

<sup>3</sup> See, e.g. Ennew and Pierre Plateau, ‘How to Research the Physical and Emotional Punishment of Children in Bangkok’ (Save the Children, Southeast, East Asia and Pacific Region 2004); Lundy and McEvoy, ‘Childhood, the United Nations Convention on the Rights of the Child, and Research: What Constitutes a “Rights-Based” Approach?’ in Freeman (ed.), *Law and Childhood Studies: Current Legal Issues Volume 14* (2012) 75.

<sup>4</sup> See, e.g. UN CRC, General Comment No. 19 on Public Budgeting for the Realization of Children’s Rights (2016) CRC/C/GC/19.

<sup>5</sup> Hoffman, ‘Ex ante Children’s Rights Impact Assessment of Economic Policy’ (2020) 24(9) *International Journal of Human Rights* 1333.

<sup>6</sup> See, e.g. Hollingsworth and Stalford, ‘Towards Children’s Rights Judgments’ in Stalford, Hollingsworth and Gilmore (eds), *Rewriting Children’s Rights Judgments: From Academic Vision to New Practice* (2017) 53–88; Tobin, ‘Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?’ (2009) 33(2) *Melbourne University Law Review* 579.

<sup>7</sup> See Part 3 below.

strategic litigation in the areas of poverty, juvenile justice, education, immigration, disability rights, and climate change at the domestic, regional and international levels.

This article considers the case for child rights strategic litigation practice that is child rights-consistent. In doing so, it endeavours to make a direct original contribution to scholarship on children's rights and on the theory and practice of human rights strategic litigation. Having defined 'child rights strategic litigation' (CRSL) (Part 1), it addresses the increasing amount and expanding range of CRSL, outlining key thematic foci of CRSL, how such litigation arises and the different actors carrying out this work, the legal standards deployed, and the ways in which diverse duty-bearers are being held to account (Part 2). The article then explains why a focus on CRSL practice—as opposed to merely aims and impact—from a child rights perspective is important and necessary (Part 3). Part 4 then outlines and analyses those rights from the UN Convention on the Rights of the Child (CRC) that can be used to assess the extent to which CRSL practice is child rights-consistent—and which should underpin future efforts to render practice more so. In doing so, it examines how these rights are potentially engaged at different stages of the strategic litigation process. The article makes clear why practitioners should develop a reflective child rights litigation practice, informed by the substantive content of child rights, paying particular attention to the specific characteristics of children as a social group in the litigation context.

## 2. DEFINING CHILD RIGHTS STRATEGIC LITIGATION

Recent years have seen extensive research focused on the deployment of litigation to bring about a change to law or policy or broader social change that results in increased rights enjoyment. Multiple different labels have been used to denote the use of law to bring about a positive change in terms of rights enjoyment. In a key study on the impacts of such work, the Open Society Justice Initiative highlights that 'strategic human rights litigation' can refer to different activities and 'is often used interchangeably with other terms, such as "impact litigation," "cause lawyering," "public interest litigation," "public policy litigation," and "human rights litigation".<sup>8</sup> The inter-changeability of terms is evident in both academic and advocacy literature. However, all of the terms above contemplate a process by which legal actions are 'consciously designed'<sup>9</sup> (i.e. selected and pursued) in order to achieve impacts beyond the case involved.

The predominance of particular terms varies from specific national or legal contexts and over time: for instance, public interest litigation with its focus on 'court-centred social change' has been a term of choice in the United States since its emergence in the 1960s.<sup>10</sup> However, in recent years there has been growing tendency on the part of some litigators—particularly those using a human rights framework—to use the terminology of 'impact litigation'.<sup>11</sup> Others, focused on engagement with bureaucracies have adopted the term 'structural reform' litigation.<sup>12</sup> Similarly, enhanced understanding of the importance of litigation in terms of supporting political activism and social movements and causes (and responding to criticisms of public interest law practice in terms of its impact in social change terms as well as its potential to undermine political activism) has led to an increased trend towards those carrying out social-change oriented legal activity describing their work as 'cause lawyering'.<sup>13</sup> A greater appreciation of the importance of

<sup>8</sup> Open Society Justice Initiative, 'Strategic Litigation Impacts: Insights from Global Experience' (OSJI 2018) 25.

<sup>9</sup> 'Strategic Litigation' (*Amnesty International*), available at: [www.amnesty.org/en/strategic-litigation/](http://www.amnesty.org/en/strategic-litigation/) [last accessed 1 February 2022].

<sup>10</sup> See Cummings and Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) 36 *Fordham Urban Law Journal* 603, 606.

<sup>11</sup> See, e.g. Sáez, 'Impact Litigation: An Introductory Guide' (Centre for Human Rights & Humanitarian Law at AUWCL 2016), 1.

<sup>12</sup> For the origins of this term, see Fiss, 'The Supreme Court 1978 Term-Foreword: The Forms of Justice' (1979) 93(1) *Harvard Law Review* 1.

ensuring a central role in legal advocacy (including litigation) for those whose rights are affected as well as the need to look beyond lawyers/the courts when designing and operationalising legal action so as to ensure that it results in meaningful change for those right-holders have been key features in ‘community lawyering’ efforts. Described as ‘using legal advocacy to help achieve solutions to community-identified issues in ways that develop local leadership and institutions that can continue to exert power to effect systemic change’, the emphasis in community lawyering is not simply power-sharing between lawyers and affected communities but power-building in the sense of such lawyering supporting community leadership and institutions.<sup>14</sup> This brief US-centric overview highlights key trends reflective of debates that have arisen in, and driven, the evolution of lawyer-driven efforts to bring about systemic change. While in no way exhaustive of the diversity of international experience, the trends and terms identified here, as well as the concerns that have given rise to them, have been echoed in a wide range of other jurisdictions.

Against this backdrop of an often-overlapping multiplicity of terms used to describe litigation aimed at legal or social change, this article focuses on ‘child rights strategic litigation’.<sup>15</sup> Our choice of ‘strategic litigation’ is due, first, to the relatively general nature of that term and its use in numerous different national and international contexts to cover a range of litigation approaches. Second, this language explicitly captures the deliberate planning that underpins litigation efforts to bring about legal or social change. The use of ‘child rights’ serves to make clear that we are looking at a sub-category of strategic litigation, specifically such work that is focused on child rights.

Consistent with both the purposive and group rights-specific focus of our approach, we define child rights strategic litigation as ‘litigation that seeks to bring about positive legal and/or social change in terms of children’s enjoyment of their rights’.<sup>16</sup> We will return to the purposive nature of this definition below.

Not all child rights cases will be CRSL and identifying whether a case qualifies as CRSL depends on a number of factors.<sup>17</sup> These include (i) the process that led up to the case; (ii) the way in which the case was developed or shaped by child rights during the duration of the litigation; (iii) the remedy granted or (iv) the outcome of the case (both legal and extra-legal). With regard to the last point, it should be clear that there will be examples of CRSL, which do not succeed in bringing about legal or social change—due to, for example, a negative judicial outcome in a particular case, the means/lack of implementation of a specific decision, or because of the ultimate impacts of the decision in practice.<sup>18</sup> As such it is necessary to be cautious with regard to including outcomes in the criteria to be used to identify CRSL. There will also be instances in which CRSL that is unsuccessful in court will ultimately result in legal or societal change due to factors such as extra-legal advocacy surrounding the litigation, an increase

<sup>13</sup> See, e.g. Sarat and Scheingold, *Cause Lawyering and The State in a Global Era* (2001).

<sup>14</sup> Healy and Taylor, ‘Making the Case for Community Lawyering’ (2016) *Clearinghouse Review* 1–6, available at: [dredf.org/wp-content/uploads/2019/08/Materials-CommunityLawyering-HealyAndTaylor-Clearinghouse-2016Nov.pdf](https://dredf.org/wp-content/uploads/2019/08/Materials-CommunityLawyering-HealyAndTaylor-Clearinghouse-2016Nov.pdf) [last accessed 4 February 2022].

<sup>15</sup> In doing so, the article employs the definition of child rights strategic litigation developed by the Advancing Child Rights Strategic Litigation project.

<sup>16</sup> For more on litigation that does not result in legal change but may still result in social change, see the text linked to *infra* n 19 below.

<sup>17</sup> ‘Child rights cases’ can be understood as cases that centres on children’s rights set out in the Convention on the Rights of the Child or other international, regional or domestic child rights instruments (e.g. constitutions or legislation).

