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# A child-rights analysis of selected United Nations treaty body jurisprudence to inform the emerging jurisprudence under the Third Optional Protocol to the Convention on the Rights of the Child


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Submitted in fulfilment of the requirements for the degree Doctor of Laws in International Children's Rights

In the Faculty of Law,
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**Supervisor: Professor Ann Skelton**

## Declaration of originality

I, the undersigned, hereby declare that this thesis, which I submit for the degree Doctor Legum (LLD) in the Faculty of Law, University of Pretoria, is my work and has not been previously submitted for a degree at another university.

I have correctly cited and acknowledged all my sources.

Signed:……………………………………………………………………………
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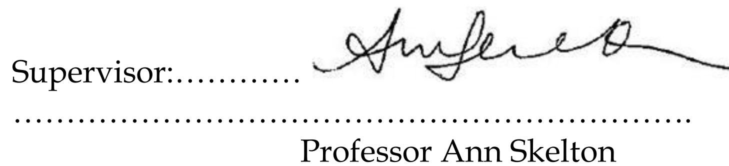
Date:…………6 Nov 2022…………………………………………………………………….



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**Dedication**

I dedicate this work to the memory of my beloved mom, Elizabeth Quan whose love, prayers and support has brought me this far.

## Acknowledgement

I thank the Almighty God, my glory and the lifter up of my head, for His loving kindness, tender mercies and favor towards me, and the Holy Spirit, my helper and my guide.

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## Acronyms and abbreviations

| | |
|---|---|
| ACHPR | African Charter on Human and People's Rights |
| CAT | Convention against Torture |
| CCPR | Convention on Civil and Political Rights |
| | |
| CRC | Convention on the Rights of the Child |
| CRoC | Committee on the Rights of the Child |
| CEDAW | Convention on the Elimination of all Forms Discrimination against women |
| CERD | Convention on the Elimination of Racial Discrimination |
| CESCR | Convention on Economic Social and Cultural Rights |
| CMW | Convention on the Protection of the Rights of Migrant Workers and Members of their Families |
| CPPED | Convention for the Protection of all Persons from Enforced Disappearance |

| CRPD | Convention on the Rights of Persons with Disabilities |
| --- | --- |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court on Human Rights |
| EU | European Union |
| HRC | Human Rights Committee |
| OPIC | Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure |
| UDHR | Universal Declaration on Human Rights |
| UN | United Nations |

**Abstract**

This research examines the extent of a children's rights jurisprudence in eight United Nations (UN) treaty bodies in order to establish whether there are important principles or findings that should inform the Committee on the Rights of the Child in its work going forward. The Third Optional Protocol to the Convention on the Rights of the Child (OPIC) is the first ever international individual complaints procedure for children. Moreover, the procedure only came into operation seven years ago. As such, there has been limited scholarly analysis of the complaints received under the OPIC. The thesis draws from the thematic areas of children in the criminal justice system, the right to non-interference with the family unit, the principle of non-refoulement, and migration detention. The research finds that the Human Rights Committee has the most developed children's rights jurisprudence amongst the other eight human rights treaty bodies. The research has identified several important principles that the Committee on the Rights of the Child can draw on from other treaty bodies. Although this research sought to establish whether there are important principles from the other treaty bodies for its future work, it also finds that the Committee on the Rights of the Child has a well-developed children's rights jurisprudence, and that unlike the other treaty bodies, it takes a child-centric approach in considering communications. Therefore, it concludes that there are lessons that the other treaty bodies can also learn from the Committee on the Rights of the Child.

**Keywords**: best interests, children's rights, criminal justice system, detention, jurisprudence, migration, non-interference, *non-refoulement*, treaty body, united nations

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# Chapter One: Introduction

*'The starting point for a consideration of the human rights of children is the insight that children are both the same as adults and different from them.'*[1]

## 1. Background

The Convention on the Rights of the Child (hereafter the CRC) is the most ratified human rights treaty and binds 196 countries in the world.[2] The CRC has also been described as a "uniquely broad instrument safeguarding children's civil, political, economic, social and cultural rights…"[3] The CRC contains 41 substantive articles which protect the rights of children in various situations. The CRC also lists the obligations that States parties have towards children in their countries.[4] Articles 42 to 45 established a Committee of 18 experts, elected by state parties. The Committee on the Rights of the Child (hereafter CRoC) has the role of monitoring state compliance

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[1] Marks and Clapham *International human rights lexicon* (2005) 19.
[2] Convention on the Rights of the Child (UNCRC), adopted by UN General Assembly Resolution 44/25 of 20 November 1989.
[3] Liefaard and Doek "Foreword" in *Litigating the rights of the child, The UN Convention on the Rights of the Child in domestic and international jurisprudenc*e (2015) vi.
[4] Liefaard and Doek (2015) *Foreword* v.

with the Convention, and of two substantive optional protocols.[5] It also plays a normative role through interpretations of the Convention in concluding observations and general comments.

On 14 April 2014 the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (hereafter OPIC) came into operation, thereby adding a further monitoring and jurisprudential role to the Committee's core mandate.[6] This development was of crucial importance to the enforcement of children's rights.[7] The OPIC will be discussed in more detail in chapter 2. However, it is important to note from the outset that the aims of this thesis centre around the work under the auspices of OPIC that is being and will in future be carried out by the Committee. Prior to the OPIC coming into force, children whose rights had been violated could only bring their claims (or more likely, have claims brought on their behalf) before other treaty body communications procedures. OPIC therefore opened new horizons for the fulfilment of children's rights and redress for violations.

### 1.1 Exponential growth of the jurisprudence of the CRoC and its implications for this research

At the onset of this research, the CRoC had received only four communications,[8] under the OPIC since it came into operation on 14 April 2014. This thesis focuses on the first 8 years since the operationalisation of OPIC, with 14 April 2022 as the general cut-off date for analysis of Views. As at that date, the jurisprudence under the OPIC

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[5] The Optional Protocol on the Involvement of Children in Armed Conflict, Adopted 25 May 2000 by General Assembly Resolution A/RES/54/263 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Adopted 15 May 2000 by General Assembly Resolution A/RES/54/263.

[6] OHCHR "Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure". https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications, Adopted 19 December 2011 by General Assembly Resolution A/RES/66/138.(Accessed 3 November 2022).

[7] Skelton "Committee on the Rights of the Child (CRC)"(2017) Max Planck *Encyclopedia of International Procedural Law* (MPEiPro).

[8] These cases are available at http://juris.ohchr.org/search/results (accessed 15 May 2018).

has grown exponentially and the CRoC has dealt with 54 communications, 17 of which the CRoC had adopted its views on the merits and 37 of which were discontinued.[9]

As discussed in further detail under "research objectives" in section 2 below, one of the aims of this research is to inform the work of the CRoC with the principles in the jurisprudence of the other eight human rights treaty bodies, with specific reference to violations of the rights of children. From the outset there was an assumption that prior to OPIC, it was the HRC that received the most communication on children's rights and therefore, there would be some lessons in the HRC's jurisprudence for the CRoC going forward.

However, recent developments in the jurisprudence of the CRoC has shown that in most cases, the CRoC is charting its own path and rarely referring to the jurisprudence of the HRC, or to other treaty bodies. The exponential growth of the jurisprudence of the CRoC has had two important bearings on this research: first it has necessitated the need to give an appraisal of the CRoC's jurisprudence, as has been done in chapter 7, and second, important principles have been drawn from the CRoC's jurisprudence for the other treaty bodies, this was not initially intended for inclusion in this research. In fact, some of the provisions of the CRC, such as the best interests principle of the child are unique to the CRoC, therefore the jurisprudence from other treaty bodies cannot provide any lessons on the best interests principle to the CRoC. However, in cases pertaining to *non-refoulement* and family related issues, the HRC has developed commendable jurisprudence with unique principles and lessons for the CRoC. The jurisprudential steps taken by the CRC, alongside the thesis' main aim of extracting lessons from the other Treaty Bodies to guide the CRoC . The jurisprudence of the other bodies, together with the signposts offered by the CRoC's early jurisprudence, make it possible to predict how the CRoC's jurisprudence is likely to evolve.

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[9] https://juris.ohchr.org/en/search/results?Bodies=5&sortOrder=Date (accessed 28 May 2021).

## 1.2 Research objectives

The aim of this research is firstly to survey the extent of a children's rights jurisprudence in nine United Nations (UN) treaty bodies and secondly to establish whether there are important principles or findings that should inform the CRoC in their work going forward. The OPIC is the first ever international individual complaints procedure for children.[10] Moreover, the procedure only came into operation eight years ago, compared to others such as the individual communications procedure in the First Optional Protocol to the International Convention on Civil and Political Rights which has been in existence since 1976, 46 years.[11] As such, there has been very limited scholarly analysis of the complaints received under the OPIC. Since the OPIC will serve as a space for the development of a children's rights jurisprudence, this research, further aims to determine whether there are important findings and principles stemming from communications from children or on behalf of children from the other eight treaty bodies for the work of the CRoC in the future. It must be noted that in communications in which rights invoked are unique to the CRoC, as well as in communications where the CRoC is charting its own path, there may be learnings for other treaty bodies such as the HRC and the CAT.

## 1.3 Delineation of study area

### 1.3.1 Selected UN treaties:

First, this research notes the existence of the 10 human rights treaty bodies. However, the thesis excludes communications from the sub-committee on the prevention of torture and other cruel inhuman, degrading treatment and punishment.(SPT) and only considers communications from the nine core human rights treaties. The SPT is a sub-committee and not one of the core treaty bodies. Second, There are other human rights treaties at the regional level, such as those of the African Union, the Inter-American human rights system and the European Union. Although examples may be drawn from these treaty body systems where relevant, this research focuses on the

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[10] https://www.crin.org/en/home/law/complaints/international/crc-complaints (accessed 12 June 2018).

[11] Communications Procedures under the First Optional Protocol to the International Convention on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966.

human rights treaties and treaty bodies created by the UN. Moreover, a consideration of children's rights in all treaty body systems, including those at the regional level, cannot be contained in one thesis. Therefore, the focus of this research is on the nine core UN human rights treaties,[12] and as will be demonstrated, some of these have produced a large proportion of cases, while others have not yet become fully operational.[13] More specifically, this research focuses on the individual communications received since the CRC came into effect. Thus, the individual communications in which the views of the relevant treaty bodies have been adopted between 2 September 1990 until the cut-off date selected, which is 14 April 2022, will be considered. Finally, this study will focus on the individual communications brought by children or on behalf of children and not on those where children are tangentially involved.

### 1.3.2 The consideration of individual complaints as a function of the treaty bodies

The central function of the UN treaty body system is to monitor the implementation of the treaty provisions by states parties.[14] Under their communications procedure, treaty bodies allow both individuals and states to complain about human rights

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[12] It should be noted that although there are factually 10 human rights treaty bodies, this thesis only considers the 9 core treaty bodies and does not consider communications from the sub-committee on the prevention of torture and other cruel inhuman, degrading treatment and punishment.(SPT).

[13] The nine core international human rights treaties are the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), adopted by UN General Assembly Resolution 2106 (XX) of 21 December 1965 ; the International Convention on Civil and Political Rights (ICCPR, adopted by UN General Assembly Resolution 2200A of 16 December 1966; the International Convention on Economic Social and Cultural Rights (ICESCR), adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966; the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted by UN General Assembly Resolution 34/180 of 18 December 1979; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted by UN General Assembly Resolution 39/46 of 10 December 1984; UNCRC ; The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), adopted by UN General Resolution 45/158 of 18 December 1990; the Convention on the Rights of Persons with Disabilities (CRPD), adopted by the Sixty-First Session of the UN General Assembly by Resolution A/RES/61/106 of 13 December 2006 ; the International Convention for the Protection of All Persons from Enforced Disappearances (CED), adopted by UN General Assembly Resolution 47/133 of 23 December 2010. It should be noted that although there are factually 10 human rights treaty bodies, this thesis only considers the 9 core treaty bodies and does not consider communications from the sub-committee on the prevention of torture and other cruel inhuman, degrading treatment and punishment.(SPT).

[14] https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm (accessed 20 November 2018).

violations in an international arena.[15] There are three procedures under which a complaint can be brought, namely individual complaints, state-to-state complaints and inquiries. State-to-state complaints or inter-state complaints as the name implies refer to the procedure where a state party can complain to the relevant treaty body about a violation(s) of the particular treaty by another state party.[16] Inquiries refer to when the relevant treaty body initiates an inquiry upon receiving reliable information 'containing well-founded indications of serious or systematic violations of the conventions in a state party'.[17] This research is concerned with individual complaints, which is a process where individuals or groups or groups of individuals claiming to be victims of rights violations under the relevant convention make complaints to the relevant treaty body against states who are parties to the convention (and the protocol where applicable).

### 1.3.3 Selected theories of jurisprudence

This research is informed by two theories of jurisprudence (legal positivism and natural law) and in particular on the aspects of these theories that relate to international law and international human rights law. It must be emphasised that the subject of jurisprudence and the different theories related to it is not the focal point of this study. The study instead focuses on the aspects of the two theories which consider international law as law and their contributions to the view that international human rights law is a hybrid of positivism and natural law.[18] Positivist theory asserts that law must be necessarily codified to be considered law and further that law and morality should be separated.[19] Natural law theory contradicts the positivist premise by asserting that norms and customs are law although they are not codified and that international norms have moral underpinnings which can be traced to natural theory.[20] It is submitted that both theories hold true tenets for this research. That

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[15] https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#inquiries (accessed 20 November 2018).

[16] *Ibid.*

[17] *Ibid.*

[18] Raz "Human rights without foundations" in Besson and Tasioulas (eds) *The philosophy of international law* (2010) 323.

[19] Bentham *A fragment on government* (1988) 8.

[20] D'Entreves *Natural law, an introduction to legal philosophy* (2017) viii.

aspect of legal positivism that limits law to written or codified documents such as treaties and treaty body findings and that aspect of natural law that recognises that international norms (which can be codified as law) have natural law underpinnings both reflect international human rights law. Therefore, this research argues that international human rights law is a hybrid of both positivism and natural law.

#### 1.3.4 Substantive aspects of jurisprudence as the focus of the research

It is noted that jurisprudence has both substantive and procedural aspects to it.[21] However, the scope of this research is limited only to the substantive aspects of jurisprudence such at the different views of the committees on children's rights contained in the selected cases. Procedural aspects such as admissibility requirements are not discussed in this research. This is because the wide nature and scope of the procedural and substantive aspects of jurisprudence cannot be contained in one thesis. Although remedies are substantive in nature, this thesis does not focus specifically on remedy. Chapter 7 of the thesis deals with the developments in the CRoC's jurisprudence and touches on remedial aspects, but a full discussion of these developments is beyond the scope of this thesis. It is certainly an important agenda for future research.

#### 1.3.5 General comments and concluding observations

Jurisprudence of the UN treaty bodies is not limited to findings of the nine treaty bodies considered in this study.[22] General comments,[23] concluding observations or recommendations are also part of the jurisprudence of the treaty bodies. Although reference will be made to general comments and concluding observations where

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[21] See Thomas Main "The procedural foundation of substantive law" 2009 (87) 801 *Washington University Law Review.*

[22] It must be noted that there is a tenth treaty body: The Sub-Committee for the Prevention of Torture (SPT), which was established under the Optional Protocol to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment , adopted by the Fifty-Seventh Session of the UN General Assembly by Resolution A/RES/57/199 of 18 December 2002.

[23] General Comments are interpretations of contents of human rights provisions by a treaty body. See http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx.

relevant, this research focuses on the findings of the individual communications dealing specifically with children's rights.

### 1.3.6 Definition of terms

For the purposes of this research, the term 'jurisprudence' refers to law and judicial law-making. In this research, jurisprudence is defined as the interpretations of the law given by a court.[24] The consideration of complaints and the subsequent issuing of findings is one of the functions of the treaty body committees.[25] This task means that the committees have a quasi-judicial nature or can be referred to as judicial bodies. If jurisprudence is understood as the interpretations of the law given by judicial and quasi-judicial bodies (as it is herein understood) then it can include the findings of the UN treaty body committees.

The term 'judicial body' is used here to include tribunals, commissions and committees and 'international judges' include the UN treaty body committees. Therefore, jurisprudence arising from treaty bodies is viewed as a form of judicial interpretation and law making,[26] which in turn is considered to be a subsidiary source of international law.[27] 'International Conventions' is used here to include treaties and covenants. 'Individual communications' is used interchangeably with 'individual petitions' and 'individual complaints'.

## 1.4 Knowledge gap

An examination of existing literature on the UN treaty body system shows that most scholarly attention has been devoted to the work of the other treaty bodies, most notably, the Human Rights Committee (hereafter the HRC).[28] OPIC came into force

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[24] Ratnapala *Jurisprudence* (2013) 3-4.
[25] Art 31 of the Vienna Convention of the Law of Treaties, done at Vienna on 23 May 1969, provides for the rules of interpretation. This will be considered in detail in chapter 3 of the thesis under 'sources of international law.'
[26] This research takes the view that judicial law making is inevitable. See Baker and Mezetti "A theory of rational jurisprudence" 2012 (120) *Journal of Political Economy*; See Alvarez *International organisations as law makers* (2005); Ginsburg "Bounded discretion international judicial law making" 2011 (45) *Virginia Journal of International Law;* Klabbers *An introduction to international organisations law* (2015).
[27] *Statute of the International Court of Justice of 1965,* Art 38(1)(d).
[28] See for example Ulfstein "Law-making by human rights treaty bodies" in *International law-making* (2013) where the author focuses on the work of the Human Rights Committee.

in 2014 and considering that it has only 54 communications in which the CRoC's views have been published by the cut-off date, there has been relatively limited scholarly articles written about these communications.[29] Prior to the OPIC, it was the HRC which considered the most complaints pertaining to the rights of children.[30] However, most of what has been written as of a general nature and did not focus on a child rights perspective. This research is justified by the need for a consideration of a children's rights jurisprudence in the UN treaty body system and an opportunity for a consideration of established principles for the work of the CRoC going forward.

### 1.5 Research methodology

Article 38(1) of the ICJ Statute has explicitly listed four sources of international law.[31] In particular, Article 38(1) (a) lists 'international conventions' as part of the sources of international law. Treaties qualify as conventions and therefore, the selected nine UN treaties will also be consulted.[32] Article 38(1)(d) of the ICJ Statute lists 'judicial decisions' as a subsidiary source of international law. Article 38 of the ICJ Statute refers to judicial decisions in general. Whether this provision captures treaty body decisions as 'judicial decisions' is debatable.[33] In this research, it is assumed that

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[29] The findings are available at http://juris.ohchr.org/search/results (accessed 15 May 2018).

[30] See for example de Zayas "The CRC in litigation under the ICCPR and CEDAW" in Liefaard and Doek *Litigating the rights of the Child: the UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 177-191 where the author notes that in the absence of a communications procedure under the CRC until April 2014, treaty body jurisprudence on children's rights was nonetheless developed through the individual complaints procedure of the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women. Examples of such instances are found in cases *Darwina Rosa Monacho de Gallicchio and Ximena Vacario v Argentina*, HRC, CCPR/C/53/D/400/1990, UN Doc. CCPR/C/53/D/400/1990 ;*LP v the Czech Republic*,HRC, 25 July 2002, UN Doc. CCPR/C/75/D/946/2000 ; *Ali Aqsar Bakhtiyari et al v Australia,*United Nations Human Rights Committee, 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002 ; *Corey Brough v Australia*, HRC, 17 March 2006, UN Doc. CCPR/C/86/D/1184/2003 ; *Karen Noelia Huaman v Peru*,United Nations Human Rights Committee, 22 November 20005, UN Doc. CCPR/C/85/D/1153/2003; *Diene Kaba v Canada*, HRC, 25 March 2010, UN Doc. CCPR/C/98/D/1465/2006 ; *SVP v Bulgaria*, CEDAW, 24 November 2012, UN Doc. CEDAW/C/53/D/31/2011.

[31] Art 38(1) ICJ Statute: (a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) International custom, as evidence of a general practice accepted as law; (c) The general principles of law accepted by civilised nations; and (d) Subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 38 (2): This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

[32] See fn 13.

[33] This point is discussed in chapter 2 under sources of law.

'judicial decisions' includes the findings of the UN treaty body committees.[34] Therefore, the findings of the eight core UN human rights treaties will be considered per treaty to determine the extent of a children's rights jurisprudence in each treaty. The findings of the treaty bodies will be further categorised thematically. The following themes have been identified as most common in the treaty body findings: migration, family law and custody disputes, education and health care, juvenile justice and enforced disappearance.[35] A further analysis of the findings will be done to establish whether there are emerging principles or findings to inform the work of the CRoC.

### 1.5.1 Selection of children's rights jurisprudence in the other eight United Nations human rights treaty body jurisprudence

The presented cases in this research were selected based on the extent of children's rights jurisprudence contained in the views provided by the various treaty bodies. Preliminary research showed 82 cases involving children's rights by the nine core human rights treaty bodies from 1990 to 2018. However, a closer look revealed that some of the cases did not focus on the rights of children, but rather gave general views on the rights of all the victims. This was particularly true for cases which were brought by a family unit, where the rights of child victims got lost in the midst of the rights of the adult victims. Mostly, children's rights in such cases were not separated from the rights of the adult victims. Instead, the views given in such cases were general in nature as the treaty bodies did not "find it necessary to consider the views of the children separately". Such cases were not included in those presented in the thesis.

### 1.5.2 Thematic scope of communications pertaining to children under the eight human rights treaty bodies

An overview of the communications received by the eight human rights treaty body committees has shown that the theme of migration has the highest number of cases

[34] In the main thesis, the sources of international law will be discussed in detail in chapter 2.
[35] It must be emphasized that the themes were derived from reading the treaty body findings and identifying central issues in each finding. The themes identified above are consistent and loom large in the findings.

and appeared mostly in HRC and the CAT's jurisprudence. Within the broader theme of migration emerged smaller themes such as non-refoulement, migration detention and the right to non-interference with the family unit, most of which also appeared in the HRC's jurisprudence. The theme of juvenile justice also emerged under the HRC and the CAT. Although the theme of education predictably emerged under the CESCR and the CEDAW and healthcare under the HRC, not enough cases were found under these themes to be contained in a chapter. Therefore, such themes have been intentionally excluded from this thesis. It is not surprising that most of the cases and themes emerged under the HRC's jurisprudence since the Optional Protocol on a communications procedure of the HRC has been in operation for 43 years, considerably longer than the other communications procedures.

### 1.6 Research question

The central research question is: How can the children's rights jurisprudence arising from communications dealt with by the eight other UN treaty bodies inform the work of the CRoC, under the third optional protocol on a communications procedure, going forward?

### 1.7 Summary of chapters

#### 1.7.1 Chapter Two: Theoretical framework

Chapter two forms the theoretical framework of the thesis. It begins with an argument that natural law and legal positivism are the two theories from which international human rights law is derived. It also discusses treaties as a source of international law and treaty body committees as quasi-judicial bodies. The legal effects of treaty body findings are also analysed. The chapter also considers the jurisdiction of treaty body committees and the use of precedent at treaty body law. The chapter concludes with an overview of each treaty body and the number of States parties that have ratified their individual communication procedures.

### 1.7.2 Chapter Three: Children in the justice system

This chapter is focused on the theme 'children in the justice system'. More specifically, it discusses the rights of children who are in the justice system in cases of children alleged as, accused of or recognised as having infringed the penal law(children in conflict with the law).[36] The chapter considers some of the principles which are unique to children who are in conflict with the law such as the need to separate child offenders from adults and the need to have contact with parents and to remain in contact with parents, as well as the need to involve parents in judicial proceedings if it in the best interests of the child to do so. The chapter concludes by extracting some principles for the CRoC.

### 1.7.3 Chapter four: The right of the child to a family life and to non-interference with the family unit

This chapter discusses children's right to a family life and family related rights through the jurisprudence of the human rights committee. The chapter commences with a discussion on the HRC's legal framework on the right to a family life and to non-interference with the family unit. Six communications pertaining to the right to non-interference with the family unit are analysed to determine whether there are important principles for the work of the CRoC. The chapter concludes with a prediction of the direction that the CRoC is likely to take in similar communications.

### 1.7.4 Chapter five: Immigration detention

Chapter five focuses on the rights of children detained for immigration purposes through an analysis of selected children's rights cases on immigration detention. It begins with a discussion of the international legal framework on the rights of children detained for immigration purposes. It then proceeds to discuss the selected cases within the theme of immigration detention. The chapter concludes with recommendations for the work of the CRoC in its emerging jurisprudence, based on jurisprudence of the relevant treaty bodies in the cases in this chapter.

[36] UNCRC, article 40(1).

### 1.7.5 Chapter six: Deportation and the principle of non-refoulement

Chapter six focuses on deportation and the principle of non-refoulement. It commences with a discussion on the international legal framework on *non-refoulement* and the context and scope within which the principle *non-refoulement* may be applied. It considers the cases which reflect *non-refoulement* for torture, and other cruel, inhuman or degrading treatment or punishment. The HRC has identified socio-economic deprivation as an instance which may trigger protection under *non-refoulement* in some circumstances and therefore the chapter analyses the cases before the HRC under this sub-heading relating to children. Communications on female genital mutilation (FGM) are also discussed under the non- refoulement principle. The chapter concludes with some lessons for the CRoC.

### 1.7.6 Chapter seven:

Chapters three to six deals with children's rights communications within the jurisprudence of the other eight treaty bodies.[37] One of the overall aims of this thesis is to determine whether the existing children's rights jurisprudence from the other eight human rights treaty bodies could inform the emerging jurisprudence under the CRoC. The jurisprudence of the CRoC has developed with 54 communications having been considered by the CRoC to date. This development has necessitated a consideration of the jurisprudence of the CRoC to determine whether the CRoC is charting its own path or following the path of the other human rights treaty bodies considered in this study. This chapter answers that question. An examination of the CRoC's jurisprudence is presented thematically under family related issues , *non-refoulement* and migration detention to determine the approach of the CRoC in its emerging jurisprudence.

### 1.7.7 Chapter eight: Conclusion

The concluding chapter extracts key principles from the jurisprudence of the treaty bodies, primarily the HRC and to a lesser extent the CAT for the work of the CRoC. It will also draw conclusions on the predictable patterns within the emerging

[37] UNCRC.

jurisprudence of the CRoC and highlight some of the learnings from the jurisprudence of the CRoC for the other treaty bodies.

# Chapter Two: Theoretical Framework

## 2.1. Introduction

This chapter begins with an argument that natural law and legal positivism are the two theories from which international human rights law is derived. It then discusses treaties as a source of international law. Since this research takes the viewpoint that the role that treaty body committees play in receiving communications is analogous to that of the judiciary, it is necessary to discuss treaty body committees as quasi-judicial bodies.[38] If treaty body committees are seen as playing a judicial role in

[38] Quasi-judicial bodies are non-judicial bodies with powers to interpret the law. Their functions and procedures resemble a court of law or a judge. They draw conclusions from facts and determine the basis for an official action. Simply put, they function partly as courts. See Abhijeet Kumar "Judicial

considering communications, this merits a discussion on the legal effects of treaty body findings. It follows then that one must consider the jurisdiction of treaty body committees and the use of precedent in treaty body law. The chapter includes an overview of the individual complaints in the nine other UN human rights treaties and reveals the extent of children's rights jurisprudence produced by those bodies. This provides a basis for the remaining chapters of the thesis which will consider whether there are important principles and lessons for the CRoC in this jurisprudence.

## 2.2. International human rights law: A hybrid of positivism and natural law

International human rights law reflects an aspect of positivism that holds that law must necessarily be posited in order to be considered law (this is most evident in the different treaties enacted for the protection of human rights and the committee observations and recommendations which are written for different states parties). In addition, by recognising customs and principles which are not necessarily posited into the sphere of international law as law,[39] international law is also reflective of natural law theory. In this sense, international law depicts both natural law and positivist ideals.

The development of modern international law was founded on the academic battle between positivists and naturalists in the 19th century, with positivists winning and becoming the most dominant theory by the end of the century.[40] By the beginning of the 20th century, international law was dominated by positivism.[41] International law today (at least international human rights law and international humanitarian law) reflects a hybrid of inclusive/soft legal positivism and natural law theories. Moreover, positivism in its most relaxed form (soft-positivism) cannot account for why certain

review of quasi-judicial decision: an Indian perspective" 2021 *Journal of Research in Humanities and Social Sciences* ,Vol 9, 40-47.

[39]Simma and Alston "The sources of human rights law: Custom, jus cogens, and general principles" 1988 (12) *Australian Yearbook of International Law* 82-108 ; See also De Wet "Jus cogens and obligations erga omnes" in Shelton (ed) *Oxford handbook on international human rights law* (2013).

[40] Shaw *International law* (2008).

[41]Collins "Classical Legal Positivism in International Law Revisited" In Kammerhofer and D'Aspremont (ed) *International legal positivism in a post-modern world* (2014) 24. It must be noted that a consideration of the different theories is not the point of his research.

legal norms are valid sources of law.[42] It is submitted that international law, like all other law, includes both positivism and natural law.[43]

Many of the norms that constitute international human rights law and international humanitarian law make reference to morality.[44] To illustrate, the ICJ in *Corfu Channel,*[45] made an appeal to considerations of humanity. Similarly, in *Barcelona Traction*,[46] The ICJ referred to the principles and rules concerning the basic rights of the human person to alternative explanations using customs.[47] The history of international human rights law can be traced back to some of the underlying concepts in natural law. Enacting treaties to secure universal or near universal adherence to norms is an instance wherein natural law underpinnings are used to augment positive law. The issue is that once a norm becomes positive law, it is quickly forgotten that it has its roots in natural law.[48] Basson puts this succinctly "What the law does is to develop, specify, or exclude morality, but not to incorporate it: it is part of it."[49] At the international level, law is constituted by norms which cannot be reduced to posited rules. For this reason, in the international order, there are still elements of natural law, even in positivist legal theories.[50]

De Wet argues that the international community is underpinned by a core value system which is common to all societies and which is embedded in different legal structures such as the international human rights treaties to allow for enforcement.[51]

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[42] O'Connell and Day "Sources in natural law theories: Natural law as source of extra-positive norms" in Basson and D'Aspremont *Oxford andbook of the sources of international law* (2017).
[43]*Ibid.*
[44]Lefkowitz " The sources of international law: Some philosophical reflections" in Besson and Tasioulas *The philosophy of international law* (2010) 189.
[45] *United Kingdom v. Albania* 1949 I.C.J. Reports 1949, p.4.
[46] *Belgium v. Spain* 1970 I.C.J. Reports 1970. p.3.
[47] Lefkowitz (2010) 190.
[48]Alford "Role of Natural Law as a Source for International Law" 19 November 2008 http://opiniojuris.org/2008/11/19/the-role-of-natural-law-as-a-source-for-international-law/ (accessed on 10 June 2018 ).
[49] Basson "Sources of international human rights law, How general is general international law" in Basson and D'Aspremont *Oxford handbook of the sources of international law* (2017) 845.
[50] John Finnis "Natural law theories" in Edward N. Zalta(ed) *The Stanford Encyclopaedia of Philosophy* (2020).
[51] De Wet "The international constitutional order" 2006 (55) *International and Comparative Law Quarterly* 53.

She adds further that the international value system is constituted of norms with strong moral and ethical underpinnings, integrated by states into positive law and which has in turn acquired a special hierarchical standing through state practice.[52] The international value system is a fundamental guideline to international decision making and particularly manifests itself in human rights norms.[53] The UN Charter system (of which human rights treaties form part) inspires those norms that articulate the fundamental values of the international community. Human rights values are in particular promoted by the UN Charter,[54] in a manner that promotes them as core components of the international value system.[55] This is evident in Articles 1(3) read together with Articles 55, 56, 62 and 68 of the said Charter,[56] which have significantly contributed to the creation of a climate for the promotion of human rights within the UN Charter by promoting fundamental values of the international community through the recognition of principles such as equality and respect for human rights.[57]

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[52] De Wet 2006 (55) *ICLQ* 57.
[53] De Wet 2006 (55) *ICLQ* 57.
[54] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, https://www.refworld.org/docid/3ae6b3930.html [accessed 19 October 2022].
[55] Nowak *Introduction to the international human rights regime* (2004) 73.
[56] Art 1(3) of the United Nations Charter, signed at the United Nations Conference on International Organisation on 26 June 1945, reads: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Art 55 reads: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 reads: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." Article 62 reads: "1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned. 2. It [the Economic and Social Council] may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all. 3. It [the Economic and Social Council] may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence. 4. It [the Economic and Social Council] may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence." Article 68 reads: "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."
[57] De Wet 2006 (55) *ICLQ* 57.

International human rights law is clear about its moral ties and this is evident mostly in the preambles of human rights treaties which make reference to dignity, equality, fairness, good faith and necessity, to name a few.[58] The moral nature of human rights law is proof that not only those laws based on state consent are to posited in international law.[59] In light of the above, it is sound to say that all human rights obligations have strong moral and ethical underpinnings which can be linked to natural law.

It is generally accepted that international law is reflective of positivism more than any other theory.[60] Therefore, the view that international law is a hybrid of positivism and natural law requires a justification and this merits a consideration of the place of natural law in international law and specifically in international human rights law.

## 2.3. Natural law and international human rights law

Human rights are moral rights in the sense that they are rights whether or not they are codified or pass the test of recognition in positivist theory.[61] Under positivism, moral and ethical principles were separated and it followed that positivism ignored the moral basis of human rights.[62] Moreover, the separation of law from morality required that laws be obeyed regardless of whether they were immoral or not. It was not surprising that in Nazi Germany and in Apartheid South Africa, immoral laws were passed and obeyed as positivist law. Under natural law theories those were morally wrong. One of the main criticisms levelled at natural law was that it was based on the assumption that there is a God.[63] Grotius, who is often referred to as the father of modern international law, detached natural law from religion and laid the foundation for a secular and rational natural law theory. An act was rational if it was based on morality.

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[58] Basson (2017) 845.
[59] Basson (2017) 845-846.
[60] *Ibid.*
[61] Skorupski "Human rights" In Besson and Tasioulas *The philosophy of international law* (2010) 358.
[62] See for example Austin *The province of jurisprudence determined* 1995. See also Hart "Positivism and the separation of law and morals" 1955 (71) *Harvard Law Review* 593.
[63] John Finnis "Natural law theories" in Edward N. Zalta(ed) *The Stanford Encyclopaedia of Philosophy* (2020).

Grotius saw international law (the law of nations as it was then called) as comprising man-made laws and laws from the principles of the law of nature. It is submitted that Grotius' theory is crucial to contemporary international law: whether international law is codified (as in treaties) or not (as in the general principles of international law), Grotius' account of natural law offered legitimacy for international law. Moreover, natural law theory led to natural rights theory, which is the theory closely associated with modern human rights.[64] Natural law's contribution to human rights cannot be overemphasized:

> It [natural law] affords an appeal from the realities of naked power to a higher authority that is asserted for the protection of human rights. It identifies with and provides security for human freedom and equality, from which other human rights easily flow. It also provides properties of security and support for a human rights system, both domestically and internationally.[65]

The revolutions against tyranny in the late eighteenth century are attributed to natural rights and natural law theory. Natural law is evident in among others the French Declaration of the Rights of Man,[66] the US Declaration of Independence,[67] the Constitutions of various states,[68] and in the principal UN human rights documents.[69] Indeed, many of the international human rights documents were drafted on the recognition of our common heritage as human beings, with inalienable rights that need to be protected. Positivism recognises international law as law but before this,

[64] Shestack "The philosophic foundations of human rights" in McCorquodale (ed) *Human Rights* (2003) 9.
[65] Shestack (2003) 10.
[66] *France: Declaration of the Right of Man and the Citizen* 26 August 1789, https://www.refworld.org/docid/3ae6b52410.html [accessed 5 February 2023].
[67] UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV), https://www.refworld.org/docid/3b00f06e2f.html [accessed 5 February 2023].
[68] See for example the Constitution of the Republic of South Africa, 1996 and the Constitution of the Republic of Ghana, 7 January 1993.
[69] Two such examples are the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic Social and Cultural Rights, 1966.

international law was already embedded in natural law and therefore it is sound to argue that international law today depicts a hybrid of positivism and natural law. To the extent that positivism claims that law must be necessarily codified before it can be referred to as law, the UN human rights treaties and their findings will be analysed as jurisprudence. Also, to the extent that international human rights law is founded on appeal to morality and moral principles integrated by states to positivist law, it is submitted that the nine treaties in question and their jurisprudence are inherently reflective of natural law principles.

Article 38 of the ICJ Statute lists treaties as the first source of international law. This research considers treaty body findings as jurisprudence and therefore as law. The following is a discussion on treaty law as a source of international human rights law and the effect of treaty bodies' findings, given that they have been provided by quasi-judicial bodies.

### 2.4. Treaties as a source of international law

In domestic legal systems, laws are passed by parliament or developed by courts. International law has neither a legislative body that passes laws nor a court with compulsory jurisdiction like domestic courts.[70] In international law, legal obligations are created through rules and are accepted by actors in the international legal system, mostly States. An example is the drafting of treaties and the subsequent choice by states to ratify a treaty in full, or with reservations, and to ratify optional protocols accompanying a treaty. The following discussion explores treaties as a source of international law.

International conventions, also known as treaties, are the first source of law set out in Article 38(1) of the ICJ Statute. According to the Vienna Convention on the Law of Treaties, "a treaty is an international agreement concluded between States in written form and governed by international law, whether or not it is embodied in a single

[70] Roberts and Sivakumaran "The Theory and Reality of the Sources of International Law" in Evans *International law* (2019) 90.

instrument or two or more related instruments and whatever its particular designation".[71] Treaties may be between two states (bilateral) or multiple states (multilateral treaties). Treaties may range between those that define the rights and obligations of individuals (such as the treaties contained in the United Nations Treaty Body system) to those that regulate the relationship between states (such as the Vienna Convention on Consular Relations of 1963).[72]

A state party to a treaty, freely, undertakes to abide by the obligations and rules created by a treaty.[73] When a state acts contrary to the provisions of a treaty, that state would have violated international law as well as its obligations towards the other states parties who are parties to that specific treaty.[74] Treaties are not to be regarded merely as a source of obligation.[75] States are the bearers of rights and obligations under international law in general.[76] However, in some instances, such as in the case of human rights treaties, treaties create rights for individuals, making individuals the direct bearers of the rights. Therefore, individuals then become the subjects of international law.[77] Treaties are often seen as a more deliberate and precise way of creating international norms and this is why it is often said that treaties are a more legitimate source of international law.[78]

Despite criticisms that Article 38 of the ICJ Statute is archaic, inadequate and incomplete, it remains the starting point for a consideration of the sources of international law.[79] Article 38 begins with the sources in which states' consent is explicit, typically treaties and conventions,[80] and then to those in which states consent

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[71] Vienna Convention on the Law of Treaties (VCLT) , done at Vienna on 23 May 1969, art 21(1)(a) .
[72] VCLT, Art 21(1)(a).
[73] Evans *International law* (2018) 780.
[74] Dixon *Textbook on international law* (2013) 31.
[75] Dixon (2013)31.
[76] Jens "Sovereignty and the personality of the state" in Schuett and Peter *The concept of the state in international relations* (2015).
[77] Simma "Sources of international human rights law" in Besson and D'Aspremont (2017) 877.
[78] Simma (2017)877.
[79] Prost "Hierarchy and the sources of international law: A critique" 2017 (39) *Houston Journal on International Law* 285. See also Hrestic "Considerations on the formal sources of international law" 2017 ( 7) *Journal of Law and Administrative Sciences* 103-111.
[80] VCLT, Art 38(1)(a).

is tacit such as the customs and general principles of law[81] and finally the auxiliary sources of law which are the jurisprudence and doctrine of the most competent specialists.[82] At first glance Article 38 appears as a hierarchical list of the sources of international law, with treaties prevailing over customs and customs taking prevalence over general principles.[83] Prost points to the general view that no source is seen as higher than the other and that all sources exist alongside each other.[84] Notwithstanding this general consensus, in practice treaties remain the most frequently used source of international law .[85]

Treaties are often described as the most prominent, important and primary source of international law.[86] Whilst treaties are said to be the only true sources of international law, judicial decisions are said to be used as a means of interpretation and ascertainment of existing norms and therefore lack the ability to create legal obligations as compared to treaties.[87] The notion that treaties should take precedence as the primary source of international law reinforces the legal positivist theory that law must necessarily be codified to allow for certainty, easy ascertainment and legitimacy. Legal positivism theory recognises the superior status of treaties in various ways. For instance, the ICJ has stated on several occasions that "rules of general international law can by, agreement, be derogated from in particular cases or as between particular states''.[88] Similarly, in the *Nicaragua v USA* case, the ICJ held that "In general, treaty rules being *lex specialis*, it would not be appropriate that a state should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim.''[89]

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[81] VCLT, Art 38(1)(b).
[82] VCLT, Art 38(1)(c).
[83] Prost (2017) 290.
[84] Prost (2017) 291.
[85] See for example Daillier et al *Droit international public* (2009) where the authors sub categorise their chapter on international law making into *formation conventionnelle* and *formation non conventionnelle*.
[86] Kennedy "The sources of international law" 1987 (2) *American University International Law Review* 1-96.
[87] Klabbers *International law* (2013) 25. See also Thirlway *The sources of international law* (2014) 8.
[88] North Sea Continental Shelf cases (*Ger.v. Den.; Ger v. Neth.*) 1969 I.C.J Reports 1969, p.3.
[89] Military and Parliamentary activities in and against Nicaragua (*Nicaragua v. United States of America)* 1968 I.C.J. Reports 1968, p.14.

Prost has identified three unique characteristics of treaties that indicate that treaties are the primary sources of international law. The first characteristic, ontological determinacy, refers to the fact that a treaty, as a source of international law, is unambiguous and uncontroversial in the sense that unlike customs, the nature, legitimacy and methods of ascertainment of a treaty are reliable.[90] The second trait, practical versatility, refers to the multiple purposes for which a treaty can be used. The setting up of an international institution such as the UN could not have been achieved without the enactment of various treaties which states would ratify as an indication of their acceptance. Treaties are used to codify or re-state customary law which pre-exists a specific treaty.[91] It must be emphasized here that this reinforces the natural law tenet that before treaties are codified as such, they were once norms and once they become codified, it is easily forgotten that they have their roots in natural law. The third and final characteristic, process legitimacy refers to the legitimate law-making process of a treaty such as the fact that states are at liberty to enter a treaty and to enter reservations that may limit the effect of a certain treaty in so far as it is applicable to them. This means that the treaty making process is conscious, deliberate and based on state consent.[92]

### 2.5. The treaty body committees as quasi-judicial bodies

The only obligation that states were willing to assume by way of international supervision of their compliance with human rights obligations was the reviewing of state reports on progress with implementation of the treaties, known as 'state party review'.[93] It was not surprising then that at the international level, there was no political will for the idea of a court that would hear individual complaints.[94] However, what countries seemed more willing to do was having an optional system that would allow individuals to make complaints to the treaty bodies. This option was available

[90] Prost (2017) 296.
[91] Prost (2017) 297.
[92] Prost (2017) 298.
[93] Rodley "International human rights law" in Evans (ed) (2018) 801. The role of monitoring which the treaty bodies undertake is mostly through the examination of periodic reports submitted by States parties to monitor the implementation of their treaty obligations in their countries.
[94] *Ibid.*

to states through optional protocols in certain treaties whilst other treaties had built in complaints mechanisms where states would have the option of declaring that they opt to be bound by the built-in complaint's mechanism.[95] Today, it is possible for individuals who reside in states parties to the nine core human rights treaties to make complaints to any of the nine human rights treaty bodies which have established communications procedures. Provided that where the communications procedure is included in an optional protocol, the state party must also have ratified the relevant protocol.

### 2.6 Jurisdiction of the treaty body committees

On the issue of jurisdiction of treaty body committees, the nine core United Nations human rights treaty bodies, monitor the implementation of the nine associated treaties. Monitoring the implementation of the treaties includes adjudicating on admissible complaints which concerns alleged violations of the provisions of the treaties by States parties which are parties to the treaty and have given their consent for a treaty body to exercise its jurisdiction. It must be recalled that this thesis does not engage with the procedural aspects of jurisprudence, but rather with the substantive aspects. However, for the purposes of this section, temporal, material and territorial jurisdiction will be briefly discussed.

Temporal jurisdiction refers to the general rule that treaty bodies will have jurisdiction to adjudicate on alleged violations of international obligations over acts that occurred after a State party has ratified a treaty, and thereby granting jurisdiction to the treaty body.[96] States parties only come under the jurisdiction of the optional protocol for acts and omissions that take place after ratification of the specific optional protocol. It

[95] *Ibid.*

[96] See Art 4(c) of the Optional Protocol to CEDAW (1999), Art 2(b) of the Optional Protocol to ICESCR (2008), Article 7(7) of the Optional Protocol to UNCRC on a Communications Procedure (2014) and Art 2(f) to the Optional Protocol to CRPD (2011). It must be noted however that the principle that a treaty is only applicable to a States party only after that States party has ratified that specific treaty applies differently to different situations. For example, it might be easier to determine whether or not a treaty is applicable to instantaneous acts or facts, as one has to simply check whether that act or fact occurred before or after the coming into force of a treaty obligations. On the contrary, when the breach of the obligation is of a continuous character, the wrongful act or fact continues until the situation of the violation has ended. Examples of such violations are enforced disappearance and arbitrary detentions.

is also important to note that all treaty bodies accept the notion of a continuing violation that may have begun before the date of ratification, but has continuing effect.[97]

Material jurisdiction (*rationae materiae*) refers to the substantive issues which judicial or quasi-judicial powers may address.[98] Material or substantive jurisdiction is limited to the violations of the provisions of a particular treaty and implies that as a general rule, it is not possible to raise alleged violations of a treaty that are not guaranteed by the particular treaty which a treaty body is mandated to monitor. [99]

Finally, territorial jurisdiction concerns whether the matter raised in a complaint falls within the geographical ambit of the state's treaty obligations.[100] A state's obligations under a treaty extends beyond people within the territorial boundary: it extends to places where the state has effective control and to persons who are under the control of the state.[101] The principle that a state's obligation extends to places where the state has effective control and to persons under the control of the state can be found in the HRC's General Comment No.31 of 2004 on the Nature of the General Legal Obligations on States Parties, which provides that:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[102]

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[97] See for example Articles 19(2) and 4(2)(e) of the of the Optional Protocol to CEDAW (1999) and Article 3(2)(b) of the Optional Protocol of the ICESCR(2008)Article 7(g) of the Optional Protocol to the UNCRC on a Communications Procedure (2014).

[98] Brill "Jurisdiction materiae" 2017 https://referenceworks.brillonline.com/entries/Rosenne-s-law-and-practice-of-the-international-court-1920-2015/*-COM_0174 (accessed 9 February 2023).

[99] OHCHR "Individual communications" https://www.ohchr.org/en/treaty-bodies/individual-communications(acessed 9 February 2023).

[100] Cedric Ryngaert *Jurisdiction in international law* (2008) 43.

[101] See HRC : Concluding Observations of the HRC: Israel UN Doc. CCPR/CO/78/ISR (21 August 2003); HRC: Observations of the Human Rights Committee: US UN Doc. CCPR/C/USA/CO/3 (15 September 2006; HRC: General Comment No. 31 of 2004 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant UN Doc. CCPR/C/21/Rev.1/Add.13.

[102] HRC, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, https://www.refworld.org/docid/478b26ae2.html [accessed 27 October 2022].

The principle of territorial jurisdiction has been shown in two important decisions by the CRoC. In *Chiara Sachi et al v Argentina et al,*[103] one of the issues in this case was the question of jurisdiction, in that most of the authors were not nationals or residents of the States parties against which the complaint was brought.[104] The CRoC relied on the jurisprudence of the Inter-American Court of Human Rights where the Inter-American Court had laid the test for determining jurisdiction.[105] Based on the Inter-American case, (Advisory Opinion OC-26) the CRoC held that persons whose rights have been violated due to transboundary damage are under the jurisdiction of the State of origin provided there is "a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory."[106] In this case the authors claimed violations of their rights by five States parties: Argentina, France, Brazil, Germany and Turkey. According to the authors the five countries had violated their rights in the CRC by causing and contributing to the climate crisis, which had caused ongoing violations of the authors' rights (right to life, right to health and right to culture).[107] What is unique about this case is that, it is the first to bring a complaint against multiple States parties to an international human rights body, from different regions of the world.[108]

In *L.H et al v France,*[109] The CRoC held that "although the State party does not have effective control in the area, it has positive obligations to take all appropriate measures and pursue all legal and diplomatic avenues at its disposal to protect the rights of the

[103] CRC/C/88/D/104/2019. It must be noted that this case was against five different states parties and therefore, the CRoC gave five different views which can be found in the following citations: CRC/C/88/D/104/2019 (Argentina), CRC/C/88/D/105/2019(Brazil), CRC/C/88/D/106/2019(France), CRC/C/88/D/107/2019(Germany), CRC/C/88/D/108/2019(Turkey).
[104] CRC/C/88/D/104/2019 (Argentina), Para 4.3.
[105] See Advisory Opinion OC-23/17 of November 15, 2017.
[106] *Chiara Sachi et al v Argentina et al*, Para 10.5.
[107] *Ibid,* paras 2-3.8.
[108] Wewerinke-Singh, Communication 104/2019 Chiara Sacchi et al v. Argentina et al, Leiden Children's Rights Observatory, Case Note 2021/10, 28 October 2021.https://www.childrensrightsobservatory.nl/case-notes/casenote2021-3 (Accessed 20 October 2022).
[109] CRC/C/85/D/79/2019–CRC/C/85/D/109/2019.

children."[110] The case concerned the repatriation of French children held in camps in Syria. The state party, France, had refused to repatriate them because of their parents' alleged support for the Islamic state in Iraq and Levant. France argued that the children were not under its jurisdiction in that they were at a camp under the authority of Kurdish, which is a non-state actor.[111] The question before the CRoC was whether the CRC was applicable under the circumstances.

The CRoC reasoned that the case concerned French children and France had the duty to protect their rights as it had an obligation towards the children even on foreign land.[112] Article 2 of the CRC provides that the CRC applies to children within the jurisdiction of States parties. This confirms the established principle that jurisdiction does not only apply in a state's territory, but also applies extraterritorially.[113] The findings of the treaty body committees are not legally binding on states parties (as will be discussed below), however the process by which they are adopted is modelled on judicial practice. For instance, the committees' deliberations are similar to a court process.[114] In fact the HRC under its General Comment No. 33 stated that the views of the HRC were adopted 'in a judicial spirit'.[115] The jurisprudence that comes from treaty body findings are accessible to the public and used by regional courts and domestic courts as authoritative interpretations of the treaties.[116] There are follow-up procedures established by some committees who make use of special rapporteurs to seek compliance with the findings of the committees. Similar to the ICJ and the European Court on Human Rights, is the practice of issuing interim measures for cases

[110] *L.H. et v France*, Para 8.7.
[111] *Ibid*, paras 2.2 -4.8.
[112] CRC/C/88/D/104/2019, Para 10.13.
[113] Duffy, Communication 79/2019 and 109/2019 et. al., Leiden Children's Rights Observatory, Case Note 2021/3, 18 February 2021.https://www.childrensrightsobservatory.nl/case-notes/casenote2021-3 (Accessed 21 October 2022).
[114] Mechlem (2009) 924.
[115] HRC : General Comment No 33 of 2008 on The obligations of states parties under the Optional Protocol to the ICCPR UN Doc CCPR/C/GC/33.
[116] For the jurisprudence on human rights treaties see https://juris.ohchr.org (accessed on 3 January 2022).

in which irreparable harm would be done to the individual, such as the death penalty or deportation.[117]

### 2.7 The Legal Effect Of Treaty Body Findings

It is well known that the findings of the nine core human rights treaty bodies are not formally binding. The drafters of the nine-core international human rights treaty bodies did not endow the treaty body committees the power to make binding decisions as a court of law. Nonetheless, treaty bodies must have the kind of juridical authority that governments could not consider as mere recommendations.[118]

The ICJ said the following concerning the HRC:

> 'Since it was created, the human rights committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in form of its 'General Comments.' Although the court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation on the Covenant on that of the committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled'.[119]

The International Law Association 's (hereafter the ILA) committee on international human rights law and practice made the following observation: 'most courts have recognised that…the treaty bodies' interpretations deserve to be given considerable weight.'[120] The HRC has shown through its jurisprudence that non-compliance with interim measures could constitute both regrettable behaviour and a breach of states'

[117] *Office of the High Commission for Human Rights "Individual communications-treaty bodies" https://www.ohchr.org/en/treaty-bodies/individual-communications(accessed 10 October 2022).*
[118] Rodley (2018) 803.
[119] *Ahmadou Sadio Diallo* (*Republic of Guinea v Republic of Congo*) 2012 I.C.J. Reports 2012 p.324
[120] ILA, Committee on International Human Rights Law and Practice "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies" (2004) .https://docs.escr-net.org/usr_doc/ILABerlinConference2004Report.pdf. (accessed on 10 March 2019).

parties obligations under the Optional Protocol on a communications procedure.[121] In fact, the HRC has reiterated this fact by including in its General Comment No.33 that a state party must comply with its interim measures as part of the obligation to respect the individual communications procedure in good faith.[122] The HRC's General Comment 33 states that its views show 'some of the principal characteristics of a judicial decision.'[123]

Although the decisions of the treaty bodies are not legally binding, national courts have relied on their findings in many instances. The HRC's view was cited by the German Federal Constitutional Court, where the court agreed with the views of the HRC that trials in absentia were against international law.[124] Also, the Supreme Court of Norway in Federation of Offshore Workers Trade Union referred to the HRC's view together with the ECtHR and the ILO.[125] The HRC is not the only treaty body that has had its views cited. The CAT Committee was cited in *Boudella v Bosnia and Herzegovina* where the Human Rights Chambers of Bosnia and Herzegovina interpreted the prohibition of torture as provided for by Article 3 of the ECHR by making reference to the CAT's views on the principle of non-refoulement, also under Article 3 of the CAT.[126] Recently, the CRoC's decision in *L.H. et al v France* ,[127] was cited by the European Court of Human Rights, where the European Court cited the CRoC's finding that the best interests of the child was a primary consideration before repatriation and further that France must take responsibility for the protection of French children in Kurdish camps. Recently, the CRoC's jurisprudence in age

[121] HRC: General Comment No. 33 on The obligations of states parties under the Optional Protocol UN Doc CCPR/C/G/GC33 (2009).
[122] HRC: General Comment No. 33 on The obligations of states parties under the Optional Protocol UN Doc CCPR/C/G/GC33 (2009).
[123]*Ibid.*
[124] Bundesverfassungsgericht , 3rd Chamber 2nd Senate (24 January 1991) 2 *BvR* 1704/90 para 57.
[125] *Federation of Offshore Workers Trade Union case*, Supreme Court of Norway, Rt 1997-580 ; ILA, Committee on International Human Rights Law and Practice "Final report on the Impact of Findings of the United Nations Human Rights Treaty Bodies" (2004).
[126] *Boudellaa v Bosnia and Herzegovina* (2002) case no. CH/02/8679 et al. , paras 313-316; *Mutumbo v Switzerland*, United Nations Committee Against Torture, UN Doc. CAT/C/12/D/3/1993,27 April 1994, para 9.3.
[127] CRC/C/85/D/79/2019–CRC/C/85/D/109/2019.

determination was also cited by the Supreme Court of Spain,[128] where the Spanish Court incorporated the CRoC's jurisprudence on age determination.

In general, treaty body findings are used to inform the understanding of the relevant human rights treaty.[129] It can then be said that the treaty findings inform the interpretation of constitutional or statutory human rights provisions. The ICJ has relied on interpretations in the context of individual procedures of both universal and regional treaty bodies.[130] Similarly, in *Belgium v Senegal*, the ICJ referred to the CAT's interpretation in one of its individual complaints that the term torture for purposes of the Convention can only mean torture that occurred subsequent to the entry into force of the Convention.[131] The Canadian Charter of Rights and Freedoms is substantively like the provisions of the ICCPR,[132] and the New Zealand Bill of Rights was also based on the ICCPR.[133] International law authorises the states to consider the findings of the human rights treaty bodies.[134]

Treaty body findings have persuasive authority as opposed to binding authority. A binding authority is authoritative due to its pedigree and treaty body findings for instance have persuasive authority due to their merits.[135] This means that judges have a discretion to decide which documents they consider persuasive and domestic courts have used the notion of persuasiveness as a basis for the consideration of treaty body findings in their judicial reasoning.[136]

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[128] Supreme Court, Civil Chamber No.2629/2019, Decision no.307/2020 Spain.
[129] Kanetake "UN human rights treaty monitoring bodies before domestic courts" 2017 (67) *International & Comparative Law Quarterly* 201-232, 222.
[130] Azaria "The legal significance of expert treaty bodies pronouncements for the purpose of interpretation of treaties" 2012 (22) *International Community Law Review* 33-60. See also Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of Congo*) 2012 I.C.J. Reports 2012, p.324., para 66.
[131] *Belgium v. Senegal* 2012 I.C.J. Reports 2012 ,p. 422., para. 100.
[132] *Canada: Constitutions Acts*, *1867 to 1982* [Canada], 29 March 1967.
[133] Evatt "The impact of international human rights on domestic law" in Huscroft and Rishworth *Litigation rights: Perspectives from domestic and international law* 281; 286-94.
[134] Kanetake (2017) 220.
[135] Flanders, "Toward a theory of persuasive authority" 2009 (62) *Oklahoma Law Review* 55, 62.
[136] Kanetake (2017) 220.

## 2. 8. The Use of Precedent in Treaty Body Law

The idea that similar cases must be decided in similar ways is an inherent aspect of formal legal practice.[137] However, Article 59 of the ICJ Statute provides that "a decision of the ICJ has no binding force except between the parties and in respect of the particular case."[138] This provision means that international courts are not bound by precedent. Unlike in domestic courts, it would seem that the power to make 'definitive interpretations…by international courts risks exacerbating the democratic deficit flowing from international courts' lack of accountability.[139] This does not mean however that international courts, used herein to include international judicial bodies, do not refer to their own precedents or to the precedents of other courts or judicial bodies.[140] The same reality is true for treaty body committees as will be shown below. There is an impressive body of UN treaty body jurisprudence in international human rights law.[141]

The HRC frequently refers to its General Comments.[142] In *Johnson V. Jamaica*, the HRC referred to a previous judgment when it was asked what the maximum period acceptable for a prisoner on the death row under the ICCPR was.[143] The same committee also draws on external sources like the work of other treaty body

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[137]Kratochwil *Rules, norms, and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs* (1991).

[138] This is illustrative of decisions of most international courts and tribunals.

[139]American Political Science Review https://www.cambridge.org/core/services/aop-cambridge-core/content/view/BAB3E5D202BE2A4BB28AD0C89392D162/S0003055414000276a.pdf/politics_of_precedent_in_international_law_a_social_network_application.pdf (accessed 20 June 2018)..

[140] The use of precedent at the international level is discussed in detail in chapter 3. See Guillaume "The Use of Precedent by International Judges and Arbitrators" 2011 (2) *Journal of International Disputes* 5 - 23. See also Pelc "The politics of precedent in international law: A social network application" 2014 (108) *American Political Science Review*. See also Ginsberg "Bounded discretion in international judicial law making" 2004 (45) *Virginia Journal of International Law* 631.

[141] Shestack (2003) 3.

[142] See for example *Vuolanne v. Finland*, United Nations Human Rights Committee , UN Doc. CCPR/C/35/D/265/1987,2 May 1989, where the CCPR referred to art 2(1) of the ICCPR, as well as its General Comments in order to determine the purpose of art 9(4) para 9.3-9.4. See also *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, United Nations Human Rights Committee, UN Doc. CCPR/C/88/D/1321-1322/2004 ,23 January 2007, para 8.2. See also CCPR: General Comment No. 24 of 2 November 1994 on the Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant UN Doc CCPR/C/21/Rev.1/Add.6 para. 19.

[143]*Errol Johnson* v. *Jamaica*, HRC, UN Doc CCPR/C/56/D/588/1994, 5 August 1996, para 8.3.

committees.[144] The Committee on the Elimination of Racial Discrimination(hereafter the CERD Committee) has also shown the tendency to interpret the CERD in line with the jurisprudence of other treaty bodies. In the *Jewish Community of Oslo,*[145] the CERD Committee adopted the interpretation of 'victim' given by the HRC and the ECtHR.[146] Like the HRC, the CAT Committee prefers to rely on its own interpretations.[147] In the case concerning Article 3 of the CAT (*non-refoulement)* the CAT referred to its General Comment No. 1.[148]

There are visible trends on how the CRoC refers to its previous jurisprudence in the CRoC's 54 published cases thus far. In *A.S. on behalf of K.S. and M.S. v Switzerland*, the CRoC referred to its previous jurisprudence on non-refoulement in deciding whether the principle of non-refoulement had been violated. In *Y.B. and N.S*. the CRoC referred to its own General Comment 14 (the best interests principle) to emphasise the need for the child to express his or her own views regardless of age or vulnerability.[149] In

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[144] See for example *Sarma* v. *Sri Lanka,* United Nations Human Rights Committee, UN Doc CCPR/C/78/D/950/2000, 16 July 2003 ,para 9.3 ; See also *Sharma* v. *Nepal*, United Nations Human Rights Committee, UN Doc CCPR/C/94/D/1469/2006, 28 October 2008, para 7.4. ; *Madoui* v. *Algeria*, United Nations Human Rights Committee, UN Doc CCPR/C/94/D/1459/2006, 28 October 2008. para 7.2.

[145] T*he Jewish community of Oslo et al. v. Norway* , Committee on the Elimination of Discrimination Against Women, UN Doc CERD/C/67/D/30/2003, 15 August 2005.

[146] *The Jewish Community of Oslo et al.* v. *Norway* para. 7.3; See *Er* v. *Denmark,* Committee on the Elimination of Discrimination Against Women, UN Doc 40/2007, 8 August 2007, para 7.2. The CERD Committee referred to the decisions of the CCPR when expanding upon the denial of justice approach.

[147] See for example *E.J. et al. v. Sweden*, UN Committee Against Torture , UN Doc. CAT/C/41/D/306/2006, 21 November 2008, para 8.3; *C.T. and K.M. v. Sweden* , United Nations Committee Against Torture , UN Doc. CAT/C/37/D/279/2005, 17 November 2006, para 7.3;*V.L. v. Switzerland*, United Nations Committee Against Torture , UN Doc. CAT/C/37/D/262/2005, 22 January 2007, para 8.5; *A. H. v. Sweden*, United Nations Committee Against Torture , UN Doc. CAT/C/37/D/265/2005, 30 November 2006, para 11.4; *M.P.S. v. Australia*, United Nations Committee Against Torture (CAT), CAT/C/28/D/138/1999, 30 April 2002, para 7.3; *H.B.H. et al. v. Switzerland*, United Nations Committee Against Torture, UN Doc. CAT/C/30/D/192/2001 , 16 May 2003, para 6.4; *J.H.A. v. Spain*, United Nations Committee Against Torture , UN Doc. CAT/C/41/D/323/2007, 21 November 2008, para 8.2; *M.F. v. Sweden*, UN Committee Against Torture , UN Doc. CAT/C/41/D/326/2007, 26 November 2008; *J.A.M.O. et al. v. Canada*, United Nations Committee Against Torture , UN Doc. CAT/C/40/D/293/2006, 15 May 2008, para 10.3.

[148]*Halil Hayden v. Sweden*, United Nations Committee Against Torture, UN Doc. CAT/C/21/D/101/1997, 16 December 1998, para 6.5 referring to UN Committee Against Torture (CAT), *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, A/53/44, annex IX para. 6. Compare the almost identical findings in the later decision: CAT Committee *E.J. et al*. v. *Sweden*,. para. 8.3.

[149]*Y.B. and N.S. v. Belgium*, CRoC, UN Doc CRC/C/79/D/12/2017, 27 September 2018.

