

# Address: Creating New Futures for All Children: The Promise of International Human Rights Law

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## Abstract

This address focuses on the intersection of a series of difficult issues in the area of human rights: childhood, youth, disability, and situations of forced migration. A brief historical background to the efforts made by the international community in setting norms and standards to create a new future for all children. Two very important international instruments, the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities* are discussed. References are made to UN Committee on the Rights of the Child's outcome recommendations regarding children and their rights in the context of migration. The address concludes with an introduction to the newly adopted *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*.

## I Introduction

The focus of this short address is the intersection of a series of difficult issues in the area of human rights: childhood, youth, disability, and situations of forced migration. It is my task to reflect on efforts made in international law to promote and protect the rights of children — more specifically, children with disabilities — under the most trying of circumstances. If children are already vulnerable in situations of displacement and civil disorder, the challenges are magnified greatly for children and young persons with disabilities. The efforts of the international community were born out of the importance of and international commitment to creating new futures for *all* children. I start by providing a brief historical background to the international efforts in setting norms and standards for the promotion and protection of children and their rights. I will then consider two very important international human rights instruments that are devoted to children with disabilities: the *Convention on the Rights of the Child*<sup>1</sup> and the *Convention on the Rights of Persons with Disabilities*.<sup>2</sup> I will examine the reality of life for children with disabilities across our world and introduce the work of the Committee on the Rights of the Child, focusing on

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\* Professor, Sungkyunkwan University and Chairperson of the UN Committee on the Rights of the Child, 2007–11. This article is a modified version of the opening address to the 'Creating New Futures for All: Children, Youth, Disability and Situations of Forced Migration' conference at Sydney Law School, 29 November 2012. It was further modified for publication. The author wishes to thank Professor Mary Crock for organising the Creating New Futures Conference. Professor Crock's history of dedication to the topic of children in difficult circumstances, most notably in asylum-seeking and refugee circumstances, is highly appreciated by all.

<sup>1</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

<sup>2</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, (2007) 46 ILM 443 (entered into force 3 May 2008). The texts of both instruments are available online: <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>>.

General Comments and Days of General Discussion, particularly the 2012 Day of General Discussion. I will conclude by giving a brief introduction of the final link to the full realisation of rights of all children: the third Optional Protocol to the Convention on the Rights of the Child (CRC),<sup>3</sup> which is a new communications procedure for dealing with complaints about alleged violations of the CRC and its two Optional Protocols by states parties.

## II Background to and Overview of the CRC and CRPD

The past few decades have witnessed major developments in the international law of human rights. Rather than treating the subjects of human rights treaties as persons in need of charity, the recent human rights treaties recognise their subjects as holders of inherent, inalienable and universal rights. This happened earlier for children than for persons with disabilities. Since the adoption of the *Declaration on the Rights of the Child* in 1959,<sup>4</sup> the international community has recognised that children are autonomous, rights-bearing human beings.

It is appropriate to recognise two important people who laid the foundation for a paradigm shift in how we think about children. They took us from viewing children as objects of charity and welfare, in need of harsh disciplining, to subjects and holders of rights. In as early as 1923, Eglantyne Jebb introduced the *Declaration on the Rights of the Child* into the League of Nations, and this served as the backbone to the 1959 UN Declaration.<sup>5</sup> The second key figure was Janusz Korczak, a Polish writer and physician, famous for his work with Jewish children orphaned during the conflicts of World War II. It was he who fought so strongly for adults to see children as autonomous persons, with their own needs and rights. He emphasised that the opinions of children must be respected and taken into consideration.<sup>6</sup> It is significant that both of these individuals worked with children in situations of forced migration. It was the experiences of displacement in World Wars I and II that led Jebb and Korczak respectively to rethink the place and rights of children in our society.

