

## Children's Rights under Regional Human Rights Law – A Tale of Harmonisation?

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### 1. Introduction

This chapter focuses on an area where a high level of harmonisation between international and regional human rights protection is evident: the rights of the child.<sup>1</sup> All of the major regional human rights systems – the African, the Inter-American and the Council of Europe – accord explicit protection to child rights and the key institutions within those systems have engaged directly with such rights in a range of different contexts. The aim of this chapter is not, however, to provide a comprehensive analysis of how regional judicial and quasi-judicial bodies have approached children's rights. Rather, its focus is on the extent to which the regional systems take into account the key international instrument on children's rights, the Convention on the Rights of the Child (CRC). In doing so, the authors will consider those entities' use of the work of the body mandated to monitor that instrument, the UN Committee on the Rights of the Child (ComRC).

The way in which and the extent to which the different regional treaty bodies have addressed children's rights reflect a range of factors. These include: (a) the human rights protected under those systems; (b) the mandate of the regional human rights bodies with responsibility for children's rights; and (c) the kinds of cases prioritised by children, child rights advocates<sup>2</sup> and others empowered to bring complaints.<sup>3</sup> Despite these variables, as

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<sup>1</sup> This chapter reflects the law as it was publicly available on 14 May 2015. As such, it does not reflect the African Committee on the Rights and Welfare of the Child's decision in Communication 1/2005, *Michelo Hunsungule (on behalf of children in Northern Uganda) v. Government of Uganda* (decided 21st Session, 15-19 April 2013) and Decision No. 003/Com/001/2012, *Communication Centre for Human Rights and La Rencontre Africaine pour la Défense des Droits de l'Homme v. Government of Senegal* (decided 14 April 2014), which were uploaded onto the Committee's website after that date.

<sup>2</sup> Although in Europe all cases are taken by personal applicants – notably parents either with or on behalf of their children – in other regions child rights litigation has also been taken by NGOs. Such bodies can bring cases to the Inter-American and African Commissions directly (see Article 44 ACHR; and the discussion in Viljoen, *International Human Rights Law in Africa*, 2nd edn (OUP, 2012), respectively) and to the African Court and the European Committee of Social Rights in more limited circumstances: see Article 5(3) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights; and Articles 1(b) and 2 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

<sup>3</sup> These include states (Articles 45 and 61 ACHR; Article 5(1)(b)–(d) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights), the Inter-American Commission (Article 61 ACHR), the African Commission (Article 5(1)(a) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African

made clear below, there are a number of common elements to the Inter-American, African and European human rights systems' approaches to children's rights.

While regional human rights systems do make use of international human rights law other than the CRC in their jurisprudence involving children's rights, this chapter's focus on that instrument is appropriate for a number of reasons. First, the CRC is the only international human rights instrument to have been ratified by all but two United Nations member states.<sup>4</sup> As such, it is the most 'universal' of all international human rights instruments dealing with children's rights. Second, as will become clear below, the CRC has been cited by all of the regional human rights protection and promotion bodies under consideration and in many cases has served as a key interpretive influence and source in relation to those institutions' approach to child-related rights issues.

Ultimately, this chapter concludes that the growing reference to, and employment of, the CRC by regional human rights bodies has contributed to an increasing harmonisation of regional approaches to children's rights. This level of harmonisation is a strong testament to the influence of that instrument given both the diverse challenges faced by children in Europe, Africa and the Americas, and the variations in approach to children's rights in the basic instruments of the regional human rights systems under consideration. Although there are many factors that result in the CRC playing a different role vis-à-vis the work of the various regional mechanisms, it is increasingly clear that the CRC is the tie that binds in child rights protection at regional as well as international level.

## **2. The African Regional Human Rights System**

The African regional system is the one that is most explicit in its embrace of the international child rights regime. The 1981 African Charter on Human and Peoples' Rights makes multiple

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Court on Human and Peoples' Rights), international and representative trade unions and employers' organisations (Article 2 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints) and African intergovernmental organisations (Article 5(1)(e) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights). Other factors affecting the choice of cases may include donor/funder concerns (particularly in the case of NGOs) and the concerns of non-child rights-centred groups which seek to use children's rights to advance particular adult-driven campaigns, for instance in relation to abortion (see, for example, Case 2141, *White and Potter (Baby Boy) v United States of America* Resolution No 23/81 (1981)).

<sup>4</sup> The US and South Sudan have not yet ratified the CRC, although South Sudan has taken steps to do so. The US forms part of the Organization of American States (OAS) and is subject to the obligations in the American Declaration of the Rights and Duties of Man. Somalia is a state party to the African Charter on Human and Peoples' Rights. South Sudan is neither a signatory nor a party to either the African Charter or the African Charter on the Rights and Welfare of the Child.

references to children and their rights. Article 17(3) outlines states parties' obligations to 'ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions', while Chapter II on duties highlights that everyone (including presumably the child) 'shall have duties towards his family and society'<sup>5</sup> and 'to preserve the harmonious development of the family'.<sup>6</sup> The right to education in Article 17 is also of particular relevance to children.<sup>7</sup> Furthermore, children are certainly included within the individuals who may, subject to certain conditions, submit a communication to the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.<sup>8</sup>

However, the key children's rights instrument under the African regional system is the 1990 African Charter on the Rights and Welfare of the Child ('Children's Charter').<sup>9</sup> That Charter post-dates the adoption of the CRC and shares a number of elements with that international instrument,<sup>10</sup> including a wide range of civil, political, economic, social and cultural rights, the principles of non-discrimination and best interests,<sup>11</sup> an emphasis on the right to the life, survival and development of the child<sup>12</sup> and participation rights.<sup>13</sup> After a slow start, the treaty has thus far been ratified by 47 out of 54 African Union (AU) states,<sup>14</sup> with only four states entering reservations to provisions of the Charter.<sup>15</sup>

However, while many of the same principles are afforded protection in the two instruments, they are frequently specified in a different way, resulting in potentially differing levels of protection for children's rights. Key examples include the fact that, in contrast to Article 4 of the CRC, the African Children's Charter does not differ in terms of the express

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<sup>5</sup> Article 27(2) African Charter.

<sup>6</sup> Article 29(1) African Charter.

<sup>7</sup> The rights of girl children are also addressed under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, while the African Youth Charter applies to children between the ages of 15 and 18 years.

<sup>8</sup> See respectively Articles 55 and 56 African Charter and Articles 5(3) and 34(6) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

<sup>9</sup> For a discussion of the history and overview of the operation in practice of the Children's Charter, see Viljoen, *supra* n 2 at 391–409.

<sup>10</sup> For an overview of the common and divergent elements of the African Charter and the CRC, see Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10(2) *International Journal of Children's Rights* 157.

<sup>11</sup> Articles 3 and 4 Children's Charter, respectively.

<sup>12</sup> Article 5 Children's Charter.

<sup>13</sup> See in particular Article 4(2) Children's Charter.

<sup>14</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 'Ratifications Table', available at: [acerwc.org/ratification-data/](http://acerwc.org/ratification-data/). It has not been ratified by Central African Republic, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia and Tunisia. South Sudan has ratified neither the CRC nor the Children's Charter.