<sup>18</sup> For more on the risks of the negative impacts of relying on judicial intervention to secure the rights of children, see Nolan, *Children’s Socio-Economic Rights, Democracy and the Courts* (Hart Publishing 2011) ch 6; Skelton ‘Children’s Rights’, in Brickhill (ed), *Public Interest Litigation in South Africa* (Juta 2018) 274. Hafén, ‘Book Review, Exploring Test Cases in Child Advocacy: In the Interest of Children—Advocacy, Law, Reform, and Public Policy by Robert H Mnookin’ (1986) 100(2) *Harvard Law Review* 435.

in public attention, sympathy or concern as a result of media coverage, or the creation of a movement or political mobilisation around a child rights issue.<sup>19</sup>

Building on the factors identified above, there are two key questions to ask when seeking to determine whether a case is CRSL. First, who are the litigants and the litigators? Litigants may include any parties in the case: applicants, plaintiffs, defendants, appellants, petitioners, authors, amici curiae, third-party intervenors.<sup>20</sup> A case is likely to constitute CRSL where litigants are: a child or group of children; an adult such as parent, guardian, curator/guardian ad litem who expressly acts on behalf of a child or children with a broader aim than merely meeting the needs of the individual child; or a human rights or civil society organisation (often but perhaps not always a children's rights organisation) acting on behalf of a child/children, in the child-specific public interest or in the interests of children generally. Other litigants whose involvement in cases may serve as an indicator that it is CRSL include NHRIs, ombudspersons, children's commissioners or child defenders. As will be indicated below, a growing amount of CRSL is being brought by litigation organisations, individual lawyers acting in their own names or *nomine officio*, law clinics and public interest law groups.

In identifying CRSL it will be especially important to consider who initiated the case. That said, in some instances CRSL may include cases that are initiated by ordinary litigators as run of the mill civil or criminal matters, but with parties with strategic aims getting involved at some stage of the case (e.g. as amici curiae or third party intervenors). Furthermore, in some jurisdictions judges initiate cases themselves, while this is rare in other jurisdictions (though judges elsewhere certainly sometimes raise legal/constitutional questions of their own volition within 'run of the mill' cases before them). Both of these kinds of 'judge-initiated' cases do not fit the definition of CRSL that is employed in this article unless parties with strategic aims get involved at some stage of the case—for instance, by serving as amici curiae or third party intervenors to provide argumentation or evidence.

The second key question in terms of identifying whether a particular instance of litigation constitutes CRSL relates to the aims of that litigation: what is/are the objective(s) of the litigation? Generally, for a case to qualify as CRSL, the aim of the litigants will need to be a broader one than merely resolving a legal, child rights-related problem for an individual child: the litigation will need to seek to advance the rights of more than one child and/or to bring about social change that will benefit all children or a category of children. However, even where the main parties in the case may have a more limited or individualised aim (for instance, defending a particular child offender), an amicus or third party intervenor admitted to the case may have a different, more strategic intention.

Having defined CRSL for the purposes of this article, we now turn to an overview of work in that area.

### 3. OVERVIEW OF CRSL IN PRACTICE

This article focuses on litigation efforts that accord with the definition of CRSL explained above in Part 2, and which have taken place subsequent to the coming into force of the CRC. In order to track where and how strategic litigation has been happening over the past three decades, we have reviewed the rapidly expanding patchwork of case law and literature on CRSL, which throws light on the strategic aims of the litigators, descriptions and analysis of cases, as well as on extra-legal activity and outcomes.<sup>21</sup> In doing so, reflecting the fact that the vast majority of CRSL has

<sup>19</sup> For more on the potential of unsuccessful strategic litigation to still result in legal and social change, see, e.g. Depoorter, 'The Upside of Losing,' (2013) 113 *Columbia Law Review* 817; NeJaime, 'Winning through Losing' (2011) 96 *Iowa Law Review* 941.

<sup>20</sup> Note that if there is an appeal, the plaintiffs may become the defendants.

<sup>21</sup> This literature is reviewed in Part 3.



been and is being brought at the national level, we focus primarily on CRSL brought before domestic courts.

A broad trends analysis based on case law and available literature reveals that in the first two decades after the coming into force of the CRC, litigation globally tended to focus on civil and political rights,<sup>22</sup> with child justice<sup>23</sup> (particularly sentencing)<sup>24</sup> and child protection systems abuses being high on the agenda.<sup>25</sup> Family law-related cases featuring children's rights also dominated in the early phase.<sup>26</sup> Corporal punishment cases featured significantly, with litigation challenging the practice in various settings being a notable theme in various regions.<sup>27</sup> In India, child labour cases were prominent.<sup>28</sup> In Latin America and Africa, there were key cases about displacement and armed conflict.<sup>29</sup>

Economic and social rights litigation was generally slower to get off the ground. Education litigation was an outlier in this regard, having received sustained legal attention in different parts of the world, perhaps because many angles of education litigation such as segregation and exclusion engage civil and political rights (historically more likely to form part of constitutional rights schema) as well as economic and social ones.<sup>30</sup> Landmark economic and social rights cases in the early phase often only tangentially dealt with children's rights, these frequently being subsumed within the rights of families and communities.<sup>31</sup> However, by the third decade after CRC ratification, economic and social rights litigation focusing on children's rights was on the rise in developing and developed economy nations, with notable efforts being made in Africa and Latin America in particular.<sup>32</sup>

<sup>22</sup> Child Rights International Network (CRIN), 'CRC in Court: The Case Law of the Convention on the Rights of the Child' (2012) 16 lists these top ten themes in child rights litigation that cited the CRC: juvenile justice, immigration, child custody, public protection of child, discrimination, child protection, corporal punishment, armed conflict, adoption and child support—the eleventh was education. While CRSL does not necessarily cite the CRC, this study provides a sense of the issues that those most working on child rights—who were those most likely to cite the CRC—were focussed on.

<sup>23</sup> See, e.g., *J.D.B. v North Carolina*, 564 U.S. 261 (2011); *S and Marper v UK* ECHR 2008-V 167.

<sup>24</sup> See, e.g., *Roper v Simmons*, 543 U.S. 551 (2005); *Miller v Alabama*, 560 U.S. 48 (2010); *Centre for Child Law v Minister of Justice and Constitutional Development* [2009] ZACC 18.

<sup>25</sup> See, e.g., Kilkelly, 'Advancing the Rights of Young People in Juvenile Justice: The Impact of Juvenile Law Center' (2016) 88(4) *Temple Law Review*. 629. CRIN's 2012 study of cases citing the CRC (supra n 22) showed that the ten most common articles cited by the courts were Article 3 (best interests), Article 37 (detention, punishment), Article 19 (violence), Article 9 (separation from parents), Article 40 (child justice), Article 7 (nationality), Article 2 (equality), Article 12 (right to be heard), Article 1 (definition of child) and Article 8 (identity). Although citation of the CRC and CRSL are not directly correlated, this list gives an indication of child rights themes litigated during that period.

<sup>26</sup> See, however, critiques that many of these cases were parent-centred. Sloth-Nielsen 'Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child' (2002) 10(2) *International Journal of Children's Rights* 137, 149–50; Fortin 'Children's Rights: Flattering to Deceive' (2014) 26(1) *Family Law Quarterly* 51, 53–4.

<sup>27</sup> See, e.g. Cr. A. 4596/98 *Plonit v Attorney General* P.D 54(1) (Israel); *A v United Kingdom* ECHR 1998-VI; *Canadian Foundation for Children, Youth and the Law v Canada*, [2004] 1 S.C.R. 76; *BLAST v Secretary of the Minister of Education*, (2011) (31) SCC. The theme has continued beyond the second decade following CRC in Southern Africa: *Pfungwa v Headmistress of Belvedere Primary School* [2017] ZWHHC 148; *YG v S* (A263/2016) [2017] ZAGPJHC 290; *Freedom of Religion South Africa v Minister of Justice* [2019] ZACC 34.

<sup>28</sup> See, e.g. *M.C. Mehta v State of Tamil Nadu* (1996) (6) SCC 756; *Bachpan Bachao Andolan versus Union of India and Others* (2011) (5) SCC 1.

<sup>29</sup> See, e.g. Constitutional Court of Colombia. Third Review Chamber. T-025 of 2004. (*Manuel José Cepeda Espinosa, Jaime Córdoba Triviño, Rodrigo Escobar Gil*; 22 January 2004); Constitutional Court of Colombia. Second Review Chamber. Auto 251 of 2008. (*Manuel José Cepeda Espinosa*; 6 October 2008); *Batumike et al. (Affaire Kavumu)*, RPA no. 139/2018 (High Military Court of the Democratic Republic of the Congo).

<sup>30</sup> See, e.g. *DH and another v the Czech Republic* ECHR 2007-IV, which originated in a constitutional appeal lodged on 15 June 1999; *Horvath and Kiss v Hungary* (2013) 57 EHRR 31 was initially brought in the Szabolcs-Szatmár-Bereg County Regional court in 2006. In the US: *Rose v Council for Better Education* 790 SW 2d 186 (Ky 1989); *Campaign for Fiscal Equity v State of New York* 719 N.Y.S. 2d 275 (2001).