The beginnings of the legal journey to recognise children as holders of inherent rights, with dignity, and with their own needs and interests, came in early 1978, when a proposal was tabled by the Polish Government at the 34<sup>th</sup> Session of the UN Commission on Human Rights (since replaced by the Human Rights Council)<sup>7</sup>. Ten years in the making, a human rights treaty for children emerged, pursuant to General Assembly Resolution 44/25, in 20 November 1989.<sup>8</sup> In record speed, this new and comprehensive treaty,

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<sup>3</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, opened for signature 19 December 2011, GA Dec 66/138, UN GAOR, 66th sess, Agenda item 64, UN Doc A/RES/66/138 (19 December 2011) (not yet in force).

<sup>4</sup> *Declaration on the Rights of the Child*, GA Res 1386 (XIV), 10 December 1959, 14 UN GAOR Supp (No 16) 19, UN Doc A/4354 (20 November 1959).

<sup>5</sup> *Geneva Declaration of the Rights of the Child*, League of Nations, 5th Assembly, adopted 26 September 1924; Clare Mulley, *The Woman Who Saved the Children* (Oneworld Publications, 2009).

<sup>6</sup> Philip E Veerman, 'Janusz Korczak and the Rights of the Child' in Michael DA Freeman (ed), *Children's Rights* (Ashgate, 2004) vol 1, 3.

<sup>7</sup> Established by General Assembly Resolution: GA Res 60/251, UN GAOR 60th sess, 72nd mtg, UN Doc A/RES/60/251 (15 March 2006).

<sup>8</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

containing 42 substantive provisions for the guarantee and protection of the economic, social, cultural, civil and political rights of children, entered into force on 2 September 1990, in accordance with art 49 of the CRC. It enjoys near universal ratification: 193 states have committed to full compliance with the Convention.<sup>9</sup> The CRC has been supplemented by two optional protocols. The *Optional Protocol on the Involvement of Children in Armed Conflict*<sup>10</sup> legally raised the age of recruitment of children in armed conflict from 15 years to 18 years. As at October 2013, it enjoys 152 ratifications. The *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*<sup>11</sup> added further protection for children. As at October 2013, this protocol enjoys 165 ratifications. Both protocols were adopted in 2000 and entered into force in 2002. These two optional protocols significantly strengthened protection from the worst forms of violations of the human rights of children.

The CRC is the only human rights instrument with almost universal ratification. All but two countries globally (still with the exception of Somalia and the US) have committed to promote, protect, and uphold children's rights. The Convention is best understood as the culmination of the recognition of different legal systems and cultural traditions, underpinned by universally agreed upon norms and standards which are not negotiable. It is founded upon the universal agreement that we must respect the dignity and worth of each and every individual child, regardless of race, color, gender, language, religion, ability, social or ethnic origin.

Four general principles have been identified as running across the CRC. They are non-discrimination (art 2); best interests of the child (art 3); life, survival and development (art 6); and respect for the views of the child (art 12). All these rights are indivisible and interdependent, providing for a holistic approach and avoiding a hierarchy of rights. The CRC made a very significant departure from most other human rights instruments, declarations and strategies with respect to children. It established the view that children — both girls and boys — from ages 0 to 18 years, are not simply the property of their parents, caregivers or the state, but citizens, rights-holders and social agents with the right to participate and be heard in the shaping of their own development and destiny, according to their age and level of maturity. Children are in constant change and are considered in accordance with their 'evolving capacities' (art 5).

Until 2006, when the CRPD was adopted, the CRC was the only international human rights instrument which gave legal effect to the promotion and protection of the rights of children with disabilities. Articles 2 and 23 of the CRC address the rights of children with disabilities. Article 2 establishes that disability should not be grounds for discrimination and recognises disability as a 'human rights' issue. In addition, art 23 explicitly addresses children with disabilities.

Just five years after Mexico proposed that the UN consider opening negotiations for a convention devoted to the rights of persons with disabilities, the text was finalised on 26 August 2006. I was present during the last Working Group to lobby for inclusion and mainstreaming children. Our work was assisted by the concerted efforts of NGOs (it must

<sup>9</sup> See the current list of the status of ratification, reservations and declarations, available at United Nations Treaty Collection: <<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>> .

<sup>10</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 25 May 2000, 2173 UNTS 222; GA Res A/RES/54/263.