<sup>15</sup> For more details, see ACERWC, 'Reservations', available at: [acerwc.org/reservations/](http://acerwc.org/reservations/).

obligations imposed on states with regard to civil and political rights and economic, social and cultural ones<sup>16</sup> (albeit that in practice, consistent with Article 4 of the CRC, those latter rights have been interpreted as being subject to the resources available to the state in question).<sup>17</sup> There are also a number of areas in which the Children's Charter appears to accord a higher level of protection than that set out in the CRC. For instance, the best interests principle under the Children's Charter (which renders such 'the primary consideration' in all actions concerning the child) accords greater priority to the child's best interests than is required by Article 3(1) of the CRC. In addition, the Children's Charter places a heavy emphasis on the rights of the girl child<sup>18</sup> and makes explicit provision for the rights of children of imprisoned mothers.<sup>19</sup> The juvenile justice provisions are also stronger in some respects than their CRC counterparts.<sup>20</sup> There are, however, some significant weaknesses in the Children's Charter relative to the CRC. These include the fact that protection of participation rights is much more limited than under the CRC,<sup>21</sup> and the Charter appears to permit parental physical punishment.<sup>22</sup> Viljoen has highlighted how the instrument fails to include the child's right to access information, to benefit from social security or to an adequate standard of living.<sup>23</sup>

In terms of divergence from the CRC, there are some elements of the Children's Charter that have clearly been strongly influenced by the specific historical and political context of the instrument,<sup>24</sup> including a provision on protection against apartheid,<sup>25</sup> a complete ban on the use of child soldiers,<sup>26</sup> the inclusion of 'Africa-specific' aims of education<sup>27</sup> and a provision dealing expressly with protection against harmful social and cultural practices.<sup>28</sup> The Children's Charter reflects a particular concern with protection of the family that is not explicitly included in the rights provisions of the CRC;<sup>29</sup> the various elements of the CRC

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<sup>16</sup> See Article 1 Children's Charter.

<sup>17</sup> ACERWC, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* Communication No 2/09 (2011) at para 62.

<sup>18</sup> See, for example, Article 11(3)(e) Children's Charter.

<sup>19</sup> Article 30 Children's Charter.

<sup>20</sup> See Chirwa, *supra* n 10 at 166–7.

<sup>21</sup> There is no equivalent of the general obligation to take the child's views into account in all matters affecting them set out in Article 12(1) CRC.

<sup>22</sup> Article 11(5) Children's Charter.

<sup>23</sup> Viljoen, *supra* n 1 at 395.

<sup>24</sup> For a discussion of the 'African features' of the Children's Charter (particularly different issues of concern to African commentators that were not addressed under the CRC), see Viljoen, *supra* n 2 at 392–5.

<sup>25</sup> Article 26 Children's Charter.

<sup>26</sup> Article 22(2) Children's Charter.

<sup>27</sup> Article 11(2) Children's Charter.

<sup>28</sup> Article 21 Children's Charter.

<sup>29</sup> See Article 18(1) Children's Charter on protection of the family. The CRC does contain language similar to that of Article 18(1) in the preamble.

dealing with the responsibilities of parents and others responsible for the child are largely distilled into one provision of the Children's Charter, Article 20 on 'parental responsibilities'.<sup>30</sup> Again, reflective of what Chirwa terms 'the African concept that the family is the basic unit of society',<sup>31</sup> the Children's Charter also outlines the duties that the child may have towards their family and society, 'subject to [their] age and ability and such limitations as may be contained in the present Charter'.<sup>32</sup>

The Children's Charter provides for an African Committee of Experts on the Rights and Welfare of the Child,<sup>33</sup> an 11-member body mandated to promote, protect and monitor the implementation of, and ensure protection of, Charter rights.<sup>34</sup> In terms of integration of the Committee's work with that of the ComRC, the Committee is required to 'cooperate with other African, *international*, and regional Institutions and organisations concerned with the promotion and protection of the rights and welfare of the Child',<sup>35</sup> which would include the ComRC. Furthermore, the Committee is to 'draw inspiration from International Law on Human Rights, particularly from ... the International Convention on the Rights of the Child'.<sup>36</sup> These provisions create a strong basis for the adoption of an integrated approach on the part of the Committee with regards to the CRC.

However, while the African regional system accords a wide range of rights protections to children on paper, the lack of capacity and inadequate resourcing of the Committee are at least partly responsible for the disappointingly limited outputs of the Committee since it began its work in 2002.<sup>37</sup>

Despite the Charter's communications system and the range of persons and bodies that can bring complaints relating to 'any matter covered by this Charter',<sup>38</sup> the Committee's jurisprudence is currently very scant. Indeed, to date only two complaints have been received and one decision on the merits handed down: *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of*

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<sup>30</sup> See, for example, Articles 18, 27 and 5 CRC.

<sup>31</sup> Chirwa, *supra* n at 169.

<sup>32</sup> Article 31 Children's Charter.

<sup>33</sup> Article 32 Children's Charter.

<sup>34</sup> Article 42(a) and (b) Children's Charter.

<sup>35</sup> Article 42(a)(iii) Children's Charter (emphasis added).

<sup>36</sup> Article 46 Children's Charter.

<sup>37</sup> For more on these points, see Mezmur, 'The African Committee of Experts on the Rights and Welfare of the Child: An Update' (2006) 6(2) *African Human Rights Law Journal* 549; and Viljoen, *supra* n 2 at 398 and 408.

<sup>38</sup> Article 44(1) Children's Charter.

*Nubian Descent in Kenya v Kenya*.<sup>39</sup> This decision concerned the obstacles faced by Nubian children in Kenya in having their births registered and in accessing Kenyan nationality – and, as a result of their lack of confirmed status as Kenyan nationals, their limited access to health care services and education. The Committee found violations of the right to name and nationality,<sup>40</sup> the prohibition on discrimination<sup>41</sup> and the rights to education and the highest attainable standard of health.<sup>42</sup> While the CRC and the work of the ComRC received less attention in the decision than the African Charter and the jurisprudence African Commission on Human and Peoples’ Rights, the Committee did make reference to the work of the ComRC as evidence of the ongoing failure of Kenya to address the gap in its birth registration practice and highlighted that the rights to birth registration and nationality were provided under both that instrument and the Children’s Charter.<sup>43</sup>

Nor has the Committee developed its work significantly in terms of investigations, as provided for under Article 45 of the Children’s Charter. Indeed, the sole instance of such an investigation was a ‘fact-finding mission to Northern Uganda in 2005 which was presented by the AU Commission to the Executive Council, the Permanent Representatives Committee and the AU Assembly’.<sup>44</sup> A state-caused obstacle in terms of the Committee’s work is the fact that only just over half of the states that have ratified the Charter have made initial reports in relation to that instrument.<sup>45</sup> More positively, and consistently with its mandate ‘to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa’,<sup>46</sup> the Committee has authored two general comments on children of incarcerated and imprisoned parents and primary caregivers<sup>47</sup> and on Article 6, the right to a name, to acquire nationality and birth registration.<sup>48</sup>

There is one recent development that is of potential concern in terms of the African regional system’s protection of children’s rights in a CRC-compliant way – and indeed the

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<sup>39</sup> Supra n 16.

<sup>40</sup> Article 6(2), (3) and (4) Children’s Charter.

<sup>41</sup> Article 3 Children’s Charter.

<sup>42</sup> Articles 11(3) and 14(2)(b), (c) and (g) Children’s Charter, respectively.

<sup>43</sup> See *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya*, supra n 16 at paras 39 and 42, respectively.

<sup>44</sup> This mission is mentioned on the ACERWC’s website (although the report is not provided): see [pages.au.int/acerwc/pages/investigation-missions](http://pages.au.int/acerwc/pages/investigation-missions). For more details on this mission, see Mezmur, supra n 37 at 564–5.

<sup>45</sup> ACERWC, ‘Initial Reports’, available at: [acerwc.org/member-states/state-reports/](http://acerwc.org/member-states/state-reports/).

<sup>46</sup> Article 42(a)(ii) Children’s Charter.

<sup>47</sup> ACERWC, General Comment No 1 on Article 30 of the African Charter on the Rights and Welfare of the Child on Children of Incarcerated and Imprisoned Parents and Primary Caregivers, ACERWC/GC/01 (2013).