<sup>31</sup> See, e.g. *Government of South Africa v Grootboom* [2000] ZACC 19; *Minister of Health v Treatment Action Campaign* [2002] ZACC 15.

<sup>32</sup> For a discussion of key cases, see Nolan (supra n 18); Liebenberg, *Socio-economic Rights. Adjudication under a Transformative Constitution* (2010) ch 5.

Migration rates and a burgeoning awareness of children's rights in the context of migration has led to a surge in migration CRSL in the third decade, focusing on issues such as migration procedures,<sup>33</sup> separation from parents,<sup>34</sup> deprivation of liberty<sup>35</sup> and access to services including education.<sup>36</sup> A child rights perspective in family law cases emerged on issues such as children of imprisoned caregivers,<sup>37</sup> intercountry adoption<sup>38</sup> and surrogacy,<sup>39</sup> with CRSL playing a role, often through *amicus curiae* or third party interventions.

This decade has also seen the emergence of children as agents for their own change, and cases on themes involving autonomy and evolving capacity such as access to sexual and reproductive health services,<sup>40</sup> sexual decision making,<sup>41</sup> recognition of intersex children,<sup>42</sup> the right to vote,<sup>43</sup> and to participate in peaceful assembly.<sup>44</sup> Litigation on the right to preserve and protect identity,<sup>45</sup> child marriage,<sup>46</sup> and in relation to tough new laws on sexual offences that have caused unintended consequences child offenders,<sup>47</sup> has also been a site of CRSL work. Children have moved to the front of litigation efforts in the environmental protection context with a sharp upward trend in this type of CRSL noted in the last ten years.<sup>48</sup>

This leads to an important point about the current state of play in CRSL. Who are the actors driving and supporting this work, and has that changed over time? Child rights organisations and University-based centres and clinics have worked and continue to work with lawyers acting pro-bono and long-time strategic litigators to successfully bring child rights cases and *amicus curiae* briefs to courts. There is a range of practice using in-house lawyers and/or lawyers on brief. Sometimes the litigation work is carried out by specialist pro-bono law 'firms', who use a range of strategies to select themes for litigation, and to identify cases and clients. Some of them work directly with children in legal clinic situations or cooperate closely with organisations that deliver services to children. In legal systems where litigation brought by an institution is possible, children's organisations have been visible as institutional clients. CRSL litigators have also taken advantage of the possibility of collective litigation complaint mechanisms.<sup>49</sup> NHRIs

<sup>33</sup> See, e.g. *Centre for Child Law v Minister for Home Affairs* 2005 (6) SA 50 (T); STS 16 June 2020 (307/2020) (Spain).

<sup>34</sup> See, e.g. *Ms. L. v US Immigration & Customs Enforcement*, 302 F. Supp. 3d 1149 (SD Cal. 2018).

<sup>35</sup> See, e.g. *Stipulated Settlement Agreement, Flores v Reno* [1997] No. CV 85–4544, C.D. Cal.; *Jb.M.R. v Public Prosecutor* [2017] 7 AMR 128 (44–51-03/2017) (High Court of Malaysia); *R.R.b.M.S. & 6 Ors v Komandan, Depot Imigresen Belantik, Kedah & 3 Ors* [2019] 4 AMR 619 (KA-44-81-09/2018) (High Court in Alor Setar, Malaysia).

<sup>36</sup> See, e.g. *R (On the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; *Centre for Child Law v Minister of Basic Education*, 2020 (3) SA 141 (High Ct. Eastern Cape Div. 12 December 2019).

<sup>37</sup> See, e.g. *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; *Chiramba v Minister of Home Affairs N.O. & Anor* [2008] ZWHHC 1029; HC 143.641, STF, 20 February 2018 (Brazil).

<sup>38</sup> See, e.g. *St. Theresa's Tender Loving Care Home v State of Andhra Pradesh*, (2005) 8 SCC 525; *Stephanie Joan Becker v State* (2013) 12 SCC 786; ad v DW (*Department of Social Development Intervening; Centre for Child Law as Amicus Curiae*) [2007] ZACC 27.

<sup>39</sup> See, e.g. *AB v Minister for Social Development* [2016] ZACC 43.

<sup>40</sup> See, e.g. *Planned Parenthood of the Great Northwest v Alaska*, 375 P.3d 1122, 2016 WL 3959952, Alaska, 22 July 2016 (NO. S–15010, S–15030, S–15039).

<sup>41</sup> See, e.g. *Teddy Bear Clinic v Minister of Justice* [2013] ZACC 35.

<sup>42</sup> See, e.g. *Baby A (Suing through the Mother EA) v Attorney General* [2014] eCLR.

<sup>43</sup> See, e.g., *Make it 16 Incorporated v Attorney-General* [2020] NZHC 2630; *Make it 16 Incorporated v Attorney General* [2021] NZCA 681.

<sup>44</sup> See, e.g. *Mlungwana v The State* [2018] ZACC 45.

<sup>45</sup> See, e.g. *Inst. for Human Rights & Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (2011) Decision No. 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

<sup>46</sup> See, e.g. *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs N.O.* [2016] ZWCC 12.

<sup>47</sup> See, e.g. *J v National Director of Public Prosecutions* [2014] ZACC 13.

<sup>48</sup> See the Climate Change Litigation Index, available at 'Climate Change Litigation Databases—Sabin Center For Climate Change Law' (Climate Case Chart), available at: [climatecasechart.com/climate-change-litigation/](https://climatecasechart.com/climate-change-litigation/) [last accessed 4 February 2022].

<sup>49</sup> See, e.g. 'Civil Association for Equality and Justice (ACIJ) c/Gobierno de la Ciudad de Buenos Aires (Ministerio de Educación) and others on precautionary measures' Capel. Satyr, Sala I, EXP 8849/2019, 2020.

with a child rights mandate<sup>50</sup> and Children's Commissioners<sup>51</sup> have also been active in CRSL in some countries, and in some cases Legal Aid or Legal Services Authorities<sup>52</sup> have been involved. Lawyers' associations have also featured in some of the work.<sup>53</sup>

Many organisations that focus on CRSL seek cases and clients through engaging with the children's rights sector, while remaining open to receiving cases through children or organisations approaching them. In the criminal justice context, there are many examples of cases where criminal appeals have been used by CRSL litigators, sometimes through amicus or third party interventions, sometimes as the child's legal representative, to challenge laws, policies or practices as being in breach of the CRC, another human rights instrument or the Constitution.<sup>54</sup> There are also examples of cases that challenged such measures in a direct manner, rather than in the context of an ongoing criminal proceeding.<sup>55</sup> In civil law cases too, amicus or third party interventions are a popular form of CRSL, but direct challenges to impugned laws, policies and practices have also been brought by children and child rights litigators. Civil actions for damages (tort/delict) are a less favoured means used by CRSL, but such cases have been successfully brought on behalf of children in the public interest.<sup>56</sup>

The respondents in these cases are usually state actors (at all levels), but this is also shifting. Private role players, including businesses providing goods or services to children<sup>57</sup> or exploiting children (such as through child labour)<sup>58</sup> are increasingly being targeted as respondents in CRSL, and this has sharply increased in the surge of environmental litigation. This type of litigation carries greater risks and tends to be more costly, particularly as the stakes are high and protection from adverse costs orders might be less well insulated than in litigation against an arm of the state.<sup>59</sup>

Another notable trend is the spread of CRSL across different geographical regions, and across different types of legal systems. The United States has the longest history of strategic litigation on CRSL, involving the use of precedent as a means to develop the law. Other common law jurisdictions such as England and Wales—and to a more limited degree, Australia and New Zealand—have provided some space for CRSL.<sup>60</sup> In the constitutional democracy of India,

<sup>50</sup> In India the National Human Rights Commission played a role in the death penalty case of *Ramdeo Chauhan v Bani Kant Das* (2010) 14 SCC 209, and in several High Court matters relating to police brutality, and weaknesses in the Remand Home system. See further Enakshi Ganguly Thukral and Anant Kumar Asthana 'Children's Rights in Litigation: Use of the CRC in Indian Courts', in Liefwaard and Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 49–50.

<sup>51</sup> For example, Northern Ireland's Commissioner for Children (NICCY) has intervened in cases including criteria for state aided education (*JR (a minor) acting by his mother and next friend* [2021] NIQB 21), special educational needs (*ML v Special Needs and Disability Tribunal* [2021] NIFam 15), and deprivation of liberty (*MP's (a minor) Application* [2014] NIQB 52).