<sup>11</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227; GA Res A/RES/54/263

be noted that Gerison Lansdown was instrumental during this process) and the Committee on the Rights of the Child.<sup>12</sup> That group was quite successful in ‘mainstreaming’ children’s issues throughout the text of the CRPD. The CRPD contains a provision which specifically addresses children with disabilities, but also adopts many of the principles from the entirety of the CRC. The following table depicts the very close relationship between the CRC and the CRPD. It sets out the many rights and principles common to both treaties and their specific location in each.

**Table 1: Relationship between the CRD and CRPD**

| Relevant Article   | CRC      | CRPD        |
|--|----------|-------------|
| Definition   | 1        | 1           |
| Non-discrimination   | 2        | 2,3,4,5,6,8 |
| Best interest  | 3        | 7, 16       |
| Implementation   | 4        | 4           |
| Evolving capacities  | 5        | 3           |
| Right to life  | 6        | 10, 25      |
| Right to name and nationality                                | 7        | 18          |
| Right to identity  | 8        | 3           |
| Non-separation from parents                                  | 9        | 23          |
| Family reunification   | 10       | 18          |
| Illicit transfer of children                                 | 11, 35   |             |
| Right to express views                                       | 12, 23   | 3, 7        |
| Freedom of expression and opinion, and access to information | 13,17,42 | 21          |
| Religious, personal and social freedom                       | 14, 15   | 29          |
| Right to privacy   | 16       | 22          |
| Family responsibilities and support                          | 18       | 23          |

<sup>12</sup> See Gerison Lansdown, ‘See Me, Hear Me: A Guide to using the UN Convention on the Rights of Persons with Disabilities to Promote the Rights of Children’ (Report, Save the Children UK, 2009).

In order to comply with the new paradigm established by the CRC and CRPD, most nations have made significant changes to their legislation and to their policies, and many countries have established new institutions to assist children, and especially children with disabilities. Unfortunately, despite all of these developments, we are still faced with many issues, old and new, and with competing priorities. As Secretary-General to the UN, Ban Ki-Moon, noted in his report on the status of the CRC to the 66<sup>th</sup> Session of the General Assembly:

Children with disabilities are one of the most marginalized and excluded groups of children, experiencing widespread violations of their rights. These violations dehumanize them, denying them respect for their dignity, their individuality, even their right to life itself.<sup>13</sup>

Millions of children experience singular and multiple forms of discrimination, exclusion from decision-making processes — all types of violence and exploitation. Children with disabilities face multiple forms of discrimination, abuse and violations of their rights. Compounding factors that exacerbate their situation are poverty and situations of migration — more specifically, forced migration. In some countries, the Millennium Development Goals will not be fully achieved; millions of children experience discrimination; a large number of children are subject to violent discipline (by parent(s) or caregiver(s)); alarming numbers of children, both girls and boys, are sexually abused and/or exploited; and the list goes on. Children with disabilities experience more discrimination and violence. Girls with disabilities live in even more dire situations than boys. What is alarming and unacceptable is that these unscrupulous activities occur despite the fact that no single state made a reservation to art 23 of the CRC upon ratification. Nor are there any reservations to art 7 of the CRPD.

### **III The Work of the Committee on the Rights of the Child: State Party reporting and General Comments**

Article 43 of the CRC provided the legal basis for the establishment of a Committee to ‘examine the progress made by States Parties in achieving the realization of the obligations undertaken in the Convention’. The Committee on the Rights of the Child (‘CRC Committee’) was formed in the spring of 1991. The CRC Committee began to consider initial State Party Reports from its Third Session, which was held in spring, 1993. Six initial reports were examined during this Third Session: Sudan, Egypt, Russian Federation, Vietnam, Sweden, and Bolivia.<sup>14</sup>

Pursuant to art 43 of the Convention, the Committee’s major mandate is to monitor state parties’ compliance with the CRC. Upon ratification of the Convention, a state party is obliged to submit an initial report within two years, which the Committee reviews, providing its observations and recommendations in the form of ‘Concluding Observations’. Subsequent reports, referred to as ‘periodic reports’ are submitted every five

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<sup>13</sup> *Status of the Convention on the Rights of the Child: Report of the Secretary-General*, UNGAOR, 66<sup>th</sup> sess, Agenda item 65(a), UN Doc A/66/230 (3 August 2011).