<sup>48</sup> ACERWC, General Comment No 2 on Article 6 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/02 (2014).

effective protection of children's rights as part of that system at all. This is the December 2014 advisory opinion of the African Court on Human and Peoples' Rights on the *Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*.<sup>49</sup> In this opinion, the Court held that, although the Committee is an organ of the Union and has standing to seek an advisory opinion in terms of Article 4(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, it is not an 'African Intergovernmental Organization' entitled to submit a case to the Court.<sup>50</sup> While the Court's jurisdiction extends to 'all cases and disputes submitted to it concerning the interpretation and application of ... any other relevant Human Rights instrument ratified by the States concerned'<sup>51</sup> and is required to apply both the African Charter and 'other relevant human rights instruments ratified by the states concerned'<sup>52</sup> (which, for the 24 states which have ratified the Protocol would certainly include the CRC, and for 21 of them would include the Children's Charter),<sup>53</sup> it is of great concern that the child rights-specific monitoring body of the African regional system cannot bring complaints to the Court on its own initiative.<sup>54</sup> Indeed, the Court itself emphasised in the advisory opinion that it is 'highly desirable that the Committee is given direct access to the Court'.<sup>55</sup>

Despite these drawbacks, the African regional human rights system undoubtedly accords more extensive, express protection to children's rights than any of the other regional systems. Crucially from the perspective of harmonisation, African regional protection of children's rights has been strongly influenced by the CRC – both in terms of the standards under the Children's Charter and the way in which these have been interpreted by the African Committee of Experts on the Rights and Welfare of the Child.

### **3. The Inter-American Regional Human Rights System**

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<sup>49</sup> 2/2013, Advisory Opinion, 5 December 2014.

<sup>50</sup> Ibid. at para 100. See also Article 5(1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

<sup>51</sup> Ibid. at Article 3.

<sup>52</sup> Ibid. at Article 7.

<sup>53</sup> African Commission on Human and Peoples' Rights, 'Ratifications Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights', available at: [www.achpr.org/instruments/court-establishment/ratification/](http://www.achpr.org/instruments/court-establishment/ratification/).

<sup>54</sup> It should be noted, however, that the Committee will be able to bring complaints to the African Court of Justice and Human Rights in terms of Article 30(c) Protocol on the Statute of the African Court of Justice and Human Rights if and when this instrument comes into force.

<sup>55</sup> *Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*, supra n 48 at para 100.

While the key documents of the Inter-American human rights system make only limited reference to children and their rights, the institutions of that system – most notably the Inter-American Court of Human Rights (IACtHR) – have outlined a detailed framework for the protection of the rights of the child strongly based on the CRC. Indeed, the Inter-American Commission on Human Rights (IACHR) itself has highlighted that ‘the text of the Convention on the Rights of the Child and decisions adopted by the Committee – such as their General and Final Comments on the periodic reports presented by the states parties to the Convention on the Rights of the Child – are incorporated into the [Inter-American] system as reference material for interpretation purposes’.<sup>56</sup>

In terms of textual attention to children’s rights, the American Declaration of the Rights and Duties of Man sets out the right of all children to special protection, care and aid,<sup>57</sup> while Chapter 2 of the Declaration delineates ‘the duty of every person to aid, support, educate and protect his minor children, and ... the duty of children to honor their parents always and to aid, support and protect them when they need it’.<sup>58</sup> Article 17 of the American Convention on Human Rights (ACHR) on the rights of the family provides that ‘provision shall be made for the necessary protection of any children solely on the basis of their own best interests’,<sup>59</sup> while states must also ensure that ‘the law shall recognize equal rights for children born out of wedlock and those born in wedlock’.<sup>60</sup> The most significant provision in terms of children’s rights within the Inter-American system is Article 19 of the ACHR on the rights of the child which provides that ‘[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state’.<sup>61</sup> The rights under Articles 17 and 19 may not be derogated from on any grounds.<sup>62</sup>

Twenty-three out of the 35 members of the Organization of American States (OAS) are currently parties to the Convention, while all members of the OAS are bound by child rights provisions under the Declaration. Where a state has not ratified the Convention, the IACHR and

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<sup>56</sup> IACHR, ‘The Rights of the Child in the Inter-American Human Rights System’, 2nd edn (2008), OEA/Ser.L/V/II.133, 29 October 2008, available at: [www.cidh.org/countryrep/Infancia2eng/Infancia2Cap1.eng.htm](http://www.cidh.org/countryrep/Infancia2eng/Infancia2Cap1.eng.htm).

<sup>57</sup> Article VII.

<sup>58</sup> Article XXX.

<sup>59</sup> Article 17(4) ACHR.

<sup>60</sup> Article 17(5) ACHR.

<sup>61</sup> In terms of other express references to children and their rights, Article 12(4) ACHR provides that parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions, while Article 13(4) ACHR on the right to freedom of thought and expression provides that ‘public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence’.

<sup>62</sup> See Article 27 ACHR.



the IACtHR will still look at that state's obligations under the Declaration on the basis that the Declaration contains and defines the fundamental human rights referred to in the Charter of the Organization of American States.<sup>63</sup> As such, child rights in one form or another are binding on all members of the OAS. Unlike the African (but similar to the Council of Europe) regional human rights system, there is no child rights-specific monitoring body with the mandate to promote and protect children's rights. Rather, this work is primarily carried out by the IACHR and the IACtHR in terms of their functions,<sup>64</sup> most importantly and influentially in their quasi-judicial and judicial role in hearing complaints and cases.

In 1998 the Commission established the Office of the Rapporteur on the Rights of the Child to 'examine the status of children's rights, carry out related activities, and propose effective measures to be taken by the member states'.<sup>65</sup> The Rapporteur's key activities include providing specialised advice to the Commission in the proceedings of petitions to the IACHR regarding violations of the rights of children and adolescents; the conduct of special studies on the rights of children and adolescents; state visits; and promotional activities such as seminars, workshops and meetings on child rights.<sup>66</sup> Outputs have included both thematic and country-specific reports.<sup>67</sup> While the various Rapporteurs have undoubtedly carried out important promotional work around children's rights, the remainder of this section will focus on the protection of children's rights through the jurisprudence and other work of the IACHR and the IACtHR.

The Commission's earliest statements on children's rights took place in the 1960s and 1970s in the context of its reporting work on the general human rights situations in the countries subject to its attention.<sup>68</sup> It also looked at the children's rights provisions under the Declaration and the Convention through its consideration of petitions and cases in terms of the American Convention.<sup>69</sup> Up until the late 1980s (and the creation of the CRC), most of these concerned violations of the right to life, to personal liberty or to humane treatment.<sup>70</sup>

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<sup>63</sup> OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights* IACtHR Series A 10 (1989) at para 43.

<sup>64</sup> See respectively Chapters VII and VIII of the ACHR.

<sup>65</sup> IACHR, Press Release No 18/98, 13 October 1998, available at: [www.cidh.org/Comunicados/English/1998/Press15-19.htm#18](http://www.cidh.org/Comunicados/English/1998/Press15-19.htm#18).

<sup>66</sup> IACHR, 'Children: Mandate and Functions', available at: [www.oas.org/en/iachr/children/mandate/Functions.asp](http://www.oas.org/en/iachr/children/mandate/Functions.asp).

<sup>67</sup> For more, see the website of the Rapporteur, available at: [www.oas.org/en/iachr/children/](http://www.oas.org/en/iachr/children/).

<sup>68</sup> For more, see IACHR, 'The Rights of the Child in the Inter-American Human Rights System', *supra* n 55 at paras 58–67.

<sup>69</sup> See, in particular, Articles 44–50 ACHR.

<sup>70</sup> IACHR, 'The Rights of the Child in the Inter-American Human Rights System', *supra* n 55 at para 59.