<sup>52</sup> The National Legal Services Authority (NALSA) in India has been involved in several landmark children's rights cases, Jharkhand State Legal Services Authority, *Landmark Judgments of Supreme Court of India on Family Matters* (JHALSA 2018). Legal Aid South Africa has a strategic litigation unit and has partnered with Centre for Child Law in the funding of some cases, and has also represented particular clients in strategic litigation matters (e.g. *J v NDP* [2014] ZACC 13—Legal Aid SA represented the appellant, J, and various children's rights organisations, represented by the Centre for Child Law, entered as amici curiae).

<sup>53</sup> For example, the Coletivo de Advogados em Direitos Humanos in the Supreme Federal Court of Brazil (supra n 37).

<sup>54</sup> See, e.g. *Salil Bali v Union of India* (2013) 7 SCC 705.

<sup>55</sup> See, e.g. *Centre for Child Law* (supra n 24).

<sup>56</sup> See, e.g. *Komape v Minister of Basic Education* [2019] ZASCA 192.

<sup>57</sup> See, e.g. the work of Alana challenging advertising to children in Brazil, including REsp. 1.558.086—SP (2015/0061578–0), STJ, 10 March 2016; 'TikTok Sued on Behalf of Millions of European Children over Data Concerns' *Financial Times* (2021), available at: [www.ft.com/content/02bb235f-f6f3-42be-a921-bc2c86b86271](http://www.ft.com/content/02bb235f-f6f3-42be-a921-bc2c86b86271) [last accessed 18 April 2022].

<sup>58</sup> Kelly, 'Apple and Google Named in US Lawsuit Over Congolese Child Cobalt Mining Deaths' *The Guardian* (2019), available at: [www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths](http://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths) [last accessed 18 April 2022].

<sup>59</sup> Ginnivan, 'Public Interest Litigation: Mitigating Adverse Costs Order Risk' (2016) 136 *Precedent* 22.

<sup>60</sup> See Williams on the role of judicial precedent and the 'rule of construction' (judicial interpretation) for the development of children's rights in Liefwaard and Doek (supra n 50) 55–56. Durbach et al. ('Public Interest Litigation: Making the Case in Australia' (2013) 38(4) *Alternative Law Journal* 219) cite the risk of legal costs being awarded against unsuccessful litigants, liberal orientation of the legal system and traditional lawyering techniques as reasons why Australia has seen less strategic



public interest litigators, using judicial review via writ petitions<sup>61</sup> have long been active in the sphere of children's rights.<sup>62</sup> On the African continent, a significant body of child rights case law has been strategically built in South Africa since its final Constitution was enacted in 1996,<sup>63</sup> and CRSL cases have also emerged in other African jurisdictions with codified constitutions, such as in Kenya, Uganda and Zimbabwe.<sup>64</sup>

Continental Europe's civil legal systems rely more heavily on written codes, and the law is not developed by precedent in the same way as in common law systems. The European human rights system, particularly children's rights successes at the European Court of Human Rights, has triggered CRSL at the national level.<sup>65</sup> The other large region where civil systems dominate is Latin America. However, several jurisdictions in this region have extensive constitutional and legislative child rights protections, and have legal avenues and remedies that have been used by civil society groups seeking justice,<sup>66</sup> such as civil actions in the public interest<sup>67</sup> and writs of mandamus.<sup>68</sup> Important institutions in several Latin American jurisdictions include the Ministério Público, a public officer that actively promotes rights, and the Defensoria Pública, which provides legal assistance and has standing to present civil actions, play an important role in CRSL.<sup>69</sup>

Domestic litigation forms the core of CRSL efforts and is our focus in this article, but there is increasing activity by child rights litigators at the regional and international level.<sup>70</sup> The coming into force of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in 2014 has created a new horizon for CRSL. Although ratification has been slow, the number of cases and the range of issues being covered is expanding.<sup>71</sup> While many of the cases are brought by parents on behalf of children, the Committee has received some cases where children are supported by strategic litigators and there is involvement of NGOs, NHRIs, academics and special rapporteurs.<sup>72</sup>

#### 4. WHY IS A FOCUS ON CRSL PRACTICE FROM A CHILD RIGHTS PERSPECTIVE IMPORTANT?

Having described the developments in CRSL, we now turn to explain why a focus on CRSL practice—as opposed to merely aims and impact—from a child rights perspective is important and necessary.

litigation, but they point out the Tasmanian Dam case shows that this kind of litigation can work. More recent CRSL efforts in the environmental law sphere (*Sharma v Minister for the Environment* [2021] FCA 560). Bigwood, *Public Interest Litigation: The New Zealand Experience in International Perspective* (2006).

<sup>61</sup> See Thukral and Asthana (supra n 50) 31–51.

<sup>62</sup> *Gaurav Jain v Union of India & Ors.* [1990] Supp. SCC 709; *M.C. Mehta* (supra n 28); *Bachpan Bachao Andolan* (supra n 28); *Ajay Goswami v Union of India* AIR 2007 SC 493.

<sup>63</sup> Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa—a 20 year retrospective' (2019) 52 *De Jure* 501.

<sup>64</sup> Skelton, 'The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa Based on International and Regional Instruments' 2009 9(2) *African Human Rights Law Journal* 482.

<sup>65</sup> Fenton Glynn, *Children and the European Court of Human Rights* (2021) 398. For more, see the various contributions to Liefard and Doek (supra n 50).

<sup>66</sup> Open Society Justice Initiative, 'Equal access to quality education' (Open Society Foundations 2017) 31.

<sup>67</sup> Civil process to protect individual right—i.e. ação civil pública.

<sup>68</sup> A remedy to protect individual rights—i.e. mandado de segurança or amparo.

<sup>69</sup> See for example HC 143.641 (supra n 37); REsp. N° 1.558.086—SP (2015/0061578-0) (supra n 57).

<sup>70</sup> Nolan and Kilkelly, 'Children's Rights under Regional Human Rights Law—A Tale of Harmonisation?' in Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (2017).

<sup>71</sup> 'CRC Trends—OPIC' (*Child Rights Connect*, 2022), available at: [opic.childrightsconnect.org/crc-trends/](https://opic.childrightsconnect.org/crc-trends/) [last accessed 9 April 2022].

<sup>72</sup> For example, the Spanish non-governmental organisation Fundación Raíces has been involved in numerous migration cases brought under OPIC. The third party interventions by NHRIs in UNCRC, *N.B.F. v Spain* (2018) CRC/C/79/D/11/2017 UNCRC; the third party interventions by academic experts in UNCRC, *L.H. and Others v France* (2022) CRC/C/89/D/77–79–109–2019 UNCRC, as well as by current and former Special Rapporteurs in UNCRC, *Sacchi and Others v Argentina and others* (2021) CRC/C/88/D/104/2019 UNCRC.

Child rights strategic litigation is not an extensively researched topic. There are significant bodies of academic and advocacy literature focused on related areas such as access to justice and the challenges (financial, legal and other) faced by children in that context,<sup>73</sup> as well as child-friendly justice and the role of children in judicial and administrative proceedings.<sup>74</sup> There is also a small body of (largely US-dominated) work on the role of lawyers in representing children.<sup>75</sup>

Most academic CRSL-related research describes or analyses specific CRSL experiences, whether domestic, regional or international. This scholarship ranges from analyses of CRSL cases, the legal issues that arose in them (e.g. standing, argumentation and remedies) and the litigation's impact in legal terms and beyond, to contributions that explore the conditions that either enhance or inhibit CRSL before different domestic courts.<sup>76</sup> There is a growing number of studies of a similar nature related to litigation efforts focused on regional or international judicial and quasi-judicial human rights bodies.<sup>77</sup> This literature is supplemented importantly by publications produced by litigators and children's rights advocates, which focus more directly on the practice of CRSL, although not always explicitly from a child rights perspective.<sup>78</sup> In

<sup>73</sup> See, e.g. Liefwaard, 'Access to Justice for Children: Towards a Specific Research and Implementation agenda' (2019) 27(2) *International Journal of Children's Rights* 195; Report of the United Nations High Commissioner for Human Rights 'Access to justice for children' (2013) A/HRC/25/35; Leskovik and Prenc, 'Access to Justice for Children, an Evolving Concept' (2015) 6(3) *Mediterranean Journal of Social Sciences* 103; Bequiraj and MacNamara 'Children and Access to Justice: National Practices, International Challenges. Bingham Centre for the Rule of Law Report' (2016); Liefwaard and Doek (supra n 50); Child Rights International Network (CRIN) 'Rights, Remedies & Representation: Global Reports on Access to Justice for Children' (2016).

<sup>74</sup> See, e.g. O'Donnell, 'The Right of Children to Be Heard: Children's Right to Have Their Views Taken into Account and to Participate in Legal and Administrative Proceedings' (UNICEF Innocenti Research Centre 2009); CRIN (supra n 73); Paré, 'L'accès des Enfants à la Justice et leur Droit de Participation Devant les Tribunaux: Quelques Réflexions' (2014) 44(1) *Revue Général de droit*. 81.