*I.A.M*, the CRoC referred to General Recommendation No.31 of 2014 of the CEDAW together with its own General Comment No.18 of 2014 to emphasize the right of the child to protection against harmful practices. In the same case, the CRoC also considered the joint General Comment No.3 of 2017 of the committee on the protection of the rights of all migrant workers and members of their families and No.22 (2017) of the CRC to highlight the human rights of children in the context of international migration. The treaty bodies refer to their own jurisprudence, the jurisprudence of other treaty bodies, their own General Comments, the case law of other international courts and tribunals and the practices of the States parties to the various covenants.[150]

As stated earlier in chapter one of this study, the aim of this research is to determine whether there are important principles for the CRoC in respect of the children's rights jurisprudence in the other eight treaty bodies. This requires an analysis of the jurisprudence in the other eight treaty bodies to determine the extent to which children's rights jurisprudence is incorporated in their communications. To this end, I give an overview of the number of individual complaints which have been brought by children or on their behalf in the different UN human rights treaty bodies.

## 2. 9 The United Nations Treaty Body System

The primary functions of the nine,[151] UN human rights treaty bodies are to review state reports, receive and issue findings on individual complaints and conduct country inquiries. They may also provide guidance for the interpretation of treaties through the issuing of general comments.[152] A complaint of any violation of the provisions of the treaties can be brought before the treaty body committees in three ways. The first is through individual communications, the second is state-to-state complaints[153]

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[150]Schlütter "Aspects of human rights interpretation by the UN treaty bodies" in Keller and Ulfstein (ed) *UN human rights treaty bodies* (2012).

[151] OCHHR "Human Rights Bodies- Complaints Procedures" http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.(accessed on 23 February 2018).

[152] Rodley "The role and impact of treaty bodies" in Shelton (ed) *The Oxford handbook of international human rights law* (2013) 626-639. See for example art 45(d) of the UNCRC which empowers the CRoC to make 'general recommendations.'

[153] Inter-state complaints refer to complaints from a State party to the relevant Committee about violations of the treaty by another State party. See CAT, art 21; CMW; Art 74 ; CED, art 32 ; art 10 of the

(inter-state complaints) and lastly, inquiries.[154] This research focuses on individual complaints. The following is an overview of the number of individual complaints received under the nine treaty bodies, and the number of complaints brought by children or on behalf of children.

### 2.9.1 The ICCPR

The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession on 16th December 1966 and entered into force on 23 March 1976.[155] The First Optional Protocol to the ICCPR which established a complaints mechanism for individual complaints, entered into force on the same day as the ICCPR.[156] In fact, this Optional Protocol is the most used and has been the most successful of all the human rights complaint procedures. Most of the complaints and decisions made under the human rights treaty body system came under this complaints mechanism. Perhaps this is attributable to the fact that it is the oldest complaints mechanism in the human rights treaty system. Under this complaint mechanism, 67 child related cases have been received as of March 2018.

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Optional Protocol to the ICESCR and art 12 of the Optional Protocol to the UNCRC on a Communications Procedure which set out the procedure for the relevant Committee to consider so-called inter-state complaints from States parties who allege that another State party is not giving effect to the provisions of the convention. See also ICERD, arts 11-13 and ICCPR, arts 41-43, which establish an *ad hoc* Conciliation Commission for resolution of disputes between States parties over a State's fulfilment of its obligation under the relevant convention. The *ad hoc* Commission applies to States parties to the ICERD but it only applies to States parties to the CRC and the ICCPR who have made a declaration to have the procedure applicable to them. It must be noted further the existence of a procedure for the resolution of interstate disputes concerning the interpretation or application of a convention. See ICERD, art 22; CEDAW, art 29, CAT, art 3; CMW, art 92 and CED, art 32 ,which provide that disputes concerning the interpretation or application of a convention be settled through negotiation, failing which arbitration and failing which the International Criminal Court. States parties may exclude themselves from this procedure by choosing to opt out at the time of ratification or accession.

[154]Inquiries involve an investigation by the relevant committee on receiving reliable information, which indicates serious or systematic violations of a convention(s) in State party. It must be noted that inquiries may only be conducted in those States parties that have recognised the competence of the relevant Committee. See for example CAT, art 28 ; art of the Optional Protocol to CEDAW , art 8 of the Optional Protocol to the CRPD and art 13(7) of the Optional Protocol on a Communications Procedure to the UNCRC which provide that a State party may opt out of the inquiry procedure at the time of signature, ratification or accession of the relevant treaty. On the other hand, art 11(8) of the Optional Protocol to ICESCR allows a State party to make a declaration at any time that they do not recognise the competence of the Committee to conduct an inquiry. The CED is the only committee that does not allow State parties the option to accept or reject an inquiry (see art 33 of the ICPPED).

[155]ICCPR.

[156] Optional Protocol to the ICCPR.

As of 1 March 2018, 169 countries have signed and ratified the ICCPR and 118 have signed the Optional Protocol on a communications procedure to the ICCPR.[157] Furthermore, 115 countries have agreed to the individual complaints procedure.[158] Thus, the HRC, which is the treaty body dealing with the ICCPR, has jurisdiction (in terms of the individual complaints mechanism) over 115 countries.[159] Article 24 of the ICCPR explicitly provide for the right of every child to protection as required by their status as a minor,[160] the right to a name,[161] and the right to acquire a nationality.[162] Article 23 is on the protection of the family unit in general, 23(4) specifically provides for the protection of children in the case of dissolution.

### 2.9.2 The CEDAW

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) came into 3 September 1981,[163] and its Optional Protocol (OP-CEDAW) establishing a communications procedure came into force on 22 December 2000.[164] The Committee on the Elimination of Discrimination against Women (CEDAW Committee) may consider individual communications alleging the violations of the rights contained in the Convention.[165] As of 1 March 2018, 7 communications related to children had been received under the OP-CEDAW. [166] On 1 March 2018, the Convention had 189 States party members and 110 States parties had ratified the OP-CEDAW.[167] 117 States parties to the Convention had also accepted the competency of

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[157] See https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en.

[158]OHCHR "UN Human Rights Treaty Bodies" http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx. (accessed on 9 January 2022).

[159]*Ibid.*

[160] ICCPR, Article 24(1).

[161] ICCPR, Article 24(2).

[162] ICCPR, Article 24(3).

[163] Office of the High Commissioner of Human Rights "Committee on the Elimination of Discrimination against Women" https://www.ohchr.org/en/treaty-bodies/cedaw (accessed 3 July 2022).

[164] *Ibid.*

[165] Bustelo "The committee on the elimination of discrimination against women" in Alston & Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 84.

[166] *M.W. v Denmark.*

[167] See https://indicators.ohchr.org/

the CEDAW Committee to accept individual complaints from their countries.[168] On children's rights, the CEDAW has provided that in all cases, the interests of children shall be of paramount importance.[169]

### 2.9.3 The CAT

The Committee against Torture (CAT Committee) may consider individual complaints alleging the violations of the rights contained in the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.[170] Like the complaints mechanism under the CERD, the individual complaints mechanism under the CAT is a built-in mechanism and came into effect on the same day as the CAT on 26th June 1987.[171] The CAT is the second most used mechanism in the treaty body system and typically issues between twenty-five (25) and thirty (30) decisions each year.[172] On 1 March 2018, the CAT had , about 32 communications which pertained to children.[173] However, at a closer look, only 5 of the 32 communications are considered a children's rights jurisprudence within the scope of this thesis.[174]

As of 1 March 2022, the CAT has been ratified by 162 countries.[175] It must be noted that CAT has a Subcommittee on the Prevention of Torture (SPT). Unlike the CAT, the SPT has a proactive mandate and is focused on the prevention of torture and ill treatment.[176] The SPT undertakes country visits where persons have been deprived of their liberty and draws reports making observations and recommendations to the

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[168] OHCHR Professional Interest; UN Convention on the Elimination of all Forms of Discrimination Against Women http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx.(accessed 28 February 2018).

[169] CEDAW, Article 16(d) and (e). See also Article 5(b) of the CEDAW where the CEDAW committee uses the words "primordial importance".

[170] Steiner and Alston *International human rights context: Law, politics, morals: text and materials* (1996) 260.

[171] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002.

[172] https://www.theadvocatesforhumanrights.org/uploads/app_i.pdf (accessed 11 March 2018).

[173] OHCHR "Jurisprudence" http://juris.ohchr.org/search/results.(accessed 28 February 2018).

[174] It must be noted that there are instances in which communications are brought on behalf of children, however, the committee's views do not take into consideration the rights of the child. Therefore, such communications are not considered as a children's rights jurisprudence for the purposes of this thesis.

[175] http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (accessed 1 March 2018).

[176] http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (accessed on 1 March 2018).

member State where the victim resides.[177] Due to the proactive mandate of the SPT, it does not consider complaints.[178] The CAT has no explicit provision on the rights of children.

### 2.9.4 The CERD

The Committee on the Elimination of Racial Discrimination (CERD Committee) may consider individual petitions alleging the violations of the CERD.[179] As of 1 March 2018, the CERD had 179 member states and has jurisdiction, in terms of individual complaints, over the 57 countries that have accepted the individual complaints procedure of the Convention.[180] The CERD establishes an individual complaint's mechanism through its Article 14.[181] States parties must make a declaration to recognise the competence of the CERD to receive and consider communications from individuals or groups of individuals within its jurisdiction .[182] The first complaint ever to be sent under this procedure was received in 1984. The mechanism is not used frequently, and this is why the committee issues decisions more quickly in comparison to some of the other treaty bodies. To date, only one communication which pertains to a child has been received.[183] Like the CAT, the CERD has no provisions specifically for children.

### 2.9.5 The CPED

On 23rd December 2010, the International Convention for the Protection of All Persons from Enforced Disappearances (CPED) became the newest treaty to come into force.[184] The CPED has a built in individual complaints mechanism under Article 31.[185] As of 1 March 2018, the CPED has 58 states parties and the CPED committee has the

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[177] www.ohchr.org (accessed 28 February 2018).
[178] This is why it is often said that there are nine, instead of ten core human rights treaty body systems.
[179] Banton "Decision-taking in the Committee on the Elimination of Racial Discrimination" in Alston and James Crawford (ed) *The future of UN human rights treaty monitoring* (2000) 55.
[180] http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (accessed 1 March 2018).
[181] CERD, Art 14.
[182] CERD, Art 14(1).
[183] UN Committee on the Elimination of Racial Discrimination (CERD), *Communication No. 46/2009 : Opinion adopted by the Committee at its eightieth session, 13 February to 9 March 2012*, 2 April 2012.
[184] CED.
[185] OHCHR "The Committee on Enforced Disappearances http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx.(accessed 12 March 2018).

competence to accept complaints from persons of the 20 States Parties who have accepted its individual complaints procedure. Currently only one case has been received under this procedure and does not relate to children.[186] The CPED has dedicated Article 25 to the rights of children and make provisions such as the need to consider the best interests of the child in all matters concerning them.[187] Furthermore, the CPED provides that a of the child who is capable of forming his or her own views must be allowed to expressed his or her views and such views must be given due weight in accordance with the age and maturity of the child.[188]

### 2.9.6 The CMW

Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[189] (CMW) provides for an individual complaints mechanism.[190] The mechanism has not yet entered into force since 10 States parties must accept the procedure in order for it to come into effect. The Committee on Migrant Workers does not yet have its individual complaints mechanism in force.[191] Article 77 allows the Committee to receive and consider individual communications from States parties who have made the necessary declaration under Article 77. As of 1 March 2018, the convention had 51 members.[192] 10 member states have to accept the communications procedure before it can come enter into force,[193] and in March 2018, only 3 members had agreed to the

[186] OHCHR "Jurisprudence" http://juris.ohchr.org/search/results (accessed 12 February 2018). It must be noted that although it would have been expected of the CPED to receive most of the cases under the theme 'enforced disappearance' surprisingly the ICCPR and the CAT considered all the complaints under this theme. A possible reason could be the fact that the CPED only came into effect in 2010 whereas the CAT and the ICCPR had been in existence for 32 and 43 years respectively.
[187] CPED, Article 25(5).
[188] *Ibid.*
[189] ICRMW.
[190] CMW, Art 77.
[191]OHCHR "Professional Interest: The International Convention on the Protection of All Migrant Workers and their Families" http: accessed on 2018-02-28 from http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx.
[192] OHCHR "UN treaty body database" https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lang=en (Accessed 1 March 2018).
[193] The communications procedure can only come into force if 10 of the 51 member states ratify it. At the time of writing in 2018, although the CMW had been ratified by 51 member states, only 3 states out of the 51 had ratified the accompanying communications procedure.

communications procedure.[194] Once in force, the Committee on Migrant Workers will receive and consider complaints from individuals whose countries have accepted its complaints procedure. It is unlikely that the committee will receive complaints from children. Specific provisions in the CMW which pertain to children include Article 30 which provides for the right of the migrant worker's child to basic education, irrespective of the migration status of the parent(s).

### 2.9.7 The ICESCR

The International Convention on the Economic, Social and Cultural Rights (ICESCR) came into force on 3rd January 1976, some 10 weeks before its sister convention, the ICCPR.[195] Unlike the OP-ICCPR which came into force on the same day as the ICCPR, the CESCR-OP was only opened for signature on 24 September 2009. It is for this reason that the CESCR-OP only came into force on 5th May 2013 .[196] On 1 March 2018, only one communication had been brought by a mother on her behalf and on behalf of her daughter.[197] The Committee on Economic, Social and Cultural Rights (CESCR) has 167 members.[198] 23 states parties have ratified the CESCR-OP and 13 have accepted the competence of CESCR to accept individual complaints. The ICESCR recognises the need to accord special measures of protection to children.[199]

### 2.9.8 The CPRD

The Convention on the Rights of Persons with Disabilities (CPRD) was adopted on 13th December 2006 and it was opened to signature on 30th March 2007.[200] The Convention has an Optional Protocol establishing an individual complaints mechanism.[201] The Optional Protocol came into force on the same day as the

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[194] Uruguay, Mexico and Guatemala are the three countries.
[195] ICESCR.
[196] International Network for Economic Social and Cultural Rights "History of the OP-ICESCR process" https://www.escr-net.org/resources/section-1-history-op-icescr-process (accessed 6 February 2023)
[197] OHCHR Jurisprudence http://juris.ohchr.org/search/results. (28 February 2018). It must be noted that under the theme of education and health, some of the cases were received under the ICCPR and not the ICESCR as would have been expected.
[198] https://www.ohchr.org/en/treaty-bodies/cescr (accessed 1 March 2018).
[199] ICESCR Article, 10(3).
[200] *Ibid.*
[201] Optional Protocol to UNCRC.

Convention on 3rd May 2008.[202] Even though the treaty and mechanism are relatively new, the CRPD Committee has already issued several important decisions under this mechanism. On 1 March 2018, two communications had been received which relate to children but both were found to be inadmissible. As at 1 March 2018, the CRPD Committee had 177 states parties and may consider individual communications alleging violations on the CRPD by State parties to the Optional Protocol.[203] As at 1 March 2018, 92 countries had accepted the individual complaints procedure under the CRPD and 92 countries had agreed to be bound by the Committee in so far as individual complaints are concerned.[204] Article 7 of the CRPD is dedicated to the rights of children with disabilities, and provides for their right to express their views freely in matters concerning them,[205] and to give due weight to such views, taking into consideration their age, maturity and disability,[206] the right to have their best interests taken as a primary consideration and the right to enjoy their fundamental freedoms on an equal basis with other children.[207]

### 2.9.9 The CRC

The International Convention on the Rights of the Child (CRC) was adopted by the United Nations General Assembly in 1989 and entered into force on 2 September 1990.[208] Before the CRC entered into force, there were contentions about whether to include a complaints mechanism, this however did not receive enough support.[209] Hence, the CRC came into force without a communications procedure and became the only international treaty without a complaints mechanism.[210] In 2007, various non-governmental organisations began to campaign for a communications procedure that would allow children to bring communications to the CRoC. This prompted

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[202] United Nations Department of Social and Economic Affairs: Disability "Convention on the rights of persons with disabilities" https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html .(accessed on 30 November 2018).

[203] https://www.ohchr.org/en/treaty-bodies/crpd (accessed 28 February 2018).

[204] *Ibid.*

[205] CRPD, Article 7(3).

[206] *Ibid.*

[207] CRDP, Articles 7(1) and 7(2).

[208] UNCRC.

[209] Lee "Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol" 2010 (18) *International Journal on Child Rights* 568.

[210] *Ibid.*

discussion on a communications procedure for the CRC. The OHCHR, the CRoC and an NGO working group in 2009 encouraged states to form an open-ended working group (OEWG). After two sessions by the OEWG a draft OP3 was approved and opened for signature in 2012.[211]

On 1 March 2018, , there were 48 states that had ratified the OPIC and 17 states that had signed but had not yet ratified it.[212] The CRoC is the body of 18 independent experts that monitors the implementation of the rights contained in the CRC and its three optional protocols.[213] As at 1 march 2018, 35 of the 196,[214] member states had accepted the competence of the Committee to accept individual complaints. It is worth a mention that the United States is the only country that has not ratified the Convention, despite having signed it in 1995.[215] The CRoC has received 89 cases as of 14 April 2022 and has published its views on the merits in 54 communications.The first was received in the same year the OPIC came into effect (2014).[216]

## 2.11 Conclusion

Natural law and positivism were discussed as the theories most reflective of international law and for the purposes of this chapter, international human rights law. The aspects of these theories that reflect international human rights law have specifically been highlighted to justify their use for this purpose , jurisprudence was defined as including the findings of the nine UN human rights treaty body committees arising from their communications procedures.

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211 Optional Protocol to UNCRC.

212 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en (accessed 12 April 2018).

213 Lansdown "The reporting process under the Convention on the Rights of the Child" in Alston and Crawford (ed) *The future of UN human rights treaty monitoring* (2000) 113.

214 OHCHR "Committee on the rights of the child concludes seventy seventh session http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22630&LangID=E.(accessed on 20 April 2018).

215 Engle "The Convention on the Rights of the Child" 2011 (29) *Quinnipiac Law Review* 793. See also Browning "The United Nations Convention on the Rights of the Child: Should it be ratified and why?" 2006 (20) *Emory International Law Review* 157.

216 https://www.ohchr.org/en/treaty-bodies/crc(accessed 11 March 2018).

This chapter presented the theoretical framework of the thesis. The study proceeds from the position that the various committees of the treaty bodies are included in the term 'judicial bodies' when they deliberate on communications. For this reason, the current chapter explored questions such as the use of precedent in treaty body law, the legal effect of treaty body findings and the jurisdiction of the treaty body committees. On the question of precedent, it was argued that the treaty bodies refer to their own General Comments frequently and the less frequently, the jurisprudence of the other treaty bodies. It was also argued on the question of legal effect of treaty body findings that both national and domestic courts have relied on the interpretations of treaties by treaty body committees and for this reason, it can be said that treaty body findings inform the interpretation of constitutional or statutory human rights findings. Finally, on the jurisdiction of treaty bodies, it was argued that treaty bodies have material jurisdiction on violations of the provisions of a treaty, they have temporal jurisdiction on violations that occurred after a state party ratified a treaty and territorial jurisdiction when a matter falls within the geographical ambit of the state's treaty obligations.

An overview of the individual complaints in most of the eight other UN human rights treaties reveals a substantial body of children's rights jurisprudence.[217] Therefore, the remaining chapters of this thesis aims to observe whether there are important principles and lessons for the CRoC in this jurisprudence. The next chapter, chapter 3 considers the rights of children in the criminal justice system

[217] For example, a review of the CPED and CMW's jurisprudence revealed no children's rights jurisprudence.

# Chapter three: Children in the criminal justice system

## 3.1. Introduction

The thesis turns now to the first of the thematic chapters. The first selected theme is children in the criminal justice system. The choice of this theme was driven by the substantial number of cases brought by children on the infringements of their rights in the criminal justice system. This chapter will deal with the rights of children in the criminal justice system through a discussion of children's rights communications in the United Nations treaty body jurisprudence.

The CRC,[218] and its related instruments have arguably provided the most influential international framework for dealing with children who are in conflict with the law. However, in international law, there are a number of principles setting minimum rules and standards for the treatment of children in conflict with the law: the United Nations Standard Minimum Rules on the Administration of Juvenile Justice,[219] (also known as the Beijing Rules) The United Nations Guidelines for the Prevention of Juvenile Delinquency,[220](the Riyadh Guidelines), The United Nations Rules for the Protection of Juveniles Deprived of their Liberty,[221] (the UN JDL or Havana Rules) are most prominent in this arena. General Comment No.24 of the CRC (which replaced General Comment No.10 of (2007)),[222] also elaborates on the nature of States parties' obligations under Articles 37 (on torture and the deprivation of liberty of juveniles) and 40 (on the administration of juvenile justice) of the CRC. There are also other

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[218] The United Nations Convention on the Rights of the Child 1989 as reprinted in Brownlie and Goodwin-Gill (ed) *Basic documents on human rights* (2006) 429-447.

[219] UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules): resolution 1985, A/RES/40/33 https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf(accessed. (accessed on 18 August 2019).

[220] UN General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency 1991, A/RES/45/112 https://www.ohchr.org/EN/ProfessionalInterest/Pages/PreventionOfJuvenileDelinquency.aspx.(accessed on 18 August 2019).

[221] UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution 45/113 adopted by the General Assembly*,14 December 1990, A/RES/45/113 (JDLs).

[222]CRoC : General Comment No. 24 of 2019 on Children's Rights in the Child Justice System UN Doc CRC/C/GC/24.

general standards and rules in international law on the rights of persons deprived of their liberty, which are not necessarily child specific but apply to children as well.[223]

### 3.1.1 Thematic scope

This chapter is focused on the theme 'children in the criminal justice system'. More specifically, it discusses the rights of children who are in the justice system in cases of children alleged as, accused of or recognised as having infringed the penal law (children in conflict with the law).[224] The cases under the theme 'children in the justice system' also reflect the sub-theme of deprivation of liberty.

### 3.1.2 Definition of terms

In this chapter, the use of the term 'deprivation of liberty' is defined as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.'[225] A child means every human being below the age of eighteen years at the time of commission of the offence.[226]

A child in conflict with the law refers to anyone under the age of 18 who comes into contact with the justice system as a result of being suspected of or charged with committing an offence.[227]

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[223] It should be noted that there are other international law provisions which are applicable to children such as the Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines), adopted by the Economic and Social Council Resolution 1997/30 of 21 July 1997 ; UN Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 2010/16: United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, 22 July 2010, E/RES/2010/16; UN General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) : resolution / adopted by the General Assembly*, 2 April 1991, A/RES/45/110; *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) : resolution / adopted by the General Assembly*, 8 January 2016, A/RES/70/175. Other UN treaties such as the ICCPR and CAT also make provision for the treatment of persons, including children, deprived of their liberty.

[224] UNCRC, Art 40(1).

[225] JDLs, Rule 11. The same definition is adopted in the OP-CAT and in the recent Global Study on Children Deprived of their Liberty.

[226] UNCRC, Art 1.

[227] Save the children "Children in conflict with the law" from https://resourcecentre.savethechildren.net/keyword/children-conflict-law.(accessed on 1 October 2020).

### 3.1.3 Delimitations

Despite the different contexts in which children may have their liberty removed or restricted,[228] in this chapter, deprivation of liberty is used only in relation to children deprived of their liberty in the justice system and not those in child and youth care centres, or migration detention centres. Whilst this chapter is focused on children in the justice system, chapter five focuses on children deprived of their liberty in migration detention centres.

International law on the rights of children are found in various soft law instruments, as discussed under 1 above. This merits a discussion on the extent to which these soft law instruments are applicable at the national level. The chapter then explores the international legal framework on the rights of children in the justice system. Based on this discussion, cases received by children or on behalf of children under the HRC,[229] pertaining to children deprived of their liberty are analysed, to determine whether there are important principles for the work of the CRoC going forward. The chapter is concludes with some principles extracted from the views of the HRC which may be used to guide future decisions of the CRoC.

## 3.2 The use of soft law instruments on child justice at the international and national level

From a law-making perspective, soft law is '… a variety of non-legally binding but normatively worded instruments used in contemporary international relations by states and international organisations'.[230] The dominant view is that norms and

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[228] It must be noted that there are different contexts in which children can be deprived of their liberty: alternative care, migration detention such as in the case of child refugees or asylum seeking children, children placed in institutions for (mental) health reasons and political child prisoners, which refers children who have been deprived of their liberty for political reasons. See Liefaard *Deprivation of liberty of children in light of international human rights law and standards* (2008) 143-161. See for example Penovic "Immigration detention of children: arbitrary deprivation of liberty" 2003 (7) *Newcastle Law Review* 56-78.

[229] Only cases by the HRC are discussed here because at the time of writing this chapter, the cases on this theme in which the decisions are published on the merits were only found in the jurisprudence of the HRC.

[230] Boyle "Soft law in international law-making" in Evans (ed) *International law* (2018) 121.

standards form part of soft law instruments and are therefore non-binding.[231] At the centre of this argument is that whilst sovereign states can adopt legally binding documents such as the various constitutions and various other legislations, no one else can decide on laws that are binding on the state.[232] An exception of course, is where a state ratifies or accedes to a treaty, thereby accepting its provisions as legally binding on that particular state.[233] Based on this view point, hard law then, can be seen broadly as law enacted by states and international organisations which have been ratified or acceded to by states (such as treaties).[234] It also follows that norms and standards, of which soft law forms part, has no binding effect. Nevertheless, soft law often forms the foundation of instruments that later become hard law.[235] Also, some aspects of the above Rules mentioned in the introduction have become binding through incorporation into treaty law.[236] Soft law may also be seen as the intermediate stage in the formulation of ideas and concepts that may in time emerge as hard law.[237]

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[231]Jousten "UN Standards and Norms on juvenile justice: From soft law to hard law" 2017, pg.13. https://www.unafei.or.jp/activities/pdf/Public_Lecture/Public_Lecture2017_Dr.Joutsen_Paper.pdf (accessed 10 November 2019). It must be noted that some scholars argue that soft law is not law. In fact, some deny the existence of soft law. Klabbers in 1996 argued that either something is considered law or it is not and that there is no such category of law as soft law. See Klabbers "The redundancy of the soft law" 1996 (65) *Nordic Journal of International Law* 13.

[232] Jousten "International standards and norms as guidance in the criminal justice system" (2015) from https://www.unafei.or.jp/publications/pdf/RS_No98/No98_VE_Joutsen.pdf. (accessed on 10 November 2019).

[233] Factors such as reservations have an impact on the extent to which a state can be bound by a treaty. It is also worth noting that the constitution of the particular state also has a bearing on the binding effect of an international treaty to which a state may be party: A dualist system treats the international and domestic systems of law as separate and independent. The validity of international law in a dualist domestic system is determined by a rule of domestic law authorizing the application of that international norm. Whilst a monist state holds that international law and domestic law form part of a single universal legal system. See generally Chaime *Monism and dualism in international law* (2018) from https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml.

[234]Joutsen (2015) 57.

[235] Davidson "Does the UN Convention on the Rights of the Child make a difference?" 2014 (22) *Michigan State International Law Review* 512.

[236]Van Bueren "United Nations Rules for the Protection of Juveniles Deprived of Their Liberty"from https://resourcecentre.savethechildren.net/library/united-nations-rules-protection-juveniles-deprived-their-liberty. (accessed on 12 December 2019).

[237]Boyle *Soft Law in International Law-Making* (2018) 125. Boyle has said that whilst some soft law instruments are the first steps to the creation of multilateral treaties, others contribute to the interpretation and amplification of treaties. Some soft law does both. In fact, nearly all the key human rights instruments begun in soft law form and today, form the corpus of international human rights law.

For example, some of the provisions of the Beijing Rules, finalised in 1986, found their way into the Convention on the Rights of the Child, adopted in 1989.

The four most prominent UN norms and standards pertaining to child justice are the Beijing Rules, the Riyadh Rules, the Havana Rules and the Vienna Guidelines. General Comment No.24(2019) of the CRoC on children's rights in the justice system also reinforces the rights and guidelines contained in the four norms and standards mentioned. It must be emphasised that although these norms and standards are not legally binding, they are crucial.[238] It is submitted that the significance of soft law such as the above-mentioned norms and standards on child justice is not in its binding or non-binding effect, but rather on their use and impact both at the international and national level.[239]

UN standards and norms on child justice may have instrumental value in guiding national development on children's right jurisprudence.[240] Joutsen has said that 'it is difficult to analyse the actual impact of UN standards and norms on the domestic level, due to a number of factors: the absence of an obligation to report, the heterogeneity of the criminal justice systems of different States, the possibility of different interpretations of the same text, and the difficulty determining if a specific change in national law, policy or practice was due to the influence of a United Nations standard and norm, or to other factors.'[241] Nonetheless, it can be argued that soft law can be useful tools to encourage governments to protect vulnerable persons [particularly children].[242] Furthermore, the CRC generates its own additional soft law through its recommendations, which some states implement to enhance the rights of children.[243]

[238] Boyle "Soft law in international law-making" in Evans (ed) International law (2018) 121.
[239] *Ibid.*
[240] Joutsen "UN standards and norms on juvenile justice: From soft law to hard law" (2017) 13 .
[241] *Ibid.*
[242] Davidson 2014 (22) MSILR 497, 512.
[243] Davidson (2014) 512.

### 3.3 International legal framework on children in the justice system

There are well established international legal norms embodied in treaty law which govern all children in conflict with the law. Foremost among these treaties is the CRC, in particular Articles 37 and 40.[244] Other pertinent treaties include the ICCPR and the CAT. There are also well-established legal standards that elaborate minimum rules for the administration of juvenile justice (the Beijing Rules), the UN Guidelines to prevent juvenile delinquency (the Riyadh Guidelines), and rules for the protection of juveniles deprived of their liberty (the Havana Rules).[245]

#### 3.3.1 Legality and non-arbitrariness

Article 37(b) of the CRC provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily'. It is interesting to note that Article 37(b) was based on Article 9(1) of the ICCPR.[246] Therefore, to understand the meaning of Article 37(b), it might be worth considering the meaning of Article 9(1) of the ICCPR. Like Article 37(b), Article 9(1) of the ICCPR provides that 'Everyone has the right to liberty and security of person'. No one shall be subjected to arbitrary arrest or detention, No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Reference to the word law in this provision is understood as the relevant law or legislation applicable to individuals in the relevant jurisdiction.[247] It follows that if an individual is deprived on his or her liberty according to procedures which are not established in the domestic law of the particular state party, the principle of legality would have been violated.[248] Two

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[244] Wijemanne "Protecting the rights of children deprived of their liberty" in Washington College of Law *Protecting children against torture in detention: Global solutions for a global problem* (2017) 123-129 from http://antitorture.org/wp-content/uploads/2017/03/Protecting_Children_From_Torture_in_Detention.pdf.(accessed 10 November 2019).

[245] Wijemanne (2017) 123-129.

[246] See Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 629.

[247] Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (2005) 224.

[248] *Ibid*. See *Bolanos v. Ecuador,* HRC, UN Doc. CCPR/C/36/D/2238/1987, 26 July 1986. See also *Domukovsky et al. v. Georgia,* UN Human Rights Committee (HRC) , UN Docs CCPR /C /62 /D /623 /1995 ,CCPR /C /62 /D /624 /1995, CCPR /C/62/D/626/1995, CCPR/C/62/D/627/1995, 29 May 1998. It might be interesting to note that the European Court of Human Rights has defined 'law' under Art 5(1) of the ECHR (which also deals with the deprivation of liberty) widely to mean both statutory and case law and even international law. See Harris, O'Boyle, Bates, and Buckley *Law of the European Convention on Human Rights* (2009).

requirements are present in the provision: lawfulness (or legality) and arbitrariness.[249] The wording of Article 37(b) implies that deprivation of liberty is only permissible when it is in accordance with a procedure as established by law and furthermore, when it is not arbitrary.[250] It is also important to note that both requirements are recognised as two separate obligations which states parties have to comply with together in order to fully realise the right to protection against unlawful and arbitrary arrest.[251] The lawfulness component requires that deprivation of liberty should be both procedurally and substantially lawful under domestic law.[252] Taken in the context of Article 37(b) of the CRC, the lawfulness or legality requirement means that aside the requirement that the relevant state party must have the basis in its domestic law to deprive a child of his or her liberty, the law concerned must provide that such deprivation when related to children must be as a measure of last resort and for the shortest appropriate period of time.[253] The non-arbitrariness requirement on the other hand serves as a safeguard against states, by requiring that the deprivation of liberty be lawful and justifiable under the domestic law of the relevant state party. The non-arbitrariness requirement does not only apply to the relevant domestic law, but also to actions of the executive arm of the state.[254] The provision against non-arbitrariness means that deprivation of liberty must be just, predictable, proportionate, non-discriminatory and appropriate to the circumstances of the particular case.[255] The requirement of non-arbitrariness also includes cases of detention which were initially lawful and non-arbitrary but have become arbitrary due to prolonged detention without justification.[256]

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[249] Manco "Detention of the child in the light of international law- A commentary on Article 37 of the International Convention on the Rights of the Child" 2015 (7) *Amsterdam Law Reform* 61.
[250] Nowak (2005) 223. See also Harris et al (2009) 133.
[251] Manco 2015 (7) *ALR* 60.
[252] Nowak (2005) 223-224.
[253] Manco 2015 (7) *ALR* 61.
[254] Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999). See also Schabas and Sax *A commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty* (2006) 76.
[255] Nowak (2005) 224.
[256] *Ibid.*

### 3.3.2 Principle of last resort and for appropriate period of time

Article 37(b) makes it clear that the deprivation of liberty of children shall be as a measure of last resort and for the shortest appropriate time. The requirement that children be deprived of their liberty in the context of child justice, only as a measure of last resort is also exclusive to Article 37(b) of the CRC.[257] The principle imposes an obligation on states parties to explore other alternatives to institutionalisation, including imprisonment.[258]

### 3.3.3 Quality of treatment of children deprived of their liberty

Article 37 (c) makes provision for the treatment of children deprived of their liberty. It requires that states parties to the Convention treat children deprived of their liberty 'with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of persons of his or her age'. It also reinforces the prohibition of ill-treatment of children as provided for by Article 37 (a).[259] The words 'needs of persons of his or her age' recognises the fact that children deprived of their liberty should be treated as individuals and not as a homogenous group, and that such treatment corresponds with their conditions and personal development.[260] This is in line with the evolving capacity of the child principle.[261] This provision is similar to Article 10 of the ICCPR which places an obligation on States parties to accord children with treatment appropriate to their age.[262]

Article 37 (c) provides further that children deprived of their liberty be separated from adults, unless it is not in the best interest of the child to do so. In the same provision,

[257] The principle of deprivation of liberty being only as a measure of last resort is exclusive to the CRC.
[258] General Comment No.24 to the CRC shows the Committee's preference for alternative means rather than depriving children of their liberty. Also, the explanatory note to Rule 19 of the Beijing Rules for instance advocate for so-called open institutions as opposed closed institutions.
[259] UNCRC, Art 37 (a) reads: *'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'.*
[260] Varadan 'The principle of evolving capacities under the UN Convention on the Rights of the Child' 2019 27 2 *International Journal on the Rights of the Child* 306 and Van Bueren (1998) 50.
[261] The evolving capacity principle is a principle of interpretation in international law, which provides that as children acquire enhanced capacities, they should be allowed to make decisions affecting their lives. See Lansdown *The Evolving Capacities of the Child* (2005).
[262] See Art 10(3) of the ICCPR which reads: *"The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."*

states parties are required to ensure that children deprived of their liberty maintain contact with their families (through visits and correspondence) save in exceptional circumstances. Furthermore, the Committee on the Rights of the Child has acknowledged that the obligations that stem from Article 37(c) should be read alongside Articles: 20 (continuation of upbringing); 3( best interest of the child); 9 (contact with family and providing family with the appropriate information; 12(on the right to be heard); 28 and 29 (on the right to education); and 24 ( regarding the right to health).[263] In addition, Article 37 (c ) of the CRC should be read alongside Article 40(1) of the CRC, which provides that every child in conflict with the law should be treated in a manner that is consistent with and promotes the child's sense of dignity and worth.[264] Nowak and McArthur have interpreted that any form of pressure on an individual, whilst in detention, should be seen as an attack on his or her dignity.[265]

### 3.3.4 Equal rights

Article 2(1) of the CRC provides that States parties are to 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's…status'. Furthermore, the HRC imposes a positive obligation towards persons who are particularly vulnerable (including, children) due to their status as people who have been deprived of their liberty.[266] The cumulative effect of Articles 2(1) of the CRC and 10 of the ICCPR is that children who are deprived of their liberty should not be denied the enjoyment of their rights, due to being detained or incarcerated. It is noted that deprivation of liberty restricts the enjoyment of human rights due to confinement. However, the restriction

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[263] In General Comment 24 to the CRC the Committee enumerates the rights that have to be observed alongside the rights which stem from Art 37 (c) para 108.

[264]Art 40(1) of the UNCRC reads: *"States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."*

[265] Nowak and McArthur "The distinction between torture and cruel, inhuman or degrading treatment" 2006 (16) *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention* 147-151. See also Nowak and McArthur *The United Nations Convention Against Torture: A commentary* (2008).

[266] See HRC: General Comment No.21 of 1992 on Article 10 (*Humane treatment of persons deprived of their liberty)* U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994) para 3.

which is imposed due to confinement should not exceed that which is necessary to protect society.

Therefore, the fundamental human rights of children and indeed all persons incarcerated, should not be impeded due to imprisonment. Such fundamental human rights include amongst others, the right to family, the right to education, and the right to healthcare.[267] General Comment No.21,[268] on Article 10, (humane treatment of persons deprived of their liberty) of the HRC provides that respect for the dignity of persons deprived of their liberty must be guaranteed under the same conditions as free persons. It adds further that persons deprived of their liberty must enjoy all the rights as set out in the ICCPR, subject to those restrictions that are unavoidable due to being in a closed environment.[269] Children who are deprived of their liberty are entitled to all the civil, political, economic and social and cultural rights under both national and international law, which concerns the deprivation of liberty.[270]

### 3.3.5 The right to be treated with humanity and dignity

The opening paragraph of Article 37(c) provides that 'every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of persons of his or her age.' General Comment No.21 of the HRC mentions that treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental rule applicable universally. Therefore, the rule is not dependent on the availability of resources in the State party and must be applied without differentiation of any kind.[271] Van Bueren notes that Article 37 (c) links three important concepts: dignity, contact with family and separation. Manco also notes that Article 37(c) recognises the importance of the environment in which the incarcerated child is placed, the

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[267] Livingstone "Prisoners' rights in the context of the European Convention on Human Rights" 2000(2) *Punishment & Society* 309-324.
[268] UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, available at: https://www.refworld.org/docid/453883fb11.html [accessed 28 October 2021].
[269] HRC: General Comment No. 21, Para 3.
[270] JDLs, Rule 13.
[271] HRC : General Comment No 21 , Para 4.

developmental needs of such child, as well as the role of the family in the life of such child.[272]

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty,[273] provide principles intended to lessen the detrimental effect of children deprived of their liberty by ensuring that their human rights are respected and protected.[274] In Section IV, the JDLs provide for the management of child facilities. For instance, a precondition to children deprived of their liberty is that they should only be detained in institutions that have valid commitment orders and maintain a proper register.[275] This is to ensure that all children facilities are managed in a manner which is consistent with respect for the human rights and dignity of children.[276] The JDLs impose an obligation on institutions to cater for the physical health and other conditions such as nutrition, education, clothing and healthcare of incarcerated children. They also establish a monitoring mechanism through the inspection, supervision and complaints procedures.[277] Rule 30 of the JDLs provides that there should be a small number of prisoners in order to maintain an individualised treatment.[278] Rule 31 of the JDLs also provides that detention facilities should be designed with the aim that it would be used for rehabilitation as well as the social and educational needs of the children who live there. This is in line with the recognition that children who are incarcerated are still human beings and their common humanity should be observed. It is also reflective of the provision that the purpose of the incarceration should be education and the eventual re-integration of the child in society.[279] The personnel appointed in detention facilities should also be trained to carry out their responsibilities effectively and in accordance with both international and domestic legislation.[280]

[272] Manco 2015 (7) *ALR* 67.
[273] JDLs.
[274] Van Bueren (1998).
[275] JDLs, para 20.
[276] Van Bueren (1998).
[277] JDLs.
[278]*Ibid,* Rules 63(3) and (4) which clarifies that the concept of a sufficiently small prison.
[279] Manco 2015 (7) *ALR* 67.
[280] JDLs, Rule 85.

General Comment No.24 emphasises the need for children deprived of their liberty to be accorded treatment which respects and protects their dignity and worth.[281] This provision also reflects Article 1 of the Universal Declaration on Human Rights which provides that all human beings are born free and equal in dignity and rights. In fact, the CRoC has stated in General Comment No.24 that the explicit reference to children's rights to dignity and worth in the preamble of the CRC has to be protected throughout the entire process of dealing with the child, that is, from the moment of first contact with law enforcement agencies to the implementation of the necessary offers applicable to the child.[282]

### 3.3.6 Separation from adults

Article 37 (c) of the CRC requires States parties to separate children deprived of their liberty from adults, unless it is not in the best interests of the child to do so. The requirement to separate children from adults is found in most human rights standards, set both internationally and regionally.[283] The requirement to separate children from adults does not specify whether it is applicable to both accused children and convicted children. It simply requires that children be separated from adults, unlike Article 10 2(a) of the ICCPR which specifically states that accused persons should be separated from convicted persons.[284] The article 37(c) separation requirement was born out of the need to protect children from harmful influences and the risk of being abused or exploited by adults. It also ensures that children are in a protective environment to develop positive life skills and prevent further conflict with the law.[285]

The CRoC has emphasized in General Comment No.24 of the CRC that the exception 'unless it is considered in the child's best interests not to do so' should be interpreted

[281] CRoC : General Comment No. 24 , Para 15.
[282] *Ibid.*
[283] UNCRC, Art 37(c); ICCPR, Arts 10(2)(b) and 10(3); Beijing rules, Rules 13.4 and 26.4 and the United Nations Standard Minimum Rules for the Treatment of Prisoners, hereafter, the SMR 8(d).
[284] ICCPR, Arts 10(2)(b) and 10(3). See also rule 8(d) of the SMR which provides that *"young prisoners shall be kept separate from adults."*
[285] CRoC: General Comment No. 24, para 104.

narrowly.[286] According to the said Committee, 'the child's best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include appropriately trained personnel, and operate according to child-friendly policies and practices'. [287] The Committee further explains in General Comment No.24 that the rule does not mean that a child placed in a facility for children must be moved to a facility for adults immediately after the child turns 18. The Committee recommends continuation of the stay of such child in the children's facility, if it is in the best interests of the child in question and the children in the facility.[288]

Rule 13.4 of the Beijing Rules also provides that 'Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.' Rule 13.4 of the Beijing Rules is flexible compared to the Article 37(c) of the CRC, in that whereas the CRC requires a strict separation of children from adults,[289] the Beijing Rules allows for children to be placed in a separate part of the institution in situations where children cannot be placed in a separate institution. Interestingly, while Article 10(2)(b) and (3) of the ICCPR requires a mandatory separation of children from adult prisoners, Article 37 (c ) of the CRC allows for non-separation of children from adult prisoners if it is in the best interests of the child.

The CRoC has also clarified that young adults who were children at the time of committing the offence, and the young adult who turns 18 while serving a sentence should benefit from the protections provided for by Articles 37(b) and (c) as well as Article 40 of the CRC. This approach simply means that young adults who were children at the time of the alleged offence, should also be kept in facilities for children. As to children who turn 18 whilst in children's facilities, the Committee has clarified

[286] *Ibid.*
[287] *Ibid.*
[288] CRoC: General Comment No. 24 , para 105.
[289] *Ibid* , paras 104-105.

that the best interest's principle means their continues stay in the children's facility.[290] However, the Committee does recognise the need to transfer a young adult whose stay in the children's facility will not be in the interests of the other children.[291]

It is also important to separate female children from male children. It is common that female children are kept in the same facilities as female adult offenders and this may lead to girl child offenders being detained with female adult offenders, disregarding their vulnerability to violence. Unfortunately, Article 37 (c) and the JDLs are silent on the need to separate children based on sex. Rule 26.4 of the Beijing Rules recognises the need to protect female child offenders. According to the commentary on this Rule, female offenders often receive less attention than their male counterparts and may encounter particular problems and needs whilst in custody. The SMR also states that men and women should be detained in separate institutions.[292] The HRC has also stated that women in detention be supervised by only females to prevent ill-treatment and abuse by male staff.[293]

Article 37 (c) of the CRC does not specify whether children awaiting trial should be kept separately from convicted children. The CRoC has however indicated in General Comment No.24 that the presumption of innocence is an important principle for the protection of the human rights of children in conflict with the law.[294] It seems the CRoC does not consider the issue of separation between convicted children and children awaiting trial because it sees pre-trial detention as a violation of the right to be presumed innocent if used for punitive reasons.[295] The Committee therefore encourages states parties to avoid pre-trial detention and to take legislative and other measures to reduce the use of pre-trial detention.[296] Van Bueren notes that Article 37

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[290] CRoC: General Comment No. 24 , para 105.
[291] *Ibid.*
[292] SMR, Rule 8.
[293] HRC: General Comment No. 28 of 2000 on Article 3 (The Equality of rights between Men and Women) UN DocCCPR/C/21/Rev.1/Add.10, para 15.
[294] CRoC: General Comment No. 24 , para 53.
[295] *Ibid*, para 104.
[296]*Ibid* , para 97.

(c ) applies to all cases of children deprived of their liberty and not only to convicted children.

In this light, she adds that Article 37(c) has a broader ambit than article 10(2)(b) and (3) of the ICCPR.[297] Rule 13 of the Beijing Rules provides for situations where detention cannot be avoided and therefore requires that children who are detained pending trial be entitled to all the rights and guarantees provided for in the SMR, Articles 9 and 10 (2)(b) and 3 of the ICCPR. Article 10 paragraphs 2 and 3 of the ICCPR obliges states parties to recognise the different statuses of convicted children and children awaiting trial and to accord different treatments to them and separate them. Thus, Rule 8(b) of the SMRs provides that persons awaiting trial and convicted persons should be kept separately. Section C of the SMRs explicitly provides that prisoners awaiting trial are entitled to special treatment, which respects their presumption of innocence.[298] Rule 17 of the JDLs also strongly recommends the separation of convicted children and children awaiting trial, this implies that Rule 17 envisages differentiated treatment for children awaiting trial due to their status of being presumed innocent.

### 3.3.7 The right of the child to have contact and to remain in contact with his or her family

Children deprived of their liberty have the right to maintain contact with their family through correspondence and visits, except in exceptional circumstances.[299] The CRoC has emphasized that the clause 'exceptional circumstances' should not be interpreted restrictively. Instead, it should be seen as a way that States parties can exercise some discretion whether to deviate from the best interests' principle in situations where allowing family members contact with the child would not be to the advantage of the child.[300] The CRoC has indicated that national legislation should indicate under which

[297] Van Bueren (1998) 222.
[298] SMR Rule 84(3).
[299] CRoC: General Comment No. 24 , para 106.
[300] Van Bueren (1998) 219.

conditions the right of contact with family should be restricted or denied and not leave it to prison authorities to decide.[301]

The right to have contact and to remain in contact with family is not only a child's right to humane treatment, but it also contributes to one of the main aims of child justice and also, prepares the child for their return and reintegration to society.[302] It is important to note that the right to contact with the child's family must also be enjoyed in a manner that respects the child's right to privacy. Rule 60 of the JDLs provides that 'regular' and 'frequent' visit refers to a visit taking place once a week and not less than once a month. It is important to also note that the right to have contact and to remain in contact with family is not limited to the child receiving visits, but it also includes the child visiting their home and family.[303] General Comment No.24 of the CRC mentions that to guarantee compliance on the right to maintain contact with a child's family, the child must be placed in a facility that is as close as possible to the home of the child.[304]

Article 37 (c) also provides for telephonic and correspondence via the post. Rule 61 of the JDLs also provides that institutions must assist the child to remain in contact his or her family. Rule 61 further emphasises that the assistance of the institution is necessary for the child to enjoy the right to remain in contact with his or her family. As to the financial assistance necessary for a child to remain in contact with their family, the CRC and the JDLs are silent.[305] As with many other rights, a child's right to remain in contact with his or her family must be read alongside other rights set out in the CRC. The CRC in Article 9(4) imposes a positive obligation on States parties to provide essential information to the child on the whereabouts of his or her family.
It appears that the JDLs provide clearer rules on a child's right to contact and to remain in contact with his or her family in comparison with the CRC. Rule 22 of the JDLs for

[301] CRoC: General Comment No. 24 , para 106.
[302] JDLs, Rule 59.
[303] *Ibid.*
[304] CRoC: General Comment No. 24 , para 106.
[305] See however Rule 85.1, Recommendation 59.3 which establishes a duty on institutions to provide children with the appropriate means to do so.

instance requires that institutions provide information to a child's parents or guardians on admission, place of admission and date of release of the child. In fact, Rule 56 of the same Rules goes further and requires that institutions must provide information on the health of the child on request.

### 3.3.8 Review of deprivation of liberty-assistance and prompt decision

Article 37 (d) provides for procedural safeguards for children deprived of their liberty. It lists the following rights: the right to prompt access to legal and other assistance, the right to challenge the legality of a deprivation before a court or other competent authority and the right to a prompt decision on any such action. It is important to note that the procedural safeguards contained in Article 37(d) applies to all children deprived of their liberty, irrespective of the context.[306]

According to the CRC, every child deprived of their liberty shall have the right to a prompt access to assistance, appropriate in preparing for his or her defence.[307] It is worth a mention that this provision is found neither in Article 9(4) of the ICCPR nor in Article 5(4) of the ECHR. Article 37(d) provides a crucial safeguard: a child's right to have his or her detention reviewed without delay. The term 'review' should be understood here as referring to the lawfulness of the deprivation of liberty and not as an appeal.[308] That is, the deprivation must be compatible with both international and domestic law.[309] The child must be immediately released if it is found that the detention is unlawful. It must be emphasized that the decision on the legality of the detention must be taken 'promptly'. The wording of the CRC is different from the ICCPR, which uses 'without delay' and the ECHR which uses 'speedily'.[310] Article 37 (d) reflects the requirement by Rule 20 of the Beijing Rules, which stipulates that

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[306] See wording of Art 37(d) of the UNCRC.
[307] UNCRC, Arts 37 (d) and 40(2)(b)(ii).
[308] See the ECtHR which has concluded that *"the review, which must be obtained 'speedily', is not an appeal but must examine the procedural and substantive conditions which are essential for the 'lawfulness', in the Convention terms, of the deprivation of liberty."*
[309] Nowak (2005) 236.
[310] ICCPR, Art 9(4).

unnecessary delay must be avoided. The use of the term 'promptly' highlights the fact that in children, a speedy review of the legality of the detention is paramount.[311]

The CRoC has clarified, in General Comment No.24 that 'prompt decision' should be interpreted as a decision made within 24 hours.[312] Thus, the legality of the detention, and its continuation should be determined within 24 hours. The Committee has also recommended that pre-trial detention be reviewed regularly, at reasonable intervals and preferably every two weeks, even if the basis of the detention is a court order.[313] The Committee has also recommended that States parties should establish a time limit to make a decision once the deprivation of liberty is challenged.[314]

### 3.4 Selected principles for the treatment of children in conflict with the law

Whilst the CRC and other relevant international instruments provide for several principles for the treatment of children in conflict with the law, the following discussion only focuses on those principles that are relevant to the body of communications which will be discussed in this chapter.

#### 3.4.1. The guarantees of a fair trial

Article 40(2) lists important guarantees for the fair treatment and trial of every child in conflict with the law. The rights contained in Article 40(2) are similar to the rights in Article 14 of the ICCPR.[315] However, the CRoC has provided that the implementation of the guarantees of a fair trial requires specific aspects when applied to children.[316] The Committee emphasizes in General Comment No.24, the importance of training persons who are involved in the administration of child justice for the implementation of the guarantees.[317] The following paragraphs are discussions of the

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[311] See the Commentary on Rule 20 of the Beijing Rules.
[312] CRoC : General Comment No. 24 , Para 100.
[313] *Ibid.*
[314] *Ibid.*
[315] Article 14 of the ICCPR reads: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
[316] CRoC: General Comment No. 24 , para 49.
[317]*Ibid.*

guarantees of a fair trial for children, according to Article 40(2). Reference will be made to similar provisions of the ICCPR and other international law on the rights of children deprived of their liberty where relevant.

### 3.4.2 No retroactive juvenile justice

Article 40(2)(a) provides that no child can be charged with or sentenced under the penal law for acts or omissions which at the time they were committed, were not prohibited by national or international laws. In the interest of legal certainty, states parties must define by law all criminal offences. According to General Comment No.24 of the CRC, many states parties have strengthened or expanded their criminal law provisions to combat terrorism and the Committee recommends that these changes should not result in retroactive punishment of children.[318] Article 40(2)(a) embodies the principle '*nullum crimen sine lege*'. The CRoC has said that 'No child shall be punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law. But if a change of law after the act provides for a lighter penalty, the child should benefit from this change'.[319]

### 3.4.3 The presumption of innocence

Another important guarantee of a fair trial is the presumption of innocence. Article 40(2)(b)(i) provides that 'every child alleged as or accused of having infringed the penal law shall be presumed innocent until proven guilty according to the law'. The presumption of innocence rule is provided for in many other international laws and goes beyond domestic law.[320] The rule means that the onus is on the prosecution to proof the charge(s) brought against the child.[321] The child is only guilty, if proven guilty and should be treated in accordance with the presumption that he or she is innocent.[322] Recognising the nature of a child,[323] the CRoC has stated that the child may behave in a suspicious manner, however, authorities may not assume that a

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[318] *Ibid,* Para 52.
[319] *Ibid.*
[320] For example, Art 14(2) of the ICCPR provides for the presumption of innocence; Art 7(1)(b) of the ACHPR, art 8 of the ACHR and Art 7(2) of the ECHR all provide the same.
[321] CRoC: General Comment No. 24 , para 53.
[322] *Ibid.*
[323] The Committee recognises that the child may act in a suspicious manner due to a lack of understanding of the process, fear, immaturity or other reasons.

child's behaviour reflects his or her guilt, without any proof.[324] The HRC in its General Comment No.32 has advised public authorities to avoid keeping the defendant in shackles or cages during trials and to avoid presenting the defendant to the court in a manner that suggests that he or she is a dangerous criminal.[325] This provision is particularly relevant to children as the use of physical restraint on children can present various human rights violations, including the right to dignity as discussed above.[326]

### 3.4.4 Informed promptly of the charges

Equally important is the right to direct information of the charges. Article 40(2) (b)(ii) provides that every child alleged as or accused of having infringed the criminal code has the right to be informed promptly and directly of the charges brought against him or her. The CRoC has interpreted 'promptly' and 'directly' to mean as soon as possible.[327] According to the HRC, the right to prompt notification means States Parties should give information on whether the person concerned is formally charged with a criminal offence under domestic law or if the defendant is publicly named as such.[328] If the relevant authority decides to use diversion, this must be explained to the child. The Committee further elaborates that it is when the police, prosecutor or judge takes the first procedural steps against the child that the right to prompt notification must be exercised.[329] In informing the child of the charge against him or her, the relevant authority must use a language which the child understands and translate where necessary, to a child-friendly language.[330] The Committee emphasizes that merely providing the child with an official document does not suffice and an oral explanation must be given as well. Also, the relevant authorities cannot leave the explanation of the charge to the parents or guardians of the child. This remains the responsibility of the relevant authority.[331] The right to be informed promptly and directly of the charges against the defendant can also be found in Article 14(3)(a) of

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[324] CRoC: General Comment No. 24 , para 53.
[325] HRC: General Comment No.32 of 2007 on Article 14 (The Right to Equality before Courts and Tribunals and to a Fair Trial UN Doc CCPR/C/GC/32, para 30.
[326] Manco 2016 (8) *Amsterdam Law Forum* 60.
[327] CRoC: General Comment No. 24 , para 58.
[328] *Ibid,* para 31.
[329] *Ibid,* para 58.
[330] *Ibid.*
[331] *Ibid.*

the ICCPR. The HRC has clarified that this right applies to all cases of criminal charges, including those not in detention.[332] According to Nowak, the duty to inform relates to the nature and cause of the charge and the accusation.[333]

### 3.4.5 The right to be heard

According to Article 12(2) of the CRC, a child has a right to be provided with the opportunity to be heard in any judicial or administrative proceedings affecting him or her. This can be done either directly or through a representative. General Comment No.12 of the CRC has emphasized that every child who is capable of forming his or her views has the right to be heard. The CRoC has clarified that the phrase 'capable of forming his or her own views' should not be seen as a limitation, but 'rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible'.[334] The right to be heard forms a significant part of the guarantees of a fair trial. The right to be heard must be exercised throughout the process, from the pre-trial stage (when a child has the right to remain silent) to the adjudication stage and implementation of measures.[335] The right to be heard is also an integral part of the right of the child to participate in legal proceedings against him or her, as will be discussed below under section 3.4.6. The child must be treated as a participant and not as a passive object.[336] The right of the child to be heard has been hailed as one of the most innovative provisions of the CRC.[337] The right to be heard confirms that a child should, in accordance with their evolving capacities, be regarded as capable of participating in proceedings affecting him or her.[338] Liefaard

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[332] HRC General Comment para 31.
[333] Nowak (2005) 331.
[334] CRoC: General Comment No. 12 of 2009 on the Right of the Child to be Heard UN Doc CRC/C/GC/12. General Comment No. 12 provides a comprehensive guideline on the right to be heard. The scope of this work does not extend to a detailed discussion on this right.
[335] CRoC: General Comment No. 24, para 55.
[336] *Ibid,* para 56.
[337] Cantwell "The origins, development and significance of the United Nations Convention on the Rights of the Child '' in Detrick (ed) *The United Nations Convention on the Rights of the Child : A guide to the 'travaux prepatoires'* (1992) 2.
[338] Krappmann "The weight of the child's view: Article 12 of the Convention on the Rights of the Child" 2010 (18) *International Journal of Children's Rights* 501, 501-502.

submits that the right to be heard is part of the group of children's participatory rights.[339]

### 3.4.6 The right to effective participation in the proceedings

As provided for under Article 40(2)(b)(iv) of the CRC, a fair trial means that the accused must be able to participate in the proceedings effectively. Effective participation means that a child must be able to understand the charges against him or her, and the consequences if found guilty, in order to participate in the trial.[340] The right to effective participation means that the accused must be able to comprehend the proceedings in order to participate.[341] This in turn requires that the proceedings be conducted in a language which the child can understand and if this is not possible, an interpreter be used for free.[342] Article 14 of the Beijing Rules emphasizes that the proceedings be conducive to the best interests of the child and be conducted in an atmosphere of understanding, to allow the child to participate fully and freely. According to Liefaard, "Even though the wording of article 12, CRC leaves room for limiting the right to be heard to those children that are 'capable of forming [their] views', the CRC Committee strongly advocates that this should not be regarded and used as a limitation."[343]

### 3.4.7 Legal or other appropriate assistance

Children deprived of their liberty should be guaranteed legal or other appropriate assistance from the beginning of the proceedings to the preparation and presentation of the trial. This right requires that once a child is arrested or detained, he or she must be informed immediately of their right to counsel. The police officer in charge is required to also give detailed information to the child about the existence and

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[339] Liefaard "Child-friendly justice: Protection and participation of children in the justice system" 2016 (88) *Temple Law Review* 908.
[340] CRoC: General Comment No. 24 , para 57.
[341] Elvis Fokala and Annika Rudman "Age or maturity? African children's right to participate in medical decision-making processes" 2020 *African Human Rights Law Journal* 20(2): 667-668. See also Elvis Fokala "The impact of the best interests and the respect for the views of the child principles in child custody cases" 2019 *Nordic Journal of International Law* 88,4, 614-635.
[342] CRoC: General Comment No. 24 , para 57.
[343] Liefaard T "Access to justice for children: Towards a specific research and implementation agenda" 2019 (27) 2 *International Journal of Children's Rights* 195, 218.

availability of a legal counsel, as well as free preliminary legal advice.[344] General Comment No.24 provides that such legal assistance must be appropriate.[345] Manco provides that this approach is in line with the informal approach to child justice that some states have adopted.[346]

It must be emphasized that although Article 40(2)(ii) of the CRC does not provide explicitly for free legal assistance, it is reflected in other human rights instruments. Thus, the Beijing Rules provide that a child in conflict with the law shall be provided with free legal aid where a country provides for it.[347] Rule 18(a) of the JDLs makes provision for a child to have free legal counsel, where available. It extends this right to children who are under arrest, detained or awaiting trial. Furthermore, States Parties are encouraged to set up free legal assistance to children, where they need it.[348] The child is not only entitled to the assistance of a lawyer but also to adequate time and facilities to prepare for the trial. The HRC has commented that 'adequate time' depends on the nature of the case and the proceedings.[349] 'Adequate facilities' has been interpreted as including access to appropriate information, files and documents where necessary, as well as facilities which allow for communication with counsel in confidence.[350]

### 3.4.8 Decision without delay and with involvement of parents

The CRC also provides for the right to a decision without delay and with involvement of parents under Article 40(2)(b)(iii). The CRoC has clarified that the time between the committing of an offence and the final response should be as short as possible. The Committee is of the opinion that the longer the time period, the more likely that the

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[344]Penal Reform International and UNICEF "Protecting children's rights in criminal justice systems" in Penal Reform International International and UNICEF *Juvenile justice training manual* 2007 from https://cdn.penalreform.org/wp-content/uploads/2013/11/Childrens-rights-training-manual-Final%C2%ADHR1.pdf.(accessed on 20 November 2019).
[345] CRoC: General Comment No. 24 , Para 60.
[346] Manco 2016 (8) *ALF* 62. See also Van Bueren (1995) 180.
[347] Beijing Rules, Rule 15.1.
[348] Vienna Guidelines, Guideline 16.
[349] HRC: General Comment No. 32, para 32.
[350] UNCRC, See Arts 16 and 40(2)(b)(vii).

response loses positive impact and the more likely that the child will be stigmatized.[351] The Committee has further explained that the term 'promptly' relates to the notification of the charges and the term 'without delay' relates to the determination of the matter. The effect of reading the two terms together, gives the right a stronger meaning and effect than using the term 'without undue delay'.[352] In light of the importance of having a decision without delay, the Committee encourages States parties to set a time limit within which a decision should be made about a child who comes into conflict with the law.[353] This time limit should be shorter than that set for adults, whilst still ensuring that the child's rights to a fair trial are fully respected.[354]

Article 40(2)(b)(iii) of the CRC and Rule 15(2) of the Beijing Rules provide that parents or legal guardians should be present during legal proceedings involving children in conflict with the law to provide psychological and emotional assistance to the child.[355] The Committee has said that this involvement can, in general, contribute to an effective response to the child's infringement of the penal code. The Committee however notes that the involvement of parents and legal guardians can be limited if the judge or other authority is of the opinion that it is not in the best interests of the child or if the child requests otherwise.[356]

### 3.4.9 Freedom from compulsory self-incrimination

Article 40(2)(b)(iii) provides for the right to freedom from compulsory self-incrimination. This provision requires that a child should not be compelled to give testimony or to confess or acknowledge guilt. It is also in line with Article 14(3)(g) of the ICCPR which provides for same. The child should also not be tortured and treated in a cruel or inhuman or degrading way in order to derive a confession or admission from him or her. Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that no such admission or

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[351] CRoC: General Comment No. 24 , para 65.
[352] *Ibid.*
[353] *Ibid*, para 66.
[354] *Ibid.*
[355] *Ibid*, para 67.
[356] *Ibid.*

confession shall be admissible as evidence.[357] The right to silence is closely linked to the right not to self-incriminate and are fundamental to the notion of a fair procedure.[358] The HRC has commented that while the right to silence protects against 'indirect coercion' the right not to self-incriminate protects against 'direct coercion'.[359] The onus is on the State to prove that statements made by the accused were given through their own free will.[360]

The CRoC has said in its General Comment No.24 that the term 'compelled' should be interpreted in a broad manner and not be limited to physical force. The Committee has further added that the child's age, development, the length of interrogation, the child's lack of understanding, the fear of possible consequence or the possibility of imprisonment may lead the child to confess.[361] The Committee has emphasized that the child being questioned must have access to legal assistance and be allowed to request the presence of his or her parents during questioning.[362] Internationally, there is agreement that the privilege offers protection at two crucial stages: the first is at the trial stage, where it endows the defendant with a right not to give evidence and the second is at pre-trial investigations, where the suspect is given the right to silence.[363]

#### 3.4.10 The right to appeal

A provided for under Article 40(2)(b)(v) of the CRC, the child in conflict with the law has the right to appeal not only against the decision finding him or her guilty of the charges, but also against the measures imposed.[364] An appeal should be decided by a higher competent, independent and impartial authority.[365] Article 14(5) of the ICCPR provides a similar right. It is important to note that the right to appeal is not limited

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[357] CAT, in accordance with Arts 27(1) and Art 15.
[358] Harris et al (2009) 259.
[359] Ashworth *Human rights, serious crime and criminal procedure* (2002) 18.
[360] HRC: General Comment No. 32 , para 41.
[361] CRoC: General Comment No. 24 , para 71.
[362]*Ibid*, para 72.
[363]McInerney "The privilege against self-incrimination from early origins to judges' rules: Challenging the 'orthodox vView'" 2014 (18) *International Journal of Evidence and Proof* 101.
[364] CRoC: General Comment No. 24 , para 74.
[365] CRoC: General Comment No. 24 , para 75.

to offences of a serious nature. The aim of this right is to ensure at least two levels of judicial scrutiny.[366]

### 3.4.11 The right to an interpreter

According to Article 40(2) (b)(vi) of the CRC, a child who does not comprehend the language used by a specific juvenile justice system is entitled to the free assistance of an interpreter. The importance of this right cannot be over-emphasized given that all other rights to a fair trial will be futile if a child does not comprehend the charges brought against him or her the nature of the proceedings.[367] General Comment No.24 of the CRC has clarified that the right to an interpreter should not be limited only to the trial stage, but also available at all times of the child justice process.[368] The Committee has also emphasized the importance of having an interpreter who is trained to work with children, in order to fully realise the right.[369] This right is also extended to children with speech impairment or other disabilities and should be interpreted in this regard with General Comment No.9 (2006) of the CRC on the rights of children with disabilities. [370]

### 3.4.12 The right to privacy

Essential to the concept of a fair trial is the right to a public hearing under Article 40(2)(b)(vii) of the CRC. However, the public should be excluded from all stages of proceedings that involves a child, including the judgment.[371] Both Article 40(2)(b)(vii) and Rule 8.1 of the Beijing Rules use the phrase 'all stages of proceedings' which covers the first initial contact with law enforcement to the court proceedings.[372] The CRoC has clarified that even if the child in question turns 18 during the proceedings, the non-publication rule is still applicable. The Committee has noted that publication causes ongoing stigmatisation on the child and this can impact negatively on the

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[366] Manco 2016 (8) *ALF* 66.
[367] Manco 2016(8) *ALF* 67.
[368] CRoC: General Comment No. 24 , para 76.
[369] *Ibid.*
[370] *Ibid,* para 77.
[371] It should be noted that the use of the word "public" does not include parents or persons whose presence will be in the best interests of the child.
[372] *Ibid,* para 78.

child's ability to access education, work, housing or to be safe.[373] The Committee has recommended that States parties should not publish the name of a person who committed an offence whilst still a child, unless it is in the interests of justice to do so.[374] The Committee has further recommended that States parties should automatically remove the names of children who have committed an offence upon reaching the age of 18 from the criminal records, and in the case of serious offences, to allow removal at the request of the child.[375]

The CRoC has added that the right to privacy imposes on States parties the obligation to ensure that children are not identifiable through press releases.[376] Also, journalists who violate this right should face discipline and penal sanctions.[377] The right to privacy as enshrined in Article 40 (2)(b)(vii) also extends to protection of files and records of child offenders in a struct confidential manner, except for those involved directly with the investigation and adjudication of the case.[378] The right to privacy under Article 40(2)(b)(vii) is complemented by Article 16 of the CRC, which also provides for the protection of children from interference with their privacy, family, home and correspondence and also to protection from libel or slander. It is noteworthy that the Committee encourages that records of child offenders should not be used in subsequent cases in adult proceedings involving the same offender.[379]

### 3.5.Discussion of communications on child justice

In chapter one, it was argued that the term 'jurisprudence' refers to the interpretations of the law given by a court.[380] It was further established that the consideration of complaints and the subsequent issuing of findings is one of the functions of the UN human rights treaty body committees. On this premise, it was then argued that the

[373] *Ibid*.
[374] *Ibid,* para 79.
[375] *Ibid,* para 80.
[376] *Ibid*.
[377] *Ibid*.
[378] *Ibid,* para 81.
[379] *Ibid*. See also Beijing Rules, Rules 21.1 and 21.2 .
[380] Ratnapala *Jurisprudence* (2013) 3-4.