<sup>14</sup> Concluding observations of the Committee on the Rights of the Child, Sudan 18 February 1993 CRC/C/15/Add.6.  
<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/25198d5ccd9bd413412561510037ea75?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/25198d5ccd9bd413412561510037ea75?Opendocument)>.

years thereafter. This also applies for the two optional protocols. Initial reports to the optional protocols are examined separately but subsequent reports are incorporated with subsequent periodic reports to the CRC. The third-fourth combined periodic report of Australia, initial report to OPAC, and the initial report to OPSC, were considered at its 60<sup>th</sup> Session, 4–5 June 2012.

Through the years of examining state parties' obligations to implement the CRC, the Committee has found it necessary to provide its interpretation of certain provisions and guidance for implementation. The CRC Committee offers the highest authoritative interpretation of provisions of the CRC in the form of General Comments that serve as guidance to state parties. To date, the Committee has adopted 17 General Comments. The first General Comment adopted by the Committee was on the Aims of Education.<sup>15</sup> During the January 2013 Session, the Committee adopted General Comments on art 31, on the right to play;<sup>16</sup> on the art 24 right to health;<sup>17</sup> and on business and child rights.<sup>18</sup> For the first time in the history of treaty bodies, two Committees are writing a joint General Comment/Recommendation. The CRC Committee and the Committee on the Elimination of Discrimination against Women have been working on the issue of 'harmful practices'. I will not discuss all the General Comments, but it is useful to mention those that have direct bearing on the topic of our discussion.

### **A General Comment no 6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin**

The Committee has set out the following principles as obligations of states parties with respect to all unaccompanied or separated children in their territory and has suggested measures for their implementation:

- Non-discrimination (art 2);
- Best interests of the child (art 3);
- Right to life, survival and development (art 6);
- Right of the child to express his/her views freely (art 12);
- Respect for the principle of *non-refoulement*; and
- Confidentiality.

In addition, the following general and specific protection needs are included in the CRC and should be given to unaccompanied and separated children outside their country of origin:

- Appointment of a guardian/adviser and legal representatives (arts 18(2), 20(1));

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<sup>15</sup> Committee on the Rights of the Child, General Comment No 1: The Aims of Education, 26<sup>th</sup> sess, UN Doc CRC/GC/2001/1 (2001).

<sup>16</sup> Committee on the Rights of the Child, General comment No 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art 31), 62<sup>nd</sup> sess (2013).

<sup>17</sup> Committee on the Rights of the Child, General comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24), 62<sup>nd</sup> sess (2013).

<sup>18</sup> Committee on the Rights of the Child, General comment No 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 62<sup>nd</sup> sess (2013).

- Care and accommodation arrangements (arts 20, 22);
- Full access to education (arts 28, 29(1)(c), 30, 32);
- Right to an adequate standard of living (art 27);
- Right to enjoy highest standard of health, etc (arts 23, 24, 39);
- Prevention of trafficking and sexual and other forms of exploitation, abuse and violence (arts.34, 35, 36);
- Prevention of military recruitment and protection against effects of war (arts 38, 39); and
- Prevention of deprivation of liberty and treatment in cases thereof.

The CRC Committee used the General Comment to stipulate that access to the asylum procedure, legal safeguards and rights in asylum should include the following:

- Access to asylum procedures, regardless of age;
- Procedural safeguards and support measures;
- Child-sensitive assessment of protection needs, taking into account persecution of a child-specific nature; and
- Full enjoyment of all international refugee and human rights by children granted refugee status (art 22).

To facilitate every child's enjoyment of these rights, training of officials and decision makers should be tailored to the needs and rights of children. The CRC Committee suggested that the following key elements should be included in the training programs:

- Principles and provisions of the CRC and the two optional protocols;
- The importance of knowledge of the country of origin of the child;
- Appropriate interview techniques;
- Child development and psychology; and
- Cultural sensitivity and intercultural communication.