<sup>75</sup> See, e.g. the diverse materials available at American Bar Association, 'Children's Rights Litigation' (*ABA Groups Litigation Committees*), available at: [www.americanbar.org/groups/litigation/committees/childrens-rights/](http://www.americanbar.org/groups/litigation/committees/childrens-rights/) [last accessed 15 February 2022]; Appell, 'Representing Children Representing What?: Critical Reflections on Lawyering for Children' (2007) 39 *Columbia Human Rights Law Review* 573; Peters, 'The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings' (1996) 64(4) *Fordham Law Review* 1505; University of Liverpool, European Children's Rights Unit, 'Training Activities for Legal Experts on Children's Rights (TALE)' (*Project TALE*), available at: [www.project-tale.org/](http://www.project-tale.org/) [last accessed 15 February 2022], funded by the European Commission (2015–2017); Legal Aid South Africa and the Centre for Child Law, University of Pretoria (2016), *Guidelines for legal representatives of children in civil matters* (PULP 2016); Buss, 'Confronting Developmental Barriers to the Empowerment of Child Clients' (1999) 84 *Cornell Law Review* 895; Matthews, 'Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases' (1996) 64 *Fordham Law Review*. 1435.

<sup>76</sup> See, e.g. Brouman et al., 'Litigating to Improve Access to Health Care for Children: Lessons from *Memisovski v Maram* (2007) 41(1) *Clearinghouse Review* 15; Center for the Study of Social Policy (CSSP), 'For the Welfare of Children: Lessons Learned from Class Action Litigation' (2012), available at: [cssp.org/resource/for-the-welfare-of-children-lessons-learned-from-class-action-litigation/](http://cssp.org/resource/for-the-welfare-of-children-lessons-learned-from-class-action-litigation/) [last accessed 10 December 2020]; McAleer, 'Litigation Strategies for Demanding High Quality Education for Incarcerated Youth: Lessons from State School Finance Litigation' (2015) 22(2) *Georgetown Poverty Law Policy* 545; Borgersen and Shapiro, '*G.L. v Stangler*: A Case Study in Court-ordered Child Welfare Reform' (1997) *Journal of Dispute Resolution*; Skelton, 'The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa Based on International and Regional Instruments' (2009) 9(2) *African Human Rights Law Journal* 482; Kilkelly and Liefwaard, 'Legal Implementation of the UNCRC: Lessons to be Learned from the Constitutional Experience of South Africa' (2009) 52 *De Jure* 521; Tobin (supra n 6); Vučković-Šahović and Savić, 'Strategic Litigation on the Right of the Child in Serbia' in Liefwaard and Doek (supra n 50) 139–156; Kamga, 'An Assessment of the Possibilities for Impact Litigation in Francophone African Countries' (2014) 14(2) *African Human Rights Law Journal*; Liefwaard & Doek (supra n 50); Skelton, 'Strategic Litigation Impacts: Equal Access to Quality Education' (2017); Vanhala et al., "Let us Learn": Learning about Legal Mobilization through a Case Study of Strategic Legal Action for the Rights of Young Migrants to Access Student Loans in the UK' (2018) 10(3) *Journal of Human Rights Practice* 439; Veriava, *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (2019); Basch, 'Children's Right to Early Education in the City of Buenos Aires: A Case Study on ACIJ's Class Action' (2011) 5 *International Budget Partnership*; Skelton (supra n 18) ch 10.

<sup>77</sup> See, e.g., Skelton, 'International Children's Rights Law: Complaints and Remedies' in Kilkelly and Liefwaard (eds), *International Human Rights of Children* (2019) 65–91; Open Society Justice Initiative, *Strategic litigation impacts: Roman school desegregation* (Open Society Foundation 2016); Sloth-Nielsen, 'Children's Rights Litigation in the African Region: Lessons from the Communications Procedure under the ACRWC' in Liefwaard and Doek (supra n 50) 249–265.

<sup>78</sup> African Child Policy Forum (ACPF), *Training Manual on Strategic Litigation and Individual Complaints Mechanism for Children in Africa* (ACPF 2020); Child Rights International Network (CRIN), 'Children's Rights: A Guide to Strategic Litigation' (CRIN 2008), available at: [www.a4id.org/wp-content/uploads/2016/04/Children%E2%80%99s-Rights-A-Guide-to-Strategic-Litigation.pdf](http://www.a4id.org/wp-content/uploads/2016/04/Children%E2%80%99s-Rights-A-Guide-to-Strategic-Litigation.pdf) [last accessed 14 February 2022]; Lawyers Without Borders (Canada) and Jamaicans for Justice, 'Strategic Litigation of Human Rights Abuses: A Guideline for Legal Practitioners from the Commonwealth Caribbean' (2014); Mental Disability Advocacy Centre (MDAC) et al., 'Innovating European Lawyers to Advance the

sum, the practice of CRSL remains a significantly under-researched issue, despite the upsurge in such litigation in the last two decades and the growing scholarly and advocate work on strategic litigation more generally.

As discussed in Part 2, climate justice is an area that is currently receiving extensive attention. There is growing scholarship focused on rights-centred litigation in this area, some of which touches on the issue of child participation and the potential role of such CRSL in terms of advancing children's views and concerns.<sup>79</sup> Thus far, however, in a way that mirrors the fields just discussed, this work remains focused predominantly on the argumentation presented to courts, as well as issues of standing and jurisdiction, rather than the *practice* of CRSL in a climate justice context.<sup>80</sup> More generally, a focus on child participation is on the increase in other CRSL literature,<sup>81</sup> whether produced by academics or practitioners—a fact that is unsurprising given the rising profile of child participation in child rights research and advocacy more generally. Overall, however, the 'child rights lens' of CRSL remains directed outwards.

One might assert that this lack of a child rights perspective on CRSL practice is unsurprising given that child rights-consistent CRSL is neither expressly contemplated nor required in terms of the Convention on the Rights of the Child: lawyers and child rights advocates are not state actors and the extent to which (if at all) they are legally bound by the Convention on the Rights of the Child is unclear. In contrast, to parents and others responsible for the day-to-day upbringing and support of the child,<sup>82</sup> there is no express mention of lawyers in the CRC, whether as the bearer of duties or responsibilities or otherwise.<sup>83</sup> Nor is such an approach explicitly foreshadowed in the work of the Committee on the Rights of the Child. Statements on children, litigation and lawyers in the Committee's General Comments focus primarily on the nature of legal assistance that children should be provided by the state, including training of lawyers as necessary, rather than on the specific obligations or responsibilities of lawyers (or other CRSL practitioners) in terms of the CRC.<sup>84</sup> The Committee has only rarely referred

Rights of Children with Disabilities' (MDAC 2017); Defence for Children International (DCI) Belgium, 'Lawyers Defending Children in Conflict with the Law: International Practical Guide' (DCI 2018).

<sup>79</sup> See, e.g. Parker et al., 'When the Kids Put Climate Change on Trial: Youth-focused Rights-based Climate Litigation around the World' (2022) 13(1) *Journal of Human Rights and the Environment* 84; Mendelson, 'Tribes, Cities, and Children: Emerging Voices in Environmental Litigation' (2019) 34(2) *Journal of Land Use & Environmental Law* 237; Slobodian, 'Defending the Future: Intergenerational Equity in Climate Litigation' (2020) 32 *The Georgetown Environmental Law Journal* 569; Bakker, 'Climate Change and Children's Rights' Todres and King (eds.), *The Oxford Handbook of Children's Rights Law* (2020); Daly, 'Youth Climate Activism and Its Impact on International Human Rights Law' (2022) 22(2) *Human Rights Law Review*.

<sup>80</sup> A notable exception to this is Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) *Transnational Environmental Law* 263.

<sup>81</sup> See, e.g. DCI (supra n 78) 33–35; Grover, 'Rights Education and Children's Collective Self-Advocacy through Public Interest Litigation' (2018) 1(1) *Human Rights Education Review* 65.

<sup>82</sup> See, e.g. Convention on the Rights of the Child (adopted 20 November 1989) (CRC) arts 18(1), 27(1), 5.

<sup>83</sup> For more on duty-bearers under the CRC, see Nolan, 'Children's Rights' in Moeckli et al. (eds), *International Human Rights* (4th edn, 2022).