UN treaty body committees have a quasi-judicial nature.[381] It was finally concluded that if jurisprudence can be defined as interpretations of the law given by judicial and quasi-judicial bodies, then the findings of the UN treaty body committees can be seen as jurisprudence.

The aim of this research is to determine whether there are important principles for the CRoC in respect of the children's rights jurisprudence in the other eight treaty bodies. This requires an analysis of the jurisprudence in the other eight treaty bodies to determine the extent of a children's rights jurisprudence. In the absence of the OPIC, the two pertinent committees which received the most complaints from children or on behalf of children were the HRC and the CAT Committee. Both the HRC and the CAT Committee have produced useful jurisprudence on children's rights and whilst these committees will continue to have jurisdiction over such cases, it is expected that most complaints pertaining to children's rights will be directed to the CRoC henceforth, as the Committee most specialised in the field of children's rights.[382] The following cases received by the HRC reflect the theme of children in the justice system, and in particular, the sub-theme of children deprived of their liberty. The views of the HRC are analysed in light of the international legal framework pertaining to children in conflict with the law. It will be established whether the views of the HRC reflect the international legal framework discussed under 4 above and secondly whether there are any important principles in the HRC's views, for the work of the CRoC going forward.

### 3.5.1 *Damian Thomas v Jamaica,*[383]

The author was 15 years of age when he was arrested for two murder charges and was detained with adult prisoners in the General Penitentiary whilst still a child**.** While at the General Penitentiary, the author wrote to the Commissioner for Prisons requesting

[381] Mechlem "Treaty bodies and the interpretation of human rights" 2009 (42) *Vanderbilt Journal of Transnational Law* 915-918.
[382] De Zayas "The CRC in litigation under the ICCPR and the CEDAW, Litigating the rights of the child through the individual complaints procedures of the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women" in Liefaard and Doek (eds) *Litigating the rights of the child, the UN Convention on the Rights of the Child in Domestic and International jurisprudence* (2015) 177.
[383] HRC , UN Doc CCPR/C/65/D/800/1998, 26 May 1999.

that he be removed from the adult prison. However, when the author was moved, he was transferred to the St. Catherine District Prison, once again among adults. The author was beaten on several occasions by police officers. The author claimed that he was being held in a prison with adult inmates in violation of the Covenant.[384]

The HRC was of the view that the facts disclosed a violation of articles 10, paragraphs 2,[385] and 3,[386] and 24,[387] of the Covenant. The State party had violated the author's rights to Article 10 paragraph 2 (treatment of accused child persons), paragraph 3 (the provision that child offenders be segregated from adults and be accorded treatment appropriate to their age) and Article 24 (right of the child). The Committee considered that it was incumbent upon the State party where a complaint such as this was submitted to it in respect of a serving prisoner, to verify whether that prisoner was, or had at any relevant stage, been a child. The Committee considered that the State party had failed to discharge its obligations under the Covenant in respect of Damian Thomas, in so far as he had been kept among adult prisoners when still a child, and consequently, found that there had been a violation of Article 10 paragraphs 2 and 3. The Committee further observed that the facts also constituted a violation of Article 24 of the Covenant, since the State party had failed to provide to Damian Thomas such measures of protection as are required by his status as a child.[388] In light of the violations, the HRC ordered that the State party was under an obligation to provide Damien Thomas with an effective remedy, entailing his placement in a child institution, separated from adult prisoners if Jamaican

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[384] *Damian Thomas* , paras 2.1-2.2.

[385] Art 10 (2)(a) of the ICCPR states that; "*Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.*" Art 10(2)(b) of the ICCPR states that: "*Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*"

[386] Article 10 (3) of the ICCPR states that: "*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*"

[387] Article 24 (1): Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. Article 24(2). Every child shall be registered immediately after birth and shall have a name. Article 24(3) Every child has the right to acquire a nationality.

[388] *Damian Thomas* , paras 6.1-6.4.

legislation authorised it, and including compensation for his non segregation from adult prisoners while a child.[389]

The Global Study on Children Deprived of their Liberty has revealed that the failure to separate children from adults is common in many states despite its prohibition in several international law.[390] Article 37(c) of the CRC provides that a child who is deprived of his or her liberty should be separated from adults. The ICCPR contains the same provision in Article 10(2)(b) which requires the separation of accused children from adult detainees and Article 10 (3) which requires that child offenders be separated from adults and be accorded treatment appropriate to their age and legal status. The requirement in the CRC to separate adult prisoners from children does not specify whether it is applicable to both accused children and convicted children. Unlike Article 37 (c), Article10 (2) (a) of the ICCPR specifically requires that convicted persons be separated from accused persons. Perhaps the CRoC can extend the right of child offenders to be separated from adults by distinguishing between convicted and accused children and introducing a new category requiring that convicted children should be separated from accused children. With regards to Article 10(3), the requirement that children be treated in a manner appropriate to their ages and status, the HRC has recommended that such treatment should include conditions such as regular contact with relatives.[391] Children should be treated in a way that furthers their reformation and re-integration.[392] Indeed the Beijing rules reiterate the provision that children deprived of their liberty be allowed regular contact with relatives.[393]

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[389] *Ibid*, para 8.

[390] Nowak *The United Nations Global Study on Children Deprived of Liberty* 2019 266 from https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf.(accessed on 30 December 2019).

[391] HRC: General Comment No. 21 , para 13.

[392] *Ibid.*

[393] United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 , para 26.5. See also United Nations Standard Minimum Rules for the Treatment of Prisoners. See also UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution/ adopted by the General Assembly*, 2 April 1991, A/RES/45/113, para 59-61.

Several provisions in international law highlight that the aim of detention should be for the rehabilitation and reintegration of the child.[394]

The CRoC issued its Concluding Observations to Jamaica in 2015,[395] and made the following observations regarding children deprived of their liberty:[396] that the number of children in conflict with the law in Jamaica were increasing.[397] Children were illegally detained in police lock-ups.[398] The fact that children were grouped together in children's facilities with no separation based on category, offence, age or special need.[399] There were inadequate psychological and educational services provided to children in children's facilities.[400] The fact the children may still be sentenced to life imprisonment and the inadequate training of correctional officers who interface with children,[401] as well as the lack of access by judges to sources of information, including copies of the current legislation, computers and the internet.[402]

In light of the above observations, the Committee recommended that Jamaica bring its child justice system in line with the CRC.[403] Furthermore and of particular relevance to the current case, the Committee recommended that where detention is unavoidable, Jamaica should ensure that adequate facilities exist for children in conflict with the law.[404] The Committee further recommended that children should not be detained

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[394] UNCRC, Art 40(1), ; ICCPR, Art 10(3); SMRTP, Art 65; Beijing Rules, Rule 26.1; Havana Rules, Rule 12; Tokyo Rules, Rules 10.1 and 10.4.

[395]UN Committee on the Rights of the Child , *Concluding observations on the combined third and fourth periodic reports of Jamaica*, 10 March 2015, CRC/C/JAM/CO/3-4.

[396] It should be noted that not all the observations made by the Committee are particularly relevant to the current subject: children deprived of their liberty. More specifically, those observations made in light of children deprived of their liberty that are particularly relevant to the rights claimed or infringed in the case of *Damian Thomas v. Jamaica* will be discussed.

[397] *Concluding observations on the combined third and fourth periodic reports of Jamaica* , para 64(a).

[398] *Ibid,* para 64(b).

[399] *Ibid,* para 64(c).

[400] *Ibid,* para 64(d).

[401] *Ibid,* para 64(e).

[402] *Ibid,* para 64(f).

[403]*Ibid,* para 65. The Committee made other recommendations such as promoting restorative justice and alternative measures to detention, providing effective rehabilitation, abolishing life imprisonment, adopting a holistic and preventive approach to addressing the problem of children in conflict with the law. See para 65 (a), (b), (d), (e) and (g) of the concluding observations.

[404] *Concluding observations on the combined third and fourth periodic reports of Jamaica* , para 65(c).

with adults and that detention conditions should comply with international standards, including access to services such as education and health care.[405] The Committee recommended that the State party should enhance the skills and specialisation of the relevant actors in child justice, including law enforcement personnel.[406]

The HRC gave its views in the current case in 1998. Then, children were detained with adults in Jamaica and in the 2015 concluding observation by the CRC, the problem persisted. The combined fifth to seventh periodic reports on Jamaica is due by 12 December 2021 and It is hoped that Jamaica has brought its child justice system in line with the CRC and with international standards. In particular, that child offenders are not detained with adults and that the general conditions in child detention centres in Jamaica have improved.

Although Jamaica has not ratified the OPIC to the CRC, and the CRoC is therefore unable to receive complaints against that state, the advice given by the CRoC in the concluding observations gives an indication of the kind of findings and remedies that it would offer, if it were to be faced with a similar case to that of Damien Thomas, against another State. The jurisprudence of the HRC would be a useful guide in such a case.

### *3.5.2 Corey Brough v Australia,*[407]

The author, an Aboriginal Australian, was convicted of burglary, assault and causing of bodily harm and was detained at a child detention centre. He was later transferred to an adult correctional facility for holding a prison staff member hostage. He was 17 at the time of his placement in the adult correctional facility.[408] Due to a minor mental disability, he was separated from other inmates on grounds that he was a threat to their security. The author was subsequently placed in a safe cell to avoid self-harm.

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[405] *Ibid,* para 65(c).
[406] *Ibid,* para 65(f).
[407] HRC, UN Doc CCPR/C/86/D/1184/2003, 17 March 2006.
[408] *Ibid*, paras 2.1-2.14.

However, he harmed himself and was taken to a dry cell,[409] for 48 hours. Due to an incident between the author and a correctional services officer, he was confined into a cell with no bedding or lights. He was given antipsychotic drugs (which he accepted since he was told that he would no longer have to be in the safe cell if he took it) even though no mental evaluation was carried out on him. A psychiatric analysis later showed that he was suffering from a post-traumatic emotional effect after a month of isolation.[410] The author alleged violation of Articles 7 (freedom from torture or to cruel, inhuman or degrading treatment and punishment), 10 (guaranteed dignity of detained persons) and 24 (child's right to freedom from discrimination) of the ICCPR when he was placed under incarceration in an adult facility, given psychiatric medicines without an official evaluation and put in an isolation.[411]

The HRC held that the facts disclosed violations of articles 10 and 24, paragraph 1, of the Covenant. It held further that Brough had failed to prove that the correctional facility's staff used inordinate force against him in contravention of Articles 7 (freedom from torture or to cruel, inhuman or degrading treatment and punishment) and 10 (guaranteed dignity of detained persons) of the ICCPR. Further, his segregation from adults at the facility ensured that Article 10 (3) (appropriate treatment to child detainees) was not breached. Regarding the author' claim under Article 10 paragraphs 2(b) and 3(the right of accused children to be separated from adults and to be brought as speedily as possible for adjudication) the Committee held that it was inadmissible since the author's right under this claim would only be applicable if he were an accused child.[412] However, the author was already convicted of burglary, assault and causing bodily harm. In this light, the author had the status of a convicted and not an accused child.[413] This view reflects the distinction in Article 10 of the ICCPR that

[409] The State party defines a 'dry cell' as "a secure cell used for the short-term containment of inmates and is used only in the case where [inmates are] unable to provide a urine sample or are suspected of concealing contraband in their bodies."
[410] *Corey Brough,* paras 2.1-2.14.
[411] *Ibid,* paras 3.1-3.10.
[412] Ibid, para 8.3 A and B.
[413] *Ibid,* paras 8.1-8.12.

accused persons should be separated from convicted prisoners. The provision acknowledges the need to protect accused persons until they are convicted.

The Committee held that his solitary confinement, periods of exposure to constant light, drug prescriptions and removal of clothes and blankets, supported by evidence were admissible in relation to articles 7 and 10 of the ICCPR. The Committee recalled that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. The Committee added that inhuman treatment must attain a minimum level of severity to come within the scope of Article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim. [414]

The Committee further observed that the State party had not demonstrated that by allowing the author's association with other prisoners of his age, their security or that of the correctional facility would have been jeopardized. The Committee considered that the measure was incompatible with the requirements of Article 10. The State party was required by Article 10, paragraph 3, read together with Article 24, paragraph 1, of the Covenant to accord the author treatment appropriate to his age and legal status. In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a child person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt.[415]

[414] *Ibid,* paras 9-1-9.2.
[415] *Ibid,* para 9.4.

The Committee therefore concluded that the author's treatment violated Article 10, paragraphs 1 and 3, of the Covenant. As regards the prescription of antipsychotic medication ("Largactil") to the author, the Committee took note of his claim that the medication was administered to him without his consent. It recalled that the treatment was prescribed by a general practitioner and that it was only continued after the author had been examined by a psychiatrist. In the absence of any elements which would indicate that the medication was administered for purposes contrary to Article 7 of the Covenant, the Committee concluded that its prescription to the author did not constitute a violation of Article 7.[416] The author was entitled to an effective remedy, including adequate compensation.

In this case, the Committee found that Australia had breached Articles 10(1) and 10(3). It would seem that the Committee would have found a violation of Article 10 (1) irrespective of whether the complainant was a child. However, the fact of his youth had exacerbated the violation.[417] In coming to the conclusion that persons deprived of their liberty may not be subjected to hardships, or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons, the Committee considered its General Comment 21,[418] in which the Committee had noted that persons deprived of their liberty should not be subjected to torture, or hardship or constraint, other than that resulting from their deprivation of liberty and that such persons be accorded respect and dignity as that of free persons. The reference to its General Comment in this regard is an indication that the Committee relies on its own jurisprudence.

In light of the finding that the requirement of separation from adults is only applicable to accused and not convicted children, it is submitted that Article 10 (2)(b) of the ICCPR indeed provides that only accused children shall be separated from adults.

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[416] *Ibid,* para 9.4-9.10.

[417] Joseph, Mitchell, Gyorki and Budel *A handbook on the individual complaints procedures of the UN Treaty Bodies* (2006) 201.

[418] HRC: General Comment No. 21 , Para 3.

However, Article 10(3) does not make a distinction between accused and convicted children. In fact, Article 10(3) simply provides that child offenders shall be segregated from adults and the Committee should have found a violation of this right at the point where the author was placed with adults, even though he was already convicted. Article 37 (c) of the CRC on the other hand requires that a child deprived of his liberty shall be separated from adults unless it is not in the child's best interest to do so.

Depending on how it is interpreted, Article 37(c) provides a better protection for children on the one hand, since it makes no distinction between accused and convicted children and takes into account the best interests of the child, as opposed to the absolute terms in which Article 10 (2) (b) and 10(3) are formulated.[419] On the other hand, it can be interpreted to the detriment of the child if one takes a literal interpretation of it, as not extending the separation rule to convicted children. The distinction between convicted and un-convicted children is unique to the ICCPR and has not been made in any other international or regional provision on the right of children to be separated from adults.[420] The Committee considered the author's age, mental disability and illiteracy and decided that he had exhausted administrative remedies that were available to him.[421] It is thus submitted that the Committee lowered the threshold of the requirement of exhaustion of domestic remedies in respect for the author. International law prohibits solitary confinement of persons under the age of 18 and there is existence evidence showing the harm it can cause, particularly in children.[422] Children in isolation are often denied contact with their family and they are also denied rights such as education and health. They are often treated in ways that decrease their chances of being successfully re-integrated into the community upon their release.[423]

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[419] Liefaard *Deprivation of liberty of children in light of international human rights law and standards* (2008) 259.

[420] Liefaard (2008) 267.

[421] Para 8.9.

[422] Birckhead " Children in isolation: The solitary confinement of youth" 2015 (50) *Wake Forest Law Review* .

[423] Human Rights Ratch *Against all odds: Prison conditions for youth offenders serving life without parole sentences in the United States* (2012) 22, 26-27 from

In its recent (2019) concluding observations to Australia, the CRoC made the following observations regarding the administration of child justice in Australia: That the age of criminal responsibility [state/insert the age here in, probably square brackets] was too low,[424] that there were reports that children in detention were subjected to verbal abuse and racist remarks.[425] That they were deliberately denied access to water.[426] That there was a high number of children in detention.[427] That the use of mandatory minimum sentence still persisted and was applicable to children in the Northern Territory and Western Australia.[428] That children lacked awareness about their rights and how to report abuses.[429]

Particularly important to the current case, the CRoC observed that there was an over-representation of Aboriginal and Torres Strait Islander children and their parents, as well as carers in the justice system, like in the present case.[430] That children who were in conflict with the law were often restrained in ways that were potentially dangerous and excessively subjected to isolation and that children were being detained with adults.[431] The author in the present case was kept in isolation and it had affected his mental health. Interestingly, the HRC made similar observations to Australia with respect to the administration of child justice.[432]

The CRoC recommended in light of its observations that Australia should immediately implement the 2018 recommendations of the Australian Law Reform Commission, to reduce the high rate of imprisonment amongst indigenous persons.[433]

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http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf.(accessed on 11 December 2019).

[424] CRoC, *Concluding observations on the combined fifth and sixth periodic reports of Australia* , 1 November 2019, CRC/C/AUS/CO/5-6 , Para 47(a).

[425] *Ibid,* para 47(b).

[426] *Ibid,* para 47(c).

[427] *Ibid,* para 47(d).

[428] *Ibid,* para 47(f).

[429] *Ibid,* para 47(h).

[430] *Ibid,* para 47(b).

[431] *Ibid,* para 47(e).

[432]HRC, *Concluding Observations on the Sixth Periodic Report of Australia* , 1 December 2017, CCPR/C/AUS/CO/6, Paras 39-44.

[433] *Ibid,* para 48(b).

The Committee also recommended that Australia should prohibit the use of isolation and force, including physical restraints as a means of coercion and discipline to children who are in detention.[434] It was further recommended that Australia should promptly investigate all cases of abuse and maltreatment of children in detention and sanction perpetrators.[435] That where detention was unavoidable, children should be separated from adults, even for pre-trial detention, and to ensure that the detention is regularly reviewed.[436]

In 2005,[437] two years after the HRC had given its views in the present case, the CRC released its concluding observations on Australia and in the area of child justice, the CRoC observed similar issues to the ones in 2019. Particularly, the CRoC observed that children were detained with adult prisoners and that there was an over-representation of indigenous children in the criminal justice system.[438] It would seem that from 2005 to 2019, the issue of children detained with adults and the issue of over-representation of indigenous children still persists. The HRC held in its views that the treatment of the author was not commensurate with his status as a child in a particularly vulnerable position because of his disability and his status as an Aboriginal.[439]

Other recommendations relevant to the current case was that Australia must deal with children with mental illness and or intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings.[440] This recommendation raises the question whether the current case would have been dealt with, without resorting to judicial proceedings had it occurred in recent times. Interestingly, at the time it gave its views (2003), the HRC did not seem to share similar views about children with mental illness who were in conflict with the law. Instead, the HRC condemned the ill-

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[434] *Ibid*, para 48(c).
[435] *Ibid* .
[436] *Ibid* , para 48(d).
[437] CRoC , *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, CRC/C/15/Add.268.
[438] Ibid, para 74 (c).
[439] *Corey Brough v. Australia*, para 9.4.
[440] Para 74(d).

treatment of the author by Australia, in light of his age, origin and mental illness and did not condemn the fact that despite his mental illness, the State Party had resorted to judicial proceedings.

The findings of the Brough case are a useful precedent for the CRoC. Although Australia has not ratified the OPIC, it may very well receive complaints of a similar nature as in the case of Brough, and if so, the Committee would probably go further than the HRC, using article 37(c) as well as its General Comment 24.

### *3.5.3 Sharifova and Ors v. Tajikistan* [441]

This case was submitted to the HRC on behalf of six individuals, (two of whom were under the age of 18 at the time of the arrest) who were arrested on suspicion of having committed burglary. They were sentenced as co-defendants to different prison terms.[442] For the purposes of this thesis, only the rights of the child offenders will be considered. The children (Rakhmatov and Mukhammadiev) were both beaten and tortured and forced to make a confession.[443] Rakhmatov was deprived of food for three days and denied contact with his family. He was not allowed the immediate services of a lawyer and as a result, his interrogation and other investigative actions were done in the absence of a lawyer. He was charged with adults and the criminal investigation of his case was not separated from the adults with whom he was accused.[444] Mukhammadiev insisted that he had not committed the crime but that he was forced to make a confession. This statement was not investigated, and he was later forced to withdraw it. He was sentenced to 7 years' imprisonment.[445]

The authors claimed the following violations: torture and forced confession,[446] unlawful arrest and unjustified deprivation of liberty,[447] inhuman detention

[441] HRC, CCPR/C/92/D/1209,1231/2003& 1241/2004, 1 April 2008.
[442] *Sharifova and Ors v. Tajikistan,* Para 2.1.
[443] *Ibid,* paras 2.2 and 2.14.
[444] *Ibid,* paras 2.2 and 2.2.
[445]*Ibid,* para 2.14.
[446] Articles 7 and 14, para 3(g).
[447] Article 9, para 1 and 2.

conditions and treatment,[448] That the trial court was partial.[449] Furthermore, they claimed that the trial was unfair.[450] The authors also claimed that their rights under Article 14, paragraphs 3(b) and (d), were violated without specifying the exact act or omission which they consider to be in contravention with the Convention. Finally, although the authors do not invoke it specifically, their communications appeared to raise issues under Article 14, paragraph 4.[451]

The Committee considered the authors' claims under Articles 9 (1) and (2) and 14 (3)(b) and (d) inadmissible for lack of substantiation.[452] The Committee held that the facts disclosed a violation of the rights of the children under Article 7, read together with Article 14, paragraph 3(g); Article 10; and Article 14, paragraph 1; and a violation of their rights under Article 14, paragraph 4, of the Covenant. On the claim of a violation of the alleged victims' rights under Article 14, paragraph 3 (g), in that they were forced to sign a confession, the Committee recalled its previous jurisprudence that the wording, in Article 14, paragraph 3(g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.[453] The Committee recalled that in cases of forced confessions, the burden was on the State to prove that statements made by the accused have been given of their own free will and on the absence of any evidence to the contrary, the Committee concluded that the facts disclosed a violation of Article 7, read together with Article 14, paragraph 3 (g), of the Covenant.[454] Regarding the claims of mistreatment in confinement, the Committee concluded that it amounted to a violation by the State party of the alleged victims' rights under Article 10 of the Covenant since the State party had failed to comment on this.[455]

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[448] Article 10.
[449] Article 14 para 1.
[450] Article 14, para 3(e).
[451] *Sharifova and Ors,* para 3.1-3.6.
[452] *Ibid,* para 5.1-5.7.
[453] *Ibid,* para 6.3.
[454] *Ibid,* para 6.3.
[455] *Ibid,* para 6.4.

On the claim of violation of Article 14, paragraph 1, as the trial did not meet the requirements of fairness and that the court was biased, the Committee recalled that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was arbitrary or amounted to a denial of justice. It further noted however, that in the present case, the State party had not presented any information to refute the authors' allegations and to demonstrate that the alleged victims' trial did in fact not suffer from any such defects.[456] Accordingly, the Committee concluded that in the circumstances of the present case, the facts as submitted amount to a violation by the State party of the alleged victims' rights under Article 14, paragraph 1, of the Covenant.[457]

On the claim that the authors were children but did not benefit from the special guarantees prescribed for criminal investigation of children, the Committee considered that those allegations raised issues under Article 14, paragraph 4 of the Covenant. The Committee recalled that children are to enjoy at least the same guarantees and protection as those accorded to adults under Article 14 of the Covenant. In addition, children need special protection in criminal proceedings. They should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence. The Committee considered further that the children were arrested without access to a defence lawyer. In the circumstances, and in the absence of any other information from the State party, the Committee concluded that the children 'rights under Article 14, paragraph 4, of the Covenant have been violated.[458] The Committee was obligated to provide the children with an effective remedy, including such forms of reparation as early release and compensation.

[456] *Ibid*, para 6.5.
[457] *Ibid.*
[458] *Ibid,* para 6.6.

The right not to be compelled to give testimony or to confess or to acknowledge guilt is provided for the under the CRC.[459] There is some consensus in international law that the privilege against self-incrimination serves to ensure that a suspect cannot be required to provide authorities with information that might be used against him in a trial.[460] The right against self-incrimination presupposes that the onus is on the prosecution to proof its case, without resorting to coercing the accused.[461] Rodley and Pollard have noted that whilst violations of Article 7 of the ICCPR usually entail violations of Article 10(1), the reverse is not always true. A number of cases received by the HRC have been found to involve violations of Article 10(1) without a violation of Article 7.[462] Article 14(3)(g) mirrors Article 40(2)(b)(iv) of the CRC and is therefore in line with the CRC's protection of children in this regard. The Committee's observation that children should at least enjoy the same guarantees and protection as those accorded to adults is in line with the principle of non-discrimination as established under General Comment 10 of the CRC. In reaching its conclusions, the HRC considered its previous jurisprudence in which similar violations had been alleged. The Committee followed its established jurisprudence regarding the right not to compelled to make a confession. The Committee also considered its established jurisprudence in assessing that the burden of establishing that confessions had been given freely rested on the State party. With regards to the remedies, the HRC ordered early release of the children, bearing in mind their particular vulnerability.[463]

The CRoC observed in its recent observation to Tajikistan that there was a limited understanding about the effective prevention of children coming into conflict with the law.[464] That children deprived of their liberty were not systematically separated from adults, both in pre-trial detention and even after conviction.[465] The Committee

[459] UNCRC , Art 40(2)(b)(iv).
[460] Redmayne "Rethinking the privilege against self-incrimination" 2007 (27) *Oxford Journal of Legal Studies* 209. See also McInerney 2014 (18) *IJEP* 101.
[461] Redmayne 2007 (27) *OJLS* 225.
[462] Rodley and Pollard *The treatment of prisoners under international law* (2009) 387.
[463] *Ibid*, para 8.
[464]CRoC , *Concluding observations on the combined third to fifth periodic reports of Tajikistan*, 29 September 2017, CRC/C/TJK/CO/3-5, paras 46 (a).
[465] *Ibid , para 46(f)*.

recommended that the State party should develop effective measures to prevent children from coming into conflict with the law.[466] That in cases where detention is unavoidable, the State party should ensure that children are not detained with adults and that detention facilities must be in accordance with international standards, in terms of education and health care services.[467] The Committee also recommended that the State party should refer all children who are in conflict with the law to State paid legal assistance, at an early stage of the procedure and throughout the proceedings. This is in line with the right to prompt and free legal assistance.[468] Tajikistan has not ratified the OPIC but complaints similar to the case of Sharifova are likely to be brought before the Committee, and if so, the HRC decision will be a useful precedent.

### *3.5.4 Valentina Kashtanova and Gulnara Slukina v. Uzbekistan,*[469]

This case was submitted to the HRC on behalf of two teenage boys who were arrested for the alleged murder of their classmate. The boys were 14 and 15 respectively at the time of the alleged murder. The boys were ill-treated whilst in prison, they were questioned in the absence of a lawyer and their parents, they were not allowed family visits for the first three months of their detention. During a visit by their mother and aunt respectively, it was discovered that the boys were still wearing summer clothes whilst the temperature outside was -15 degrees, the cells were not heated, an officer had broken one of the boys' legs during an interrogation and had refused to provide medical assistance to him.[470] It was submitted on behalf of the boys that the pre-trial investigation and the trial itself were conducted with important breaches of procedural norms as well as breaches of the victims' procedural and constitutional rights. It was further submitted that the rights of the boys under Articles 7(which provides for the prohibition of torture, cruel inhuman or degrading treatment or punishment ), 10(1) (which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person),

[466] *Concluding Observations on the Combined Third to Fifth Periodic Reports of Tajikistan*, para 47(a).
[467] *Ibid* , para 47(g).
[468] *Ibid* , para 47(d).
[469]HRC, UN Doc. CCPR/C/118/D/2106/2011, 28 October 2016.
[470] *Ibid,* para 2.8.

14 (which provides for the right to equality before the courts and tribunals) and 24(1) (which provides for measures of protection as required by a child's status as a child) had been violated.[471]

Save for the claims under Article 14 which the committee held was inadmissible for lack of substantiation, the remaining claims were admissible. The human rights Committee held that the State party had violated the boys' right to protection against torture or cruel, inhuman or degrading treatment or punishment,[472] their right to be treated with dignity and respect as persons deprived of liberty,[473] and their rights as children.[474] Regarding the questioning of the boys as suspects in the absence of attorneys or parents and the fact that they were not allowed family visits for the first three months of their detention, the Committee noted that detainees should be guaranteed prompt and regular access to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so required to the family members.[475]

Regarding the complaint that the boys had been ill-treated whilst in detention the Committee recalled that once a complaint had been filed about ill-treatment, a State party must investigate such complaint promptly and impartially.[476] In this regard, the Committee noted its General Comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, paragraph 14, in which the Committee emphasised the need for recognition by States parties of the right to lodge complaints concerning ill-treatment of persons in detention in their domestic law. The same General Comment also reiterated the State party reports must contain remedies available to persons who have been ill-treated whilst in detention.[477]

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[471] *Valentina Kashtanova,* paras 2.1-2.6.
[472] ICCPR, Art 7.
[473] ICCPR, Art 10.
[474] ICCPR, Art 24.
[475] *Valentina Kashtanova,* para 8.3.
[476] *Ibid,* para 8.2.
[477] *Ibid,* para 8.3.

The Committee also recalled its General Comment No. 35 (2014) on liberty and security of persons, in which it stated that when children are arrested, notice of the arrest and the reasons should also be provided directly to their parents, guardians or legal representative.[478] It further recalled that Article 24(1) of the Covenant entitled every child "to such measures of protection as are required by his[/her] status as a child on the part of his family, society and the State." The Committee added that Article 24(1) entailed the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by Article 9 for everyone. The Committee therefore considered that the State party had also violated Article 24(1) in respect of the children, who, as children, should have been afforded special protection.[479] The State party was ordered to provide the victims with an effective remedy.[480] This required it to make full reparation to the boys. The State party was also obligated, to carry out an impartial, effective and thorough investigation into the allegations of torture and ill-treatment, initiate criminal proceedings against those responsible and provide the victims with appropriate compensation.[481]

Informing parents of their children's apprehension, is considered one of the necessary safe-guards, due to a child's vulnerability in the earliest stages of a criminal justice proceedings.[482] A child who is questioned whilst in police custody needs protection against ill-treatment. Liefaard submits that the police should recognise that children require greater protection than adults and should be sensitive to the special needs of the child.[483] The HRC acknowledged the rights of the children who were deprived of their liberty to immediate and prompt legal representation. It is submitted that this is in line with the CRC's provision of the right to legal representation.[484] The Committee also referred to the jurisprudence of the CRC, in particular, General Comment No. 10

[478] *Ibid*.
[479] *Ibid*, para 10.
[480] *Ibid*.
[481] *Ibid*, para 10.
[482] Liefaard 2016 (88) *TLR* 919.
[483] *Ibid*.
[484] UNCRC, Arts 37(d) , 40(2)(b)(ii) and (iii).

(2006) on children's rights in child justice, as discussed in chapter two, it is noted that this is an instance where the treaty bodies refer to each other's jurisprudence. In this regard, the Committee held that the general requirement of Article 9 (freedom and security of person and freedom from arbitrary arrest), interpreted in light of Article 24(1) means the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by Article 9 for everyone.[485] This is an indication that the HRC considers the jurisprudence of other Committees apart from its own.

The Committee made several references to its previous findings in cases where similar issues arose and followed the set principles or findings in the established jurisprudence.[486] This indicates consistency, certainty and predictability in the jurisprudence of the HRC and contributes to the legitimacy of the views of the HRC. Liefaard notes that the CRC has considered the harsh treatment of children in detention as amounting to cruel, inhuman or degrading treatment.[487]

In its concluding observations to Uzbekistan, the CRoC observed that children in conflict with the law are not provided with timely and adequate legal aid.[488] The Committee submitted further that such children were did not have access to education and health services,[489] and they were subjected to torture during interrogations and detention.[490] In view of the observations, the Committee recommended that the State

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[485] Para 8.3.

[486] *Separdurdy Khadzhiev v. Turkmenistan*, HRC, U.N. Doc. CCPR/C/113/D/2079/2011, 2015, para 8.4. The Committee considered this jurisprudence in establishing that the burden of proof rested on the State party to refute allegations of torture. *Krasnova v Kyrgyzstan,* HRC , UN Doc CCPR/C/101/D/1402/2005, 29 March 2011. para. 8.5, where the Committee established that notice of the arrest and the reasons for their detention should also be provided directly to their parents, guardians or legal representative.

[487] Liefaard (2008).

[488] *Concluding Observations on the Combined Third and Fourth Periodic Reports of Uzbekistan*, adopted by the Committee at its sixty-third session (27 May-14 June 2013) CRC/C/UZB/CO/3-4 , para 69 (b).

[489] *Ibid*, para 69 (f).

[490] *Ibid*, para 69(c) It should be noted that the Committee made other observations in respect of children in conflict with the law: (a) The State party continues to have no holistic child justice system and its laws on child justice are fragmented; (d) There are inadequate measures for ensuring that children in conflict with the law, particularly girls, are detained in separate facilities from adult detainees; (e) There are inadequate alternative measures to detention and no regular reviews of such detention with a view to assessing the need for its continuation.

party should provide qualified and impartial legal aid to children in conflict with the law at an early stage of the procedure and throughout the legal proceedings.[491] Furthermore, it was recommended that the State party should ensure the proper and timely investigation of all cases of alleged mistreatment and subject perpetrators to the appropriate sanction.[492] It was also recommended that the State party should ensure that all children deprived of their liberty have effective access to education and health care.[493] Uzbekistan has not ratified the OPIC, but if the CRoC receives cases alleging similar complaints to the Valentina Kashtanova case, it would benefit from the jurisprudence of the HRC, and could provide more up to date guidance by making reference to General Comment 24 which has been adopted subsequent to the Kashtanova decision.

### *3.5.5 Vyacheslav Berezhnoy v Russian Federation* [494]

The author was arrested when he was between the ages of 15 and 16. He was not informed of the reasons for his apprehension, his rights were not explained to him and he had no access to legal counsel. He claimed that, at the police station, he was forced to write a confession that he had committed several thefts and burglaries. The author also submitted that during those hours of illegal detention, he had no access to legal counsel or to his parents.[495] This, according to him, constituted a violation of the domestic criminal procedure, which required that child suspects be immediately provided with a lawyer free of charge.[496]

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[491] *Ibid,* para 70 (b).
[492] *Ibid*, para 70 (c).
[493] *Ibid* , para 70 (f) Other recommendations required that the State party: (a) Establish a child justice system, including child courts, on the basis of a comprehensive legal framework for a child justice system, as well as diversion measures to prevent children in conflict with the law from entering the formal justice system and to develop more alternatives such as community service and mediation between the victim and offender in order to avoid stigmatization and for their effective rehabilitation and social reintegration; (d) Promote alternative measures to detention, such as diversion, probation, mediation, counselling, community service or suspended sentences, wherever possible and ensure that detention is a measure of last resort and for the shortest possible period of time, and that it is reviewed on a regular basis with a view to its withdrawal; (e) Ensure that children are not, including in relation to police custody, detained together with adults and that in instances where detention is unavoidable ensure that the conditions for this are compliant with international standards.
[494] *Vyacheslav Berezhnoy v. Russian Federation*, HRC, UN Doc CCPR/C/118/D/2107/2011, 5 December 2016.
[495] *Ibid*, para 2.1-2.2.
[496] *Vyacheslav Berezhnoy* , para 2.1-3.6.

Save for the claim under Article 14(1) and (3)(g) which was considered inadmissible for lack of substantiation, the Committee found the rest of the claims admissible. The Committee held that the facts disclosed a violation under Article 9 paragraph 3 (right to be brought promptly before a judge promptly after arrest) and 4 (right to take proceedings before court; court to decide on lawfulness of detention), Article 10 paragraph 2 (b) (accused children brought as speedily as possible for adjudication), Article 14 paragraph 3 (b) (right to adequate time for preparation of trial), and (c) (right to be tried without undue delay), Article 14 paragraph 4 (proceedings involving child persons) read in conjunction with Article 24 (1), of the Covenant (right of the child). [497]

The Committee recalled that, in accordance with Article 9(3) of the Covenant, anyone arrested or detained on a criminal charge "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power". The Committee also recalled that while the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. Accordingly, 48 hours was sufficient to transport the individual and to prepare for the judicial the facts revealed a violation of the author's rights under Article 9 (3) of the Covenant. [498]

The Committee recalled that Article 9 paragraph 4 of the Covenant and its longstanding jurisprudence provided that a detained person shall be entitled to take proceedings before the court. If there was no lawful basis for continuing the detention, the judge must order release. It added that the author was not brought before a judge for issuance of the initial detention order and he was not allowed to take proceedings before a court to challenge the lawfulness of his detention, in direct violation of the provisions of Article 9(4) of the Covenant. In the light of this finding, the Committee

[497] *Ibid,* paras 8.1-8.6.
[498] *Ibid,* paras 9.1-9.7.

decided not to examine the author's claims under Article 9 (1) and (2) of the Covenant separately. [499]

The Committee recalled its General Comment No. 17 on the rights of the child, its General Comment 32 on the right to equality before courts and tribunals and to a fair trial and its jurisprudence, in which it stated that accused child persons were entitled to be tried as soon as possible in a fair hearing.[500] It noted that Article 10 paragraph 2(b) (accused children brought as speedily as possible for adjudication), reinforced for children the requirement in Article 9(3) that pretrial detainees be brought to trial expeditiously. The Committee considered that the author's rights to a speedy trial under Article 10(2)(b) had been violated. Based on this finding, and for the same reasons, the Committee found that the facts disclosed a violation of the author's rights under Article 14 (3)(c) of the Covenant (right to be tried without undue delay).[501]

The Committee recalled that Article 14 (3) (b) of the Covenant provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision was an important element of the guarantee of a fair trial and an application of the principle of equality. Taking into consideration the age of the author at the time and his vulnerability, the Committee considered that the author was not provided with adequate time and facilities to prepare his defence or to communicate with counsel of his own choosing, and that his rights under Article 14 (3) (b) of the Covenant have thus been violated.[502] Based on this finding, the Committee decided not to separately examine the author's claims under Article 14(5) (right review of conviction and sentence).[503] Regarding the author's claims that his rights under Article 14 (4) were

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[499] *Ibid.*
[500] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para 42, https://www.refworld.org/docid/478b2b2f2.html [accessed 9 February 2023].
[501] *Ibid.*
[502] *Ibid*, para 9.5.
[503] *Ibid*, para 9.6.

violated (proceedings involving child persons), the Committee recalled Article 24 of the Covenant and stated that in criminal proceedings, children needed special protection.[504]

The Committee considered that given the author's age at the time, which placed him in a vulnerable position, unimpeded access by his parent or legal guardian or legal representative could have played a crucial role in protecting his rights throughout the criminal proceedings.[505] The State party was obligated to provide the author with adequate compensation, including reimbursement of court fines, legal costs and other related fees incurred. The State party is also under an obligation to take all the steps necessary to prevent similar violations against child offenders from occurring in the future.

The Global Study on children deprived of their liberty has highlighted that a lack of legal representation disproportionately affects children who cannot afford the services of a lawyer.[506] Most especially in states where there is no legal free or effective legal advice and assistance. The study expressed concern about the treatment of children who are interrogated in police custody in the absence of a lawyer or their parents.[507] Liefaard has said that the requirement to have parents available during interrogation does not pre-suppose that parents are necessarily knowledgeable about the law, but that the presence of parents in general contribute to an effective response to the child's infringement of the penal law.[508] The views in this case were published on the same day as the views in the previous case above (*Valentina Kashtanova and Gulnara Slukina v. Uzbekistan*).

It would have been interesting if in both cases similar violations were alleged, to see the approach of the Committee. In the present case, the Committee held that an

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[504] *Ibid,* para 9.7.
[505] *Ibid.*
[506] U.N. , *The United Nations study on children deprived of liberty*, October 2019, 266.
[507] *Ibid.*
[508] Liefaard (2016) 920.

especially strict standard of promptness, such as 24 hours, should apply in cases concerning children. The Committee recognised that the meaning of 'promptly' may vary depending on the circumstances of each case. The Committee held that 48 hours was sufficient to transport an individual and to prepare him for judicial hearing and that any delay longer than 48 hours must be exceptional and justified. Most importantly, the Committee set a standard for what was considered 'prompt' in respect of children. The Committee held that in respect of children, an especially strict standard of 24 hours should apply with regard to the right to be brought promptly before a judge.[509]

In reaching the above conclusion, the Committee considered its longstanding jurisprudence on the right of an accused to be brought promptly before a judge. Where the Committee had established that the purpose of the right to be brought promptly before a judge was to decide on the lawfulness of his or her detention and that if there was no lawful basis of the accused person's detention, the judge must order his immediate release.[510] It is submitted that the right to be brought promptly before a judge is in accordance with the spirit of the as a whole CRC and particularly article 40 as well as the Beijing rules.[511] The Committee considered the vulnerability of the child and held that in his particular circumstances, unimpeded access to his parents or legal representatives would have played a crucial role in the proceedings.[512] The CRoC's observations and recommendations do not reflect any of the violations above.[513] Russia has not ratified OPIC, but similar cases to Berezhnoy are very likely to be brought before the Committee against another state. The Committee would no doubt reinforce the definition of promptly using its General Comment 24 (2019) on children's

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[509] *Vyacheslav Berezhnoy,* para 9.2.

[510] *Ibid,* para 9.3.

[511] UNCRC , Art 40(2)(b)(iii) and Beijing Rules , Rule 10.2.

[512] *Vyacheslav Berezhnoy,* para 9.7.

[513]CRoC, *Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation*, 25 February 2014, CRC/C/RUS/CO/4-5.

rights in the child justice system,[514] which also provides that children should be brought before a court as soon as possible and not later than 24 hours.

### *3.5.6 Lakpa Tamang v. Nepal,[515]*

The author was about 17 years of age when he was accused of theft and arrested.[516] He was taken into police custody and was tortured in order to derive a confession from him. He was interrogated in a small empty room without windows, where he was beaten, he was given electric shocks, he lost consciousness temporarily and out of fear, he agreed to confess to the crime of theft. The police then prepared a confession letter and forced the author to sign it, after which he was threatened with death if he told anyone about the torture.[517]

The author alleged a violation of Article 7 read with Article 24(1) due to the torture and ill-treatment from the Police. This violation was aggravated by the fact that the author was a child at the time of the events and was therefore entitled to receive special measures of protection required by his status, which the State party failed to adopt. A violation of Article 7, read in conjunction with Articles 2(3) and 24(1) of the Covenant, due to the State authorities' failure to effectively investigate, prosecute and sanction those responsible with appropriate penalties and the failure to provide him adequate compensation. A violation of Article 7, read in conjunction with articles 2(2) and 24(1) of the Covenant, due to the Nepalese authorities' failure to adopt adequate legislative measures to prevent instances of torture against children and for the same reasons as above.[518]

The Committee found a violation of Article 7, read in conjunction with Articles 2(3) and 24(1), of the Covenant. The Committee considered that the acts of torture described, inflicted by police officers on the author, who was 17 years old at the time, with the aim of coercing a confession of a crime, amounted to a violation of the

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[514] CRoC, *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, https://www.refworld.org/docid/51ef9e134.html [accessed 29 October 2022]
[515] HRC, UN Doc. CCPR/C/122/D/2756/2016, 21 March 20.
[516] *Ibid*, paras 2.1-2.13.
[517] *Ibid.*
[518] *Ibid,* paras 3.1-3.4.

author's rights under Article 7, in conjunction with Article 24(1) of the Covenant. With regards to the claim of violation of Article 2(3) in conjunction with articles 7 and 24 (1), The Committee reiterated the importance it attaches to States parties establishing appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law.[519] The Committee further noted the author's allegations regarding the State party's failure to effectively investigate, prosecute and sanction those responsible for the violations with adequate penalties. To that effect, the Committee noted that the perpetrators were criminally prosecuted and convicted of torture under Article 7 of the Nepalese Children's Act and fined as compensation to the author.

The Committee noted further that no penalty of deprivation of liberty was imposed and further that the State party had not provided any information regarding any administrative or disciplinary action effectively taken against the perpetrators or the nature or scope of that action. It further recalled that purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective reparation within the meaning of Article 2(3) of the Covenant, in the event of particularly serious violations of human rights.[520] The Committee recalled that under Article 7 of the Covenant, domestic law must prohibit the use of statements or confessions obtained through torture or other prohibited treatment in judicial proceedings,[521] either civil or criminal.

The Committee considered that the sanction imposed on the perpetrators, consisting in the payment of a 5,000 NR fine and 50,000 NR compensation to the author, was insufficient to constitute adequate reparation commensurate with the seriousness of the violations of his rights. Accordingly, the Committee concluded that the facts revealed a violation of Article 7, read in conjunction with articles 2(3) and 24(1) of the Covenant. Having found a violation of Article 7, in conjunction with articles 2(3) and 24(1) of the Covenant, the Committee decided not to examine the author's claims of a

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[519] *Ibid,* paras 6-7
[520]*Ibid.*
[521]*Ibid.*

violation of Article 7 in conjunction with Article 2(2) of the Covenant separately. The State party was ordered to provide the author with adequate compensation proportionate to the gravity of the violations, Review its investigation to ensure that those responsible are sanctioned, ensure that the reconciliation agreement has no evidentiary value in legal proceeding and to prevent similar violations from occurring in the future.[522] The following reflect on cases in which torture is alleged.

A significant number of international treaties prohibit the use of torture and other ill-treatment.[523] Article 37(a) of the CRC continues international law's commitment to the prohibition against torture and other forms of ill-treatment. The provision against torture is non-derogable, like in other instruments.[524] In fact the HRC has held that the ICCPR allows no limitation on the prohibition against torture, even during public emergencies.[525] It follows that no arguments can be used to justify the use of torture or other ill-treatment.[526] The prohibition against torture places both a positive and a negative obligation on States Parties. A State party has a negative obligation to refrain from treatment which violates the prohibition against torture. At the same time, it has a positive obligation to take all appropriate measures consistent with Articles 2 and 4 of the CRC to ensure that children enjoy effective protection from such treatment.[527]

This case invokes similar violations to the case of *Valentina Kashtanova and Gulnara Slukina v. Uzbekistan* discussed earlier. The views in the latter were handed down in 2016 and the former in 2018. In both cases, violations of Article 7 (which provides for the prohibition of torture, cruel inhuman or degrading treatment or punishment) and 24 (which provides for measures of protection as required by a

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522 *Ibid,* para 9.

523 CAT, Arts 2(1) and 16(1) ; Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 26 November 1987, ETS 126, and Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art 5 .

524 See for example CAT, Art 2.

525 HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 3.

526 Rodley and Pollard (2009).

527 Joseph and Castan *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2013), paras 9.150-9.

child's status as a child) were claimed. In both cases, the HRC found violations of Articles 7 and 24.

The CRC provides for the right not to be compelled to give testimony or to confess or acknowledge guilt.[528] The ICCPR's provision is thus in line with the CRC. Although the Committee held that the compensation made to the author was not sufficient to constitute adequate reparation commensurate with the seriousness of the violations of his rights, the Committee did not give its view on what would have been considered adequate compensation, bearing in mind the nature of the rights infringed. The most recent observations and recommendations of the CRoC to Nepal do not reflect the rights violated in the case below.[529] Nepal has not ratified the OPIC. This case will be another positive precedent for the CRoC to follow, in the event that a matter with similar violations is brought before it.

### *3.5.7 Emelysifa Jessop v. New Zealand,*[530]

The author was aged 15 when she was convicted and sentenced to 4 years imprisonment for aggravated robbery. On 2 June 1998, Jessop, then aged 14 years and 9 months, was identified as an assailant of an aggravated robbery by a witness at an identification parade. She later confessed to the crime and was sentenced to four years imprisonment. The Court of Appeal quashed the committal to the High Court and sentence because the Youth Court judge had not followed the correct procedure, namely having the charge read and having the defendant enter a plea. Jessop later entered a not guilty plea and the Youth Court again committed the case to the High Court for trial. Jessop was convicted on 14 October 1999 and sentenced to four years and eight months' imprisonment. At that time, Ms Jessop was aged 16. Jessop was one of several appellants who contended that the procedure of the Court of Appeal was illegal. The Privy Council upheld this appeal and remitted the case to the Court of Appeal. Later, the Court of Appeal again dismissed her appeal. An application for

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[528] UNCRC , Art 40(2)(b)(iv).

[529] CRoC: Concluding Observations on the Combined Third to Fifth Periodic Reports of Nepal CRC/C/NPL/CO/3-5 (2016), 27 July 2016.

[530] HRC, UN Doc. CCPR/C/101/D/1758/2008, 29 March 2011.

leave to appeal to the Supreme Court (which had replaced the Privy Council as the final court in New Zealand) was dismissed on 27 March 2006 in a short decision of four paragraphs. An application to set aside this decision was made on 16 August 2007 and dismissed on 30 November 2007.[531]

Jessop contended that the naming of her after the first sentence breached her right to privacy under Article17. Jessop argued that the delays from the second committal of her case to the final appeal in 2007 breached Articles 14(3)(c),[532] 14(4),[533] and 14(5) of the ICCPR.[534] Jessop also argued that the short dismissal of her appeal by the Supreme Court of 27 March 2006 without an oral hearing breached Article14 of the ICCPR.[535]

The Committee was of the view that the claims regarding Articles 14 paragraph 4 and 24 of the ICCPR were not sufficiently substantiated and therefore inadmissible. Furthermore, the complaint of the breach of Articles 14 paragraph 4 and 17 of the ICCPR from the publication of her name was inadmissible for failure to exhaust domestic remedies as no application was made in respect of those issues in the domestic proceedings. The complaint regarding delays in the proceedings was admissible, as was the complaint regarding the Supreme Court appeal.[536] The Human Rights Committee was of the view that the facts before it did not reveal a breach of any provision of the Covenant.[537]

With respect to the author's allegation of delay in the proceedings under Article 9 paragraph 3, Article 10 paragraph 2 (b), and Article14, paragraph 3(c), paragraph 4 and paragraph 5, the Committee recalled that children are to enjoy at least the same guarantees and protection as those accorded to adults under Article 14 of the Covenant. The Committee took note of the author's contention that the second committal of her case to the High Court resulted in undue delay, as the Youth Court

[531] *Emelsysifa Jessop* , paras 2.1-2.17.
[532] The right to be tried without delay.
[533] The requirement that the age of child offenders should be taken into consideration as well as the desirability of promoting their rehabilitation.
[534] The right to have a conviction and sentence reviewed by a higher tribunal according to law.
[535] *Emelysifa Jessop* , para 3.1-3.8. The right of equality before the courts.
[536] *Ibid,* paras 7.1-7.18.
[537] *Ibid,* para 9.

would have proceeded faster. The Committee recalled its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay.

The Committee held that the issue of delay must be assessed against the overall circumstances of the case, including an assessment of the factual and legal complexity of the case. The Committee noted that the State party attributed this time lapse to the preparation of records and submissions in respect of the 12 appellants in the case. The Committee noted that the author's lawyer accepted responsibility for two years and nine months out of this delay. The Committee also noted the efforts of the Court of Appeal to fix a date for the hearing, and the repeated requests from the author, for documentation, as well as requests on her part for the adjournment of the case.[538]

Regarding the Supreme Court hearing, it transpired from the file that after the dismissal of her case by the Court of Appeal in December 2005, the author sought leave to appeal before the Supreme Court in January 2006, which was rejected on 27 March 2006. It was only in August 2007, that is, 17 months after the Supreme Court decision, that she filed an application to set aside that decision. The Supreme Court rendered its decision on 30 November 2007. In the specific circumstances of the case, the Committee considered that the delay in determining the author's appeal did not amount to a violation of Article14, 3(c), (4) or (5) of the Covenant.[539]

Regarding the author’s contention, that she was unable to interrogate the victim during the High Court trial, which resulted in a breach of her rights under Article14, (3) (e), the Committee observed that the victim, who was nearly 89 years’ old at the time of the High Court trial in 1999, was found unable to attend the hearing for health reasons.[540] The Committee observed the importance of the evidence of the victim for the trial, magnified by the fact that he had provided contradictory statements, initially

[538] *Ibid,* paras 8.1-8.2.
[539] *Ibid,* paras 8.2-8.5.
[540] *Ibid,* para 8.6.

claiming that there was only one assailant when the robbery occurred, while later stating that there were two, thereby implicating the author. The Committee recalled that Article14, (3) (e), guaranteed the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.

The Committee observed that a reading of the victim's statement to the jury could have fallen short of the requirement, under Article 14 (3) (e), to be given a proper opportunity to question and challenge witnesses, a fortiori where their evidence is of direct relevance for the resolution of the case, and where the charges faced are of such serious nature. However, in the particular circumstances of the case, the fact that the author, was convicted based on her own confession and without the victim's statement having been read to the jury, did not support a finding of violation of the principle of equality of arms under Article 14, 3(e).[541]

The Committee observed that it was not disputed that the author's trial and appeal were openly and publicly conducted and recalled its previous jurisprudence that the disposition of an appeal does not necessarily require an oral hearing. Accordingly, the Committee was of the view that the Supreme Court proceedings of March 2006 did not disclose a violation of Article 14, (1), of the Covenant for the author.[542] The Committee did not grant the author any remedies since no violation was found.
This case raised the issue of violation of privacy in terms of child justice and would have been interesting to know the Committee's views in respect of children whose names have been published. Unfortunately, the Committee found that the author had not exhausted domestic remedies in respect of this allegation and did not consider it admissible. General Comment No.24 has provided that the right to privacy includes protecting the identity of the child who is in conflict with the law.[543] The court may make an order to allow the publication of so much information as may be necessary

[541] *Ibid*.
[542] *Ibid,* para 9.
[543] CRoC: General Comment No.24, para 79.

and may permit such publication after it has determined in a court hearing that, it may be in the interests of justice to do so.[544]

According to a report by CRIN on access to justice by children, 'It is widely recognised that publishing information about children involved in the justice system can re-victimize accused children in the justice system.'[545] The Beijing Rules makes provision for the right of children to privacy. It emphasizes the need to protect and respect the privacy of children at all stages to avoid harm due to undue publicity.[546] The rules state that 'in principle, no information that may lead to the identification of a child offender shall be published.'[547] The rule recognise that young persons are particularly susceptible to stigmatisation.

It was surprising that despite the considerable delays, the Committee did not apportion part of the blame on the State party so as to amount to a breach of Article 14(3)(c) of the ICCPR. The CRoC has provided that for children in conflict with the law, the period between the commission of the offence and the final response to this act should be as short as possible.[548] The longer the time period, the more likely that the child will be stigmatised. The CRoC has said in light of this, that States Parties should set a time limit between the commission of the offence and the final court decision.[549] The right to have a matter considered without delay is provided in the CRC as well as the Beijing rules.[550] The Committee's jurisprudence on the right to trial without undue delay is in line with the principle of non-discrimination as discussed above. The present case raises questions such as the time limit which is accepted in terms of delay of justice for children. The current case was in 2008 and by then, the

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[544] *Ibid.*
[545] CRIN "Rights remedies and representation: Global report on access to Jjstice for children" 2016 https://www.crin.org/en/library/publications/rights-remedies-and-representation-global-report-access-justice-children (accessed 20 August 2019).
[546] Beijing Rules, Rule 8.
[547] *Ibid,* Rule 8.2 .
[548] CRoC: General Comment No.24, para 65.
[549] *Ibid,* para 66.
[550] UNCRC , 40(2)(b)(iii); Beijing Rules, Rule 20(1).

HRC had not set the standards of what amounted to undue delay in respect of children.

In *Vyacheslav Berezhnoy v Russian Federation*,[551] which is considered above, the Committee held that an especially strict standard of promptness, such as 24 hours, should apply in cases concerning children. The Committee recognised that the meaning of 'promptly' may vary depending on the circumstances of each case.

In its most recent concluding observation to New Zealand, the Committee on the Rights of the Child recommended that New Zealand should withdraw its reservation to Article37(c ) of the CRC, and to ensure that any child deprived of his or her liberty is separated from adults in all places of detention.[552] Article37 ( c) provides amongst other provisions,[553] that every child deprived of his or her liberty shall be treated with humanity and with respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons his or her age.

In September 2022, New Zealand ratified the OPIC, and could therefore face cases being brought against it, if it has not already ensured that the kind of failure of justice that occurred in Jessop's case could not occur again. Whether such a case is brought against New Zealand or any other state, it seems likely that the CRoC could build on the jurisprudence from the HRC and add some of its own jurisprudence derived from General Comment 24 which makes such clear statements about privacy, provided of course that the domestic remedies had been exhausted.

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[551] CCPR/C/118/D/2107/2011.

[552] CRoC, Concluding observations on the fifth periodic report of New Zealand, 21 October 2016, CRC/C/NZL/CO/5, Para 45 (c). Other recommendations included (a) To raise the minimum age of criminal responsibility in accordance with the Committee's general comment No. 10, and notably its paragraphs 32 and 33; (b) To raise the age of criminal majority to 18 years; (d) To intensify its efforts to implement the recommendations made by the Joint Thematic Review of Young Persons in Police Detention to reduce the detention of children in police custody, improve detention conditions and limit the use of detention to a measure of last resort and for the shortest period of time; (e) To strengthen its efforts to address the overrepresentation of Maori and Pasifika children and young people in the child justice system, including by improving the police's cultural capability and by investigating allegations of racial biases.

[553] Art 37 (c) also provides for the separation of children from adults in detention.

### *3.5.8 Bronson Blessington and Matthew Elliot v. Australia*,[554]

The authors were serving life imprisonment sentences at the time of the communication. Both authors had unstable childhood years, were subjected to violence and sexual assault and suffered from psychological problems. In 1990, at the age of 14 and 15 respectively, the authors committed assault and were sentenced for that crime. As they had also abducted, raped and killed a second victim, in 1990 they were convicted to life imprisonment in relation to this crime. The authors' appeals were dismissed. At the time that the offences were committed, murder was punishable by mandatory life in prison for adult offenders. That penalty was discretionary for child offenders. At that time, a life sentence did not mean for the term of someone's 'natural life'; rather it depended upon judicial and administrative processes. After 10 years had been served, the person could apply for release on licence. In 1990, that scheme was abolished and replaced with a right to apply for a determination of the life sentence after eight years had been served. Between 1997 and 2005 numerous legislative changes were made in Australia to sentencing legislation which amongst other things, the authors claimed, meant that they had no possibility of parole.[555]

The authors claimed that the imposition of a life sentence without possibility of parole for crimes committed as children: (1) was incompatible with obligations under Article 24 (1) of the Covenant (right of the child); (2) was in breach of Article 10 (3) of the Covenant (child offenders to be segregated from adults and given treatment appropriate to their age) as it was incompatible with the requirement that the essential aims of the penitentiary system be "reformation and social rehabilitation"; and (3) constituted cruel, inhuman and/or degrading punishment and imposing such a sentence breaches Article 7 of the Covenant. They further claimed that by failing to ensure that the authors did not become subject to a heavier penalty than the one that was applicable to them at the time the crime was committed, Australia was in breach of its obligations under Article 15 of the Covenant (no punishment without law).[556]

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[554] HRC, UN Doc. CCPR/C/112/D/1968/2010, 22 October 2014.
[555] *Bronson Blessington* , para 2.1-2.13.
[556] *Ibid,* paras 3.1-3.6.