The Commission has dealt with children's rights in terms of a wide range of its functions,<sup>71</sup> including the production of studies and reports on child rights-related issues,<sup>72</sup> requests to government to supply information on the implementation of child rights, its annual reports, addressing petitions in the context of its complaint process and the issuing of statements and press releases drawing attention to and expressing concern about existing or potential child rights violations in the Americas.<sup>73</sup>

The coming into force of the CRC had a transformative impact on the approach of the Inter-American bodies. In particular, the post-CRC era resulted in a more substantive development of the content of Article 19 of the ACHR,<sup>74</sup> in light of the standards set out in the CRC and developed by the ComRC. The IACtHR has played a key role in this, stating in its first treatment of children's rights that '[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention'.<sup>75</sup> The Commission has played an important part in advancing the Court's jurisprudence in this area, through bringing cases to the IACtHR and requesting advisory opinions in terms of Articles 61 and 64(1) of the ACHR, respectively.

In defining childhood, the IACtHR has primarily relied on the wording of Article 1 of the CRC.<sup>76</sup> However, the IACtHR has been prepared in at least one case to recognise that, where the national age of majority is higher than 18, then a child under that age qualifies as a child for the purposes of Article 19, even if she is over 18.<sup>77</sup>

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<sup>71</sup> The IACHR's key functions are outlined in Article 41 ACHR.

<sup>72</sup> See, for example, IACHR, 'The Rights of Boys and Girls to a Family: Alternative Care. Ending Institutionalization in the Americas', 2013, available at: [www.oas.org/en/iachr/children/docs/pdf/Report-Right-to-family.pdf](http://www.oas.org/en/iachr/children/docs/pdf/Report-Right-to-family.pdf).

<sup>73</sup> See, for example, OAS, 'Press Release: IACHR expresses concern over the initiative to amend Brazil's constitution in order to lower the minimum age of criminal responsibility for adolescents', 23 March 2015, available at: [www.oas.org/en/iachr/media\\_center/PReleases/2015/036.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/036.asp).

<sup>74</sup> IACHR, 'The Rights of the Child in the Inter-American Human Rights System', supra n 55 at para 60.

<sup>75</sup> *Case of the 'Street Children' (Villagrán Morales et al.) v Guatemala* IACtHR Series C 63 (1999) at para 194.

<sup>76</sup> See, for example, OC-17/02, *Juridical Condition and Human Rights of the Child* IACtHR Series A 17 (2002) at para 42; and *Case of the 'Street Children' (Villagrán Morales et al.) v Guatemala*, ibid. at para 188. While the wording of Article 4 ACHR would appear to indicate that the unborn may have rights under that Convention ('[the right to life] shall be protected by law and, in general, from the moment of conception'), this will not be discussed in this chapter. Rather, our focus is on the born child. For more on the right to life of the unborn under the ACHR, see *Case of Artavia Murillo et al. ('In Vitro Fertilization') v Costa Rica* IACtHR Series C 257 (2012) at paras 163–264.

<sup>77</sup> *Case of the 'Juvenile Reeducation Institute' v Paraguay* IACtHR Series C 112 (2004).

The leading decision of the IACtHR on child rights – and indeed the most detailed statement of any institution within the Inter-American system in this area – is the advisory opinion on the *Juridical Condition of the Child*,<sup>78</sup> provided at the request of the IACHR. The request was motivated by a particular concern about the failures of OAS states in terms of ensuring children’s rights to a fair trial and to judicial protection under the Convention.<sup>79</sup> In addressing the CRC, the Court emphasised that it has been ratified by almost all OAS member states and that ‘the large number of ratifications shows a broad international consensus ... in favour of the principles and institutions set forth in that instrument’,<sup>80</sup> which reflects current development of the protection of children’s rights. In this decision, the Court dealt with a range of the general principles identified by the ComRC including non-discrimination and the best interests of the child, and child participation,<sup>81</sup> making it clear that these standards apply in the context of interpreting relevant provisions of the ACHR in relation to child rights. When considering the concerns raised by the Commission, the Court referred both to a number of UN soft law instruments on juvenile justice as well as the *travaux préparatoires* of the CRC.<sup>82</sup> Ultimately, with regard to the procedural rights of children in the context of judicial and administrative proceedings, the Court concluded that certain specific measures must be adopted for them to effectively enjoy these rights and guarantees.<sup>83</sup>

The IACtHR has made reference to the CRC in a range of different situations in which it has been called on to consider child rights. While its primary focus has been on fleshing out the special measures of protection owed to children under Article 19, it has also looked at the CRC in terms of other provisions of the ACHR, as evidenced by its decisions on the rights to name and nationality of child descendants of migrants,<sup>84</sup> the rights to life and personal integrity of children detained or wounded by police,<sup>85</sup> the right to life of children subject to extrajudicial killings by state agents,<sup>86</sup> the rights of detained children,<sup>87</sup> the rights of the child to life, protection of the family, a name, privacy and family life, and the right to

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<sup>78</sup> OC-17/02, *Juridical Condition and Human Rights of the Child*, supra n 75.

<sup>79</sup> Articles 8 and 25 ACHR, respectively.

<sup>80</sup> OC-17/02, *Juridical Condition and Human Rights of the Child*, supra n 75 at para 29.

<sup>81</sup> *Ibid.* at paras 43–55, 56–61 and 137(2); and at para 99, respectively.

<sup>82</sup> *Ibid.* at para 75.

<sup>83</sup> *Ibid.* at para 98.

<sup>84</sup> See, for example, *Case of the Girls Yean and Bosico v Dominican Republic* IACtHR Series C 156 (2006) at nn 111 and 190, respectively.

<sup>85</sup> See, for example, *Case of Barrios Family v Venezuela* IACtHR Series C 237 (2011) at para 85.

<sup>86</sup> See, for example, *Case of the Gómez Paquiyauri Brothers v Peru* IACtHR Series C 110 (2004) at para 124.

<sup>87</sup> For example, *Case of the ‘Juvenile Reeducation Institute’ v Paraguay*, supra n 76.

identity of children subject to forced disappearance.<sup>88</sup> Indeed, in this latter context, the CRC has been used as the basis for the identification of a right to identity under the ACHR.<sup>89</sup>

The CRC has also been cited by the IACtHR in highlighting the rights of children in internal armed conflicts,<sup>90</sup> while it and its Optional Protocol on the Involvement of Children in Armed Conflict have been cited by the Court in considering rights violations caused by forced recruitment, and subsequent mistreatment and death of children in active military service.<sup>91</sup>

Another area in which the Court has considered the role of the CRC in fleshing out rights under Article 19 and other provisions of the ACHR is that of indigenous children, in relation to whom states are required to take the particular measures of special protection as ‘indigenous children whose communities are affected by poverty find themselves in a situation of particular vulnerability’.<sup>92</sup> In dealing with the cultural rights of indigenous children, the Court has found that Article 30 of the CRC ‘establishes an additional and complementary obligation that gives content to Article 19 of the [ACHR], and that consists of the obligation to promote and protect the right of indigenous children to enjoy their own culture, their own religion, and their own language’.<sup>93</sup> Reflecting the growing scope of its work, more recently, the IACtHR has also addressed the rights of the children of lesbian parents, focusing in particular on the right of such children to freedom from discrimination, their best interests and their right ‘to be heard and have their views taken into consideration’ in custody decisions.<sup>94</sup> Again, the CRC was identified by the Court as a key factor for the purposes of the interpretation of the relevant ACHR provisions.

An important point of contrast between the CRC and the ACHR is that the CRC contains an extensive range of child-specific economic, social and cultural rights (ESCR). (The Declaration includes a number of ESCR that are not child-specific but that apply to children as rights-holders under that instrument).<sup>95</sup> The only reference to economic, social and cultural rights under the Convention is in Article 26, which provides that ‘the States Parties

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<sup>88</sup> See, for example, *Case of Contreras et al. v El Salvador* IACtHR Series C 232 (2011); and *Case of Gelman v Uruguay* IACtHR Series C 221 (2011).

<sup>89</sup> See, for example, para 136; *Case of Gelman v Uruguay*, *ibid.* at para 122; and *Case of Contreras et al. v El Salvador*, *ibid.* at para 112.