<sup>84</sup> See, e.g. UN CRC, General Comment no. 25 on children's rights in relation to the digital environment (2021) CRC/C/GC/25 [44]; UN CRC, General Comment no. 24 on children's rights in the child justice system (2019) CRC/C/GC/24 [106]; UN CMW and CRC, Joint General Comment no. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (2017) CMW/C/GC/4-CRC/C/GC/23 [16], [17(f)]; UN CRC, General Comment no. 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) CRC/C/GC/14 [96]; UN CRC, General Comment no. 13: The right of the child to freedom from all forms of violence (2011) CRC/C/GC/13 [56] (lawyers are understood by the authors as included in 'all professionals working with or for children'); UN CRC, General Comment no. 12: The right of the child to be Heard (2009) CRC/C/GC/12 [35]–[37], [49]; UN CRC, General Comment no. 11: Indigenous children and their rights under the Convention (2009) CRC/C/GC/11 [76]; UN CRC, General Comment no. 10: Children's Rights in Juvenile Justice (2007) CRC/C/GC/10 [40]; UN CRC, General Comment no. 9: The rights of children with disabilities (2006) CRC/C/GC/9 [27]; UN CRC, General Comment no. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (2006) CRC/C/GC/8 [43]; UN CRC, General Comment no. 7: Implementing Child Rights in Early Childhood (2005) CRC/C/GC/7/Rev. 1 [13(a)], [41]; UN CRC, General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005) CRC/GC/2005/6 [69], [95]; UN CRC, General Comment no. 4:

to strategic litigation (using the term ‘public interest litigation’), stating that public interest litigation should be made possible by states.<sup>85</sup>

The Committee has addressed the role of one set of CRSL actors—national human rights institutions—in a way that is relevant to CRSL. In its General Comment No.2 on the role of independent NHRIs in the promotion and protection of the rights of the child, the Committee asserted that NHRIs ‘should have the power to support children taking cases to court, including the power (a) to take cases concerning children’s issues in the name of the NHRI and (b) to intervene in court cases to inform the court about the human rights issues involved in the case’.<sup>86</sup> The Committee has also focused in a CRSL-related way on the work of NHRIs themselves: when delineating the recommended activities which those entities should carry out in relation to the implementation of children’s rights, the Committee stated that NHRIs should take legal proceedings to vindicate children’s rights in the State or provide legal assistance to children and provide expertise in children’s rights to the courts, in suitable cases as *amicus curiae* or *intervenor*.<sup>87</sup>

With regard to law and legal practice more generally, the Committee has provided a sense of what is required in terms of legal representation for the purposes of the Convention. It has stressed the need for representation to be provided in a child-friendly manner and for free, quality legal advice and representation for children.<sup>88</sup> In its General Comment No.24 on child justice, the Committee noted that

to effectively participate, a child needs to be supported by all practitioners [including presumably lawyers] to comprehend the charges and possible consequences and options *in order to direct the legal representative*, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.<sup>89</sup>

While this statement was made in the context of the rights of children alleged or accused of having infringed the penal law under Article 40(2)(b) CRC, it can be understood to apply to non-criminal proceedings, including CRSL. Indeed, the Committee’s previous statement in its General Comment No.6 on the treatment of unaccompanied and separated children outside their country of origin that in ‘legal representation, children’s views should also be taken into account’<sup>90</sup> is strongly suggestive of a view that the rights under the CRC have implications for legal practice.

Although it cannot be argued convincingly that lawyers and other CRSL practitioners have direct legally binding child rights obligations under the CRC, which does not mean that the Convention (and its related protocols) does not have implications for their work. In its General Comment No.5, the Committee stated that:

[i]mplementation is an obligation for States parties, but needs to engage all sectors of society, including children themselves. The Committee recognizes that responsibilities to respect and ensure the rights of children extend in practice beyond the State and State-controlled services

Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003) CRC/GC/2003/4 [16] and [17(f)].

<sup>85</sup> UN CRC, GC No. 25 (supra n 84); UN CRC, General Comment no. 16 on State obligations regarding the impact of the business sector on children’s rights (2013) CRC/C/GC/16 [68].

<sup>86</sup> UN CRC, General Comment no. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child (2002) CRC/GC/2002/2 [14].

<sup>87</sup> Ibid. [19(p)], [19(r)].

<sup>88</sup> See, e.g. UN CRC, GC No. 4 (supra n 84) [16].

<sup>89</sup> UN CRC, GC No. 24 (supra n 84) [46]. Emphasis added by authors.

<sup>90</sup> UN CRC, GC No. 6 (supra n 84) [25]. Emphasis added by authors.

and institutions to include children, parents and wider families, other adults, and non-State services and organizations.<sup>91</sup>

This necessarily includes CRSL practitioners whose efforts through CRSL to advance the implementation of the CRC must respect and ensure children's rights. This cannot be done where CRSL practice is not consistent with child rights standards.

In addition to these arguments in favour of child rights-consistent practice based on the Convention and the work of the Committee, questions can and should be asked about any practice or activity that is oriented towards the achievement of child rights but in itself is undermining of those rights. CRSL efforts that aim to advance children's rights through legal or social change but are inconsistent with child rights in terms of how they are implemented raise issues with regard to the legitimacy of those endeavours, as well as their internal coherence and overall contribution to children's rights achievement. A child rights-advancing outcome in CRSL should be matched by a practice that upholds those rights.

## 5. THE PARAMETERS OF CHILD RIGHTS-CONSISTENT PRACTICE

But what is child rights-consistent practice? In order to answer this question, it is necessary to identify those child rights standards that are most appropriate in terms of assessing the extent to which existing CRSL practice is child rights-consistent. These standards will be of relevance to all stages of litigation: the scoping, planning and design of CRSL; the operationalisation of CRSL; the follow-up to CRSL (including implementation and broader dissemination of CRSL outcome(s)), and extra-legal advocacy (political advocacy and other campaigning, media and communications work) that relates to that CRSL.

In outlining the rights standards that should be borne in mind by CRSL practitioners in their work, it will be unsurprising that a significant number relate to children's ability to understand, engage with and input meaningfully into decision-making around CRSL. The first key standard in this context is the right of children who are capable of forming their own views to express those views in all matters affecting them and to have those views given due weight in accordance with their age and maturity (Article 12 CRC). This right is supplemented and supported by the child's right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds through any media of the child's choice (Article 13 CRC), as well as the right of children to have access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health (Article 17 CRC).

In a CRSL decision-making context, there is a crucial link between children's ability to formulate and express views and the provision of information to them. Children must have the information necessary to understand and weigh up the opportunities/risks involved in litigation. This is enabled through the provision of information in a child-friendly format that recognises that the right to information not only requires the conveying of facts to the child but requires a process of contextualising that information, presenting genuine choices, defining what support is available to enable the child to exercise those choices, calibrating

<sup>91</sup> UN CRC, General Comment no. 5: General measures of implementation of the Convention on the Rights of the Child (2003) CRC/GC/2003/5 [56]. See also UN CRC, GC no. 16 (supra n 85) [8].



expectations in the light of other factors that influence decisions about the child, and presenting realistic and clear projections as to what outcomes might arise from different courses of action.<sup>92</sup>

As the Committee has noted:

the realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child's clarified decisions.<sup>93</sup>

Ensuring that CRSL practice is consistent with these rights enables children to control and/or input into the work of those carrying out CRSL with regard to their rights.<sup>94</sup> Effective communication between children and CRSL practitioners will be at the heart of this work. Children are often excluded from playing a direct role in legal proceedings by standing limitations in different national legal systems, leading to reliance on adult representatives and/or litigants in the context of CRSL. This places children one step further away from the proceedings than a legally empowered adult would be. This 'further remove' of children from the legal process reduces their ability to control their legal representatives, to set the 'agenda' for the litigation, or to ensure that it is directed by their view of what the vindication of their rights should entail.

Even where children are directly involved in litigation or extra-legal advocacy around that litigation, the impact of their views and desires on the conduct of that litigation may be limited. Recent work on 'participatory litigation' involving adults has argued for a situation in which 'lawyers and clients should have an equal dialogic relationship, with each bringing skills and insights to their mutual struggle'.<sup>95</sup> The achievement of this is particularly challenging in the context of CRSL and, with some children (as indeed with some adults), will be impossible. The child-adult power differential that permeates the relationship between adults and children compounds the social, cultural, racial, psychological and socio-economic differences that may separate children—and socially disadvantaged groups of children in particular—and CRSL practitioners.<sup>96</sup> Child rights-consistent practice will be enhanced if CRSL practitioners recognize those differentials and take meaningful steps to overcome them.

Furthermore, where CRSL is planned and pursued by lawyers but direct engagement with affected children is managed by partner child rights organisations, there is a risk that those with key responsibility for designing the litigation (as opposed to the broader advocacy effort of which it may form part) will remain insulated from children and their views. Ultimately, all CRSL planning and implementation will entail some degree of adult mediation of children's views about their rights. However, a child-rights consistent approach to CRSL entails adults considering the appropriateness of the scope and nature of that mediation. The potential for a disconnect between children's views and those of CRSL practitioners is exacerbated in the context of collective cases, given the possibility of divergent views on the part of different children, which practitioners may be either unable or uninterested in gauging and reflecting.<sup>97</sup>

<sup>92</sup> Stalford et al., 'Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information' (2017) 5(3) *Social Inclusion* 207, 212.