All the claims were considered admissible by the HRC. The Committee held that Australia had violated the authors' rights under Articles 7, 10 and 24 of the Covenant. The Committee considered that the imposition of life sentences on the authors as children could only be compatible with Article 7, read together with Articles 10 and 24 of the Covenant "if there is a real possibility of review and a prospect of release, notwithstanding the gravity of the crime they committed and the circumstances around it. That does not mean that release should be necessarily granted. It rather means that release should not be a mere theoretical possibility and the review procedure should be a thorough one …." The Committee noted that the review procedure was subjected to such restrictive conditions that the prospect of release seemed extremely remote.[557]

Furthermore, the release, if it ever occurred, would be based on the impending death or physical incapacitation of a claimant rather than on the principles of reformation and social rehabilitation, which are contained in Article 10 of the Covenant. The Committee recalled its General Comment No. 21 on Article 10 (humane treatment of persons deprived of their liberty) stating that no penitentiary system should only be retributory and that it should seek to reform and socially rehabilitate the prisoner. The Committee considered that taking into account the lengthy period prescribed before the authors were entitled to apply for release on parole, the restrictive conditions imposed by the law to obtain such release, and the fact that the authors were children at the time they committed their crimes, the life sentences being served did not meet the obligations of the State party under Article 7 and subjected the authors to cruel, inhuman and/or degrading punishment. The State party was ordered to provide an effective remedy, including compensation. The State party was also obligated to review its legislation to ensure conformity with the relevant Articles of the Covenant and allow the authors to benefit from the reviewed legislation.

[557] *Ibid,* para 4.18.

The HRC found that given the 1999 Act, the sentences imposed on both Elliot and Blessington provided no genuine chance of release and were thus in breach of the UN Covenant, in that they violated their rights against cruel and degrading treatment. In coming to this conclusion, the HRC considered its General Comment No.21 of 1992 in which it emphasized that penitentiary systems should seek the reformation and social rehabilitation of the prisoner and not just retribution.[558] Fitz-Gibbon opines that the finding of the Committee 'recognised that the retrospective sentencing legislation imposed not only removed the hope of release but also denied both the opportunity to rehabilitate and to have that rehabilitation recognised through release at a later date. For a jurisdiction to allow the removal of hope of release for a child sentenced to life, regardless of the offence committed, is quite clearly out of step with human rights obligations and international sentencing practice'.[559] The State of New South Wales' law in this regard contradicted the provisions of the CRC, that for children sentenced to life imprisonment, the possibility of release must be realistic and regularly considered.[560] Sentencing a child to life without parole disregards the rehabilitative potential of the child.[561]

The CRoC has said in its General Comment No.24 that no child who was below the age of 18 at the time he or she committed an offence should be sentenced to life imprisonment without the possibility of a parole.[562] Unlike for adults, the period to be served before consideration of parole should be substantially shorter for children. Moreover, the possibility of parole should be regularly reconsidered.[563] Although the

[558] UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, para 10 https://www.refworld.org/docid/453883fb11.html [accessed 10 February 2023]
[559] Fitz-Gibbon "Life without parole in Australia: Current practices, child sentences and retrospective sentences reform" in Van Zyl Smit and Appleton(eds) *Life imprisonment and human rights* (2016) 84.
[560] CRoC: General Comment No. 24 (2019), Para 81.
[561] William " Life-with-hope sentencing: The argument for replacing life without parole sentences with presumptive life sentences" 2015 (76) *Ohio State Law Journal* , 1051–1085 . See also Dawit Mezmur B, "The Convention on the Rights of the Child, migration and Australia: Repositioning the Convention from being "a wish list" to a "to do list" the 2018 Australian human rights institute annual lecture." https://repository.uwc.ac.za/handle/10566/6343 , where the author discusses some of the measures Australia has taken against migration, including immigration detention (accessed 20 September 2020)
[562] CRoC: General Comment No. 24 , para 81.
[563] *Ibid.*

CRoC is yet to review cases alleging this infringement, the CRoC's view in the General Comment makes its position predictable.

The then New South Wales Attorney General was of the view that the HRC had neglected the gruesome manner in which the two accused murdered the victim. He submitted that the HRC had failed to consider the right of the community to protection against such acts of barbarism and the need to impose life imprisonment sentences even on child as a means of deterrence.[564] It is submitted that a sentence of life without parole on children amounts to a condemnation of death of the child in prison. Moreover, such sentence contradicts the understanding that children have potential for growth and maturity. Also, being sentenced to life without parole, diminishes the possibility of rehabilitation.[565] The Committee's finding that Australia should review its approach to Juvenile Life Without Parole( JLWOP) nationally and this can be seen as an instance wherein the Committee gave a 'daring' order. If the CRoC received a complaint of this nature it is also likely to make a far-reaching order on the issue of JLWOP. In its General Comment 24, the Committee stated that it 'strongly recommends that States parties abolish all forms of life imprisonment' for all offences committed by persons who were below the age of 18 at the time of the offence.[566]

### 3.5.9 ***N.K v. the Netherlands***,[567]

The author, who was below the age of 18 was convicted of public violence(verbal aggression and theft) and was sentenced to 36 hours of community service, or 18 days in a detention centre for children.[568] The author was also ordered to present herself for purposes of having her DNA sample taken, in accordance with the Dutch DNA testing which requires that DNA samples be taken from convicted persons for whom pre-trial detention may be imposed or any offence carrying a minimum statutory prison

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[564] Fife-Yeomans "NSW will defy UN on killers" *The Daily Telegraph* (2014-11-25).
[565] De la Vega and Leighton "Sentencing our children to die in prison: Global law and practice" 2008 (42) *University of San Francisco Law Review* , 983 – 1044.
[566] CRoC: General Comment No. 24, para 81.
[567] HRC, UN Doc. CCPR/C/120/D/2326/2013/Rev.1
[568] *Ibid*, para 2.1

sentence of at least four years.[569] A DNA sample was taken of the author to determine her DNA profile and enter into the DNA database.

The author claimed that her right to non-interference with her private life, under Article 17 of the ICCPR has been violated.[570] The author further claimed a violation of her right under Article 14(4) of the ICCPR, according to which, in the case of children in conflict with the law, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.[571]

The HRC found a violation of the author's right to non-interference with her private life under Article 17 of the ICCPR. In reaching this conclusion, the HRC considered that the collection of DNA for purposes of analysing and storing to be used in the future for criminal investigation is sufficiently intrusive to constitute interference with the author's privacy.[572] Having established that the DNA testing constitutes an interference with the author's right to private life, the HRC held further that the interference was arbitrary, considering:

> "that children differ from adults in their physical and psychological development, and their emotional and educational needs. As provided for, in, among others, articles 24 and 14 (4) of the Covenant, State parties have the obligation to take special measures of protection. In particular, in all decisions taken within the context of the administration of juvenile justice, the best interest of the child should be a primary consideration. Specific attention should be given to the need for the protection of children's privacy at criminal trials."[573]

N.K. is interesting because it provides a unique set of facts in terms of children's rights to privacy in DNA testing in the criminal justice system. The HRC's finding that DNA testing of children can constitute an interference with their right to privacy lays new jurisprudence for children's rights in the justice system.

[569] *Ibid.*
[570] *Ibid*, para 3.2.
[571] *Ibid*.
[572] *Ibid.*
[573] *Ibid,* para 9.10.

### 3.6 Important principles for the CRoC

#### 3.6.1 Introduction

Each of the eight treaty body committees have to examine cases only on the basis of its own treaty or convention. The treaty body committees may not find violations of treaties that are not their own, however, there are instances in which treaty body committees refer to relevant provisions in other treaties. Moreover, the decisions of the HRC and CAT committee are not legally binding on other Committees, but only binds the particular state party against whom a complaint is brought.[574] The HRC, has demonstrated how inter alia, Articles 24, 10, 17, 23 should be interpreted through its substantial case law.[575] When the CRoC considers complaints, it should take into account the jurisprudence of the other treaty bodies.[576]

In *Damian Thomas*, the HRC held that the state party had violated the authors' right to be separated from adult prisoners as a child, due to his status as an accused and not a convicted child. In *Corey Brough*, the HRC held that the author was convicted of the crimes he was accused of and therefore, he did not hold the status of an accused person. This view reflects the distinction in Article 10 of the ICCPR between accused and convicted persons. Although the two cases were years apart, the HRC kept to its jurisprudence. The requirement in the CRC to separate adult prisoners from children does not specify whether it is applicable to both accused children and convicted children. Unlike Article 37 (c), Article 10 (2) (a) of the ICCPR specifically requires that convicted persons be separated from accused persons. Perhaps the CRoC can extend the right of child offenders to be separated from adults by distinguishing between convicted and accused children and introducing a new category requiring that convicted children should be separated from accused children. In *Cory Brough*, the HRC referred to its own jurisprudence and held that persons deprived of their liberty should not be subjected to torture, or hardship or constraint, other than that resulting

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[574] De Zayas (2015) 179.
[575] De Zayas (2015) 179.
[576] *Ibid*, 190.

from their deprivation of liberty and that such persons be accorded respect and dignity as that of free persons.

In *Sharifova*, the Committee recalled from its previous jurisprudence that the wording, in article 14, (3)(g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.[577] The Committee recalled further from its jurisprudence that in cases of forced confessions, the burden was on the State to prove that statements made by the accused have been given of their own free will. The Committee recalled once again that juveniles are to enjoy at least the same guarantees and protection as those accorded to adults under article 14 of the Covenant.

In *Valentina Kashtanova and Gulnara Slukina*, the Committee referred to its General Comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment in which the Committee emphasised the need for recognition by States parties of the right to lodge complaints concerning ill-treatment of persons in detention in their domestic law. In the same General Comment, the Committee also reiterated that State party reports must contain remedies available to persons who have been ill-treated whilst in detention.[578] The Committee also recalled its General Comment No. 35 (2014) on liberty and security of persons, in which it stated that when children are arrested, notice of the arrest and the reasons should also be provided directly to their parents, guardians or legal representatives. Interestingly, the Committee also referred to the jurisprudence of the CRC, in particular General Comment No. 10 of , 2017 on children’s rights in juvenile justice,[579] according to which the authorities (police, prosecutor, judge) must explain to a child

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[577] *Sharifova,* para 6.3.
[578] Para 8.3.
[579]CRoC *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, available at: https://www.refworld.org/docid/4670fca12.html [accessed 29 October 2022]

and his or her parents or guardian, the charge being laid against the child.[580] Mere submission of a document is insufficient. This is an example of where the treaty bodies refer to the jurisprudence of other treaty bodies. The HRC also referred to a previous case, *Khadzhiev v. Turkmenistan*,[581] In which it was established that the burden of proof rested on the State party to refute allegations of torture. Similarly, it considered *Krasnova v. Kyrgyzstan* where the Committee established that notice of the arrest and the reasons for the arrest of juveniles should also be provided directly to their parents, guardians or legal representative.[582]

In *Vyacheslav Berezhnoy*, the HRC recalled that article 9 (4) of the Covenant and its longstanding jurisprudence provided that a detained person shall be entitled to take proceedings before the court. If there was no lawful basis for continuing the detention, the judge must order release. The HRC recalled its General Comment No. 17 on the rights of the child and its General Comment 32 on the right to equality before courts and tribunals and to a fair trial and its jurisprudence, in which it stated that accused juvenile persons were entitled to be tried as soon as possible in a fair hearing. The HRC also noted that the right to a fair trial includes expeditious rendering of justice without delay. In fact, the HRC held that with respect to children, an especially strict standard of promptness should be applied and a child should be brought before a judge within 24 hours. In *Lakpa Tamang*, the HRC held that acts of torture inflicted by police officers on a child, with the aim of coercing a confession of a crime, amounted to a violation of Article 7, read together with Article 24.

In *Jessop,* the HRC noted that children should at least enjoy the same guarantees and protection as those accorded to adults under Article 14 of the ICCPR. In ***Blessington****,* the Committee considered that the imposition of life sentences on children could only be compatible with Article 7, read together with Articles 10 and 24 of the Covenant if

[580] CRoC: General Comment No.24, Para 59. This provision also appeared at para 48 in CRoC: General Comment No.10 , which has now been replaced by General Comment No.24.
[581]*Khadzhiev v Turkmenistan*.
[582]*Krasnova v. Kyrgyzstan.*

there is a real possibility of review and a prospect of release, notwithstanding the gravity of the crime they committed and the circumstances around.

### 3.7 Conclusion

This chapter sought to analyse the views of the HRC against the international legal framework for children in the justice system and to determine whether there are important principles for the work of the CRoC going forward. It is submitted that so far as the international legal framework is concerned, the CRC has provided for the protection of the rights of children in the justice system extensively. In fact, it can be argued that the CRC and its related instruments offer better protection to children in conflict with the law, and in general. One can for instance predict the outcomes of similar cases if and when presented to the CRoC, by reading the CRoC's recent General Comment No.24 on Children's rights in child justice systems. The CRoC is yet to give its views on issues pertaining to children in conflict with the law. De Zayas has said that case law 'is not merely curative, but in a very real sense preventive, of human rights violations, because once a decision, opinion or judgment has become public, governments and individuals know that in similar cases the norms should be applied in a prescribed way. Case law is thus eminently educational'.[583]

One important principle which the HRC maintained throughout the cases is that children must be accorded special treatment even if they are in conflict with the law. Others, as highlighted above include the fact that a child has to be brought before a judge within 24 hours of his or her arrest. That coercing a child to confess by inflicting physical or psychological pain on him or her falls under the definition of torture when read with Article 24 of the ICCPR and that apart from separating children from adults, accused children should further be separated from convicted children. Although the rights of children have been justiciable before other treaty body committees, the OPIC has ample opportunity to define and advance the rights of children, of course by taking into account established jurisprudence of other treaty body committees. The

[583] De Zayas (2015) 179.

following chapter, chapter 4 explores the right of the child to respect for family life and non-interference with the family unit.

# Chapter 4: The right of the child to respect for family life and to non-interference with the family unit

## 4.1. Introduction

Although there is no formally established legal definition of the family that is internationally accepted,[584] international instruments such as the UDHR recognises that family is the "fundamental group of society".[585] The ICCPR makes a similar recognition: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state".[586] Likewise, the ICESCR also provides that "...the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society".[587] In its preamble, the CRC states that "Convinced that the family, as the fundamental group of society…".[588] The HRC has clarified that the term "family" for the purposes of Article 17 must be interpreted broadly "to include all those comprising the family as understood in the society of the State party concerned".[589]

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[584] Khazova and Mezmur "UN Committee on the rights of the child: Reflections on family law issues in the jurisprudence of the CRC committee" in Marrus and Laufer-Ukeles *Global reflections on children's rights and the law: 30 Years after the Convention on the Rights of the Child* (2021) 307.
[585] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art 16.
[586]ICCPR, Article 23.
[587] ICCPR, Art 10(1).
[588]UNCRC, Preamble.
[589] HRC: CCPR General Comment No. 16 of 1988 on Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation UN Doc HRI/GEN/1/Rev.1 at 21 (1994).

The UDHR gives the first pronouncement on the right to respect for privacy and family: "No one shall be subjected to arbitrary interference with his/[her] privacy, family, home or correspondence, nor attacks upon his/[her] honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".[590]

This chapter discusses children's right to a family life and family related rights through the jurisprudence of the HRC .[591] Where relevant, the jurisprudence of other treaty bodies such as the CRoC are referred for purposes of a comparative analysis.

#### 4.1.1. Definition of Terms

According to General Comment No.16 of 1988 on Article 17 of the HRC,[592] the term "unlawful" "means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."[593]

The HRC has defined "arbitrary interference" to include interference provided for under the law. It has also clarified that "the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".[594]

Finally, the HRC has stated that "for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned."[595]

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[590] UDHR, adopted by UN General Assembly Resolution 217 A(III) of 10 December 1948.

[591] This is because at the time of writing this chapter, the human rights committee's jurisprudence was the only treaty to have received communications on the right to non-interference with the family unit from children or on behalf of children. Moreover, the ICCPR provides for a clear protection against interference with the family unit.

[592] HRC: CCPR General Comment No. 16 : Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation.

[593] *Ibid,* para 3.

[594] *Ibid,* para 4.

[595] *Ibid,* para 5.

For the purposes of this chapter, the above definitions are adopted, because the communications discussed hereunder are from the HRC.

### 4.1.2. Scope and delimitation

First, this chapter is concerned with the right to non-interference with the family unit as it relates to family separation due to migration enforcement laws. Second, the international legal framework used in this chapter is limited to the provisions of the human rights treaty bod(y)ies under which complaints have been brought on the right to non-interference with family life, privacy and home.

Third, two communications have been identified and pertain to the privacy aspects of Article 17 of the ICCPR. However, the views of the HRC in both cases focus on the right to privacy of the families in general and not specifically the rights of the children involved. For this reason, these communications are not discussed in this chapter.[596] Fourth, there are communications on custody issues in which complainants claim interference with the family unit. Such cases are noted,[597] but do not fall within the scope and purpose of this chapter.

Finally, It is noted that this chapter is significantly shorter than the preceding chapter. This is justified by the fact that within the present theme, fewer communications were found. Moreover, as already stated above, some communications which do not fit within the scope of this chapter are not included.

## 4.2. The Human Rights Committee's framework on the right to non-interference with the family unit

Article 17(1) of the ICCPR provides for the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence, and further that

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[596] *Antonios Georgopoulos et al. v. Greece,* United Nations Human Rights Committee, UN Doc. CCPR/C/99/D/1799/2008, 14 September 2010 and A*nnakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka* , HRC, UN Doc. CCPR/C/103/D/1862/2009, 18 April 2012.

[597] *Darwinia Rosa Monaco de Gallicchio v. Argentina,* United Nations Human Rights Committee, UN Doc. CCPR/C/53/D/400/1990, 3 April 1995; *Manuel Balaguer Santacana v. Spain,* HRC, UN Doc. CCPR/C/51/D/417/199, 27 July 1994 ; *Natalya Tcholatch v. Canada*, HRC, UN Doc. CCPR/C/89/D/1052/2002, 20 March 2007.

everyone has the right to the protection of the law against such interference or attacks.[598] As Lixinski notes, Article 17 thus provides for a prohibition on unlawful and arbitrary interference with the family. Article 17 does not have a limitations clause, it is simply implied in the drafting of Article 17 through the words "arbitrary and unlawful".[599] Additionally, Article 24 of the ICCPR provides for the protection of the rights of the child both by the fact that he or she is a child and also by the fact that the child is a member of the family.[600] The HRC has noted in its General Comment No. 19 of 1990 on the protection of the family, the right to marriage and equality of spouses, that the concept of family may differ in different countries, and even in different regions within a country. Therefore the HRC notes that it is difficult to assign a standard definition to the concept. However the HRC has emphasised that "when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23."[601]

General Comment No. 16 of 1988 on the right to respect of privacy, family, home and correspondence, protection of honour and reputation,[602] expands on Article 17 by providing that the protection against unlawful interference is applicable whether such attack emanates from state authorities or from natural or legal persons.[603] To this end, a States party is required to adopt legislation and other measures to give effect to the

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[598] ICCPR, Art 17(2).

[599] Lixinski "Comparative international human rights law: An analysis of the right to private and family life across human rights jurisdictions" 2014 (32) *Nordic Journal of Human Rights*. See HRC: CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation paras 3-4 . The term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. 4. The expression 'arbitrary interference' is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."

[600] Lixinski 2014 (32) *NJHR* 102. See also HRC: CCPR General Comment No. 19 of 1990 on Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the UN Doc HRI/GEN/1/Rev.1 at 28 (1994).

[601] *Ibid,* para 2.

[602] HRC: CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation.

[603] *Ibid*, para 1.

prohibition against such interferences and attacks, and to further adopt legislation to protect the right.[604] In fact the HRC has stated clearly that above the protection in Article 17, the onus remains on States parties to make provision for the right set in Article 17.

### 4.3. Family separation due to migration enforcement laws

The following section considers communications wherein families are separated or risk being separated due to migration enforcement laws. The communications are classified according to the principles they establish.

#### 4.3.1 The *locus classicus* on the right to non-interference with the family unit: the case of *Winata*

In *Hendrick Winata and So Lan Li v. Australia*,[605] which was held in 2000, the authors were Indonesian nationals who had both entered Australia on a student and visitor's visa respectively and commenced a de facto relationship akin to marriage. They gave birth to a son, Barry Winata, who became an Australian citizen. The authors' application for protection and parent visa were denied and were due to be deported to Indonesia. The communication was submitted on behalf of their child, Barry Winata.[606] The authors submitted that their removal to Indonesia would violate their rights and their child's rights under Articles 17 (protection against arbitrary or unlawful interference with family), 23 paragraph 1 (protection of family) and 24 paragraph 1 (protection of child) of the ICCPR. They submitted further that the protection of unlawful or arbitrary interference with family life under Article 17 and their de facto relationship was recognised under Australian law. In this regard they also claimed that should their son remain in Australia while they were removed to Indonesia, it would constitute interference with the family unit.[607]

[604] *Ibid*.
[605] HRC, UN Doc. CCPR/C/72/D/930/2000, 16 August 2001.
[606] *Winata*, paras 2.1-2.6.
[607] *Ibid,* paras 3.1-3.6.

The Committee found that authors' deportation, if implemented, amounted to violations of Articles 17 (protection against arbitrary or unlawful interference with family), 23 paragraph 1 (protection of family) and 24 (1) (protection of child) of the Covenant.[608] In relation to the claimed violation of Article 17, the Committee found that the removal of the parents to Indonesia, if implemented, would violate Article 17 (1) in conjunction with Article 23 in respect of all the authors and their child, and additionally a violation of Article 24 paragraph 1 of the child. In making this finding, the Committee first and foremost considered that the choice of having the child either leave to go to Indonesia with his parents, or stay alone in Australia, amounted to interference:

> In the present case, the Committee considers that a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and contrary to article 17 of the Covenant.[609]

The Committee also acknowledged that there was significant scope for the State party to enforce their immigration policy and to deport persons who were unlawfully in their territory. However, such discretion was not to be exercised arbitrarily or without limitation. Further, the Committee considered that simply removing the parents to Indonesia for purposes of enforcing its immigration policies (without any additional factors for removing them) was not an adequate reason and was therefore an arbitrary interference with the family unit. The Committee considered the fact that both authors had been in Australia for over fourteen years; that the authors' son had grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that.[610]

[608] *Ibid*, para 7.2.
[609] *Ibid,* para 7.2.
[610] *Ibid,* para 7.3.

It considered further that in view of this duration of time, it was incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness. In relation to the violation of Article 24 (1), the Committee considered such a violation based on the fact that there had been a failure to provide the necessary measures of protection to a minor. The State party was ordered not to remove the authors to Indonesia until they had an opportunity for their parent visas to be examined with due consideration given to the protection of the child.[611]

The decision in *Winata* is significant because it is the first case in which the HRC held that removing individuals who are illegally present in a States party's territory can amount to a violation of the right to family life. According to Burchill, the HRC's decision "marks a shift in international practice which has commonly given States a wide margin of discretion in upholding their immigration laws when it comes to individuals illegally present in their territories".[612]

Burchill is of the view that the authors must have been aware of the consequences of their actions, since they applied for asylum a day after their son had obtained Australian citizenship and not during the time that they had spent illegally in Australia.[613] In fact Australia raised this point in its arguments to the HRC that the disruption to the family unit was caused by the authors, who intentionally acted contrary to Australia's immigrations laws, unfortunately, the HRC failed to address the point.[614] Burchill identifies that the main flaw in the HRC's reasoning is that they focused too much on the rights of the parents instead of the child. The HRC should

[611] *Ibid.*
[612] Burchill "The right to live wherever you want? The right to family life following the UN Human Rights Committee's decision in Winata" 2003 (21) *Netherlands Quarterly of Human Rights.*
[613] Burchill 2003 (21) *NQHR* 242.
[614] Joseph "Human rights committee: Recent decisions"2001 (1) *Human Rights Law Review*.

have focused on the rights of Barry, considering that he would be most affected by the decision to remove his parents from Australia, in order to make a sound reasoning.[615]

Perhaps the reasoning of the dissenting view in the case is sound and more convincing. The dissenting view submitted that since there was no obstacle in the family living in another country, such as Indonesia, their country of origin, it cannot be said that removing the authors from Australia would interfere with their right to a family life. On the question of whether or not the removal of the authors would be arbitrary, the dissenters reasoned that the States party (Australia) should not be required to demonstrate additional factors to prove that their decision to remove the authors was arbitrary. The dissenters argued that the illegal status of the authors does not entitle them to stay in the country, irrespective of the fact that they established a family in Australia.[616]

It is submitted that although the rights set out in the ICCPR are individual rights, the protection offered by Article 23 protects individuals who together form a family unit. The right to protection of family life cannot be adequately protected if it focused solely on an individual and not on the family unit as a whole.[617]

### 4.3.2 Advantage to a child's development in living with both parents in Farag

In *Farag El Derwani v. Libya,*[618] which was decided two years after *Winata,* the author was granted asylum and got approved for family reunification in Switzerland. The author's wife and three youngest children sought to leave Libya to join him in Switzerland. They were stopped at the Libyan-Tunisian border where the wife's passport, which also covered three of her children, was confiscated. The author's wife had sought to retrieve her passport on numerous occasions but failed. She and her six children had no income and faced substantial economic hardship. She fell sick due to

[615] Burchill 2003 (21) *NQHR* 242.
[616] *Winata,* Dissenting Opinion.
[617] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, HRC, UN Doc CCPR/C/12/D/35/1978, 9 April 1981, para 9.2.
[618] HRC, UN Doc. CCPR/C/90/D/1143/2002, 31 August 2007.

fear and strain. Her three oldest children, who had their own passports, could not leave her in difficulty.[619]

The husband brought a claim on behalf of himself and his family, claiming several violations, including Articles 17 (protection against arbitrary or unlawful interference with family), 23 (protection of the family) and 24 (rights of the child) of the ICCPR. He further maintained that the prevention of his wife and children from joining him in Switzerland amounted to interference with family life was arbitrary and in breach of Articles 17 and 23 of the Covenant. The State party's action had effectively impeded all six of the children from fully enjoying their right to family life. The author also argued that by not permitting family reunification, the State party had placed the children in dire economic need as they had been deprived of their sole means of support. He argued further that the State party had failed to give due consideration to the impact thereof on the well-being of the children under eighteen years of age and had violated Article 24 of the Covenant.[620]

The Committee found violations of Articles 17 (protection against arbitrary or unlawful interference with family) and 23 (protection of the family) in respect of the author, his wife and all children; and a violation of Article 24 (rights of the child) in respect of the children under the age of eighteen as of September 2000. As to the claims under Articles 17, 23 and 24, the Committee noted that the State party's action amounted to a definitive, and sole, barrier to the family being reunited in Switzerland. In the absence of justification by the State party, the Committee concluded that the interference with family life was arbitrary in terms of Article 17 with respect to the author, his wife and six children, and that the State party failed to discharge its obligation under Article 23 to respect the family unit in respect of each member of the family.[621]

On the same basis, and in view of the advantage to a child's development in living with both parents absent persuasive countervailing reasons, the Committee

[619] *Farag*, paras 2.1-2.3.
[620] *Farag,* paras 3.1-3.4.
[621] *Farag,* paras 6.1-6.3.

concluded that the State party's action had failed to respect the special status of the children, and found a violation of the rights of the children up to the age of eighteen years under Article 24. The State party was under an obligation to ensure that the author, his wife and their children had an effective remedy, including compensation and return of the passport of the author's wife without further delay, allowing her and the covered children to depart the State party for purposes of family reunification.[622]

It is submitted that the HRC's consideration of "advantage to a child's development in living with both parents", and the need to respect the special status of the child, is in line with the CRoC's jurisprudence in its General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, where the CRoC has stated that:

> "Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein. In this context, States parties are particularly reminded that 'applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner' and 'shall entail no adverse consequences for the applicants and for the members of their family' (art. 10 (1)). Countries of origin must respect 'the right of the child and his or her parents to leave any country, including their own, and to enter their own country' (art. 10 (2))."[623]

In view of the above, one can predict that the CRoC would have come to a similar conclusion in *Farag El Derwani* as the HRC. As Ippolito notes, "As to the identification of the child's best interests in expulsion cases, it emerges from the CRC that the most prominent factor to be considered is certainly the unity of the family. The preamble is

[622] *Farag,* para 6.3.
[623] CRoC : General Comment No. 6 of 2005 on the Treatment of unaccompanied and separated children outside their country of origin UN Doc CRC/GC/2005/6.

rather revealing in this connection, as it recalls both the determination of States Parties to afford the family "all necessary protection "and the idea that the harmonious development of the child's personality requires that he/she grows up "in a family environment".[624]

Apart from general comment no.6 , Joint general comment no.3 of the CRoC and no.22 of the CMW (2017) also protect the rights of children in migration situations. General comment 6 of the CRoC and joint general comments no. 4 of the CRoC and No. 22 of the CMW both deal with the rights of migrant children. The former is dedicated to unaccompanied and separated children outside of their country of origin, and the latter, with the human rights of children in the context of international migration. Whilst the scope of general comment no.6 is limited only to unaccompanied and separated children, joint general comments no.4 of the CRoC and No.22 of the CMW applies to all migrant children, irrespective of whether they are unaccompanied or separated.

The best interests principle as provided for by the CRC suggests that the child's best interests be considered in expulsion cases to protect the child's physical or mental well-being, irrespective of whether the expulsion order is for a parent or a child.[625] Detrick has stated, "Articles 9( 1)and 10(1) of the Convention on the Rights of the Child" embody the principle of family unity, as they share the aim of protecting children against separation from their parents."[626]

In *Ngambi and Nebol v France*, held a year after *Farag El Derwani*, the HRC confirmed that Article 23 of the ICCPR guarantees the protection of family life and family reunification.[627] Furthermore, in its General Comment No.19, the HRC has stated that "The possibility to live together implies the adoption of appropriate measures, both

[624] Ippolito "What protection for children of migrant workers facing deportation" in Ippolito & Biagioni(eds) *Migrant children: Challenges for public and private international law(*2016) 200-201.
[625] Leloup, 'The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency' (2019) 37 *Netherlands Quarterly of Human Rights* 50, 54-56.
[626] Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 191.
[627]*Benjamin Ngambi and Marie-Louise Nébol v. France*, United Nations Human Rights Committee, UN Doc. CCPR/C/81/D/1179/2003, 16 July 2004, para 6.4

at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."[628]

### 4.3.3 Interim measures in family separation matters: Mansour Leghaei

*Mansour Leghaei et al. v. Australia*,[629] followed in 2010. In this case, Mr. Mansour Leghaei, an Iranian national residing in Australia submitted the communication on his behalf and on behalf of his wife and their four children. Three of the children were Australian citizens, and one an Iranian citizen. Only one child was a minor and also born in Australia. The author had been residing in Australia with short-term visas until he applied for a permanent visa, however, this application was denied on grounds that he was a threat to national security.[630]

The author claimed that the decision to deny him a permanent visa to remain in Australia made him liable to removal from Australia to the Islamic Republic of Iran, in breach of a number of his rights including Article 17 (protection against arbitrary or unlawful interference with family), 23 (protection of the family), 24 (rights of the child). As far as Articles 17, 23 and 24 were concerned, he argued that the legal consequence of the refusal of his visa was his deportation to the Islamic Republic of Iran, which would have the practical effect of separating him from his family and his community in Australia and thereby interfering with his family life.[631]

The Committee held that the facts disclosed a violation of Article 17 (protection against arbitrary or unlawful interference with family) read in conjunction with Article 23 (protection of the family) of the Covenant, with regard to the author and his family.[632] With regards to the claims under Articles 17 and 23 the Committee recalled its jurisprudence that a State party's refusal to allow one member of a family to remain in its territory could involve interference in that person's family life. The Committee considered that a decision by the State party that involved the obligatory departure of

[628] HRC : CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses.
[629] HRC UN Doc. CCPR/C/113/D/1937/2010, 23 March 2015.
[630] *Mansour Leghaie* Paras 2.1-2.10.
[631] *Ibid*, paras 3.1-3.7.
[632] *Ibid*, para 11.

a father of a family that included a child, and that compelled the family to choose whether they should accompany him or stay in the State party, was to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case.[633] Chaudry *et al* have identified the psychological impact that family separation could have on the child.[634]In the present circumstances, the Committee considered that the decision by the State party to refuse the author's request for a visa, which led to this situation, constituted interference within the meaning of Article 17 of the Covenant.

The Committee had to determine whether such interference with his family life was arbitrary or unlawful pursuant to Article 17 paragraph 1 (protection against arbitrary or unlawful interference with family) of the Covenant. The Committee recalled that the notion of arbitrariness included elements of inappropriateness, injustice, lack of predictability and due process of law. In the present case, the author had lived more than 16 years legally in the territory of the State party without any legal restrictions. The Committee considered that disrupting long-settled family life imposed an additional burden on the State party as far as the procedure leading to such disruption was concerned. In light of the author's 16 years of lawful residence and long-settled family life in Australia and the absence of any explanation from the State party as to the reasons for terminating his right to remain, except for the general assertion that it was done for "compelling reasons of national security", the Committee found that the State party's procedure lacked due process of law.[635]

The State party had, therefore, not provided the author with an adequate and objective justification for the interference with his long-settled family life. In the specific circumstances, the Committee considered that the State party had violated the author's rights under Article 17, read in conjunction with Article 23, of the Covenant, and, as a result, had also violated the rights of his family under those provisions.

[633] *Ibid*, paras 10.3- 10.4.
[634] See Ajay Chaudry et al, 'Facing Our Future: Children in the Aftermath of Immigration Enforcement', The Urban Institute (2010) <www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.PDF> (accessed 14 February 2022).
[635] *Ibid*, para 10.5.

Having reached this conclusion, the Committee decided not to examine separately the remaining grounds invoked by the author under Article 24 (rights of the child) of the Covenant. The State party was obligated to provide the author with an effective and appropriate remedy, including a meaningful opportunity to challenge the refusal to grant him a permanent visa and compensation.[636]

Perhaps the important element that stood out in *Mansour Leghaei* was the interim measure which the HRC ordered to restrain Australia from removing the author from Australia. According to the HRC, the purpose of the interim measure was to prevent irreparable harm to the author's family life. It is worth noting that the HRC had previously applied its practice of issuing interim measures to prevent irreparable harm to communications involving the risk of torture or death.[637] However, it applied the remedy in the present communication when it was argued on behalf of the author that the expulsion of him and his wife would result in abandonment and irreversible traumatisation of the author's 14 year old daughter, who was born in Australia, was an Australian citizen and had lived her whole life in Australia.[638]

### 4.3.4 Long settled family life as grounds for non-interference: Madafferi

The HRC has interpreted Article 17 by considering elements that need to be balanced against the state's interests. In Francesco *Madafferi v Australiai,*[639] which was decided in 2004, similar circumstances existed like in *Winata* above. Like in *Winata*, the HRC considered the fact that there was a long-established family life, the fact that the family's ties would be irreparably severed if the author was deported, as regular correspondence between the author and his family who lived in Canada would be limited.[640] Mr Madafferri was refused a visa to remain in Australia with his wife and four minor children due to complications with previous convictions. He and his family claimed to be victims of several violations by Australia including Article 17,

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[636] *Ibid*, paras 10.5-11.

[637]Saul "The Kafka-esque case of Sheikh Mansour Leghaei" 2010 (33) *University of New South Wales Law Journal* 637.

[638] According to the author's lawyer, Australia did not comply with the interim measure. See Saul 2010 (33) *UNSWLJ* 637.

[639]*Francesco Madaferri v Australia*, HRC, UN Doc. CCPR/C/81/D/1011/2001, 26 July 2004. It must be noted that the date of initial communication was 2001, however, the HRC gave its views in 2004.

[640]*Ibid,* para 10.5.

(protection against arbitrary or unlawful interference with privacy and family), 23 (protection of the family) and 24 (rights of the child). The authors claimed that as Mrs. Madafferri did not intend to accompany her husband to Italy if he were removed, the rights of all the authors and the children in particular, would be violated as the family unit would be split-up. The authors claimed that such a separation would cause psychological and financial problems for all concerned, but more particularly for the children, considering their young ages. The authors further claimed that the decision to reject Mr. Madafferri's visa was arbitrary.[641]

The Committee considered that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to Article 17 (1), in conjunction with Article 23 (protection of the family), of the Covenant in respect of all of the authors, and additionally, a violation of Article 24 paragraph 1 (protection of child), in relation to the four children due to a failure to provide them with the necessary measures of protection.[642]

The Committee considered that a decision by the State party to deport the father of a family with four young children and to compel the family to choose whether they should accompany him or stay in the State party was to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would have followed in either case. The Committee held that the State Party had not presented sufficient reasons to justify Mr Madaferri's removal and the consequences of his removal on the rights of his children. Thus, the Committee considered that the removal of Mr. Madafferi would have constituted arbitrary interference with the family, contrary to Article 17 (1), in conjunction with Article 23, of the Covenant in respect of all of the authors, and additionally, a violation of Article 24 (1), in relation to the four children due to a failure to provide them with the necessary measures of protection as minors.[643]

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[641] *Ibid*, paras 2.1-3.3.
[642] *Ibid*, para 9.8.
[643] *Ibid.*

As Ronen notes, "the Winata and Madafferi jurisprudence expanded the notion of 'interference' with the family with respect to situations where the family has a free-standing right to remain in that state of residence. It combined the candidate expellee's right to family life with the attachment of his or her family to the state of residence".[644]

Both *Madafferi* and *Winata* are examples of instances where state power to control immigration may be limited. As Dembour notes, the assumption that the state's power to control migration is "almost unfettered...a matter of well-established international law' is both historically inaccurate given the recent nature of migration control and 'problematic from a legal theory perspective"[645] as the general rule of law principle that requires constraint of state powers should apply to immigration.[646]

However, the international obligation of states to refrain from arbitrary or unjustified interference with the unity and privacy of families does not, of course, prohibit states from ever separating families. Rather, it simply demands an internationally cognizable justification that overrides the interests supporting family unity.[647]

According to Abram, for the young child, ties to an absent parent might break due to separation and furthermore, prolonged separation can be experienced as a permanent loss, which might cause profound emotional harm.[648] Children derive great benefits from the continuous care of their parents. While happy families share warmth and the security of family unity, unhappy families are happy in their own ways and involuntary separation of children can cause distress.[649] A state policy which intervenes in family life and deliberately separates children from their parents, when the best interests of the child does not dictate alternative care, may be interpreted as a misuse of public authority. Despite this, state intervention in family life through

[644]Ronen "The ties that bind: Family and private life as bars to the deportation of immigrants" (2012) (8) *International Journal of Law in Context*.
[645] Dembour *When humans become migrants: Study of the European Court of Human Rights with an Inter-American counterpoint* (2015) 117-8.
[646] Dembour (2015) 119–20.
[647]Starr and Brilmayer "Family separation as a violation of international law" 2003 (21) *Berkeley Journal of International Law* 213,272.
[648] Abram "The child's right to family unity in international immigration law" 1995 (17) *Law & Policy* 397,399.
[649] *Ibid,* 400.

migration restrictions still occurs despite parents and children desire to live together. Indeed, some authors have observed that it is a deliberate policy that does not take into consideration the best interests of the child.[650]

### 4.3.5 Decision to expel parent after birth of child constitutes new circumstances: Muneer

In *Muneer Ahmed Husseini v. Denmark*,[651] the HRC held that a decision to expel a father which was taken after the birth of his two children, constitutes new circumstances which the State party had neglected to consider in its decision to expel the author.[652] The HRC added further that the decision to expel the father would, if implemented, constitute arbitrary interference with the family unit as contemplated in Article 23(1) of the ICCPR. The author, an Afghan national, submitted the communication on his behalf to two minor children, both Danish citizens. The author was residing in Denmark and married a Danish national. The author was convicted for several crimes including robbery and was imprisoned for five years and six months. Consequently, he was ordered to be expelled with a permanent re-entry ban.[653]

The author claimed that the decision to expel him from Denmark violated his rights under Articles 2 (non-discrimination), 23 (protection of the family) and 24 (rights of the child) of the Covenant. He emphasized that inadequate consideration had been given to his right to a family life with his children and his family ties in Denmark. The author submitted that despite several restrictions placed on him since his release from prison, he maintained a family life despite not being able to live permanently with them nor provide financial support. The author claimed to have a good relationship with his children, including seeing them regularly. He therefore claimed his expulsion from Denmark and the ban on his re-entry would have constituted a violation of his right to family life under Article 23 of the Covenant. Additionally, the author submitted that his children were born after the decision to expel him and therefore maintained that the State party violated his children's rights under Articles 23 and 24

[650] *Ibid.*
[651]HRC, UN Doc. CCPR/C/112/D/2243/2013, 26 November 2014.
[652] *Muneer*, para 9.6.
[653] *Ibid*, paras 2.1-2.13.

of the Covenant. He also underlined that his children were Danish nationals and had no ties with Afghanistan.[654]

The Committee held that the author's removal to Afghanistan would violate his and his children's rights under Article 23 paragraph 1 (protection of family), read in conjunction with Article 24 (rights of the child) of the Covenant. The Committee considered the author's claims under Article 23 and observed that separation of the author from his children and the rest of his family in Denmark could have given rise to issues under Article 23 paragraph 1 of the Covenant. It reiterated its jurisprudence that when a State party refused to allow a member of the family to remain in its territory, this could amount to interference in that person's family life.[655]

The Committee considered that in the case presented, the decision to deport the father was an interference with the family life – in so far as it resulted in substantial changes in the family life. It found that despite severe restrictions imposed on the author, he was still able to maintain a close relationship with his family. In considering whether such interference was arbitrary or contrary to Article 23 paragraph 1 of the Covenant, it considered the significance of reasons for a person's removal versus the hardships the family would suffer as a result of their removal. In particular the Committee noted that the children were born after the decision to expel the author was taken, and that the State party had not reviewed those new circumstances – therefore it found that given the material before it, it could not conclude that due consideration was given by the State party to the right of the family to protection by society and the State nor to the right of children to special protection.[656]

The Committee found the deportation of the author without reviewing the new circumstances (the subsequent birth of the two children), would have amounted to a violation of Article 23 paragraph 1 read in conjunction with Article 24 of the Covenant. In essence, it concluded that the deportation to Afghanistan of the author would have violated Articles 23 paragraph 1, and 24 of the Covenant, of both the author and his

[654] *Ibid,* paras 3.1-3.8.
[655] *Ibid,* para 9.7.
[656] *Ibid,* para 9.3.

children. The Committee ordered that the State party review its decision to expel the author with a permanent ban on re-entry.[657]

International norms which protect family integrity and unity are often motivated by individual interests of keeping families together.[658] The communications discussed above show that the HRC requires that States parties must justify family separation by providing firstly that their actions do not amount to interference with the family unit and secondly, where the State's action amounts to an interference with the family unit, the State must prove that such interference is not arbitrary. Therefore, a State party that wants to deport a member of a family, must pass the two steps approach adopted by the HRC: first the decision to remove must not amount to an interference with the family unit, and second, such decision must not be arbitrary.

Starr and Brilmayer note that "At a minimum, we think there should be a clear presumption that involuntary family separation violates international law. To put this another way, the existence of involuntary family separation should be considered sufficient to overcome the ordinary baseline presumption of international law - that the actions of sovereign states are presumptively legitimate. Thus, states should have to justify separating families".[659] In fact, the HRC has confirmed that in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of ... respect for family life arise."[660]

### 4.3.6 The best interests of the child in deportation of parent: *D.T. v. Canada*

More recently, *D.T. v. Canada*,[661] in which the HRC delivered its views in 2016, concerned a Nigerian mother and her son, a Canadian citizen, born and raised in Canada. The author submitted the communication on her behalf and on behalf of her son. The author escaped Nigeria due to maltreatment from her ex-husband's family

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[657] *Ibid*, para 9.6.
[658] Starr and Brilmayer 2003 (21) *BJIL* 214.
[659] *Ibid*, 286.
[660] HRC: CCPR General Comment No. 15 of 1986: The Position of Aliens Under the Covenant.
[661] HRC, UN Doc. CCPR/C/117/D/2081/2011, 4 August 2011.
It must be noted that the views in the case were adopted in 2011. This case was discussed in chapter 6 "Non-refoulement".

and applied for asylum in Canada. The author's application was denied and she faced deportation to Nigeria. The author argued that if she is deported to Nigeria, her right under Articles 17 and 23(1) of the ICCPR and her son's right under Article 24(1) would also be violated.[662] She further noted that Nigeria does not have adequate healthcare and education facilities to cater for her son's needs, who was suffering from several health conditions including a heart murmur and a congenital malformation of the meniscus and Attention Deficit Hyperactivity Disorder(ADHD). The author also claimed that she and her son would be subjected to irreparable harm if deported to Nigeria.[663]

The HRC considered "that to issue a deportation order against the single mother of a 7-year-old child who is a citizen of the State party constitutes interference with the family, 15 within the meaning of article 17 of the Covenant".[664] On the issue of whether such interference was arbitrary, the HRC recalled its jurisprudence that "in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal".[665]

The HRC considered that in all decisions affecting a child, the best interests of the child must be a primary consideration. The Committee considered that the State party failed to give primary consideration to the best interests of the author's child , and that, as a result, "its interference with the author's family life and the ensuing insufficient protection afforded to her family generated excessive hardship to the author and her son."[666] Werner and Goeman note that "primary consideration" means that the

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[662] *D.T v. Canada* , para 3.1.
[663] This claim gives rise to non-refoulement infringements which has been addressed in chapter 6.
[664] *D.T. v. Canada,* para 7.5.
[665] *D.T. v. Canada* , para 7.6.
[666] *D.T v. Canada ,* Para 7.10.

interests of the child may not be given the same value as the interests of others, but should be considered weightier.[667]

Further, the HRC added that the issuance of a removal order against the author faced the author with the choice of leaving her 7-year-old behind in Canada, or exposing him to a lack of the medical and educational support on which he was dependent. Most importantly, the HRC considered that issuing a removal order against the author meant the author would have to leave her 7 year old behind. The HRC considered that:

> "No information has been provided to the Committee to indicate that the child had any alternative adult support network in Canada. It was thus foreseeable that the author would take her son back to Nigeria with her, with the consequence that he would be deprived of the socio-educational support he needed. Given the young age and special needs of the author's son, both alternatives confronting the family — the son remaining alone in Canada or returning with the author to Nigeria — could not have been deemed to be in his best interests. Still, the State party has not adequately explained why its legitimate objective in upholding its immigration policy, including in requiring the author to apply for a permanent resident status from outside Canada, should have outweighed the best interests of the author's child, nor how such an objective could justify the degree of hardship that confronted the family as a result of the decision to remove the author."[668]

For the reasons above, the HRC concluded that the removal order constituted interference in the family life of both the author and her son.

The HRC in *D.T. v Canada* considered the best interests of the child extensively unlike in the other cases discussed thus far in this thesis. This could be an indication that in recent jurisprudence children's right to have their best interests considered are given the same weight as the rights of the parent who is facing removal. In earlier cases, the views of the HRC were centred on the rights of the parents facing removals and the consequences of their removal on the family unit. The rights of the children involved are considered with the rights of the family as a whole and not given individual

[667] Jorg Werner and Martine Goeman "Families constrained , an analysis of the best interests of the child in family migration policies" (2015) 11 http://www.defenceforchildren.org/wp-content/uploads/2015/12/20151021_DC_Families-constrained.pdf (accessed 17 February 2023).
[668] *D.T v. Canada* , Para 7.10.

attention as in *D.T v Canada*. The focus is on protecting the right to non-interference with the family unit and not what unlawful interference would mean for the children in the family. According to Smyth, the best interests principle is most problematic in migration cases where the state's sovereign interests are weighed against the interests of the child.[669]

### 4.4 Conclusion

The objective of this thesis is to determine whether there are lessons for the CRoC within the jurisprudence of the other eight human rights treaty bodies for the work of the CRoC going forward. To that end this chapter sought to identify and discuss children's rights to non-interference with the family unit within the jurisprudence of the HRC. The communications discussed above have proven that respect for the right to non-interference with the family unit begins with first and foremost, the recognition that the family is the fundamental unit of society. As Jastram and Newland note :

> As the foundation, there is universal consensus that, as the fundamental unit of society, the family is entitled to respect and protection. A right to family unity is inherent in recognizing the family as a 'group' unit: if members of the family did not have a right to live together, there would not be a 'group' to respect or protect. In addition, the right to marry and found a family includes the right to maintain a family life together. The right to a shared family life is also drawn from the prohibition against arbitrary interference with the family and from the special family rights accorded to children under international law.[670]

The locus classicus for non-removal of persons illegally residing in a state's territory is *Winata*. The HRC considered "a long settled family life",[671] in *Madafferi* as grounds for non- removal. In *Farag El Deewani*, the HRC found violations of Article 17, 24 and 24 of the ICCPR "in view of the advantage to a child's development in living with both parents''.[672] With regard specifically to refugees and family reunification, the HRC has

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[669] Ciara Smyth, 'The Best Interests of the Child in the Expulsion and First Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?' (2015) *European Journal of Migration and Law* 70, 71.
[670] Jastram and Newland "Family unity and refugee protection" in Erika Feller *et al Refugee protection in international law: UNHCR's Global Consultations on International Protection* (2003).
[671] *Madafferi*, para 10.5.
[672] *Farag*, para 6.3.

clearly affirmed in *El Dernawi* v. Libya that a refugee "cannot reasonably be expected to return to his [or her] country of origin" to enjoy his or her right to family unity.

The HRC acknowledges the right of States parties to remove persons who are illegal from their territory, however, it also allows that such removals must not, as a general rule, interfere with the family unit and where it does interfere with the family unit, it must not be arbitrary. In *Muneer Ahmed Huseini*, the HRC developed its jurisprudence by holding that the decision to expel a father, which was taken after the birth of his two children constitutes "new circumstances" which a States party must consider in their decision to remove a parent. Even more interesting was the HRC's focus on the best interests of the child *D.T,* notably, the HRC had not focused on the rights of the children in cases such as *Mansour Leghaie.* The Committee's decision in *D.T.* which is more recent shows that the HRC is more "conscious" of the rights of children in family related cases and that in future, the rights of children will not be "invisible" in the midst of their parents' rights.

There is evidence in the jurisprudence of the CRoC, most notable in the CRoC's General Comments to predict the direction of the CRoC in similar cases. As Ippolito notes, "...the CRC can be safely interpreted first and foremost as placing upon States willing the deportation of a person who is the parent of a child the procedural obligation to consider the impact of such action on that child".[673]

And as is evidenced in its 2005 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin the CRoC has stated that:

> "In order to pay full respect to the obligation of States under article 9 of the Convention [on the Rights of the Child (CRC)] to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views."

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[673]Ippolito "What protection for children of migrant workers facing deportation" in Ippolito & Biagioni(eds) *Migrant children: Challenges for public and private international law*(2016) 202.

One of the aims of this thesis is to determine the extent of a children's rights jurisprudence within the other seven United Nations human rights treaty bodies, and consider whether there are lessons for the CRoC. This chapter discussed the right to non-interference with the family unit within the jurisprudence of the HRC and has extracted some learnings for the CRoC, as well as predicted the direction that the CRoC is likely to take in similar cases.

The next chapter, chapter 5, focuses on the principle of non-refoulement in international human rights law and its applicability to communications relating to children.

# Chapter 5: Deportation and the principle of non-refoulement

## 5.1 Introduction

The principle of territorial sovereignty dictates that states have control over their territories and can determine who enters and remains on their territory.[674] The said principle  means that a state reserves the right to expel non-nationals from their borders.[675] International human rights law has placed restrictions on the exercise of territorial sovereignty. The first restriction is on the procedural rules of expulsion and it includes the right to appeal the decision to expel,[676] the right to submit reasons against expulsion,[677] the right to a decision in accordance with the law,[678] and the right to legal representation.[679]

The second restriction on territorial sovereignty has to do with the substantive rights of migrants. Frigo submits that human rights law may place substantive limitations on expulsion in two types of situations: first is the principle of *non-refoulement*, which refers to an instance where there exists a risk of human rights violations if an individual is returned to his or her country of origin or to a third party State.[680] The principle of *non-refoulment* therefore prevents the removal of an individual to his or her own country or a third state where he or she faces a real risk of serious human rights violations. It is important to note that it is the sending state that bears the responsibility for the potential violation.[681] However, the focus is on the human rights

674 Stilz *Territorial dovereignty: A philosophical exploration* (2019) 1-2.
675 Shaw  *International law* (2017) 361-409. See in particular chapter 9 where the author discusses the concept of "territory".
676 Ippolito "Procedural rights for migrant children: Tailoring specific international standards" in Ippolito and Biagioni (eds) *Migrant children: Challenges for public and private international law* (2016) 167-168. See also ICCPR, Art 13.
677 *Ibid.*
678 ICCPR, Art 13.
679 *Ibid.*
680 Massimo Frigo "Migration and international human rights law: A practitioner's guide" (2014) 108 https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf (accessed 10 February 2021).
681 *Ibid.*

situation in the receiving state and the risk that the individual's right could or would be violated upon return.[682]

Second, the removal of the individual from the territory of the sending state would itself violate the rights of the individual in the sending state. Therefore, the focus is primarily on the rights of the individual in the sending state and not on the potential risk of violation in the receiving state.[683] Such rights include the right to non-interference with the family unit,[684] the right to education,[685] the right to religion, the right to shelter and food and the right to healthcare.[686]

The focus of this chapter is on *non-refoulement* and the rights that could potentially be violated in the receiving state if the individual or family is deported.[687] More specifically, the chapter focuses on *non-refoulement* as it relates to the rights of children in migration situations.

### 5.1.1 Definition of terms

Lauterpatch and Bethlehem submit that the principle of *non-refoulement* is "a concept which prohibits states from returning a refugee or an asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."[688] According to the Refugee Convention, the *non-refoulement* principle provides that no one may return or expel a refugee against his or her will in any manner, to a country or territory where he or she fears threats to life or freedom.[689]

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[682] *Ibid.*
[683] *Ibid.*
[684] See for example *D.T. v. Canada,* United Nations Human Rights Committee, UN Doc. CCPR/C/117/D/2081/2011 , 29 September 2016 .
[685] *Fahmo Mohamud Hussein v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/124/D/2734/2016 , 14 February 2019.
[686]*Jasin et al. v. Denmark*, HRC, UN Doc. CCPR/C/114/D/2360/2014 , 25 September 2015 and *Raziyeh Rezaifar v. Denmark* , United Nations Human Rights Committee, UN Doc. CCPR/C/119/2512/2014 , 10 April 2017.
[687] The right to non-interference with the family unit is discussed under chapter 4 on the right to family.
[688] Lauterpacht and Bethlehem "The scope and content of the principle of non-refoulement: Opinion" in Feller, Turk and Nicholson (eds) *Refugee protection in international law: UNHCR's Global Consultations on International Protection* (2003) 90.
[689]Convention Relating to the Status of Refugees, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly

This chapter adopts the broader definition by Lauterpatch and Bethlehem as it reflects the wide range of cases discussed below.

The words "expulsion", "deportation", "removal" are used interchangeably in this chapter to mean involuntary removal from a country's territory of non-nationals. The term refugee is used herein to mean "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[690]

### 5.1.2 Delimitation and scope of the chapter

First, as discussed under the introduction, there are situations where deportation may result in an interference with the family unit or cause family separation. This was considered under chapter 4.

Second, the international legal framework on *non-refoulement* does not always reflect the rights of children specifically. However, as children are also right bearers within this framework, it is discussed together with specific rights which protect children under the principle of *non-refoulement,* most notably the rights as provided under the UNCRC and as developed and interpreted in its related instruments.

Finally, the principle of *non-refoulement* is recognised both in international refugee law and in international human rights law.[691] In international refugee law, the principle applies to refugees present in the territory of a particular country, as well as refugees

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resolution 429 (V) of 14 December 1950. According to Weis "proof of a substantial risk of torture, inhuman or degrading treatment may constitute a well-founded fear of persecution or evidence thereof." Furthermore, he argues that "the criterion of a well-founded fear of persecution is a legal standard whose application is conditioned by the existence of objective facts."See Weis *The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary* (1990) 7 and 9. In *I.N.S. v. Cardozafonseca* 480 U.S. 421 (1987), the Supreme Court of the United States laid the test of reasonable possibility of persecution as the basis of determining the meaning of well-founded fear of prosecution. Grahl- Madsen, has also argued that it is not the frame of mind of the person concerned which is decisive for his or her claim for refugee status, but the claim for refugee status should be measured with an objective yardstick. See Grahl-Madsen (1966) 173. See further pages 176, 188- 189.

[690]Protocol Relating to the Status of Refugees Resolution, adopted by the United Nations General Assembly Resolution 2198(XXI) of 16th of December 1966.

[691]Frigo "Migration and international human rights law: A practitioner's guide" 108.

present at the border.[692] *Non-refoulement* as applied in international human rights law refers to all transfers of nationals or non-nationals and migrants, whether they are regular or irregular and refugees. Since the subject of this thesis is on international human rights law, it adopts the approach of *non-refoulement* as applied in international human rights law.

This chapter commences with a discussion on the international legal framework on *non-refoulement* and the context and scope within which the principle *non-refoulement* may be applied. It then considers the rights which may trigger protection under *non-refoulement.* The cases in this chapter reflect *non-refoulement* for torture, and other cruel, inhuman or degrading treatment or punishment. This merits a discussion on *non-refoulement* for that purpose. Since the focus of the chapter is on the rights of children under the principle *non-refoulement*, it merits a discussion on the best interests principle and *non-refoulement.* The HRC as identified socio-economic deprivation as an instance which may trigger protection under *non-refoulement* in some circumstances and therefore the chapter analyses the cases before the HRC under this sub-heading relating to children. The issue of female genital mutilation (FGM) has been widely accepted as a practice against which protection is generally afforded under *non-refoulement*. As the CRoC already has some jurisprudence on this, the chapter compares and contrasts the views of the CRoC, the HRC and the CAT on FGM, children and *non-refoulment*. Finally, some conclusions and recommendations are drawn.

### 5.2 International legal framework on non-refoulement

The basis of the principle of *non-refoulement* is found in the Refugee Convention of 1951.[693] *Non-refoulement* is the principle which provides that no one may return or expel a refugee against his or her will in any manner, to a country or territory where he or she fears threats to life or freedom.[694] The drafters of the Refugee Convention have noted that the emphasis of the definition is on the protection of persons from

[692] Conclusion No. 6 (XXVIII) Non-refoulement, Executive Committee, United Nations Commissioner for Human Rights, 28th Session, 12 October 1977, Para (c).
[693] UN General Assembly, Convention and Protocol Relating to the Status of Refugees (1966).
[694] UN General Assembly *Convention on the Status of Refugees* (1951), Art 3.

political or other forms of persecution.[695] Furthermore, it is highlighted in the introductory note that the Refugee Convention is grounded on Article 14 of the UDHR,[696] which recognises the rights of persons to seek asylum from persecution in other countries.[697]

Article 3 of the Convention against torture ,[698] explicitly includes the principle of non-refoulement:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture; and
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The principle can also be derived from a number of international instruments, notably, Article 7 of the ICCPR,[699]. Which reads “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Since the principle of *non-refoulement* also protects the right to life in certain instances, Article 7 of the ICCPR is often read with Article 6, the right to life and the right against arbitrary deprivation of life.

Article 16 of the Convention for the Protection of all Persons from Enforced Disappearances,[700] (hereafter the CPED) also affirms:

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[695] *Ibid.*

[696] United Nations General Assembly, *Universal Declaration of Human Rights* adopted by the United Nations General Assembly on 10 December 1948 by General Assembly Resolution 217 A (III).

[697] *Ibid*, Introductory note by the office of the High Commissioner for Refugees , 2.

[698]Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted by UN General Assembly Resolution 39/46 of 10 December 1984.

[699]The ICCPR, adopted by UN General Assembly Resolution 2200A of 16 December 1966.

[700] The International Convention for the Protection of All Persons from Enforced Disappearances (CED), adopted by UN General Assembly Resolution 47/133 of 23 December 2010.

> 1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

Article 3 of the CRC,[701] read with General Comment No.6 of the CRoC sets out how the principle of *non-refoulement* applies in the context of unaccompanied or separated children.[702] The CRoC has said in its General Comment No.6, [703] that the definition of a refugee under the Refugee Convention "must be interpreted in an age and gender sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children."[704]

Joint General Comment No.4 & No.23 of the CRoC and the CMW on children in international migration provides that, [705] provides that :

> The Committees have already pointed out that States shall not reject a child at a border or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm, such as, but by no means limited to, those contemplated under articles 6 (1) and 37 of the Convention on the Rights of the Child, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of States parties' action or inaction.

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[701]Convention on the Rights of the Child (UNCRC), adopted by UN General Assembly Resolution 44/25 of 20 November 1989.

[702] UNCRC, Art 3 reads 1. 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. The protection of children under the UNCRC with regards to the principle of non-refoulement is discussed in more detail below.

[703]CRoC , *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, UN Doc. CRC/GC/2005/6.

[704] *Ibid,* para 74.

[705] CMW, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, UN Doc. CMW/C/GC/3-CRC/C/GC/22, para 46.

In the said General Comment, both Committees reiterate the need for a wider definition of the meaning of *non-refoulement*.[706] The Committee on the Elimination of Forms of Discrimination Against Women, (hereafter the CEDAW) has stipulated that :[707]

> "States should adopt legislation and other measures to respect the principle non-refoulement, in accordance with existing obligations under international law, and take all measures necessary to ensure that victims of serious forms of discrimination, including gender-related forms of persecution, who are in need of protection, regardless of their status or residence, are not returned under any circumstance to any country in which their life would be at risk or where they might be subjected to serious forms of discrimination, including gender-based violence, or to torture or inhuman or degrading treatment or punishment".

The principle of *non-refoulement* is widely accepted as a peremptory norm of customary international law.[708] This implies that derogation or exceptions to this rule are not permitted. In human rights law, the principle has an absolute character. International human rights instruments do not allow for this exception where the expulsion of a migrant would create a real risk of human rights violations that would cause irreparable harm.[709] That is to say, when there is a risk of torture, cruel or inhumane and degrading treatment or punishment or where an individual faces threats to his or her life.

In fact, the HRC has clarified that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction

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[706] *Ibid,* para 46.

[707] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, UN Doc. CEDAW/C/GC/32, para 17.

[708] International Organisation for Migration "International Migration Law Information Note on the Principle of Non-Refoulement" 10 https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-on-the-Principle-of-non-refoulement.pdf (accessed 15 February 2021).

[709] HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 ; HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, Art. 7.

of the State Party."[710] This means that the provision for *non-refoulement* in the ICCPR applies to all migrants, regardless of security concerns. On the contrary, under the Refugee Convention, whilst the principle applies to all migrants, Article 33(2) of the Refugee Convention allows certain exceptions to the principle of non-refoulement: when a refugee represents a danger to the security of a country or has been convicted for a serious crime.[711] *Non-refoulement* has been examined and developed in general comments and the jurisprudence related to the treaties discussed above.[712]

Both the CRoC and the HRC have indicated that the *non-refoulement* principle can be applicable to more than just the right to life and the right not to be subjected to torture, and to cruel, degrading or inhuman treatment.[713] The CRoC has stated in its General Comment no. 6 of (2005),[714] that States shall not return a child to a country where "there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Article 6 and 37 of the CRC…"[715] According to Forster the use of the language "such as" and "by no means limited to" makes it clear that the CRoC does not limit the scope of *non-refoulement* to the rights mentioned in Articles 6 and 37 of the CRC,[716] a point that is borne out by its jurisprudence, discussed later in this chapter.