## **B General Comment no 9: the Rights of Children with Disabilities**

It is noteworthy that in this General Comment, the CRC Committee stressed the importance of a coordination body as a 'Focal point' for disabilities. Services for children with disabilities are often delivered by various actors and are fragmented, which results in overlapping of functions and gaps in provisions. The CRC Committee recommends that this body should include personnel from all public or private organisations, and must be empowered and supported from the highest possible levels of government. A coordination body for children with disabilities could be a part of a broader coordination system for the rights of the child. It would have the advantage of working within an already established system.

### **C General Comment no 12: the Right of the Child to be Heard**

Article 12 of the CRC relates to participation of children in all decision-making processes affecting them. It asks states parties to ‘assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’. General Comment no 12 stressed the application of this principle in the migration context. It notes that these children must be provided with ‘all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceeding’. Particular assistance may be required for children formerly involved in armed conflict. This General Comment also demands that a guardian or adviser should be appointed, free of charge. These are significant steps for a state party to take, but are vital to ensuring that art 12 is complied with.

### **D General Comment no 13: the Right of the Child to Freedom from all Forms of Violence.**

In this General Comment, the CRC Committee strongly rejects corporal punishment. Once again, the CRC Committee underscored the importance of a national coordinating framework. It proposed that the framework should be underpinned by a child rights approach and recognition of the gender dimensions of violence against children. A coordinating framework should include primary prevention and should recognise the primary position of families in child caregiving and protection strategies. It should recognise and articulate resilience and protective factors as well as risk factors, such as the situations which render children particularly vulnerable. It should articulate human, financial and technical resource allocations and should establish coordinating mechanisms at central, regional, and local levels, between different sectors and with civil society. Finally, it must ensure accountability.

### **E General Comment no 14 on the Best Interests of the Children art 3 (1)**

Article 3 para 1 of the CRC demands that: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ Since I started to serve on the CRC Committee, it has been clear that the concept of ‘best interests of the child’ has never really been clearly understood by stakeholders. The principle of recognising and giving effect to the best interests of the child is one of the general principles of the CRC, yet there has been no available standard on how to operationalise this principle. Over the years, there have been some suggestions that perhaps art 3 was the only overarching principle of the Convention, and at the same time a substantive right. To address the confusion about art 3, I was determined that the CRC Committee take on the role of providing the highest authoritative interpretation of this article and providing guidance on its implementation and application. It generally takes the Committee anywhere between two and four years to draft and adopt a General Comment, but it took roughly four years in the drafting of a text. The General Comment has now been finalised and adopted, and I will briefly discuss what it tells us about art 3.



Undoubtedly, the concept of the best interests of the child requires the development of a holistic participatory rights-based approach to secure and promote the human dignity and the physical and psychological integrity of children, engaging all actors of society. The purpose of determining best interests should be aimed at both ensuring the full and effective enjoyment of the rights recognised in the CRC and the comprehensive development of the child. It is a dynamic concept, referring to issues that are continuously evolving. This article must be viewed as encompassing the following three aspects:

- A substantive right: this refers to the right of the child to have his/her best interests assessed and given due importance when different interests are being considered in order to reach a solution, and requires a legal guarantee that this principle will be applied whenever a decision is to be taken concerning a child, a group of children or children as a group. Precisely because it is so intrinsic to the Convention, we contend that art 3 para 1 is directly applicable (self-executing), and therefore can be invoked before a court to overturn a decision in which the best interests principle has not been respected.
- A rule of procedure: whenever a decision is to be taken that will affect a specific child, a group of identified children, or children as a collective group, the decision-making process must include the step of evaluating the possible impact of the decision (positive or negative) on the child/children concerned. Assessing and determining best interests of the child will require procedural guarantees; and
- A fundamental, interpretive legal principle: if a legal provision may be interpreted in more than one way, one should choose the interpretation which best serves the child's best interest.