<sup>93</sup> UN CRC, GC no. 12 (supra n 84) [25].

<sup>94</sup> For a thoughtful deconstruction of the challenges to child-adult control in a litigation context, see Buss (supra n 75).

<sup>95</sup> Lobel, 'Participatory Lawyering', (2022) 74 *Stanford Law Review* 87, 93.

<sup>96</sup> Nolan citing Stephen Wexler, 'Practicing Law for Poor People' (1970) 79 *Yale Law Journal* 1049, 1052. For more on the gulfs between children and their lawyers, see Appell (supra n 75).

<sup>97</sup> For more on this point, in the context of class action litigation on behalf of children in the United States, Matthews (supra n 75).

Given the purposive nature of CRSL, a situation in which the views and agendas of children are marginalised in such work would be particularly troubling from a rights perspective. CRSL practitioners should consciously avoid subordinating children's goals and rights to those of others—and be attentive to the risk of any such subordination happening inadvertently. Ensuring that the litigation pursues children's agendas and is consistent with their rights will also impact positively on legal argumentation and remedies and thus enhance the value of CRSL and its ability to bring about positive legal and social change.

The ability of children to instruct or supervise their legal representatives and other adults involved in CRSL may be limited due to both legal incapacitation as well as socially constructed attitudinal barriers towards children on the part of CRSL practitioners. This raises a range of issues, including the concern that those planning and operationalising CRSL may accord a different priority or strike a different balance between the various rights or interests of children, than would children themselves. Adding to this complexity: children have interests that are indeterminate in complex ways, and that may differ from their current, stated preferences.<sup>98</sup> There may at times be good reason to question or override the priority accorded by young children to different issues, rights or interests in a CRSL practice context. For instance, where a child's preferred course of action may pose a risk to the ultimate success of the case. In such situations, the weight to be accorded to the child's views will need to be considered against their age and maturity and balanced against their other rights interests. Furthermore, there will be some children who will not be capable of such prioritisation at all (for instance, infants). As Buss notes in the context of legal representation and client empowerment, equating child clients with adult clients in terms of the direction to be taken from them by lawyers, regardless of their socio-cognitive development or capacity may ultimately serve those children poorly.<sup>99</sup> That said, it is vital that those carrying out CRSL, including lawyers, carefully interrogate their own assumptions around child capacity, maturity, quality of judgment, and expertise based on lived experience. Such action can avoid a situation in which children are allocated a passive role in CRSL and their dependence on adults is reinforced. Articles 12, 13 and 17 are key tools that can be used to frame and shape CRSL practice on this issue. These rights together suggest that, to the greatest extent possible and in line with children's own wishes with regard to their role vis-à-vis the CRSL process, children should be engaged in identifying the rights issue(s) to be litigated in CRSL cases, the definition of the goals to be pursued by the litigation and the broader strategy of which the litigation forms part.

Article 5 of the CRC, which focuses on the child's evolving capacities provides further guidance to CRSL practitioners as to how children's rights, particularly those related to views, voice and agency, should apply in the context of CRSL.

The Committee on the Rights of the Child has stated that,

... [t]he child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities, as stated in this article. The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child's development, but will steadily increase as the child is encouraged to contribute her or his views.<sup>100</sup>

<sup>98</sup> Matthews (supra n 75) 1437.

<sup>99</sup> Buss (supra n 75). For an influential discussion of client empowerment argument in the context of litigation involving children, see Hunt Federle, 'The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counselling the Child Client' (1996) 64(4) *Fordham Law Review* 1655.

<sup>100</sup> UN CRC, GC no. 12 (supra n 84) [84].

While Article 5 refers to the role of parents/legal guardians, the Committee's contemplated shift from adult direction to dialogue on the basis of equality has implications for CRSL practitioners' understanding of their role vis-à-vis child clients. In particular, the article provides guidance to CRSL practitioners on the balance to be struck between the views/preferences of children and those of the parents/legal guardians. CRSL is frequently protracted: Article 5 suggests that as children grow older and become more mature (i.e. as their capacities evolve), CRSL practitioner reliance on parents/legal guardians' views on how children's rights should be secured must shift towards greater direct reliance on children's understandings of how their rights can best be ensured—both through and in litigation. Another issue that may be of particular relevance in protracted CRSL is the accommodation of children's changing views over the course of litigation, including with regard to continuing that litigation or remaining involved in it.

Articles 12, 13, 17 and 5 do not just have implications for the planning or conduct of the litigation itself—they also have impacts on extra-legal advocacy surrounding the litigation, as well as on media work. If children's right to freedom of expression or right to express their views is to be given effect to, where media forms part of the litigation strategy children will need to be provided with the support needed in line with their evolving capacities to engage with the media effectively (should they choose to do so).<sup>101</sup> Furthermore, children's views about how they/their cases should be presented to external audiences (including in publicity materials)—whether by litigators, collaborators or funders who support the CRSL work financially—should be given effect to.

The need for rights-consistent practice does not necessarily end with the conclusion of the litigation. If children's right to information in the context of CRSL is to be respected, it will not be sufficient for lawyers and others working with children to make sure that the children fully understand the outcome of the case (although this is crucial). Rather, children should also be informed of subsequent developments following the relevant ruling or decision. Their Article 12 rights should also be respected in the context of work follow-up or implementation, with children being involved in such work (assuming that they wish to be).

Another key standard for the purposes of child rights-consistent CRSL practice is that of non-discrimination, as set out in Article 2 CRC. Children are not a homogenous group and that provision sets out a range of grounds upon which children must not be discriminated against, namely 'the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. The use of 'or other status' indicates that the list of grounds enumerated in Article 2(1) is not exhaustive and the work of the Committee has stressed that 'other status' includes grounds such as migration status,<sup>102</sup> health status,<sup>103</sup> sexual orientation or gender identity.<sup>104</sup> The Committee has been explicit that Article 2 covers multiple and intersectional discrimination.<sup>105</sup> By referring to the status of parents/legal guardians, the CRC recognises that children may be the subject of discrimination due to their association with, or membership of, a particular social group.<sup>106</sup>

So what does Article 2 mean in a CRSL context? It is of particular relevance with regard to client selection and, relatedly, the choice of which cases to bring. Given the challenges (real and perceived) faced by CRSL efforts in terms of standing rules, legal argumentation and public

<sup>101</sup> For more on this, see the discussion of Article 16 below.

<sup>102</sup> Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration: General principles (2017) CRC/C/GC/22 [9].

<sup>103</sup> UN CRC, General Comment no. 3 on HIV/AIDS and the rights of the child (2003) CRC/GC/2003/3 [7]–[9].

<sup>104</sup> See, Peleg, 'International Rights of the Child: General Principles' in Kilkelly and Liefwaard (supra n 77) 135–157.

<sup>105</sup> Joint GC No. 3 CMW and No. 22 CRC (supra n 102) [26].

<sup>106</sup> See further CRC (supra n 82) art. 2(2), which requires all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

sympathy, there will be times when litigators will face tough choices between ensuring non-discrimination and maximising the (apparent) prospects of success of a particular CSRL effort. That said, where an action is taken with minimal chance of success in advancing the rights enjoyment of children involved, then this raises other rights issues (for instance, whether such CSRL is in the best interests of the children in question) and an appropriate balance will have to be struck between the needs and diverse rights of children whose rights are at play in the relevant decision-making. Article 2 implies that biases, whether explicit or subconscious, must be acknowledged and avoided in order to ensure that these do not play a role in shaping choices about client or case selection in ways that are discriminatory against children.

Matthews notes that

Lawyers may have ethical duties concerning the distribution of the scarce resource of public-interest advocacy, and may be obligated to engage in a rational and systematic case selection process in choosing among the many potential groups of children—all needy and powerless—who could benefit from representation.

CSRL that is consistent with Article 2 UNCRC will require a similar exercise.

Once litigation is underway, when CSRL practitioners are working on behalf of or representing diverse groups of children, equal priority should be given to those groups and their views, both in terms of legal argumentation and the outcomes sought, including remedies.