### 5.3 The rights protected under the principle of non-refoulement

The principle of *non-refoulement* may trigger protection of certain rights under international law. Although the range of rights which are protected under *non-refoulement* are not fully settled, the most serious violations of a wide range of human

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[710]HRC, General Comment No. 31 (2004); See also HRC, *CCPR General Comment No. 15: The position of aliens under the Covenant*, 11 April 1986.

[711]Convention on the Status of Refugees, Art 33(2) of the reads as follows: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final Judgment of a particularly serious crime, constitutes a danger to the community of that country."

[712]HRC, General Comment No. 20 (1992) on Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment): Replaces HRC, General Comment 7 (1992) on Prohibition of Torture and Cruel Treatment or Punishment (Art. 7) ; HRC, General Comment No. 31 (2004).

[713]Forster "Non-refoulement on the basis of socio-economic deprivation: The scope of complementarity protection in international human rights law" 2009 (Part II) *New Zealand Law Review* , 273.

[714]CRoC, General Comment No. 6 (2005), para 27.

[715] *Ibid*, para 27.

[716] Forster 2009 (Part II) *NZLR* 273.

rights may find protection under the principle.[717] Jurisprudence on *non-refoulement* continues to develop towards wider application. Notably, the HRC has included economic difficulty or "extreme difficulty"[718] as an instance wherein *non-refoulement* may be applied.[719]

The CAT has recognised in the 2003 communication of *T.A. v. Sweden,[720]* that a woman and her child could face torture (in violation of Article 3 of the CAT) if deported to Bangladesh due to the woman's affiliation with a political party which was in opposition to the ruling party.[721] The CAT gave similar views in the 2009 communication of *M.A.M.A.et al v. Sweden,* [722] and held that the author and his wife, as well as six children (four of whom were minors at the time) would be subjected to torture if deported to Egypt due to the author's association with a group which was suspected for the attempted assassination of President Hosni Mubarak.

In 2015, in *R.S.A.A et al v. Denmark*,[723] the CEDAW Committee recognised gender based violence and child marriage as a ground for *non-refoulement*. The CEDAW Committee held that returning a woman and her daughters to Jordan would expose them to a serious gender based violence, which could even result in their death.[724]

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[717] Frigo (2014).
[718] This concept was coined in *Jasin et al. v. Denmark* to describe a situation where a single mother and her children would otherwise face destitution if deported to Italy. This case is discussed in more detail below.
[719] The range of cases under socio-economic difficulty are discussed below.
[720] *T.A. v. Sweden,* United Nations Committee Against Torture, UN Doc. CAT/C/ 34/D/226/2003, 27 May 2005, paras 8.1-10.
[721] In reaching this conclusion, the CAT considered the fact that the author belonged to a political party which was in opposition to the ruling party. The CAT noted also that torture of political opponents was frequently practised by state agents. The CAT furthermore considered that the author had previously been subjected to torture for her involvement in political activities as well as the political activities of her husband, who was still in hiding.
[722]*M.A.M.A.et al v. Sweden*, United Nations Committee against Torture, UN Doc. CAT/C/48/D/391/2009, 23 May 2012, paras 9.1-12.
[723] *R.S.A.A et al v. Denmark* , United Nations Commitee on the Elimination of Discrimination Against Women, UN Doc. CEDAW/C/73/D/86/2015, 15 July 2019, paras 8.1-11.
[724] The author and her daughters had fled Jordan to Denmark due to abuse by her husband. She feared that their deportation would expose them to more violence and abuse as her husband was angered by the fact that they had fled Jordan. The Committee concluded that the State Party had failed to give sufficient consideration to the real, personal and foreseeable risk of serious forms of gender-based violence faced by the author and her daughters should they be returned to Jordan and that the party should have undertaken an individualized assessment of the real, personal and foreseeable risk that the author would face, as a woman who had knowingly abandoned her violent husband and fled

Moreover, the woman had two daughters under the age of 18 who were at risk of forced marriage if deported. These cases confirm the that the principle of *non-refoulement* has been developed under the CEDAW.

The following rights have been identified to merit protection in international law on the basis of *non-refoulement*:

First and most relevant to this chapter is *non-refoulement* for torture and other cruel, inhuman or degrading treatment or punishment.[725] Second, is enforced disappearance,[726] third is extra-judicial executions,[727] fourth is the death penalty,[728] fifth is the death row,[729] sixth a flagrant denial of justice and of the right to liberty,[730] and seventh, freedom of religion and belief.[731] It must be emphasized that this list is not exhaustive as the jurisprudence on *non-refoulement* continues to develop.

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Jordan with their two daughters who were under 18, and, at the risk of forced marriage there, rather than relying exclusively on a number of inconsistent statements and the inferred non-credibility of the author. In that connection, the Committee recalled its concluding observations on the sixth periodic report of Jordan (United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations on the sixth periodic report of Jordan*, 9 March 2017, UN Doc. CEDAW/C/JOR/CO/6), in which it expressed concern about the persistence of deep- rooted discriminatory stereotypes concerning the roles and responsibilities of women and men in the family and in society. It also noted with concern that patriarchal attitudes were on the rise within State authorities and society and that gender equality was being openly and increasingly challenged by conservative groups.

[725] The cases in this chapter give rise to issues under this category.

[726] CED, adopted by UN General Assembly Resolution 47/133 of 23 December 2010, Art 1. See also United Nations Commission on Human Rights, *Declaration on the Protection of All Persons from Enforced Disappearance*, 28 February 1992, E/CN.4/RES/1992/29, Art 8.

[727]*Baboeram et. al v. Suriname*, HRC, UN Doc. CCPR/C/24/D/146/1983 , 4 April 1985 and *Naveed Akram Choudhary v. Canada* , United Nations Human Rights Committee, UN Doc. CCPR/C/109/D/1898/2009 , 17 December 2013, paras 9.7-9.8. See also Article 5 of the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 24 May 1989 ECOSOC Resolution No.1989/65, 15th Plenary meeting.

[728] *Judge v. Canada,* HRC, UN Doc. CCPR/C/78/D/829/1998 , 13 August 2003, para 10.4 and *Kwok Yin Fong v. Australia* , United Nations Human Rights Committee, UN Doc. CCPR/C/97/D/1442/2005, 23 October 2009, para 9.4.

[729] *Kindler v. Canada,* HRC, UN Doc. CCPR/C/45/D/470/1991, 11 November 1993, para 15.2 and *Ng v. Canada* , United Nations Human Rights Committee, UN Doc. CCPR/C/46/D/469/1991, 5 November 1993, para 16.1.

[730] *A.R.J. v. Australia*, HRC, UN Doc. CCPR/C/60/D/692/1996, 11 August 1997, para 6.15 and *Alzery v. Sweden,* HRC , *UN Doc.* CCPR/C/88/D/1416/2005, 10 November 2006, para 11.9.

[731] *Z and T v. United Kingdom* , European Court of Human Rights, Application No. 27034/052006, 28 February 2006. See also *Kokkinakis v. Greece* , European Court of Human Rights, Application No.14307/88 , 25 May 1993, para 31.

The cases in this chapter engage with *non-refoulement* for reasons of torture and other cruel and inhuman or degrading treatment or punishment. For this reason, the discussion turns on this sub-topic below.

### 5.4 *Non-refoulement* for torture and other cruel, inhuman or degrading treatment or punishment

According to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "one of the bedrock principles of international law is the express prohibition against refoulement of persons to where there are substantial grounds to believe there is a risk of torture."[732] It is well established in international law that it is prohibited to expel persons who may otherwise face torture, inhumane, cruel or degrading treatment and punishment, as well as irreparable harm.[733]

In *Saadi v. Italy*,[734] it was held by the ECtHR that the distinction between torture and other ill-treatments depends on the intensity of suffering inflicted on the victim. It must be noted that an act of torture is not limited to severe physical pain or bodily injury, but also acts that cause mental fear, anguish, feelings of inferiority, humiliation and degradation.[735] The threshold for determining torture or other cruel, inhuman or degrading treatment or punishment depends on the age, sex and health of the complainant.[736]

Examples of acts which have been identified under international human rights law as constituting torture and other cruel, inhuman or degrading treatment or punishment are corporal punishment,[737] acts of sexual violence, including but not limited to

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[732]United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68.

[733] CAT, Art 6 ; ICCPR, Article 7 ;Convention and Protocol Relating to the Status of Refugees, Art 32.

[734] *Saadi v. Italy*, European Court of Human Rights, Application No. 37201/06, 28 February 2008, para 134; *Chahal v. The United Kingdom*, European Court of Human Rights, Application No. 70/1995/576/662, 15 November 1996 , para 74.

[735] *Ibid*, para 134.

[736] *Ibid.*

[737] CCPR, General Comment No. 20 (1992), para 5.

rape,[738] prolonged incommunicado detention,[739] harmful practices such as female genital mutilation,[740] prolonged or repeated solitary confinement,[741] poor prison conditions and over crowdedness as well as lack of adequate medical attention in prison,[742] repeated or unnecessary and intrusive strip search,[743] the most severe forms of racial discrimination,[744] and domestic violence.[745] As mentioned above, the HRC has included "extreme economic hardship" as amounting to torture and other cruel, inhuman or degrading treatment or punishment.[746]

The HRC has held that the principle of *non-refoulement* applies to all treatment prohibited by Article 7 of the ICCPR.[747] The CAT on the other hand has explicitly stated in Article 1 of the Convention Against Torture that the obligation of *non-refoulement* is only applicable to acts of torture.[748] In the 2007 communication of *X.H.L.*

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[738] *C.T. and K.M. v. Sweden* , United Nations Committee Against Torture, UN Doc. CAT/C/37/D/279/2005 , 7 December 2006, para 7.5.

[739] Concluding Observations on USA, CAT, Para 17-; CCPR; General Comment No.20 (1992), para 6; United Nations Commission on Human Rights, "Civil and Political Rights, Including the Question of Torture and Detention, Report of the Special Rapporteur on the Question of Torture, Theo van Boven" UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004, para 34.

[740] *I.A.M. v. Denmark* CRoC , UN Doc. CRC/C/77/D/3/2016, 25 January 2018; *Dien Kaba v. Canada,* United Nations Human Rights Committee, UN Doc. CCPR/C/98/D/1465/2006, 21 May 2010, para 10.1; *M.J.S. v. Netherlands,* United Nations Committee Against Torture, UN Doc. CAT/C/66/D/757/2016, 14 June 2016 ; *R.O. v. Sweden,* CAT, UN Doc. CAT/C/59/D/644/2014, 19 January 2017.

[741] CCPR , General Comment No.20 (1992), para 6; *Kuznetsov v. Ukraine* , European Court of Human Rights, Application No. 39042/97, 29 April 2003.

[742] *Peers v. Greece*, European Court for Human Rights, Application No. 28524/95, 19 April 2001, paras 67-75; *Conteris v. Uruguay*, HRC, UN Doc. CCPR/C/25/D/139/1983, 17 July 1985.

[743] *Van der Ven v. the Netherlands*, European Court of Human Rights, Application No. 50901/99, 4 February 2003; *Valasinas v. Lithuania*, European Court of Human Rights, Application No. 44558/98, 24 July 2001.

[744] *Cyprus v. Turkey*, European Court of Human Rights, Application No. 25781/94,10 May 2001 ; *East African Asians v. United Kingdom*, European Commission of Human Rights, Application Nos. 4403/70-4419/70, 4422/70, 442J/70, 44]4/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70 (joined), 14 December 1973.

[745] *Z and Others v. United Kingdom*, European Court of Human Rights, Application No. 29393/95, 10 May 2001; *R.S.A.A. et. al v. Denmark ,* CEDAW, UN Doc. CEDAW/C/73/D/86/2015, 10 September 2019.

[746] *Rezaifar v. Denmark* , HRC, UN Doc. CCPR/C/119/D/2512/2014, 10 April 2017; *O.A. v. Denmark ,* United Nations Human Rights Committee, UN Doc. CCPR/C/114/D/2360/2014, 27 November 2017; *Jasin v Denmark*.

[747] HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, https://www.refworld.org/docid/478b26ae2.html [accessed 2 November 2022] Para 12.

[748] It is argued below that the CAT has since developed its jurisprudence to expand on this limitation.

*v. the Netherlands*,[749] the HRC held that deporting an unaccompanied child amounted to cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR as the decision to deport him failed to take into consideration his best interests as a child.[750] The HRC held: "Without a thorough examination of the potential treatment that he may have been subjected to as a child with no identified relatives and no confirmed registration"[751] the child would face hindrances in "proving his identity or access any social assistance services"[752] once he arrives in his country of origin.

### 5.5 Socio-economic rights as a ground for protection under non-refoulement

The HRC has developed a series of cases on socio-economic deprivation as a ground for *non-refoulement*.[753] Return to a situation of deprivation, whether in the form of famine, lack of medical treatment,[754] or education,[755] can also trigger protection under *non-refoulement*. Forster remarks that the fact that the obligation to protect from refoulement may include socio-economic rights violations, can be a threat to state sovereignty.[756] This implies that the right to control entry, residence and expulsion under the principle of state sovereignty may be limited if *non-refoulement* is extended widely to include socio-economic rights.[757] Put simply, States may be bound by international law, as well as their treaty obligations not to expel individuals on grounds of socio-economic rights, thus threatening their sovereignty as a State.

The following cases involve *non-refoulement* on grounds of socio-economic rights and invoke the Dublin Regulation as some asylum seekers will not have access to basic socio-economic rights in some States due to the varying standards of reception, and

[749]*X.H.L. v. The Netherlands,* HRC, UN Doc. CCPR/C/102/D/1564/2007, 22 July 2011.
[750] Ibid, paras 10.2-11.
[751] Ibid, para 10.3.
[752] Ibid, para 10.2.
[753] Çali, Costello and Cunningham "Hard protection through soft courts? Non-refoulement before the United Nations treaty bodies" 2020 (21) *German Law Journal* 367.
[754]*R.A.A. and Z.M. v. Denmark,* HRC, UN Doc. CCPR/C/118/D/2608/2015, 29 December 2016. This case is discussed in more detail below.
[755] *Fahmo Mohamud Hussein v. Denmark*, HRC, UN Doc. CCPR/C/124/D/2734/2016 , 14 February 2019, which is discussed in more detail below.
[756] Forster 2009(Part II) *NZLR* 257-258.
[757]Haines "Sovereignty under challenge-The new protection regime in the Immigration Bill 2007" 2009 (2) *New Zealand Law Review* 149-205.

also due to the differences, in general, in the economic standards of EU member states.[758] Moreover, the fact that the majority of the cases are against European countries merits a discussion on the Dublin Regulation, as it relates to the principle of *non-refoulement* and children.

### 5.5.1 The Dublin III Regulation in non-refoulement for socio-economic rights cases

The Dublin III Regulation,[759] replacing the Dublin II Regulation,[760] and the original Dublin Convention which was signed in 1990,[761] provides for the mechanisms and criteria for determining the Member State responsible for examining an application for international protection lodged by a third country national in one of the European Union Member States.[762] One of the aims of the Dublin III Regulation in relation to children is to promote family reunification. It is worth a mention that the various Dublin revisions (The Dublin Convention, the Dublin II and Dublin III Regulations ) have granted more rights to children. For instance, the Dublin III Regulation prioritises the need to place unaccompanied children in the same member state as a family member or relative, provided it is in the best interest of the child.[763] Taking note of the best interest principle, the Dublin III Regulation allows an unaccompanied child, unlike any other asylum seeker, the choice of which member state to apply to.[764] It also discourages unnecessary movement of children, in order to prevent their disappearance by including a principle of non-transfer of children.[765] It further recognises the need for a speedy consideration of asylum applications by children. [766] Finally, it recognises the role of a guardian for accompanied children seeking asylum.

[758] European Council on Refugees and Exiles, *Position on the implementation of the Dublin Convention, in the light of lessons learned from the implementation of the Schengen Convention*, 1 December 1997, paras 35-36.
[759] Dublin III Regulation.
[760] Dublin II Regulation.
[761] EU, "*Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities*" *("Dublin Convention")*, 15 June 1990, Official Journal C 254 , 19/08/1997 p. 0001 - 0012.
[762]Dublin III Regulation.
[763] *Ibid,* art 8.
[764] *Ibid.*
[765] *Ibid.*
[766] *Ibid.*

The cases in this chapter, however, reflect the rule that an individual's application for asylum must be considered by his or her country of first entrance. Also, the cases in this chapter are reflective of children who are accompanied by their parents or guardians.[767]

Under the European Union's Dublin system, a European State may return an individual or a group of individuals to their country of first entrance in Europe which is seen as the country responsible for the individual by virtue of having been the first state where the person sought asylum.[768] This is the so-called country of first entrance rule, and it provides that a refugee or an asylum seeker must apply for asylum in the first European country which they enter.[769] Heyns *et al* have described the Dublin Regulation as "the cornerstone in the European Union's common refugee agenda."[770] The Dublin rule of transfer has been frowned on by the HRC, which has held in a series of cases that removing an individual from one country to a third country, which is not their country of origin can also constitute a breach of the principle of non-refoulement under Article 7 of the ICCPR.[771] This is the practise of indirect refoulement, [772] and refers to a situation where one state expels a migrant to another state which is not their home country. In General Comment 20 on Article 7 of the HRC, the HRC has stated that States parties "must not expose individuals to the danger of torture cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[773] As Heyns *et al* note, the focus is not on whether there are grounds to remove the individual, but whether

[767] *Ibid.*
[768] Dublin III Regulation , art 17.
[769] *Ibid.*
[770] Heyns, Rueda and du Plessis "Torture and ill-Treatment: The UN Human Rights committee" in Evans and Modvig *Research handbook on torture* (2020) 123.
[771] Frigo "Migration and international human rights law: A practitioner's guide" 125 https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf (accessed 10 February 2021).
[772] Çali, Costello and Cunningham 2020 (21) *GLJ* 365, 367.
[773] The Convention on Civil and Political Rights General Comment No. 20 on Article 7 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (1992), UN Doc. A/47/40 193-195, para 1.

by doing so, the individual would be exposed to ill-treatment that would violate Article 7 of the ICCPR.[774]

The threat on the individual or group of persons who are about to be removed must be a real risk of irreparable harm in order to violate Article 7. The HRC held in *O.A. v. Denmark*,[775] that deporting the author, who claimed to be a child, to Greece (his first country of asylum)without first taking measures to ensure a reasonable assertion of his age would, if implemented, violate the author's rights under Article 7 of the ICCPR (prohibition of torture, cruel, inhuman or degrading treatment or punishment) as well as Article 24 of the ICCPR (The right of every child to receive protection from his family, society or state without discrimination).[776]

The HRC held also that an assessment of the general condition in the receiving country must be done and most importantly, the personal circumstances of the individual concerned must also be assessed.[777] The HRC mentioned that these circumstances include vulnerability-increasing factors relating to such persons, such as their age, which means they may not be able to tolerate certain situations and conditions due to their age.[778] The HRC held that it was incumbent on the State party to assess the individual circumstances of the author in view of the obligation to afford children special measures of protection pursuant to Article 24 of the ICCPR.[779]

The HRC has established through its jurisprudence that the principle of non-refoulement applies both to transfers to a State where an individual will be at risk(direct refoulement) and transfers to States where there is a risk of further transfer

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[774] Heyns, Rueda and Du Plessis (2020) 122.
[775]*O.A. v. Denmark*, CCPR/C/121/D/2770/2016.
[776] *Ibid*, para 9.
[777] *Ibid,* para 8.11.
[778] *Ibid.*
[779] *Ibid.*

to a third party(indirect refoulement).[780] In *Jasin v Denmark,*[781] which was held in 2014, and which was the HRC's first case in terms of the Dublin Regulation, one Committee member gave a dissenting view with which two members concurred. The concurring view argued that economic destitution was not enough to constitute a ground for *non-refoulement*.[782] However, the fact that the family could be returned to their home country, given the poor conditions in Italy should have been the main reason for the finding in favour of *non-refoulement.*[783] It is submitted that this view acknowledges the so-called indirect form of refoulement, since the risk of refoulement still arises after the individual is sent to another country.[784] Mathew has argued the need for a recognition of yet another form of refoulement, which is constructive refoulement. This form of refoulement is when the state orchestrates material conditions to compel individuals to leave the borders of the state in question.[785] The concurring opinion in *Jasin* also argued the concept of extreme vulnerability which the HRC has subsequently employed in cases of Dublin removals.[786]

Prior to Jasin, which will be discussed below, the HRC did not recognise socio-economic rights as grounds for non-refoulement. In *A.S.M. and R.A.H. v. Denmark*,[787] which was held in 2014, the same year as Jasin, the authors and their three minor children faced deportation to Italy on the grounds that they held residential permits

[780] CCPR, General Comment No. 31 para. 12; CAT, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, UN Doc A/53/44, annex IV, para. 2; The CAT also follows this approach: See *Hamayak Korban v. Sweden,* CAT, UN Doc. CAT/C/21/D/88/1997,16 November 1998, para. 7; The European Court on Human Rights also recognises this principle: See *Salah Sheekh v. the Netherlands,* European Court for Human Rights, Application no. 1948/04 2007 , 11 January 2007 , para. 141; *M.S.S. v. Belgium and Greece,* European Court of Human Rights, Application No. 30696/09, para. 342.
[781] CCPR/C/114/D/2360/2014
[782] Ibid, para 5.
[783] The author was given a resident's permit when she first arrived in Italy (her country of first entry). However, the permit has expired and there are other factors, which questions the ability of Italy to grant the author and her three children asylum. These factors include the extreme vulnerability of the author and her children, the failure of the Italian social welfare system and the lack of guarantees in Italy, are factors which might force the author to go back to her home country, Somalia.
[784] This is a type of refoulement where a state transfers an individual from one place to another, from which in turn the risk of refoulement arises. See Cali, Costello and Cunningham 2020 (21) *GLR* 365.
[785]Mathew "Constructive Refoulement" in Satvinder S Juss (ed) *Research Handbook on International Refugee Law* (2019) 207-223.
[786]*Raziyeh Rezaifar v. Denmark*; *Hibaq Said Hashi v. Denmark* , United Nations Human Rights Committee, UN Doc. CCPR/C/120/D/2470/2014, 9 October 2017; *R.A.A. and Z.M. v. Denmark* and *O.A. v. Denmark*
[787] *A.S.M. and R.A.H. v. Denmar*k.

in Italy.[788] They were originally from Somalia and fled to Italy due to fear of persecution from Al-Shabaab.[789] The HRC found no violation of Article 7 on the grounds that the mere fact that the authors could be homeless and in a precarious situation if returned to Italy did not mean that they would necessarily be in a special situation of vulnerability.[790] Therefore, their return to Italy would not constitute a violation of the State party's obligations under Article 7. Furthermore, it held that one of the authors (A.S.M) had worked in the past in Italy and had not shown why he would not be able to obtain employment this time. Although the authors claimed that they would have limited access to medical services if returned to Italy, they had failed to identify before the Committee the specific circumstances in which they or their children were denied medical services when they needed them.[791]

A dissenting view from one Committee member found that there could be a risk of violation of Article 7, if the authors were expelled to Italy. Indeed, according to the Committee member, the presence of children, the suffering due to uprooting and the degree of vulnerability of the family in the country of first asylum constituted decisive factors for the evaluation of risk.[792] In the view of the dissenting member, the HRC had not taken these factors sufficiently into account. It is submitted that the dissenting view is in line with the CRoC's view in *I.A.M .v. Denmark* that in assessing deportation which involves children, the best interests of the child must be considered.[793]

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788 The authors are originally from Somalia and fled to Italy due to fear of persecution from Al-Shabaab. They were provided accommodation under an agreement for international protection seekers and refugees. The authors had their first child in Italy in October 2009. When the authors' six months housing contract expired in June 2010, they became homeless and decided to leave Italy for Germany. In July 2010, they applied for asylum in Germany. Their application was refused on the grounds that they had already been granted residence in Italy. They were then transferred back to Italy in February 2011, where they had their second child. During this time, the authors and their children were homeless and decided to move to Denmark. In December 2012, they arrived in Denmark and applied for asylum, but it was denied on the basis that Italy had granted them residential permits and thus that they should return to Italy. They gave birth to their third child in Denmark.

789 *A.S.M. and R.A.H. v. Denmark,* para 2.1.

790 *Ibid* , para 9.

791 *Ibid* , para 8.6.

792 *Ibid* , annex I para 1-7.

793 See in general Article 3 of the UNCRC and specifically the CRoC's views in *I.A.M. v. Denmark* CRC/C/77/D/3/2016

*Raziyeh Rezaifar v. Denmark,*[794] which followed *Jasin* in 2014, concerned a mother and her two children, one of whom was a three year old child at the time the communication was sent. They faced deportation to Italy (their first country of asylum).[795] The HRC held that although Italy was considered the first country of asylum, the author and her children faced intolerable living conditions in Italy.[796] The HRC held further that the State party did not explain how the author's renewable resident's permit in Italy would protect her and her children.[797] The HRC noted that the youngest child suffered a heart condition and the exceptional hardship and destitution the family had faced in Italy.[798] The HRC concluded that the author and her children were especially vulnerable and therefore their removal would if implemented, amount to a violation of Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment) in respect of the author and her two children.

In reaching this conclusion, the HRC cited its jurisprudence in *Jasin and others v. Denmark*.[799] In *Jasin*, , like in *Raziyeh Rezaifar*, a single sick mother and her children faced deportation to Italy where they had suffered hardship and destitution. The HRC held in both cases that the State party failed to consider the particular vulnerabilities of the mothers and their children, and most importantly failed to obtain an assurance from Italy that the mothers and their children would be received in conditions compatible with their status as asylum seekers entitled to temporary protection and the guarantees under Article 7.[800]

The HRC found in *R.A.A. and Z.M. v. Denmark,*[801] which was decided in 2015 that the fact the male author would not have access to medical treatments, combined with the hardships and destitution that the family had previously faced, and the impact on

[794] *Raziyeh Rezaifar v. Denmark***.**
[795] *Ibid* , paras 2.1-2.12.
[796] *Ibid* , para 8.8.
[797] *Ibid.*
[798] *Ibid.*
[799] *Jasin and others v. Denmark*.
[800] *Ibid* , paras 8 and 10.
[801] *R.A.A. and Z.M. v. Denmark***.**

their baby, meant that deporting the authors and their baby to Bulgaria would expose them to irreparable risk in violation of Article 7 of the ICCPR. This decision proves that the HRC protects the right to access to medical care under Article 7. Whilst the lack of access to medical care may constitute a violation under Article 7 of the ICCPR, information that the child will have access to medical care and educational services may lead to the HRC deciding that return was not a violation. This was confirmed in *Fahmo Mohamud Hussein v. Denmark*, [802] in which the HRC's views were issued in 2016.

Although *Jasin* is the *locus classicus* for the "Dublin cases" the HRC has come to different findings in subsequent cases with similar facts, in which it was expected to have the same outcome based on the finding in *Jasin*. For example in *M.A.S. v. Denmark*,[803] the HRC did not find a violation of Article 7 when a married couple with four children faced deportation to Bulgaria. The HRC held that:

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[802] *Fahmo Mohamud Hussein v. Denmark* , HRC, UN Doc. CCPR/C/124/D/2734/2016, 14 February 2019. The author, a Somali national, arrived in Italy after fleeing Somalia at the age of 16 and applied for asylum upon arrival. She was granted protection and residence for three years (which was extended for another three years after the permit expired) after one year of processing. The author was homeless and jobless for all six years of her residency, despite asking for assistance from the Italian government, and depended on handouts and a single meal every day from a shelter. She claimed she was harassed in the streets and witnessed how other young women fell victims to violence if they tried to defend themselves when confronted with harassments and slurs. The author left Italy for Denmark to live with her family once her Italian residence permit expired and applied for asylum three days after arrival. She gave birth to a child while in Denmark and had help from the family in raising him. Denmark rejected her asylum claim six months after she applied, and rejected her appeal two months later. The HRC considered that the information before it did not show that the author would face a personal and real risk of treatment contrary to article 7 of the Covenant if she were removed to Italy. See Paras 9-9.10 of the case. In two dissenting views however, two Committee members found a violation of Article 7 of the ICCPR. It was reasoned that "since Denmark has failed to conduct a thorough and sufficient evaluation of whether author and her son would be exposed to conditions constituting cruel, inhuman or degrading treatment if returned to Italy, thus rendering this return a particularly traumatic experience for them, especially for the child." See para 9.1 and 8 respectively of the two individual opinions.

[803] *Jasin and others v. Denmark*. The HRC held that since the authors had residence permits in Bulgaria, they were unlikely to be detained upon entry; and that by virtue of not having to stay in a State-run facility, they would not experience the same ill-treatment they did during their first stay in Bulgaria. The Committee also pointed out that the authors had not claimed before the Danish immigration authorities that their health situation should have barred them from deportation. The Committee also noted that the authors had not sought help from Bulgarian authorities for their ill treatment, consequently it found that there was no indication the authorities were not willing to and unable to provide assistance. The Committee therefore found that the authors had failed to substantiate that a real and personal risk existed in Bulgaria in relation to the difficulty in obtaining housing or entering the labour market. The Committee also found that the authors had not established that they were homeless prior to their departure from Bulgaria, nor that they could possibly be confronted with serious

> The fact that they may possibly be confronted with serious difficulties upon return ..., by itself does not necessarily mean that they would be in a special situation of vulnerability – and in a situation significantly different to many other refugee families – such as to conclude that their return to Bulgaria would constitute a violation of the State party's obligations under Article 7.[804]

As in *M.A.S.* above, the HRC did not recognise a violation of Article 7 in the following cases: *R.I.H. and S.M.D. v. Denmark,*[805] and *B.M.I. and N.A.K. v. Denmark.*[806] The common grounds on which the HRC's finding of non-violation in these cases were that their economic situation in the States to which they were being deported were not deplorable. In *B.M.I.* for instance, the HRC found that the authors had access to medical treatment in Bulgaria and that before leaving Bulgaria, they were not

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difficulties upon return, in light of the past traumas suffered by all members of the family, in particular the children. Accordingly, the HRC did not find a violation of Article 7 of the HRC.

[804] *Ibid,* para 8.12.

[805] *R.I.H. and S.M.D. v. Denmark,* HRC, UN Doc. CCPR/C/120/D/2640/2015 , 22 August 2017. The authors had young children just like in many of the cases which the HRC found a violation of the Article 7 of the ICCPR. However, the HRC reasoned that notwithstanding the fact that it was difficult, in practice, for refugees and beneficiaries of subsidiary protection to gain access to the labour market or to housing, the authors had failed to substantiate a real and personal risk to themselves upon return to Bulgaria. The authors had not established that they were homeless before their departure from Bulgaria; they did not live in destitution; and their situation with four children, the youngest of whom was 14 years old, should be distinguished from the case of *Jasin et al. v. Denmark.* The mere fact that the authors could possibly be confronted with difficulties upon their return did not, by itself, necessarily mean that they would be in a special situation of vulnerability — and in a situation significantly different to many other families — such as to conclude that their return to Bulgaria would constitute a violation of the State party's obligations under Article 7. Although the authors disagreed with the decision of the State party's authorities to return them to Bulgaria as the country of their first asylum, they had failed to explain why this decision was manifestly unreasonable or arbitrary in nature.

[806]*N.A.K. v. Denmark,* HRC, UN Doc. CCPR/C/118/D/2569/2015, 16 December 2016. The HRC found no violation of Article 7 when it was alleged by the authors that they and their children would face inhuman or degrading treatment, contrary to the best interests of the child, as they would face homelessness, destitution, lack of access to health care and lack of personal safety in. The HRC held that the authors were not homeless before their departure from Bulgaria and did not live in destitution, they had access to medical treatment and had not explained why they would not be able to find a job in Bulgaria or to seek the protection of the Bulgarian authorities in case of unemployment. Furthermore, they had not substantiated their claim that they would face a real and personal risk of inhuman or degrading treatment if they returned to Bulgaria. Accordingly, the Committee considered that the mere fact that the authors could be possibly confronted with difficulties upon their return to Bulgaria did not in itself mean that they would be in a special situation of vulnerability and in a situation significantly different to many other families. The Committee further considered that although the authors disagreed with the decision to return them to Bulgaria as their country of first asylum, they had failed to explain why that decision was manifestly unreasonable or arbitrary, or procedurally irregular. Accordingly, the Committee could not conclude that the removal of the authors to Bulgaria by the State party would constitute a violation of Article 7 of the Covenant. The Committee was confident that the State party would duly inform the Bulgarian authorities of the authors' removal, in order for the authors and their children to be kept together and to be taken charge of in a manner adapted to their needs, especially taking into account the age of the children.

homeless.[807] In *R.I.H,* the HRC held that the authors' youngest child was 14, which was different from the children in *Jasin*, they were younger and had a single mother who had a health condition and was holding an expired resident's permit.[808] Moreover, the mere fact that the authors could possibly be confronted with difficulties upon their return did not, by itself, necessarily mean that they would be in a special situation of vulnerability — and in a situation significantly different to many other families — such as to conclude that their return to Bulgaria would constitute a violation of the State party's obligations under Article 7.[809] The HRC gave similar views in *M.A.S. and L.B.H. v Denmark,*[810] and held that since the authors had residence permits in Bulgaria, they were unlikely to be detained upon entry; and that by virtue of not having to stay in a state-run facility, they would not experience the same ill-treatment they did during their first stay in Bulgaria.[811]

Çali *et al* argue that the UN treaty bodies apply a similar standard of proof.[812] The HRC requires that the author(s) demonstrates "substantial grounds for believing that there is a real risk of irreparable harm",[813] the CAT uses similar terms by requiring that the author shows "substantial grounds" for believing that he or she is in danger or experiencing torture other harm. Furthermore, the CAT requires that the risk of such torture must be "foreseeable, personal, present and real".[814]

The CEDAW Committee has advised in its General Recommendation No.32 that States parties have the duty "to protect women from being exposed to a real, personal and foreseeable risk of serious forms of discrimination against women, including gender-based violence."[815] The CEDAW Committee further requires that States "should take into account that the threshold for accepting asylum applications should

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[807] *B.M.I and N.A.K. v. Denmark*, para 8.6.
[808] *R.I.H. and S.M.D. v. Denmark,* para 8.6
[809] *Ibid*.
[810]*M.A.S. and L.B.H. v Denmark,* HRC, UN Doc. CCPR/C/121/D/2585/2015, 18 December 2017.
[811] *Ibid* , para 8.12.
[812] Çali , Cosstello and Cunningham 2020 (21) *GLR* 375.
[813] ICCPR General Comment No.31 para 12.
[814] CAT, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22 UN Doc. CAT/C/GC/4, 9 February 2017, para 11.
[815] CEDAW , General Recommendation No. 32 , para 22.

be measured not against the probability, but against the reasonable likelihood that the claimant has a well-founded fear of persecution or that she would be exposed to persecution upon her return."[816] As for the CRoC, States must not return children to countries where there are "substantial grounds for believing that there is a real risk of irreparable harm to the child."[817]

Frigo remarks on the importance of the exact location within a country to which an individual is to be transferred. According to him, if a person can be safely relocated to another part of the same country, where the risk of a violation is diminished, then the obligation of *non-refoulement* will not be violated.[818] This position is confirmed by the CAT in *B.S.S. v. Canada*, [819] and in *I.A.M* by the CRoC.

In both *Raziyeh* and the *Jasin* case, the authors did not allege violations of the rights of their children under Article 24 of the ICCPR. Therefore, the HRC was not in a position to pronounce on the violation or non-violation of Article 24. In *O.A. v. Denmark* above, the HRC found a violation of Article 24. However, unlike *Jasin* and *Raziyeh, O.A*. alleged a violation of his right under Article 24 of the ICCPR and the HRC took note of this and pronounced on his circumstance as an unaccompanied child in need of special protection as articulated under Article 24 of the ICCPR. One may argue that the HRC could have pronounced on the violation of Article 24 in *Jasin* and *Raziyeh* in the interests of the children, however, as argued above, the HRC and indeed all other Committees are, as a general rule, restricted to pronouncing on violations which are brought by the authors and or their representatives. Moreover, if the author is legally represented, one cannot argue that he or she has been prejudiced due to ignorance or lack of knowledge of his or her rights. A number of other cases with similar facts have been presented before the HRC, which are not discussed to avoid repetition.[820] However, the general approach is captured in the cases selected for discussion.

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[816] *A.v. Denmark*.
[817] CRoC , General Comment No.6 para 27.
[818] Frigo (2014).
[819] *B.S.S. v. Canada* , CAT, UN Doc. CAT/C/32/D/183/2001, 17 May 2004, para 11.5.
[820] See for example *Hibaq Said Hashi v. Denmark,* where the HRC found yet another violation of Article 7 of the ICCPR if the author and her child were deported to Denmark. The Committee noted that

### 5.6 Female genital mutilation as a ground for non-refoulment

So far, under *non-refoulement* for socio-economic reasons, the sending state has been the source of harm for the complainants in treaty body cases. The recognition of FGM as a ground for *non-refoulement* indicates convergence from the treaty bodies that non-state actors are also recognised as a source of harm.[821] The HRC has found in *E.P. and F.P. v. Denmark,*[822] that state protection is a mitigating factor when considering the risk that the victim faces in the hands of non-state actors.[823] The CAT on the other hand seems to be limited by its definition of torture, which is confined to that caused by state agents, or done with their consent.[824] The CAT has since remedied this limitation

according to the author's uncontested allegations, she faced poor living conditions in Italy, even during her pregnancy, with access to only one meal per day, and she had no education and was not aware she had received a residence permit to live in Italy. The information before the Committee showed that persons in a situation similar to that of the author often end up living on the streets or in precarious and unsafe conditions unsuitable, in particular, for small children. Against this background, the Committee considered that the State party failed to give due consideration to the special vulnerability of the author, a single mother with no education, with a 5-year-old child, and with no previous integration into Italian society. The State party also failed to seek effective assurances from the Italian authorities that the author and her son would be received in conditions compatible with their status as asylum seekers entitled to temporary protection and the guarantees under Article 7. In particular, the State party failed to request Italy to undertake: (a) to renew the author's residence permit and to issue a permit to her child; and (b) to receive the author and her son in conditions adapted to the child's age and the family's vulnerable status that would enable them to remain in Italy. As such, the Committee considered that the removal of the author and her son to Italy, in her particular circumstances and without the aforementioned assurances, would amount to a violation of Article 7. Interestingly, in a case with a set of similar facts, the HRC did not find a violation of Article 7 of the ICCPR. See also *R.A.A. and Z.M. v. Denmark*, where the HRC held that deporting the authors and their baby to Bulgaria would expose them to irreparable risk in violation of Article 7 of the ICCPR. The HRC considered the previous hardships which the family had suffered in Bulgaria. The HRC considered that the State party's conclusion had not adequately taken into account the information provided by the authors, based on their own personal experience that, despite being granted a residence permit in Bulgaria, they faced intolerable living conditions there. In that connection, the Committee noted that the State party did not explain how, in case of a return to Bulgaria, the residence permits would protect them, in particular accessing the medical treatments that the male author needed, and from the hardship and destitution which they had already experienced in Bulgaria, and which would also affect their baby. The Committee recalled that States parties should give sufficient weight to the real and personal risk a person might face if deported and considered that it was incumbent upon the State party to undertake an individualized assessment of the risk that the authors and their child would face in Bulgaria, rather than rely on general reports and on the assumption that as the authors had benefited from subsidiary protection in the past, they would, in principle, be entitled to the same level of protection today.

[821] Çali , Cosstello and Cunningham 2020 (21) *GLR* 370.

[822] *E.P. and F.P. v. Denmark*, HRC, UN Doc. CCPR/C/115/D/2344/2014 , 10 December 2015.

[823] *Yang v. Netherlands,* HRC, UN Doc. CCPR//C/99/D/1609/2007, 24 August 2010.

[824]CAT, Art 16 reads "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…" Here, the CAT limits its definition of torture as an act which can only be committed by state actors.

in its case law where it has followed a less literal approach in its interpretation of the Convention in its decision on non-state actors.[825] The CEDAW Committee is clear that it considers harm from non-state actors as a ground for *non-refoulement* where the state is unwilling or unable to offer protection.[826] The CRoC has made it clear through its General Comment No.6 that harms that originate from non-state actors also trigger *non-refoulement* obligations.[827] The CRoC also recognises child trafficking, sale of children and commercial sexual exploitation of children, as well as child marriage as sources of harm which may merit protection under non-refoulement.[828]

In the HRC case of *Diene Kaba v. Canada*,[829] The author had fled Guinea to Canada to prevent her 6 year old daughter from undergoing female genital mutilation.[830] They faced deportation to Guinea since Canada denied their asylum claim. The HRC held that deporting the author and her daughter to Guinea would amount to a violation of Article 7 of the ICCPR.[831] The HRC reasoned that given the particular circumstances regarding the practice of FGM in the family of the author and in their ethnic group, there was a real risk of harm which could be inflicted on the author's daughter if deported. This reasoning is in contrast to the general approach of the HRC, as it has

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[825] See for example *M.F. v. Sweden*, CAT, UN Doc. CAT/C/41/D/326/2007, 26 November 2008 ; *S.V.et al. v. Canada*, CAT, UN Doc. CAT/c//26/D/49/1996, 15 May 2001 ; *G.R.B. v. Sweden* , United Nations Committee Against Torture, UN Doc. CAT/C/20/D/83/1997 , 15 May 1998.

[826] See *Y.W .v. Denmark*, United Nations Committee on the Elimination of Discrimination Against Women, UN Doc. CEDAW/C/60/D/51/2013 , 13 April 2015, para 8.8. In this case, the author, a Chinese national, faced deportation to China from Denmark. The author claimed that she sought protection from Chinese authorities from attacks from loan sharks and organized crime elements. This claim was rejected by the Chinese authorities on grounds that the author never sought protection on these grounds and had no prima facie proof that the Chinese authorities were or would be unable or unwilling to offer her protection against the organized crime elements.

[827] CRoC, General Comment No.6 , para 27.

[828] *Ibid* , para 27; See also *I.A.M. v. Denmark*, para 11.8.

[829] *Diene Kaba v. Canada*.

[830] The author was able to prevent the excision from happening but was beaten by her husband and in the process, the author's daughter also sustained a scalp injury.

[831] *Diene Kaba v. Canada* , para 10.3.

shown in cases prior to *Kaba*, that being a member of a particular group which is at a risk in a particular country is not sufficient to establish a personal risk [832].[833]

In 2014, in *R.O. v. Sweden*,[834] the CAT issued an interim order to the effect that the State party should not expel the author and her two daughters to Nigeria, where the three children could undergo the irreparable harm of female genital mutilation. In this case, the CAT found no violation of Article 3 (non-refoulement) of the Convention Against Torture. The author and her daughters held permanent resident's permits in Italy but escaped to Sweden due to the fear that her ex-husband and ex-mother in law would take her daughters to Nigeria, where they risked being victims of female genital mutilation.[835]

The CAT held that the author had failed to establish that her daughters would face real and personal risk if deported to Nigeria.[836] The CAT reasoned that the practise of FGM varied across various states in Nigeria and the author had not shown that it was practised in either her or her ex-husband's ethnic groups. Therefore, she had failed to establish that her daughters were at real and personal risk. She lived in Nigeria for more than two decades but did not adduce evidence that she was personally subjected to FGM.[837]

The CAT held further that the author had not refuted the information provided by the Italian authorities that her and her daughters held valid permanent resident permits in Italy. She had not provided information that the Italian authorities were unwilling

[832] *Ibid*, para 10.2 ; See for example *W.K v. Canada* , CRoC, UN Doc. CCPR/C/122/D/2292/2013 , 12 June 2018; *A and B. v. Denmark*, HRC, UN Doc. CCPR/C/117/D/2291/2013 , 9 September 2016 and *A. and B. v. Canada* (CCPR/C/117/D/2387/2014)- However HRC did find a violation of Article 7 in *M.K.H. v. Denmark* , as the author had demonstrated the risk he would be exposed to in Bangladesh due to his homosexuality

[833] Heyns, Rueda and Du Plessis (2020) 122.

[834] *R.O. v. Sweden*, paras 2.1-2.13.

[835] The author argued that her permanent residence permit was dependent on her ex-husband's permit and further that Sweden had not investigated whether Italy would allow her and her daughters back. She added further that even if her resident's permit was independent of her ex-husband's permit, she would have to prove that she could maintain herself and her daughters. Since she could no longer fulfil this requirement, her permit could be revoked, and they would be sent back to Nigeria.

[836] *R.O. v. Sweden,* para 8.9

[837] *Ibid.*

or unable to protect them. The Committee concluded that the author had not provided sufficient evidence that her and her daughters' removal to Italy or to their country of origin would expose them to a foreseeable, real and personal risk of treatment contrary to Article 1 (definition of torture) of the Convention. The Committee requested for Sweden to give the author and her children reasonable time to leave the country voluntarily.[838]

In 2016, the CAT gave a similar in *M.J.S. v. Netherlands*,[839] it was argued on behalf of the author who was 1 year old at the time of submission that she would be put at risk of female genital mutilation if deported to the Ivory Coast.[840] An interim order was issued by the CAT to the effect that the author is not expelled while her case was under consideration.[841] The CAT concluded that the author's removal to the Ivory Coast by the State party would not constitute a breach of Article 3 (*non-refoulment*).[842] The CAT found that the author had not adduced sufficient grounds for it to believe that she would run a real, foreseeable, personal and present risk of being subjected to torture upon her return to the Ivory Coast. The CAT noted that the author had failed to show that someone in her family would pressurise her mother, who was against female genital mutilation into practicing the procedure, which would put her at a real and personal risk of being mutilated.[843]

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[838] *Ibid*, paras 8.9-8.10.
[839] *M.J.S. v. Netherlands*.
[840] The author is M.J.S. born on 31 January 2015. The author is a national of Cote d'Ivoire. She was born in the Netherlands and continued to reside there. The author faces deportation to Cote d'Ivoire following the denial of her application for asylum. On 24 April 2015, the author's mother lodged an application for asylum on her behalf, on the basis that the author risked being circumcised if returned to Côte d'Ivoire. On 3 June 2015, this application was denied by the Immigration and Naturalization Service. The author unsuccessfully challenged this decision on three occasions. On 25 June 2015, the Hague District Court declared her application for judicial review unfounded and denied her application for interim relief. On 21 August 2015, the Council of State rejected her appeal. On 25 August 2015, the Administrative Jurisdiction Division declared the subsequent appeal manifestly unfounded. The author's mother had also unsuccessfully sought asylum since arriving in the Netherlands in March 2011. However, the author's mother had been permitted to stay in the Netherlands during her pregnancies on the basis of section 64 of the Aliens Act 2000.
[841] *M.J.S. v. Netherlands* , para 1.2.
[842] *Ibid* , para 11.
[843] *Ibid* , para 8.8.

Unlike Articles 6 and 7 of the ICCPR, Article 3 of the CAT does not refer to cruel, inhuman or degrading treatment.[844] However, the CAT has expanded on its non-refoulement protection: in its General Comment No.2, the CAT gave an interpretation of torture to the end that torture and other forms of harm were inter-related, materially and casually,[845] and within the meaning of non-refoulement.

The CRoC interprets Article 19 of the CRC as including a prohibition of non-refoulement.[846] In its General Comment No.6, the CRoC has stated that a state may not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to him or her.[847] Furthermore, the CRoC makes explicitly clear that in assessing the risk of such serious violations, the State must do so in an age and gender-sensitive manner, taking into account situations such as where children may have insufficient provisions of food or health care services.[848] The CRoC has of course recognised FGM as a ground of protection under *non-refoulement* in *I.A.M. v. Denmark,*[849] which is discussed in more detail chapter I.A.M.is the CRoC's first case on non-refoulement and the CRoC gave far reaching views including the view that a relative accompanying a child who could face FGM should also be given protection. Predictably, the CRoC found violations of the best interests of the child and the right to protection from all forms of violence.

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[844] Lauterpacht and Bethlehem (2003) 152-153.

[845] CAT, *General Comment No. 2 on the Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2000, para 3: "Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure" . In the same paragraph the CAT also notes: "The obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment under article 16, paragraph 1, are indivisible, interdependent and interrelated."

[846]Klaassen and Rodrigues "The Committee on the Rights of the Child on female genital mutilation and non-refoulement" 20 March 2018 https://leidenlawblog.nl/articles/the-committee-on-the-rights-of-the-child-on-female-genital-mutilation (Accessed 19 February 2021).

[847]CRoC, General Comment No. 6 , Para 27.

[848] *Ibid.*

[849] CRoC , UN Doc. CRC/C/77/D/3/2016, 25 January 2018.

More recently in *S.S.F. v Denmark*,[850] the CRoC's second case on FGM, the CRoC noted the immediate and long term effect that FGM may have on the health of an individual,[851] and recommended that "the legislation and policies relating to immigration and asylum should recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum and that consideration should also be given to providing protection to a relative who may be accompanying the girl or woman."[852]

Like the HRC, the CRoC also recognises lack of medical treatment as grounds for non-refoulement. In *D.R. v Switzerland*,[853] the CRoC considered non-refoulment on medical conditions for the first time and held that congenital hypothyroidism was essential for the child's development. This case is discussed in detail in chapter 7.

In *Z.S. and A.S. on behalf of K.S. and M.S. v Switzerland*,[854] the CRoC made a finding that deporting a deaf child, who could not be guaranteed to receive adequate medical care in Russia is a violation of the child's best interests, the right to medical care and the right to survival and development. Unlike in the ECtHR which applies a higher threshold to medical cases to adult migrants, the CRoC applied a lower threshold to the child migrant.[855] The case is discussed in more detail in chapter 7, which gives an account of the CRoC's jurisprudence.

### 5.7 When can a state be said to have violated the principle of non-refoulement: Actual deportation and mere anticipation

The language of the HRC, the CAT and the CEDAW Committee, implies that a State party can be said to have violated the ICCPR, the CAT and the CEDAW only if the deportation takes place. Thus, according to the HRC:

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[850] CRC/C/90/D/96/2019.
[851] *Ibid*, Para 8.4
[852] *Ibid.*
[853] CRC/C/87/D/86/2019.
[854] CRC/C/89/D/74/2019.
[855] M. Renemen, *Communication 74/2019 Z.S and A.S on behalf of K.S and M.S V Switzerland*, Leiden Children's Rights Observatory, Case Note 2022/1, 13 September 2022.https://www.childrensrightsobservatory.nl/case-notes/casenote2022-01 (Accessed 31 October 2022).

> The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the deportation of the author and her three children to Italy **would violate** their rights under article 7 of the International Covenant on Civil and Political Rights.[856]

The CAT uses a similar language as the HRC by stating that the enforcement of an expulsion order would constitute a violation of article 3 of the Convention.[857] The CEDAW does same by holding that deporting an author and her daughters would amount to a breach of articles 2 (d) (e) and (f), read in conjunction with article 1, of the Convention, taking into consideration the Committee's general recommendations No. 19 and No. 35.[858] However, the CRoC seems to take a different approach and holds that the facts before it amount to a violation of articles 3 and 19 of the Convention.[859]

Whilst the HRC employs the language "would violate", the CAT uses "would constitute" and the CEDAW Committee "would amount". The CRoC's, wording in *I.A.M.*,[860] seems to imply that a State would have violated the rights of the child by merely anticipating deportation. The child need not have been deported for his or her rights under the CRC to be violated, mere anticipation of the deportation suffices. In *S.S.F. v Denmark*, the CRoC confirms that it intentionally creates a higher standard of protection to children who face deportation. It is submitted that the vulnerability of children and the potential, (sometimes irreversible)harm which the child will face if deported could be the reason why the CRoC creates a higher standard for children.

### 5.8 The best interests of the child principle as an independent source of protection for children facing deportation

856 *Jasin v. Denmark,* para 9.
857 *M.A.M.A. et al v. Sweden ,* para 10.
858 *R.S.S.A. et al v. Denmark ,* para 9.
859 *I.A.M. v. Denmark* , para 11.10.
860 See the CRoC's decision in the case "The Committee on the Rights of the Child, acting under article 10, paragraph 5, of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, is of the view that the facts before it amounts to a violation of articles 3 and 19 of the Convention" para 11.10.-

In General Comment no.14(2013)on the best interests of the child ,[861] the CRoC has acknowledged that the best interests principle is threefold, consisting of a substantive right, an interpretive legal principle and a rule of procedure.[862] Thus far, the best interests principle as a substantive right has been discussed. Non-refoulement obligations in international law are often triggered by provisions such as Article 3 of the CAT, [863] Articles 6 and 7 of the ICCPR,[864] and Articles 6 and 37 of the CRC.[865] To

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[861] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html [accessed 17 February 2023]

[862] *Ibid*, para 6.

[863]Article 3 (1) provides that: No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. AND 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights

[864] Article 6 : 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant. AND Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[865] Article 6: 1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child. AND 37 States Parties shall ensure that:(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation

illustrate, communications in which child authors have claimed protection using non-refoulement are always founded on grounds such as their right to protection against torture, cruel or degrading treatment, and their right to life and survival.[866]
The findings of the various committees are based on the fact that the perceived risk that the child will face if deported will not be in the child's best interests. Put simply, there is a substantive right(s) that the child author will claim a violation or a possible violation of if deported and that right is interpreted in view of or together with the best interests principle. The finding of a violation or possible violation is not based on the best interests principle, but on an existing right interpreted in light of the best interests principle.

Considering the above, and the CRoC's assertion in General Comment no.6 that "return to the country of origin shall in principle be arranged if such return is in the best interests of the child"[867] and that all matters concerning children, the best interests of the child shall be a primary consideration,[868] can the best interests principle provide an independent legal basis for protection under the non-refoulement principle, that is independent of the provisions under human rights law and the refugee convention?

According to McAdam, the best interests principle reflects an absolute principle of international law and is highly relevant in determining whether or not a child needs international protection.[869] She asserts further that the best interests principle provides for an additional layer in the interpretation of the refugee convention, in addition to "constituting a complementary ground of protection in its own right."[870]

of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

[866] See for example *Kaba v. Canada* (CCPR/C/98/D/1465/2006), para. 10.1; *F.B. v. The Netherlands* (CAT/C/56/D/613/2014), para. 8.7; and *M.N.N. v Denmark* (CEDAW/C/55/D/33/2011), para. 8.8.
[867] CRoC: General Comment no.6(2005), para 84.
[868] Article 3 of the CRC.
[869] Jane McAdam *Complementary protection in international refugee law* (2017)173.
[870] McAdam (2017) 173.

Pobjoy argues that Article 3 " creates a new category of protected persons whose claims need to be assessed and evaluated by domestic decision-makers,"[871] in that the best interests of the child principle may prevent the deportation of a child even if that child is not eligible for protection under international human rights law or the refugee convention.[872] He adds that in deportation cases, the relevant inquiry is whether the removal of the child is in the child's best interests and "If removal is contrary to those interests, there will be a strong presumption against removing the child, subject only to a tightly circumscribed range of considerations that may in certain circumstances override the child's best interests."[873]

It is submitted that the best interests principle encompass a substantive right, a procedural right and an interpretative rule, as such can provide an independent source of protection in non-refoulement cases.

### 5.9 Conclusion and lessons for the

This chapter sought to outline children's rights jurisprudence on non-refoulement within the United Nations treaty body jurisprudence. The international legal framework is clear that returns should not violate the principle of non-refoulement. As Moran notes, the concept of non-refoulement or the right not to be returned was agreed upon by States to protect those who could or would face death if they are returned.[874] However, the adoption of the concept in human rights has resulted in its expansion and the concept has now departed significantly from the original intention of the drafters of the 1951 Convention on the Status of Refugees.[875] Moran notes further that the departure from the original intention of the concept is problematic for

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[871] Jason Pobjoy "The best interests of the child principle as an independent source of protection" (2015) 64(2) *International Comparative Law Quarterly* 327,8.
[872] Pobjoy (2015) 8.
[873] Pobjoy (2015) 8-9.
[874]Moran "Strengthening the principle of non-refoulement" 2020 (1) The *International Journal of Human Rights*.
[875] Moran (2020) *IJHR* 1.

both refugee and human rights law in that it has resulted in a narrower interpretation of the concept by States in an attempt to avoid mass migration.[876]

It is submitted that whilst Moran's observations are relevant, the adoption of the concept in human rights law has also paved the way for protection from deportation based on many other deprivations and risks as seen in the cases above. Its adoption into human rights law has widened the scope of protection for refugee and asylum seekers, as well as migrants. Moreover, as Frigo notes, the concept continues to develop further beyond its current scope.[877] One of the advantages of non-refoulement is that is protects victims complainants from being deported to countries where the harm perceived could be done. In essence, it is a remedy that one can claim before the anticipated harm.

The recognition of socio-economic rights as grounds for *non-refoulement* was unique to the HRC until the CRoC recognised the same in *W.M.C. v. Denmark*,[878] which is discussed in chapter 7. The HRC has built its jurisprudence on socio-economic rights as grounds for *non-refoulement* using a substantive number of communications. Notably, the HRC appears to be lenient in its approach to socio-economic rights and non-refoulement particularly when the communication involves young children and their mothers. The CRoC's jurisprudence on *non-refoulement* is discussed in chapter 7 and has one communication on socio-economic rights as grounds of *non-refoulement.* The provision in Article 6 of the CRC already predicted that the CRoC was likely to take a similar approach as the HRC. Article 6 of the CRC provides for the right of every child to survival and development. Article 6 requires amongst others that States parties should ensure that they put measures in place to allow children to survive into adulthood in conditions that are optimal for their development.[879] This includes

[876] *Ibid.*
[877] Frigo (2014) 130
Ibid
[878] *W.M.C. v. Denmark,* CRoC, UN Doc. CRC/C/85/D/31/2017, 15 October 2020.
[879]The Child Rights International Network "Article 6: Survival and Development" https://archive.crin.org/en/home/rights/convention/articles/article-6-survival-and-development.html (accessed 6 January 2022).

providing healthcare, nutrition, sanitation and drinking water. It is submitted that General Comment No.6 of the CRoC (2005)on the Treatment of Unaccompanied Children and Article 6 of the CRC, read together with the best interests principle meant that the CRoC was likely to recognise non-refoulement on grounds of socio-economic rights as it rightfully did in *W.MC. v. Denmark*.

In chapter 6, the theme of migration detention as it relates to children is discussed, focusing on rights that relate to migration detention. The chapter also explores the CRoC's new jurisprudence on the matter.

# Chapter 6: Immigration Detention

## 6.1 Introduction

The CRoC has stated that immigration detention is not in the best interests of the child and will always constitute a child rights violation.[880] Whilst immigration detention is meant to be used to ensure compliance with immigration procedures, it is often used as a restrictive measure to control illegal migration.[881] It is well established in

[880] CRoC : Report on the 2012 Day of General Discussion 'The Rights of all children in the context of international migration', 28 September 2012 , para 32.

[881]See The Global Detention Project www.globaldetentionproject.org (accessed 10 August 2021) for individual country estimates. See also Sampson and Mitchell "Global trends in immigration detention

international law that in immigration control, detention should be the exception rather than the norm and should be used as a measure of last resort.[882] Detention should be used only where other alternatives such as reporting requirements or restrictions on residence cannot be used.[883] Despite this, children are often detained for migration reasons, whether in relation to their or their parents' irregular migration status.

This chapter focuses on the rights of children detained for immigration related purposes through an analysis of selected children's rights cases on immigration detention. It begins with a discussion of the international legal framework on the rights of children detained for immigration purposes. It then proceeds to discuss the selected cases within relevant sub-headings. It concludes with recommendations for the work of the CRoC in its emerging jurisprudence, based on jurisprudence of the relevant treaty bodies in the cases in this chapter.

### 6.1.1 Definition of terms

The term "migrant children" includes refugee, asylum seeking children or children with irregular migration status. Vandenhole, Turkelli and Lembrechts submit that "the terminology of migrant versus refugee has been used to delineate those children deserving of international protection and those that are not."[884] However, the Joint General Comment of the CRoC and the CMW situates all children on an equal footing

and alternatives to detention: Practical, political and symbolic rationales " 2013 (1) *Journal on Migration and Human Security* 97-121.

[882] UN Human Rights Council, *Report of the Working Group on Arbitrary Detention (WGAD)*, 16 February 2009, A/HRC/10/21, paras 67 and 82; *European Guidelines on Accelerated Asylum Procedures,* adopted by the Council of Europe Parliamentary Assembly Resolution 1471 of 2005, principle XI.1. See also UN High Commissioner for Refugees (UNHCR) , Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009, *Conclusion No. 7 (XXVII) Expulsion (1977),* para e: "an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged." See also UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009, *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers (1986)* para B; CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Bahamas*, 28 April 2004, CERD/C/64/CO/1, para 17.

[883]Frigo "Migration and international human rights law: A practitioner's guide" 6 updated edition (2014) 175 https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf (accessed 2 December 2020).

[884] Vandenhole, Turkelli and Lembrecht *Children's rights: A commentary on the Convention on the Rights of the Child and its Protocols* (2019) 240.

by calling on states to enact policies which allow for free and quality legal advice and representation for migrant, asylum seeking and refugee children.[885]

This chapter adopts the definition of "immigration detention" under the Joint General Comment between the CRoC and the CMW.[886] Accordingly, immigration detention is understood as "any setting in which a child is deprived of his/her liberty for reasons related to his/her, or his/her parents', migration status, regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty".[887] The study adopts this definition because it is based on the framework of protection provided by the CRoC under the CRC and its related instruments.

### 6.1.2 Delimitation

First, as the title suggests, this chapter is focused on the detention of children in the context of migration. It is noted that children can be detained in various circumstances. Deprivation of liberty of children in the context of child justice has been discussed under chapter 3.

Second, some of the cases discussed below involve children and their parents. Therefore, even though some of the facts also involve the rights of the parents, for the purposes of this research, only the facts concerning the rights of the child in the context of migration detention will be discussed.

Finally, it must be noted that this chapter considers international human rights law principles in so far as they relate to the rights of migrant children detained for migration purposes. The chapter also considers general international law provisions

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[885] CMW, *Joint general comment No. 4 (2017) of the and No. 23 (2017) of the CRoC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23.
[886] *Ibid*,para 6.
[887] *Ibid.*

for the protection of persons detained for migration reasons, as children are also beneficiaries of these protections.

## 6.2 International legal framework

According to Article 37(b) of the CRC, "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." According to the Global Study on Children Deprived of their Liberty, this implies a strict standard when it comes to the personal liberty of children.[888] Article 37(b) is often used in the context of child justice and when applied in the immigration context, it raises the question of whether immigration detention of children is prohibited outright or allowed only as a measure of last resort. The CRoC and the CMW have clarified in their Joint General Comment No. 4 of the CMW and 23 of the CRC (2017) that unlike in criminal justice situations where a child may be detained as a measure of last resort, in the context of migration detention, the rule is not applicable as it might conflict with the best interests principle and the right to development.[889] Consequently, the CRoC and the CMW concluded that the detention of a child and family for migration reasons should be prohibited by law and abolished both in policy and practice.[890] Furthermore, non-custodial solutions should be preferred over detention.[891] According to the Global Study on Children Deprived of their Liberty, "the position of the two UN treaty monitoring bodies seems to suggest that there is an international trend to move beyond the Article 37(b) standard as far as the immigration detention of children is concerned."[892] The Global Study submits that there is no need to move beyond the Article 37(b) standard as the best interests principle (Article 3 of the CRC) and the right to life, survival and development (Article

[888] United Nations "The United Nations global study on children deprived of their liberty" 2019 https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf (Accessed 24 December 2021).
[889] The Joint General Comment No. 4 of the CMW and No.23 of the CRoC (2017), para 10.
[890] *Ibid*, para 12.
[891] *Ibid.*
[892] United Nations, United Nations Global Study on Children Deprived of their Liberty (2019).