#### **IV The Work of the Committee on the Rights of the Child: Days of General Discussion**

In accordance with r 79 of its Rules of Procedure, the CRC Committee devotes annual Days of General Discussion ('DGD') on provisions of the CRC or themes relating to children's rights, allowing for an in-depth discussion at the global level. General Comments often evolve from these DGDs, which often also lead to the commissioning of further research on an issue. I highlight here two early successes. The first DGD was held in 1992, on the theme of 'children in armed conflict'. The recommendations of this day called on the Committee to request the UN General Assembly to ask the Secretary General to conduct a major study (pursuant to art 45(c)).<sup>19</sup> Consequently, Graça Machel conducted a study on 'the impact of armed conflict on children' in 1996. This in turn led to the creation and appointment of a Special Representative to the Secretary-General for Children affected by armed conflict, with whom the CRC Committee now works closely.

The Committee has since devoted two days of general discussions for violence against children: In 2000, on state violence against children, and in 2001, on violence against children within the family and in school. The result of these two days was another request to the General Assembly requesting the Secretary-General to appoint an independent

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<sup>19</sup> Committee on the Rights of the Child, *General Discussion on Children in Armed Conflicts* UN Doc CRC/C/10 (1992).

expert to conduct a global study on violence against children. Professor Sergio Pinheiro was appointed and conducted this study between 2004 and 2006.<sup>20</sup> Violence against children was found in all societies, and in 5 different settings: Home, Educational, Community, Work Places, and Care and Justice. The independent expert underscored that 'No violence is justifiable; and all violence is preventable'.<sup>21</sup> A recommendation from the study, as well as from the DGDs, was to appoint a Special Representative of the Secretary-General on Violence against Children.

In 2012, the CRC Committee devoted a DGD to 'The Rights of All Children in the Context of International Migration'. The DGD took place during the Committee's 61<sup>st</sup> session on 28 September 2012 and was attended by more than 250 participants from multiple sectors from states, international organisations, regional organisations, civil society and child representatives. The report was released in early 2013.<sup>22</sup>

The participants in the DGD were divided into two working groups. Each working group concluded by adopting a list of recommendations. The working group that discussed an international framework on the rights of children in international migration situations recommended the following:

- States should enact legislation to prohibit the detention of children for migration irregularities; art 37 of the CRC, which also applies in migration situations and is legally binding for its 193 states parties, explicitly states that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily' and 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',
- Measures for strengthening coordination between regions should be sought; it is the lack of implementation frameworks for protection standards rather than the lack of standards that is the main problem;
- Where possible, national legislation should stipulate equal rights and protection for children regardless of their migration status;
- Inter-country adoption should be recognised as a form of international migration and be subject to relevant child protection standards;
- Measures for addressing potential trauma experienced during situations of irregular/forced migration should be in place to ensure children in such circumstances receive adequate support;
- Concrete measures should be taken to establish operational guidelines for the application of best interests of the child in migration situations;
- Capacity, methodologies and systems for the collection of disaggregated data on child migration should be strengthened;

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<sup>20</sup> Paulo Sérgio Pinheiro, *World Report on Violence Against Children* (UN Secretary-General's Study on Violence Against Children, 2006) <[www.unicef.org/lac/full\\_text\(3\).pdf](http://www.unicef.org/lac/full_text(3).pdf)>.

<sup>21</sup> *Ibid* 3.

<sup>22</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration* Office of the United Nations High Commissioner for Human Rights (2013) <[http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGD-Childrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf)>.

- Policy linkages between Economic, Social, and Cultural Rights international obligations and migration policies should be strengthened.

The working group that discussed national level measures to implement the rights of children in international migration situations in countries of origin, transit and destination provided the following set of recommendations:

- States should ensure legal representatives with training on the CRC should be made available to all asylum-seeking children;
- National initiatives addressing child labour should also take into account the particular vulnerabilities of children in a migration situation;
- In addition to compliance with the CRC, migration legislation should adhere to the ILO Convention No 182;
- Special care should be taken to make mental health services available to unaccompanied children, including in the context of conducting best interests determinations;
- States should refrain from categorisations which subject children between the age of 16 and 18 years to lower/different standards of care and protection than children up to the age of 16 years;
- Measures should be taken to improve coordination between state mechanisms addressing migration issues and child protection issues;
- Children should be issued individual residence permits that are independent of their parents;
- Given clear evidence of large margins of error, current age determination methods that are based on skeletal bone age assessment should be discontinued; and
- Birth registration should be guaranteed regardless of a child's migration status.