Ensuring non-discrimination between children is not simply about treating all children the same. Drawing on the work of the Human Rights Committee and other treaty bodies,<sup>107</sup> the Committee has been clear that Article 2 is not focused on identical treatment of all children: as appropriate, there may be call for special measures to diminish or eliminate conditions that cause discrimination with regard to particular groups of children.<sup>108</sup> In the context of CSRL practice, this entails practitioners engaging with different children differently and taking special measures to engage with children who are at particular risk of discrimination to ensure their rights are taken into account adequately in CSRL. An example of such a measure would be the development of communication and other strategies to ensure that children with disabilities are given appropriate attention in CSRL, and that their views are heard and considered.<sup>109</sup>

The final set of CRC provisions that we will focus on are largely protective. For CSRL to be child rights-consistent, it must also be in line with Article 3(1) (best interests), Article 19 (right to protection from all forms of injury or abuse, negligent treatment, maltreatment or exploitation), Article 36 (right to protection from all other forms of exploitation prejudicial to any aspects of the child's welfare) and Article 39 (the duty to take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims). The child's right to privacy (Article 16) also has important implications for CSRL efforts. Another provision that will be dealt with in this context is Article 6 (right to life, survival and development). While this right is certainly not solely protection-oriented in focus,<sup>110</sup>

<sup>107</sup> See, e.g. UN CRC, GC No.5 (supra n 91) [12]; Joint General Comment No. 3 CMW and No. 22 CRC (supra n 102), para 25.

<sup>108</sup> UN CRC, GC No.5 (supra n 91) [12]. In considering whether differential treatment constitutes discrimination, the Committee has stated that such treatment must 'be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards' if it is to be in conformity with Article 2 (Joint General Comment No. 3 CMW and No. 22 CRC (supra n 102) [22]).

<sup>109</sup> See, e.g. Mental Disability Advocacy Center (MDAC), 'Access to Justice for Children with Mental Disabilities. The Ability to Communicate With, and to Facilitate the Communication of, Children with Mental Disabilities' (MDAC), available at: [mdac.org/A2J-training-site/skills-training/the-ability-to-communicate-with-and-to-facilitate-the-communication-of-children-with-mental-disabilities/](https://mdac.org/A2J-training-site/skills-training/the-ability-to-communicate-with-and-to-facilitate-the-communication-of-children-with-mental-disabilities/) [last accessed 7 March 2022].

<sup>110</sup> See, e.g. Peleg and Tobin, 'Art. 6 The Rights to Life, Survival and Development' in Tobin (ed.), *The UN Convention on the Rights of a Child: A Commentary* (2019) 186, 190–235.

it imposes important defensive obligations centred on securing the child's life, survival and personal development.

Article 3(1) UNCRC requires that in all actions concerning children, 'whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Crucially—given the potential indeterminacy inherent in the identification of what a child/children's best interests might be—the Committee has flagged that 'the rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation'.<sup>111</sup>

In guidance that will be helpful to CRSL practitioners seeking to make their work child rights-consistent, the Committee has specified that the child's best interests is a 'rule of procedure': whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, 'the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned'.<sup>112</sup> The Committee has stated that the justification of a decision (and this can be understood to apply to CRSL-related decision-making) must show that 'the right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake' has been 'explicitly taken into account'.<sup>113</sup> There will be a need for CRSL practitioners to explain 'how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases'.<sup>114</sup>

The text of Article 3(1) makes clear that the child's best interests are not always determinative and nor do those interests always trump other considerations. This is an element of Article 3(1) that will require careful balancing to be carried out by CRSL practitioners: as the Committee notes, '[p]otential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise'. Notably, the Committee's work on Article 3(1) has not yet engaged meaningfully with the sticky question of how to balance potentially conflicting best interests of different groups of children—and there will certainly be situations in which CRSL will have to deal with balancing the interests of different groups of children.

Article 6 UNCRC sets out the child's right to life and the requirement that states parties should ensure to the maximum extent possible the life, survival and development of the child. For the purposes of our consideration of child rights-consistent CRSL, Article 6 plays a key role in relation to considering the harmful impacts on children that CRSL might lead to. These include backlash and targeting of child litigants by those hostile to the litigation. This is a particular risk where the CRSL focuses on an issue that is politically contested within the society in which children are based.<sup>115</sup> However, even where there are no external negative reactions to the litigation, the process itself may place emotional, psychological and other demands on children. At a more prosaic level, participation in CRSL and accompanying advocacy will have implications for children's time—which in turn may impact on their educational and extra-curricular development activities. In line with Article 6 UNCRC, lawyers will need to be conscious of the diverse potential effects of CRSL involvement on children and seek to mitigate

<sup>111</sup> Ibid.

<sup>112</sup> UN CRC, GC No.14 (supra n 84) [6].

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> For a useful discussion of reprisals against children seeking to assert their rights (albeit not in a litigation-specific context), see Child Rights Connect, *The Rights of Child Human Rights Defenders: Implementation Guide* (Child Rights Connect, 2020).



these to the extent that this is possible, including drawing on expertise beyond law (for instance, psychology, social work or medical) where it is necessary to do so.

The child's right to privacy should also inform CRSL practice and has implications for decision-making around seeking the anonymisation of courts proceedings or arguing for *in camera* hearings. Similarly, Article 16 requires practitioners to consider carefully whether to bring action to ensure that the child's name or image or identity is not reported in the media (bearing in mind that the child's views on this will need to be given due weight as well). The child's right to privacy will be of particular importance where the litigation focuses on an issue that is politically or societally controversial.

For CRSL practice to be consistent with Article 19 UNCRC (right to protection from all forms of injury or abuse, negligent treatment, maltreatment or exploitation), it must 'do no harm' to children. Amongst other things, this entails CRSL practitioners ensuring that children are not exposed to harm or (re)trauma in (or as a result of) the litigation process. This will be a particular issue in the context of CRSL work involving children who have already experienced trauma, for instance in the context of CRSL related to sexual violence or immigration. This may require CRSL practitioners to ensure children receive necessary emotional, psychological or other support. A key challenge that may be faced by CRSL practitioners following the conclusion of the strategic litigation is that some children involved in CRSL may need ongoing support where that litigation is unsuccessful or only partially successful. Indeed, while Article 39 UNCRC is focused on states parties' duties to take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims, child rights-consistent CRSL will be concerned with these aims also, not just in terms of legal argumentation but also with regard to ensuring the provision of appropriate support to victims of rights violations both before, during and after litigation.<sup>116</sup>

The prohibition on exploitation envisaged in Article 19 is reinforced by Article 36 of the UNCRC, which sets out the child's right to 'protection from all other forms of exploitation prejudicial to any aspects of the child's welfare'.<sup>117</sup> Together these provisions make clear that CRSL should not exploit or instrumentalise children. That said, there will always be a mix of motivations for CRSL, with these likely to be focused both on the situation of the children whose rights are the specific focus of the litigation, as well as on legal and social change more broadly. Where CRSL would become problematic from an Article 36 perspective would be when it amounted to unfair advantage being taken of a child by encouraging or coercing that child to take part in CRSL that provides others with a benefit that is not commensurate to the benefit gained by the child.<sup>118</sup>

A final, key element of child rights-consistent CRSL is the management of children's expectations. This is a fundamental part of providing children with the information they need to develop informed views and input meaningfully into CRSL decision-making (in lines with Articles 12, 13 and 17). It is also vital in terms of making sure that children are not surprised by a negative outcome in a case. Given the emotional, psychological and other investment that children may have made in CRSL, a failure to manage expectations may result in harm being caused to child (Article 19). CRSL, which involves children but fails to inform them of the risks of that involvement, is potentially exploitative (Article 36).

<sup>116</sup> For more on Article 39, see John Tobin and Chelsea Marshall, 'Article 39. The Right to Reintegration and Recovery' in Tobin (supra n 110), 1567.

<sup>117</sup> Economic and sexual exploitation of children are covered in CRC (supra n 82), Articles 34 and 35, respectively.

<sup>118</sup> Tobin, 'Article 36. Protection against All Other Forms of Exploitation' in Tobin (supra n 110), 1410.

## 6. CONCLUSION

This article has argued for a child rights perspective to be brought to bear on an area that has growing importance for the enjoyment of those rights: CRSL. It has provided a clear justification for why CRSL practitioners should consider the extent to which their practice (rather than simply the aims or impact of such) is consistent with child rights standards. In doing so, it has outlined those rights that should be used to frame efforts to ‘turn the child rights lens inwards’ on CRSL efforts and suggested how they arise in the litigation process. This article posits that an explicit consideration of child rights can serve as a clear, multi-faceted framework that enables litigators to strengthen their existing practice in a legitimate, unified and coherent way. In turn, this should contribute to the development of reflective child rights strategic litigation practice, informed by the substantive content of child rights, the specific characteristics of children as a social group and driven by the views and lived experiences of children.

The article has made the case for child rights-consistent CRSL practice. Having read it, one might ask: what difference, if any, would such an approach make? The extent of the impact of such an approach in terms of CRSL practitioner work is an empirical question—and one that this article does not seek to answer. Rather, our aim has been to demonstrate the importance that those working on children’s rights in a strategic litigation context should engage consciously with the implications of children’s rights for their own practice: turning the lens inwards will reinforce the legitimacy of the means of CRSL, as well as its ends.