6 of the CRC) are not in conflict with the principle of last resort in Article 37(b) of the CRC.[893]

According to Smyth, the position in the Joint General Comment No, 4 of the CMW and No. 23 of the CRoC (2017) that the detention of children for immigration purposes is prohibited is correct. However, Smyth submits that the position is founded on the wrong premise and she proposes a means by which the position should be founded.[894] Smyth submits that immigration detention is arbitrary and can potentially violate numerous rights of the child.[895] Therefore, it is not necessary to go beyond the question of arbitrariness to the question of whether the detention complies with the 'measure of last resort' requirement under Article 37(b) of the CRC.[896] In this view, Smyth takes a similar approach as the Global Study discussed above.

Vandenhole, Turkelli and Lembrechts note that the phrase "deprivation of liberty" contained in Article 37(b) of the CRC gave rise to an issue of loss of terminology in that the term is often used to mean arrest, detention or imprisonment of a child.[897] They submit that this often creates the impression that the applicability of Article 37(b) is limited to juvenile justice cases, whereas it is intended to apply widely to all cases involving deprivation.[898]

Manco clarifies that Article 37(b) applies to all children and therefore, it is implied that that it is applicable to all children deprived of their liberty, irrespective of the context.[899] However, in reality, Article 37 is often interpreted to mean deprivation of

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[893]*Ibid*.
[894]Smyth "Towards a complete prohibition on the immigration detention of children" 2019 (19) *Human Rights Law Review* 1.
[895]According to Smyth 2019 (19) *HRLR* the following rights of children can be violated through immigration detention: The right to health, the right to development, the right to freedom from cruel, inhuman and degrading treatment or punishment, the right of the unaccompanied child to special protection and assistance from the state and the right of the unaccompanied child to family life.
[896] *Ibid,* 35-36.
[897]Manco "Detention of the child in light of international law- A commentary on Article 37 of the United Nations Convention on the Rights of the Child" 2015 (7) *Amsterdam Law Forum* 55-75 59.
[898] Vandenhole, Turkelli and Lembrechts (2019) 357.
[899] Manco 2015 (7) 74.

liberty in the child justice system and it is often cited along-side Article 40, which deals with the rights of children in the child justice system. Nevertheless, it appears that the CRoC does view it as being applicable to children in situations of migration, and although the Committee did not spell this out clearly, Smyth's analysis clarifies that what the drafters probably meant was that the last resort principle does not apply because detention is disproportionate in situations of migration, and therefore arbitrary, thus the next leg of article 37(b) is not reached.[900]

The best interests principle as stipulated under Article 3 of the CRC requires that states have to prove that detaining a child for immigration purposes would be in the best interests of the child.[901] Depending on the circumstances of the detention, migration detention may also trigger violations of the right to life, survival and development as required under Article 6 of the CRC. Detaining a child for migration reasons may also amount to treatment that is cruel, inhuman and degrading in violation of Article 37(a) of the CRC.

Joint General Comment No.4 & No.23 of the CRoC and the CMW(2017) on Children in International Migration provides that "every child at all times has a fundamental right to liberty and freedom from immigration detention."[902] In addition, General Comment No.6 of the CRoC (2005) on the Treatment of Unaccompanied Children provides that "In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof."[903]

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[900] Smyth 2019 (19) *Human Rights Law Review* 1.
[901] United Nations , United Nations Global Study on Children Deprived of their Liberty (2019). See also UNCRC, Art 3 on the best interests principle.
[902] The Joint General Comment No. 4 of the CMW and No.23 of the CRoC (2017), para 5.
[903]CRoC, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para 61.

Other treaty bodies such as the HRC and the CMW have also expressed their views on the detention of children for immigration purposes. The HRC's general position is that immigration detention is not prohibited by Article 9(1) of the ICCPR, however, it must be individually assessed and justified as reasonable, necessary and proportionate in light of the circumstances.[904] This view was expressed in *F.K.A.G et al v Australia*,[905] which will be discussed in detail below. In relation to children, the HRC has stated in its General Comment No. 35 of 2014 that:

> Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[906]

The CMW Committee has also stated that children and more specifically separated or unaccompanied children should not be detained solely for immigration purpose.[907] Smyth submits that this position implies that children may be detained if there is another reason accompanying the immigration reason to justify the detention. She adds that "furthermore, the provision also implies that the particular mention of unaccompanied or separated children suggests a less than absolute prohibition of detention where accompanied children are concerned. In this regard the Joint General Comment provides a welcome clarification of the Committee's position."[908]

The CEDAW Committee has also said that the following in the context of migration:

> Children should not be detained with their mothers unless doing so is the only means of maintaining family unity and is determined to be in the best interest of the child. Alternatives to detention, including release with or without conditions, should be considered in each individual case and especially when separate facilities for women and/or families are not available.[909]

[904] *F.K.A.G. et al. v Australia* , HRC, UN Doc CCPR /C /108 /D / 2094/2011 , 20 August 2013, para 9.3.
[905] *F.K.A.G. et al. v Australia* .
[906] HRC, *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para 18.
[907] CWM: General Comment No. 2 of 2003 on The Rights of Migrant workers in an Irregular Situation and Members of their Families,UN Doc CMW/C/GC/2 , 28 August 2013, para 33.
[908] Smyth 2019 (19) *HRLR* 11.
[909] CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, para 49.

Apart from the above, in 2010, the UN Working Group on Arbitrary Detention said that "Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in the Article 37(b) clause 2 of the CRC, according to which detention can be used only as a measure of last resort."[910] The CRoC said in 2012, during a Day of General Discussion that detaining a child due to their, or their parent's migration status constituted a violation of their rights as a child.[911] The UN Secretary-General stated that the "detention of migrant children constitutes a violation of child rights."[912]

### 6.3 Nature of detention

In international human rights law, deprivation of liberty is not defined according to the national laws of the state in question, but rather on the reality of the restrictions placed on the individual concerned.[913] Therefore, individuals who are held at a facility for purposes of migration can be seen under international human rights law as being deprived of their liberty, depending on the impact of the restriction on their freedom of movement.[914] Indeed, holding centres at airports and other points of entry have been found to constitute deprivation of liberty as they imposed restrictions on movement.[915]

Under international human rights law, restrictions on movement can amount to deprivation of liberty depending on the following factors, among others : the type of

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[910] United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/13/30, 15 January 2010, para 60.

[911] CRoC , *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration* , 28 September 2012, para 78.

[912] UN General Assembly: Report of the UN Secretary-General on International Migration and development , UN Doc A/68/190, 30 July 2014 , para 75.

[913] *Amuur v. France*, 17/1995/523/609, Council of Europe: ECtHR, 25 June 1996, para 42; *Nolan and K v. Russia*, Council of Europe: European Court of Human Rights, Application no. 2512/04, 12 February 2009,paras 93–96; *Abdolkhani and Karimnia v. Turkey*, Council of Europe: European Court of Human Rights, Application No. 30471/08, 22 September 2009, paras 125–127; *Ashingdane v. United Kingdom* European Court of Human Rights Application No. 8225/78 , 28 May 1985, para 42.

[914] *Abdolkhani and Karimnia v. Turkey* para 127, finding that detention at an accommodation centre, although not classified as detention in national law, did in fact amount to a deprivation of liberty.

[915] *Amuur v. France* ; Council of Europe: Committee for the Prevention of Torture, *The CPT standards*, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2010, para 53–54

restriction imposed, the duration of the restriction, the impact on the individual and the manner in which the restriction is imposed on the individual.[916] The difference between deprivation of liberty and restriction on freedom of movement is not clear: it is the degree of intensity of the restriction and not the nature of the restriction that determines the difference.[917]

The UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention provides that restrictions on liberty imposed for short periods of time, at points of entry in countries for purposes of administration, such as checking identity or the processing of asylum application would not amount to deprivation of liberty unless such processes are unnecessarily prolonged.[918] According to the same Guidelines,[919] the fact that a detained individual is freed from the place of detention by agreeing to leave the country, does not imply that such detention did not amount to a deprivation of liberty.[920]

Restrictions on freedom of movement may raise issues under Article 12 of the ICCPR but may not amount to deprivation of liberty. This was confirmed by the HRC in *Celipli v. Sweden*,[921] where it was held that the confinement of an individual to a single municipality, whilst he was awaiting deportation, with the requirement that he reports three times in a week did not amount to deprivation of liberty but did raise issues under Article 12 of the ICCPR. Finally, restrictions on residence may raise issues

[916] *Engel and Others v. Netherlands*, European Court of Human Rights, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, para 59; *Guzzardi v. Italy*, Council of Europe: European Court of Human Rights, Application no. 7367/76, 6 November 1980, para 92.
[917] *Guzzardi v. Italy*, para 93.
[918] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 6.
[919]*Ibid.*
[920] UNHCR Guidelines on detention (2012) , Terminology para 7.
[921] *Celepli v. Sweden* , HRC, UN Doc CCPR/C/51/D/456/1991 views of the HRC of 26 July 1994.

under the right to respect for family life, where such restrictions separate members of the family.[922]

### 6.4 Immigration detention and its threats to children's rights

The Joint General Comment No.4 & No.23 of the CRoC and the CMW (2017) on Children in International Migration has laid down the foundation that detaining a child for their or their parents' immigration status constitutes a child rights violation, and contravenes the best interests principle.[923] The Joint General Comment highlights the inherent harm in any deprivation of liberty as well as the negative impact that immigration detention can have on children's physical and mental health and on their development, even if children are detained for a short period of time with their families.[924]

First, the fact that migration detention can potentially violate a number of children's rights means that it cannot be in the best interests of the child to be detained for immigration purposes. Every right of the child which is violated or which can potentially be violated through immigration detention, must be measured against the best interests principle, due to the requirement that in every matter concerning a child, the child's best interests must be taken into consideration.[925] Therefore, a decision to detain a child because of immigration related reasons either fails to consider the best interests of the child or does not afford sufficient weight to the rights of the child.[926] The CRoC has expressed its views regarding the best interests of the child and immigration, that the best interests of the child should take preference over any migration interests of the state.[927] The CRoC has said in its General Comment No.6 of

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[922] The link between migration detention and families being separated from residences often raises issues regarding the right to non-separation of family and this is discussed under the chapter on the right to protection of the family.
[923] The Joint General Comment No. 4 of the CMW and No.23 of the CRoC (2017), para 5.
[924] *Ibid.*
[925] UNCRC, Art 3(1).
[926] Smyth 2019 (19) *HRLR* 24.
[927] Gamze Erdem Türkelli and Wouter Vandenhole, "Case Note: 2018/3 'Communication 12/2017: Y.B. and *N.S. v Belgium*'" in *Leiden Children's Rights Observatory* 2018.

(2005) that "the child's best interests must supersede state aims, for example, of limiting irregular migration."[928]

Pobjoy argues that best interests principle could potentially be an independent source of international protection for asylum seeking and refugee children, because the best interests principle applies to all children in the jurisdiction of a State party without discrimination based on migration status or citizenship.[929] This position is reinforced by the Global Compact for Migration, according to which the best interests principle serves as a baseline in addressing and reducing the vulnerabilities of children in migration.[930]

The CRoC has stated that the child's right to development (Article 6(2) of the CRC) should be interpreted in its broadest form, to include physical, mental, spiritual, moral, psychological and social development of the child.[931] A holistic interpretation of the child's right to development can be linked to the right to health in Article 24(1) of the CRC, which provides that every child has the right to the enjoyment of the highest attainable standard of health.[932] The Global Study on Children Deprived of their Liberty also found that children who were detained for immigration purposes may suffer serious mental health disorders, often created by torture and trauma prior to arrival, the breakdown of families within detention, the length of detention and uncertainties about outcomes, amongst others.[933] The impact that prolonged detention can have on children can be seen in *F.K.A.G v Australia* where it was found that the children had suffered mental health issues due to their prolonged detention.[934]

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[928] CRoC: General Comment No. 6 (2005), para 86.
[929] Pobjoy "The Best Interests' Principle as an Independent Source of International Protection" 2015 (64) *International & Comparative Law Quarterly* 331.
[930] The Global Compact for Migration Global compact for Safe, Orderly and Regular Migration, para 15 https://www.iom.int/global-compact-migration (accessed 12 December 2020). The Global Compact for Migration is the first ever UN global agreement on a common approach to international migration in all forms. It is not legally binding and it comprises 23 objectives to better manage migration, locally, internationally, regionally and at a global level.
[931] CRoC , *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, para 62.
[932] Smyth 2019 (19) *HRLR* 25.
[933] United Nations , The United Nations Global Study on Children Deprived of their Liberty (2019).
[934] *F.K.A.G v Australia* , paras 3.12 and 3.13.

## 6.5 Detention pending deportation and detention on entry

First, it must be established the different circumstances under which an individual can be detained for migration purposes under international law. Detention can occur at the point of entry into a country or pending deportation.[935] States often detain persons at the point of entry into their territory to prevent unauthorized entry. With regard to detention at the point of entry, states must ensure that detention on entry does not adversely affect the rights under international refugee law,[936] such as the right of access to procedures when one is claiming refugee status.[937] The HRC has shown through its jurisprudence, an acceptance of detention based on illegal entry.[938] The HRC conducts an individualised assessment of whether States parties consider the proportionality and necessity of detention in their decision to detain individuals.[939] The HRC requires States Parties to show that the detention of individuals for migration purposes is necessary in circumstances of a particular case.

In *Madafferri and Madafferi v Australia*,[940] the HRC held that "although the detention of unauthorized arrivals is not *per se* arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant." The HRC has shown in its jurisprudence that detention must be reasonably justifiable, and must not last beyond the period for which the justification applies.[941] In *Bakhtiyari v. Australia*,[942] the HRC held that detention may be used for the purposes of identification and verification upon entry. However, such detention can become arbitrary if it is prolonged unduly.[943] In

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[935] See for example *D and E, and their two children v. Australia*, HRC, UN Doc. CCPR/C/87/D/1050/2002, 9 August 2006, where a family was detained upon arrival.
[936] Frigo (2014) 186.
[937] See for example the ECtHR's judgment in *Amuur v. France*, para 43.
[938] *A. v. Australia*, HRC, UN Doc. CCPR/C/59/D/560/1993, 3 April 1997, para 9.3.
[939] See for example *F.K.A.G. et al v. Australia,* para 9.2-12.
[940] *Madafferri et al. v. Australia,* HRC, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004, para 9.2 This case is centered around the arbitrary detention of Mr Madeferri and the consequences of his and his family's right to protection of the family unit. It is discussed fully under the chapter on the right to family.
[941] *M.M.M. et al v Australia,* HRC, UN Doc CCPR/C/108/D/2136/2012, 20 August 2013 ; *D and E v. Australia* ; *F.K.A.G. et al v. Australia*; *A. v. Australia* paras 9.3.-9.4.
[942] *Bakhtiyari v. Australia,* HRC, UN Doc CCPR/C/79/D/1069/2002 , 6 November 2003. It must be noted that this case also involves the detention of the parents, especially Mr Bakhtiyari. However, for the purposes of this chapter, it is the rights of the children which will be discussed**.**
[943] *Bakhtiyari v. Australia* paras 9.2-9.3 ; See also *F.K.A.G. et al v. Australia* , para 9.3.

*Bakhtiyari*, the Bakhtiyari family lodged a complaint among others that Australia had violated the rights of their children under Article 24(1) of the ICCPR as a result of the children being detained together with their parents at an immigration detention for two years and eight months.[944]

The HRC held that the detention of the children was arbitrary. It held further that in all decisions affecting the children, the best interests principle formed an integral part of every child's right to such measures of protection as required by his or her status as a minor, under Article 24(1) of the ICCPR.[945] The HRC noted the ongoing, demonstrable and adverse effect of the detention on the children and found a violation of Article 9(1) of the ICCPR. It was held further that the State party's decision to keep the children in detention for such a long period of time failed to consider the best interests of the children in violation of Article 24(1) of the ICCPR.[946]

Interestingly, the State Party submitted that Article 24(1) of the ICCPR should not have been interpreted in light of the best interests principle and further that the HRC did not have the competency to interpret the provisions of the CRC, that is, the best interests principle.[947] As to detention for purposes of deportation, it is well established within the jurisprudence of the HRC that in order for detention not to be arbitrary, the State Party in question must be able to establish individual circumstances that justify detention in each case.[948] According to the HRC, States Parties must show that the decision to detain an individual can be justified under national law. In addition, States Parties must show other factors such as the propensity to escape or the risk that the individual may commit a further crime if not detained.[949]

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[944] *Bakhtiyari v Australia*, para 9.4-9.7.
[945] *Ibid.*
[946] *Ibid.*
[947] *Bakhtiyari v. Australia*, para 5.15
[948]*Samba Jalloh v. Netherlands*, HRC, UN Doc. CCPR/C/74/D/794/1998, 15 April 2002, paras 7.2-7.3.
[949] *F.K.G.A. v Australia.*

Interestingly, the European Court on Human Rights (ECtHR) has similar requirements to the HRC. According to the jurisprudence of the ECtHR, the detention of children must be exceptional and must only occur under national law.[950]

## 6.6 Detention must be justified

As discussed under section 4 above, detention of asylum seekers and refugees is regulated by Article 31 of the Geneva Refugee Convention and its associated standards. The Geneva Refugee Convention establishes a presumption against detention and provides for the principle that detention must be justified in any given case.[951] The ICCPR does not provide for the circumstances under which deprivation of liberty is permitted. Instead, it simply prohibits arbitrary detention.[952] In *M.M.M. et al v. Australia,*[953] one of the authors was a child and was detained with his mother at an immigration detention centre in Australia for purposes of removal from Australia.[954] The HRC considered the child author's claims together with the rest of the claimants and found violations of Articles 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), and 9 paragraphs 1 (liberty and security of person) and 4 (right to take proceedings before court; court to decide on lawfulness of detention). The HRC gave similar views in *F.K.A.G et al v. Australia,*[955] which will be discussed below.

Interestingly, the African Charter on Human and People's Rights (ACHPR) follow the same approach as the ICCPR and do not provide for the circumstances under which deprivation of liberty is permitted. It is also well established in international law that

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[950] The Department for the Execution of judgments of the European Court of Human Rights "Migration and Asylum" https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b November 2021 (Accessed 31 October 2022).
[951] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, 13.
[952] ICCPR, Art 9.
[953] *M.M.M et al v Australia*. This case also has facts on the right to family and will be considered in the appropriate chapter.
[954] *Ibid*, para 4.4. Among other claims the authors claimed that their detention was in violation of the following rights: Article 9 paragraphs 1 (liberty and security of person), 2 (information on reasons of arrest and charges) and 4 (right to take proceedings before court; court to decide on lawfulness of detention), and Articles 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment) and/or 10 paragraph 1 (dignity of persons deprived of liberty). See paras 3.1-3.18.
[955] CCPR/C/108/D/2094/2011.

detention must have a clear legal basis in national law. This serves as an essential safeguard against arbitrary detention. It also reflects the principle of legal certainty, which dictates that individuals should be able to foresee the legal consequences of their actions as far as possible. Simply put, detention must have a basis in national law, and national law must be able to protect all persons form arbitrary detention. National law must thus provide for deprivation of liberty and the state must bear the burden of justifying the legality of a detention.[956] This position has been confirmed by the Inter-American Commission on Human Rights:

> "[t]he grounds and procedures by which non-nationals may be deprived of their liberty should define with sufficient detail the basis for such action, and the State should always bear the burden of justifying a detention. Moreover, authorities have a very narrow and limited margin of discretion, and guarantees for the revision of the detention should be available at a minimum in reason- able intervals."[957]

The state must further ensure that the law governing detention is accessible, certain and foreseeable. This is particularly important for migrants who are often faced with unfamiliar legal systems and language barriers.[958]

### 6.7 Detention must not be arbitrary, unnecessary or disproportionate

As Hanson *et al* suggest, the right to liberty is the starting point of protecting individual dignity.[959] Freedom from arbitrary detention is a moral fence by which individuals can be protected from unjust interference of liberty.[960] Under Article 9 of the ICCPR, to establish that detention is not arbitrary, a State party must show that the detention was reasonable, necessary and proportionate in a particular case.[961] This position has been confirmed by the HRC in several cases.[962] To pass the necessity and

[956] Frigo (2014) 179-180.
[957]Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights,* OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para 379.
[958] *Ibid.*
[959] See Devine, Hansen, Wilde, and Poole *Human rights: The essential reference* (1999) 78.
[960] Hudelson *Modern political philosophy* (1999) 7.
[961] International refugee law also provides the same requirement with regards to refugees and asylum seekers and their detention.
[962] See for example *A. v. Australia*, Views of 30 April 1997, para 9.3: "The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for

proportionality test of detention,  a State party must show that there were other less intrusive means applied but were insufficient in the circumstances of the particular case.  In *F.K.A.G. et al v. Australia,*[963] three children were detained with their parents and a group of other persons for purposes of removal to their home country.[964] It was submitted on behalf of the children that their right under Article 24(1)(right of the child) of the ICCPR had been violated due to the arbitrary and prolonged nature of their detention,[965] also contrary to Article 9 (1) (liberty and security of person) Article 9(2) (right to be informed of substantive reason of detention) and (4) (right to take proceedings to court to decide on lawfulness of detention) of the ICCPR.[966] There were also reports to the effect that the prolonged detention had affected the children and some of them were experiencing physical and mental health issues.

The HRC held that the notion of "arbitrariness" was not to be equated with "against the law" but should be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law. It added that the detention in the course of proceedings for the control of immigration was not arbitrary *per se*, but that the detention had to be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extended in time.[967] It added that asylum seekers who unlawfully enter a State party's territory could be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it was in doubt. To detain them further while their claims were being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision had to consider

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detention particular to the individual case. It must also show that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends."

[963] *F.K.G.A. v Australia*. It must be said that this case involves various families, who were all detained at the same detention center. However, for the purposes of this chapter, only those rights involving the children and the general rights of detained persons will be discussed. It must also be noted that there the case also involves the right to non-interference with the family unit and will be discussed under the chapter dealing with Protection of the family unit.

[964] *F.K.A.G. et al v. Australia*, paras 2.1-2.7.

[965]*Ibid* , para 3.17.

[966] *Ibid* , paras 3.9-3.11.

[967] *Ibid,* paras 9.2-12.

relevant factors case-by-case, and not be based on a mandatory rule for a broad category.[968]

It also held that the decision to detain them had to take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and had to be subject to periodic re-evaluation and judicial review. Concerning the children, the HRC held that the decision to detain the group had to also take into account the needs of children and the mental health condition of those detained.[969] Finally, it was held that individuals could not be detained indefinitely on immigration control grounds if the State party was unable to carry out their expulsion.[970] In light of this, the HRC found violations of Articles 9(1) and 9(4) of the ICCPR. However, it found the claims under Article 24 (1) inadmissible for lack of substantiation. In *C.v. Australia*,[971] the HRC held that there was a violation of Article 9.1 in so far as the State party did not consider less intrusive means before detaining the complainant.[972]

It is imperative to note that the longer detention is prolonged, the more likely it is to become arbitrary.[973] Therefore, detention must be as short as possible. The CAT has pointed out in its Concluding Observations on Sweden,[974] that excessive length of detention may raise issues under the Convention Against Torture, in so far as the provision against cruel, inhuman or degrading treatment is concerned. The CAT also expressed its concerns to Costa Rica about the length of administrative detention of

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[968] *Ibid.*
[969] *Ibid.*
[970] *Ibid.*
[971]*C. v. Australia*, HRC, UN Doc. CCPR/C/76/D/900/1999, 13 November 2002, para 8.2.
[972] The HRC cited imposition of reporting obligations and sureties as some of the other means which the State party could have considered. See *C v. Australia* , para 8.2.
[973]UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 18 December 1998, E/CN.4/1999/63, para 69, Guarantee 10; UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4 Principle 7; WGAD, *Annual Report 2008,* paras 67 and 82. https://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx (accessed 10 December 2020).
[974]CAT, *Concluding observations of the Committee against Torture : Sweden*, 4 June 2008, CAT/C/SWE/CO/5 , para 12: detention should be for the shortest possible time.

migrants.[975] In fact the CAT has warned against the excessive use of prolonged or indefinite detention in the context of migration.[976]

In its Concluding Observations on the Czech Republic, the HRC noted that legislation permitting the detention of minors for up to 90 days was extreme and recommended that the State party take measures to reduce the length of detention for minors.[977] In addition, it can also violate Article 24 of the ICCPR. It may be interesting to note that the Inter-American Court of Human Rights also requires that there be a legitimate aim for detention and that it must be necessary and proportional.[978]

### 6.8 Conditions of detention for children

According to the CRoC's General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin:[979]

> "In the exceptional case of detention, conditions of detention must be governed by the best Interests of the child . . . Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. ...Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. ...In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative."[980]

[975] CAT, *Concluding observations of the Committee against Torture : Costa Rica* , 7 July 2008, UN Doc. CAT/C/CRI/CO/2, para. 10, expressed concern at failure to limit the length of administrative detention of non-nationals. CAT recommended that : "the State Party should set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite."

[976] *Ibid.*

[977] HRC: *Concluding Observations of the Human Rights Committee : Czech Republic,* 9 August 2007 UN Doc. CCPR/C/CZE/CO/2, para 15.

[978] *Caso Vélez Loor vs. Panamá*, Inter-American Court of Human Rights (IACrtHR), 23 November 2010 , para 166.

[979] CRoC: General Comment No. 6, para 63.

[980] TheCESCR has also expressed its concerns on the conditions for children in detention in its Concluding Observations to Cyprus.

The position above is different from the CRoC's Joint General Comment No. 23 and No.4 of the CMW(2017), wherein the CRoC and the CMW Committee have explicitly stated that unlike in criminal justice situations where a child may be detained as a measure of last resort, in the context of migration detention, the rule is not applicable as it might conflict with the best interests principle and the right to development.[981] Consequently, the CRoC and the CMW Committee have concluded that the detention of a child and family for migration reasons should be prohibited by law and abolished both in policy and practice. This is an indication of development in the jurisprudence of the CRoC, in that whereas General Comment No.6 of the CRoC, (2007) allowed immigration detention but only as a measure of last, the Joint General Comment of the CRoC and the CMW Committee (2017) have taken it a step higher by prohibiting the immigration detention of children altogether.

The CRoC has two recent views on migration detention. In *K.K & R.H. v Belgium*,[982] and in *E.B. v Belgium*, [983] both concerning the detention of children with their parents for immigration purposes. In *K.K & R.H* , The CRoC held that the state party had not considered any alternatives to the detention of the children. More specifically, the CRoC held that the family lived in their home, which they returned to after their release. Therefore, the state party should have considered allowing the family to stay in their family home during the appeal proceedings.

The CRoC held that in view of the fact that the children were detained for four weeks in a so-called family house which is in effect a closed detention centre. The Committee found "that the deprivation of liberty of children for reasons related to their migratory status – or that of their parents – is generally disproportionate and therefore arbitrary within the meaning of article 37 (b) of the Convention."[984]

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[981] The Joint General Comment No. 4 of the CMW and No.23 of the CRoC (2017) para 10.
[982] CRC/C/89/D/73/2019.
[983] CRC/C/89/D/55/2018.
[984] *K.K & R.H. v Belgium*, paras 10.11-10.14.

In *E.B. v Belgium*, the children were detained with their mother in a family home in a closed centre for four week and for three weeks and four days respectively.[985] The state party argued that the detention was prolonged because of the many remedies that their mother sought. The CRoC held that the mother's right to judicial review did not justify the detention of her children.[986] Moreover, the CRoC considered that the state party had not considered any alternatives to detaining the children such as taking them to live with their paternal grandmother.[987] Neither were best-interests assessment carried out in connection with the decisions to detain the children or to extend their detention. In these views the CRoC concluded that the state party had violated the rights of the children under Article 37 of the CRC, read together and read alone with Article 3.[988]

In view of the fact that the CRoC has explicitly said migration detention should be prohibited, the need for the right to education for children detained for immigration purposes should not ordinarily arise. However, children are still detained for their parents' or their own migration status, as is evidenced in *K.K* and *R.H* and *E.B.* both communications followed the CRoC's and CMW's joint General Comment on children in international migration, that children should not be detained for immigration purposes and yet in 2022, the CRoC found itself with two such issues. Therefore, it is submitted that the right to education in migration detention remains relevant. The right to education in immigration detention is protected by various international conventions.[989] At least in both cases, the children took part in educational activities that were appropriate to their ages.[990]

[985] *E.B. v Belgium* para 13.11.
[986] *Ibid*, para 13.13.
[987] *Ibid*, 13.14
[988] *Ibid*, para 13.14.
[989] Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, European Treaty Series No. 009, Art 2; UNCRC, Art 28 ; ICERD, Art 5(e)(v) ; ICESCR, Art 13 ; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para. 34: "confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status."
[990] E.B. para 7.5 and K.K. para 4.19.

Children in immigration detention must continue to enjoy the right to education, which must be provided for them on an equal basis with children who are at liberty. Education must be provided for children in immigration detention without discrimination on the grounds of race, nationality or religion.[991] According to the UNHCR Guidelines on Detention and the CRoC's General Comment No.6, children have a right to education whilst in detention,[992] and that such education must take place outside of the detention premises and furthermore, provision must be made children's recreation, as well as play.[993] In *D and E v. Australia*,[994] it was submitted on behalf of two children that their prolonged detention of over three years together with their parents violated Article 24 of the ICCPR,[995] and that the best interests of the children were not served by detaining them together with their parents.[996] The HRC held that the State Party had undertaken efforts to provide children in migration detention with appropriate educational, recreational and other programs, including programs which were outside of the detention facility.[997] In light of this finding, the HRC held that Article 24 was not sufficiently substantiated for purposes of admissibility.[998]

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[991] *Ibid.*

[992] It must be emphasized that both the CRoC and the UNCHR do not specify which type of detention, but provide for the right to education for children in detention in general. Any kind of detention.

[993] *UNHCR Guidelines on Detention,* Guideline 9.2; CRoC : General Comment No. 6 , para 63.

[994] *D and E v. Australia*, CCPR/C/87/D/1050/2002.

[995] *Ibid,* paras 3.1-3.2.

[996] The children were detained with their parents upon arrival by boat from Iran to Australia. Among other claims, the authors claimed that their detention was in breach of Article 9 paragraphs 1 of the ICCPR (liberty and security of person) and 4 of the ICCPR (right to take proceedings before court; court to decide on lawfulness of detention). The authors noted that they were detained upon arrival under section 189(1) of the Migration Act, and that this provision did not provide for any review of detention, either by judicial or administrative means. In supporting their claim, the authors referred to the case of *A v. Australia*. While the authors were held under differing provisions than in that case, the effect of the relevant legislation in the present case was the same, to the extent there was no provision for them to be able to make an effective application for review of their detention by a court. It must be noted that the principal asylum applicant was D, the mother of the children who claimed that she would be punished if she returned to her Iran for her involvement in making pornographic films. The Minister for Immigration rejected the authors' asylum application. The authors' application for review of this decision was refused by the Refugee Review Tribunal (RRT). The RRT did not consider that D's fear of being punished upon her return to Iran by reason of her involvement in making pornographic films brought her within the refugee definition contained in the 1951 Convention. See paras 2.1 -3.3 of the case.

[997] *D and E v. Australia* , para 6.4.

[998] *Ibid.*

The HRC however found a violation of Article 9 paragraph 1 (liberty and security of person) of the ICCPR. The Committee recalled its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party could provide appropriate justification.[999] It observed that the authors were detained in immigration detention for three years and two months. It added that whatever justification there could have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party had not demonstrated that their detention was justified for such an extended period.[1000]

It had also not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies. As a result, the HRC concluded that the continuation of immigration detention for the authors, including the two children, for the length of time described above, without any appropriate justification, was arbitrary and contrary to Article 9 paragraph 1.[1001] In addition to education, children detained for immigration purposes must be given adequate healthcare and access to essential medicines.

Frigo argues that Inadequate healthcare or lack of access to essential medicines may also be seen as a violation of the freedom from inhuman or degrading treatment, either on its own or in conjunction with other ill treatments.[1002] There is an obligation to protect the physical and mental well-being of persons in detention.[1003] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) set out the principle that medical care in detention should be equivalent to those available to the general public.[1004] The UNHCR's revised

[999] *D and E v. Australia* , para 7.2.
[1000] *Ibid.*
[1001] *Ibid.*
[1002] Frigo (2014) 204.
[1003] *Hurtado v. Switzerland*, ECtHR, Case no. 37/1993/ 432/511, 1994; *Mouisel v. France ,* European Court of Human Rights (ECtHR) , Application No. 67263/01,14 November 2002, para 40; *Keenan v. United Kingdom* , ECtHR , Application No. 27229/95,4 March 2001, para 111; *Aleksanyan v. Russia*, Council of Europe: European Court of Human Rights, Application no. 46468/06, 22 December 2000 , para 137.
[1004] *CPT Standards,* Extract from the 3rd General Report [CPT/Inf (93) 12] 27, para 31. Although the European Court of Human Rights has sometimes accepted a lower standard of healthcare for prisoners than that available in the community, this has been in regard to convicted prisoners only, and the Court

guidelines on detention of asylum seekers also provide for the right to appropriate medical treatment, as well as psychological counselling where appropriate for detainees.[1005]

### 6.9 Missed opportunities?

As with *D and E v. Australia* above, the HRC did not make special pronunciations on the rights of the children in *F.K.A.G. et al v. Australia.* Perhaps the HRC should have given detailed views on the psychological effects of the detention on the children in *F.K.A.G.* In contrast, the HRC commented briefly on the psychological effects of the prolonged detention on the children. Save for the views in *Bakhtiyari,* the HRC considered the rights of the children in the remaining cases together with the right of the adults. This approach is problematic as it neglects the special protection which must be given to children in immigration detention .

In *Samba Jalloh v. Netherlands*,[1006] the author was an unaccompanied minor who was detained for immigration reasons. Unfortunately the HRC did not find a violation of Article 9(1) (The right to liberty and protection against arbitrary arrest and detention) of the ICCPR. The HRC made the following comments regarding the Article 24(1) of the ICCPR:

> The detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three-and-a-half months entailed a

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has expressly drawn a distinction between convicted prisoners and other detainees in this regard: *Aleksanyan v. Russia* , para 139.

[1005] UNHRC : *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* , Guideline 10 (V). See also United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955 (Rules 22 to 25) ; UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly*, 9 December 1988, A/RES/43/173 (Principles 22 to 26), JDLs (Section H), and UN General Assembly, *The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, UN Doc. A/RES/65/229, 16 March 2011, which set out detailed guidelines regarding appropriate medical care in detention.

[1006] *Samba Jalloh v. Netherlands*.

> failure by the State Party to grant him such measures of protection as are required by his status as a minor.[1007]

It should be noted that the HRC gave its view in the above case in 2002 and its General Comment No. 35 on the Article 9, Liberty and security of person (2014), (hereafter General Comment No. 35 of the HRC) came into effect in 2014. In the said General Comment, the HRC has indicated that "Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors."[1008] This position is not reflected in the Samba Jalloh case because the case pre-dates the General Comment in question.

Smyth submits that detention as a measure of last resort indicates that there may be other resorts rather than detention. She adds that three and a half months of detention is not the shortest appropriate time. Therefore, she reasons that "in comparing the jurisprudence of the Human Rights Committee with its 2014 General Comment, it is clear that the Committee has evolved to but not beyond the ultima ratio principle."[1009]

It would have been interesting to see the HRC's views regarding Article 9(1) and the rights of an unaccompanied minor who was detained for immigration purposes. However, from the HRC's General Comment No. of 2014, it seems the HRC would allow the detention of a child for immigration purposes, provided that it is done as a measure of last resort.

Although the HRC and the CRoC have two opposing views on detaining children for immigration purposes, it is submitted that the HRC's position in its General Comment No. 35 of 2014 that children should be detained only as a measure of last resort indicates that the HRC has moved a step away from its previous position that the

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[1007]*Ibid,* para 8.3.
[1008] HRC : General Comment No. 35, para 18.
[1009] Smyth 2019 (19) *HRLR* 1–36, 11.

detention of a child is not a violation of Article 24 of the ICCPR. By so doing, the HRC's position is a step closer to the CRoC's absolute stance that children may never be detained for immigration related reasons. Whether there is room for reconciliation between the two opposing views, will be determined in subsequent cases from both treaty bodies.

### 6.10 Conclusion

This chapter sought to outline the rights of children detained for immigration purposes through an analysis of selected children's rights cases from the United Nations human rights treaty body system. The following have been observed from the chapter:

The CMW Committee's approach, although it is yet to demonstrate this through individual complaints, is that children, and more specifically separated or unaccompanied children should not be detained solely for immigration purposes.[1010] The CEDAW Committee's approach is that children should not be detained with their mothers unless doing so is the only means of maintaining family unity, which is determined to be in the best interests of the child. The CEDAW Committee is also a proponent of detaining children only after considering alternatives to detention.[1011]

The HRC's position that immigration detention of children should only be as a measure of last resort indicates that the HRC is not likely to find a violation of Articles 9(1) and 24 of the ICCPR if a State's party can prove that the detention of a child for immigration purposes was as a measure of last resort and for the shortest appropriate period of time.

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[1010] [1010] CMW: General Comment No. 2 of 2003 on The Rights of Migrant workers in an Irregular Situation and Members of their Families, UN Doc CMW/C/GC/2 , 28 August 2013, para 33.

[1011] CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, para 49.

The CRoC and the CMW Committee have clarified their position that immigration detention of children is prohibited and that the position that children should only be detained as a measure of last resort is also applicable in immigration detention.[1012]

Furthermore, the CRoC and the CMW Committee's position in the Joint General Comment No. 23 of the CRoC and No.4 of the CMW Committee (2017) indicates a shift from the CRoC's previous jurisprudence in its General Comment No. of 6 (2005) that immigration detention of children can only be as a measure of last resort. The CRoC's position goes a step further than the HRC, in its jurisprudence by stating that immigration detention should be prohibited.[1013]

Finally, whilst the CRoC has evolved beyond the "measure of last resort" principle, and goes a step further than the HRC in so far as immigration detention of children is concerned, the HRC is yet to evolve and prohibit the immigration detention of children. However, the CRoC's position is clear and predictable in migration detention cases: the CRoC would find immigration detention of children in violation of Articles 3 and 37 of the CRC , particularly if the state party fails to consider alternatives to detaining the child. This position was demonstrated in *E.B v Belgium* and *K.K. & R.H v Belgium* however, before the views in these cases were given, the CRoC's General Comment had already established the principle.

The following chapter, chapter 7 is the penultimate chapter and it considers selected cases in the CRoC's developing jurisprudence which is comparable to the themes in this research.

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[1012] Joint General Comment No.4 & No.23 of the CRoC and the CMW on children in international migration

[1013]HRC: General comment No. 35, para 18.

# Chapter 7: The development of comparable Jurisprudence of the croc since OPIC

## 7. 1 Introduction

At the onset of this research, the CRoC had received only four communications,[1014] under the OPIC since its inception in 2014. As of 12 April 2022, the CRoC had dealt with 54 individual communications under OPIC, 17 of which the CRoC had published it's views on the merits and 37 of which were discontinued.[1015] The preceding chapters have dealt with children's rights communications within the jurisprudence of the other treaty bodies.[1016] One of the overall aims of this thesis was to determine whether the existing children's rights jurisprudence from the other eight human rights treaty bodies could inform the emerging jurisprudence under the CRoC. The jurisprudence of the CRoC has since developed with 54 communications having been dealt with thus far. This development has necessitated a consideration of the jurisprudence of the CRoC to determine whether the CRoC is charting its own path or following the path of the other human rights treaty bodies. This chapter seeks an answer to that question. An examination of the CRoC's jurisprudence is presented thematically under family related issues, *non-refoulement* and migration detention to determine the approach of the CRoC in its emerging jurisprudence.

### 7.1.1 Delimitations

Firstly, some of the themes in this chapter such as *non-refoulement* and the family related themes correlate with other themes that have been dealt with in detail under

[1014] These cases are available at http://juris.ohchr.org/search/results (accessed 15 May 2018).
[1015] https://juris.ohchr.org/en/search/results?Bodies=5&sortOrder=Date (accessed 28 May 2021).
[1016] The HRC has the most jurisprudence on children's rights in comparison to all the other treaty bodies.

the earlier chapters,[1017] and this has created an overlap in some chapters, more specifically, chapter 5 on non-refoulement. For this reason, the legal framework in this chapter is limited to the relevant provisions of the CRC in relation to the issues arising from the communications.

Secondly, this chapter is different from the preceding chapters in that thus far, the preceding chapters have dealt with the jurisprudence of all the other treaty bodies. In contrast, this chapter considers the emerging jurisprudence of the CRoC that is comparable with the selected jurisprudence of other treaty bodies discussed in the earlier chapters in order to determine the approach of the CRoC in the various communications selected for discussion, and whether it is charting its own path or following the approach of the other treaty bodies.

Finally, it must be noted that some of the communications received under the CRoC do not neatly fit into the general themes in this thesis as a whole. This challenge is as a result of considering all the jurisprudence of the CRoC's thus far, whereas in the other chapters, the approach has been to focus on the themes with the most communications.

### 7.1.2. Definition of terms

The term "*non-refoulement*" according to the Refugee Convention, is the principle which provides that "no one may return or expel a refugee against his or her will in any manner, to a country or territory where he or she fears threats to life or freedom.[1018]

As discussed in chapter 6, Lauterpatch and Bethlehem submit that the principle of non-refoulement is "a concept which prohibits states from returning a refugee or an asylum seeker to territories where there is a risk that his or her life or freedom would

[1017] See for example Chapter 4 on the right to a family life and non-interference with the family unit and Chapter 6 on *non-refoulement.*

[1018] Convention Relating to the Status of Refugees, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

be threatened on account of race, religion, nationality, membership of a particular social group or political opinion."[1019]

### 7.1.3 Family related cases

I have selected two family related cases in which the CRoC has given its views on the merits. In chapter 4, under the right to protection of family life and non-interference with the family unit, the relevant international legal framework was set out.[1020] It is crucial to note that unlike the ICCPR, the CRC does not make provision for the right to a family.[1021] Instead, it provides for family related rights under various Articles in the CRC.[1022] As discussed under "delimitations" above, only the relevant provisions relating to family under the CRC's framework and the communications below will be discussed.

## 7.2 The CRC'S legal framework on family related cases relevant to the selected cases

Article 9 of the CRC deals with separation of the child from parents.[1023] Particularly relevant to this chapter is Article 9(3)which provides for the child's right to maintain personal relations and direct contact with both parents on a regular basis, unless such contact would be contrary to the best interests of the child. Article 9(3) also reflects the principle in Article 18 that both parents have common responsibilities for the upbringing and development of the child.[1024] This basic principle is also enshrined in the 1959 Declaration of the Rights of the child: "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents..."[1025] The

[1019]Lauterpacht and Bethlehem (2003) 90. It must be noted that non-refoulement is discussed in more detail in chapter 6 which is dedicated to the subject.

[1020] See Chapter Four on "The right to protection of family life and non-interference with the family unit"

[1021] See in general ICCPR, Article 23 and in particular, Article 23(2) , which reads: The right of men and women of marriageable age to marry and to found a family shall be recognized.

[1022] The UNCRC provides for family related rights in the following Articles: 8,9,10,16,20 and 22.

[1023] See Article of the UNCRC where it is stipulated that children must be not separated from their parents unless it is in the best interests of the child and further that such separation must be fair.

[1024] This principle is also reflected in CEDAW . See Article 5 of the CEDAW.

[1025] Article 6 of the UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV), 1959.

same words are echoed in the preamble of the CRC: "the child… should grow up in a family environment, in an atmosphere of happiness, love and understanding."[1026]

Article 10 of the CRC concerns the right to family reunification, of children who are or whose parents are involved in entering or leaving a country. Article 10 requires that applications by a child for the purposes of family reunification shall be dealt with by States Parties in "a positive, humane and expeditious manner."[1027] It is interesting to note that some States expressed their concern during the drafting of Article 10, on the interpretation of the word "positive". [1028]As a result, the words "favourable" and "objective" were proposed but were rejected.[1029] According to Detrick, it was decided that "favourable" contained elements of pre-judgment, however, on the contrary, although "positive" was stronger than "objective", it did not presuppose that States Parties must agree to the application.[1030] It has been suggested that the word "humane" qualifies the word "positive".[1031] The CRoC has emphasized on numerous occasions, the fact that delay and uncertainty can be prejudicial to children, therefore, it has called for all judicial and administrative processes concerning children to be pursued as quickly as possible.[1032]

Article 10 further requires that parents and children be allowed to visit each other if they live in separate countries. Hodgkin and Newell submit that the wording of Article 10 is weaker than Article 9, in that the right to family reunification is not expressly guaranteed in Article 10, even though in Article 10, reference is made to

[1026] UNCRC.
[1027] UNCRC, Art 10.
[1028] United Nations Commission on Human Rights, *Question of a Convention on the Rights of the Child.*, 8 March 1989, E/CN.4/RES/1989/57.
[1029] *Ibid*.
[1030] Detrick (1999) 206.
[1031] Hodgkin and Newell (2007) 136-137.
[1032] See for example Finland CRC/C/15/Add.273 , para. 49 where the CRoC expressed its concerns to Finland on delays on family reunification and same to Canada in its CRoC Concluding Observations on the periodic report of Canada by the Committee at its 9th session (20 June 1995 ) Canada CRC/C/15/Add.37 (2005), paras. 13 and 24.

Article 9. They submit further that the wording of Article 10 reflects concerns of immigration control by richer countries.[1033]

The Joint General Comment No. 3 of the CMW and No.22 of the CRoC (2017) emphasizes the need to preserve the family unit when assessing the best interests of the child in relation to family reunification.[1034] The same General Comment provides that rights-based solutions should be initiated without delay for children who are separated from their parents due to, among other reasons, enforcement of immigration laws.[1035] Finally, General Comment No.14 of the CRoC (2013) on the right of the child to have his or her best interests taken as a primary consideration also highlights the need to take into account preservation of the family unit when assessing the best interests of the child in decisions of family reunification.[1036]

The significance of Article 12 of the CRC as a general principle of fundamental importance, cannot be overemphasized. Article 12 is relevant to all aspects of implementation and interpretation of all Articles of the CRC. Article 12 requires that any child who is capable of forming a view, on a matter that affects him or her, is given the right to express such views freely and further that the child's views are given due weight, in accordance with the child's age and maturity, in any judicial and administrative proceedings affecting him or her. The CRoC has consistently emphasized that the child is an active subject of rights and must be seen as such. In fact, one of chief purposes of the CRC has been to emphasize that human rights extend to children.[1037] General Comment No. 12 of 2009 on the right to be heard has highlighted that Article 12 imposes no age limit on the right of the child to express his or her own views. In this regard, the CRoC discourages States Parties from

[1033] Hodgkin and Newell (2007) 135.
[1034] *Ibid,* para 32.
[1035] *Ibid* para 34.
[1036] CRoC, General comment No. 14 (2013) on the Right of the Child to have his or her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), 29 May 2013, UN Doc. CRC/C/GC/14, para 66.
[1037] Hodgkin and Newell (2007) 149.

introducing age limits both in law and in practice which would restrict the child's right to be heard.[1038]

Fokala and Rudman argue that children have the right to participate in decisions that affect them, albeit in different contexts. They add that adults who are legally responsible for the child have "an underlying mandate to continuously assess a child's evolving capacity based on the child's age, maturity and ability to contribute substantively in a decision-making process. The importance of this responsibility relates to the fact that the right to participation, unlike any other right, requires a child to be meaningfully engaged in a decision-making process. It is the meaningful engagement (or lack thereof), enabled by the relevant adult(s), which constitutes the enjoyment or abjuration of this right."[1039]

### 7.3 Communications related to family rights

*Y.B. and N.S. v. Belgium*,[1040] set the precedent that *kafalah,*[1041] is recognised as a form of adoption.[1042] This case concerned the rejection of a visa application on behalf of C.E. on grounds that N.S. and Y.B. were foster parents and not recognised as adoptive parents under *kafalah*.[1043]

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[1038] CRoC , *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, UN Doc. CRC/C/GC/12, para 21.

[1039] E Fokala & A Rudman 'Age or maturity? African children's right to participate in medical decision-making processes ' (2020) 20 African Human Rights Law Journal 667-687, 669. See also Dixon and Nussbaum, "Children's Rights and a Capabilities Approach: The Question of Special Priority" 2012 *Cornell LR* 549

[1040] CRoC , UN Doc. CRC/C/79/D/12/2017, 27 September 2018 .

[1041] Kafala is a form of alternative care recognized under Islamic law and permits a Muslim couple or a Muslim woman to provide guardianship for an abandoned child as his or her biological parents would. It must be noted that Kafala does not provide for the right to a legal parental relationship and neither does it provide for the right to succession. See Hodgkin and Newell (2007) 295-296. See also Mezmur "Intercountry adoption as a measure of last resort in Africa: Advancing the rights of a child rather than a right to a child " 2009 (6) *Sur. Revista Internacional de Direitos Humanos* 83, 87.

[1042] *Y.B. and N.S. v. Belgium* , paras 3.1-3.8.

[1043] In this case Y.B. (Belgian national) and N.S. (a dual Belgian and Moroccan national) brought the complaint on behalf of C.E. (a Moroccan national born on 21 April 2011). The authors are married to each other and under a *kafalah* arrangement, they took in C.E., who was born to an unknown father and was abandoned by her mother at birth. Because *kafala* does not create a parental relationship, the claimants were unable to introduce a long stay visa application on the basis of family reunification. They introduced an application to enter and reside in Belgium for humanitarian reasons and were rejected after several appeals. See Paras 2.1 -2.9 of the case. The communication alleged that the Belgian State violated the rights of C.E. under Articles 2 (non-discrimination), 3 (best interests of the child), 10

The CRoC found violations of Articles 3 (best interests of the child), 10 (family reunification) and 12 (right to be heard) of the Convention.[1044] With respect to Article 3 of the UNCRC, the Committee found that the reasons given by the Belgian State in its refusal of a long-term visa to be of a general nature and that they failed to examine the particular situation of C.E. The Committee also found Belgium's implication that C.E. could be cared for by her biological family to be unrealistic and uncorroborated by the fact of her specific circumstances as a child born of an unknown father and abandoned at birth by her biological mother.[1045] With respect to Article 12, the Committee noted that although C.E. had been considered too young by Belgium to voice her opinion and that Belgian authorities believed her opinion to be of no relevance in the visa proceedings, she was five years old and, in line with her best interests, should have been given a say in the process that had long-lasting repercussions for her life and education.[1046] With respect to Article 10, the Committee found Belgium had failed to take into consideration the relationship and the *de facto* family ties forged by the claimants and C.E. since 2011, to the effect that one of the claimants had been living with and caring for C.E. almost since her birth. In the seven years that elapsed, Belgium had failed to treat the family reunification request of the claimants "in a positive, humane and expeditious manner" as required by Article 10.[1047]

(family reunification), 12 (right to be heard) and 20 (special protection of children deprived of family environment) of the Convention. See further paras 3.1-3.8 of the case.

[1044] The Committee concluded that there had been violations of Articles 3, 10 and 12 of the Convention. The CRoC however did not consider it necessary to examine whether the same facts constituted a violation of Article 2 (non-discrimination). The State party was obligated to re-examine the visa application of C.E. urgently and in a positive manner, ensuring the child's best interests to be a primary consideration and that the voice of C.E. was heard. In addition, the Committee noted that Belgium should take into consideration the family ties forged de facto between the claimants and the child. Finally, the State party was deemed to also have an obligation to take all necessary measures to prevent similar violations from recurring. See paras 8.1-8.12 of the case.

[1045] *Y.B. and N.S. v. Belgium* , para 8.5.

[1046] It is noted that the CRoC stated in the current case that C.E. was not too young to express her own views, as Article 12 of the CRC imposes no age limit on the right of the child to express his or her views. This implies that C.E. could have expressed her view through other means apart from verbal. See paras 8.6-8.8 of the case.

[1047] *Y.B.and N.S. v Belgium* Para 8.1 -8.12

In reaching its conclusion, the CRoC highlighted the need to consider the best interests of the child as a primary consideration and that:

> "The concept should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in the light of the specific circumstances of the particular child."[1048]

In this regard, the CRoC cited its General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration.[1049] The CRoC noted that although Article 10 of the CRC does not oblige a State Party to recognize as a general rule the family reunification rights of children who are under a *kafalah* regime, the term family had to be interpreted in a broader manner to comprise not only biological parents but adoptive parents or those caring for the child.[1050] This is in line with General Comment No.14 of the CRoC(2013) on the best interests principle,[1051] and the joint General Comment No.23/4(2017) of the CRoC and the CMW.[1052] It is also similar to the provision in the HRC's jurisprudence that family must be interpreted broadly to include *de facto* relationships, this is discussed in detail in chapter four , under the right to protection of family life and non-interference with the family unit. Dawit Mezmur submits that where countries do not allow adoption, alternative cares such as *kafalah* should be supported and strengthened in view of giving care and support to children who are deprived of their family environment.[1053]

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[1048] *Ibid,*Para 8.3.

[1049]UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, https://www.refworld.org/docid/51a84b5e4.html [accessed 1 November 2021] para. 32.

[1050] *Y.B. and N.S v. Belgium* , para 8.11.

[1051] CRoC , General comment No. 14 (2013), para 59.

[1052] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) 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*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: https://www.refworld.org/docid/5a12942a2b.html [accessed 1 November 2021] .

[1053] Dawit Mezmur B I*ntercountry adoption in an African context: A legal perspective* (Thesis, University of the Western Cape,2009) 73

The CRoC considered the jurisprudence of the European Court of Human Rights,[1054] and emphasized the fact that CE and the authors had formed effective family ties *de facto* over the seven years period in the context of a *kafalah*.[1055] This is similar to the first leg of the inquiry to establish whether the relationship between applicants should be considered a family.[1056] The HRC and the ECHR uses this inquiry to determine whether there is or has been a family relationship. The CRoC also pointed to the fact that where a child is old enough to express his or her own views in a matter, that child must be allowed to do so. This assertion shows the significant relationship between the right to be heard and the best interests of the child as Turkelli and Vandenhole have noted.[1057] The CRoC considered C.E. who was five years old at the time of the hearing to be old enough to express her own views in the matter.[1058] The CRoC came to conclusion by considering its own jurisprudence under Article 12 of the CRC in which it has been stated that:

> "Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice that would restrict the child's right to be heard in all matters affecting her or him. […] It is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter […]".[1059]

Sloth-Nielsen and Assim note the inclusion of *kafalah* in the CRC as "...the first time an exclusively Islamic concept is recognised in a binding Islamic instrument."[1060] Furthermore, they note that the inclusion of *kafalah* in the text of the CRC reflects cultural and religious diversity, as well as compromise in the drafting of international instruments.[1061] It should be

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[1054] *Wagner and J.M.W.L. v. Luxembourg* , European Court for Human Rights (ECtHR), Application No. 76240/01, 28 June 2007, ECtHR 2010 ; *Moretti et Benedetti c. Italie,* Council of Europe: European Court of Human Rights, Requête no 16318/07, 27 April 2010, and *Harroudj v. France,* European Court of Human Rights,Application No. 43631/09, 4 October 2012.
[1055] *Y.B. and N.S. v. Belgium,* para 8.5.
[1056] See chapter four on the right to family, where this inquiry is discussed in detail.
[1057] Erdem Türkelli and Vandenhole, *Communication 12/2017: Y.B. and N.S v Belgium, Leiden Children's Rights Observatory*, Case Note 2018/3, Leiden Law School-Leiden Children's Rights Observatory, 10 December 2018.
[1058] *Y.B. and N.S. v. Belgium* , para 8.6.
[1059] *Y.B. and N.S. v. Belgium*, para 8.7. See also CRoC, *General comment No. 12* (2009), para 21.
[1060] Julia Sloth-Nielsen and Usang Assim "Islamic kafalah as an alternative care option for children deprived of a family environment" (2014) 14 *African Human Rights Law Journal*, 322-345, 324.
[1061] *Ibid*, 325.

noted that the textual distinction provides an opportunity for a unique CRoC jurisprudence.In Y.B., the CRoC took this opportunity, writing the first treaty body decision relating to *kafalah.*

*N.R. v. Paraguay*,[1062] (hereafter *N.R.*) involved custody issues between the author and the mother of his child and the right of the child to maintain personal relations and direct contact with her father.[1063] The author submitted the communication on behalf of C.R. (his daughter) and alleged violations of the following rights: Articles 3 (best interests principle), 4 (State co-operation for implementation of rights), 5 (States parties respect for rights, duties and responsibilities of parents and guardians), 9(1) (non-separation of children from parents), 10(2) (child's right to maintain contact with parents), 18 (Common responsibilities of parents on upbringing of child) and 19 (Protection from abuse, neglect and maltreatment) of the CRC.

The CRoC considered that in general, national authorities had to interpret and apply national law, unless such interpretation is arbitrary or amounts to a denial of justice. This, the CRoC recalled from its own jurisprudence in *L.H.L. and A.H.L. v. Spain*.[1064] The CRoC emphasized that its role was to verify the absence of arbitrariness or denial of justice in the national authorities' assessment of a case. In the present case, the CRoC found that the State Party did not take the necessary measures to ensure compliance with the court order which allowed the author contact and communication with C.R. over the years.[1065] The national court had issued an order to the effect that it was in

[1062] CRoC, UN Doc. CRC/C/83/D/30/2017, 12 March 2020.

[1063] The author N.R had C.R. with L.R.R. who later left with C.R. The author was able to visit C.R without any custody arrangements until L.R.R. prevented the author from seeing C.R. The author applied for a communication and visitation regime from the court and L.R.R. has since refused to comply with the court order, permitting the author to visit and to communicate with C.R. telephonically.

[1064] CRoC, UN. Doc. CRC/C/81/D/13/2017, 17 June 2019, para. 9.5.

[1065] The author has had to file complaints about delays in judicial proceedings and despite the report of the social worker, the State Party authorities had not taken any of the measures provided for in its legislation to guarantee compliance with final judgment. Based on these proven facts, the CRC Committee considered that the judicial procedures that determine the visitation rights between a child and parent from whom the child was separated required an expedited procedure, since the passage of time can have irreparable consequences in the relations between them. This includes the prompt execution of decisions resulting from those procedures. In the present case, the CRC Committee took note of the author's argument, which was not contested by the State Party that, despite its numerous attempts to ensure compliance with the visitation regime established by the court's decision of April 30, 2015 - no response was received. See paras 2.1-2.12 of the case.

C.R.'s best interests to have contact with her father. However, since the court order was not effectively enforced by the States Party, C.R. was gradually alienated from her father (the author). Based on this finding, the CRoC held further that the national authorities had failed to ensure that L.R.R complied with the court order in a timely manner and this has deprived C.R. her enjoyment of her right to maintain regular personal relations and direct contact with her father. Accordingly, the CRoC found violations of Articles 3, 9(3), 10(2) of the CRC and did not consider it necessary to examine whether the same facts amounted to separate violations of Articles 4 and 5 of the CRC. The CRoC also referred to its own General Comment No. 4 of 2013 on the right of the child to have his or her best interests taken as a primary consideration and held that "The preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties ... are particularly relevant in cases where parents are separated and live in different places." [1066]

*N.R* was the first case brought before the CRoC on the right of children to maintain personal relations and direct contact with their parents in a private family law setting.[1067] *N.R.* is thus an important contribution to the CRoC's emerging jurisprudence on the child's right to have and maintain contact with his or her parents in a private family law situation. The CRoC's view in *N.R.* brought together family law and the best interests principle. In reaching the conclusion that the national authorities had not taken "sufficient steps in a timely manner to ensure that the mother of the author's daughter complied with the Court's judgment,"[1068] the CRoC considered the HRC's jurisprudence in *Asensi Martínez v. Paraguay,*[1069] in which the HRC had held that the authorities had not taken sufficient steps to ensure that the mother of the child had complied with the Court order in a timely manner. This is an

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[1066] CRoC, *General comment No. 14* (2013), para 70.

[1067] Espejo Yaksic, *Communication 30/2017: N.R., on behalf of C.R. v. Paraguay,* Leiden Children's Rights Observatory, Case Note 2020/3, 19 May 2020. https://childrensrightsobservatory.nl/case-notes/casenote2020-3#footnote-2

[1068] *N.R.*, para 8.7.

[1069] HRC, UN Doc. CCPR/C/95/D/1407/2005, 24 April 2009. The CRoC cited Asensi Martinez v. Paraguay in the footnotes of the N.R case when determining the role of the authorities to ensure compliance with a court order which protects the right of the child to maintain personal relations and direct contact with their parents.

indication that the CRoC considers the existing jurisprudence of the other treaty bodies in building its emerging jurisprudence.

An important assertion which the CRoC made in this case was that in cases such as [*N.R.*], children need to have access to expedited procedures due to the fact that delays can cause irreparable consequences when it comes to children and their relations with their parents. The CRoC emphasised that this is particularly true with regards to children who have been separated from their parents. Furthermore, the CRoC noted that in family proceedings, not only should States parties expedite the process, but also ensure that the process is sufficient. According to Yaksic, this requirement means that "States Parties need to provide an efficient execution of judicial decisions or agreements between parents and in relation to personal relations and direct contact. When this is not the case, as this decision demonstrates, the right to family life of children might be severely affected and compromised."[1070]

### 7. 4 *Non-refoulement* in the jurisprudence of the CRoC

It must be recalled that the principle of *non-refoulement* has been discussed in detail in chapter 6. In this section the principle of *non-refoulement* is discussed in relation to the communications received under the jurisprudence of the CRoC.

### 7.4.1 The CRC'S Legal framework on *non-refoulement*

According to the Refugee Convention, the *non-refoulement* principle provides that no one may return or expel a refugee against his or her will in any manner, to a country

[1070] Yaksic, *Communication 30/2017: N.R., on behalf of C.R., v. Paraguay,* Leiden Children's Rights Observatory, Case Note 2020/3, 19 May 2020. https://childrensrightsobservatory.nl/case-notes/casenote2020-3 (Accessed 10 September 2022).

or territory where he or she fears threats to life or freedom.[1071] Article 3 of the CRC,[1072] read with General Comment No.6 of the CRoC sets out how the principle of *non-refoulement* applies in the context of unaccompanied or separated children.[1073] The CRoC has said in its General Comment No.6,[1074] that the definition of a refugee under the Refugee Convention "must be interpreted in an age and gender sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children."[1075]

In General Comment No.3 of the CMW and No.22 of the CRoC, (2017) both Committees reiterate the need for a wider definition of the meaning of *non-refoulement*.[1076] It is evident that the CRoC discourages deportations of children to territories where there is a risk that they might be subjected to irreparable harm. The cases discussed in the next section will examine how the CRoC has approached the assessment of irreparable harm in the cases the it has dealt with.

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[1071] UN General Assembly, Convention Relating to the Status of Refugees (1951). According to Weis "proof of a substantial risk of torture, inhuman or degrading treatment may constitute a well-founded fear of persecution or evidence thereof." Furthermore, he argues that "the criterion of a well-founded fear of persecution is a legal standard whose application is conditioned by the existence of objective facts."See Weis The refugee convention, 1951: The travaux preparatoires analysed with a Commentary (1990) 7 and 9. In *I.N.S. v. Cardozafonseca* 480 U.S. 421 (1987), the Supreme Court of the United States laid the test of reasonable possibility of persecution as the basis of determining the meaning of well-founded fear of prosecution. Grahl- Madsen has also argued that it is not the frame of mind of the person concerned which is decisive for his or her claim for refugee status, but the claim for refugee status should be measured with an objective yardstick. See Grahl-Madsen The status of refugees in international law (1966) 173. See further pages 176, 188- 189.

[1072] UNCRC.

[1073] UNCRC, Article 3 reads 1. 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. The protection of children under the CRC with regards to the principle of non-refoulement is discussed in more detail below.

[1074] CRoC, *General comment No. 6* (2005).

[1075] *Ibid*, para 74.