The CRC working group's report builds on existing legal frameworks for the protection of all children in difficult circumstances such as forced migration, unaccompanied and separated asylum seeking children, and how to apply the best interests of the child (as stipulated in art 3) in these situations, giving due weight to the views of the child (as stipulated in art 12). The United Nations High Commission for Refugees ('UNHCR') is the UN agency that deals with issues of situations of seeking asylum. The two most important guidelines to consider in the context of unaccompanied and separated children; children in the context of forced migration, and the protection of their rights are the *UNHCR Guidelines on Determining the Best Interests of the Child*,<sup>23</sup> adopted in 2008, and *Guidelines on International Protection: Child asylum claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, adopted in 2009.<sup>24</sup> Both these

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<sup>23</sup> United Nations High Commission for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child* (Geneva, 2008).

<sup>24</sup> United Nations High Commission for Refugees, *Guidelines on International Protection: Child asylum claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/09/08 (22 December 2009).

guidelines refer to the CRC in general, and more specifically to General Comment no 6 on Treatment of unaccompanied and separated children outside their country of origin. We hope that the report of the 2012 DGD will add to this jurisprudence and will help states to make better decisions in respect of children who are migrants.

## **V The Convention on the Rights of the Child and its New Communications Procedure**

Human rights are the only universally recognised system of values. They provide minimum standards and procedural rules for human relations that are applicable to governments, law enforcement bodies and the military, business enterprises, international organisations, as well as private individuals. Most obligations, however, attach to states. Each state has the duty to prevent violations and to respect, protect, and promote human rights. All human rights have procedural components which include obligations of states to provide adequate remedies and procedures of protection against human rights violations and investigation of these violations. But rights have no meaning when anyone is denied the opportunity to seek a remedy for violation of their rights. Even when remedies may exist, they are often ineffective. For human rights to be realised, every human being must have the opportunity to challenge violations and seek remedies at the national, regional and international level. One mechanism for achieving this is the UN structure commonly known as a 'communications procedure'. A communications procedure allows an individual to make a complaint directly to the monitoring committee in relation to an alleged breach by a state party to a human rights treaty.

Negotiations for a human rights treaty for children overcame many hurdles and obstacles. One which was not overcome was the inclusion of a communications procedure in the CRC in its original form. As a consequence, the CRC entered into force, and remained the only international human rights instrument that has a mandatory reporting procedure but does not have a communications procedure. Throughout the two decades of the existence of the CRC, the need for such a procedure was voiced many times. Unfortunately, the idea did not move fast enough, and the CRC Committee itself was not in agreement on the need for a communications procedure.

When I was elected as the Chairperson of the Committee in 2007, I took on the mission to complete the journey for the full realisation of children's rights. With close cooperation and collaboration with the NGO Group for the CRC and the EU-GRULAC Group, we reopened the discussion on a communications procedure. At the 63<sup>rd</sup> General Assembly, I brought the issue back to the international community for discussion. A Human Rights Council Resolution<sup>25</sup> was then adopted to establish a working group to explore the possibility of elaborating an optional protocol to the CRC to provide a communications procedure. It recalled:

the view of the Committee on the Rights of the Child, expressed by its Chairperson in her oral report to the General Assembly at its sixty-third session that the

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<sup>25</sup> *Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure*, Human Rights Council Res, UN GAOR, 11<sup>th</sup> sess, Agenda item 3, UN Doc A/HRC/11/L.3 (12 June 2009).

development of a communications procedure for the Convention on the Rights of the child would significantly contribute to the overall protection of children's rights.<sup>26</sup>