<sup>90</sup> *Case of the Mapiripán Massacre v Colombia* IACtHR Series C 134 (2005) at paras 153–156.

<sup>91</sup> See *Case of Vargas Areco v Paraguay* IACtHR Series C 155 (2006).

<sup>92</sup> *Case of Rosendo Cantú et al. v Mexico* IACtHR Series C 216 (2010) at para 201.

<sup>93</sup> *Case of the Xákmok Kásek Indigenous Community v Paraguay* IACtHR Series C 214 (2010) at para 261. For more, see *Case of Chitay Nech et al. v Guatemala* IACtHR Series C 212 (2010) at paras 164–170.

<sup>94</sup> *Case of Atala Riffo and Daughters v Chile* IACtHR Series C 239 (2012) at paras 151–152 and 196–200, respectively.

<sup>95</sup> Articles 11–16 American Declaration.

undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.’ This provision has not, however, received extensive attention from the IACtHR.<sup>96</sup>

That said, the IACtHR has acknowledged children’s entitlement to a wide range of economic, social and cultural rights through the adoption of a ‘canopy approach’ in terms of which it has subsumed free-standing economic, social and cultural rights into a broadly understood concept of the ‘right to life’ and, more specifically, the ‘right to harbor a project of life’.<sup>97</sup> For instance, in the ‘*Street Children*’ case, which centred on the abduction, torture and murder of street children by policemen, the Court emphasised that the right to life includes not only the right of every human being not to be deprived of her life arbitrarily, but also the right that she will not be prevented from having access to the conditions that guarantee a dignified existence.<sup>98</sup> Similarly, in another child rights case, the IACtHR emphasised that one of the obligations that the state must undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person.<sup>99</sup> The IACtHR has also made clear that the right to education ‘which contributes to the possibility of enjoying a dignified life and to prevent unfavourable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognised for them in Article 19 of the American Convention’<sup>100</sup> – a prioritisation that it regarded as consistent with the approach of the ComRC.<sup>101</sup>

In addition, although the IACtHR cannot directly consider violations of the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights that are not based on trade union rights or the right to education,<sup>102</sup> the Court has repeatedly turned to that instrument and the CRC in order to determine the content and

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<sup>96</sup> Two notable (non-child-specific) exceptions to the IACtHR’s general failure to engage with Article 26 are *Case of the ‘Five pensioners’ v Peru* IACtHR Series C 98 (2003); and *Case of Acevedo Buendía et al. (‘Discharged and Retired Employees of the Office of the Comptroller’) v Peru* IACtHR Series C 198 (2009).

<sup>97</sup> Melish, ‘The Inter-American Court of Human Rights: Beyond Progressivity’, in Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008) 372 at 388.

<sup>98</sup> *Case of the ‘Street Children’ (Villagrán Morales et al.) v Guatemala*, supra n 74 at para 144.

<sup>99</sup> See, for example, *Case of the ‘Juvenile Reeducation Institute’ v Paraguay*, supra n 76 at para 159.

<sup>100</sup> OC-17/02, *Juridical Condition and Human Rights of the Child*, supra n 75 at para 84.

<sup>101</sup> *Ibid.* at para 88.

<sup>102</sup> Article 19(c) San Salvador Protocol.

scope of Article 19 of the ACHR in the context of economic, social and cultural rights. With regard to the protection of the socio-economic rights of the child, the Court has declared that the San Salvador provisions

allow us to define the scope of the ‘measures of protection’ referred to in Article 19 of the American Convention, from different angles. Among them, we should emphasise those that refer to non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living and the social rehabilitation of all children who are abandoned and exploited.<sup>103</sup>

In its decision in the case of the *‘Juvenile Reeducation Institute’ v Paraguay*, which focused on the conditions experienced by children in a detention centre, the Court reiterated the linkage between the right to life and other civil rights and the rights to health and education. In particular, it ruled that the obligation to provide children deprived of their liberty with special periodic health care and education programmes flows from a proper interpretation of Article 4 of the Convention, in combination with the pertinent provisions of the CRC and Article 13 of the San Salvador Protocol.<sup>104</sup>

Although the ACHR and the American Declaration make relatively limited reference to children’s rights, the key institutions of the Inter-American system – the Commission, the Rapporteur and the Court – have used the CRC and the work of the ComRC to outline a detailed child rights protection schema in the context of the specific challenges faced by children in the Americas region. This deliberate reliance on and use of the CRC to establish the parameters of regional child rights protection in the Americas, as well as to fill gaps in the founding instruments of the Inter-American system, has resulted in a very high level of harmonisation between the CRC and Inter-American regimes overall.

#### **4. The Council of Europe Regional Human Rights System**

The Council of Europe has adopted many instruments on children’s rights over the years including instruments that preceded the CRC, like the European Convention on the Adoption of Children, adopted in 1967, and the European Convention on the Legal Status of Children Born out of Wedlock, adopted in 1975. Newer instruments that post-date the CRC include the Convention on Contact concerning Children from 2003, the European Convention on the

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<sup>103</sup> *Case of the ‘Street Children’ (Villagrán Morales et al.) v Guatemala*, supra n 74 at para 196.

<sup>104</sup> *Case of the ‘Juvenile Reeducation Institute’ v Paraguay*, supra n 76 at para 172.

Exercise of Children's Rights from 1996 and the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. More recently, a series of unique instruments on matters concerning juvenile justice, child-friendly justice, healthcare and social services have been adopted by the Council of Europe Committee of Ministers<sup>105</sup> as part of its strategy to advance children's rights.<sup>106</sup> The Parliamentary Assembly has also actively considered children's rights issues, adopting resolutions and recommendations on important challenges for children's rights such as immigration, violence and children without family care.<sup>107</sup> With this activity, the Council of Europe has made a unique and increasingly important contribution to standard setting in the area of children's rights regionally.

At the same time, the Council of Europe's most important human rights treaties remain the European Convention on Human Rights (ECHR) adopted in 1953, the European Social Charter (ESC) adopted in 1961 and the Revised European Social Charter (RESC or 'Revised Charter') adopted in 1996. Although the ECHR contains general human rights protections, grounded in civil and political rights, with few references to children, the case law has revealed the clear potential of its provisions to advance children's rights. The ESC, by contrast, recognises a range of economic, social and cultural rights, including some explicit references to children and their families. Moreover, the Revised Charter, adopted after the CRC came into force, strengthened the Charter's protections while also expanding its protection of children's rights.<sup>108</sup> The rest of this section will focus on the work of the key enforcement bodies in relation to those instruments, the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR).

### **A. European Convention on Human Rights**

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<sup>105</sup> See, for example, Recommendation of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, CM/Rec(2008)11, 5 November 2008; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly health care, 21 September 2011; Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 17 November 2010; and Recommendation of the Committee of Ministers to member states on children's rights and social services friendly to children and families, CM/Rec(2011)12, 16 November 2011.

<sup>106</sup> For the most recent strategy, see Council of Europe Strategy for the Rights of the Child 2012–2015, at 6, available at: [www.coe.int/t/dg3/children/StrategySept2012\\_en.pdf](http://www.coe.int/t/dg3/children/StrategySept2012_en.pdf).

<sup>107</sup> See, for example, PACE Recommendation 1666 (2004), Europe-wide ban on corporal punishment of children, 23 June 2004; PACE Resolution 1762 (2010), Children without parental care: Urgent need for action, 7 October 2010; and PACE Resolution 1247 (2001), Female genital mutilation, 22 May 2001.

<sup>108</sup> As the Revised Charter has a separate ratification process, it does not automatically supersede the 1961 Charter and binds only those countries that have ratified it. As states parties ratified the Revised Charter, their obligations under that instrument supplant those under the original Charter. For this reason, reference will continue to be made both to the European Social Charter and the Revised European Social Charter below. Where reference is made to provision that is contained only in one or other instrument, that will be made clear.