[1076] CMW, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November2017, CMW/C/GC/3-CRC/C/GC/22, available https://www.refworld.org/docid/5a2f9fc34.html [Accessed 1 November 2021]

### 7.4.2 *Non-refoulement* communications

*I.A.M. v. Denmark,*[1077] the CRoC's first case in which it has published its views on the merits on *non-refoulement* in 2018, involved a mother and her daughter who were subject to deportation to Somalia. It was submitted on behalf of the child that her rights under Articles 1 (definition of a child), 2 (non- discrimination), 3 (the best interests of the child) and 19 (right to protection from all forms of violence) of the Convention, would be violated if she was deported to Somalia, as she could be subjected to female genital mutilation (FGM).[1078] She claimed that the principle of *non-refoulement* was applicable under the Convention and had extraterritorial effects in certain cases such as female genital mutilation.[1079] The CRoC held that the facts amounted to a violation of Articles 3 (best interests of the child) and 19 (right to protection from all forms of violence) of Convention.[1080] This finding is in line with the jurisprudence of the CAT and the HRC that FGM constitutes a ground for *non-refoulement* and hardly establishes a new principle.[1081]

With regard to the claim of fear of FGM as a ground for *non-refoulement*, the Committee recalled its own jurisprudence in General Comment No. 6 (2005) on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, in which it stated that States shall not return a child to a country where there were substantial grounds for believing that there was a real risk of irreparable harm to the child.[1082] It added that *non-refoulement* obligations applied irrespective of whether serious violations of those rights guaranteed under the Convention originated from non-State actors or whether such violations were directly intended or were the indirect consequence of action or inaction. The CRoC cited the jurisprudence

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[1077] CRoC , UN Doc. CRC/C/77/D/3/2016, 25 January 2018.
[1078] *Ibid,* paras 2.1-2.5.
[1079] *Ibid.*
[1080] The Committee found that the communication was admissible in part. The Committee held that the claim under Article 2 was manifestly ill-founded and inadmissible
[1081] See the HRC and the CAT's views in for example *Dien Kaba v. Canada,* CRoC, UN Doc. CCPR/C/98/D/1465/2006, 21 May 2010, and *R.O. v. Sweden* , CAT, UN Doc. CAT/C/59/D/644/2014, 19 January 2017. The CAT and HRC's position that FGM constitutes grounds for non-refoulement is discussed in detail in chapter 6.
[1082] *I.A.M. v. Denmark,* para 11.3.

of the CEDAW,[1083] as well as its own jurisprudence,[1084] and the Joint General Comment between the CRoC and the CMW on the human rights of children in the context of international migration,[1085] and held that the assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner.[1086]

In that sense, the Committee recalled from its own jurisprudence that "when assessing refugee claims (...) States shall take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by the UNHCR in exercising its supervisory functions under the 1951 Refugee Convention."[1087] In particular, the Committee indicated from its previous jurisprudence in General Comment No.6 that:

> "The refugee definition in that Convention should be interpreted in an age- and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which could justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures."[1088]

The CRoC also recalled from its own jurisprudence in General Comment No.18,[1089] the immediate and long-term consequences that FGM may have on the child and called on States Parties to recognise this fact and note harmful practises as ground for asylum.[1090] The CRoC gave a far- reaching view, that even relatives accompanying a girl who is seeking asylum due to FGM must also be given protection. This view the

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[1083] CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, UN Doc. CEDAW/C/GC/32 , para. 25.
[1084] CRoC, General Comment No.6 (2005), para 27 .
[1085] CMW and CRoC *Joint General Comment No. 3(2017) and No. 22 (2017)*, para 43.
[1086] *Ibid.*
[1087] *Ibid.*
[1088] *Ibid.*
[1089] CEDAW and CRoC, Joint General recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the CRoC on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para 19.
[1090] Para 11.4.

CRoC reached by considering its own jurisprudence in the Joint General Comment between the CEDAW and itself.[1091]

It is interesting to note that unlike the HRC and the CAT, the CRoC is yet to recognise FGM as falling under the definition and scope of torture. Perhaps this can be attributed firstly to the fact that the author in *I.A.M* did not raise the issue of torture albeit with legal representation. As Çali *et al* note, the CRoC uses a dynamic definition of harm.[1092] According to the CRoC, when dealing with children facing deportation, harm has to be assessed on a case by case basis, taking into consideration the best interests of the child.[1093] The CRoC's notion of irreparable harm includes persecution, torture, gross violations of human rights, or other irreparable harm.[1094] Çali *et al* observe that the "other" irreparable harm is open-ended, and it may include harm to the survival, development, or health (physical or mental) of the child. [1095] The CRoC goes as far as requiring that a guardian be appointed to accompany a child facing deportation.[1096]

More recently in *S.S.F. v Denmark*,[1097] the CRoC's second case on FGM, the author brought the communication on behalf of his daughter who would face the risk of FGM if deported to Somalia. The CRoC noted the immediate and long-term effect that FGM may have on the health of an individual,[1098] and recommended that "the legislation and policies relating to immigration and asylum should recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum and that consideration should also be given to providing protection to a relative who may be accompanying the girl or woman."[1099] The CRoC noted the jurisprudence of other treaty bodies who had held that subjecting a girl to

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[1091] CEDAW and CRoC, *Joint General Comments No. 31 and No. 18* (2014) , para 55.
[1092] Çali , Costello and Cunningham 2020 (21) *German Law Journal* 370.
[1093] CMW and CRoC, Joint General Comments No.3 and No.22 , paras 12 and 28 ( 2017).
[1094] Cali , Costello and Cunningham 2020 (21) *GLJ* 370.
[1095] *Ibid.*
[1096] *M.T. v. Spain*, CRoC, UN Doc. CRC/C/82/D/17/2017, 5 November 2019.
[1097] CRC/C/90/D/96/2019.
[1098] *Ibid*, para 8.4
[1099] *Ibid.*

FGM amounts to torture or cruel, inhuman or degrading treatment: the HRC in *Kaba*, the CAT in *F.B.* and *M.N.N.* in the CEDAW Committee.[1100]

In a dissenting view, one committee member held that the committee should have raised the issue of FGM on their own accord because the CRoC has a role to guide the child author who is neither an expert nor a legal professional through the best interests principle and through the principle of progressive autonomy.[1101] The view also noted that the fact that the risk is real and certain should have also prompted the CRoC to invoke rights not raised by the author.[1102] Finally, the dissenting view presented that the particular status of the prohibition of torture recognized by the international community as a norm of *ius cogens*, should have also prompted the CRoC to act ex-officio.[1103]

Like the HRC, the CRoC also recognises lack of medical treatment as grounds for non-refoulement. In *D.R. v Switzerland*,[1104] the CRoC considered non-refoulment on medical conditions for the first time and held that congenital hypothyroidism was essential for the child's development. In this case the CRoC considered that the principle of non-refoulment "does not confer a right to remain in a country solely on the basis of a difference in health services that may exist between the State of origin and the State of asylum, or to continue medical treatment in the State of asylum, unless such treatment is essential for the life and proper development of the child and would not be available and accessible in the State of return"[1105]

However, the CRoC came to the finding that medical treatment was available in Sri Lanka, where the child and his family were being deported to, thus finding that the

[1100] *Kaba v. Canada* (CCPR/C/98/D/1465/2006), para. 10.1; *F.B. v. The Netherlands* (CAT/C/56/D/613/2014), para. 8.7; and *M.N.N. v Denmark* (CEDAW/C/55/D/33/2011), para. 8.8.
[1101] See paragraph 5 of the dissenting view.
[1102] Dissenting view Para 6
[1103] Dissenting view Para 7
[1104] CRC/C/87/D/86/2019.
[1105] *Ibid*, para 11.6

child's deportation to Sri Lanka will not create obstacles in gaining access to medical treatment and therefore found no violation.[1106]

In *Z.S. and A.S. on behalf of K.S and M.S v Switzerland*,[1107] the CRoC made a finding for the first time that deporting a deaf child from Switzerland, who could not be guaranteed to receive adequate medical care in Russia is a violation of the child's best interests, the right to medical care and the right to survival and development. Unlike in the ECtHR which applies a higher threshold to medical cases to adult migrants, the CRoC applied a lower threshold to the child migrant.[1108]

Reneman remarks that it is not surprising that the CRoC recognises non-refoulement on medical grounds,[1109] as the CRoC had already indicated in *I.A.M*, that "non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-state actors or whether such violations are directly intended or are the indirect consequence of action or inaction."[1110]

The CRoC has set a precedent in *D.D. v. Spain,*[1111] its first case on summary deportations, published in 2019 (hereafter *D.D)* that so-called "pushbacks" or summary deportations are strongly condemned D.D. is the first case on pushbacks. The author D.D., a Malian national was returned from Melilla to Morocco as an unaccompanied asylum seeking child. The author had fled the war in Mali and crossed the border fence between Morocco and the Spanish enclave of Melilla. D.D. was apprehended by Spanish authorities at the border and was immediately sent back

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[1106] *Ibid*, para 11.6
[1107] CRC/C/89/D/74/2019.
[1108] Marcelle Renemen, *Communication 74/2019 Z.S and A.S on behalf of K.S and M.S V Switzerland*, Leiden Children's Rights Observatory, Case Note 2022/1, 13 September 2022.https://www.childrensrightsobservatory.nl/case-notes/casenote2022-01 (Accessed 31 October 2022).
[1109] *Ibid.*
[1110] *I.A.M.* para 11.3.
[1111] CRoC, UN Doc. CRC/C/80/D/4/2016, 1 February 2019.

the Morocco. D.D. was not identified as a child and was not given a chance to express his willingness to apply for asylum and to seek legal assistance.[1112]

The CRoC considered its own jurisprudence under General Comment No.6,[1113] and emphasized the obligations on States Parties to take all necessary steps to immediately identify children, particularly, those found at the borders.[1114] The CRoC considered its own jurisprudence in the CRC where it had stated that States must conduct initial assessments of children prior to their removal. The State party had failed to conduct any assessment on the author and had not given the author an opportunity to object to his deportation. The CRoC found this to be in violation of Article 3 (best interests principle), 20 (The obligation to offer special protection to children who have deprived of their family environment) and 37 (Prohibition of torture, cruel and inhuman degrading treatment or punishment) the CRC.[1115] The CRoC found a violation of Articles 3 and 20 in light of the fact that there was no initial assessment before the author was removed, and neither was he given an opportunity to object to his deportation.[1116] The findings of a violation of Article 3 and 37 were based on the fact that there was violence against migrants in the border area with Morocco, together with the ill-treatment given to the author, including the manner in which he was detained and deported, and also considering the principle of *non-refoulement*.

The CRoC reached the above conclusions by referring to its own jurisprudence under General Comment No.6,[1117] and the Joint General Comment between itself and the CMW,[1118] where it had established that States parties should not return a child to a territory where there are substantial grounds for believing that there is a real risk of irreparable harm to the child.[1119] It is noteworthy to mention the CRoC's view that the obligation on States parties to provide special protection and assistance to

[1112] *D.D. v. Spain,* paras 2.1-2.7.
[1113] CRoC, *General comment No. 6 (2005).*
[1114] *D.D. v. Spain,* para 14.3.
[1115] *Ibid,* paras 4.7-14.8.
[1116] *Ibid.*
[1117] CRoC, *General Comment No. 6* (2005), para 27.
[1118] CMW, *Joint general comment No. 3 (2017) and No. 22 (2017)*, para. 46.
[1119] *D.D. v. Spain,*para 14.4.

unaccompanied children applies even "with respect to those children who come under the State's jurisdiction when attempting to enter the country's territory".[1120] Morlachetti notes that the decision of the CRoC in this case is hardly a surprise, since the practice of summary deportations at the border fences of Ceuta and Melilla has been reported several times.[1121] In fact, UNICEF in a 2019 report has warned about the practice of pushbacks at Melilla.[1122] Wriedt notes that the CRoC's decision in this case "goes not only beyond the individual case, but also beyond the Spanish-Moroccan border. It constitutes a clear condemnation of States' practice to create zones of exception at the border where basic rights are suspended."[1123] The case also confirms the principle under the CRoC's General Comment No.6 principle that:

> "State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory."[1124]

D.D. was under the effective control of Spanish authorities when he was apprehended and therefore, he was under Spanish jurisdiction, irrespective of whether D.D. was said to have entered Spanish territory or not. This was rightfully confirmed by the CRoC.[1125]

In 2020, the CRoC published its view on the merits on *non-refoulement*, concerning a mother and her children in *W.M.C. v. Denmark*.[1126] The CRoC set a precedent in this case that the right of access to education, healthcare and other social services

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[1120] *Ibid*, para 14.3. This view was cited from the CRoC's General Comment No.6 , para 12.
[1121] Morlachetti, *Communication 4/2016: D.D. v. Spain*, Leiden Children's Rights Observatory, Case Note 2019/1, Leiden Law School, 11 June 2019 https://www.childrensrightsobservatory.nl/case-notes/casenote2019-1
[1122] UNICEF "Pushback practices and their impact on the human rights of migrant" February 2021 https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/UNICEFSubmission.pdf (Accessed 19 September 2022).
[1123] Wriedt "Push-backs rejected: D.D. v. Spain and the Rights of Minors at EU borders", 29 April 2019 https://eumigrationlawblog.eu/push-backs-rejected-d-d-v-spain-and-the-rights-of-minors-at-eu-borders/ (Accessed 10 May 2021).
[1124] CRoC, *General comment No. 6 (2005),* para 12.
[1125] *D.D. v. Spain,* para 13.4.
[1126] CRoC , UN Doc. CRC/C/85/31/2017, 15 October 2020.

constitutes grounds for *non-refoulement*.[1127] In this case, a Chinese single mother with three children, all of whom were under the age of 18 sought asylum in Denmark but were rejected.[1128] According to the mother, she and her daughters would be subjected to irreparable harm if returned to China as she will not be able to register her children in the Chinese Hukou household registration system (This is required in order for the children to have access to health, education and social services, it is also a means to prove one's identity in China).[1129] In this regard, the author alleged that Denmark had violated her children's rights under Articles 2 (The prohibition of discrimination) 7 (The right to birth registration) 3(1) (the best interests principle) of the CRC, 6 (Right to life, survival and development) and 8 (respect for the right to preserve identity and nationality).[1130]

On the claims concerning Articles 3(1), 6 and 8 of the CRC, the CRoC referred to its own General Comment No.6 in which it held that states shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child. Furthermore, the determination of the real risk of irreparable harm should be conducted in an age and gender sensitive manner.[1131] The CRoC added that:

> "Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction…Such assessment should be carried out following the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such risks, State parties should refrain from deporting the child."[1132]

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[1127] *W.M.C. v. Denmark,* para 8.9.
[1128] *Ibid,* paras 2.1-2.8.
[1129]The applicant fled China in 2012. In China ,she was forced to undergo an abortion and her father was killed in an incident involving the police. Her mother also died of heart failure. In Denmark, the applicant gave birth to three children in 2014, 2015 and 2018. The father of the children is an asylum seeker who does not appear on the children's birth certificate. The author also added that she feared persecution for being a single mother and that her children would possibly be taken away from her. See paras 2.1-2.8.
[1130] The CRoC declared the complaints concerning violations of Article 2 UNCRC (the prohibition of discrimination) and Article 7 UNCRC (the right to birth registration) to be inadmissible. See paras 3.1-3.2.
[1131] CRoC, General Comment No.6, para 26.
[1132] *W.M.C. v. Denmark,* para 8.3.

The CRoC recalled the best interests principle in its jurisprudence,  where it had held that the best interests of the child should be a primary consideration in decisions that involves the deportation of a child and further that such decisions "should ensure-within a procedure with proper safeguards that the child will be safe and provided with proper care and enjoyment of rights."[1133] The CRoC also considered the fact that Denmark had not taken sufficient steps to ascertain whether a Danish birth certificates would suffice for purposes of registration in the Hukou,[1134] and if not what other procedures were available for the children to obtain their Chinese birth certificates and how long the children would have to wait until they are registered into the Hukou.[1135] Finally, the CRoC held that Denmark had failed to consider how the rights of the children to education and healthcare would be ensured pending or failing their registration.[1136] In light of this, the CRoC concluded that Denmark had failed to consider the best interests of the child when assessing the risk that the author's children would face since they are not registered under the Hukou, which is required to ensure their access to health, education and social services, as well as being the only means to prove their identity in China.[1137] The CRoC found a violation of Article 3, and further that the return of the author and her children would amount to violations of Articles 6 and 8 of the CRC.[1138]

[1133] *Ibid,* para 8.6.
[1134] *Ibid.*
[1135] *Ibid.*
[1136]*Ibid.* In reaching this conclusion, the CRoC took note of a 2019 report of the United States Department of State, according to which, although under both civil law and marriage law the children of single women are entitled to the same rights as those born to married parents, in practice children born to single mothers or unmarried couples are considered outside of the policy and are subject to the social compensation fee and the denial of legal documents, such as birth documents and the *hukou*. It also took note of a 2018 report of the United Kingdom Home Office, in which it is stated that many children born to single or unmarried parents had been denied a household registration document, preventing them from accessing public services, medical treatment and education. It also considered that although the Government has stated it is making it easier for illegitimate children to be registered, the implementation of this is inconsistent and there can still be obstacles. Furthermore, it also took note of a 2016 report of the Immigration and Refugee Board of Canada, which states that neither the birth certificate from the Population and Family Planning Commission nor the medical birth certificate, in themselves, are functional civil documents beyond their role in the birth registration process. In other words, they cannot attest legal identity or nationality; they are only of use within their capacity to enable birth registration.
[1137] *W.M.C. v. Denmark,* para 8.9.
[1138] *Ibid,* para 9.

According to Klassen and Rodrigues, the CRoC's reasoning in General Comment No.6 (2006) is similar to the test which both the HRC and the CAT Committee employs in assessing whether a real or personal risk exists.[1139] If the CRoC establishes that there are substantial grounds for believing that there is a real risk of irreparable harm to the child, the CRoC will find a breach of Article 6 and or 37 (a) of the CRC, which includes the principle of non-refoulement.[1140]

Moreover, it is noted that in both non-refoulement cases, *I.A.M* and *W.M.C.* , the CRoC has indicated that the assessment of the real risk of irreparable harm should be carried out "following the principle of precaution and that States parties should refrain from deportation where reasonable doubts exist that the receiving state will not protect the child."[1141]Notably, a unique feature of the CRoC's jurisprudence on FGM and non-refoulement is the principle of precaution which the CRoC applies to give children a higher standard of protection.

*V.A. v. Switzerland*,[1142] involved the author V.A. and her children E.A. and U.A. who faced a Dublin transfer back to Italy from Switzerland.[1143] The author argued that Switzerland should apply the Dublin III regulation, more specifically, the sovereignty

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1139 Klassen and Rodrigues, *Communication 31/2017: W.M.C. v. Denmark*, Leiden Children's Rights Observatory, Case Note 2021/2, 29 January 2021.https://childrensrightsobservatory.nl/case-notes/casenote2021-2 (Accessed 7 January 2022).

1140 *Ibid.*

1141 *I.A.M. v Denmark*, para 11.8(c) and *W.M.C. v Denmark*, para 5.4.

1142 CRoC , UN Doc. CRC/C/85/D/56/2018, 30 October 2020 . Although this communication is discussed here under non-refoulement, it differs slightly in that it is also a Dublin case. As discussed in chapter 6, the Dublin Regulation provides for the mechanisms and criteria for determining the Member State responsible for examining an application for international protection lodged by a third country national in one of the European Union Member States. See European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, (Dublin III Regulation), which replaced European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003 (Dublin II Regulation).

1143 The author V.A. and her husband, as well as two children E.A. and U.A., fled their home country in Azerbaijan to Switzerland due to political pressure. In the course of their asylum procedure, the family decided to go back to Azerbaijan due to inadequate reception conditions in Switzerland. Following their return, the author's husband was arrested for political reasons. V.A. was then threatened by authorities in Azerbaijan due to her journalism and political activities. The author decided to return to Switzerland with her children via an Italian visa.

clause, which stipulates that a "State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation."[1144] The Swiss authorities refused to apply the sovereignty clause and ordered the removal of the family to Italy. The author alleged that the State party had violated the rights of E.A and U.A by not considering their vulnerability and by infringing on their rights at the time of the attempted removal, in violation of Article 2 (the obligation of respect the rights set forth in the Convention) of the CRC.[1145] She also alleged a violation of Article 3 (Best interests principle) in that no meaningful assessment of the best interests of E.A. (8 years old) and U.A. (3 years old) was made during an attempt to remove the children to Italy.[1146] She further claimed violations of Articles 6 (2) (survival and development of the child) in that the children were traumatized during the attempted removal,[1147] 12 (the right to be heard and to participate in proceedings) in that the children were not heard during the proceedings and that the numerous reports and testimonies introduced during the proceedings were ignored,[1148] 22 (co-operation and assistance of States Parties to allow for family reunification), in that the State Party had failed to consider the sovereignty clause of the Dublin III Regulation and that E.A. and U.A. were not provided with assistance during the attempted removal,[1149] Article 24 (Right to enjoyment of the highest attainable standard of health) in that removing the children to Italy would mean that they would not have access to adequate psychological care,[1150] and finally Article 37 (right to protection against inhuman and degrading treatment) of the CRC because the attempted removal was carried out in a manner that constitutes degrading

[1144] Dublin III Regulation, Art 17(1). The author argued this on grounds that they were a vulnerable family, who had already fled their country of origin, that her husband had already been arrested and that the children were already integrated and they were attending school in Ticino. She alleged further that she was in a state of depression and that transferring her children to Italy would violate their rights and their best interests. See para 2.6 of the case.
[1145] *V.A. v. Switzerland,* para 3.1.
[1146] *Ibid,* para 3.2.
[1147] *Ibid,* para 3.3.
[1148] *Ibid,* para 3.4.
[1149] *Ibid,* para 3.5.
[1150] *Ibid,* para. 3.6. It was alleged that the following treatment inflicted on the children during the attempted removal constitutes degrading treatment.

treatment, especially since the children were subjected to verbal and psychological abuse.[1151]

The CRoC held that the claims under Articles 2, 6(2), 24 and 27 were inadmissible.[1152] The CRoC found a violation of Article 12, on the reasoning that the right to be heard does not impose an age limit on the right of the child to express his or her own views. Therefore, it discourages States parties from placing an age limit that would restrict the child's right to be heard. The CRoC recalled from its previous jurisprudence that:

> "determining the best interests of the children requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application. Therefore, the Committee considers that in the circumstances of the present case, the absence of a direct hearing of the children constituted a violation of article 12 of the Convention."[1153]

The CRoC also held that the State party's failure to hear E.A. and U.A. on the facts concerning the trauma which they experienced, including twice fleeing their country of origin, once passing through a third country, once returning to their country of birth, and another attempt to return them to Italy under very traumatic conditions, means that the State party has failed to show due diligence in assessing their best interests. The CRoC emphasized that these experiences may have very different consequences on them, than what their mother had suffered.[1154]

More recently, the CRoC gave its views in A.B. v Finland,[1155] which is the CRoC's and the United Nations human rights treaty bodies' first communication on LGBTI in the context of asylum.[1156] The case concerned a child who experienced bullying and isolation in school due to his parents' sexual orientation. The family also experienced

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[1151] *V.A. v. Switzerland,* para 3.7.
[1152] *Ibid,* para 6.2. on grounds of failure to exhaust domestic remedies.
[1153] *Ibid,* para 7.3.
[1154] *Ibid,* para 7.4.
[1155] CRoC, UN Doc. CRC/C/86/D/51/2018, 5 February 2021.
[1156] "First UN committee decision on rights of children of LGBT parents in asylum context" Child Rights International Network , 17 February 2021 https://home.crin.org/readlistenwatch/stories/un-committee-delivers-decision-on-rights-of-an-lgbt-couples-child (Accessed 7 January 2022).

threats and harassment and fled their home country Russia to Finland as they feared for their lives.[1157] Their application for asylum in Finland was rejected by the Finnish authorities on grounds that the bullying, threats and harassment experienced by the family does not amount to persecution.[1158]

The CRoC held that Finland had violated Articles 3 (best interests principle) in that the State party had failed to consider A.B.'s best interests in assessing his asylum request. the CRoC was particularly concerned that "the formal and general reference to the best interests of the child by the Immigration Service, without having considered the author's views reflects a failure to consider the specific circumstances surrounding the author's case and to assess the existence of a risk of a serious violation of the Convention against such specific circumstances." [1159]

The CRoC found a further violation of 19 (protection from all forms of physical and mental violence) in that Finland had failed to consider that a real risk of serious violation of the authors' rights exists if returned to Russia. This view was based on the reasoning that irreparable harm was foreseeable in light of past bullying. The CRoC focused on the lack of consideration of the author's age at the time the decision to refuse his refugee application was made, as well as the impact of the bullying and stigmatization on the child.[1160] Finally, a violation of Article 22 (protection of child seeking refugee status) of the CRC was also found.

In *W.M.C.* above, the CRoC applied the principle of precaution in assessing the risk of irreparable harm. However, in the present case (*A.B*), the CRoC considered the author's age and interpreted the principle of non-refoulement in a child-sensitive way.[1161] Also noteworthy was the fact that unlike in ***I.A.M.***, in which the breach of non-refoulement was based on physical violence, in the present case (A.B), the risk of

[1157]*A.B. v. Finland* , paras 21.1-2.12.
[1158] *Ibid.*
[1159] *Ibid,* para 12.4.
[1160] *Ibid*, para 12.5.
[1161] Sormunen, *Communication 51/2018: A.B. v. Finland*, Leiden Children's Rights Observatory, Case Note 2021/4, 7 May 2021 https://www.childrensrightsobservatory.nl/case-notes/casenote2021-4 (Accessed 9 January 2022).

harm is not physical violence but mental harm.[1162]According to Sormunen,[1163] "The finding that returning a child to an environment hostile to LGBTI people could in itself be against non-refoulement is remarkable, as it indicates that factors related to the sexual orientation of parents can contribute to defining the threshold of non-refoulement."[1164]

### 7.5 Assessing non-refoulement for children: A comparison of the standards in non-refoulement cases of CAT, HRC and CRoC

In *I.A.M,* the CRoC sets a *non-refoulement* test which is different from the standards used by the CAT's and the HRC's. Article 3 of the of the Convention Against Torture requires "substantial grounds" for believing that a person would be in danger of being subjected to torture if deported.[1165] The CAT has established further that there must be a "personal and foreseeable risk" and that the existence of a pattern of gross, flagrant or mass violations of human rights does not *per se* constitute sufficient reason to assume a personal real risk.[1166] As for the HRC, in order to find a violation of the prohibition of *non-refoulement* under Article 7 of the ICCPR, there must be a "real risk of irreparable harm."[1167] Furthermore, the HRC has indicated that the risk must be personal and sets a higher threshold for providing substantial grounds to establish a real risk. In *K.v. Denmark*,[1168] the HRC held that generally, it is a State Party who must examine the facts and evidence on the existence of a real risk, unless that assessment is arbitrary or amounts to an error or a denial of justice.

The reasoning of the CRoC in General Comment No.6, and in *W.M.C.* is similar to the test used by both the CAT and the HRC. According to the CRoC, if there are substantial grounds for believing that there is a "real risk of irreparable harm to the

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[1162] *Ibid*.
[1163] *Ibid*.
[1164] *Ibid*.
[1165] CAT, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, UN Doc. A/53/44, annex IX, paras. 6-7.
[1166] See for instance, The CAT's view in *F.B. v Netherlands* (CAT, UN Doc. CAT/C/56/D/613/2014, 15 December 2015, para 8.3).
[1167] HRC, *General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* ,UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 , para 12.
[1168] HRC, UN Doc. CCPR/C/114/D/2393/2014, 11 September 2015.

child", this will result in a finding of a violation of Articles 6,[1169] and 37(a),[1170] of the CRC. The CRoC has shown consistency in the application of its own jurisprudence in *I.A.M.* by holding in *W.M.C.* that the assessment of a real risk of irreparable harm should be carried out based on the principle of precaution and that state parties should refrain from deportation where reasonable doubts exist that the receiving state will not protect the child.

### 7.6 Missed opportunities: Migration detention in the jurisprudence of the CROC

Communications on age assessment often involves detention of children. This has been identified from the facts alleged by the authors in five cases.[1171] It has been well established under international law that children should not be detained for migration related issues, and further that the detention of children for migration purposes is never in the best interests of the child and will always constitute a child rights violation.[1172] Article 37(b) of the CRC enshrines the right of the child to liberty and freedom from arbitrary detention:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

The CRC has said clearly in its General Comment No.6 of the CRoC (2005) on the Treatment of Unaccompanied Children:

> Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.[1173]

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[1169] UNCRC, Art 6 reads: States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.
[1170] UNCRC, Art 37(a) reads: No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
[1171] CRoC , *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration* , 28 September 2012, paras 78-79.
[1172] See *A.L. v. Spain, M.T. v. Spain, J.A.B. v. Spain, M.A.B. v. Spain* and *R.K. v. Spain.*
[1173] *Ibid.*

Despite this, children are detained for migration related reasons. The following is a brief discussion of communications alleging detention for migration related reasons and in which the CRoC missed its opportunity to develop a jurisprudence on children detained for that purpose.

In *M.B. v. Spain*,[1174] the State party failed to conduct any age assessment on the author and registered him as a 21 year old adult.[1175] Although it was later proven that he was under the age of 18, he was held in the detention centre for 52 days with adults.[1176] He was not recognised as a child and he was not assigned a guardian to look after his legal interests, neither was he offered the protection that he was entitled to as a minor under both national and international law.[1177] The issue of migration detention also appears in some of the age assessment cases. For example, the authors were held in detention centres for 15 days (*M.T.*) and 50 (*R.K.*) days respectively.[1178] These facilities were meant for adult deportees pending the decision to deport them.[1179] *M.A.B*,[1180] was also detained for 52 days whilst his deportation was being considered and *A.L,*[1181] who first detained in a police station for 4 days and later held in a migration detention centre for 60 days (which is the maximum period allowed by Spanish migration law).[1182] Whilst the facts of these cases describe that the authors were detained for migration related reasons, none of the authors alleged a violation of their rights under Article 37(b) of the CRC.[1183]

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[1174] CRoC, UN Doc. CRC/C/85/D/28/2017, 12 June 2018.
[1175] *Ibid*, para 4.2.
[1176] *Ibid*, para 2.3
[1177] *Ibid.*
[1178] *M.T. v. Spain* , para 2.2 and *R.K. v. Spain.* para 2.8.
[1179] *Ibid.*
[1180] *M.A.B. v. Spain* , para 2.3.
[1181] *A.L. v. Spain* , para 5.4
**1182** *Ley Orgánica de Extranjería* 4/2000 (Ceriani Cernadas C*ommunications No. 16/2017 A.L. v. Spain; 17/2017 M.T. v. Spain; 22/2017 J.A.B. v. Spain; 24/2017 M.A.B. v. Spain and 27/2017 R.K. v. Spain*, Leiden Children's Rights Observatory, Case Note 2020/2, 18 May 2020 https://www.childrensrightsobservatory.nl/case-notes/casenote2020- 2.
[1183] UNCRC, Art 37(b) reads: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Whilst the CRoC gave comprehensive views in each of these case, Cernadas notes that one of the missing issues in the views of the CRoC is on the detention of the authors in an immigration detention centre.[1184] He notes further that whilst none of the authors alleged a violation of Article 37(b), [1185] of the CRC, the facts described that the children were detained for immigration related purposes, offering the CRoC an opportunity to give its views in that regard.[1186] It is submitted that since the authors were not legally represented, the CRoC should have given its views on their detention, in their best interests as children. It is crucial to note that it was due to inadequate age assessment policies that led to their detention. Although the five communications should have been suitable opportunities for the CRoC to reaffirm its standards on the prohibition of detention of children for immigration purposes, the CRoC's views are only limited to violations which authors allege.

The CRoC finally received and dealt with two recent views on migration detention. In *K.K & R.H. v Belgium*,[1187] and in *E.B. v Belgium*.[1188] (Both cases were discussed in detail earlier in chapter 6 on migration detention) In *K.K & R.H*, the CRoC held that the state party had not considered any alternatives to the detention of the children. More specifically, the CRoC held that the family lived in their home, which they returned to after their release. Therefore, the state party should have considered allowing the family to stay in their family home during the appeal proceedings.

And in *E.B. v Belgium*, the children were detained with their mother in a family home in a closed centre for four week and for three weeks and four days respectively.[1189] The CRoC considered that the state party had not considered any alternatives to detaining the children such as taking them to live with their paternal grandmother.[1190] Neither were best-interests assessment carried out in connection with the decisions to

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**1184**Ceriani Cernadas (2020) C*ommunications No. 16/2017 A.L. v. Spain; 17/2017 M.T. v. Spain; 22/2017 J.A.B. v. Spain; 24/2017 M.A.B. v. Spain and 27/2017 R.K. v. Spain* .
1185 UNCRC, Article 37 (b) protects against arbitrary interference on the child's right to liberty.
**1186**Ceriani Cernadas (2020).
1187 CRC/C/89/D/73/2019.
1188 CRC/C/89/D/55/2018.
1189 E.B. v Belgium Para 13.11.
1190 Ibid, 13.14

detain the children or to extend their detention. In this view the CRoC concluded that the state party had violated the rights of the children under Article 37 of the CRC, read together and read alone with Article 3.[1191]

### 7.7 The best interests principle in the CROC'S jurisprudence

The best interests principle is one of the four pillars of the CRC.[1192] It is almost always applied in all of the CRoC's views. The CRoC has held that "[…] [T]he best interests of the child is understood, appropriately integrated and implemented in all legal provisions as well as in judicial and administrative decisions […] that have direct and indirect impact on children."[1193] According to Klassen and Rodriguez, General Comment No. 14 on the best interests principle is an important document " because domestic immigration judges and authorities find this principle rather vague and hard to operationalize".[1194] General Comment No.14 of the CRoC(2013) on the best interests principle stipulates that the principle is a threefold concept: a substantive right, a fundamental, interpretative and legal principle and rule of procedure.[1195] One can safely say that the best interests principle is applicable in all matters which may impact a child. Often, the best interests principle is interpreted against various Articles of the CRC.

The following is a discussion of how the CRoC has interpreted the best interests principle in situations involving *non-refoulement*, age assessment and family related cases. This discussion also draws on the examples from the HRC and the CAT, where relevant and in so far as the best interests principle is concerned.

In *Y.B. and N.S. v. Belgium*, the CRoC interprets the best interests principle largely on the right to be heard under Article 12 of the CRC. According to the CRoC, the child who was five years at the time should have been given the opportunity to express her

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[1191] Ibid, Para 13.14.

[1192]CRoC, *General comment No. 14 (2013)*, para 1.

[1193] See for instance United Nations Committee on the Rights of the Child , *UN Committee on the Rights of the Child: Concluding Observations, Finland*, 20 October 2005, CRC/C/15/Add.272, para. 21.

[1194] Klaassen and Rodrigues *Communication 31/2017: W.M.C. v. Denmark*, Leiden Children's Rights Observatory, Case Note 2021/2, 29 January 2021.

[1195] CRoC, *General comment No. 14* (2013*)* , para 6.

views in accordance with Article 12. The CRoC also comments on the need for the State party to consider the specific situation of the child, including the emotional and social needs in the best interests assessment. In fact, the CRoC is critical of the State Party for only considering the educational needs of the child in the best interests assessment.[1196] In *N.R. v. Paraguay,* the author did not allege a violation of Article 12. Therefore, the CRoC's interpretation on the child's best interests surrounds the manner in which the domestic authorities applied the best interests principle, without properly considering the child's wishes. As Yaksic notes the domestic authorities only referred to the opinion of the child through the voice of her mother in the domestic proceedings.[1197]

Family related cases are not the only areas in which the CRoC has shown the significance of the best interests principle and the right to be heard. In *V.A. v. Switzerland,* the CRoC recalled that "determining the best interests of the children requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application. Therefore, the Committee considers that in the circumstances of the present case, the absence of a direct hearing of the children constituted a violation of Article 12 of the Convention."[1198] This view reaffirms the position that Article 12 is an important component of the CRC.

In *I.A.M. v. Denmark*, the CRoC assessed the best interests of the child against female genital mutilation and reasoned that, contrary to the State Party's argument, the child's right to protection from all forms of physical and mental violence, injury or abuse under Article 19 cannot be dependent on the mother's ability to resist family and societal pressure.[1199] The CRoC added that the best interests of the child had to be considered in light of the fact that FGM was persistently practised in Puntland, where

[1196] *Y.B. and N.S. v. Belgium* , paras 8.3-.8.4.
[1197] Yaksic, *Communication 30/2017: N.R., on behalf of C.R. v. Paraguay*, Leiden Law School, Children's Rights Observatory, Case Note 2020/3, 19 May 2020, https://www.childrensrightsobservatory.nl/case-notes/casenote2020-3.
[1198] *V.A. v. Switzerland* , para 7.3.
[1199] *I.A.M. v. Denmark,* para 11.b. The State Party had argued that having left Somalia, the mother of the child should be considered independent, with considerable personal strength to resist pressure, including the ability to resist the pressure of allowing her daughter to undergo FGM.

the author and her daughter were from.[1200] Moreover, the CRoC considered the child's best interests in light of the fact that the mother would return to Somalia as a single parent without a male supporting network, should they be deported.[1201]

In *W.M.C. v. Denmark*, the best interests principle was interpreted against the right of access to education, healthcare and social services. In this case the CRoC concluded that Denmark had failed to consider the best interests of the child when assessing the risk that the author's children would face since they are not registered under the Hukou, which is required to ensure their access to health, education and social services, as well as being the only means to prove their identity in China.[1202] The CRoC also recalled that the best interests of the child should be a primary consideration in decisions that involves the deportation of a child and further that such decisions "should ensure-within a procedure with proper safeguards that the child will be safe and provided with proper care and enjoyment of rights."[1203] More recently in *A.B. v. Finland*, the CRoC considered the author's age and interpreted the principle of non-refoulement in a child sensitive way. This manner of approach is different from the principle of precaution which the CRoC has used in *W.M.C. v Denmark* to assess the risk of irreparable harm to the author.[1204]

In *E.B*,[1205] the migration detention case, the CRoC held that the best-interests assessment was to be carried out in connection with the decisions to detain the children or to extend their detention. This shows the link between the best interests principle and the migration detention.

The best interests principle was applied in non-refoulement on medical grounds in Z.S and A.S on behalf of K.S. and M.S. v Switzerland, where the CRoC made a finding

[1200] *Ibid,* para 11.8 a.
[1201] *Ibid.*
[1202] *W.M.C. v. Denmark,* para 8.9.
[1203] *Ibid,* para 8.6.
[1204] Sormunen *Communication 51/2018: A.B. v. Finland* (2021).
[1205] *Ibid*, para 13.14.

for the first time that deporting a deaf child who could not be guaranteed to receive adequate medical care in Russia is a violation of the child's best interests.[1206]

In *D.D. v. Spain*, the CRoC interpreted the best interests of the author against the author's right to protection as a child temporary deprived of his family environment as contemplated under Article 20 of the CRC. According to the CRoC, the failure to provide special protection and assistance to the author and the lack of initial assessment to determine his best interests prior to his deportation violated his rights under Article 20 of the CRC. The author's best interests were also assessed against Article 37 (protection against the risk of violence and degrading or inhumane treatment in Morocco). The CRoC was of the view that the manner in which D.D. was deported (he was arrested and handcuffed), together with the fact that he did not receive any legal assistance violated his rights under Article 3, read together with Article 20 and 37 of the CRC.

Whilst the ICCPR does not have a provision for the best interests principle, the said principle is embedded in the jurisprudence of the CRoC and this can be attributed to the fact that the best interests principle is one of the bedrocks of the CRC. One of the stark contrasts between the views of the CRoC and the HRC, has been on the right to be heard. Whereas it is evident that the CRoC is deliberate about hearing the views of children in matters affecting them, the HRC often bases its views solely on the submissions of parents or guardians. This is particularly true in *non-refoulement* cases, where the HRC has never considered the views of the child, unless if the communication is brought by the child alone,[1207] despite parents alleging that the communications are brought on behalf of their children.[1208] Rap, Schmidt and Liefaard

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[1206] Para 11.

[1207] See for example, *O.A v. Denmark,* HRC, UN Doc. CCPR/C/121/D/2627/2015, 27 November 2017.

[1208] See for example the HRC's views in *Raziyeh Rezaifar v. Denmark,* HRC, UN Doc. CCPR/C/119/D/2512/2014, 10 April 2017; *Jasin and others v. Denmark,* HRC, UN Doc. CCPR/114/D/2360/2014, 25 September 2015; *R.A.A. and Z.M. v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/118/D/2608/2015, 29 December 2016; *Hibaq Said Hashi v. Denmark,* HRC, UN Doc. CCPR/C/120/D/2470/2014, 9 October 2017; *R.A.A. and Z.M. v. Denmark*, United Nations Human Rights Committee, UN Doc. CCPR/C/118/D/2608/2015, 29 December 2016, *these cases all involve the deportation of children and their parents. In fact the parents claim that the cases are brought on behalf of their children, however, the views of the children are never heard.*

argue that there is often a tension in the CRC, where on the one hand it recognises the child as an evolving individual with autonomy to participate in decisions affecting him or her. However, on the one hand, it seeks to protect children.[1209]

The HRC has shown a tendency to refer to the best interests principle through its views in *X.H.L. v. the Netherlands*,[1210] the HRC found the State party had breached the author's right to protection as a child under Article 24 of the ICCPR and the right not to be subjected to cruel, inhuman or degrading treatment or punishment. This conclusion was based on the reasoning that the State party had failed to take into consideration his best interests as a child before returning him to his country of origin.[1211] The HRC held: "Without a thorough examination of the potential treatment that he may have been subjected to as a child with no identified relatives and no confirmed registration"[1212] the child would face hindrances in "proving his identity or access any social assistance services"[1213] once he arrives in his country of origin. In six cases concerning different issues, the HRC explicitly refers to the best interests principle as a primary consideration.[1214] However, in *O.A. v. Denmark*, the child author raised the best interests principle but the HRC did not consider it, although it acknowledged the vulnerability of the child author.[1215] In *Martinez v. Paraguay*,[1216] a family law case, the HRC rejected the domestic court's explanation of the best interests, but did not give its views on what it would have considered an acceptable explanation of the principle.

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1209 Rap, Schmidt and Liefaard "Safeguarding the dynamic legal position of children: A matter of age limits? Reflections on the fundamental principles and the practical applications of age limits in light of international children's rights law"2020 (1) *Erasmus Law Review* 4.
1210 HRC, UN Doc. ICCPR/C/102/D/1564/2007, 22 July 2011.
1211 *X.H.L. v. The Netherlands* , para 10.3.
1212 *Ibid*, para 10.3.
1213 *Ibid*, para 10.2.
1214 Views adopted between 2016-2019: *DT v Canada*, HRC, UN Doc. CCPR/C/117/D/2081/2011, 29 September 2016; *Hashemi v Netherlands*, HRC, UN Doc. CCPR/C/125/D/2489/2014, 7 June 2019; *Bakhtiyari v Australia* ,HRC , UN Doc. CCPR/C/79/D/1069/2002, 6 November 2003 ; *Husseini v Denmark* , HRC, UN Doc. CCPR/C/112/D/2243/2013, 26 November 2014; *Abdoellaevna v Netherlands* ,HRC, UN Doc. CCPR/C/125/D/2498/2014, 15 April 2019; *NK v Netherlands*, United Nations Committee Against Torture, UN Doc. CAT/C/60/D/623/2014, 5 July 2017.
1215 *O.A v. the Netherlands,* paras 8.6-8.9.
1216 HRC, UN Doc. CCPR/C/95/D/1407/2005, 27 March 2009, para 7.3.

The CRoC has shown through the cases discussed above, how the best interests principle should be applied in different situations In family related cases it has clarified that the emotional and social needs of a child, who is to be reunified with his or her parents are as important as their educational needs.[1217] In *non-refoulement* cases, it has clarified that States Parties should not only rely on the views of parents and neglect the child's right to be heard. More specifically, the CRoC has shown its disapproval of so-called "pushbacks." It can also be observed that the best interests principle is often interpreted alongside the right to be heard under Article 12. Finally, in family related issues, the CRoC has stated explicitly in *Y.B. and N.S* that a child of five years old is considered old enough to express her own views in matters which concerns her.

### 7.8 Conclusions and observations

First, as Turkelli and Vandenhole note, "The CRC Committee takes a rights-based approach to migration: it puts children and their human rights first. This different starting point translates into different priorities. The Committee is primarily concerned with the negative impact of migration procedures on children's well-being. In particular, it is acutely aware of the negative impact an insecure and precarious migration status has."[1218] The fact that the CRoC takes a rights-based approach to migration is largely evident in its jurisprudence. The views of the CRoC in the communications are child-centric and suggest that the rights and well-being of the child should supersede migration rules.

Second, other treaty bodies do not engage with the best interests principle the way the CRC does. As noted, this can be attributed to the fact that on the part of the HRC, the ICCPR does not make provision for the best interests principle. Nonetheless, there is evidence in the jurisprudence of the HRC that it does cite the CRoC's jurisprudence on the best interests principle. This is an indication of the cross fertilisation between the treaty bodies.

[1217] *Y.B. and N.S. v Belgium,* paras 8.3-8.5.
[1218] Türkelli and Vandenhole, *Communication 12/2017* (2018).

Third, although the communications discussed in this chapter suggest that the CRoC is charting its own path, this is true for communications unique to the CRoC, in which the CRoC has to inevitably chart its own path. However, the CRoC has referred to the jurisprudence of the other treaty bodies in several of its views, which is an indication that the CRoC does consider the jurisprudence of other treaty bodies.

Fourth, the CRoC has expanded its scope of non-refoulement cases by including mental harm in the form of bullying and stigmatization as grounds on which one can claim non-refoulement. As discussed earlier in the chapter, A.B. is the first case on the rights of a child of an LGBT couple and other treaty bodies are yet to develop their jurisprudence in this area.

Finally, under the *non-refoulement* communications, one can predict a pattern that is beginning to form: the special emphasis on the child's right to be heard. This pattern resonates with one of the unique provisions of the CRC: Article 12. Whereas the HRC has largely assessed *non-refoulement* cases based on testimonies of parents, the provision in Article 12 of the CRC that children capable of expressing their own views must be allowed to express their views in matters affecting them allows the CRoC to assess non-refoulement cases based on the views of children.

Chapter 8 is the final and concluding chapter and highlights selected principles for the CRoC in the jurisprudence of the other treaty bodies. In light of recent developments in the jurisprudence of the CRoC, it extracts lessons from the CRoC's own jurisprudence.

# Chapter Eight: Conclusion

## 8.1. Introduction

This thesis sought to examine the extent of a children's rights jurisprudence within the United Nations human rights treaty body system, with the aim to determine whether there were important lessons for the work of the CRoC going forward. To this end communications received by the other eight treaty bodies were researched and it was found that the HRC had received the most complaints[1219] in general and the most complaints in relation to children's rights, unsurprising due to its long existence as compared with the other treaty bodies.[1220] The research also found that most of the communications within the UN human rights treaty body system were within the broader theme of migration. This means firstly that most of the communications in this research are from the HRC and secondly that many of them are under the broader theme of migration.

At the onset of this research, in 2018, the CRoC had given its views on the merits for only four communications, and therefore the aim was to extract principles and learnings from the jurisprudence of the other human rights treaty bodies for the CRoC

[1219] At the onset of this thesis in 2018, the HRC jurisprudence had the highest number of communications across all treaty bodies.
[1220] These cases are available at http://juris.ohchr.org/search/results.

to consider in building its own jurisprudence. Whilst this aim has been achieved to some extent, in that there are lessons for the CRoC within the jurisprudence of some of the other seven treaty bodies, the CRoC's jurisprudence in terms of individual communications has developed over the past four years. As of 14 April 2022, the CRoC has published its views on the merits in 24 communications. An analysis of this development finds that the CRoC is charting its own path in many areas.

This concluding chapter, discusses findings in this research regarding important learnings and principles for the CRoC mostly from the jurisprudence of the HRC, and predicts the path that the CRoC is likely to take in similar communications. It ends with highlighting important findings in the research.

## 8.2. Lessons for the CROC on children in the criminal justice system

Chapter three focused on the rights of children in the criminal justice system and discussed communications relating to children who are alleged as, accused of or recognised as having infringed the penal law(children in conflict with the law).[1221] The chapter found the following important principles which are unique to children in conflict with the law: first, the need to separate child offenders from adults offenders,[1222] second that children must be accorded special treatment even if they are in conflict with the law, third, that in respect of children, an especially strict standard of 24 hours should apply with regard to the right to be brought promptly before a judge,[1223] and fourth, that coercing a child to confess by inflicting physical or psychological pain on him or her falls under the definition of torture when read with Article 24 of the ICCPR.

It can be argued that the CRC and its related instruments offer better protection to children in conflict with the law, as compared to the ICCPR. For example, the requirement that children in conflict with the law have to have contact and remain in

[1221] Art 40(1) of the CRC
[1222] Art 10(2)(b) of the ICCPR.
[1223] *Vyacheslav Berezhnoy,* para 9.2.

contact with their parents is provided for by the CRoC.[1224] Based on the CRoC's General Comment No. 24 on children's rights in the child justice system, one can also predict the outcomes of similar cases if and when presented to the CRoC.

Perhaps the most important lesson for the CRoC in this chapter is the distinction which the HRC makes under Article 10(2)(a) of the ICCPR between accused and convicted persons. According to the HRC, apart from separating children from adults, accused children should further be separated from convicted children. Unlike Article 37 (c) of the CRC, Article 10 (2) (a) of the ICCPR, specifically, requires that convicted persons be separated from accused persons. The requirement in the CRC to separate adult prisoners from children does not specify whether it is applicable to both accused children and convicted children. The HRC demonstrated this principle in two communications from children.[1225] It is submitted that as the only international treaty dedicated to protecting children's rights the CRoC should develop Article 37(c) of the CRC by interpreting it to include a rule that accused children should be separated from convicted children like the HRC has done. As the CRoC has not yet issued any views in relation to child justice matters, there is much scope for the Committee to consider the jurisprudence of the HRC and where relevant, the other treaty bodies, particularly the CAT Committee, since both the HRC and CAT have a substantial body of views on child justice matters.

### 8.3. Lessons for the CRoC in family related cases

In chapter four, the right of the child to respect for family life and to non-interference with the family unit was discussed. Six communications from the jurisprudence of the HRC were considered in this chapter. It should be noted that unlike that ICCPR, the CRC and its Optional Protocols, do not make provision for the right to non-interference with the family unit.

[1224] CRoC: General Comment No. 24 , para 106

[1225] HRC , UN Doc CCPR/C/65/D/800/1998, 26 May 1999.
(Damian Thomas) and HRC, UN Doc CCPR/C/86/D/1184/2003, 17 March 2006.(Corey Brough).

Therefore, some of the important principles from the jurisprudence of the HRC which were established in, for example, *Winata,*[1226] (the locus classicus for the right to protection against arbitrary interference with the family unit) and which are important for the CRoC are that removals must not, as a general rule, interfere with the family unit and where it does interfere with the family unit, it must not be arbitrary.[1227] Also relevant are the principles that the onus is on States parties to justify family separation by providing firstly that their actions do not amount to interference with the family unit and secondly, where the State's action amounts to an interference with the family unit, the State must prove that such interference is not arbitrary.[1228]

Relevant principles supporting non removal include firstly, that a long settled family life is a ground for non-removal, secondly, the advantage to a child's development in living with both parents,[1229] and thirdly, that the birth of a child constitutes "new circumstances"[1230] which the state party must consider before removing a parent. Not new to the CRoC is the HRC's recognition of the best interests of children in removals. This has only more recently developed in the HRC's case law, as the earlier cases focused on the family unit in general and not specifically on the rights of the child.[1231] It can be predicted that the CRC will continue to emphasise primacy of the best interests of children in migration related removals cases.

Whilst the CRC and its related instruments do not make provision for the right to non-interference with the family unit, there is evidence in the CRoC's jurisprudence, most notably in its general comments, to predict the direction of the CRoC in similar cases: family separation will not be in the best interests of the child. In view of the HRC's developed jurisprudence, it is strongly recommended that the CRoC develops its jurisprudence by expanding on its Joint General Comment No.4 & No.23 of the CRoC

[1226] HRC, UN Doc. CCPR/C/72/D/930/2000, 16 August 2001.
[1227] Article 17(1) of the ICCPR.
[1228] *Winata* para 7.2.
[1229] *Farag El Derwani v. Libya* HRC , UN Doc. CCPR/C/90/D/1143/2002, 31 August 2007.
[1230] *Muneer Ahmed Husseini v. Denmark* HRC , UN Doc. CCPR/C/112/D/2243/2013, 26 November 2014.
[1231] *D.T. v. Canada* HRC, UN Doc. CCPR/C/117/D/2081/2011 , 4 August 2011.

and the CMW on children in international migration to explicitly provide for the right to protection against arbitrary interference with the family unit.

### 8.4. Lessons for the CROC in *non-refoulement* cases

Chapter five focused on deportation and the principle of *non-refoulement* as applied to children. This chapter drew from a range of treaty body jurisprudence because there are relevant communications related to children not only from the HRC, but also from the CEDAW and CAT committees.

The jurisprudence of the HRC has extended the criteria considered in non-refoulement decisions to include socio-economic difficulty.[1232] The HRC has developed a series of cases on socio-economic deprivation as grounds for *non-refoulement*: return to a situation of deprivation, whether in the form of famine,[1233] lack of medical treatment, or education,[1234] can also trigger protection under *non-refoulement*. It is notable that the CRoC has also recognised socio-economic difficulty as grounds for *non-refoulement*,[1235] and has considered access to medical treatment as an important issue in determination of non-refoulement of children.[1236]

Both the CRoC and the HRC have indicated that the *non-refoulement* principle can be applicable to more than just the right to life and the right not to be subjected to torture, and to cruel, degrading or inhuman treatment. The CRoC's decision in *W.MC. v. Denmark* provides a clear indication of the CRoC's direction in similar cases. The CRoC has gone a step further than the HRC, CEDAW and CAT by holding that a child need not have been deported for his or her rights under the CRC to be violated, mere anticipation of the deportation suffices.[1237] This is notably, a unique feature of the

[1232] See *Jasin et al. v. Denmark*, HRC, UN Doc. CCPR/C/114/D/2360/2014.
[1233] *R.A.A. and Z.M. v. Denmark,* HRC, UN Doc. CCPR/C/118/D/2608/2015, 29 December 2016.
[1234] *Fahmo Mohamud Hussein v. Denmark* , HRC, UN Doc. CCPR/C/124/D/2734/2016, 14 February 2019
[1235] *W.M.C. v. Denmark* CRoC, UN Doc. CRC/C/85/D/31/2017, 15 October 2020.
[1236] *D.R. v Switzerland,* CRC/C/87/D/86/2019 and *Z.S. and A.S. on behalf of K.S and M.S v Switzerland* CRC/C/89/D/74/2019.
[1237] I.A.M.

CRoC's jurisprudence on FGM and non-refoulement is the principle of precaution which the CRoC applies to give children a higher standard of protection[1238]

The following important principles have been noted from the jurisprudence of the HRC on non-refoulement and children: First, that the decision to deport an unaccompanied child must take into consideration their best interests.[1239] Second, that deporting an author who claims to be a child without first taking measures to ensure a reasonable assertion of his age amounts to a violation of his right in Article 7 of the ICCPR. [1240] Third, that an assessment of the general condition in the receiving country must be done and most importantly, the personal circumstances of the individual concerned must also be assessed.[1241] According to the HRC, personal circumstances include vulnerability-increasing factors relating to such persons, such as their age, which means they may not be able to tolerate certain situations and conditions due to their age.[1242] Fourth, the HRC has held that it is incumbent on the State party to assess the individual circumstances of the authors in view of the obligation to afford children special measures of protection pursuant to Article 24 of the ICCPR.

The CEDAW Committee has recognised gender based violence and the risk of child marriage as grounds for *non-refoulement*.[1243] Whilst the CRoC's jurisprudence provides for protection against child marriage, it is yet to give its views on child marriage as a ground for non-refoulement, but given its jurisprudence on FGM, and given its firm approach to the age of marriage being set at 18, with no exceptions, in its joint general comment with CEDAW,[1244] it seems likely that CROC would follow CEDAW in this regard.

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[1238] [1238] *I.A.M. v Denmark*, para 11.8(c) and *W.M.C. v Denmark*, para 5.4.
[1239] *X.H.L. v. the Netherlands*
[1240] *O.A. v. Denmark*
[1241] *Ibid,* para 8.11.
[1242] *Ibid.*
[1243] *R.S.A.A et al v. Denmark.*
[1244] CEDAW Committee and CRoC, Joint General Recommendation No 31 and General Comment No 18: Harmful Practices, as revised (2019).

The CAT has recognised the protection for a mother and child due to the woman's affiliation with a political party which was in opposition to the ruling party,[1245] and due to which she could face arrest or imprisonment if she was returned. The CAT also recognises association with a group which was suspected for the attempted assassination of President Hosni Mubarak as grounds for non-refoulement and held that both the author and his children could face the risk of persecution if returned.[1246] In view of the fact that the CRoC has stated in its General Comment no. 6 of (2005),[1247] that States shall not return a child to a country where "there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Article 6 and 37 of the CRC…"[1248], it is clear that the CRoC anticipates a wider scope for non-refoulement and one can predict that it will recognise protection under the principle of non-refoulement in similar cases.

### 8.5. Lessons for the CRoC in migration detention cases

Chapter six dealt with the rights of children detained for immigration purposes through an analysis of selected children's rights cases on immigration detention. The HRC's general position is that immigration detention is not prohibited by Article 9(1) of the ICCPR, however, it must be individually assessed and justified as reasonable, necessary and proportionate in light of the circumstances.[1249]

The CEDAW Committee has said that the following in the context of migration:
Children should not be detained with their mothers unless doing so is the only means of maintaining family unity and is determined to be in the best interest of the child. Alternatives to detention, including release with or without conditions, should be considered in each individual case and especially when separate facilities for women and/or families are not available.[1250] The CMW Committee has also stated that

[1245] *T.A. v. Sweden*
[1246] *M.A.M.A.et al v. Sweden.*
[1247]CRoC, General Comment No. 6 (2005), para 27.
[1248] *Ibid*, para 27.
[1249] *F.K.A.G. et al. v Australia* , HRC, UN Doc CCPR /C /108 /D / 2094/2011 , 20 August 2013, para 9.3.
[1250] CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, para 49.

children and more specifically separated or unaccompanied children should not be detained solely for immigration purpose.[1251]

In a General Comment, the HRC has explicitly held that "Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors."[1252]

Some of the key principles which can be drawn from the jurisprudence of the HRC relating to decisions to apply migration detention are as follows: First, that detention must be reasonably justifiable, and must not last beyond the period for which the justification applies.[1253] Second, that detention may be used for the purposes of identification and verification upon entry.[1254] Third, that in all decisions affecting children, the best interests principle form an integral part of every child's right to such measures of protection as required by his or her status as a minor.[1255] Fourth, a decision to hold children in detention for a period of two years and eight months failed to consider the best interests of the children in violation of Article 24(1) of the ICCPR.[1256] Fifth, a decision to detain the group must also consider the needs of children and the mental health condition of those detained.[1257]

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[1251] CMW: General Comment No. 2 of 2003 on The Rights of Migrant workers in an Irregular Situation and Members of their Families, UN Doc CMW/C/GC/2, 28 August 2013, para 33.

[1252] HRC, *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para 18.

[1253] *M.M.M. et al v Australia,* UN Human Rights Committee (HRC), UN Doc CCPR/C/108/D/2136/2012, 20 August 2013 ; *D and E v. Australia* ; *F.K.A.G. et al v. Australia*; *A. v. Australia* paras 9.3.-9.4.

[1254] *Bakhtiyari v. Australia,* HRC, UN Doc CCPR/C/79/D/1069/2002 , 6 November 2003. It must be noted that this case also involves the detention of the parents, especially Mr Bakhtiyari. However, for the purposes of this chapter, it is the rights of the children which will be discussed

[1255] *Ibid.*

[1256] *Ibid.*

[1257] *Ibid.*

Regarding the duration and conditions of detention, it has been held that legislation permitting the detention of minors for up to 90 days is extreme.[1258] The HRC has held that a State Party which has undertaken efforts to provide children in migration detention with appropriate educational, recreational and other programs, including programs which were outside of the detention facility has not violated the rights of the child under Article 24 of the ICCPR.

The CRoC's jurisprudence on migration detention is developing as seen in two recent communications,[1259] in which the CRoC has held that states parties must consider alternatives to detention and that best-interests assessment must be carried out in connection with decisions to detain children or to extend their detention.[1260]

Until these cases, the CRoC had not spelled out clearly in its views under OPIC whether Article 37 is applicable to the detention of migrant children and not only children in the criminal justice system. Article 37 is often interpreted to mean deprivation of liberty in the child justice system and it is often cited along-side Article 40, which deals with the rights of children in the child justice system.[1261] Whilst scholarly writing,[1262] has clarified that the CRoC's position as stated in Joint General Comment No.4 & No.23 of the CRoC and the CMW (2017), there remained some uncertainty regarding this aspect, in the absence of views dealing directly with this issue. However, the CRoC's position has been consolidated since it issued its view in *E.B v Belgium* and *K.K. & R.H v Belgium*: The CRoC found immigration detention of children in violation of Articles 3 and 37 of the CRC, particularly if the State party fails to consider alternatives to detaining the child. This is in line with the Committees interpretation of article 37 in relation to migration – the Committee said that "[t]he

[1258] HRC: *Concluding Observations of the Human Rights Committee : Czech Republic,* 9 August 2007 UN Doc. CCPR/C/CZE/CO/2, para 15.
[1259] *E.B v Belgium* CRC/C/89/D/55/2018 and *K.K and R.H v Belgium* CRC/C/89/D/73/2019.
[1260] *E.B. v Belgium* para 13.14.
[1261] Smyth "Towards a Complete Prohibition on the Immigration Detention of Children" 2019 (19) *Human Rights Law Review*, 32.
[1262] Smyth (2019) 32.

possibility of detaining children as a last resort must not be applicable in immigration proceedings".[1263]

## 8.6. Important principles from the CROC's own jurisprudence

As stated earlier in this chapter, the aim of this research was to determine the extent of a children's rights jurisprudence within the UN human rights treaty body system, given that the CRoC had only four communications in which it had published its views on the merits in 2018 at the onset on the research. Whilst there are some learnings, most notably within the jurisprudence of the HRC for the CRoC, developments in the CRoC's own jurisprudence have created important principles for international children rights. Important findings within the jurisprudence of the CRoC include the following.

An important contribution,[1264] to the CRoC's emerging jurisprudence on the child's right to have and maintain contact with his or her parents in a private family law situation set the precedent that in custody matters, children need to have access to expedited procedures because delays can cause irreparable consequences when it comes to children and their relations with their parents.[1265]

Under the non-refoulement principle, the CRoC has set a precedent that the right of access to education, healthcare and other social services constitutes grounds for *non-refoulement*.[1266] An important principle which the CRoC holds is that determining the best interests of the children requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application and that such separate assessment includes hearing of children's views.[1267] The CRoC has a leading case on the rights of children whose parents are members of the LGBTI

[1263] *KK & R.H. v Belgium*, CRoC, UN Doc. CRC/C/89/D/73/2019 para 10.9.
[1264] *N.R., on behalf of C.R., v. Paraguay.*
[1265] *Ibid.*
[1266] *W.M.C. v Denmark.*
[1267] *V.A. v. Switzerland,* CRoC , UN Doc. CRC/C/85/D/56/2018, 30 October 2020 para 3.7.

community,[1268] where it held that fleeing one's country to escape bullying and isolation because of the child's stigmatisation due to parents' sexual orientation is a ground for non-refoulement in that irreparable harm upon return was foreseeable in light of past bullying.