Through another resolution, adopted in March 2010,<sup>27</sup> an open-ended working group was established to elaborate on what was to become a third Optional Protocol to the CRC. Heavy negotiations continued for 10 working days and at last, on 9 June 2011, a draft Optional Protocol was accepted by consensus<sup>28</sup> and was adopted at the 66<sup>th</sup> General Assembly, 2 November 2011.<sup>29</sup> The Optional Protocol contains 24 articles and was opened for signature on 28 February 2012, and will enter into force upon ratification by 10 states.<sup>30</sup> As at October 2013, there are eight ratifications and 43 signatories.<sup>31</sup>

At last we will have an instrument that will allow children and/or their representatives to seek remedies for violations of their rights. Rights have no meaning if there are no effective remedies available, or if the procedure for obtaining redress is unduly prolonged. The CRC Committee was very involved during the process of drafting the Optional Protocol and also proposed what we referred to as the 'elements to the protocol'. We therefore had very high expectations. But, ultimately the drafting of a human rights instrument is a political process, and many of our proposals were not fully taken into account. In particular, I was disappointed at the final version of the Optional Protocol for the following reasons:

- Abandonment of the collective communications procedure. An earlier version included it with an opt-in possibility;
- The possibility of states parties to opt out of the Protocol's inquiry procedure;
- The possibility of states parties to make reservations under the Optional Protocol; and
- The fact that the admissibility criteria for a communication require it to be in writing, whereas the CRPD's equivalent optional protocol does not require complaints to be made in writing.

Nevertheless, with this new Optional Protocol, the circle of international standards and norms will have been largely completed. This is one giant leap forward for the full realisation of children's rights. This new possibility is consistent with art 12, the right of the child to be heard. It finally gives a mechanism for the child who is capable of forming his/her own views to make those views heard in accordance with his or her age and maturity, and his or her evolving capacities.

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<sup>26</sup> Ibid 3.

<sup>27</sup> *Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure*, Human Rights Council Res, UN GAOR, 13<sup>th</sup> sess, Agenda item 3, UN Doc A/HRC//RES/13/3 (24 March 2010).

<sup>28</sup> *Optional Protocol to the Convention on the Rights of the Child*, Human Rights Council Res, UN GAOR, 17<sup>th</sup> sess, A/HRC//RES/17/18 (17 June 2011).

<sup>29</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, GA, UN GAOR, 3<sup>rd</sup> Comm, 66<sup>th</sup> sess, Agenda item 64, UN Doc A/C.3/66/L.66 (2 November 2011).

<sup>30</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, opened for signature on 19 December 2011, GA Dec 66/138, UN GAOR, 66<sup>th</sup> sess, Agenda item 64, UN Doc A/RES/66/138 (19 December 2011) (not yet in force).

<sup>31</sup> See the United Nations Treaty Collection database of ratifications and signatures, <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en)>.

There have still been only a few ratifications, and I am still eagerly waiting for states to come forward to really ‘walk the talk’ in promoting and protecting children and their rights. I firmly believe that a communications procedure will serve to guarantee children better realisation and exercise of all the provisions set forth in the CRC, and ask that advocates lobby their governments to ratify the optional protocol.

## **VI Conclusion**

In conclusion, I would like to emphasise that unless conditions under which children live in the present are adequately addressed, there will be no ‘future’ for them. Children can hardly be considered to be ‘future leaders’, if they are not fully respected as holders of rights, who have dignity and special interests and needs. Compliance and full implementation of the CRC goes beyond moral obligation: in fact it creates legal obligations. Full implementation requires legislative action, but it also requires research and public debate in many issues, such as the root causes of violence against children, such as poverty, gender inequalities and harmful practices. That research must identify risk factors as well as protective factors. A two-track approach — legal prohibition and awareness-raising — can bring about changes in cultural and social norms which have supported violence. Research on the realisation of all rights enshrined in the CRC must inform all aspects of the implementation and compliance of the state’s international obligation. Policies, programs, strategies, legal, and administrative measures must be underpinned by the CRC and based on sound evidence. Although the primary responsibility rests on the state to respect, promote, and protect children and their rights, it is also the responsibility of all duty-bearers. Finally, I commend the adoption of the third Optional Protocol to the CRC and encourage more states to become parties to it. It offers the best way forward to address the situations of disadvantage and disempowerment in which many children still live.