Although the ECHR contains few references to children's rights, many ECHR provisions are relevant and offer protection to the rights of children. Indeed, the true promise of the ECHR in terms of children's rights is really only discernible from the case law of the ECtHR.<sup>109</sup> Although few cases have been taken directly by children, the case law concerning children's rights is now extensive and encompasses children's protection from harm under Article 3, their right to fair trial under Article 6, their right to liberty under Article 5 and a host of procedural and positive duties to respect family life and private life interests under Article 8.<sup>110</sup>

Despite the merits of its case law on children's issues, the ECtHR has rarely relied directly on the CRC in its judgments.<sup>111</sup> One interesting reference to the CRC was made in a child abduction case – *Bajrami v Albania* – where the ECtHR took account of the fact that Albania had 'not yet implemented' the CRC in finding that efforts to discharge the state's obligations under Article 8 were inadequate.<sup>112</sup> More generally, however, children's rights principles have had an indirect influence on the reasoning of the Court. One such area of the Court's case law – where the Court drew on the text of the ECHR provision (Article 6) but appears to have been inspired by Articles 12 and 40 of the CRC – is in relation to the treatment of children in conflict with the law. Here, the ECtHR developed the principle of 'effective participation'<sup>113</sup> and although it did not rely directly on Article 12 of the CRC in this context, it is hard to imagine the concept developing in isolation from the CRC principle.

Procedural obligations developed under Article 8 of the ECHR have been found to include a duty to ensure that parents are involved in decisions made about their children.<sup>114</sup>

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<sup>109</sup> See Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23(2) *Human Rights Quarterly* 308.

<sup>110</sup> See, for example, *Olsson v Sweden (No 2)* Application No 13441/87, Merits and Just Satisfaction, 27 November 1992; *Z and Others v United Kingdom* Application No 29392/95, Merits and Just Satisfaction, 10 May 2001; *DG v Ireland* Application No 39474/98, Merits and Just Satisfaction, 16 May 2002; *Hokkanen v Finland* Application No 19823/92, Merits and Just Satisfaction, 23 September 1994; and *Ignaccolo-Zenide v Romania* Application No 31679/96, Merits and Just Satisfaction, 25 January 2000.

<sup>111</sup> References to the CRC are mainly confined to the preliminary part of its judgments where it sets out the instruments relevant to the substantive issue. See further Kilkelly, 'The CRC in Litigation under the ECHR', in Liefwaard and Doek (eds), *Litigating the Rights of the Child* (Springer, 2014) 193.

<sup>112</sup> *Bajrami v Albania* Application No 35853/04, Merits and Just Satisfaction, 12 December 2006, at paras 35–38.

<sup>113</sup> *T. v United Kingdom* Application No 24724/94, Merits and Just Satisfaction, 16 December 1999; *V. v United Kingdom* Application No 24888/94, Merits and Just Satisfaction, 16 December 1999; *S.C. v United Kingdom* Application No 60958/00, Merits and Just Satisfaction, 15 June 2004.

<sup>114</sup> See, for example, *McMichael v United Kingdom* Application No 16424/90, Merits and Just Satisfaction, 24 February 1995.



To date, however, no equivalent obligation to ensure the participation of the child in such decisions has emerged in the case law. Although the ECtHR has considered the child's participation in private family law decisions, it has not considered this a right of the child, preferring instead to leave the matter to the discretion of national courts.<sup>115</sup> In this way, the ECHR standard falls short of the requirement in Article 12 of the CRC.

In other areas too, case law can be said to reflect principles and provisions of the CRC at least indirectly. For example, in the case of *Mikulić v Croatia*<sup>116</sup> the ECtHR upheld the right of the child applicant to identity as part of respect for her private life. In particular, it held that the failure to put in place an effective mechanism whereby the paternity of the child could be definitively determined breached her rights under Article 8. This builds on previous case law which has emphasised the importance to children of identity,<sup>117</sup> the legal recognition of relationships between children and their parents<sup>118</sup> and the quest for legal certainty in respect of those relationships.<sup>119</sup> This case law coheres with the duty to respect the child's right to identity set out in Articles 7 and 8 of the CRC and indeed goes beyond the CRC provision by requiring a mechanism at national level to give proper effect and respect to this right.

The Court's contribution to child protection is also significant and has invariably either drawn on or been directly influenced by Article 19 of the CRC. In that context, the ECtHR has developed a general human rights provision in Article 3 of the ECHR (prohibition of torture and inhuman or degrading treatment or punishment) into a duty to take steps to protect children from the risk of ill-treatment. This began with *Tyrer v United Kingdom*,<sup>120</sup> which established the relevance to children of Article 3's protection in a case about judicial punishment, and continued with *A. v United Kingdom*<sup>121</sup> and *Z and Others v United Kingdom*,<sup>122</sup> concerning the duty on the state to take steps to protect children from harm, including in the family. Most recently, in *O'Keeffe v Ireland*<sup>123</sup> the ECtHR made explicit that there is a positive duty on the state to take steps to protect children in schools from the risk of ill-treatment which should or could have been foreseen. Through this important series of

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<sup>115</sup> See, for example, *Sahin v Germany* Application No 30943/96, Merits and Just Satisfaction, 8 July 2003, at para 77.

<sup>116</sup> Application No 53176/99, Merits and Just Satisfaction, 7 February 2002.

<sup>117</sup> *Gaskin v United Kingdom* Application No 10454/83, Merits and Just Satisfaction, 7 July 1989.

<sup>118</sup> See *Johnston and Others v Ireland* Application No 9697/82, Merits and Just Satisfaction, 18 December 1986.

<sup>119</sup> *Kroon and Others v The Netherlands* Application No 18535/91, Merits and Just Satisfaction, 27 October 1994.

<sup>120</sup> Application No 5856/72, Merits, 25 April 1978.

<sup>121</sup> Application No 25599/94, Merits and Just Satisfaction, 23 September 1998.

<sup>122</sup> Application No 29392/95, Merits and Just Satisfaction, 10 May 2001.

<sup>123</sup> Application No 35810/09, Merits and Just Satisfaction, 28 January 2014.

cases, therefore, the ECtHR case law has not only breathed life into Article 3 of the ECHR, indirectly it has given effect to Article 19(2) of the CRC, which sets out the state's responsibility to take effective protective measures with regard to violence against children, including the prevention, reporting and investigation of child maltreatment.

On occasion, the ECtHR has relied on the CRC more explicitly. In *Maslov v Austria*,<sup>124</sup> for example, the ECtHR drew on the CRC in a case concerning the deportation of the applicant who had been convicted of a number of criminal offences as a child. Here, the Court held that where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate the child's reintegration, in line with Article 40 of the CRC. In the Court's view, reintegration would not be achieved by severing the child's family or social ties through expulsion and in this way, the CRC was one of the grounds used to find that the expulsion was a disproportionate interference with the applicant's rights under Article 8.

Although ECHR case law about children's rights is now vast, this presentation provides a representative sample of the areas where the CRC's influence is most apparent. It shows that there is at times a clear coherence between the case law of the ECHR and the CRC. This appears to occur more by accident than design although cause and effect is hard to establish. At the same time, it is equally difficult to envisage that the jurisprudence of the ECtHR would have developed in the way it has without the widely accepted, international legal standards of the CRC as a backdrop and indeed a binding treaty on all parties to the ECHR.

## ***B. European Social Charter***

The 1961 ESC sets out protections on economic and social rights and contains general provisions of particular relevance to children including those recognising the right of all workers and their dependents to social security,<sup>125</sup> social welfare services<sup>126</sup> and social and medical assistance.<sup>127</sup> More specific to children are Articles 7 and 17. Article 7 extends a right to special protection from economic exploitation to children and young persons and in doing so compares favourably with Article 32 of the CRC, which recognises the right of the child to be protected from work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or development.