In migration detention, the view that a State party must consider possible alternatives to the detention of children and that failure to do so means that a state party has failed to give due regard to the best interests of the child as primary consideration.[1269]

### 8.7. FINDINGS AND CONCLUSIONS

In addition to the specific findings above, this research also made some important general findings. At a glance, it appears that communications on children's rights within the UN treaty body system is substantial. However, at a closer look, most communications cannot be classified as containing children's rights jurisprudence as the treaty bodies (other than CRoC) do not recognize the need to consider the rights of the children in the complaint separately from those of their parents, and often miss the opportunity to create a child rights-specific jurisprudence. This has limited the number of complaints that can factually be called children's rights jurisprudence.

The "invisible" approach which some treaty bodies apply when considering complaints which involve children often applies to cases brought as a family unit. This has led to an underdevelopment of children's rights within the UN treaty body system in general, save for the jurisprudence of the HRC which is beginning to make specific pronouncements in matters concerning children which are brought with other members of the family, and in doing so, sometimes applying principles derived from the CRC.

The CRoC takes a different approach, not only because it is the only treaty body specifically dedicated to children, but also because the CRoC seems to provide higher

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[1268] *A.B. v Finland*, CRoC, UN Doc. CRC/C/86/D/51/2018, 5 February 2021.
[1269] *K.K and R.H v Belgium* CRC/C/89/D/73/2019 Para 10.13

standards of protection for children. For example, by developing in non-refoulement communications, the precautionary measure that mere anticipation of grave harm on return could constitute an infringement of the child's right. More specifically, the CRoC maintains the best interests principle in almost all of its views and often interprets the best interests principle with the right to be heard, intentionally specifying that the right to be heard is not limited by age.[1270] The rate at which the CRoC's jurisprudence has developed within a relatively short space of time is undoubtedly proof that the OPIC is a useful mechanism to enforce the rights of children.

## 8.8 THEORETICAL REFLECTIONS

In chapter two, natural law and positivist theories were discussed as the two theories of jurisprudence most reflective of international human rights law. It was argued that human rights law has its foundations in natural law, and was later codified according to the positivist theory.[1271] The development of jurisprudence by the different treaty bodies through the views presented in this research are practical examples of legal positivism and natural law. The process by which the rights contained in the different treaties are developed is based on the moral recognition that all human beings are equal and have inalienable rights which must be protected, this aligns with the natural law theory.[1272] The subsequent codification of these rights into treaties, committee observations and recommendations and for the purposes of this thesis, views or cases reflect the positivist position on jurisprudence.

The development of jurisprudence through the views of the different committees as evidenced in the preceding chapters, is an exercise which the treaty bodies engage in as quasi-judicial bodies.[1273] As discussed in chapter two, the treaty bodies have jurisdiction over States parties which are parties to the treaty and have given their

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[1270] United Nations Committee on the Rights of the Child , *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, UN Doc. CRC/C/GC/12, para 21.
[1271] O'Connell and Day "Sources in natural law theories: Natural law as source of extra-positive norms" in Basson and D'Aspremont *Oxford andbook of the sources of international law* (2017).
[1272] Skorupski "Human rights" In Besson and Tasioulas *The philosophy of international law* (2010) 358.
[1273] Rodley "International human rights law" in Evans (ed) (2018) 801.

consent for a treaty body to exercise its jurisdiction.[1274] Evidently, the cases discussed in the preceding chapters were brought by children or on behalf of children who are nationals or residents of States parties that have ratified a treaty. However it is notable that the CRoC has developed the notion of treaty body jurisdiction to include persons whose rights have been violated due to transboundary damage and are under the jurisdiction of the State of origin provided there is "a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory."[1275]

Although treaty bodies are not bound by each other's precedent, there are instances where they refer to each other's jurisprudence. This is particularly true in instances where a treaty body provides for a wider protection of a right. For example, in chapter three, the HRC referred to the CRoC's General Comment No. 10 (2006) on children's rights in child justice.

## 8.9 REFLECTIONS AND RECOMMENDATIONS FOR FURTHER RESEARCH

As stated in chapter one, under delineation, the focus of this research is on the substantive and not the procedural aspects of jurisprudence. Therefore, the principles derived from the cases presented in this thesis are based on jurisprudence developed through the substantive findings and reasonings in terms of rights violations. However, further areas of research can be identified. First, research can be conducted on the procedural aspects of jurisprudence such as admissibility requirements in accordance with the rules of procedure for bringing complaints before the treaty bodies. For example, in terms of the principle of *rationae personae*, whilst the CRoC can only receive complaints from children, the eight other treaty bodies do not have restrictions on age.[1276] But rather restrictions on the subject matter (*rationae materiae*)

[1274] See Art 4(c) of the Optional Protocol to CEDAW (1999), Art 2(b) of the Optional Protocol to ICESCR (2008), Article 7(7) of the Optional Protocol to UNCRC on a Communications Procedure (2014) and Art 2(f) to the Optional Protocol to CRPD (2011).

[1275] *Chiara Sachi et al v Argentina et al*, Para 10.5.

[1276] *A.L. v. Spain,* CRC/C/81/D/16/2017, 10 July 2019, para 11.2.

on which the complaints can be brought. Inadmissibility for lack of substantiation appeared in a number of cases presented in this research.

Second, the area of remedies in terms of rights violation can also be explored and analyzed. This thesis focused on the findings of treaty bodies in relation to rights violations and did not engage in detail regarding the remedies provided. It is an important area for future research, especially as it is apparent the CRC committee is charting an ambitious course in this regard.

Lastly, follow-up procedures to determine compliance by States Parties with remedies and recommendations can also be researched. This can be justified by the need to assess the extent of state party compliance with remedies and recommendations, especially under those circumstances where the nature of the violation requires urgent and immediate action.

# Bibliography

## Books and chapters in books

Alvarez J *International organisations as law makers* (2005) Oxford University Press, Oxford.

Ashworth A *Human rights, serious crime and criminal procedure* (2002) Sweet & Maxwell Ltd, London.

Banton M "Decision-taking in the Committee on the Elimination of Racial Discrimination" in Alston P & Crawford J (eds) *The future of UN human rights treaty monitoring* (2000) Cambridge University Press, Cambridge.

Bentham J *A fragment on government* (1988) Cambridge University Press, Cambridge.

Boyle A "Soft law in international law-making" in Evans M (ed) *International law* (2018) Oxford University Press, Oxford.

Bustelo M "The Committee on the Elimination of Discrimination against Women" in Alston P & Crawford J (eds) The *future of UN human rights treaty monitoring* (2000) Cambridge University Press, Cambridge.

Cantwell N "The origins, development and significance of the United Nations Convention on the Rights of the Child '' in Detrick S, Doek J and Cantwell N (ed) *The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires'* (1992) Dordrecht, Boston; M. Nijhoff Publishers.

Devine C, Hansen C, Wilde R, and Poole H *Human rights: The essential reference* (1999) Greenwood Publishing, Westport.

Collins R "Classical legal positivism in international law revisited'' in Kammerhofer J and D'Aspremont J (eds) *International legal positivism in a post-modern world* (2014) Cambridge University Press, Cambridge.

Daillier P et al *Droit international public* (2009) 8th ed L.G.D.J. Publications, Paris.

Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) Martinus Nijhoff, Netherlands.

De Zayas A "The CRC in litigation under the ICCPR and the CEDAW, litigating the rights of the child through the individual complaints procedures of the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women" in Liefaard T and Doek J *Litigating the rights of the Child: the UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) Springer, Netherlands.

Dixon M *Textbook on international law* (2013) 7ed Oxford University Press, Oxford.

Evatt E "The impact of international human rights on domestic law" in Huscroft G and Rishworth P (eds) *Litigation rights: Perspectives from domestic and international law* (2002) Hart Publishing, Oxford.

Fitz-Gibbon K "Life without parole in Australia: Current practices, child sentences and retrospective sentences reform" in Van Zyl Smit D and Appleton C(eds) *Life Imprisonment and human rights* (2016) Hart Publishing, Oxford.

Gornik B, Sedmak M and Sauer B "Unaccompanied minor migrants in Europe: Between compassion and repression" in Gornik B et al (eds) *Unaccompanied children in European migration and asylum practices: In whose best interests* (2018) Routledge, Abingdon.

Grahl-Madsen A *The status of refugees in international law* (1966) A.W.Sijthoff, Leyden.

Grotius H *De jure belli et paci* (1689) Oxford Clarendon Press, London.

Harris D, O'Boyle M, Bates E, and Buckley C *Law of the European Convention on Human Rights* (2009) Oxford University Press, Oxford.

Heyns C, Rueda C and du Plessis D "Torture and ill-treatment: The UN Human Rights Committee" in Evans M and Modvig J *Research handbook on torture* (2020) 123, *Edward* Elgar Publishing, Cheltenham.

Hodgkin R and Newell P *Implementation handbook for the Convention on the Rights of the Child* (2007) UNICEF, Geneva.

Hudelson R *Modern political philosophy* (1999) Routledge, Abingdon.

Ippolito F "Procedural rights for migrant children: tailoring specific international standards" in Ippolito F and Biagioni G (eds) *Migrant children: Challenges for public and private international law* (2016) Editoriale Scientifica , Naples.

Ippolito F "What protection for children of migrant workers facing deportation" in Francesca Ippolito & Giacomo Biagioni (eds) *Migrant children: Challenges for public and private international law* (2016) .

Jastram K and Newland K "Family unity and refugee protection" in Feller E et al *Refugee protection in international law: UNCHR's global consultations on international protection* (2003) Cambridge University Press, Cambridge.

Joseph S, Mitchell K , Gyorki L and Budel C *A handbook on the individual complaints procedures of the UN treaty bodies* (2006) World Organisation Against Torture, Geneva.

Joseph S and Castan M *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2013) Oxford University Press, Oxford.

Khazova O and Mezmur B "UN Committee on the Rights of the Child: Reflections on family law issues in the jurisprudence of the CRC Committee" in Marrus E and

Laufer-Ukeles P *Global reflections on children's rights and the law: 30 years after the Convention on the Rights of the Child* (2021) Routledge, London.

Kindred H "The use and abuse of international legal sources by Canadian courts: Searching for a principled approach" in Fitzgerald O (ed) *The globalised rule of law: Relationships between international and domestic law* (2006) Irwin Law,Toronto.

Klabbers J *An introduction to international organisations law* (2015) Cambridge University Press, Cambridge.

Klabbers J *International law* (2013) Cambridge University Press, Cambridge.

Kratochwil F *Rules, norms and decisions: On conditions of practical and legal reasoning in international relations domestic affairs (*1991) Cambridge University Press, Cambridge.

Lansdown G *The evolving capacities of the child* (2005) UNICEF Innocenti Research Centre, Florence.

Lauterpacht E and Bethlehem D "The scope and content of the principle of non-refoulement: Opinion" in Feller E, Turk V and Nicholson F (eds) *Refugee protection in international law: UNHCR's global consultations on international protection* (2003) Cambridge University Press, Cambridge.

Lefkowitz D "The Sources of International Law: Some Philosophical Reflections" in Besson S and Tasioulas J (eds) *The Philosophy of International Law* (2010) Oxford University Press, Oxford.

Liefaard T *Deprivation of liberty of children in light of international human rights law and standards* (2008) Intersentia, Cambridge.

Liefaard T and Doek J "Foreword" in *Litigating the rights of the child, the UN Convention on the Rights of the Child in domestic and international jurisprudenc*e (2015) Springer , Netherlands.

Marie-Bénédicte Dembour *When humans become migrants: study of the European Court of Human Rights with an Inter-American counterpoint* (2015) Oxford University Press, Oxford.

Mathew P "Constructive refoulement" in Juss S (ed) *Research handbook on international refugee law* (2019) Edward Elgar Publishing,Cheltenham.

Marks S and Clapham A *international human rights lexicon* (2005) Oxford University Press, Oxford.

Nowak M *Introduction to the international human rights regime* (2004) Martinus Nijhoff, Leiden.

Nowak M *UN Covenant on Civil and Political Rights: CCPR commentary* (2005) N.P.Engel, Germany.

Nowak M and McArthur E *The United Nations Convention Against Torture: A commentary* (2008) Oxford University Press, Oxford.

O'Connell M & Day C "Sources in natural law theories: Natural law as source of extra-positive norms" in D'aspremont J and Besson S (eds) *Oxford handbook of the sources of international law* (2017) Oxford University Press, Oxford.

Passerin d'Entreves A *Natural law, an introduction to legal philosophy* (2017) Routledge, Abingdon.

Ratnapala S *Jurisprudence* (2013) Cambridge University Press, Cambridge.

Raz J "Human rights without foundations" in Besson S and Tasioulas J (eds) *The Philosophy of international law* (2010) Oxford University Press, Oxford.

Roberts A and Sivakumaran S "The theory and reality of the sources of international law" in Evans M (ed) *international law* (2018) Oxford University Press, Oxford.

Rodley N "International human rights law" in Evans M (ed) *International law* (2018) Oxford University Press, Oxford.

Rodley N and Pollard M *The treatment of prisoners under international law* (2009) Oxford University Press, Oxford.

Schabas W and Sax H *A Commentary on the United Nations Convention on the Rights of the Child, article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty* (2006) Brill Academic Publishers, Leiden.

Shaw M *International law* (2008) 6th ed. Cambridge University Press, Cambridge.

Shaw M *International law* (2017) Cambridge University Press, Cambridge.

Shestack J "The philosophic foundations of human rights" in McCorquodale R *Human rights* (ed) (2003) Routledge, London.

Skorupski J "Human rights" in Besson S and Tasioulas J *The Philosophy of International Law* (2010) Oxford University Press, Oxford.

Stafford H "The CRC in litigation under EU law" in Liefaard T and Doek J Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence (2015) Springer, Dordrecht.

Steiner H & Alston P *International human rights context: Law, politics, morals: Text and materials* (1996) Oxford University Press, Oxford.

Stilz A *Territorial sovereignty: A philosophical exploration* (2019) Oxford University Press, Oxford.

The United Nations Convention on the Rights of the Child 1989 as reprinted in Brownlie I and Goodwin-Gill G (ed) *Basic documents on human rights* (2006) Oxford University Press, Oxford.

Thirlway H *The sources of international law* (2014) Oxford University Press, Oxford.

Ulfstein G "Law-making by human rights treaty bodies" in *International law-making, essays in honour of Jan Klabbers* (2013) Routledge, London.

Vandenhole W, Turkelli G.E. and Lembrechts S *Children's rights: A commentary on the Convention on the Rights of the Child and its Protocols* (2019) Edward Elgar Publishing, Gloucestershire.

Van Bueren G *The International Law on the Rights of the Child* (1998) Martinus Nijhoff Publishers, Netherlands.

Weis P *The Refugee Convention, 1951: The travaux preparatoires analysed with a commentary* (1990) Cambridge University Press, Cambridge.

## Journal articles

Abram E "The child's right to family unity in international immigration law" 1995 (17) *Law & Policy* 397.

Baker S and Mezetti C "A theory of rational jurisprudence" 2012 (120) *Journal of Political Economy* 513.

Bhabha J "Arendt's children: Do today's migrant children have a right to have rights?" 2009 (31) *Human Rights Quarterly* 410.

Birckhead T " Children in isolation: the solitary confinement of youth" 2015 (50) *Wake Forest Law Review* 1.

Burchill R "The right to live wherever you want? The right to family life following the UN Human Rights Committee's decision in Winata" 2003 (21) *Netherlands Quarterly of Human Rights* 225.

Çali B, Costello C and Cunningham S "Hard protection through soft courts? Non-refoulement before the United Nations treaty bodies" 2020 (21) *German Law Journal* 367.

Davidson H "Does the UN Convention on the Rights of the Child make a difference?" 2014 (22) *Michigan State International Law Review* 497.

De la Vega C and Leighton M "Sentencing our children to die in prison: global law and practice " 2008 (42) *University of San Francisco Law Review* .

De Wet E "The international constitutional order" 2006 (55) *International and Comparative Law Quarterly* 51.

Engle E "The Convention on the Rights of the Child" 2011 (29) *Quinnipiac Law Review* 793.

Flanders C "Toward a theory of persuasive authority" 2009 (62) *Oklahoma Law Review* 55.

Fokala E and Rudman A "Age or maturity? African children's right to participate in medical decision-making processes" 2020 *African Human Rights Law Journal* 20(2): 667-668.

Fokala E "The impact of the best interests and the respect for the views of the child principles in child custody cases" 2019 *Nordic Journal of International Law* 88,4, 614-635.

Forster M "Non-refoulement on the basis of socio-economic deprivation: The scope of complementarity protection in international human rights law" 2009 (Part II) *New Zealand Law Review* 257.

Gilbert G "The use of precedent by international judges and arbitrators" 2011 (2) *Journal of International Dispute Settlement* 5.

Ginsburg T "Bounded discretion international judicial law making" 2011 (45) *Virginia Journal of International Law* 632.

Haines R "Sovereignty under challenge the new protection regime in the immigration bill 2007" 2009 (2) *New Zealand Law Review* 149.

Hrestic M "Considerations on the formal sources of international law" 2017 (7) *Journal of Law and Administrative Sciences* 103.

Joseph S "Human Rights Committee: recent decisions" 2001 (1) *Human Rights Law Review* 317.

Kanetake M "UN human rights treaty monitoring bodies before domestic courts" 2017 (67) *International & Comparative Law Quarterly* 201.

Kennedy D "The sources of international law" 1987 (2) *American University International Law Review* 1.

Klabbers J "The redundancy of the soft law" 1996 (65) *Nordic Journal of International Law* 167.

Krappmann L "The weight of the child's view: Article 12 of the Convention on the Rights of the Child" 2010 (18) *International Journal of Children's Rights* 501.

Krzysztof J "The Politics of Precedent in International Law: A Social Network Application" 2014 (108) *American Political Science Review* 547-564.

Lee Y "Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol" 2010 (18) *International Journal on Child Rights* 567.

Le loup M "The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency" (2019) 37 *Netherlands Quarterly of Human Rights* 50.

Liefaard T "Child-friendly justice: Protection and participation of children in the justice system" 2016 (88) *Temple Law Review* 905.

Liefaard T "Access to justice for children: Towards a specific research and implementation agenda" 2019 (27) 2 *International Journal of Children's Rights* 195.

Lixinski L "Comparative international human rights law: An analysis of the right to private and family life across human rights 'jurisdictions'" 2014 (32) *Nordic Journal of Human Rights* 99.

Livingstone S "Prisoners' rights in the context of the European Convention on Human Rights" 2000 (2) *Punishment & Society* 309.

Main T "The procedural foundation of substantive law" 2009 (87) 801 *Washington University Law Review.*

Manco E "Detention of the child in the light of international law- A commentary on Article 37 of the International Convention on the Rights of the Child" 2015 (7) *Amsterdam Law Reform* 55.

Manco E "Protecting the child's rights to participate in criminal justice proceedings" 2016 (8) *Amsterdam Law Forum* 48.

Mechlem K "Treaty bodies and the interpretation of human rights" 2009 (42) *Vanderbilt Journal of Transnational Law* 905.

Mezmur DB "Intercountry adoption as a measure of last resort in Africa: Advancing the rights of a child rather than a right to a child" 2009 (6) *Sur. Revista Internacional de Direitos Humanos* 83.

McInerney P "The privilege against self-incrimination from early origins to judges' rules: Challenging the 'orthodox view'" 2014 (18) *International Journal of Evidence and Proof* 101.

Moran C.F. "Strengthening the principle of non-refoulement" 2021 (25) *The International Journal of Human Rights* 1032.

Nowak M and McArthur E "The distinction between torture and cruel, inhuman or degrading treatment" 2006 (16) *Torture: quarterly journal on rehabilitation of torture victims and prevention* 147.

Penovic T "Immigration detention of children: arbitrary deprivation of liberty" 2003 (7) *New Castle Law Review* 56.

Pobjoy J "The best interests' principle as an independent source of international protection" 2015 (64) *International & Comparative Law Quarterly* 327.

Rap S, Schmidt E and Liefaard T "Safeguarding the dynamic legal position of children: A matter of age limits? Reflections on the fundamental principles and the practical applications of age limits in light of international children's rights law"2020 (1) *Erasmus Law Review* 4.

Prost M "Hierarchy and the sources of international law: A Critique" 2017 (39) *Houston journal on international Law* 285.

Redmayne M "Rethinking the privilege against self-incrimination" 2007 (27) *Oxford Journal of Legal Studies* 209.

Ronen Y "The ties that bind: Family and private life as bars to the deportation of immigrants" 2012 (8)*International Journal of Law in Context* 283.

Sampson R and Mitchell G “Global trends in immigration detention and alternatives to detention: Practical, political and symbolic rationales” 2013 (1) *Journal on Migration and Human Security* 97.

Saul B “The Kafka-esque case of Sheikh Mansour Leghaei” 2010 (33) *University of New South Wales Law Journal* 629.

Settersen R and Mayer K “The measurement of age, age structuring, and the life course” 1997 (23) *Annual Review of Sociology* (1997) 233.

Simma B and Alston P “The sources of human rights law: Custom, jus cogens, and general principles” 1988 (12) *Australian Yearbook of International Law* 82.

Skelton A “Committee on the Rights of the Child (CRC)”(2017) Max Planck *Encyclopedia of International Procedural Law* (MPEiPro).

Sloth-Nielsen J and Assim U “Islamic kafalah as an alternative care option for children deprived of a family environment” 2014 (14) *African Human Rights Law Journal* 322.

Smyth C “Towards a complete prohibition on the immigration detention of children” 2019 (19) *Human Rights Law Review* 1.

Starr S and Brilmayer L “Family separation as a violation of international law” 2003 (21) *Berkeley Journal of International Law* 213.

Varadan S “The principle of evolving capacities under the UN Convention on the Rights of the Child” 2019 27 2 *International Journal on The Rights of The Child* 306.

William B “Life-with-hope sentencing: The argument for replacing life without parole sentences with presumptive life sentences” 2015 (76) *Ohio State Law Journal* 1051.

## Case Law

*A and B. v. Denmark*, United Nations Human Rights Committee, UN Doc. CCPR/C/117/D/2291/2013, 9 September 2016 .

*A.B. v Finland*, United Nations Committee on the Rights of the Child, UN Doc. CRC/C/86/D/51/2018, 5 February 2021.

*Abdoellaevna v Netherlands* ,United Nations Human Rights Committee, UN Doc. CCPR/C/125/D/2498/2014, 15 April 2019.

*Abdolkhani and Karimnia v. Turkey*,Council of Europe: European Court of Human Rights, Application No. 30471/08, 22 September 2009.

*Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of Congo*) 2012 I.C.J. Reports 2012, p.324.

*A. H. v. Sweden*,, United Nations Committee Against Torture , UN Doc. CAT/C/37/D/265/2005, 30 November 2006.

*A.L. v. Spain,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/81/D/16/2017, 10 July 2019.

*Aleksanyan v. Russia,*Council of Europe: European Court of Human Rights, Application no. 46468/06, 22 December 2000.

*Ali Aqsar Bakhtiyari et al v Australia,*United Nations Human Rights Committee, 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002.

*Alzery v. Sweden,* United Nations Human Rights Committe*e, UN Doc.* CCPR/C/88/D/1416/2005, 10 November 2006.

*Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.

A*nnakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka*, United Nations Human Rights Committee, UN Doc. CCPR/C/103/D/1862/2009, 18 April 2012.

*Antonios Georgopoulos et al. v. Greece,* United Nations Human Rights Committee, UN Doc. CCPR/C/99/D/1799/2008, 14 September 2010.

*A.R.J. v. Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/60/D/692/1996, 11 August 1997.

*Asensi Martínez v. Paraguay,* United Nations Human Rights Committee (HRC), UN Doc. CCPR/C/95/D/1407/2005, 24 April 2009.

*Ashingdane v. United Kingdom,* European Court of Human Rights Application No. 8225/78, 28 May 1985.

*Z.S and A.S on behalf of K.S.and M.S. v Switzerland,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/89/D/74/2019.

*A. v. Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/59/D/560/1993, 3 April 1997.

*Baboeram et. al v. Suriname*, United Nations Human Rights Committee, UN Doc. CCPR/C/24/D/146/1983 , 4 April 1985.

*Bakhtiyari v. Australia,* United Nations Human Rights Committee, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003.

*Belgium v. Senegal*, 2012 I.C.J. Reports 2012, p. 422.

*Belgium v. Spain* 1970 I.C.J. Reports 1970. p.3.

*Benjamin Ngambi and Marie-Louise Nébol v. France*, United Nations Human Rights Committee, UN Doc. CCPR/C/81/D/1179/2003, 16 July 2004.

*Bronson Blessington and Matthew Elliot v. Australia,* United Nations Human Rights, UN Doc. CCPR/C/112/D/1968/2010, 22 October 2014.

*Bolanos v. Ecuador,* United Nations Human Rights Committee, UN Doc. CCPR/C/36/D/2238/1987, 26 July 1986.

*Boudellaa v Bosnia and Herzegovina* , Human Rights Chamber for Bosnia and Herzegovina, (2002) case no. CH/02/8679 .

*B.S.S. v. Canada*, United Nations Committee Against Torture, UN Doc. CAT/C/32/D/183/2001, 17 May 2004.

Bundesverfassungsgericht, 3rd Chamber 2nd Senate (24 January 1991) 2 *BvR* 1704/90.

*Caso Vélez Loor vs. Panamá*, Inter-American Court of Human Rights (IACrtHR), 23 November 2010.

*Celepli v. Sweden,* United Nations Human Rights Committee, UN Doc CCPR/C/51/D/456/1991, 26 July 1994.

*Chahal v. The United Kingdom*, European Court of Human Rights, Application No. 70/1995/576/662, 15 November 1996.

*Chiara Sachi Et Al v. Argentina Et Al***,** United Nations Committee on the Rights of The Child UN Doc. CRC/C/88/D/104/2019.

*Conka v. Belgium*, Council of Europe: European Court of Human Rights Application No. 51564/99, 5 February 2002.

*Conteris v. Uruguay*, United Nations Human Rights Committee, UN Doc. CCPR/C/25/D/139/1983, 17 July 1985.

*Corey Brough v Australia, United* Nations Human Rights Committee, UN Doc CCPR/C/86/D/1184/2003, 17 March 2006.

*C.T. and K.M. v. Sweden,* United Nations Committee Against Torture, UN Doc. CAT/C/37/D/279/2005, 17 November 2006.

*Cyprus v. Turkey*, European Court of Human Rights, Application No. 25781/94,10 May 2001.

*C. v. Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/76/D/900/1999, 13 November 2002.

*D and E, and their two children v. Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/87/D/1050/2002,), 9 August 2006.

*Damian Thomas v. Jamaica,* United Nations Human Rights Committee, UN Doc CCPR/C/65/D/800/1998, 26 May 1999.

*Darwinia Rosa Monaco de Gallicchio v. Argentina,* United Nations Human Rights Committee, UN Doc. CCPR/C/53/D/400/1990*,* 3 April 1995.

*D.D. v. Spain,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/80/D/4/2016, 1 February 2019.

*Diene Kaba v. Canada,* United Nations Human Rights Committee, UN Doc. CCPR/C/98/D/1465/2006, 21 May 2010.

*Domukovsky et al. v. Georgia,* United Nations Human Rights Committee, UN Docs CCPR /C /62 /D /623 /1995, CCPR /C /62 /D /624 /1995, CCPR /C/62/D/626/1995, CCPR/C/62/D/627/1995, 29 May 1998.

*D.T. v. Canada,* United Nations Human Rights Committee, UN Doc. CCPR/C/117/D/2081/2011, 29 September 2016.

*East African Asians v. United Kingdom*, European Commission of Human Rights, Application Nos. 4403/70-4419/70, 4422/70, 442J/70, 44]4/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70 (joined), 14 December 1973.

*E.B. v. Belgium,* United Nations Committee on the Rights of the Child CRC/C/89/D/55/2018.

*E.J. et al. v. Sweden*, United Nations Committee Against Torture, UN Doc. CAT/C/41/D/306/2006, 21 November 2008.

*Emelysifa Jessop v. New Zealand*, United Nations Human Rights Committee, UN Doc. CCPR/C/101/D/1758/2008, 29 March 2011.

*Engel and Others v. Netherlands*, European Court of Human Rights, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976.

*E.P. and F.P. v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/115/D/2344/2014, 10 December 2015.

*Errol Johnson* v. *Jamaica*, United Nations Human Rights Committee, UN Doc CCPR/C/56/D/588/1994, 5 August 1996.

*Er* v. *Denmark,* Committee on the Elimination of Discrimination Against Women, UN Doc 40/2007, 8 August 2007.

*Fahmo Mohamud Hussein v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/124/D/2734/2016, 14 February 2019.

*Farag El Dernawi v. Libya,* United Nations Human Rights Committee, UN Doc. CCPR/C/90/D/1143/2002, 31 August 2007.

*F.B. v Netherlands* ,United Nations Committee against Torture, UN Doc. CAT/C/56/D/613/2014, 15 December 2015.

*Federation of Offshore Workers Trade Union case*, Supreme Court of Norway, Rt 1997-58.

*F.K.A.G. et al. v Australia*, UN Human Rights Committee (HRC), UN Doc CCPR /C /108 /D /2094/2011, 20 August 2013**.**

*Francesco Madaferri v Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/81/D/1011/2001, 26 July 2004.

*G.R.B. v. Sweden*, United Nations Committee Against Torture, UN Doc. CAT/C/20/D/83/1997, 15 May 1998.

*Guzzardi v. Italy*, Council of Europe: European Court of Human Rights, Application no. 7367/76, 6 November 1980.

*Halil Hayden v. Sweden*, United Nations Committee Against Torture, UN Doc. CAT/C/21/D/101/1997, 16 December 1998.

*Hamayak Korban v. Sweden,* United Nations Committee Against Torture, UN Doc. CAT/C/21/D/88/1997,16 November 1998.

*Harroudj v. France,* European Court of Human Rights, Application No. 43631/09, 4 October 2012.

*Hashemi v Netherlands*, United Nations Human Rights Committee, UN Doc. CCPR/C/125/D/2489/2014, 7 June 2019.

*H.B.H. et al. v. Switzerland*, United Nations Committee Against Torture, UN Doc. CAT/C/30/D/192/2001, 16 May 2003.

*Hendrick Winata and So Lan Li v. Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/72/D/930/2000, 16 August 2001.

*Hibaq Said Hashi v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/120/D/2470/2014, 9 October 2017.

H*urtado v. Switzerland*, European Court of Human Rights, Case no. 37/1993/ 432/511, 1994.

*Husseini v Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/112/D/2243/2013, 26 November 2014.

*I.A.M. v. Denmark* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/77/D/3/2016, 25 January 2018.

*I.N.S. v. Cardozafonseca* 480 U.S. 421 (1987).

*J.A.B. v. Spain,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/81/D/22/2017, 9 July 2019.

*J.A.M.O. et al. v. Canada*, United Nations Committee Against Torture, UN Doc. CAT/C/40/D/293/2006, 15 May 2008.

*Jasin and others v. Denmark,* United Nations Human Rights Commission, UN Doc. CCPR/114/D/2360/2014, 25 September 2015.

*J.H.A. v. Spain*, United Nations Committee Against Torture, UN Doc. CAT/C/41/D/323/2007, 21 November 2008.

*Judge v. Canada,* United Nations Human Rights Committee, UN Doc. CCPR/C/78/D/829/1998, 13 August 2003.

*Karen Noelia Huaman v Peru*, United Nations Human Rights Committee, UN Doc. CCPR/C/85/D/1153/2003, 22 November 2005.

K.K And R.H V Belgium, United Nations Committee On The Rights Of The Child , Un Doc. CRC/C/89/D/73/2019

*Keenan v. United Kingdom,* European Court of Human Rights (ECtHR) , Application No. 27229/95,4 March 2001.

*Kindler v. Canada,* United Nations Human Rights Committee, UN Doc. CCPR/C/45/D/470/1991, 11 November 1993.

*Kokkinakis v. Greece,* European Court of Human Right*s,* Application No.14307/88, 25 May 1993.

*Krasnova v Kyrgyzstan,* United Nations Human Rights Committee, UN Doc CCPR/C/101/D/1402/2005, 29 March 2011.

*Kuznetsov v. Ukraine*, European Court of Human Rights, Application No. 39042/97, 29 April 2003.

*Kwok Yin Fong v. Australia*, United Nations Human Rights Committee, UN Doc. CCPR/C/97/D/1442/2005, 23 October 2009.

*K.v. Denmark,* United Nations Human Rights Committee (HRC), UN Doc. CCPR/C/114/D/2393/2014, 11 September 2015.

*Lakpa Tamang v. Nepal***,** United Nations Human Rights, UN Doc. CCPR/C/122/D/2756/2016, 21 March 2018.

*L.H. et al v. France*, United Nations Committee on The Rights Of The Child, Un. Doc. CRC/C/85/D/79/2019–CRC/C/85/D/109/2019.

*L.H.L. and A.H.L. v. Spain,* United Nations Committee on the Rights of the Child, UN. Doc. CRC/C/81/D/13/2017, 17 June 2019.

*LP v the Czech Republic*, United Nations Human Rights Committee, 25 July 2002, UN Doc. CCPR/C/75/D/946/2000.

*M.A.B. v. Spain,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/89/D/41/2018, 10 March 2022.

*Madafferri et al. v. Australia,* United Nations Human Rights Committee, UN Doc CCPR/C/81/D/1011/2001, 26 August 2004.

*Madoui* v. *Algeria*, United Nations Human Rights Committee, UN Doc CCPR/C/94/D/1459/2006, 28 October 2008.

*M.A.M.A.et al v. Sweden,* United Nations Committee against Torture, UN Doc. CAT/C/48/D/391/2009, 23 May 2012.CCPR/C/113/D/1937/2010, 23 March 2015.

*Manuel Balaguer Santacana v. Spain,* United Nations Human Rights Committee, UN Doc. CCPR/C/51/D/417/199, 27 July 1994.

*Mansour Leghaei et al. v. Australia,* United Nations Human Rights Committee, UN Doc.

*Martinez v. Paraguay,* United Nations Human Rights Committee, UN Doc. CCPR/C/95/D/1407/2005, 27 March 2009.

*M.A.S. and L.B.H. v Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/121/D/2585/2015, 18 December 2017.

*M.B. v. Spain*, United Nations Committee on the Rights of the Child, UN Doc. CRC/C/85/D/28/2017, 12 June 2018.

Military and Parliamentary activities in and against Nicaragua (*Nicaragua v. United States of America)* 1968 I.C.J. Reports 1968, p.14.

*M.J.S. v. Netherlands,* United Nations Committee Against Torture, UN Doc. CAT/C/66/D/757/2016, 14 June 2016.

*M.F. v. Sweden*, United Nations Committee Against Torture, UN Doc. CAT/C/41/D/326/2007, 26 November 2008.

*Moretti et Benedetti c. Italie*, Council of Europe: European Court of Human Rights, Requête no 16318/07, 27 April 2010.

*Mouisel v. France, European* Court of Human Rights, Application No. 67263/01,14 November 2002.

*M.P.S. v. Australia*, United Nations Committee Against Torture, CAT/C/28/D/138/1999, 30 April 2002.

*M.S.S. v. Belgium and Greece,* European Court of Human Rights, Application No. 30696/09.

*M.T. v. Spain*, United Nations Committee on the Rights of the Child, UN Doc. CRC/C/82/D/17/2017, 5 November 2019.

*Muneer Ahmed Husseini v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/112/D/2243/2013, 26 November 2014.

*Mutumbo v Switzerland*, United Nations Committee Against Torture, UN Doc. CAT/C/12/D/3/1993,27 April 1994.

*N.A.K. v. Denmark*, United Nations Human Rights Committee, UN Doc. CCPR/C/118/D/2569/2015, 16 December 2016.

*Natalya Tcholatch v. Canada*, United Nations Human Rights Committee, UN Doc. CCPR/C/89/D/1052/2002, 20 March 2007.

*Naveed Akram Choudhary v. Canada*, United Nations Human Rights Committee, UN Doc. CCPR/C/109/D/1898/2009, 17 December 2013.

*N.B.F v. Spain,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/79/D/11/2017, 18 February 2019.

*Ng v. Canada*, United Nations Human Rights Committee, UN Doc. CCPR/C/46/D/469/1991, 5 November 1993.

*NK v Netherlands*, United Nations Committee Against Torture, UN Doc. CAT/C/60/D/623/2014, 5 July 2017.

*Nolan and K v. Russia*, Council of Europe: European Court of Human Rights, Application no. 2512/04, 12 February 2009.

North Sea Continental Shelf cases (*Ger.v. Den.; Ger v. Neth.*) 1969 I.C.J Reports 1969, p.3.

*N.R. v. Paraguay*, United Nations Committee on the Rights of the Child, UN. Doc. CRC/C/83/D/30/2017, 12 March 2020.

*O.A. v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/114/D/2360/2014, 27 November 2017.

*Peers v. Greece*, European Court for Human Rights, Application No. 28524/95, 19 April 2001.

*R.A.A. and Z.M. v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/118/D/2608/2015, 29 December 2016.

*Raziyeh Rezaifar v. Denmark*, United Nations Human Rights Committee, UN Doc. CCPR/C/119/2512/2014, 10 April 2017.

*Rezaifar v. Denmark*, United Nations Human Rights Committee, UN Doc. CCPR/C/119/D/2512/2014, 10 April 2017.

*R.I.H. and S.M.D. v. Denmark,* United Nations Human Rights Committee, UN Doc. CCPR/C/120/D/2640/2015, 22 August 2017.

*R.K. v. Spain,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/82/D/27/2017, 5 November 2019.

*R.O. v. Sweden,* United Nations Committee against Torture (CAT), *UN* Doc. CAT/C/59/D/644/2014, 19 January 2017.

*R.S.A.A et al v. Denmark,* United Nations Committee on the Elimination of Discrimination Against Women, UN Doc. CEDAW/C/73/D/86/2015, 15 July 2019.

*R.Y.S. v. Spain,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/86/DR/76/2019/Rev.1, 4 February 2021.

*Saadi v. Italy*, European Court of Human Rights, Application No. 37201/06, 28 February 2008.

*Salah Sheekh v. the Netherlands,* European Court for Human Rights, Application no. 1948/04 2007 , 11 January 2007.

*Samba Jalloh v. Netherlands*, United Nations Human Rights Committee, UN Doc. CCPR/C/74/D/794/1998, 15 April 2002.

*Sapardurdy Khadzhiev v. Turkmenistan*, United Nations Human Rights Committee, U.N. Doc. CCPR/C/113/D/2079/2011, 2015.

*Sarma* v. *Sri Lanka,* United Nations Human Rights Committee, UN Doc CCPR/C/78/D/950/2000, 16 July 2003.

*Sharifova and Ors v. Tajikistan,* United Nations Human Rights Committee, CCPR/C/92/D/1209,1231/2003& 1241/2004, 1 April 2008.

*Sharma* v. *Nepal*, United Nations Human Rights Committee, UN Doc CCPR/C/94/D/1469/2006, 28 October 2008.

*Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, United Nations Human Rights Commission, UN Doc CCPR/C/12/D/35/1978, 9 April 1981.

*S.V.et al. v. Canada*, United Nations Committee Against Torture, UN Doc. CAT/c//26/D/49/1996, 15 May 2001.

*S.S.F. Denmark,* United Nations Committee on the Rights of the Child , UN Doc. CRC/C/90/D/96/2019.

*SVP v Bulgaria,* United Nations Committee on the Elimination of Discrimination Against Women, 24 November 2012, UN Doc. CEDAW/C/53/D/31/2011.

*T.A. v. Sweden,* United Nations Committee Against Torture, UN Doc. CAT/C/ 34/D/226/2003, 27 May 2005.

T*he Jewish community of Oslo et al. v. Norway,* Committee on the Elimination of Discrimination Against Women, UN Doc CERD/C/67/D/30/2003, 15 August 2005.

*United Kingdom v. Albania* 1949 I.C.J. Reports 1949, p.4.

*V.A. v. Switzerland,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/85/D/56/2018, 30 October 2020

*Valentina Kashtanova and Gulnara Slukina v. Uzbekistan,* United Nations Human Rights Committee, UN Doc. CCPR/C/118/D/2106/2011, 28 October 2016.

*Valasinas v. Lithuania*, European Court of Human Rights, Application No. 44558/98, 24 July 2001.

*V.L. v. Switzerland*, United Nations Committee Against Torture, UN Doc. CAT/C/37/D/262/2005, 22 January 2007.

*Vuolanne v. Finland*, United Nations Human Rights Committee, UN Doc. CCPR/C/35/D/265/1987,2 May 1989.

*Vyacheslav Berezhnoy v. Russian Federation*, United Nations Human Rights Committee, UN Doc CCPR/C/118/D/2107/2011, 5 December 2016.

*Wagner and J.M.W.L. v. Luxembourg,* European Court for Human Rights (ECtHR), Application No. 76240/01, 28 June 2007.

*W.K v. Canada*, United Nations Human Rights Committee, UN Doc. CCPR/C/122/D/2292/2013, 12 June 2018.

*W.M.C. v. Denmark,* United Nations Committee on the Rights of the Child, UN Doc. CRC/C/85/D/31/2017, 15 October 2020.

*X.H.L. v. The Netherlands,* United Nations Human Rights Committee, UN Doc. ICCPR/C/102/D/1564/2007, 22 July 2011.

*Yang v. Netherlands,* United Nations Human Rights Committee, UN Doc. CCPR//C/99/D/1609/2007, 24 August 2010.

*Y.B. and N.S. v. Belgium*, United Nations Committee on the Rights of the Child, UN Doc CRC/C/79/D/12/2017, 27 September 2018.

*Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, United Nations Human Rights Committee, UN Doc. CCPR/C/88/D/1321-1322/2004, 23 January 2007.

*Y.W.v. Denmark*, United Nations Committee on the Elimination of Discrimination Against Women, UN Doc. CEDAW/C/60/D/51/2013, 13 April 2015.

*Z and Others v. United Kingdom*, European Court of Human Rights, Application No. 29393/95, 10 May 2001.

*Z and T v. United Kingdom*, European Court of Human Rights, Application No. 27034/052006, 28 February 2006.

## International protocols

Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, European Treaty Series No. 009.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 57/199 of 18 December 2002.

Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Adopted by General Assembly resolution 66/138 of 19 December 2011.

Optional Protocol to the Convention on the Rights of Persons with Disabilities, Adopted by General Assembly resolution 61/106 of 13 December 2006.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 63/117 of 10 December 2008.

Protocol Relating to the Status of Refugees Resolution, adopted by the United Nations General Assembly Resolution 2198(XXI) of 16th of December 1966.

## International instruments and guidelines

Communications Procedures under the First Optional Protocol to the International Convention on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966.

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

United Nations General Assembly, Declaration on the Rights of the Child adopted by Resolution 1386 (XIV) of 20 November 1959.

Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines), adopted by the Economic and Social Council Resolution 1997/30 of 21 July 1997.

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Statute of the International Court of Justice, 1965.

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted by UN General Assembly Resolution 39/46 of 10 December 1984.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted by UN General Assembly Resolution 34/180 of 18 December 1979.

The Convention on the Rights of the Child (UNCRC), adopted by UN General Assembly Resolution 44/25 of 20 November 1989.

The Convention on the Rights of Persons with Disabilities (CRPD), adopted by the Sixty-First Session of the UN General Assembly by Resolution A/RES/61/106 of 13 December 2006.

The Convention Relating to the Status of Refugees, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

The International Convention on Civil and Political Rights (ICCPR), adopted by UN General Assembly Resolution 2200A of 16 December 1966.

The International Convention on Economic Social and Cultural Rights (ICESCR), adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), adopted by UN General Assembly Resolution 2106 (XX) of 21 December 1965.

The International Convention for the Protection of All Persons from Enforced Disappearances (CED), adopted by UN General Assembly Resolution 47/133 of 23 December 2010.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), adopted by UN General Resolution 45/158 of 18 December 1990.

United Nations Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, E/CN.4/RES/1992/29, 28 February 1992.

United Nations General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) : Resolution A/RES/70/175 of 8 January 2016/

UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2010/16: United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 22 July 2010, E/RES/2010/16.

United Nations General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly, 9 December 1988, A/RES/43/173.

United Nations General Assembly, The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), UN Doc. A/RES/65/229, 16 March 2011. \

UN General Assembly, Universal Declaration of Human Rights, adopted by resolution 217 A(III) of 10 December 1948.

UN General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution 45/113 adopted by the General Assembly, 14 December 1990, A/RES/45/113 (JDLs).

UN General Assembly, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): resolution / adopted by the General Assembly, 2 April 1991, A/RES/45/110.

Vienna Convention of the Law of Treaties, Vienna on 23 May 1969.

### Concluding observations of treaty bodies

United Nations Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, CRC/C/15/Add.268, 20 October 2005.

United Nations Committee on the Rights of the Child, Concluding *Observations, Finland*, CRC/C/15/Add.272, 20 October 2005.

United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Reports of Uzbekistan, CRC/C/UZB/CO/3-4, 10 July 2013.

United Nations Committee on the Rights of the Child, Concluding Observations on the combined fourth and fifth periodic reports of the Russian Federation, CRC/C/RUS/CO/4-5 ,25 February 2014.

United Nations Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Jamaica, CRC/C/JAM/CO/3-4, 10 March 2015.

United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Third to Fifth Periodic Reports of Nepal CRC/C/NPL/CO/3-5 (2016), 27 July 2016.

United Nations Committee on the Rights of the Child , Concluding Observations on the fifth periodic report of New Zealand, CRC/C/NZL/CO/5,21 October 2016.

United Nations Committee on the Rights of the Child (CRC), Concluding Observations on the combined third to fifth periodic reports of Tajikistan, CRC/C/TJK/CO/3-5, 29 September 2017

United Nations Committee on the Rights of the Child , Concluding Observations on the combined fifth and sixth periodic reports of Australia , CRC/C/AUS/CO/5-6 , 1 November 2019.

United Nations Human Rights Committee , Concluding Observations of the Human Rights Committee: Czech Republic, UN Doc. CCPR/C/CZE/CO/2, 9 August 2007.

United Nations Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia , CCPR/C/AUS/CO/6, 1 December 2017.

United Nations Committee on the Elimination of Racial Discrimination (CERD), *UN* Committee on the Elimination of Racial Discrimination: Concluding Observations, Bahamas, CERD/C/64/CO/1, 28 April 2004.

United Nations Committee Against Torture (CAT), Concluding observations of the Committee against Torture: Sweden, CAT/C/SWE/CO/5, 4 June 2008.

United Nations Committee Against Torture (CAT), Concluding observations of the Committee against Torture: Costa Rica, UN Doc. CAT/C/CRI/CO/27 July 2008.

### General comments of treaty bodies

United Nations Human Rights Committee, CCPR General Comment No. 15 of 1986: The Position of Aliens Under the Covenant U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994), 11 April 1986.

United Nations Committee on the Rights of the Child: General comment No. 6 of 2005 on the Treatment of Unaccompanied and Separated Children Outside their Country-of-Origin UN Doc CRC/GC/2005/6, 1 September 2005.

United Nations Committee on the Rights of the Child, General Comment No. 12 of 2009 on the Right of the Child to be Heard UN Doc CRC/C/GC/12, 1 July 2009.

United Nations Committee on the Rights of the Child, General comment No. 13 (2011): The right of the child to freedom from all forms of violence, CRC/C/GC/13,18 April 2011.

United Nations Committee on the Rights of the Child, General comment No. 14 (2013) on the Right of the Child to have his or her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), UN Doc. CRC/C/GC/14, 29 May 2013.

United Nations Committee on the Rights of the Child, General Comment No. 24 of 2019 on Children's Rights in the Child Justice System UN Doc CRC/C/GC/24, 18 September 2019.

United Nations Committee on the Rights of the Child, General Comment No.14 of 2013 on the right of the child to have his or her best interests taken as a primary consideration UN Doc CRC/C/GC/14, 29 May 2013.

United Nations Human Rights Committee, CCPR General Comment No. 15 on the Position of Aliens Under the Covenant, UN Doc. HRI/GEN/1/Rev.1 at 18(1994), 11 April 1986.

United Nations Human Rights Committee, CCPR General Comment No. 16 of 1988 on Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation U.N. Doc. HRI/GEN/1/Rev.1 at 21, 8 April 1988.

United Nations Human Rights Committee, General Comment No. 19 of 1990 on Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of Spouses UN Doc HRI/GEN/1/Rev.1 at 28 (1994), 27 July 1990.

United Nations Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

United Nations Human Rights Committee, General Comment No. 28 of 2000 on Article 3 (The Equality of rights between Men and Women) UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000.

United Nations Human Rights Committee, General comment no. 31 [80] on the nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13,26 May 2004.

United Nations Committee on the Rights of the Child, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005.

United Nations Human Rights Committee, General Comment No.32 of 2007 on Article 14 (The Right to Equality before Courts and Tribunals and to a Fair Trial UN Doc CCPR/C/GC/32, 23 August 2007.

United Nations Human Rights Committee: General Comment No. 33 of 2008 on the obligations of states parties under the Optional Protocol to the ICCPR UN Doc CCPR/C/GC/33, 5 November 2008.

United Nations Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35,16 December 2014.

United Nations Committee Against Torture (CAT), General Comment No. 1 on the Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), UN Doc A/53/44, annex IX, 21 November 1997.

United Nations Committee Against Torture, General Comment No. 2 on the Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2000.

United Nations Committee Against Torture (CAT), General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, UN Doc. CAT/C/GC/4, 9 February 2017.

United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 5 November 2014.

United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the sixth periodic report of Jordan, UN Doc. CEDAW/C/JOR/CO/6, 9 March 2017.

United Nations Committee on the Elimination of Discrimination against Women and The United Nations Committee on the Rights of the Child, Joint General recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and General Comment No. 18 of the Committee on the Rights of the

Child on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014.

United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: General Comment No. 2 of 2003 on The Rights of Migrant Workers in an Irregular Situation and Members of their Families Doc CMW/C/GC/2 , 28 August 2013.

United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) 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, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017.

United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3-CRC/C/GC/22, 16 November 2017.

United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), E/C.12/1999/10, 8 December 1999.

## Internet sources

Alford R "Role of Natural Law as a Source for International Law" http://opniojuris.or/2008/11/19/the-role-of-natural-lawlaslalsource-for-international law/ (accessed 12 June 2018).

Baer H "Some Reflections on the Problem of Natural Law: Comments on the Papers" 03/01/2010 https://www.elca.org/JLE/Articles/318(accessed 28 November 2018).

Chaime M *Monism and Dualism in international law* (2018) from https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml.

CRIN "Article 6: Survival and Development" Https://Archive.Crin.Org/En/Home/Rights/Convention/Articles/Article-6-Survival-And-Development.Html (Accessed 6 January 2022).

CRIN "CRC Complaints" Https://Www.Crin.Org/En/Home/Law/Complaints/International/Crc-Complaints (Accessed 12 June 2018).

CRIN "CRC Complaints Mechanism Toolkit" Https://Www.Crin.Org/En/Docs/Filemanager/Op3crc_Toolkit_Report.Pdf (Accessed 12 March 2018).

CRIN "First Un Committee Decision On Rights Of Children Of LGBT Parents In Asylum Context" 17 February 2021 Https://Home.Crin.Org/Readlistenwatch/Stories/Un-Committee-Delivers-Decision-On-Rights-Of-An-Lgbt-Couples-Child (Accessed 7 January 2022).

CRIN "Rights Remedies And Representation: Global Report On Access To Justice For Children" 2016 Https://Www.Crin.Org/En/Library/Publications/Rights-Remedies-And-Representation-Global-Report-Access-Justice-Children (Accessed 20 August 2019).

Dawit Mezmur B, "The Convention on the Rights of the Child, migration and Australia: Repositioning the Convention from being "a wish list" to a "to do list" the 2018 Australian human rights institute annual lecture." https://repository.uwc.ac.za/handle/10566/6343 (accessed 20 September 2020).

Duffy H, Communication 79/2019 And 109/2019 Et. Al., Leiden Children's Rights Observatory, Case Note 2021/3, 18 February 2021.Https://Www.Childrensrightsobservatory.Nl/Case-Notes/Casenote2021-3 (Accessed 21 October 2022).

Erdem Türkelli G and Vandenhole W, *Communication 12/2017: Y.B. and N.S. v Belgium, Leiden Children's Rights Observatory*, Case Note 2018/3, Leiden Law School-Leiden Children's Rights Observatory, 10 December 2018. https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/jr-case-note-3-clean-version---7.12.18.pdf.

Espejo Yaksic N, *Communication 30/2017: N.R., on behalf of C.R., v. Paraguay,* Leiden Children's Rights Observatory, Case Note 2020/3, 19 May 2020. https://childrensrightsobservatory.nl/case-notes/casenote2020-3#footnote-2

Frigo M "Migration and international human rights law: A practitioner's guide" 6 updated edition (2014) https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf(accessed 2 December 2020).

Gallinetti "Getting to know the child justice Act" (2009) from http://www.childjustice.org.za/publications/Child%20Justice%20Act.pdf. (accessed on 12 August 2019).

Geary P "CRC complaints mechanism toolkit" https://www.crin.org/en/guides/legal/crc-complaints-mechanism-toolkit. (accessed 12 May 2018)

Human Rights Watch "Against all odds: Prison conditions for youth offenders serving life without parole sentences in the United States" (2012) 22, 26-27 Http://Www.Hrw.Org/Sites/Default/Files/Reports/Us0112forupload_1.Pdf.(Accessed On 11 December 2019).

Ila, Committee on international human rights law and practice "Final report on the impact of findings of the united nations human rights treaty bodies" (2004) Https://Docs.Escr-Net.Org/Usr_Doc/Ilaberlinconference2004report.Pdf. (Accessed On 10 March 2019).

International Organisation For Migration "International migration law information note on the principle of non-refoulement" Https://Www.Iom.Int/Files/Live/Sites/Iom/Files/What-We-Do/Docs/Iml-Information-Note-On-The-Principle-Of-Non-Refoulement.Pdf (Accessed 15 February 2021).

Iwasawa Y "Chapter V. Domestic application of international law: A framework of analysis (378)" in Collected courses of the Hague Academy of International Law, the Hague Academy of International Law (2016) accessed http://dx.doi.org/10.1163/1875-8096_pplrdc_ej.9789004321250.C01.ch07 (24 March 2019).

Janet Fife-Yeomans "NSW will defy UN on killers" The Daily Telegraph (2014-11-25).

Jousten M "International standards and norms as guidance in the criminal justice system" (2015)https://www.unafei.or.jp/publications/pdf/RS_No98/No98_VE_Joutsen.pdf .(accessed on 10 November 2019).

Jousten M "UN standards and norms on juvenile justice: from soft law to hard law" (2017) https://www.unafei.or.jp/activities/pdf/Public_Lecture/Public_Lecture2017_Dr.Joutsen_Paper.pdf (accessed 10 November 2019).

Klassen M and Rodrigues P Communication 31/2017: W.M.C. v. Denmark, Leiden Children's Rights Observatory, Case Note 2021/2, 29 January 2021.https://childrensrightsobservatory.nl/case-notes/casenote2021-2 (Accessed 7 January 2022).

Klaassen M and Rodrigues P "The Committee on the Rights of the Child on female genital mutilation and non-refoulement" 20 March 2018 https://leidenlawblog.nl/articles/the-committee-on-the-rights-of-the-child-on-female-genital-mutilation (Accessed 19 February 2021).

Ley Orgánica de Extranjería 4/2000 (Ceriani Cernadas P Communications No. 16/2017 A.L. v. Spain; 17/2017 M.T. v. Spain; 22/2017 J.A.B. v. Spain; 24/2017 M.A.B. v. Spain and 27/2017 R.K. v. Spain, Leiden Children's Rights Observatory, Case Note 2020/2, 18 May 2020 https://www.childrensrightsobservatory.nl/case-notes/casenote2020-2. )

Morlachetti A, *Communication 4/2016: D.D. v. Spain*, Leiden Children's Rights Observatory, Case Note 2019/1, Leiden Law School, 11 June 2019. https://www.childrensrightsobservatory.nl/case-notes/casenote2019-1

Nowak M The United Nations global study on children deprived of liberty 2019 266 https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf.(accessed on 30 December 2019).

OHCHR "Annual Thematic Reports" Https://Www.Ohchr.Org/En/Issues/Detention/Pages/Annual.Aspx (Accessed 10 December 2020).

OHCHR "Committee on the Rights of the Child concludes seventy-seventh Session" 2 February 2018 Http://Www.Ohchr.Org/En/Newsevents/Pages/Displaynews.Aspx?Newsid=22630&Langid=E. (Accessed 10 September 2018)

OHCHR "Complaints about human rights Violations"Https://Www.Ohchr.Org/En/Hrbodies/Tbpetitions/Pages/Hrtbpetitions.Aspx#Individualcomm (Accessed 20 November 2018).

OHCHR "Introduction to the Committee On The Rights Of The Child" Http://Www.Ohchr.Org/En/Hrbodies/Crc/Pages/Crcintro.Aspx. (Accessed 13 October 2018).

OHCHR "Jurisprudence" Https://Juris.Ohchr.Org/En/Search/Results?Bodies=5&Sortorder=Date (Accessed 14 April 2022).

Penal Reform International and UNICEF "Protecting children's rights in criminal justice systems" In Penal Reform International and UNICEF juvenile justice training tanual 2007 Https://Cdn.Penalreform.Org/Wp-Content/Uploads/2013/11/Childrens-Rights-Training-Manual-Final%C2%Adhr1.Pdf.(Accessed On 20 November 2019)

Save The Children "Children in conflict with the law" Https://Resourcecentre.Savethechildren.Net/Keyword/Children-Conflict-Law.(Accessed On 1 October 2020).

Schlütter B "Aspects of human rights interpretation by the UN treaty bodies" https://www.cambridge.org/core/books/un-human-rights-treaty-bodies/aspects-of-human-rights-interpretation-by-the-un-treaty-bodies/45FE6B3E17C8661CB5C0F65D799A615F/core-reader#

Skelton and Badenhorst "The criminal capacity of children in South Africa: International developments and considerations for review" (2011). Https://Dullahomarinstitute.Org.Za/ChildrensRights/Publications/Other%20PUBLICATIONS/The%20CRIMINAL%20CAPACITY%20OF%20CHILDREN%20IN%20SOUTH%20AFRICA%20%20INTERNATIONAL%20DEVELOPMENTS%20AND%20CONSIDERATIONS%20FOR%20A%20REVIEW.Pdf.(12 August 2019).

Sloss D "Domestic application of treaties" (2011) https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs (accessed 10 April 2019)

Sormunen M *Communication 51/2018: A.B. v. Finland*, Leiden Children's Rights Observatory, Case Note 2021/4, 7 May 2021 https://www.childrensrightsobservatory.nl/case-notes/casenote2021-4 (Accessed 9 January 2022).

The Advocates for Human Rights
Https://Www.Theadvocatesforhumanrights.Org/Uploads/App_I.Pdf (Accessed 11 March 2018).

The global compact for migration "Global compact for safe, orderly and regular migration" Https://Www.Iom.Int/Global-Compact-Migration (Accessed 12 December 2020).

Erdem Türkelli G and Wouter Vandenhole W, "Case Note: 2018/3 'Communication 12/2017: Y.B. and *N.S. v Belgium*" in *Leiden Children's Rights Observatory* https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/jr-case-note-3-clean-version---7.12.18.pdf (accessed 10 May 2021).

United Nations "The United Nations global study on children deprived of their liberty" 2019 Https://Www.Chr.Up.Ac.Za/Images/Publications/Un_Global_Study/United%20NATIONS%20GLOBAL%20STUDY%20ON%20CHILDREN%20DEPRIVED%20OF%20LIBERTY%202019.Pdf (accessed 24 December 2021).

Van Bueren G "United Nations rules for the protection of juveniles deprived of their liberty" from https://resourcecentre.savethechildren.net/library/united-nations-rules-protection-juveniles-deprived-their-liberty.(accessed on 12 December 2019).

Wewerinke-Singh M, Communication 104/2019 Chiara Sacchi Et Al V. Argentina Et Al, Leiden Children's Rights Observatory, Case Note 2021/10, 28 October 2021.Https://Www.Childrensrightsobservatory.Nl/Case-Notes/Casenote2021-3 (Accessed 20 October 2022).

Wijemanne "Protecting the rights of children deprived of their liberty" in Washington College of Law Protecting children against torture in detention: Global solutions for a global problem (2017) http://antitorture.org/wpcontent/uploads/2017/03/Protecting_Children_From_Torture_in_Detention.pdf.(accessed 10 November 2019).

Wriedt V "Push-backs rejected: D.D. v. Spain and the rights of minors at EU borders", April 2019 https://eumigrationlawblog.eu/push-backs-rejected-d-d-v-spain-and-the-rights-of-minors-at-eu-borders/ (accessed 10 May 2021).

Yaksic E, *Communication 30/2017: N.R., On Behalf Of C.R. V. Paraguay*, Leiden Law School, Children's Rights Observatory, Case Note 2020/3, 19 May 2020,

Https://Www.Childrensrightsobservatory.Nl/Case-Notes/Casenote2020-3 (Accessed 10 May 2022)

## Reports

Inter-American Commission on Human Rights , *Report on Terrorism and Human Rights,* OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

International Law Commission, Report of the study group on fragmentation of international law: Difficulties arising from the diversification and expansion of international law (13 April 2006) UN Doc/A/CN.4/L.682.

Federation of offshore workers trade union case, Supreme Court of Norway, Rt 1997-580; cited in ILA, Committee on International Human Rights Law and Practice "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies" (2004).

United Nations Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration,* 28 September 2012.

United Nations Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration,* 28 September 2012.

United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, E/CN.4/1999/63, 18 December 1998.

United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2000/4,28 December 1999.

United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention (WGAD)*, A/HRC/10/21, 16 February 2009.

United Nations Human Rights Council, Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/13/30, 15 January 2010.

United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68, 5 March 2015.

United Nations General Assembly: Report of the UN Secretary-General on International Migration and development, UN Doc A/68/190, 30 July 2014

United Nations Commission on Human Rights, "Civil and Political Rights, Including the Question of Torture and Detention, Report of the Special Rapporteur on the Question of Torture, Theo van Boven" UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004.

### Theses

Dawit Mezmur B I*ntercountry adoption in an African context: A legal perspective* (Thesis, University of the Western Cape,2009) 73

Diener K *A Defense of soft positivism: Justice and principles processes* (Thesis Georgia State University, 2006).

Smyth C *The common European asylum system and the rights of the child : An exploration of meaning and compliance* (Thesis Leiden University, 2013).

Valentine J *Adding value through OPIC and to whom? Applying lessons learned by the HRC to maximize potential impact of OPIC for children*. (Thesis Leiden University, 2020)

### Other

Conclusion No. 6 (XXVIII) Non-refoulement, Executive Committee, United Nations Commissioner for Human Rights, 28th Session, 12 October 1977, Para (c).

Council of Europe: Committee for the Prevention of Torture, *The CPT standards*, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2010.

European Council on Refugees and Exiles, *Position on the Implementation of the Dublin Convention, in the Light of Lessons Learned from the Implementation of the Schengen Convention*, 1 December 1997.

*European Guidelines on Accelerated Asylum Procedures,* adopted by the Council of Europe Parliamentary Assembly Resolution 1471 of 2005, principle XI.1.

European Union, "*Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities" ("Dublin Convention")*, 15 June 1990, Official Journal C 254, 19/08/1997 p. 0001 - 0012.

European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, 29 June 2013 (Dublin III Regulation).

European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003 18 February 2003 (Dublin II Regulation).

United Nations Commission for Human Rights, *Question of a Convention on the Rights of the Child*, E/CN.4/RES/1989/57, 8 March 1989.

United Nations High Commissioner for Refugees (UNHCR), Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009.

United Nations High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ECOSOC Resolution No.1989/65, 15th Plenary meeting,24 May 1989.

Domestic legislation

*Canada: Constitutions Acts*, *1867 to 1982* [Canada], 29 March 1967.