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<sup>124</sup> Application No 1638/03, Merits and Just Satisfaction, 23 June 2008.

<sup>125</sup> Article 12 ESC.

<sup>126</sup> Article 14 ESC.

<sup>127</sup> Article 13 ESC.

The concern with the education and vocational training of children and young persons, reflected in Articles 28 and 32(1) of the CRC is also present in the Social Charter, Article 7(3) of which provides that those of compulsory school age should not be deprived of the full benefit of their education by virtue of their work. Articles 9 and 10 set out rights to vocational training and guidance, respectively, with the former providing that assistance should be available free of charge to young people, including schoolchildren. The latter requires states parties to provide or promote systems of apprenticeship and other types of training for young boys and girls.

Under the ESC, Article 17 recognises the right of mothers and children to appropriate social and economic protection ‘irrespective of marital status and family relations’. Consistent with the CRC and other regional systems, it recognises the family as a fundamental unit of society and outlines the family’s rights to social, legal and economic protection, including social and family benefits and housing.<sup>128</sup>

Article 19 sets out the right to protection and assistance of migrant workers and their families,<sup>129</sup> and the obligation it imposes to facilitate family reunion of migrant workers mirrors the protection in Article 10 of the CRC, which provides more detailed protections for such children.

The ESC was revised in 1996 and under the RESC, the rights afforded to children were expanded, including through the addition of 12 new provisions extending general protections (for example, the right to housing under Article 31) which are of particular importance for children. The two articles which refer most explicitly to children under the 1961 ESC, Articles 7 and 17, were revised in a number of ways. The ‘direct’ inspiration of the CRC has been explicitly acknowledged by the European Committee of Social Rights in the revision of Article 17.<sup>130</sup> Whereas the ESC recognised the right of mothers and children to social and economic protection, the RESC has been re-conceptualised so that Article 17 now recognises the right of children and young persons to appropriate social, legal and economic protection. A reference to Article 1 of the CRC, defining the age of a child, is contained in the RESC Appendix.

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<sup>128</sup> See also Article 4(1) ESC. These provisions reflect the right to social security and maintenance under Article 26 CRC and to an adequate standard of living under Article 27 CRC.

<sup>129</sup> The Appendix to ESC stipulates that the ‘family’ should be understood to mean at a minimum the migrant’s spouse and dependent children under the age of 21.

<sup>130</sup> ECSR, *International Federation of Human Rights Leagues (FIDH) v France* (14/2003) Merits, 8 September 2004, at para 36.

Article 17 of the RESC recognises the right of children to grow up in an environment which encourages the full development of their personality and capacities, and requires states parties to ensure that children have ‘the care, the assistance, the education and the training they need’, with regard to the rights of their parents.<sup>131</sup> Article 17(1)(b) outlines the need for states parties to protect children from violence, negligence and exploitation, and Article 17(1)(c) requires that special aid and protection be provided for young people deprived of family support.

Although many parts of Article 7 were unchanged in the Revised Charter, protections concerning children’s participation in dangerous or unhealthy work were strengthened. Article 27 of the Charter has been expanded by recognising the right of workers with family responsibilities to equal opportunities and equal treatment. Article 30, which provides a right to protection against poverty and social exclusion, requires states to promote the effective access of people in, or at risk of, social exclusion or poverty and their families to ‘employment, housing, training, education, culture and social and medical assistance’. These provisions contain important protections for children and in some respects go beyond the equivalent provisions (most notably, Articles 26 and 27) in the CRC, which address neither poverty nor social exclusion directly.<sup>132</sup>

Article 19 of the ESC concerning the rights of migrant workers and their families was also expanded and revised in the Revised Charter,<sup>133</sup> including the recognition of the linguistic rights of the families of migrant workers. This provision now goes beyond Article 30 of the CRC, which recognises in a most minimal way the right of a child belonging to a minority not to be denied the right to enjoy her own culture or to use his or her own language.

Most of the collective complaints involving children’s rights brought to the ECSR, the independent expert committee which considers state reports and collective complaints vis-à-vis the ESC and the RESC, have invoked either Article 7 (economic exploitation of children) or Article 17 (protection of children from violence and exploitation). Complaints have also

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<sup>131</sup> Article 17(1)(a) RESC.

<sup>132</sup> For more on these CRC provisions, see the relevant chapters in Tobin and Alston (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (OUP, forthcoming).

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<sup>133</sup> Under Article 19(6), providing for the possibility of family reunification for workers lawfully in the territory, the ‘family’ was redefined in the RESC Appendix as meaning at least the worker’s spouse and unmarried children, as long as the latter are still considered to be minors by the receiving state and are dependent on the migrant worker.

concerned the rights of children deprived of family care under Article 17 of the RESC, as well as the right to free primary and secondary education of children with disabilities under Article 15 of the RESC.<sup>134</sup>

The CRC has been relied upon by those complaining to the ECSR and the Committee itself has made it clear that it is justified in having regard to the CRC on the basis that that instrument has been ratified by all member states of the Council of Europe.<sup>135</sup> In particular, in *Defence for Children International (DCI) v Belgium*, the ECSR stated that it may have regard to the CRC when it rules on ‘an alleged violation of any right conferred on children by the Charter adopting the interpretation given to [the CRC] by the United Nations Committee on the Rights of the Child’.<sup>136</sup> More specifically, the ECSR has noted that following the guidance of the ComRC, the personal scope of the Charter (as to whether child migrants unlawfully present in a state party fall within the scope of Article 17 of the Revised Charter) must be determined according to the principle of the child’s best interests, as articulated in General Comment No 5 of the ComRC.<sup>137</sup> This practice of explicitly having regard to the CRC’s best interests principle has been evident in other decisions also.<sup>138</sup>

A more subtle example of the influence of the CRC is found in one of the first complaints brought to the Committee against Portugal concerning its practices regarding child labour. The complaint concerned Article 7(1) of the ESC, which sets 15 years as the minimum age for admission to employment. In the complaint of *International Commission of Jurists (ICJ) v Portugal*,<sup>139</sup> the ECSR recalled that the aim and purpose of the Charter was to protect rights not merely theoretically but also in practice; therefore child labour legislation must not only exist, it must be effectively applied and rigorously supervised. On the evidence, a large number of children were employed illegally in Portugal resulting in a violation of Article 7(1) of the Charter.

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<sup>134</sup> For a useful overview of many of the children’s rights collective complaints addressed by the ECSR, see Council of Europe, ‘Children’s Rights under the European Social Charter’, available at: [www.coe.int/t/dghl/monitoring/socialcharter/Theme%20factsheets/FactsheetChildren\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Theme%20factsheets/FactsheetChildren_en.pdf).

<sup>135</sup> ECSR, *Defence for Children International (DCI) v Belgium* (69/2011) Merits, 23 October 2012, at para 31.

<sup>136</sup> *Ibid.* See also ECSR, *World Organisation against Torture v Ireland* (18/2003) Merits, 7 December 2004, at para 61.

<sup>137</sup> ComRC, General Comment No 5: General measures on the implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, at paras 45–47, cited in *DCI v Belgium*, supra n 134 at para 32.

<sup>138</sup> See, for example, ECSR, *Defence for Children International (DCI) v The Netherlands* (47/2008) Merits, 4 February 2008, at para 29.

<sup>139</sup> (1/1998) Merits, 9 September 1999.

Article 7(10) (identical in both the ESC and the RESC) also addresses other forms of exploitation and the ECSR has expressed concern to states during the reporting process about the ineffectiveness of their protections in this area, in particular requiring that all aspects of child prostitution, child pornography and trafficking of children are criminalised. As such it has considered civil and political rights, not just economic and social ones. For instance, Poland and the Czech Republic were criticised for not being in conformity with this provision on the basis that young people between the ages of 15 and 18 were not adequately protected against sexual exploitation.<sup>140</sup> Likewise, the ECSR has criticised Slovenia for its lack of legislation prohibiting the possession of child pornography and criminalising the trafficking of children for the purposes of sexual exploitation.<sup>141</sup> Although there was no cross-reference to the CRC rights by the ECSR in these instances, the connection with Articles 19 and 34 and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography is clear.

The ECSR has stated that in order to comply with Article 17 of the Charter, states' domestic law must prohibit and penalise all forms of violence against children, including acts or behaviour likely to affect the child's physical integrity or well-being.<sup>142</sup> The ECSR has consistently criticised states for failing to prohibit the corporal punishment of children<sup>143</sup> and although it does not reference the CRC systematically in these Conclusions, the position reached by the ECSR is reflective of the position adopted by the ComRC against the corporal punishment of children.<sup>144</sup> Moreover, the ECSR found against four countries – Belgium, Greece, Ireland and Portugal – in a complaint taken by World Organisation against Torture invoking the Article 17 duty to protect children from violence.<sup>145</sup> Here, the ECSR found a violation on the grounds that the corporal punishment of children was not effectively prohibited in all circumstances. A follow-up complaint reinforced this conclusion in 2013.<sup>146</sup>

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<sup>140</sup> See ECSR, Conclusions concerning Poland, XVII-2 (2005); and Conclusions concerning Czech Republic, XVII-2 (2005).

<sup>141</sup> ECSR, Conclusions concerning Slovenia (2002).

<sup>142</sup> ECSR, Conclusions concerning France (2003); and Conclusions concerning Romania (2003).

<sup>143</sup> To date Belgium, the Czech Republic, Estonia, France, Greece, Hungary, Ireland, Lithuania, Malta, Moldova, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey and the United Kingdom have been held not to comply with the Charter as the corporal punishment of children is not effectively prohibited (Conclusions 2005, Conclusions XVII-2).

<sup>144</sup> For more on the ComRC's position on this, see its General Comment No 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), CRC/C/GC/8.

<sup>145</sup> *World Organisation Against Torture (OMCT) v Greece* (17/2003) Merits, 26 January 2005; *OMCT v Ireland* (18/2003) Merits, 7 December 2004; *OMCT v Belgium* (21/2003) Merits, 26 January 2005; and *OMCT v Portugal* (34/2006) Merits, 7 December 2004.

<sup>146</sup> See for example *Association for the Protection of All Children (REACH) v Ireland* (93/2013) which found that Ireland was in violation of Article 17 ESC and Article 7(1) ESC and RESC.

The duty in Article 17(2) of the RESC to provide children with free primary and secondary education and to promote regular school attendance has been invoked in the collective complaints process, where the substance of the concerns reflects those raised by Article 28 of the CRC.<sup>147</sup> According to the ECSR, where there is a significant number of children failing to successfully complete compulsory education, measures must be taken to improve the situation.<sup>148</sup> Equal access to education for especially vulnerable children has also been the concern of the ECSR, which has asserted with respect to the terms of the RESC that special measures for Roma children cannot involve the establishment of separate or segregated schooling facilities.<sup>149</sup> The particular situation faced by migrant children has also been addressed, leading the ECSR to assert the crucial nature of access to education for all children, whatever their residency status. As a consequence, in *DCI v The Netherlands*,<sup>150</sup> the ECSR held that states must ensure that children unlawfully present in their territory have effective access to education. The ECSR has also considered the entitlement of foreign nationals to other Charter rights. In 2012, it found in *DCI v Belgium*<sup>151</sup> that foreign minors unlawfully present or seeking asylum in Belgium were denied their rights under the RESC to full social, health, legal and economic protection. Similarly, in a case against France, the ECSR found that health care must be available to all children without discrimination, including children of illegal or undocumented migrants.<sup>152</sup> In all of these decisions, the ECSR made explicit references to the CRC.

The RESC has also been invoked with respect to the right of children with disabilities to access education.<sup>153</sup> In a collective complaint brought by Autism Europe against France, it was alleged that there was, inter alia, insufficient education for children with autism in the mainstream and special schools. The ECSR found a violation of Articles 15(1) and 17(1) of the Revised Charter on the grounds that France had failed to achieve sufficient progress in advancing the provision of education for children with autism.<sup>154</sup>

It is clear from the above review that the ESC and the RESC are being used to advance children's rights at a regional level in Europe. Indeed, the ECSR has stated that its

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<sup>147</sup> For instance, Article 28(1) CRC requires states to make primary education compulsory and free for all, whereas Article 28(1)(e) requires measures to 'encourage regular attendance at schools and the reduction of drop-out rates'.

<sup>148</sup> See, for example, ECSR, Conclusions concerning Moldova (2005); and Conclusions concerning Romania (2003).

<sup>149</sup> See, for example, ECSR, Conclusions concerning Slovenia (2005).

<sup>150</sup> Supra n 137.

<sup>151</sup> Supra n 134.

<sup>152</sup> *FIDH v France*, supra n 129.

<sup>153</sup> *International Association Autism-Europe (13/2002)v France*, Merits, 4 November 2003.

<sup>154</sup> *Ibid* paras 47-54.

comprehensive approach, coupled with the effective nature of the rights it embodies, renders the ESC ‘the most significant treaty at the European level for children’s human rights’.<sup>155</sup> The ECSR has made it clear that the CRC is a powerful influence, given its widely ratified world status and its universal ratification in Europe. Taking the Council of Europe system as a whole, it is apparent that the relatively modest references to children’s rights in the respective texts of the ECHR and the ESC/RESC have not limited their scope to protect children’s rights. This is largely due to the interpretive approaches of their respective treaty bodies, which have seen the instruments’ relevance to children’s rights expanded. While the ECSR has been explicit in its acceptance of the CRC as an interpretive tool, the ECtHR has been more subtle in being guided by the CRC’s principles and provisions. In both cases, however, the impact of the CRC as a widely ratified international instrument, especially one ratified by all members of the Council of Europe, looms large.

## 5. Conclusion

It is clear that the CRC has played a key and growing role in terms of shaping regional protection of children’s rights. Nor is this cross-fertilisation exclusively one-way. There have been a number of instances in which regional systems’ approaches towards human rights have clearly impacted on (or at least been registered by) the international. This is evidenced by the ComRC’s reference to the work of the ECtHR on ‘effective participation’ in the context of the implementation of Article 12 of the CRC in criminal proceedings.<sup>156</sup> Similarly, the ComRC has cited the work of the European and Inter-American Courts when fleshing out ‘prevention measures’ in its General Comment No 13 on the right of the child to freedom from all forms of violence.<sup>157</sup> There thus appears to be scope for future ‘regional standard-driven’ harmonisation of children’s rights.

Reliance upon and reference to the CRC has not resulted in perfect harmonisation of protection of children’s rights across the different regional bodies. Indeed, this would seem impossible and undesirable given the clear differences between the child rights (and other) standards under the various systems. Nor have any of the regional systems unwaveringly followed the approach of the CRC – a fact that is again attributable to the divergences between the standards enshrined in the CRC and the regional instruments. Moreover, just as each regional human rights system’s protection of children’s rights reflects a particular cultural, historical and political context, so too does the CRC. However, as stated in the

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<sup>155</sup> *DCI v The Netherlands*, supra n 136 at para 29.

<sup>156</sup> ComRC, General Comment No 12 (2009): The right of the child to be heard, CRC/C/GC/12, at para 60.

<sup>157</sup> CRC/C/GC/13.



introduction and demonstrated through this chapter, the CRC has undoubtedly served as a unifying element to the different regional systems' approaches to child rights. As we look forward, it seems inevitable that, whether by strategy or otherwise, the CRC will have an increasing impact on the African, Inter-American and Council of Europe regional human rights systems' evolving approaches to child rights protection.